

No. 26-265

In the Supreme Court of the United States

JILLIAN LESKO,

Petitioner,

v.

UNITED STATES,

Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit*

**BRIEF OF THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

The Federal Employees Pay Act (FEPA) contains a provision giving the Office of Personnel Management (OPM) authority to “prescribe regulations . . . necessary for the administration of this subchapter.” 5 U.S.C. § 5548(a). The en banc Federal Circuit, splitting 7-4, held that this provision required it to adopt OPM’s definitions of terms in the FEPA, even where those definitions were contrary to the longstanding judicial construction of the statute.

The question presented is: Under this Court’s decision in *Loper Bright*, does the general rulemaking provision in 5 U.S.C. § 5548(a) delegate authority to OPM to authoritatively interpret FEPA, such that courts must adopt OPM’s definitions?

TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. A STATUTORY GAP IS INSUFFICIENT TO AUTHORIZE DETAIL-FILLING	7
A. <i>Wayman</i> Tied Detail-Filling Authority to Express Congressional Delegation.	7
B. The Oleomargarine Act Cases Demonstrate That General Regulatory Authority Does Not Establish Detail- Filling Authority	9
C. FEPA Lacks the Congressional Assignment That Detail-Filling Requires.	11
II. EVEN IF FEPA DELEGATES DETAIL- FILLING AUTHORITY, A WRITING REQUIREMENT IS NOT A PERMISSIBLE DETAIL.	13
A. Detail-Filling Authority Must Implement Congressional Intent.	13
B. An Agency May Not Use Detail-Filling Authority to Alter a Statutory Condition	15
C. OPM's Writing Requirement Alters the Condition Congress Enacted.	17

III.A BROAD READING OF THE AGENCY'S DETAIL-FILLING POWER WILL RESTORE THE INSTABILITY THAT <i>LOPER BRIGHT</i> ENDED.	19
CONCLUSION	21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anderson v. United States</i> , 136 Ct. Cl. 365 (1956)	20
<i>Archroma U.S., Inc. v. Dep’t of Com.</i> , Nos. 2024-2159 & 2024-2162, 2026 U.S. App. LEXIS 23777 (Fed. Cir. Aug. 7, 2026)	11, 12
<i>Bank of the United States v. Halstead</i> , 23 U.S. (10 Wheat.) 51 (1825)	8, 9
<i>Buttfield v. Stranahan</i> , 192 U.S. 470 (1904)	14
<i>Campbell v. United States</i> , 107 U.S. 407 (1883)	16
<i>Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984)	2
<i>Dep’t of Transp. v. Ass’n of Am. R.Rs.</i> , 575 U.S. 43 (2015)	14
<i>Doe v. United States</i> , 372 F.3d 1347 (Fed. Cir. 2004)	20
<i>In re Kollock</i> , 165 U.S. 526 (1897)	10, 14
<i>Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 (1993)	21
<i>Lesko v. United States</i> , 161 F.4th 1352 (Fed. Cir. 2025)	2, 7, 20
<i>Loper Bright Enters v. Raimondo</i> , 603 U.S. 369 (2024)	2, 3, 4, 5, 6, 13, 19, 21
<i>Mercier v. United States</i> , 786 F.3d 971 (Fed. Cir. 2015)	20

<i>Morrill v. Jones</i> , 106 U.S. 466 (1883).....	15, 16
<i>Nat’l Cable & Telecomms. Ass’n v. Brand X</i> <i>Internet Servs.</i> , 545 U.S. 967 (2005)	19
<i>United States v. Eaton</i> , 144 U.S. 677 (1892).....	9
<i>United States v. George</i> , 228 U.S. 14 (1913)	15, 18
<i>United States v. Grimaud</i> , 220 U.S. 506 (1911)	14
<i>United States v. United Verde Copper</i> , 196 U.S. 207 (1905)	16
<i>Wayman v. Southard</i> , 23 U.S. (10 Wheat.) 1 (1825)	4, 6, 7, 8, 14, 17
Statutes	
5 U.S.C. § 5542(a)	3, 11
5 U.S.C. § 5548(a)	3, 11
Other Authorities	
Cass R. Sunstein, <i>Our Marbury: Loper Bright</i> <i>and the Administrative State</i> , 74 DUKE L.J. 1893 (2025).	5
Regulations	
5 C.F.R. § 550.111(c)	3, 17
Constitutional Provisions	
U.S. CONST. art. III, § 2	2

INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs, conducts conferences, and produces the annual Cato Supreme Court Review.

This case concerns Cato because it implicates the proper scope of the judicial power under Article III. The separation of powers embodied in the Constitution provides a fundamental safeguard against government overreach.

¹ Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

For 40 years, the *Chevron* doctrine was a fault line in our constitutional structure. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Article III of the Constitution entrusts the judiciary with the power to decide cases and controversies, and the judicial power implies a responsibility to determine what the law means. U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But under *Chevron*, when a statute was judicially understood to be ambiguous, courts then deferred to agency interpretations—even if those courts would ultimately have read the statute differently. That deference blurred the Constitution’s separation of powers: It added quasi-judicial powers to the enforcement authority held by administrative agencies.

After four decades, *Loper Bright* overturned *Chevron*. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). That decision restored some constitutional first principles: The judiciary must independently determine what the law means and what discretion Congress has conferred to agencies. The Court rejected alleged ambiguity as a “reliable indicator of actual delegation,” holding that an agency cannot claim interpretive power merely because statutory text presents a close question of statutory interpretation. *Id.*

But old doctrines have a habit of returning under new names. In this case, the Federal Circuit invoked *Loper Bright* itself to revive the premise that statutory silence can result in agency power. Pet. App. 12a–14a. The Federal Circuit assessed claims by more than a thousand federal nurses who performed uncompensated overtime work during the COVID-19 pandemic. As hospitals struggled to meet extraordinary

demands, supervisors directed nurses to stay beyond their scheduled shifts. Their work was required, but their orders were not in writing. Pet. App 7a-8a.

Absent paperwork led to absent compensation. The Federal Employees Pay Act (“FEPA”) provides for overtime compensation for work that is “officially ordered or approved.” 5 U.S.C. § 5542(a). A separate provision of FEPA authorizes the Office of Personnel Management (“OPM”) to prescribe regulations that are necessary to administer the premium-pay subchapter. 5 U.S.C. § 5548(a). OPM used its general authority to add another condition: The overtime had to be ordered or approved “only in writing.” 5 C.F.R. § 550.111(c). Thus, although supervisors required overtime, the absence of written authorization was read to defeat the nurses’ claims.

The Court of Federal Claims dismissed the nurses’ overtime claims, and the en banc Federal Circuit affirmed. Pet. App. 2a, 67a. The majority reasoned that because FEPA does not specify what formalities an order or approval must satisfy, and because OPM holds general authority over the premium-pay subchapter, Congress delegated authority to OPM to “fill up the details.” Pet. App. 12a–14a. In other words, because Congress left certain questions unanswered, they became OPM’s to decide.

In short, the Federal Circuit revived a significant portion of *Chevron* by means of a few innocuous words: “fill up the details.” Pet. App. 13a–14a. That phrase describes one form of the “degree of discretion” that *Loper Bright* allows agencies. 603 U.S. at 394–95. In this case, the Federal Circuit used that phrase to transform statutory silence and general rulemaking authority into delegated power. But if the “degree of

discretion” exception in *Loper Bright* is read so expansively, it will swallow up the principle of separation of powers that *Loper Bright* restored. The Constitution therefore requires that agency detail-filling must be constrained in three important respects.

First, statutory silence alone does not show that Congress left a question open for an agency to resolve. *See Loper Bright*, 603 U.S. at 399–400. If a statute truly authorizes an agency to “fill up” a detail, it does so explicitly. FEPA contains no such detail-filling delegation. And the history of the phrase “fill up the details” confirms as much: Congress must explicitly identify and assign the specific details it wishes for another branch to fill, rather than leaving courts to conjure up delegation from silence. *See Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

Second, delegations of authority to “fill up the details” cannot entail the authority to *alter* or *narrow* the plain meaning of statutory text. Detail-filling authority can give an agency some discretion in choosing the means to implement a directive enacted by Congress. But it cannot allow the agency to add a new substantive condition and thus change when a statutory right attaches. Thus, even if FEPA delegates some detail-filling authority to OPM, a writing requirement does not qualify as a permissible “detail.” OPM’s writing requirement does not merely regulate the mechanics of approval; it decides whether an approval that would be valid under the plain meaning of the statutory text counts as an approval counts at all.

Third, detail-filling should be confined to its historical role: a limited authority to complete an assigned task, not a broad license to transform silence into delegation. An expansive understanding of detail-filling

risks recreating the very instability *Loper Bright* sought to end. *Loper Bright*, 603 U.S. at 399, 412; *id.* at 438–39 (Gorsuch, J., concurring). If statutory silence plus general rulemaking authority is enough to establish delegated discretion, unresolved questions of statutory interpretation will once again fall under agency authority. And if agencies may revise such “details” over time, a statute can change its operation while its text stays put. This Court should grant review to ensure that lower courts do not begin to reinstate *Chevron* by misreading *Loper Bright*.

ARGUMENT

Loper Bright restored the Constitution’s locus of “the judicial Power” to its proper place. Courts, not agencies, are meant to say what the law means. *Loper Bright*, 603 U.S. at 392–93; Cass R. Sunstein, *Our Marbury: Loper Bright and the Administrative State*, 74 Duke L.J. 1893 (2025). Agencies are granted interpretive discretion only when a court, exercising its own independent judgment, determines that Congress actually delegated that authority. *Loper Bright* identified three forms that this delegation may take: (1) express authority to define a statutory term; (2) authority to “fill up the details” of a statutory scheme; and (3) authority bounded by flexible terms such as “appropriate” or “reasonable.” *Loper Bright*, 603 U.S. at 394–95. Those categories are limited qualifications to independent judicial interpretation, not substitutes for it. In each instance, the court must independently determine that agency delegation is proper, fix its boundaries, and ensure that the agency exercised reasoned judgment. *Id.*

In this case, the Federal Circuit concluded that FEPA’s premium-pay provisions fit within the second

form of delegated discretion recognized in *Loper Bright*—authority to “fill up the details.” Pet. App. 13a–14a. Because FEPA does not specify whether overtime must be ordered or approved in writing, and because § 5548(a) gives OPM general authority to administer its premium-pay provisions, the court treated the missing formalities as details Congress had left to OPM to decide. Pet. App. 12a–14a. It then determined that OPM’s writing requirement was a reasoned exercise of the authority Congress had delegated. Pet. App. 18a–21a

Of *Loper Bright*’s three forms of delegated discretion, detail-filling is (quite literally) the sketchiest. The Court supplied concrete statutory examples of the other two forms of delegated discretion to show how Congress conferred it—but it did not do so for detail-filling. *Loper Bright*, 603 U.S. at 394–95 & nn.5–6. Rather, the opinion’s explanation of the scope of detail-filling consisted of little more than a citation to an early nondelegation case. *Id.* at 394–95 (citing *Wayman*, 23 U.S. (10 Wheat.) at 43). In short, although *Loper Bright* allows agencies to “fill up the details” of statutes in some circumstances, that decision does not explain what constitutes a “detail” or how to tell when Congress has actually delegated the authority to fill such a detail up.

Loper Bright’s glancing allusion to detail-filling also threatens to resuscitate a now-disfavored doctrine. *Loper Bright* rejected the premise that statutory ambiguity itself establishes delegation. *See id.* at 399–400. But if every question Congress leaves unresolved can be recast as a “detail” for an agency to fill, statutory silence then becomes a source of agency authority—and *Chevron* returns in substance, if not in name.

If *Chevron*'s recurrence is to be avoided, that will require courts to set meaningful limits on the circumstances in which detail-filling is called for, what an agency may properly treat as a detail, and how much agencies may use their detail-filling authority over time.

I. A STATUTORY GAP IS INSUFFICIENT TO AUTHORIZE DETAIL-FILLING.

If the general principle is that statutory silence authorizes delegation and opens the door to the exercise of general rulemaking authority, then *Loper Bright* will have become little more than an elaborate detour back to *Chevron*. In fact, that is not the correct principle. Rather, the cases that involve detail-filling point to a narrower rule: Congress may leave details unresolved, but it must identify the subject that another decisionmaker is authorized to complete. In the case at hand, FEPA identifies no such subject. Nevertheless, the Federal Circuit allowed detail-filling delegation by pairing § 5542(a)'s silence about formalities with § 5548(a)'s general rulemaking provision. Pet. App. 13a–14a. That reasoning threatens to warp FEPA's constitutional authority to administer the statute into an unconstitutional discretion to define its conditions.

A. *Wayman* Tied Detail-Filling Authority to Express Congressional Delegation.

The concept of “fill[ing] up the details” appropriately bore significant constraints from the start. In *Wayman*, Congress had adopted the Process Acts; they specified the “forms and modes of proceeding” that governed the federal judicial process. 23 U.S. (10 Wheat.) at 43. Congress then expressly authorized the federal courts to make “such alterations and additions” to

those procedures as the courts deemed appropriate. *Id.* at 41–44. The Acts’ challengers argued that allowing courts to alter procedures would impermissibly delegate legislative power to the judicial branch. Chief Justice Marshall disagreed. He distinguished between “important subjects, which must be entirely regulated by the legislature itself,” from “those of less interest,” which could be properly delegated. *Id.* With respect to the latter, Congress could properly issue general provisions that authorized another decisionmaker to “fill up the details.” *Id.*

In other words, detail-filling was only appropriate if Congress had *expressly* authorized it. In *Wayman*, Congress had already identified the subject the courts could regulate—the forms and modes of judicial process—and had expressly authorized them to issue rules in that domain. The resulting “details” were the particulars of that delegated subject: notice before sale, custody of seized property, and whether a sale would be for cash or credit. *Id.* at 44–46. Justice Marshall called those matters “minor regulations” within the “great outlines marked out by the legislature.” *Id.* Those matters were open to judicial regulation because Congress had authorized courts to alter their own governing procedures. Thus, the authority coming from the Process Acts derived from what Congress said, not from what Congress left out.

Wayman’s companion case, *Bank of the United States v. Halstead*, sheds light on how the Court understood the delegation discussed in *Wayman*. 23 U.S. (10 Wheat.) 51 (1825). In interpreting the same grant of statutory authority, the same Court held that the power to make “alterations and additions” extended beyond mere changes in form. *Id.* at 59–61. Because

Congress had expressly empowered federal courts to regulate their own processes, the courts could “frame, mould, and shape” that process in ways affecting its “effect and operation.” *Id.* Read together, *Wayman* and *Halstead* confirm that the scope of detail-filling authority turns on the scope of the delegation Congress actually decided to furnish.

B. The Oleomargarine Act Cases Demonstrate That General Regulatory Authority Does Not Establish Detail-Filling Authority.

Two of this Court’s cases that involve the Oleomargarine Act are about congressional delegation of authority to a federal agency; the first case provides an example of the improper exercise of agency power, and the second case illustrates an exercise of agency power that is proper.

The first case shows that an agency that is given general authority to administer a statute is not thereby granted the authority to fill up the statute’s details. *United States v. Eaton*, 144 U.S. 677, 685 (1892). The Oleomargarine Act authorized the Commissioner of Internal Revenue to issue “all needful regulations” to carry the Act into effect. Although Congress expressly required manufacturers to keep records and file returns, it imposed no comparable duty on wholesale dealers. *Id.* The Commissioner nevertheless issued a regulation that also required wholesalers to keep records and file returns, and ultimately the government sought to punish a wholesaler for regulatory noncompliance. *Id.* at 686–87. The Court rejected that effort. General rulemaking authority did not permit the agency to create a new criminally enforceable duty that Congress had not imposed. *Id.* at 688.

A second case five years later involved the same Act, but that case concerned a different kind of delegation of power. *In re Kollock*, 165 U.S. 526 (1897). Congress had required oleomargarine packages to be “marked, stamped and branded” as the Commissioner “shall prescribe,” imposing penalties for the knowing sale of noncompliant packages. *Id.* at 532. When the Commissioner’s specifications were challenged, the Court upheld the arrangement. The Court reasoned that because Congress had already fixed the requirements and their legal consequences, the Commissioner had merely supplied the details of compliance. In distinguishing *Eaton*, the Court explained that the wholesaler’s wrongfully punished act in *Eaton* lay “in the violation of a duty imposed only by a regulation,” rather than a duty Congress itself had imposed. *Id.* at 535. The Court also noted that Congress later enacted a statute that expressly required wholesale dealers to keep such books and returns as the Commissioner prescribed. That later statute demonstrated the kind of specific congressional assignment that the facts of *Eaton* lacked. *Id.*

In short, Congress’s decision to exercise its own authority (or to decide not to do so) is the driver of the distinction between *Eaton* and *Kollock*. In order to delegate, Congress need not supply every regulatory detail—that is the point of delegation—but it must identify the subject that subordinate decisionmakers are authorized to regulate. In *Kollock*, the agency properly exercised its assigned authority to specify package markings. In *Eaton*, the agency improperly inferred authority over wholesale record-keeping from a general rulemaking clause. In *Kollock*, the agency filled in assigned details whose determination Congress had expressly delegated to the agency; in *Eaton*, the agency

improperly attempted to import a free-standing power into its scope of authority that Congress had never written into statute.

C. FEPA Lacks the Congressional Assignment That Detail-Filling Requires.

Unlike the statutes at issue in *Wayman* or *Kollock*, FEPA contains no comparable assignment of authority to determine the substantive requirements of overtime approval. Section 5542(a) makes overtime compensable when it is “officially ordered or approved,” while § 5548(a) authorizes OPM to prescribe regulations necessary to administer the subchapter. 5 U.S.C. §§ 5542(a), 5548(a). Those provisions give OPM a scheme to administer, but they do not expressly assign OPM the power to determine what makes an order or approval legally sufficient.

The Federal Circuit’s own recent decision in *Archroma* demonstrates how Congress has assigned detail-filling powers to agencies in recent times and what those details look like. *Archroma U.S., Inc. v. Dep’t of Com.*, Nos. 2024-2159 & 2024-2162, 2026 U.S. App. LEXIS 23777, at *12–14 (Fed. Cir. Aug. 7, 2026). That opinion explains how Congress directed the Department of Commerce to obtain, from interested parties, “a statement expressing their willingness to participate” in an administrative review “by providing information requested by” Commerce. *Id.* Congress thus expressly assigned Commerce authority to issue inquiries and to determine the scope of the information it would seek. The Federal Circuit had to determine whether, as part of the exercise of its authority, Commerce was allowed to establish deadlines for the submission of such information. The court found that Commerce’s decision to establish deadlines for its

requests was within the scope of the agency’s power, reasoning that because “Commerce is given explicit authority to require a statement of intent to participate, and further explicit authority to determine the information to request, it follows that Commerce likewise has authority to ‘fill in’ the detail of a reasonable deadline for submission of these materials.” *Id.* at 14.

Archroma thus illustrates how detail-filling delegation works. The agency was entitled to exercise detail-filling powers because Congress expressly assigned the relevant subject to the agency. In contrast, the Federal Circuit’s opinion in this case is missing something important: It fails to explain why statutory silence—even in the context of general rulemaking authority—allows the delegation of regulatory power.

Congress could readily have assigned the matter of formal overtime approval to OPM without deciding the details itself. It could have written such a delegation into statute in all manner of ways: For instance, it could have required overtime to be officially ordered or approved “in such a manner as OPM shall prescribe,” authorized OPM to “prescribe the form and manner of approval,” directed OPM to “establish requirements for official authorization,” or made compensation contingent on approval “in accordance with regulations prescribed by OPM.” Each of these hypothetical formulations leaves resolution of the ultimate requirements to the agency while identifying the scope of the details that Congress intended OPM to flesh out. Express delegation reveals the agency that Congress empowers to make decisions, but all that a textual gap reveals is silence.

Loper Bright restored the Constitution’s Article III powers to the judiciary. Agencies can only wield

interpretive discretion if a court determines that Congress has actually delegated that decision-making power to them. *Loper Bright*, 603 U.S. at 399–400. Detail-filling is only a bounded form of delegated discretion: It is not a broad or general license to infer agency power from statutory silence. Historically, this Court’s precedents demonstrate that detail-filling is permissible only when Congress identifies an administrative mission that requires further articulation and it expressly entrusts that task to an agency decisionmaker. Even if a statute leaves large questions ambiguous and even if an agency possesses general rulemaking authority, that provides no justification for detail-filling.

II. EVEN IF FEPA DELEGATES DETAIL-FILLING AUTHORITY, A WRITING REQUIREMENT IS NOT A PERMISSIBLE DETAIL.

Even if we assume that § 5548(a) authorizes OPM to “fill up the details” of FEPA’s overtime scheme, OPM’s writing requirement exceeds that authority. *Loper Bright* requires the court to “fix the boundaries of the delegated authority” and to confirm that the agency stayed inside them. *Loper Bright*, 603 U.S. at 395. The same history that establishes the creation of a detail-filling delegation also establishes what a detail is. A detail can flesh out the rule Congress enacted—but OPM’s rule does the opposite. It makes the absence of written approval fatal to compensation, even when overtime was in fact officially ordered or approved.

A. Detail-Filling Authority Must Implement Congressional Intent.

Wayman and *Kollock* illustrate the proper exercise of detail-filling authority—that is, the details the

agency filled in must supply the means of carrying out the ends that Congress had established in the statute. *Wayman*'s filled-in details governed the mechanics of carrying judgments into effect—notice, custody of property, and terms of judicial sale. Those rules did not alter the judgment. 23 U.S. (10 Wheat.) at 44–46. In *Kollock*, Congress assigned the Commissioner the job of determining an appropriate scheme that governed the markings on oleomargarine packages; because “[t]he criminal offence [was] fully and completely defined by the act,” the Commissioner’s designation of marks was “a mere matter of detail.” 165 U.S. at 533. See also *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) (Congress fixed the “primary standard,” leaving the Secretary “the mere executive duty to effectuate the legislative policy declared in the statute”); *United States v. Grimaud*, 220 U.S. 506, 522 (1911) (upholding regulations that “all relate to matters clearly indicated and authorized by Congress”).

What made agency detail-filling permissible was not that the details were small or trivial in some theoretical sense; what made the detail-filling permissible was that it carried out Congress’s command in a manner that was consistent with the discretion that Congress had granted. As Justice Thomas has explained, what matters is “not the quantity, but the quality, of the discretion.” *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 82–83 (2015) (Thomas, J., concurring) (explaining *Wayman*’s operation). A seemingly minor agency act will therefore exceed that agency’s authority if it cannot be reconciled with the larger policy decisions that are Congress’s to make.

B. An Agency May Not Use Detail-Filling Authority to Alter a Statutory Condition.

This Court has repeatedly rejected the use of agency administrative authority to narrow the impact of those decisions that Congress has already made. Consider *United States v. George*, which involved a rule of proof. 228 U.S. 14 (1913). In that case, Congress specified what a homestead claimant had to establish and how: residence and cultivation by two credible witnesses, nonalienation, and allegiance by the claimant's own affidavit. *Id.* at 19. The Land Department, by regulation, required the claimant to testify as a witness as well, in effect demanding three witnesses where Congress had only required two. *Id.* at 21. The regulation was thus invalid because it “add[ed] a requirement which that section [did] not[.]” *Id.*

The authority that the Secretary attempted to rely on in that case should sound familiar. It was a general grant to “enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.” *Id.* at 20. The Court summarized the problem nicely: “If the Secretary of the Interior may add by regulation one condition, may he not add another?” *Id.* at 21.

Other decisions of this Court similarly show that an agency may not add requirements which alter the policy choices made by Congress. In *Morrill v. Jones*, Congress had decided to allow animals that were imported for breeding purposes to enter duty-free. 106 U.S. 466, 467 (1883). The Treasury Secretary issued a rule narrowing that exemption to animals of “superior stock,” reasoning that only those animals would improve domestic breeds. *Id.* The Court rejected the regulation because the Secretary had attempted “to put

into the body of the statute a limitation which Congress did not think it necessary to prescribe.” *Id.* The Secretary could regulate the mode of administering the exemption, but he could not redefine its coverage. *Id.*

In *Campbell v. United States*, Congress granted exporters a statutory right to recover duties paid on certain imported materials and authorized the Secretary of the Treasury to prescribe regulations for the administration of those payouts. 107 U.S. 407 (1883). The exporters complied with the regulations by filing the required materials, but the collector, acting on the Secretary’s instructions, refused to issue the certificate that would have triggered payment. In court, the government argued that the law imposed no obligation to pay until the collector issued the certificate. The Court rejected that reasoning, explaining that it would be “curious” to conclude that Congress first clearly granted exporters a right to recovery and then silently empowered the Secretary to “defeat totally the right which Congress had granted.” *Id.* at 410.

In *United States v. United Verde Copper*, Congress authorized residents of certain western mining areas to cut timber from federal lands for “building, agricultural, mining, or other domestic purposes,” while authorizing the Secretary of the Interior to regulate that use. 196 U.S. 207 (1905). The Secretary subsequently issued a regulation barring timber use for smelting. The Court invalidated the rule because the regulatory authority that Congress had delegated did not include the power to shrink the statute’s scope. As the Court put it, if the Secretary “can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.” *Id.* at 215.

Taken together, these cases mark a clear boundary between implementing a statutory rule and transforming it. When an agency issues a rule that changes the statutory condition Congress enacted, narrows a right Congress granted, or makes the agency's own regulation the source of the legal obligation, then that agency is doing much more than filling in details. Rather, such actions displace choices that Congress has already made. They impinge on what Justice Marshall called "important subjects, which must be entirely regulated by the legislature itself." *Wayman*, 23 U.S. (10 Wheat.) at 43.

C. OPM's Writing Requirement Alters the Condition Congress Enacted.

OPM's writing requirement crosses the line the earlier cases drew. Section 5542(a) makes overtime compensable when it is "officially ordered or approved." OPM's rule provides that overtime may be ordered or approved "only in writing." 5 C.F.R. § 550.111(c). But an express order issued by an official who is empowered to authorize overtime does not change its character merely because it was spoken rather than written.

Consider a supervisor with delegated authority who directs a nurse to stay past her shift, does so again the following week, and puts neither directive in writing. Overtime was officially ordered and approved in every sense that § 5542(a) uses; indeed, there is little doubt a judge would so interpret the statutory text in the absence of a regulation to the contrary. But under 5 C.F.R. § 550.111(c), the nurse recovers nothing, because the overtime approval was not "in writing." The statutory condition was satisfied; the regulatory condition was not. This regulation thus falls outside the

zone of detail-filling. It is not administration of § 5542(a); rather, it is an attempt to displace the choices that Congress memorialized in that statute

That is just the distinction the earlier cases drew. In *George*, the agency added in a proof requirement that was heavier than the one Congress had required. In *Morrill*, the Secretary narrowed an exemption Congress had granted. OPM's rule has the same defect. It blocks nurses from being compensated for their overtime work because the agency has imposed an *ultra vires* condition.

Indeed, if the writing requirement at issue in this case is ultimately recognized as being legitimate—and thus becomes an engine of cancellation of obligations to pay people for the overtime they work—it will open the door to all kinds of bureaucratic bait-and-switch maneuvers. Perhaps budget-conscious administrators are, even now, designing new overtime forms that will be required to approve overtime payments; perhaps the receipt of overtime pay will soon be contingent on, say, the collection of signatures from multiple mandatory signatories who are, in practice, difficult to track down. By means of these additional, atextual requirements, an agency could effectively defeat a right that Congress had previously established. *George's* aphorism is worth repeating: “If the Secretary of the Interior may add by regulation one condition, may he not add another?” *George*, 228 U.S. at 21.

OPM will have ample room to administer FEPA if the writing requirement it has imposed is struck down. OPM can prescribe how approvals are documented, routed, verified, or preserved. Those rules would govern the administration of a scheme whose terms Congress set. However, OPM cannot issue administrative

requirements that, as a practical matter, make the statutory entitlement that Congress enacted cease to exist. Even assuming § 5548(a) gives OPM authority to fill in some of FEPA’s details, that authority does not reach the rule at issue in this case. It is beyond the scope of OPM’s powers to convert “officially ordered or approved” into “officially ordered or approved in writing.”

III. A BROAD READING OF THE AGENCY’S DETAIL-FILLING POWER WILL RESTORE THE INSTABILITY THAT *LOPER BRIGHT* ENDED.

Loper Bright did more than end *Chevron* deference. It restored the central Article III authority of federal courts, whose job it is to resolve questions of statutory meaning. Under *Brand X*—an opinion that serves as something of a high-water mark of the tensions and difficulties that the *Chevron* doctrine created—an agency could adopt a reasonable interpretation of an ambiguous statute that differed from its earlier judicial construction, and that agency interpretation generally controlled. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005). In effect, this doctrine allowed agencies to displace a previous judicial construction of a statute, even if Congress never changed a word of it. This Court has called that regime “the antithesis” of the traditional judicial role. *Loper Bright*, 603 U.S. at 399. Justice Gorsuch described its practical consequences more bluntly: “constant uncertainty and convulsive change” that, paradoxically, emerges from static statutory text. *Id.* at 438–39 (Gorsuch, J., concurring).

FEPA’s own history demonstrates how Article III judicial authority can live on in theory but wither in

practice. In *Anderson v. United States*, decided long before *Chevron*, the Court of Claims independently interpreted the statutory phrase “officially ordered or approved” to mean that an overtime authorization need not be written. 136 Ct. Cl. 365 (1956). Nonetheless, *Doe v. United States* later upheld OPM’s writing requirement under *Chevron*. 372 F.3d 1347 (Fed. Cir. 2004). The Federal Circuit did not reject *Anderson*’s reading of the statute; rather, it held that OPM’s regulation was entitled to *Chevron* deference and therefore allowed the agency’s contrary rule to supersede *Anderson*. Then in *Mercier v. United States*, the Federal Circuit interpreted that identical phrase in a parallel statute that was unaccompanied by a controlling agency rule; once again, it concluded that written authorization was unnecessary. 786 F.3d 971 (Fed. Cir. 2015). The words of the statute remained essentially the same, but the ultimate interpretive result turned on whether an agency had spoken.

The Federal Circuit’s decision in this case risks preserving *Chevron*-style instability, even in the face of *Loper Bright*. With *Chevron* overruled, the Federal Circuit could no longer rely on ambiguity as a reason to defer to the agency. Instead, the court characterized the unresolved question as a “detail” that Congress had delegated to OPM to fill—and it therefore upheld OPM’s writing requirement under that doctrine. Pet. App. 9a–18a. A broad understanding of detail-filling will grant *Chevron*-influenced decisions like *Brand X* a second life. Courts will still provide independent determinations of what statutory language means, but agencies will likely continue to test the constitutional constraints that Article III is meant to impose by altering statutory schemes that govern private rights

and cloaking those alterations in the garb of filling up details.

CONCLUSION

As Justice Scalia famously noted in his criticism of the *Lemon* test, some doctrines that are meant to be discarded do not always stay interred. He compared the *Lemon* test to a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (Scalia, J., concurring). As that jurist lamented, the *Lemon* test continued to haunt the terrain of the Establishment Clause even after six of the Court’s Justices had “personally driven pencils through the creature’s heart.” *Id.* The parallels are notable: Only recently, this Court laid *Chevron* deference to rest, with six of its Justices broadly rejecting the premise that statutory ambiguity can shift interpretive authority from courts to agencies. *Loper Bright*, 603 U.S. at 399–400. And yet *Chevron* already threatens to rise again—this time hooded and cloaked in the language of the very opinion that buried it.

No matter what form it takes or likeness it adopts, the *Chevron* doctrine should stay buried—so that the judicial power remains in the hands of the judiciary and that agency discretion remains confined to subjects that Congress actually delegated. *Id.* at 392–95, 399–400. *Loper Bright* should mark the end of *Chevron*’s logic, not its emergence from the grave.

For these reasons and those given by Ms. Lesko, this Court should grant the petition and reverse the decision below.

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