United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

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VIA ELECTRONIC TRANSMISSION

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Acting Secretary Su:

As Ranking Member of the Senate Health, Education, Labor, and Pensions (HELP) Committee, I write concerning the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, and the significant changes that federal agencies will make to their rulemaking and other processes in its aftermath. For 40 years, Congress and federal courts have ceded their respective responsibilities to write and interpret statutes to federal agencies. Under the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, courts were required to give broad deference to agencies' interpretations of ambiguous provisions in statutes.[1] The Court has now overturned that deference, reinforcing that Congress and the courts are responsible for writing and interpreting the laws, respectively; not agencies.[2] The Court held that such deference defies the Administrative Procedure Act, and that agency interpretations are no longer entitled to deference.[3]

This decision is an opportunity for executive agencies to re-examine their role relative to Congress, and to return legislating to the people's elected representatives. For too long, *Chevron* deference has let agencies make broad decisions governing a diverse country of over 330 million people. Instead of engaging in the hard work of making tradeoffs and building coalitions needed to legislate, unelected agency bureaucrats exploit statutes to impose policy decisions that exceed their authority from Congress and exercise discretion far outside their core expertise and purpose.

Such unfettered agency power by the unelected is a perversion of the Constitution. *Loper Bright* makes clear that no agency is above the law or should be afforded special treatment when its authority is challenged. Moreover, the Court has separately confirmed that agencies need clear, specific statutory authorization from Congress to take action on issues of "vast 'economic and

[1] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[2] *Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360 (U.S. June 28, 2024).
[3] *Id.* at *3.

political significance.'"[4] Agencies cannot seize broad power based on authorities that Congress intended to be exercised narrowly—subtle, vague, or ambiguous statutory provisions provide no foundation for sweeping action.[5] Even then, Congress cannot delegate its Article I legislative powers to agencies.[6]

Congress is the most politically accountable branch in our government, and should be responsible for making the most important policy decisions that affect the American people. The Court also makes clear that Congress makes law, not agencies. When the Executive Branch does make law, such as promulgating new regulations, it does so to implement the laws Congress makes and only within the clearly established guardrails that Congress sets. In *Loper Bright*, the Court makes clear that the role of federal courts is to "independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[7]

Despite the Court's decision, given your agency's track record, I am concerned about whether and how the U.S. Department of Labor ("DOL" or "the Department") will adapt to and faithfully implement both the letter and spirit of this decision. DOL has promulgated and proposed rules that ignore congressional intent, judicial interpretation, and the plain meaning of labor and employment statutes. For example, DOL recently implemented a rule that raises the minimum salary to qualify for the executive, administrative, and professional (EAP) overtime exemption by 65 percent.[8] This rule leaves out many bona fide employees who should be exempt, in excess of the authority Congress gave DOL. The rule also flagrantly violates a 2016 federal court decision that invalidated a similar DOL rule because it would have left out bona fide EAP employees from the overtime exemption, in violation of the Fair Labor Standards Act.[9]

DOL has also improperly eclipsed its statutory authority to benefit its political allies. For example, the Occupational Safety and Health Administration (OSHA) promulgated the "walkaround" rule, which strips employers of their property rights by forcing them to permit union representatives into their workplaces.[10] When OSHA conducts an inspection, federal law allows employees to appoint a representative to accompany an OSHA inspector for "the purpose of aiding such inspection."[11] Under OSHA's new rule, employers must allow a union representative (or anyone else) to accompany an inspector, even if the workplace is not unionized and even if the union

[4] *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).
[5] *See Whitman v. Am. Trucking Ass'ns, Inc*., 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").
[6] *See, e.g.*, *Gundy v. United States*, 588 U.S. 128, 135 (2019) ("Congress, this Court explained early on, may not transfer to another branch 'powers which are strictly and exclusively legislative.'" (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825))).
[7] *Loper Bright*, 2024 WL 3208360 at *2.
[8] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 89 Fed. Reg. 32842 (Apr. 26, 2024) (to be codified at 29 C.F.R. pt. 541).
[9] *Nevada v. U.S. Dep't of Lab.*, 275 F.Supp.3d 795 (E.D. Tex. 2017).
[10] Worker Walkaround Representative Designation Process, 89 Fed. Reg. 22558 (Apr. 1, 2024) (to be codified at 29 C.F.R. 1903).
[11] 29 U.S.C. § 657(e).

representative has no safety background that could assist in the inspection.[12] This extra-statutory requirement has no purpose other than to benefit labor unions and to give the appearance that those unions have tacit support from the federal government.

Finally, DOL has used the rulemaking process to vastly expand federal regulations and legislate from the Executive Branch. The Department's proposed rule on "National Apprenticeship System Enhancements"—which turns a two-page law into 135 pages of new regulatory requirements—is an attempt to do through regulation what Congress did not do through statute.[13] This proposed rule would drastically expand regulatory burdens on states and apprenticeship sponsors, discourage voluntary participation in the national apprenticeship system, and inject political ideology into the national apprenticeship system through new diversity, equity, and inclusion (DEI) policies.

DOL has also consistently failed to provide timely or satisfactory responses to oversight requests, hindering Congress' ability to make informed policy decisions and hold agencies accountable for implementing the laws Congress writes. Among the most troubling examples of this failure has been DOL's response—or lack thereof—to my oversight efforts on DOL's handling of child labor violations. For months, I have sent letters to, and requested information from, DOL regarding its efforts to proactively prevent exploitative child labor throughout the country.[14] Each time, however, DOL has simply provided re-packaged press releases, touted its public record of enforcing the law ***after*** children are hurt in the workplace, and detailed its perceived need for more funding to actually make a difference in children's lives. Unfortunately, this kind of non-response is all too common from DOL.

Agency responses to congressional oversight are not optional. Constructive dialogue between Congress and Executive agencies is critical to both branches serving the American people and fulfilling their respective constitutional responsibilities. To facilitate this dialogue, agencies cannot simply shrug off oversight or side-step legitimate inquiries by providing only the information the agency wants to share. Congress is constitutionally mandated to perform oversight over federal agencies, and DOL must change its perspective to be more accountable to Congress moving forward.

To understand how DOL will abide by and implement the Court's new framework, I ask that you answer the following questions, on a question-by-question basis, **by July 19, 2024**:

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[12] Worker Walkaround Representative Designation Process, 89 Fed. Reg. 22558, 22601 (Apr. 1, 2024) (to be codified at 29 C.F.R. 1903).

[13] National Apprenticeship System Enhancements, 89 Fed. Reg. 3118 (proposed Jan. 17, 2024) (to be codified at 29 C.F.R. pts. 29-30).

[14] *See e.g.*, Press Release, Sen. Bill Cassidy, Ranking Member, S. Comm. on Health, Educ., Lab. & Pensions, Ranking Member Cassidy Criticizes DOL's Failure to Provide Answers on Efforts to Combat Exploitation of Migrant Children (Oct. 19, 2023), https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-criticizes-dols-failure-to-provide-answers-on-efforts-to-combat-exploitation-of-migrant-children; Press Release, Sen. Bill Cassidy, Ranking Member, S. Comm. on Health, Educ., Lab. & Pensions, Ranking Member Cassidy Slams Biden Administration's Failure to Address Rising Child Labor Exploitation, Demands Answers (Mar. 5, 2024), https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-slams-biden-administrations-failure-to-address-rising-child-labor-exploitation-demands-answers.

1. How will DOL change its current practices to enforce the laws as Congress writes them, and not to improperly legislate via agency action?

    a. Will DOL be conducting a systematic, action-by-action review of its ongoing activities to identify opportunities where DOL needs to make changes to comply with or otherwise account for the decision?

    b. Will DOL pause or stop any existing rulemaking activities in light of the Court's decision? If so, what rule(s) is DOL halting? If not, why does DOL feel it is legally able to continue existing rulemakings without considering the impacts of the Court's decision?

2. How does DOL plan to facilitate greater congressional involvement in policy issues under the agency's purview? Please be as specific as possible with respect to oversight responses, regular briefings, trainings and seminars, and other actions you plan to take.

3. What are your current policies about when your staff may or may not provide briefings to congressional staff? Where are such policies codified?

4. How do you plan to increase DOL's responsiveness to oversight and technical assistance requests from Congress?

    a. For example, how do you plan to streamline DOL's process for clearing technical assistance to reduce response times to congressional requests?

5. Moving forward, will you commit to providing a substantive response to congressional oversight requests within 30 days of receipt of the request? If not, why not?

6. Will DOL reconsider the overtime rule, lowering the salary exemption threshold, to ensure that bona fide executive, administrative, and professional employees remain exempt as Congress required?

    a. If so, in what ways does DOL plan to address these concerns within its rule?

    b. If not, why does DOL not believe it is necessary to revisit this rule?

7. Does DOL plan to rewrite the walkaround rule to ensure that it reflects congressional intent—that employee representatives have expertise to assist in the inspection—and are not there simply to organize employees?

    a. If so, in what ways does DOL plan to address these concerns within its rule?

b. If not, why does DOL not believe it is necessary to revisit this rule?

Thank you for your prompt attention to this important matter.

Sincerely,

Bill Cassidy, M.D.

Bill Cassidy, M.D.
Ranking Member
U.S. Senate Committee on Health,
Education, Labor, and Pensions