UNITED STATES TAX COURT

GARY M. SCHWARZ & MARLEE SCHWARZ	)	
Petitioners,	)	Docket No. 12347-20
v.	)	Judge Goeke
COMMISSIONER OF INTERNAL REVENUE,	)	Paper Filed
Respondent.	)	

MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE*

National Foreign Trade Council, Inc., respectfully moves for leave to file the brief attached to this motion as *amicus curiae* in the above-captioned case.

IN SUPPORT, the movant states:

1. National Foreign Trade Council, Inc. ("NFTC") is the premier business association advancing trade, tax, national security, and supply chain policies that support access to the global marketplace. Founded in 1914, NFTC promotes an open, rules-based global economy on behalf of a diverse membership of U.S.-based businesses, who account for over $6 trillion in revenue and employ nearly 6 million people in the United States. NFTC believes that its *amicus curiae* brief can provide information and assistance to the Court.

2. On November 5, 2024, the Court issued an order ("Briefing Order") that the parties brief two issues with respect to *Loper Bright*, 603 U.S. 369 (2024). Specifically, the Court ordered briefing to address: (1) *Loper Bright*, any relevant opinions released since *Loper Bright*, and any relevant caselaw preceding *Loper Bright* regarding the level of deference that should be afforded to regulations; and (2) Congressional delegation of authority to the Secretary of the Treasury to promulgate regulations regarding the ascertainment of an activity or section 183[1] generally. Briefing Order at 3. The Court instructed the parties to "discuss section 7805(a) and [explain] how [the Court] should consider this section in the wake of *Loper Bright*." Briefing Order at 3.

3. The decision to permit the filing of an *amicus curiae* brief is within the discretion of the Court. *See Ward v. Commissioner*, T.C. Memo. 1992-535, 64 T.C.M. (CCH) 714, 716. Such submissions are appropriate when they will provide additional information and assistance, and especially when they can help the Court understand how its decision will affect other taxpayers. Order, *Rajagopalan v. Commissioner*, T.C. Dkt. No. 21394-11 (Mar. 22, 2017).

4. NFTC understands that the proper application of section 7805(a) in the wake of *Loper Bright* is important to many corporate taxpayers. Treasury

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[1] All section references are to the Internal Revenue Code of 1986, title 26 of the U.S. Code, unless otherwise indicated.

regulations issued under section 7805(a) often govern complex and high-stakes areas of tax compliance and planning, and uncertainty about the level of deference courts will now afford such regulations may significantly affect taxpayers' ability to evaluate risk, structure transactions, and resolve disputes. Accordingly, the resolution of the issues raised in the Briefing Order will have wide-ranging impact in addition to the relevance to the above-captioned case.

5. NFTC has contacted counsel for both petitioners and respondent. Petitioners do not object to the filing of this motion. Respondent objects to the filing of this motion.

WHEREFORE, NFTC respectfully requests that the Court grant this motion for leave to file the attached *amicus curiae* brief.

Dated: July 9, 2025

Jenny Austin
Mayer Brown LLP
71 S. Wacker Dr.
Chicago, IL 60606
Tel: (312) 701-7140
jaustin@mayerbrown.com
Tax Court No. AJ0616

Anne Gordon
National Foreign Trade Council, Inc.
1225 New York Ave., NW
Suite 650B
Washington, DC 20005
Tel: (202) 887-0278
agordon@nftc.org
Tax Court No. GA0563

Respectfully submitted,

Gary Wilcox
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
Tel: (202) 263-3399
gwilcox@mayerbrown.com
Tax Court No. WG0363

Juliana Brensinger
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
Tel: (202) 263-3080
jbrensinger@mayerbrown.com
Tax Court No. BJ22266

Counsel for National Foreign Trade Council, Inc.

No. 12347-20

IN THE UNITED STATES TAX COURT

GARY M. SCHWARZ & MARLEE SCHWARZ,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

AMICUS BRIEF OF THE NATIONAL FOREIGN TRADE COUNCIL, INC.

Anne Gordon
National Foreign Trade Council, Inc.
1225 New York Ave., NW
Suite 650B
Washington, DC 20005
Tel: (202) 887-0278

Jenny A. Austin
Mayer Brown LLP
71 S. Wacker Dr.
Chicago, IL 60606
Tel: (312) 701-7140

Gary B. Wilcox
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
Tel: (202) 263-3399

Juliana Brensinger
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
Tel: (202) 263-3080

CORPORATE DISCLOSURE STATEMENT

Pursuant to Tax Court Rules 20(c) and 151.1(c), Amicus Curiae National Foreign Trade Council, Inc., states that it does not have a parent corporation and that no publicly held company owns 10% or more of the stock of the amicus.

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae the National Foreign Trade Council, Inc. (NFTC) is the premier business association advancing trade, tax, national security, and supply chain policies that support access to the global marketplace.[1] Founded in 1914, NFTC promotes an open, rules-based global economy on behalf of a diverse membership of U.S.-based businesses, who account for over $6 trillion in revenue and employ nearly 6 million people in the United States.

The NFTC submits this brief as *amicus curiae* in response to Court's November 5, 2024, Order seeking briefs from the parties on the following issues:

1. *Loper Bright*, any relevant opinions released since *Loper Bright*, and any relevant caselaw preceding *Loper Bright* regarding the level of deference that should be afforded to regulations. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 388 (2024) (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and other cases); and

2. Congressional delegation of authority to the Secretary of the Treasury to promulgate regulations regarding the ascertainment of an activity or section 183[2] generally. *See Loper Bright*, 603 U.S. at 394-96, 404 (discussing delegations of authority to agencies). The parties should discuss section 7805(a) and how we should consider this section in the wake of *Loper Bright*. *See Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55-58 (2011) (ruling that a regulation issued

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. Tax Court Rule 151.1(c).

[2] All section references are to the Internal Revenue Code of 1986, title 26 of the U.S. Code, unless otherwise indicated.

under the grant of authority under section 7805(a) was entitled to *Chevron* deference rather than a less deferential standard of review).

The NFTC submits this brief to provide its perspective on the issues identified in the Court's order. The brief focuses only on addressing those issues; it does not address any of the other issues raised in *Schwarz*.

INTRODUCTION

Loper Bright sets out a new paradigm for judicial review of statutory interpretations by administrative agencies. In *Loper Bright*, the Supreme Court overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 487 U.S. 837 (1984), which had held that a federal court generally should defer to an agency's reasonable interpretation of an ambiguous statute that it administers. The *Loper Bright* Court explained that, rather than defer to an agency's resolution of a statutory ambiguity, a federal court instead should independently determine whether the agency's interpretation reflects the *best* reading of the statute. In doing that analysis, the reviewing court may consider the agency's views for their power to persuade, but may not give dispositive weight to those views. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The Supreme Court recognized a narrow exception to its rule of no deference. In some circumstances, the *Loper Bright* Court explained, Congress has clearly stated its intent to give an administrative agency discretion to interpret a particular statutory term. In those circumstances, the Court explained, a reviewing court *should*

follow the agency's statutory interpretation. The Court gave examples of three types of statutory provisions that fall within this exception: a statute that expressly authorizes the agency to interpret a specific statutory term; a statute that empowers the agency to fill in procedural details of a particular statutory scheme; and a statute that expressly gives the agency discretion to regulate on a certain issue. If the statute expressly confers authority on the agency to make one of those determinations, then a court should follow the agency's interpretation so long as the delegation is constitutional and the agency acted within the bounds of its delegated authority. But outside of those narrow situations, a court should decide the meaning of an ambiguous statute itself, without any deference to the agency's views.

Section 7805(a) is not the type of exceptional statutory provision that delegates discretionary interpretive authority to an administrative agency. It does not fall within any of the three categories identified by the Supreme Court. Instead, it is a general grant of rulemaking authority, similar to many other general grants of rulemaking authority throughout the U.S. Code. It permits the Secretary of the Treasury to issue regulations, but does not specifically authorize the Secretary to interpret any specific term in the Internal Revenue Code; empower the Secretary to fill up the procedural details of a statutory scheme; or grant the Secretary discretion to decide a particular question. Indeed, if Section 7805(a) were interpreted to confer the type of interpretive authority that would be afforded deference, then the

government could claim deference to virtually all tax regulations – as well as virtually all regulations issued by other agencies under similar general grants of authority. That would completely undo the holding of *Loper Bright* and return federal courts to a deference regime.

This Court should not adopt such a self-defeating interpretation of *Loper Bright*. The Court should instead hold that statutory interpretations embodied in regulations issued under Section 7805(a) are not entitled to any deference.

ARGUMENT

I. *Loper Bright* Sets Out A New Approach For Evaluating Agency Statutory Interpretations

In *Chevron*, 467 U.S. 837 (1984), the Supreme Court set out a two-step framework for determining the validity of an agency's interpretation of a statute. *Id.* at 842. First, the court asked "whether Congress has directly spoken to the precise question at issue." *Id.* If so, then the statute was unambiguous and that unambiguous meaning of the statute controlled. *Id.* Second, if the statute was "silent or ambiguous with respect to the specific issue" at hand, then the court deferred to the agency's interpretation if it is "based on a permissible construction of the statute," *id.* at 843 – meaning a construction that is "reasonable" in light of the statutory text, context, and history, *id.* at 845. That deference was warranted, the Supreme Court held, even if the court would have reached a different interpretation on its own. *Id.* at 843 & n.11. This principle of deference was based on the presumption that Congress

intended to delegate the interpretation of ambiguous statutes to the agencies charged with administering those statutes. *Id.* at 843-44 & n.14; *see Smiley v. Citibank (S. Dak.), N.A.*, 517 U.S. 735, 740-41 (1996).

In the years after *Chevron*, the Supreme Court became skeptical of the broad power that *Chevron* gave to agencies. *See* T. Merrill, *The Demise of Deference – And the Rise of Delegation to Interpret?*, 138 Harv. L. Rev 227, 230-31 (2024). For many years, the Supreme Court simply did not defer to the government's statutory interpretations, instead simply deciding itself whether the government's interpretation was the best reading of the statute. *See Loper Bright*, 603 U.S. at 406 (observing that in the 15 years before *Loper Bright*, the Court only once deferred to an agency's interpretation under *Chevron*). The Court also developed doctrines, such as the major-questions doctrine, to limit when *Chevron* would apply. *Id.* at 405.

In *Loper Bright*, the Supreme Court finally overruled *Chevron*. The Court held that courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous" and instead "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." 603 U.S. at 413.

The *Loper Bright* Court's reasoning has both a constitutional and statutory basis. First, the Court explained that Article III of the Constitution makes federal courts responsible for adjudicating disputes between parties, including by

interpreting federal statutes. 603 U.S. at 384-87. The Court cited cases all the way back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), which explained that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Loper Bright*, 603 U.S. at 385. The Court concluded that historically, "the views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it," because otherwise, "judicial judgment could not be independent at all." *Id.* at 386.

The Supreme Court also relied on the judicial review provision in the Administrative Procedure Act (APA). 603 U.S. at 391-94. That provision requires a court to "decide all relevant questions of law" and "interpret constitutional and statutory provisions," and then to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." 5 U.S.C. § 706. The Court explained that this language "incorporate[s] the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions." *Loper Bright*, 603 U.S. at 394. The Court noted that this language "prescribes no deferential standard for courts to employ in answering those legal questions," unlike other language in the APA, which requires deference for "agency policymaking and factfinding." *Id.* at 392 (citing 5 U.S.C. § 706(2)(A) and (E)). The Court concluded that "by directing courts to 'interpret constitutional and statutory provisions' without

differentiating between the two, Section 706 makes clear that agency interpretations of statutes – like agency interpretations of the Constitution – are *not* entitled to deference." *Id.*

The *Loper Bright* Court rejected the view that federal courts should defer to agency interpretations of statutes simply because the statutes address technical matters. According to the Court, "even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions." 603 U.S. at 402. Instead, the Court explained, the reviewing court can obtain assistance in the form of briefs from "[t]he parties and *amici*" in a case. *Id.* Further, the Court can consider guidance from the agency itself: "Although an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'" *Id.* In particular, the Court observed that agency "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning." *Id.* at 394.

Thus, after *Loper Bright*, courts faced with a statutory ambiguity should not simply "declar[e] [an agency's] reading 'permissible'" (as they did under *Chevron*), but instead should "use every tool at their disposal to determine the best reading of

the statute and resolve the ambiguity." *Loper Bright*, 603 U.S. at 400. That means using "the traditional tools of statutory construction," *id.* at 394, and considering agency views for their "power to persuade," *id.* at 388 (citing *Skidmore*, 323 U.S. at 140).[3]

The Supreme Court recognized a narrow exception to its rule – that in some circumstances, Congress has expressly "delegated discretionary authority" to an administrative agency on a particular issue; in those circumstances, a court should follow the agency's interpretation of the statute. *Loper Bright*, 603 U.S. at 395. The Court set out three examples: a statute that "expressly delegate[s] to an agency the authority to give meaning to a particular statutory term," *id.* at 394-95 (internal quotation marks omitted); a statute that "empower[s] the agency to prescribe" procedural rules under a given "statutory scheme," *id.* at 395; and a statute that expressly grants the agency discretion on how it resolves a particular issue, *id.*

Even when Congress has delegated discretionary authority to an agency in one of those ways, a federal court does not simply uphold the agency's interpretation of the statute. Instead, the Supreme Court explained, the court should (1) assess

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[3] Although some courts have colloquially referred to this type of consideration of an agency's views as "*Skidmore* deference," it is not deference but instead respectful consideration of the agency's views for their power to persuade, which depends upon "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Loper Bright*, 603 U.S. at 388 (internal quotation marks omitted).

whether the delegation is constitutional, *Loper Bright*, 603 U.S. at 395; (2) determine the "boundaries of the delegated authority," *id.* (internal quotation marks omitted); and (3) ensure that the agency "engaged in reasoned decisionmaking within those boundaries," *id.* (internal quotation marks omitted).

The bottom line is under *Loper Bright*, a court construing an ambiguous statutory provision should not reflexively defer to an agency's interpretation of the statute, but instead should independently determine the best reading of the statute. If the best reading of the statute is that it delegates discretionary authority to the agency, then court may uphold the agency's view if the agency has acted within its delegated authority and the delegation is constitutional. But the Court's opinion makes clear that those situations will be rare.

II. Section 7805(a) Is Not The Type Of Special Statute That Delegates Substantive Interpretive Authority To The Government

The regulations at issue in this case involve Section 183 of the Internal Revenue Code. But Section 183 does not expressly authorize rulemaking, *see* 26 U.S.C. § 183, so the only authority for the regulations is Section 7805(a).

Section 7805(a) broadly authorizes the Secretary of the Treasury to issue "all needful rules and regulations for the enforcement of this title" – *i.e.*, the Internal Revenue Code. 26 U.S.C. § 7805(a); *see Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (explaining that "an agency literally has no power to act . . . unless and until Congress confers power upon it"). Although Section 7805(a)

indisputably grants the Secretary rulemaking authority, it is not the type of narrow delegation of substantive interpretative authority that would make agency views controlling under the exception in *Loper Bright*. Thus, regulations enacted pursuant to Section 7805 that interpret ambiguous statutory provisions are not entitled to any deference.

A. Section 7805(a) Does Not Delegate Discretionary Authority Under The Exception Set Out In *Loper Bright*

Section 7805(a) is a general grant of authority to the Secretary of the Treasury to promulgate regulations under the Internal Revenue Code. It provides:

> Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

26 U.S.C. § 7805(a). The delegation to the Secretary to "proscribe all needful rules and regulations" to carry out Title 26 is, by its terms, a very general grant of authority. It does not delegate any specific authority to define particular terms or delegate discretion to answer particular questions; it instead generally gives the Secretary the authority to issue "rules and regulations" as needed to enforce Title 26.

Section 7805(a)'s language clearly gives the Secretary the authority to promulgate rules and regulations. But that does not mean that regulations promulgated under that grant of authority are controlling on issues of statutory

interpretation. That question depends on whether Section 7805(a) sets out one of the special types of delegations of discretionary authority mentioned in *Loper Bright*.

The first type of delegation under *Loper Bright* is when a statute that "expressly delegate[s] . . . authority to give meaning to a particular statutory term." 603 U.S. at 394-95. The Court gave two examples. The first is the Fair Labor Standards Act's authorization for the Secretary of Labor to "define[] and delimit[]" by "regulation" when a person qualifies as an "employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." *Id.* at 394 n.5 (quoting 29 U.S.C. § 213(a)(15)). The second is the Atomic Energy Act's authorization for the Nuclear Energy Regulatory Commission to "define[] by regulations" when "a facility regulated pursuant to the Atomic Energy Act . . . contains a defect which could create a substantial safety hazard." *Id.* (quoting 42 U.S.C. § 5846(a)(2)). Both of these involve Congress expressly giving an agency power to define a particular statutory term.

Section 7805(a) does not involve this type of delegation. It authorizes, in general terms, the Secretary of the Treasury to issue regulations to enforce the Internal Revenue Code, 26 U.S.C. § 7805(a), but it does not authorize the Secretary to "define[]" or "delimit[]" any specific terms in the Code, *e.g.*, 29 U.S.C. § 213(a)(15). That type of delegation must be "expressly" conferred, *Loper Bright*,

609 U.S. at 394 (internal quotation marks omitted), and Section 7805(a) plainly does not confer any express interpretative authority.

The second type of delegation under *Loper Bright* is when a statute "empower[s] an agency to prescribe rules to 'fill up the details' of a statutory scheme." 609 U.S. at 395. The Court cited *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), as providing an example of this type of delegation. *Wayman* involved Section 17 of the Judiciary Act of 1789, which delegated to the federal courts the "power" "to make and establish all necessary rules for the orderly conducting business in the said Courts, provided such rules are not repugnant to the laws of the United States." *Id.* at 42 (internal quotation marks omitted). The Court explained that this provision "g[a]ve the Court full power over all matters of practice," such as "mak[ing] rules[] directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description." *Id.* at 42-43.

The *Wayman* example makes clear that the second type of delegation under *Loper Bright* involves situations where Congress has set out the substantive rules in the statute and then empowered the administrative agency to establish the procedural rules to carry out Congress's substantive policy. This type of delegation does not involve a delegation of *substantive* interpretive authority.

Section 7805(a) does not involve the second type of delegation under *Loper Bright*. It grants the Secretary, in general terms, the power to promulgate rules and regulations to "enforce[]" the Internal Revenue Code. 26 U.S.C. § 7805(a). Unlike the Judiciary Act provision cited in *Wayman*, Section 7805(a) does not identify a specific statutory scheme (such as "orderly conducting business in the [federal] Courts") for the Secretary of the Treasury to "fill in the details." 23 U.S. at 42-43 (internal quotation marks omitted). More generally, Section 7805(a) is not limited to the authority to make procedural rules, but instead is broader. So even if Section 7805(a) could be compared to the provision cited in *Wayman*, the most that could be said is that Section 7805(a) confers authority to promulgate procedural rules; it does not confer any substantive interpretative authority.

The third type of delegation under *Loper Bright* is when a statute empowers an agency "to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable'" – that is, it expressly delegates discretionary authority to the agency on a certain issue. 609 U.S. at 395 (internal quotation marks and citation omitted). The Court gave two examples: the Clean Water Act's delegation to the EPA Administrator to set effluent limits whenever, "in the judgment of the Administrator," "discharges of pollutants from a point source or group of point sources . . . would interfere with the attainment or maintenance of [the] water quality" needed to protect the "public health" and "public

water supplies," *id.* at 396 n.6 (quoting 33 U.S.C. § 1312(a)), and the Clean Air Act, which directs the EPA to "perform a study of the hazards to public health" potentially posed by power plants and then to regulate those plants "if the Administrator finds such regulation is appropriate and necessary after considering the results of the study," 42 U.S.C. § 7412(n)(1)(A). These examples both involve conferring discretion on the administrative agency official to exercise his or her judgment on a particular issue.

Section 7805(a) also does not involve the third type of delegation. That type of delegation requires not only that the statute use words indicating discretion (such as "discretion," appropriate," "necessary," or "reasonable"), but also to identify the specific issue or subject the agency may regulate and to set out the conditions or limits on the exercise of the agency's discretion (such as by referring the agency's "judgment" or "findings"). Although Section 7805(a) uses a word indicating some flexibility ("needful"), it does not refer to any particular issue or subject matter or any particular objective the agency must seek to further – instead referring generally to all of the Internal Revenue Code. 26 U.S.C. § 7805(a). Section 7805(a) also does not set out any conditions or limits on the Secretary's exercise of discretion.

The bottom line is that Section 7805(a) does not confer the type of discretionary authority described in the exception in *Loper Bright*. Accordingly, when a court reviews a statutory interpretation in a regulation promulgated under

Section 7805(a), it should decide *de novo* whether that regulation represents the best interpretation of the statutory text, without any deference to the agency's views.

B. Other Factors Confirm That Section 7805(a) Does Not Confer Discretionary Interpretive Authority

There are three additional reasons to conclude that Section 7805(a) does not confer substantive interpretive authority on the Secretary of the Treasury.

First, Section 7805(a) is just like many other general grants of rulemaking authority to agencies throughout the U.S. Code. *See, e.g.*, 25 U.S.C. § 1524 ("The Secretary of the Interior is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this chapter."); *id.* § 5209 (same).[4] Indeed,

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[4] *See also, e.g.*, 30 U.S.C. § 293 ("The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying this chapter into full force and effect."); *id.* § 541g ("The Secretary of the Interior is authorized to issue such rules and regulations as may be necessary or appropriate to effectuate the purposes of this chapter."; *id.* § 1211(c)(2) ("The Secretary [of the Interior] shall . . . publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this chapter."); 7 U.S.C. § 956 ("The Secretary [of Agriculture] may make rules and regulations as may be necessary in the administration of this chapter."); 12 U.S.C. § 1742 ("The Secretary [of Housing and Urban Development] is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter."); *id.* § 2707(a) ("The Secretary [of Housing and Urban Development] is authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter."; 16 U.S.C. § 1463 ("The Secretary [of Commerce] shall develop and promulgate . . . such rules and regulations as may be necessary to carry out the provisions of this chapter."); 22 U.S.C. § 2581(i) ("[T]he Secretary of State . . . is authorized to . . . make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary or desirable to the exercise of any authority conferred upon the Secretary of State by the provisions of this chapter.").

there are many other similar grants of general rulemaking authority within the Internal Revenue Code itself. *See, e.g.*, 26 U.S.C. § 59(*l*)(3) ("The Secretary shall provide for such regulations or other guidance as is necessary to carry out the purposes of this subsection.").[5]

If the general grant of rulemaking authority in Section 7805(a) confers substantive interpretive authority, that would mean that agencies have broad power to interpret virtually all of the statutes they administer. That would be plainly contrary to *Loper Bright*, which makes clear that *courts*, not administrative agencies, are responsible for interpreting statutes. 603 U.S. at 391. And it would entirely defeat the Supreme Court's purpose in overruling *Chevron*, which was to *limit* agency power.

Second, interpreting Section 7805(a) as delegating broad discretionary authority to interpret the Internal Revenue Code would be inconsistent with the many provisions where the Code expressly confers specific discretionary authority on the Secretary. *See, e.g.*, 26 U.S.C. § 702(a)(7) (permitting the Secretary to determine by regulation the "extent" to which a partner shall take into account for income tax purposes his share of the partnership's items of income, gain, loss, deduction, or credit not otherwise expressly provided for by the statute); *id.* § 954(c)(3)(A)(ii)

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[5] *See also* D. B. Susswein, E. Brauer, & A. Blackburn, *A List of Vague Regulatory Delegations*, 185 Tax Notes Fed. 1143, 1145 tbl.1 (2024) (listing examples).

(permitting the Secretary to determine by regulation the "extent" to which "payments made by a partnership with 1 or more corporate partners shall be treated as made by such corporate partners" for purposes of determining foreign personal holding company income). Statutes should not be interpreted in ways that would render other provisions superfluous. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011). Yet that would be the effect of overreading Section 7805(a); there would be no need for Congress to have expressly delegated discretion in specific instances in the Code if Section 7805(a) already conferred that discretion as to the entire Code.

Third, reviewing regulations promulgated under Section 7805(a) without deference restores the status quo that existed before *Chevron*. That is consistent with the Supreme Court's goal in *Loper Bright* of restoring the "traditional" judicial function that existed at the time the APA was enacted. *See* 603 U.S. at 394.

Before *National Muffler Dealers Association, Inc. v. United* States, 440 U.S. 472 (1979), courts often distinguished between "legislative" and "interpretive" regulations and afforded controlling deference only to legislative regulations. *Batterton v. Francis*, 432 U.S. 416, 425-26 & n.9 (1977). For tax regulations in particular, courts typically viewed regulations issued pursuant to a specific grants of rulemaking authority as legislative, and viewed regulations issued pursuant to general grants of rulemaking authority – such as Section 7805(a) – as interpretive.

P. Richman & T. Cranor, *Legislative and Interpretive Tax Rules and Rulemaking*, 178 Tax Notes Fed. 1149, 1151 (2023); *see, e.g.*, *Tutor-Saliba v. Comm'r*, 115 T.C. 1, 7 (2000). Accordingly, courts would not defer to agency statutory interpretations embodied in regulations promulgated pursuant to Section 7805(a), but courts still could consider the agency's views for their power to persuade under *Skidmore*. Richman & Cranor, *supra*, at 1153.

In *National Muffler*, the Supreme Court set out a special judicial standard of review that applied to section 7805(a) regulations. 440 U.S. at 477. That standard considered six different factors and generally gave a measure of deference to the agency's interpretation. *See id.* Nonetheless, the Court continued to recognize that regulations issued under Section 7805(a) were owed "less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision." *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981); *see United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982).

Then the Supreme Court decided *Chevron*, and in *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011), the Supreme Court held that *Chevron* provides the correct approach for courts reviewing regulations that interpret tax statutes. *Id.* at 57-58. The Court rejected the special tax-only deference rule in *National Muffler*. *Id.* It explained that it would not "carve out

an approach to administrative review good for tax law only," because there should be a "uniform approach to judicial review of administrative action." *Id.* at 55. The Court also explained that whether "*Chevron* deference is appropriate . . . does not turn on whether Congress's delegation of authority was general or specific." *Id.* at 56-57. The effect was to afford *Chevron* deference to all tax regulations, including those promulgated under Section 7805(a). *Id.* at 55-58.

Loper Bright rejects *Chevron*'s reflexive deference to agency interpretations of ambiguous statutes. It permits courts to give decisive weight to an agency's interpretation of a statute only in the limited situations where the statute expressly delegates that interpretation to the agency. 603 U.S. at 412-13. In the context of tax regulations, Section 7805(a) simply does not confer that sort of interpretative authority. Accordingly, in reviewing regulations promulgated under Section 7805(a), courts may not defer to agency interpretations, but instead may consider the agency's views only for their power to persuade under *Skidmore* – just as courts did before *National Muffler*. There is nothing unworkable about that approach, as it was the approach courts took for decades. And it ensures that courts, not agencies, perform the traditional judicial function of interpreting the law. *Id.* at 394.

CONCLUSION

When a federal court is reviewing a tax regulation promulgated under Section 7805(a), it should not defer to the Secretary's interpretation of an ambiguous tax statute.

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Respectfully submitted,

Jenny Austin
Mayer Brown LLP
71 S. Wacker Dr.
Chicago, IL 60606
Tel: (312) 701-7140
jaustin@mayerbrown.com
Tax Court No. AJ0616

Gary Wilcox
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
Tel: (202) 263-3399
gwilcox@mayerbrown.com
Tax Court No. WG0363

Anne Gordon
National Foreign Trade Council, Inc.
1225 New York Ave., NW
Suite 650B
Washington, DC 20005
Tel: (202) 887-0278
agordon@nftc.org
Tax Court No. GA0563

Juliana Brensinger
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
Tel: (202) 263-3080
jbrensinger@mayerbrown.com
Tax Court No. BJ22266

Counsel for National Foreign Trade Council, Inc.

CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion was served on the parties on July 9, 2025, by mailing a copy First-Class Mail, postage paid, and emailing an electronic copy to the following addresses:

Counsel for Petitioner:

Justin L. Campolieta
Jones Day
250 Vesey Street
New York, NY 10281-1047
Tel: (212) 326-3662
Tax Court No. CJ1671

Counsel for Respondent:

Matthew Ryan Delgado
General Attorney (Houston)
Small Business/Self-Employed
8701 S. Gessner, Suite 710
Houston, TX 77074-2944
Tel: (281) 721-7367
Matthew.R.Delgado@irscounsel.treas.gov
Tax Court No. DM0465

Dated: July 9, 2025

Respectfully Submitted,

Jenny A. Austin
Mayer Brown LLP
71 S. Wacker Dr.
Chicago, IL 60606
Tel: (312) 701-7140
jaustin@mayerbrown.com
Tax Court No. AJ0616

Counsel for National Foreign Trade Council, Inc.