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TESTIMONY HOUSE SUBCOMMITTEE ON WATER, WILDLIFE, AND FISHERIES, HOUSE COMMITTEE ON NATURAL RESOURCES

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Madam Chair Hageman, Ranking Member Hoyle, and members of the Subcommittee, thank you so much for the opportunity to provide my views on the implications of our clients' victories in *Loper Bright Enters., Inc. v. Raimondo/ Relentless, Inc. v. Dep't of Com.*, 144 S.Ct. 2244 (2024) ("*Loper Bright/Relentless*"), to provide the Congress the opportunity to work its will, direct the executive branch and, among other things, improve the implementation of the Marine Mammal Protection Act and the Endangered Species Act. I worked many years to overturn *Chevron* deference, as has my organization the New Civil Liberties Alliance ("NCLA"). Now that that task has been accomplished, the Congress can reassert itself, as the Founders believed it would and should, to set the course for law and policies of the Federal Government in protecting, exploiting and managing the nation's natural resources.

Since the momentous decision on June 28, 2024, I've been asked about the effect of the decision on administrative agencies and on law making of the end of *Chevron* deference. Some commentators and the press have predicted the end of important environmental and social regulations merely because the agencies are no longer able to create "ambiguities" and then fill those ambiguities with whatever regulations they like. This is not so. Since the creation of the Interstate Commerce Act of 1887 to address the regulatory challenges of the transcontinental railroads, administrative regulatory power has been exercised by Congress and affirmed by courts, including the Supreme Court. In 1946 the Congress passed, and President Harry Truman signed, the Administrative Procedure Act (the "APA"). When *Chevron* deference came along in 1984, Congress had been creating administrative agencies that made regulations covering huge swaths of American life, including securities, energy, the environment and natural resources for

over 100 years. *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837 (1984). *Chevron* did not even mention the APA that Congress had explicitly enacted to control agency regulation and its adjudication by the Courts. Chief Justice Roberts' decision for the majority in *Loper Bright/Relentless* relied on the language of the APA to strike down *Chevron* deference. While I and my organization believe that the Constitution itself forbids Article III courts from deferring to an interpretation of the law by the Article II executive branch, it should be understood that the majority opinion relied on this Congress's written will that "*courts* must 'decide all relevant questions of law.'" 5 U.S.C. § 706 (quoted in *Loper Bright/Relentless*, 144 S.Ct. at 2260) (emphasis in original).

The case does not limit the ability of Congress to enact statutes to regulate, nor does it prevent constitutional delegation of authority to agencies. As Chief Justice Roberts said for the majority "[This] is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has." *Id.* at 2268. The holding of the case is that "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id.* at 2273.

The subject of this hearing is "Evaluating the Implementation of the Marine Mammal Protection Act and the Endangered Species Act." I'm familiar with those two acts but have not litigated them as I have the Magnuson Stevens Act also within the Committee's jurisdiction. I'm

not an expert on their provisions. However, *Loper Bright/Relentless* does not change the power of Congress to control agencies including the agencies with responsibility to implement these two statutes. It means that agencies will have to point to actual language and authority in a statute to support regulations or regulatory actions. The basics are probably well-known to this Committee. When Congress uses the words "the Secretary shall" do such and such it is taking away discretion. When it says the "Secretary may" do such and such it is granting discretion.

In the very first opinion of this Supreme Court term the Supreme Court analyzed how Congress grants discretion to agencies and withholds it. *Bouarfa v. Mayorkas*, 604 U.S. 6 (2024). In that case, Justice Jackson for a unanimous court notes the things Congress can do to grant wide discretion and also to cabin that discretion. The Court noted that Congress had stated the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any [visa] petition." *Id.* at 10 (quoting 8 U.S.C. § 1155). That case notes that the immigrant statutes is made up of "mandatory statutory rules paired with discretionary exceptions." *Id.* at 8. For the purposes of this Committee, courts are likely to interpret similar statutory language similarly. *Bouarfa* contrasts the broad discretion granted to the Secretary in revoking or not revoking visas for prior "sham marriage" violations with that granted to the Attorney General of the United States who can only exercise discretion for clemency after making certain findings of fact (such as the length of time the non-citizen has been in the country). *Id.* at 13-15.

The Endangered Species Act ("ESA") and the Marine Mammal Protection Act ("MMPA") directs the Secretary of the Interior or Secretary of Commerce, and through them the U.S. Fish and Wildlife Services ("FWS") and the National Marine Fisheries Service ("NMFS") to identify and take measures to protect various species of animals under threat of extinction. It

uses language like I've described to instruct them on what they may do. For example, the Endangered Species Act states for recovery plans states

> The Secretary shall develop and implement plans … for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species.
>
> 16 U.S.C. § 1533 (f)(1).

In this case he shall, without discretion after he's listed a species, create a recovery plan unless he finds it won't help conserve the species. His actions would then be tested under the APA for making decisions or findings "arbitrarily or capriciously" or otherwise violating the law. It appears that much of the litigation over these statutes centers on whether the agencies are assessing risk to the various species accurately. *See e.g. Friends of the Animals v Williams*, 628 F.Supp.3d 71 (D.D.C. 2022) (remand to agency determine whether species of red macaw was endangered or threatened); *Friends of the Animals v. Ross*, 396 F.Supp.3d 1 (D.D.C. 2019) (remand to agency for further studies on type of conch's range).

Recently the D.C. Circuit explained how this body amended the ESA in 1979 to ease the tremendous economic damage it had caused in development of the TVA in the famous "snail darter" case. *See Me. Lobstermen's Ass'n v. NMFS*, 70 F.4th 582, 596 (D.C. Cir. 2023) (describing original language of ESA and Congress's changes to correct after Supreme Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978)). They explain how Congress changed the original statutes "no exceptions" command to provide resort to better science and a concern for expense.

Under *Loper Bright/Relentless*, the secretaries of the agencies under these statutes will not be assumed to have legislative power whenever they wish to use ambiguous language in the statutes to change a regulation. *Chevron* deference meant that silence or ambiguity allowed the administrator to do anything the courts would deem "reasonable" within his purview. Now, he

must state where Congress provided that power or discretion. In many cases in these statutes, it will have done so.

There are ways for Congress to prevent such discretion from being abused. First is requiring the Secretary to find certain facts as in *Bourfa* before exercising the discretion. In my example, I described one case where the ESA already does so. If Congress believes the secretaries are not taking a factor into account that should be taken into account, it can require them to do so. If it believes they are using a criterion that is not valid and does not lead to protecting species it can require him to use it.

There is one last consideration that concerns the Court's *Loper Bright/Relentless* decision that I think will be useful to this Committee. In that case, and in the effort to overturn *Chevron* deference, one result of that deference that struck judges and commentators as unfair was that the exact same law could mean regulations changed 180 degrees with a change in the administration. I believe the Supreme Court has signaled that when a new law or amendment is passed, the way the first administration deals with that law and issues regulations and interpretations of the new law is likely to set the tone and parameters of the regulatory scheme going forward. The Court went out of its way to note the "respect" the executive branch's interpretation of a statute "was issued roughly contemporaneously with enactment of the statute and remained consistent over time." *Loper Bright/Relentless*, 144 S.Ct. at 2258. The Courts are suspicious of vast changes in the obligations the same statute imposes when there has been no change in the statute by Congress. Vague language will no longer be allowed to empower the agencies. At oral argument in *Loper Bright*, Paul Clement posited that legislative compromise was being stymied partly because each side had incentive to assume when its party had the Presidency, any vagueness in the law would redound to its benefit. Whether he was right or wrong about that if

there was such an incentive, it's gone now. Clarity on what the Congress wants will now be rewarded, and vagueness is unlikely to allow the Executive to work its will unchallenged by the Courts.

Congress no longer has any incentive to allow its statutory intent to be unclear in the hopes a friendly administration will be empowered to do what it did not clearly command and it also need not fear an unfriendly one can do anything it wants in that space. I thank you for this opportunity to lay out my thoughts on the new regulatory landscape.