Testimony

Of

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In the

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Regarding the Hearing

"Reining in the Administrative State:
Agency Adjudication and Other Agency Action"

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Thank you for the opportunity to be here today, Mr. Chairman and Mr. Ranking Member. My name is Skye Perryman. I am a lawyer and the President and CEO of Democracy Forward Foundation, which is a non-partisan, national legal organization that promotes democracy and progress through litigation, regulatory engagement, policy education, and research.

Democracy Forward has had the privilege of representing clients that make up the very fabric of our democracy in courts across the nation – teachers, parents, workers, small business owners and entrepreneurs, researchers, students, veterans, innovators, doctors, voters, and so many more. Our team is comprised of lawyers, policy experts, and researchers who have prior experience serving our nation and have held positions throughout government, including in the military and national security communities, at independent agencies, other federal agencies, including the Department of Justice, as well as individuals who have practiced law on behalf of corporations and businesses in private practice, and at public interest organizations. We have represented clients both in challenging harmful and unlawful governmental action and in supporting governmental action, including the actions of federal agencies that enable the government to deliver for people within the bounds of our constitutional and statutory system. We are committed to our country's founding idea that our government derives its power from the consent of the governed[1] and are dedicated to bringing about our democracy's promise that the government must work for all people.[2] At Democracy Forward, we see in our work every day that the vast majority of the American people believe in the promise and potential of democracy and that it is incumbent upon us all to play a role in advancing our democracy during this critical time.

Over the course of my nearly two decades as a practicing attorney, including an attorney who has held positions in corporate law firms, as a general counsel and chief legal officer, and in non-profit organizations, I have been both in the position of representing clients who have challenged governmental action, including the action of federal agencies, when it was outside the bounds of the law, and I have been in a position of supporting lawful governmental action that is beneficial for people, communities, and businesses throughout the nation. Fundamentally, my work in leading Democracy Forward centers on the premise that when the government does its job and works for the people within the bounds of the law, our society is

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[1] U.S. Nat'l Archives and Recs. Admin., *Declaration of Independence: A Transcription,* Nat'l Archives, available at https://www.archives.gov/founding-docs/declaration-transcript (last visited Mar. 19, 2024).
[2] *E.g.*, Lincoln, Abraham, *Fragment of a Speech by Abraham Lincoln on the Conflict between Slavery and Republican Government* (1857), available at https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=381, (last visited Mar. 19, 2024).

stronger – and when our government strays from this purpose, serving only private interests or particularized agendas, our democracy and the well-being of people and communities throughout the nation is in danger.

I appreciate the opportunity today to discuss the role our federal agencies and civil servants play in service of the American people and some particularized threats to the ability of our government to deliver on its promises to the American people.

I. The Role of Federal Agencies & Civil Servants in Delivering for the American People

Under our system of government, legislative power is vested in Congress, and the Executive branch has the obligation to see that the laws are faithfully executed. Congress created the first federal agency in 1789 and more than 100 years ago created the first independent regulatory commission. Throughout our country's history, federal agencies have played crucial roles in ensuring the laws are executed and policies adopted that protect the American people. As the Brookings Institute notes, "every day, the government takes impactful action and implements important policies through the work of federal agencies."[3]

Federal agencies play a critical role in keeping our nation safe, regulating our nation's health care system, protecting consumers, protecting our environment, ensuring safe drinking water, delivering our mail, maintaining our national parks, providing critical data (including reports that farmers depend on to maintain the agriculture industry), maintaining international trade, and providing crucial benefits that millions of people rely on like Social Security and Medicare.

Federal agencies are led by people appointed by the President and also employ staff comprised of career civil servants, many who have particularized subject matter expertise and all of whom swear an oath to support and defend the Constitution. The oath that civil servants take is important – it ensures that the people doing the work of the federal government fulfill a duty to the American people and not to any particular political agenda.

The power of federal agencies is generally controlled by Congress, which can limit or expand their scope by statute. Federal agencies must operate within the bounds of the law, including the Administrative Procedure Act, which was passed by Congress and signed by President Harry S. Truman in June of 1946.[4]

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[3] Brookings Inst., *Tracking Regulatory Changes in the Biden Era*, Brookings (Jan. 4, 2024), https://www.brookings.edu/articles/tracking-regulatory-changes-in-the-biden-era/.
[4] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

II. Current Threats to Our Federal System and the Ability of Government to Deliver for People

Presently, the nation is experiencing a number of threats to our democracy and the ability of our federal government to deliver for the people, including threats to Congressional power and our constitutional system. Some of these threats are arising in litigation filed in federal courts.

Today, I will highlight a series of cases that are on the docket at the U.S. Supreme Court and will be decided this term that, if resolved the way certain interests urge, could have the potential to undermine the well-being of millions of Americans across the nation as well as the stability of our regulatory system – from compromising the government's ability to protect consumers and investors, to protecting our environment and delivering in our healthcare system. This includes several cases that have risen to the Supreme Court from the U.S. Court of Appeals for the Fifth Circuit where litigants have brought cases to undermine the functioning of particular federal agencies and, in so doing, seek to undermine the power that Congress has to structure our federal system.

As members of the Subcommittee will recall, following the greatest economic downturn since the Great Depression, this body took action to protect the American public from predatory consumer practices, including predatory loans and other deceptive, discriminatory, and abusive practices. Through the Dodd Frank Act, Congress created the Consumer Financial Protection Bureau (CFPB), and Congress chose to fund its operations through the Federal Reserve system so that in times of gridlock or other emergency, its essential functions would remain available to the American people and small businesses.[5] Congress has similarly structured other programs this way such as Social Security and Medicare – to ensure the stability of programs that American people rely on to meet their needs.

This term, the U.S. Supreme Court is hearing a challenge in a case – *Consumer Financial Protection Bureau v. Community Financial Services Association of America (CFPB v. CFSA)* – that is seeking to attack the existence of the CFPB.[6] In this case, which has arisen from the U.S. Court of Appeals for the Fifth Circuit, the payday lending industry is seeking to undermine the CFPB's funding structure. The payday lending industry claims that the way Congress chose to fund the CFPB – enabling the agency to function in times of gridlock through being funded through the Federal Reserve system as opposed to the appropriations process – is unconstitutional. No Supreme Court decision has concluded that the Appropriations Clause

[5] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[6] *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am.*, No. 22-448 (U.S. argued Oct. 3, 2023).

limits how Congress can fund an agency it creates in this way nor has Congress or the executive branch historically understood the clause to operate to create such limitations on agencies Congress creates. Notably, two federal courts of appeals have reviewed and rejected the argument. The implications of this case, if the payday lending industry were to prevail at the Court, could undermine the funding structure of core federal programs such as Social Security, Medicare, and others where Congress has chosen a funding structure to enable the government to function and provide essential services to people on a consistent basis and one that is not affected by the political whims or gridlock of Washington.

While we believe the law is abundantly clear and that there is no merit to CFSA's argument – and we hope the Court will see it the same way – it is important that people understand the level of extreme attacks that we are seeing on our federal agencies and the ability of the government to work for people. It is also important to understand that a range of interests have joined the payday lending industry in seeking to challenge Congress' power to fund the CFPB through the Federal Reserve system. Organizations that are aligned with interests that have been involved in advocating in courts against the way Congress chose to fund the CFPB have also been involved in other efforts to undermine our federal regulatory system and the rights of the American people.

Another case that is arising at the Court from the Fifth Circuit is *Food and Drug Administration v. Alliance for Hippocratic Medicine*.[7] The Supreme Court will hear oral argument in this matter next week where a special interest group in Texas has sought to undermine the Food and Drug Administration's (FDA) long-standing approval and expertise in regulating an essential medication that has been studied for more than two decades. Many of the extreme arguments made in the initial stage of the case, which were largely endorsed by the Fifth Circuit, were stayed by the Court in a 7-2 decision last spring. Members of this Committee are no doubt aware that a broad variety of communities are concerned about the attacks on FDA in the *AHM* matter, including, for example, the pharmaceutical industry[8] and the nation's medical community,[9] which filed briefs in the case highlighting the harms of these attacks on our nation's healthcare system.

This term, the U.S. Supreme Court will also decide *Securities and Exchange Commission v. Jarkesy*,[10] a case where a divided three-judge Fifth Circuit panel ruled that the way in which

[7] *FDA v. All. for Hippocratic Med.*, No 23-235 (U.S. petition for cert. filed Sept. 8, 2023).
[8] Amicus Brief of Pharmaceutical Research and Manufacturers of America in Support of Petitioners, *FDA v. All. for Hippocratic Med.*, No. 23-235 (Jan. 30, 2024); *see also* Amicus Brief of Pharmaceutical Companies, Investors, and Executives, *FDA v. All. for Hippocratic Med.*, No 23-235 (April 14, 2023).
[9] Amicus Brief of Medical and Public Health Societies, *FDA v. All. for Hippocratic Med.*, No 23-235 (Apr. 14, 2023).
[10] *SEC v. Jarkesy*, No. 22-859 (U.S. argued Nov. 29, 2023).

Congress structured the Securities and Exchange Commission (SEC) and in particular its use of administrative law judges violates the Constitution. The Fifth Circuit also found that administrative law judges are not entitled to for-cause removal protections. There are broad concerns regarding the implications of this matter for the independence of administrative adjudications, as demonstrated by the fact the American Bar Association and other institutions weighed in at the Court in favor of removal protections for administrative law judges.[11] A decision undermining the independence of administrative law judges and enabling the executive branch to remove them without cause is contrary to bedrock principles of administrative adjudication and the APA's guarantee of fairness and impartiality. It is also not based on legal precedent, as federal courts and the U.S. Supreme Court have routinely recognized that a higher level of removal protections are appropriate for officials who serve adjudicative, as opposed to policymaking, functions. The Fifth Circuit's divided panel's decision, if sustained at the Supreme Court, not only threatens to compromise the independence of administrative law judges but also threatens to overburden our already burdened and backlogged federal court system. There are broad concerns that the Fifth Circuit's decision, if sustained, would undermine the ability of other agencies to use administrative adjudications, further straining our federal courts system and delaying benefits and protections for the American people.

The *CFSA*, *AHM*, and *Jarksey* matters are all cases where the government has had to appeal to the U.S. Supreme Court because of rulings by the U.S. Court of Appeals for the Fifth Circuit that undermine not only the federal agencies but the way that Congress has chosen to create and structure agencies. Ideologically diverse communities and interests have weighed in about the extreme nature of these arguments and the threats that would be posed to our federal system if the Court were to adopt them.

In addition to these cases, I appreciate the opportunity to highlight three other cases on the Court's docket this term that present severe threats to our government's ability to deliver for people. In *Loper Bright Enterprises, Inc. v. Gina Raimondo*[12] and *Relentless, Inc. v. Department of Commerce*,[13] a pair of cases together referred to as "*Loper Bright/Relentless*," the U.S. Supreme Court has decided to consider whether to overturn a principle of law known as *Chevron* deference, which was articulated in the 1984 case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[14] The principle of law says that when Congress passes a law that contains ambiguous or unclear language, judges should defer to the expertise of federal agencies

[11] Amicus Brief of American Bar Association, *SEC v. Jarkesy*, No. 22-859 (Sept. 5, 2023).
[12] *Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. argued Jan. 17, 2024).
[13] *Relentless, Inc. v. Dep't of Com.*, No. 22-1219 (U.S. argued Jan. 17, 2024).
[14] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

in interpreting that language as long as the agency's interpretation is reasonable. This deferential approach, the Court in *Chevron* reasoned, both respected Congress's delegation of authority to the agency to implement the laws it passed and the expertise of agencies themselves, which are able to develop and hold more specialized information than generalist judges. Although the Supreme Court articulated this specific doctrine in the *Chevron* matter in the 1980s, the legal principles behind it have been recognized for more than a century. In the nearly 40 years since the Court decided *Chevron*, administrative agencies have been empowered by Congress to conduct countless services and programs serving the American people like Social Security, Medicaid, overtime protections, federal grant programs, small business lending programs, environmental standards, food and drug safety protocols, and so much more.

Chevron deference has been described as a doctrine of judicial humility, including by Justice Kagan.[15] There is a concern that without the courts deferring to agency interpretations in appropriate circumstances, courts would substitute their own views for the experience of the agencies and in so doing disrupt the uniform interpretation of federal regulations. Research has shown that *Chevron* deference has been critical in helping to curtail partisan ideologies or specific preferences or views of individual judges from affecting our regulatory system.[16] *Chevron* deference has been shown to curb the judiciary from imposing its own ideological or policy-driven perspectives when interpreting regulations. Data has shown that when an agency issues an ideologically conservative interpretation of a statute, a judicial panel comprised of judges known to be more ideologically liberal agrees with the agency's statutory interpretation about 51 percent of the time under *Chevron* deference. When not applying *Chevron*, that number drops to about 18 percent. Ideologically conservative judicial panels respond similarly when addressing liberal interpretations of a statute. When faced with a liberal interpretation by an agency, an ideologically conservative panel applying *Chevron* deference will agree with an agency's statutory interpretation about 66 percent of the time. When not applying *Chevron*, that number likewise drops to 18 percent.[17] *Chevron* thus places an important limit on the federal judiciary and on ensuring that our regulations are driven by policy expertise, not individual judicial preferences or orientations.

Loper Bright/*Relentless* threatens administrative agencies' ability to continue delivering for the American people by setting aside decades of legal precedent enabling the agencies to interpret ambiguous language in laws that Congress passes in a reasonable way in light of the

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[15] Transcript of Oral Argument at 34, *Loper Bright Enters. v. Raimondo*, No. 22-451 (Jan. 17, 2024).
[16] Kent Barnett et. al., Administrative Law's Political Dynamics, 71 Vand. L. Rev. 1463, 1467-68 (2019), https://tinyurl.com/dvthftdx; *see also* Amicus Brief of Law Professors of Kent Barnett and Christopher J. Walker in Support of Neither Party, *Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. July 24, 2023).
[17] *Id.*

agency's expertise. While *Loper Bright/Relentless* focuses on one regulation – the National Marine Fisheries Service (NMFS) regulation – issued by one particular administrative agency, the cases could have far-reaching impact because the Court is being asked to overturn its precedent set forth in *Chevron* in considering the legality of the NMFS regulation. If petitioners are successful and the Court overturns *Chevron*, the authority and expertise of all administrative agencies and the thousands of programs and services they run for the American people's benefit could be at risk. Overturning *Chevron* could lead to litigation challenging federal agency programs and result in the substitution of the views of judges for the expertise of federal agencies. In this way, *Loper Bright/Relentless* is akin to cases in other contexts like *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), in terms of its potential to radically alter the legal and policy landscape by overturning years of legal precedent, with sweeping implications for millions of Americans.

In addition to *Loper Bright* and *Relentless*, the Supreme Court will also decide *Corner Post v. Board of Governors of the Federal Reserve System*.[18] *Corner Post* concerns the statute of limitations for bringing claims challenging final actions from federal agencies under the Administrative Procedure Act ("APA"), which is a law that proscribes limits to federal agencies. In *Corner Post*, the Court will consider whether legal challenge to a regulation must be made within six years of the regulation's issuance, or within six years of when the regulation first "injures" the plaintiff. Every federal court of appeals that has considered the matter, except for one, has interpreted the six-year statute of limitations period in the APA as beginning when an agency issues a regulation. This allows for challenges to regulations but then, after a period of those challenges and judicial decisions, it promotes relative regulatory stability. Yet, petitioners in *Corner Post* seek to expand the time horizon for bringing challenges to agency action, enabling longstanding federal regulations to be challenged years after they are implemented, including by entities that come into existence simply for the purpose of challenging federal regulations, leaving the door open to much opportunistic mischief. Legal scholars have warned that adoption of the arguments in *Corner Post* would create a situation where courts all over the country could strike down or reinterpret regulations years after the fact, creating an unworkable regulatory environment.[19]

The *Corner Post* case, when considered in light of *Loper/Relentless*, could have broad sweeping implications for regulatory stability. Regulatory stability is not only important for the benefits and services that agencies provide ordinary Americans but is also critical for the ability of small businesses to grow, thrive, and compete. In each of these matters, coalitions

[18] *Corner Post v. Bd. of Governors of the Fed. Rsrv. Sys.*, No. 22-1008 (U.S. argued Feb. 20, 2024).
[19] Heinzerling, Lisa, Opinion, The Supreme Court's Self-Coronation, Regul. Rev, Mar. 18, 2024.

representing small business interests weighed in at the Court to warn of the harms that could ensue if our regulatory system was subject to the whims of individualized district courts. Indeed, one can imagine the chaos that could result if the scope of an agency's regulatory authority was interpreted differently across each of the 13 federal courts of appeal and the 94 federal district courts. Institutions representing hundreds of thousands of small businesses and small business interests have weighed in at the Court urging it to uphold the rule of law. As the Court contends with the cases on its docket, it is imperative that policymakers and the public understand the stakes for our system and for the people for whom our government is obligated to serve.

In addition to threats moving through the federal courts, I appreciate the opportunity to highlight an unprecedented effort by special interests – known as "Project 2025" – to undermine a number of elements in our federal system, including our civil service – the 2.2 million individuals who, every day, in all states across the country, go to work for the people in this nation. Project 2025 proposes to take a number of actions that would undermine the functioning of good government, the ability of the federal government to do the work of the American people, and important protections for our country's civil workforce.[20] It is important that policymakers understand the risks presented by this type of threat not only to the American people but to our overall constitutional order and the work of this legislative body.

III. The Harmful Impact on People and Communities of Undermining Our Federal System

The concerted efforts to undermine our federal system through efforts like Project 2025 as well as litigation seeking to rewrite administrative law and disrupt Congress' ability to structure agencies to the benefit of the American people present a range of threats to people and communities throughout the nation. Indeed, while some of the cases referenced above have received modest attention from media outlets and policymakers that have characterized the cases as relevant to what has been called the "administrative state," they have received far less attention than they deserve for the tremendous implications these cases would have on the lives of millions of Americans. Characterizations of these issues as those concerning the "administrative state" often fail to describe the high stakes of the matters to millions of ordinary people in America.

Fundamentally, these cases could radically alter the ability of our federal government and overall system of democracy to deliver for the American people. The implications for people

[20] Project 2025 Presidential Transition Project, Mandate for Leadership: The Conservative Promise, Heritage Found. (2023), https://thf_media.s3.amazonaws.com/project2025/2025_MandateForLeadership_FULL.pdf.

and for our democracy as a whole are broad. A decision to overturn *Chevron* deference could undo the stability of established regulations, from standards on the air we breathe to rules protecting our rights at work, and open up untold numbers of previously settled regulations to new attacks. Researchers and scholars have warned that everything from our nation's promise to support quality education, the work that our agencies do to protect our food and drug supply, to worker and public health protections could be weakened.

Attacks on the ability of federal agencies to implement policies as enacted by Congress, attacks on the independence of civil servants, attacks on the independence of administrative administrative law judges, and attacks on bedrock principles of administrative law could have wide sweeping negative consequences to the stability and prosperity of our country.

Thank you for having me here today to speak to these issues.

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