23-1823

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JILLIAN LESKO,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA
Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN 1:22-cv-00715 CNL

JUDGE CAROLYN N. LERNER

EN BANC REPLY BRIEF OF APPELLANT JILLIAN LESKO

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Oral Argument Scheduled for September 12, 2025

Brief filed: August 6, 2025

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 23-1823

Short Case Caption Lesko v. United States

Filing Party/Entity Appellant Jillian Lesko

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INTRODUCTION

Federal workers should be paid for the overtime that they are required to, and do, perform. Congress mandates this by statute. 5 U.S.C. § 5542(a). Yet the Office of Personnel Management's ("OPM") regulation— 5 C.F.R. § 550.111(c)— withholds pay when a supervisor fails to authorize the work in writing, a practice that the Court of Claims sitting *en banc* in 1956 shortly after issuance of the regulation labeled "subterfuge" and "denial of the substance of the statute". *Anderson v. United States*, 136 Ct. Ct. 365, 371 (1956). Ms. Lesko and the class members in this case are nurses who during the COVID-19 pandemic worked extensive overtime that, as alleged, was verbally induced and required by their supervisors, necessary to save lives and to comply with workplace policies and medical standards, and performed under threat of termination. Yet the government would pay them nothing.

The legal question in these *en banc* proceedings can be reduced to the following: Does a statutory delegation that authorizes regulations "necessary for the administration" of a statutory scheme empower an agency to alter the plain meaning of statutory terms in a manner that restricts the substantive scope of a statutory right as interpreted by the courts? The answer must be no.

The government's arguments to the contrary propose a standard of agency deference that would essentially be a return to *Chevron*, which *Loper* overruled. *Loper* requires that this Court independently interpret the "officially ordered or approved" language in § 5542(a), not mechanically defer to OPM's interpretation, and consider OPM's interpretation only to the extent it fits within the boundaries of a constitutional delegation of rulemaking authority, which, as set forth in prior briefing and below, it does not. The government does not account for the litany of cases from *Anderson* through to *Mercier* that interpret the statutory language of "officially ordered or approved" as encompassing inducement theory. The government relies almost entirely on *Doe* and principles of *stare decisis*, but fails to meaningfully grapple with *Mercier* and the many ways in which it undercut *Doe*'s rationale and reaffirmed *Anderson*'s interpretation of the statutory right to overtime pay. Ultimately, the government fails to cite a single case post-*Loper* holding that an agency may by regulation contradict the plain language of a statute and restrict the scope of a statutory right as interpreted by the courts. Numerous cases since *Loper*, however, have expressly held that *Loper* prevents an agency from doing so.

For the reasons set forth herein and in her prior briefing, Ms. Lesko respectfully requests that this Court reverse and vacate the Court of Federal Claims' order and judgment in this matter.

ARGUMENT

A. The Government Proposes a Standard of Agency Deference that Would Constitute a Return to *Chevron*, Which *Loper* Overruled

The government chiefly argues that the writing regulation falls within the bounds of authority Congress delegated to OPM. But its arguments propose a standard of agency deference that would essentially constitute a return to *Chevron* and nullify *Loper*.

As set forth in Ms. Lesko's *en banc* opening brief, the Supreme Court instructed in *Loper* that courts must exercise their own independent judgment in determining the meaning of statutory provisions and in deciding whether an agency has acted within its statutory authority, and that they may not defer to an agency interpretation simply because the statute is ambiguous. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 371-72, 394-95, 412-13 (2024). *Loper* further makes clear that an agency has authority to exercise discretion in administering statutes only insofar as Congress constitutionally delegates by statute such authority to the agency and the agency acts within the bounds of the statutory delegation. *Loper*, 603 U.S. at 394-95.

The government asserts, however, that the mere presence of statutory ambiguity requires deference to an agency's regulation(s) interpretating the ambiguous statutory terms. *See En Banc* Brief of Appellee at 15 ("By declining to specify how overtime must be ordered or approved in section 5542(a), Congress

left it to OPM to 'fill up the details of a statutory scheme.'"). That is the essentially the two-step *Chevron* standard, which *Loper* overruled. *See Duffus v. MaineHealth*, -- F. Supp. 3d --, Case No. 2:24-CV-00268-SDN, 2025 WL 1928339, at *9 (D. Me. July 15, 2025) ("Under *Loper Bright*, express authority is the name of the game: congressional silence is no longer an invitation for regulatory discretion. Absent clear statutory authorization, courts cannot presume Congress intended for an agency to fill statutory gaps or interpret statutory ambiguities.").

The government also takes the position that any of what it calls "discretion-conferring phrases"—which it defines to include not just actual statutory delegation language but also any statutory ambiguity—equally confers upon an agency the full discretion to "fill up the details of a statutory scheme." *En Banc* Brief of Appellee at 16 ("Through the use of discretion-conferring phrases—'officially ordered and [*sic*] approved' in section 5542 and 'necessary to the administration' in section 5548—Congress instructed the agency to 'fill up the details of a statutory scheme' and granted the agency flexibility in doing so."). The government would have such discretion and flexibility include the authority to define "officially ordered or approved" in a manner contrary to judicial interpretation and notwithstanding the absence of an express delegation of authority to define the phrase. According to the government, OPM's authority has essentially no limits. This is contrary to *Loper*'s instruction that courts must

"police the outer statutory boundaries of . . . delegations, and ensure that agencies exercise their discretion consistent with the APA." *Loper*, 603 U.S. at 404. Indeed, the government's argument fails to account for the "sliding scale of agency authority" envisioned by *Loper*. *Duffus*, 2025 WL 1928339, at *8 (D. Me. July 14, 2025).

Duffus is instructive. In that case, the court held that an agency could not define a statutory phrase absent express statutory authority to do so, notwithstanding a broad statutory delegation of authority. *Id.* at *11. The court explained:

> An agency can only wield power Congress confers…. [W]hen a statute is ambiguous, it can be hard to glean Congress's intent. As Justice Scalia once put it, there are two options for interpreting ambiguous statutes: "(1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516.
>
> *Chevron* created a judicial presumption that the second option was always the case. . . . If Congress left ambiguities in a statute, it meant that Congress actually intended for an agency—not a court—to clear them up. *Chevron* operationalized this presumption with a two-step process. At *Chevron* step one, courts "first assess[ed] 'whether Congress has directly spoken to the precise question at issue.' If ... congressional intent is 'clear,' that is the end of the inquiry." . . . But if the statute was "'silent or ambiguous with respect to the specific issue' at hand," courts would proceed to step two. . . . At *Chevron* step two, courts were required to defer to an agency's interpretation of the statute, so long as that interpretation was reasonable. . . .
>
> When it overruled *Chevron, Loper Bright* eliminated the second step

> and rejected *Chevron*'s "across-the-board presumption" that ambiguity confers agency discretion.

Duffus, 2025 WL 1928339, at *8-9 (citing *Loper*, 603 U.S. at 379; *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *O'Brien v. Lowell Gen. Hosp.*, 749 F. Supp. 3d 209, 215–16 (D. Mass. 2024).

Duffus further explained:

> Nonetheless, while *Chevron* step two is gone, step one, affirming the longstanding principle that courts interpret statutes according to their plain meaning, remains. . . . After *Loper Bright*, courts must continue to operate within the "traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions." . . . Sometimes, as a limited tool of statutory interpretation at step one, courts may still "seek aid" from regulations that "constitute a body of experience and informed judgment." . . . But courts may not "mechanically" defer to reasonable regulations, as *Chevron* formerly required.

Duffus, 2025 WL 1928339, at *9 (citing *Strickland v. Comm'r, Me. Dep't of Hum. Servs.*, 38 F.3d 12, 16 (1st Cir. 1995); *O'Brien*, 749 F. Supp. 3d at 216; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Where the "best reading of [the] statute is that it delegates discretionary authority to an agency," *Loper*, 603 U.S. at 395, courts must "'identify ... such delegations of authority' where they actually exist—rather than inferring delegations from congressional silence—and 'police [the delegations'] outer statutory boundaries." *Duffus*, 2025 WL 1928339, at *9 (citing *Loper*, 603 U.S. at 404).

Here, the government's arguments must fail because they propose a standard of agency deference that would simply repackage *Chevron* deference. The government would have courts infer delegated authority from silence or ambiguity, as allowed by *Chevron* but contrary to *Loper*'s clear instruction. The government would also have courts allow any delegation, regardless of its particular wording, to grant agencies plenary authority to issue any regulations it deemed reasonable, even if contrary to a court's own independent interpretation of statutory language. Doing so was permissible under *Chevron*, but under *Loper* would fail to police the constitutional and statutory boundaries of the delegation. "***The case that declared 'Chevron is overruled' didn't quietly reinstate it***." *Duffus*, 2025 WL 1928339, at *14 (quoting *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 420 (6th Cir. 2024) (emphasis added)). The government's position should therefore be rejected.

B. The Government Ignores *Loper*'s Mandate that Judicial Interpretation of Statutory Language Controls

Applying the actual standard espoused in *Loper*, the government's arguments fail for numerous reasons. First, the government would mistakenly have the Court disregard the longstanding judicial interpretation of "officially ordered or approved" as encompassing inducement theory.

Loper mandates that courts "independently interpret the statute," whether it is ambiguous or not. *Loper*, 603 U.S. at 395. Here, as set forth in Ms. Lesko's *en banc* opening brief, the language "officially ordered or approved" unambiguously

does not require a writing. *En Banc* Opening Brief of Appellant at 18-22. Further, since 1956 in *Anderson* through to 2015 in *Mercier*, there is a consistent judicial interpretation of "officially ordered or approved" that it includes both written and verbal orders or approval. *See En Banc* Opening Brief of Appellant at 15-18.

The government does not meaningfully grapple with this litany of cases that interpret the meaning of "officially ordered or approved" to include work that is induced. Its characterizations of dictionary definitions essentially amount to arguing that "officially ordered or approved" could include written orders and approval, but fail to explain why the phrase necessarily *excludes* verbal orders and other conduct evidencing approval.[1] The government asserts that a writing is necessary to satisfy some element of formality, but any such formality is satisfied by requiring that the overtime work be authorized or required by a supervisor or other authority figure or workplace policies and be non-voluntary. *En Banc* Opening Brief of Appellant at 18-22. No case law exists holding that a writing is necessary or the only way to establish formality. The government fails to justify a departure from precedent defining the meaning of "officially ordered or approved".

Instead, the government relies on the holding in *Doe v. United States*, 372

[1] Ms. Lesko fully addresses the government's argument that a writing is required to distinguish the "officially ordered or approved" language in § 5542(a) from the "suffer or permit to work" standard of the Fair Labor Standards Act, 29 U.S.C. § 203(g) in her opening brief and does not repeat those arguments here. *See En Banc* Opening Brief of Appellant at 19-21.

F.3d 1347 (Fed. Cir. 2004) and principles of *stare decisis*. But as set forth in Ms. Lesko's brief, *Doe* has no real bearing on the proper interpretation of the statutory language "officially ordered or approved" because, as *Mercier* noted, its holding was not based on interpretation of the statute but rather deference to the regulation. *Mercier v. United States*, 786 F.3d 971, 981-92 (2015); *En Banc* Opening Brief of Appellant at 25-26. The government fails to address that *Doe* is, therefore, not actually precedent on the issue of judicial interpretation of this statutory language. And indeed, even *Doe* acknowledged that "dictionaries at the time FEPA was enacted in 1945 make clear that the term 'order' may refer to either a written or oral direction". *Doe*, 372 F.3d at 1358.

The government also attempts to distance itself from its admissions at initial oral argument in this matter that the plain language of "officially ordered or approved" includes both written and verbal orders, but the recording of the hearing speaks for itself. *En Banc* Opening Brief of Appellant at 22-24 (citing Lesko Oral Argument[2] at 24:32-26:07, 28:17-28:36).

The Court should therefore reject the government's arguments and, applying *Loper*, adopt the same construction of "officially ordered or approved" as that in *Anderson*, *Mercier*, and the many other cases cited in

[2] *Lesko v. United States*, Case No. 23-1823, Oral Argument (Fed. Cir. Oct. 9, 2024), *available at* https://www.cafc.uscourts.gov/10-10-2024-2023-1823-lesko-v-us-audio-uploaded/ (hereinafter "Lesko Oral Argument").

Ms. Lesko's opening brief.

C. The Government's View of All Statutory Delegations as Equal Fails to Comply with *Loper*'s Requirement that Courts Police the Boundaries of Delegations

Applying the actual standard from *Loper*, it is clear that the government's arguments fail because they do not meaningfully attempt to fix the boundaries of any delegations. Properly policing those boundaries shows that OPM's writing regulation is not within the scope of any statutory delegation, as explained in Ms. Lesko's opening brief. *En Banc* Opening Brief of Appellant at 30-35. Congress has not delegated to OPM the specific authority to define "officially ordered or approved". Nor is doing so within the ambit of 5 U.S.C. § 5548(a) because it is not "necessary" to "administration". Nor do 5 U.S.C. §§ 1104(b)(3) or 1103(a)(5)(A), 7 delegate the required authority to OPM.[3] Further, no delegation could

[3] The government asserts that Ms. Lesko does not address the scope of the purported delegation in 5 U.S.C. § 1104(b)(3) in her opening brief. *En Banc* Brief of Appellee at 24. But that is because this subsection does not contain a delegation. Ms. Lesko does address § 1104(a)(1) in her brief and explains why it does the writing regulation. *En Banc* Opening Brief of Appellant at 31. The government argues that § 1104(b)(3) contains delegation language, but misquotes the statute. *En Banc* Brief of Appellee at 16, 24. This subsection does not grant OPM the authority to "prescribe regulations." *Id.* It states only that nothing in subsection (a) of the statute "shall be construed as affecting the responsibility of [OPM] to prescribe regulations". 5 U.S.C. § 1104(b)(3). This subsection itself does not create any such responsibility. 5 U.S.C. § 1103(a)(5)(A), (7) likewise is not a source of authority to issue regulations but rather concerns OPM "executing, administering, and enforcing" them. *En Banc* Brief of Appellate at 24.

permissibly authorize OPM to issue a regulation that constricts the judicially-interpreted scope of a statutory right.[4]

1. Not All Delegations are Created Equal

As explained in detail by the Chamber of Commerce's *amicus* brief, not all delegations are created equal. *See* Docket Item No. 70 (Chamber of Commerce of the United States of America *En Banc* Amicus Brief at 10-12, 28-32). The government's brief asserts that the Supreme Court has previously rejected efforts to distinguish between regulations enacted pursuant to general versus specific rulemaking authority. *En Banc* Brief of Appellee at 25. For this proposition the government relies on a case decided prior to *Loper* that was specifically decided under a *Chevron* deference framework, admittedly citing also to a case pre-*Chevron* that held to the contrary. *Id.* at 25 (citing *Mayo Found. for Med. Educ. and Research v. United States*, 562 U.S. 44, 57 (2011); *United States v. Vogel Fertilizer Co*., 455 U.S. 16, 24 (1982) (holding that regulations issued pursuant to a general delegation are owed less deference than those issued pursuant to a specific delegation)). The Court must, therefore, consider the nature and specificity of any

[4] The government relies upon a number of pre-*Loper* cases for the unremarkable proposition that where an agency is granted rulemaking authority and acts within that authority, or engages in fact-finding requiring expertise, a court should respect agency action. *En Banc* Brief of Appellee at 28-29. These cases are irrelevant here because OPM has acted outside the bounds of its statutory delegation, and the writing regulation does not involve fact finding of scientific or technical issues.

statutory delegation of authority to an agency.

2. General Delegations of Rulemaking Authority Do Not Empower Agencies to Define Plain Statutory Terms

The current governing standard of *Loper*, as referenced above, envisions a "sliding scale of agency authority," which does not always include power to define statutory terms. *Duffus*, 2025 WL 1928339, at *8 (D. Me. July 14, 2025). As *Duffus* explains:

> On one end of the spectrum, when Congress explicitly authorizes an agency to define a specific term, or to exercise judgment on a narrow question, "effectuat[ing] the will of Congress" only requires a court to "ensur[e] the agency has engaged in 'reasoned decisionmaking' within [the statutory] boundaries." [citing *Loper*, 603 U.S. at 395].
> …
> On the other end of the spectrum, when Congress does not authorize *any* agency action, an unauthorized regulation "is ultra vires and violates the Administrative Procedure Act." [citing *City of Providence v. Barr*, 954 F.3d 23, 31 (1st Cir. 2020); *La. Pub. Serv. Comm'v. F.C.C.*, 476 U.S. 355, 357 (1986) (explaining "an agency literally has no power to act" absent congressional authorization)].
> …
> Towards the center of the spectrum are statutes where Congress generally authorizes an agency to implement a statute but provides no specifics. These are the "fill up the details" types of statutory authority. [citing *Loper Bright*, 603 U.S. at 395]. In such a case, the agency must be able to do ***something***, otherwise the statutory authorization for agency action would be meaningless. ***But the agency cannot define specific terms; otherwise, statutes that expressly provide for agency definition would be superfluous***. Instead, the statutory authority to "fill up the details," *id.*, permits agencies to regulate within the gaps Congress leaves. However, ***an agency cannot rely on only a broad delegation to regulate in places Congress has already spoken by defining or interpreting congressional language***.

Duffus, 2025 WL 1928339, at *10-11 (emphasis added). *See*, *e.g.*, *Seven Cnty.*

Infrastructure Coalition v. Eagle Cnty., 245 S.Ct. 1497, 1512 (2025) (meaning of statutory term "detailed" is "a question of law to be decided by a court"); *Institutional S'holder Servs., Inc. v. Sec. & Exch. Comm'n*, 142 F.4th 757, 766-68 (D.C. Cir. 2025) (holding that it is the court's role to interpret the meaning of statutory language "to solicit"); *Moctezuma*, 124 F.4th at 420 (reasoning that "express language conferring discretion on the agency is critical" and that there was none authorizing agency to interpret "exceptional and extremely unusual hardship," which was a "purely legal" question).

Duffus is again instructive. The case involved the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S. § 1395dd(c), which prohibits hospitals from discharging emergency patients unless they are stabilized. *Duffus*, 2025 WL 1928339 at *1. By statute, Congress delegated to the Secretary of Health and Human Services ("HHS") the power to "make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to . . . efficient administration" and "to prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this subchapter." *Id.* at *11. Pursuant to that delegation, HHS issued a regulation providing that a hospital's stabilization obligation is *automatically* satisfied once a patient is admitted to inpatient care. *Id.* at *1.

The plaintiff, a stroke patient, was discharged after a twelve-day inpatient

stay for a stroke. *Id.* He sued for violation of the statute on grounds that he was not stabilized at the time of discharge because his stroke symptoms persisted. *Id.* Defendants moved to dismiss, relying on EMTALA's implementing regulation. The plaintiff argued the regulatory presumption of stabilization for admitted patients was invalid because it conflicts with the statutory stabilization requirement. *Id.* The court agreed.

As Ms. Lesko argues here, the court reasoned that the agency did not have the power to define a statutory term — "stabilized" — absent express statutory authorization, nor could it adopt regulations that conflict with the statute. *Id.* at *11. The court reasoned that "under the regulation a hospital satisfies its obligation to stabilize whether or not it actually stabilizes a patient who presents with an emergency medical condition so long as the hospital admits the patient as an inpatient in a good faith attempt to stabilize the patient. However, the statute itself provides no such exception." *Id.* at *5. "Therefore, the final step of the post-*Loper Bright* analysis in this case is straightforward. The . . . regulation, insofar as it limits EMTALA's stabilization requirement to patients who are not admitted as inpatients, exceeds the scope of any statutory authorization." *Id.* at *14.

Similarly, here, under its regulation OPM can escape paying overtime for work that is required, non-voluntary, and, therefore, officially ordered or approved, so long as there is no written authorization. The statute, however, provides no such

exception. The regulation, insofar as it limits OPM's statutory obligation to compensate overtime only as to work that is authorized in writing, exceeds the scope of any statutory authorization.

Duffus compared the invalid regulation to other permissible regulations that "fles[h] out the logistics of the statutory process . . . without contradicting the statutory language." *Id.* at *12.

The *Duffus* court also emphasized that the delegation language at issue in that case, which mirrors the language here, did not actually confer upon HHS the authority to "exercise judgment." *Id.* at *13-14. As the Chamber of Commerce points out in its *amicus* brief, Congress has delegated to most agencies general rulemaking authority. Docket Item No. 70, at 20 ("If [general rulemaking authority] were enough to justify judicial deference to an agency's reading of a statute, courts would not be permitted to exercise "independent judgment" in most cases). The *Duffus* court contrasted the delegation language at issue, which granted HHS the authority to issue regulations "as may be necessary" to administration, to other statutory delegations that specifically use the wording "as the Secretary may find necessary." *Duffus*, 2025 WL 1928339, at *13-14. The court reasoned that the latter language specifically authorizes the agency to make determinations about what regulations may be necessary, whereas the former does not and instead leaves the issue of what is deemed necessary to the courts. *Id.* at

*14 ("[U]nlike the examples provided in *Loper Bright*, the statute does not ***instruct an agency*** to determine reasonableness.") (emphasis in original); *see also Kansas v. Kennedy*, -- F. Supp. 3d --, Case No. C24-110-LTS-KEM, 2025 WL 1702670, at *8 (N.D. Iowa June 18, 2025) (notwithstanding "capacious" grant of general rulemaking authority, agency did "not have the authority to rewrite a statute so as to replace one term with another" by requiring 24/7 nurse care when statute required only "at least 8 hours per day").

In *Kansas*, the regulation was "not plainly incongruous with the statutory language" given that the regulatory 24/7 nurse care requirement is within the scope of the statutory "at least 8 hours per day" requirement. *Id.* However, the court reasoned that the regulation impermissibly "replaces the Congressionally-established floor". *Id.* The court explained that a general statutory provision authorizing rulemaking cannot be construed to permit regulations that would swallow a more specific statutory provision. *Id.* at *8-10. Allowing OPM to, by regulation promulgated pursuant to § 5548(a), contradict the scope of the statutory language "officially ordered or approved" as interpreted by the courts would allow just that. It would further replace the Congressionally-established floor of requiring compensation for all overtime that is officially ordered or approved, whether verbally, in writing, or induced, with a new floor of requiring payment only for work authorized in writing. Such an expansive reading of delegated

authority would also make the other specific delegation to OPM found in § 5542(c) to define hours of work and what constitutes overtime hours for FLSA § 7 employees superfluous.

3. Cases Post-*Loper* Are in Accord that an Agency May not by Regulation Restrict the Scope of Statutory Language

As set forth in Ms. Lesko's prior briefing, numerous other post-*Loper* cases are likewise in accord that courts must carefully parse the language of any statutory delegation, and that no delegation can permit an agency to issue regulations that contradict the statutory language. *En Banc* Opening Brief of Appellant at 30-35 (citing *Pickens v. Hamilton-Ryker IT Solutions, LLC*, 133 F.4th 575, 588 (6th Cir. 2025) (court must consider wording and boundaries of any statutory delegation); *Texas Med. Ass'n v. U.S. Dep't Health & Human Servs.*, 120 F.4th 494, 507-08 (5th Cir. 2024) (general delegation of authority to "promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter" did not license agency to alter the statute's unambiguous terms regarding deadlines); *Sharma v. Peters*, 756 F.Supp. 3d 1271, 1284 (M.D. Ala. 2024) (bureau of prisons cannot substantively restrict prisoners' statutory eligibility for time credits by issuing regulations that add requirements not present in statute)).

Numerous cases issued since the filing of Ms. Lesko's opening *en banc* brief reiterate these same principles. *See Las Vegas Sun, Inc. v. Adelson*, -- F.4th --, Case No. 24-2287, 2025 WL 2203418, at *9, *12 (9th Cir. Aug. 4, 2025) (applying

Loper to invalidate regulation as contrary to statute, the Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq*., where statute would apply to both new and amended joint operating agreements between newspapers but regulation would restrict the statutory scope only to new joint operating agreements); *Institutional S'holder*, 142 F.4th at 766-68 (holding that it is the court's role to interpret the meaning of statutory language "to solicit", and that the SEC's regulation that would expand "solicitation" to include "advice" and "influence" "cannot be reconciled with the statutory text" and was "contrary to law"); *Maze v. Midland Credit Mgmt., Inc*., -- F. Supp. 3d --, Case No. 2:24-CV-1161-ACA, 2025 WL 1450550, at *4 (N.D. Ala. May 20, 2025) ("[T]o the extent Regulation F interprets § 1692d in a way inconsistent with the court's interpretation of the statutory language, the court disregards it.").

Even if the Court were to hold that § 5548(a) encompasses the ability to define a statutory term, there would remain "the more interesting question in the wake of *Loper Bright* . . . [of whether the] definition of the term is accurate." *See Nagaiah v. Allen*, -- F. Supp. 3d --, Case No. 23-2077-KSM, 2025 WL 1508028, at *8 (E.D. PA. May 27, 2025). "Previously, courts would have deferred to this interpretation so long as it was reasonable. But under *Loper Bright*, 'courts may [no longer] rely on what agencies say; we must read statutes for ourselves, exercising our own judgment.'" *Id*; *see Loper*, 603 U.S. at 412-13 (discussing

Skidmore v. Swift & Co., 323 U.S. 134 (1944) and framing its rationale regarding the "weight" courts should give to agency interpretations as a form of "respect" based on the agency's power to persuade). Accordingly, here, regardless of whether § 5548(a) allows OPM to define "officially ordered or approved" the Court must still consider whether its regulatory definition is persuasive, and should, in exercising its own judgment, conclude that it is not, for the same reasons *Anderson*, its progeny, and *Mercier* held that the phrase encompasses induced overtime.

Accordingly, the government's arguments that any statute delegates to OPM the authority to define "officially ordered or approved," let alone in a way that contradicts the judicially-interpreted scope of the language, should be rejected.[5]

D. The Government Relies Entirely on *Doe* For the Proposition that a Regulation May Restrict the Judicially-Interpreted Scope of a Statutory Right, but Fails to Account for the Errors in *Doe*'s Rationale Made Clear by *Mercier*

The government fails to cite a single case post-*Loper* holding that an agency may by regulation contradict the plain language of a statute and reduce the scope of a statutory right as interpreted by the courts. Instead, it relies entirely on *Doe*

[5] Notably, in fixing the constitutional boundaries of any delegation to OPM, Ms. Lesko does not assert that § 5548(a)'s language itself is in any way unconstitutional. Rather, OPM's proposed interpretation of it would exceed constitutional limits by allowing OPM to, by regulation, contradict the scope of judicially-interpreted statutory language.

for this proposition and preaches *stare decisis*. The government fails, however, to account for the mistakes in *Doe*'s rationale identified in Ms. Lesko's brief, many of which were made clear by *Mercier*, including that *Doe* did not have the power to overrule *Anderson*. *En Banc* Opening Brief of Appellant at 24-28. Indeed, the government ignores *Mercier* almost entirely, dismissing it in a single short paragraph at the end of its brief.

Regarding *Mercier*, the government states only:

> *Mercier* also does not help Ms. Lesko's argument. To begin, *Mercier* was proceeding on the assumption that *Anderson*'s interpretation of the "officially ordered or approved" language now contained in section 5542(a) was binding upon the panel. 786 F.3d at 980-92. But *Anderson* does not bind the *en banc* Court, as *Mercier* made recognized. *Id.* at 981. Even more fundamentally, *Mercier* did not question the central holding of *Doe*: that the writing regulation was a reasonable interpretation of FEPA and thus should be upheld. Indeed, *Mercier* considers a claim that was not covered by a regulation requiring the order or approval to be in writing. *Id.* at 982. *Mercier* thus provides no reason to diverge from *Doe*.

En Banc Opening Brief of Appellant at 56.

The government's analysis of *Mercier* is deficient. *Mercier* squarely addressed the central question *Loper* requires this Court to answer: how should a court interpret the statutory language "officially ordered or approved"? *Mercier* answered that question by reaffirming *Anderson*'s holding that the phrase encompasses inducement theory "remains good law". *Mercier*, 786 F.3d at 982. As referenced above, *Doe*, in contrast, has no real bearing on the proper

interpretation of the statutory language "officially ordered or approved" because its holding was not based on interpretation of the statute but rather deference to the regulation. *Mercier*, 786 F.3d at 981-82.

Further, *Doe*'s holding was based on the mistaken premise that the *Anderson* line of cases had been implicitly overruled by *Schweiker v. Hansen*, 450 U.S. 785 (1981) and *Office of Personnel Mgmt v. Richmond*, 496 U.S. 414 (1990). *Mercier* clarifies that *Doe* did not have the power to overrule *Anderson*. *Mercier*, 786 F.d at 981. It further instructs that *Doe*'s reasoning about the implicit overruling of *Anderson* was wrong. *Mercier*, 786 F.3d at 978-80. "Neither *Hansen* nor *Richmond* have any relevance to *Anderson*'s interpretation of FEPA." *Id.* at 980.

The government dismisses *Mercier* on grounds that this *en banc* panel is empowered to disturb precedent, but that reasoning is a red herring and applies equally to *Doe*.

The government also fails to account for the conflict between *Doe* and *Anderson* on the issue of whether the statutory language "officially ordered or approved" is ambiguous, which further undermines *Doe*'s precedential value. *En Banc* Opening Brief of Appellant at 24-25.

The government asserts that *Mercier* did not involve a writing regulation, given that it concerned Title 38 employees not subject to 5 C.F.R. § 550.111(c), which is true. But *Mercier* reasoned that the language "officially ordered or

approved" that appears in 38 U.S.C. § 7453(e)(1) should be afforded the same meaning as that same phrase that appears in 5 U.S.C. § 5542(a), which was subject to OPM's interpretation in § 550.111(c).

Accordingly, Ms. Lesko does not seek to undo *Doe* because of its "mere" reliance on *Chevron*. *Loper*, 603 U.S. at 412. *Doe*'s mistakes extend well beyond *Chevron* deference, as the *Mercier* court explained. Its precedential value is also dubious given there are multiple precedents at play here that reach different outcomes and require reconciliation. *Doe* deferred to the regulation and did not address the best reading of the statute. *Mercier* interpreted the full scope of the statute but did not address the propriety of a writing requirement regulation. The instant case requires this Court both to interpret the statute and assess the viability of the regulation under *Loper*. The conflict and complexity among the precedents amidst the backdrop of a changing legal landscape is, presumably, why this Court ordered *sua sponte* that this matter be reheard *en banc*. *Doe*'s holding should therefore not be determinative based on principles *stare decisis*.

E. Legislative History Does Not Suggest that Written Authorization for Overtime Should be Required

The government attempts to make much of the legislative history behind the writing regulation and the passage of § 5542(a). But none of the legislative history it cites or exhibits says anything about written approval for overtime. *En Banc* Brief of Appellee at 5-8.

The government asserts that the writing regulation has "remained in effect, without substantive change, for more than 80 years." *En Banc* Brief of Appellee at 39. Of course, this ignores that for nearly 50 of those years, between 1956 when the Court of Claims decided *Anderson* and 2004 when the Federal Circuit decided *Doe*, the writing regulation was considered invalid by the courts.

The government also asserts that Congress has repeatedly reenacted FEPA, but has not made changes relevant to the "officially ordered or approved" language, suggesting this means it tacitly approved OPM's regulation. *Id.* at 7-8. Given the judiciary's evolving approaches to interpreting this language prior to *Anderson*, between *Anderson* and *Doe*, and since *Doe*, Congress's inaction arguably cuts both ways. After *Anderson*, for example, Congress could have amended the relevant statutes to incorporate the regulation's writing requirement, but did not. Congress could likewise have amended any statutory delegations to OPM to specifically empower it to define "officially ordered or approved", but did not. The government's admission that Congress amended the statutory delegation from permitting regulations that "may be necessary" to only those that are "necessary" indicates, if anything, that Congress intended OPM's rulemaking authority to be narrower over time. *En Banc* Opening Brief of Appellant at 22.

The government's concern for brightline rules to protect its budgetary concerns are, as set forth in prior briefing, not sufficient reason to issue regulations

that constrict a statutory right. Brief of Appellant at 43-44 (citing *FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120, 125-26 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" (citing *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988))). No case law permits administrative ease to trump statutory rights to compensation.

The government also argues that Ms. Lesko is seeking overtime pay for work for which she did not seek approval in accordance with Indian Health Service policies. *En Banc* Appellate Brief of Appellee at 49-50. But this factual assertion, whether true or not, is a separate issue from the legal issue of whether inducement is a viable theory under § 5542(a).

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CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Ms. Lesko respectfully requests that this Court reverse the Court of Federal Claims' opinion and order dated March 21, 2023, granting the United States' motion to dismiss, and vacate the judgment entered on March 23, 2023. Appx001-011.

August 6, 2025

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMEWNTS, AND TYPE STYLE REQUIREMENTS

I hereby certify pursuant to Fed. R. App. P. 32(g)(1) and Fed Cir. R. 32(b)(1) and (3) that the foregoing brief contains 5,935 words according to the Microsoft Word count function, excluding those materials not required to be included under Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

Dated: August 6, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2025, I electronically filed the foregoing document described as follows with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel for all parties who have registered for receipt of documents filed in this matter.

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