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Aprill, Ellen

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**2025 ERWIN N. GRISWOLD LECTURE BEFORE THE AMERICAN COLLEGE OF TAX COUNSEL:
*MEMORIAL HERMANN: REJECTING PRO-TAXPAYER REGULATIONS UNDER *LOPER BRIGHT****

BY

ELLEN P. APRILL

JOHN E. ANDERSON PROFESSOR OF TAX LAW EMERITA
LMU LOYOLA LAW SCHOOL

SENIOR SCHOLAR IN RESIDENCE
LOWELL MILKEN CENTER FOR PHILANTHROPY AND NONPROFITS
UCLA SCHOOL OF LAW

2025 Erwin N. Griswold Lecture Before the American College of Tax Counsel:
Memorial Hermann: Rejecting Pro-Taxpayer Regulations under Loper Bright

Ellen P. Aprill*

When *Loper Bright v. Raimondo* overruled the *Chevron* doctrine,¹ which had called for judicial deference to reasonable administrative interpretations of ambiguous statutes, many anticipated a new age of taxpayer litigation aimed at burdensome regulations. In March of 2025, Professor Leslie Book, for example, predicted that, “we will be seeing taxpayers taking fresh *Loper Bright* challenges at established rules.”² In *Memorial Hermann Accountable Care Organization v. Commissioner* (“*Memorial Hermann*”),³ however, rather than a taxpayer succeeding under *Loper Bright* in a challenge to an existing regulation, the Fifth Circuit relied on *Loper Bright* to reject the appellant taxpayer’s claim that a longstanding section 501(c)(4) regulation entitled it to exemption as a section 501(c)(4) social welfare organization. The Fifth Circuit did not accept the invitation of *Loper Bright* to afford the existing regulation respect, even though doing so could have drawn attention to the significance of the regulatory choice on

* Senior Scholar in Residence, Lowell Milken Center for Philanthropy and Nonprofits, UCLA School of Law; John E. Anderson Professor Emerita, LMU Loyola Law School. I thank Jeremy Bearer-Friend, Leslie Book, Roger Colinvaux, Harvey Dale, Michael Desmond, Kristin Hickman, Katherine LaBeau, Catherine Livingston, Lloyd Hitoshi Mayer, H. David Rosenbloom, Michael Schler, and Donald Tobin for their invaluable comments on earlier versions of this piece. Special gratitude goes to my husband, Sandy Holo, for his unflagging support (except for reading footnotes) of my scholarly endeavors. All errors, of course, are mine alone.

¹ *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), *overruling* *Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

² Leslie Book, *Procedurally Taxing: Loper Bright and Uncertainty*, TAX NOTES TODAY (March 2025), <https://www.taxnotes.com/procedurally-taxing/loper-bright-and-uncertainty/2025/03/05/7rjdy?highlight=Leslie%20Book%20and%20Loper%20Bright>. Memoranda from law firms said much the same. *See, e.g.*, Miller and Chevalier Tax Alert, *The Growing Impact of Loper Bright on the Tax Court* (May 13, 2025), <https://www.millerchevalier.com/publication/growing-impact-loper-bright-tax-court>; Covington Alert, *Considering the Tax Implications of Loper Bright and Corner Post* (July 9, 2024), <https://www.cov.com/en/news-and-insights/insights/2024/07/considering-the-tax-implications-of-loper-bright-and-corner-post>; Morgan Lewis, *Loper Bright Upends Judicial Deference: Implications for the IRS, Treasury and Taxpayers* (July 2, 2024), <https://www.morganlewis.com/pubs/2024/07/loper-bright-upends-judicial-deference-implications-for-the-irs-treasury-and-taxpayers>.

³ *Memorial Hermann Accountable Care Organization v. Commissioner of Internal Revenue*, 120 F.4th 215 (5th Cir. 2024).

situations beyond the facts of the case before the court.

Section 501(c)(4) of the Internal Revenue Code exempts organizations that are “operated *exclusively* for the promotion of social welfare.”⁴ Both courts and our tax agencies have found interpretation of such absolute language challenging. The 1959 regulation on which appellant Memorial Herman relied has historically been understood as providing a pro-taxpayer standard more liberal than the statutory text.⁵ The regulation provides: “An organization is operated exclusively for the promotion of social welfare if it is *primarily* engaged in promoting in some way the common good and general welfare of the community.”⁶ The Fifth Circuit in *Memorial Hermann* rejected appellant’s reliance on this regulation. The court looked instead to a “no substantial nonexempt purpose” test articulated by the Supreme Court in a 1945 case, *Better Business Bureau v. United States* (“*BBB*”), a case that involved language in the Social Security Act paralleling language that now appears in section 501(c)(3).⁷ The Fifth Circuit concluded that, because of the extent of Memorial Hermann’s commercial activities, it failed the statutory “exclusively” requirement of section 501(c)(4).⁸

Yet, neither the section 501(c)(4) regulation nor *BBB* read the statutory requirement of “exclusively” literally.⁹ Both tests allow some degree of exception to the “exclusively”

⁴ Section 501(c)(4) (emphasis added). As Professor Lloyd Mayer has explained, this basis for exemption first entered the tax laws in 1913, probably at the request of the U.S. Chamber of Commerce, and that the its language at the time was associated with politically active organizations, including those that evaluated candidates for public office. Lloyd Hitoshi Mayer, *A (Partial) Defense of Section 501(c)(4)’s “Catchall” Nature*, 21 NYU J. LEGIS. & PUB. POL. 439, 443-444 (2018). Thus, the language of this provision “was even broader than it may appear to the modern reader.” *Id.* at 444.

⁵ Both in the title of this essay and elsewhere in it, I use “pro-taxpayer” only to mean an interpretation that offers easier compliance for taxpayers subject to the provision than other possible regulatory choices. I do not intend it to contrast to “anti-taxpayer.”

⁶ Treas. Reg. § 1.501(c)(4)-1(a)(2) (emphasis added). In the rest of this essay, I will refer to the test set out in this regulation as the “primarily engaged” test.

⁷ *Better Business Bureau v. United States*, 326 U.S. 279 (1945). I will refer to the test articulated in the case as the “substantial purpose” test. For further discussion of *BBB* and its test, see *infra* notes 49-52 and accompanying in text.

⁸ *Memorial Hermann*, 120 F.4th at 219.

⁹ Under *Chevron* as well as *Loper Bright*, the Supreme Court directed judges to uphold only regulations consistent with the statutory language. As the Congressional Research Service has summarized, “the first inquiry in the two-step *Chevron* framework is whether Congress “directly addressed the precise question at issue.” A court proceeds to step two only if a statute is “silent or ambiguous with respect to the specific issue.” If the statute is unambiguous, a court must “give effect” to that congressional intent without deferring to the agency.” Benjamin Barcewsky, *Chevron Deference: A Primer*, Congressional Research Service, at 7-8 (updated May 18, 2023) (quoting *Chevron*, footnote citations omitted), <https://www.congress.gov/crs-product/R44954>. The “exclusively” requirement of the statutory language has long made judicial compliance with that command difficult, if not impossible. See *infra* note 62 for discussion of the impact court decisions had on the “primarily engaged” regulation.

requirement. The absolute language of the statute complicates any interpretation of its meaning. In this essay, I argue that both the validity of the section 501(c)(4) regulations under *Loper Bright* and the authority of *BBB* as the test for qualification under section 501(c)(4) are more complicated and uncertain than *Memorial Hermann* acknowledges. Issues that the case raises include the implications of *Loper Bright* as to delegated administrative authority, the role of “purpose” and “activity” in both *BBB* and the section 501(c) regulations, and the impact of the case on campaign intervention by section 501(c)(4) organizations. These issues are particularly important because of ongoing cases that also involve the validity of the section 501(c)(4) regulations after *Loper Bright*.¹⁰

After giving some background to the case, this essay discusses each of these issues. It concludes with a discussion of the impact of the case on current law. *Memorial Hermann* raises issues not only as to the meaning of section 501(c)(4), but also more generally for both tax law and administrative law. This examination underscores the need for further guidance from the Supreme Court, Congress, the Department of Treasury, and the IRS, however unlikely it may be that such guidance will soon appear.

I. Background of the Case

Memorial Hermann is an accountable care organization (“ACO”). ACOs are groups of health care providers who “work together to manage and coordinate care” for Medicare beneficiaries, often as part of the Medicare Shared Savings Program (“MSSP”), a program established under the Patient Protection and Affordable Care Act.¹¹ According to the webpage of the Centers for Medicare and Medicaid Services, “Coordinated care helps ensure that patients, especially the chronically ill, get the right care at the right time, with the goal of avoiding unnecessary duplication of services and preventing medical errors.”¹² An ACO that satisfies cost-savings benchmarks established by the Secretary of Health and Human Services is eligible to share in the savings thereby achieved for the Medicare program.¹³

¹⁰ See discussion of the D.C. District Court case, *Freedom Path, Inc. v. IRS*, *infra* note 69, and the Tax Court case, *Mira Vista Homeowners Association, Inc. v. Commissioner*, *infra* note 79.

¹¹ *Memorial Hermann*, 120 F.4th at 217, quoting 42 U.S.C. § 1395jjj(a)(1)(A).

¹² Centers for Medicare and Medicaid Services, Accountable Care Organizations (ACOs): General Information, <https://www.cms.gov/priorities/innovation/innovation-models/aco>.

¹³ *Memorial Hermann*, 120 F.4th at 217, referencing 42 U.S.C. § 1395jjj(d)(2).

Patients are assigned to an ACO either by the Centers for Medicare and Medicaid Services or by commercial insurers.¹⁴ Approximately 10% of the patients assigned to Memorial Hermann by the government are within the MSSP.¹⁵ The rest of its population is assigned by and covered through commercial insurers as part of a Medicare Advantage Plan or employer-sponsored health plans.¹⁶ The revenue that Memorial Hermann receives from the MSSP varies significantly from year to year. As the Fifth Circuit described, “For example, in fiscal year 2014, none of MHACO’s \$7.8 million in revenue came from MSSP. The next year, however, 87% of MHACO’s \$32.8 million in revenue derived from MSSP. MHACO claims that 65% of its revenue over the course of its life was generated by its MSSP activities.”¹⁷

Memorial Hermann filed an application for exemption as a section 501(c)(4) social welfare organization in 2017.¹⁸ In 2020, after having requested and received additional information, the IRS issued a proposed adverse determination letter asserting that Memorial Hermann did not qualify as an organization exempt under 501(c)(4) because of its extensive activities under its non-MSSP programs.¹⁹ Memorial Hermann filed a protest with the IRS Independent Office of Appeals.²⁰ At the end of the protest process, in December of 2021, the IRS issued a final adverse determination.²¹

Disputing this denial of exempt status, Memorial Herman then sought a declaratory judgment from the Tax Court under section 7428.²² In its discussion of section 501(c)(4), the Tax Court’s opinion first discussed the section 501(c)(4) regulation setting forth the “primarily engaged” test.²³ It followed with discussion of *BBB* along

¹⁴ Memorial Hermann Accountable Care Organization v. Commissioner of Internal Revenue, T.C. Memo 2023-62 at 1. The MSSP is the main, but not the only way, ACOs can share in Medicare savings. See AMA, Medicare alternative payment models (updated Aug. 9, 2024), <https://www.ama-assn.org/practice-management/payment-delivery-models/medicare-alternative-payment-models>.

¹⁵ *Memorial Hermann*, 120 F.4th at 217.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Memorial Hermann*, T.C. Memo 2023-62, at 3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Memorial Hermann*, T.C. Memo 2023-62 at 1. Although declaratory judgments are generally not authorized under the Internal Revenue Code, § 7428 permits, after administrative remedies have been exhausted, declaratory judgment actions in the Tax Court, the D.C. District Court, or the Court of Federal Claims for denial or revocation of exempt status, as well as certain other classifications of exempt organizations.

²³ *Memorial Hermann*, T.C. Memo 2023-62 at 4.

with other section 501(c)(4) cases relying on *BBB*.²⁴ Eliding the “primarily engaged” test of the section 501(c)(4) regulation and the “substantial purpose test” of *BBB*, although emphasizing the latter, the Tax Court concluded that Memorial Hermann did not qualify under section 501(c)(4) because “its non-MSSP activities primarily benefit commercial payor and healthcare provider participants, rather than the public, and therefore constitute a substantial nonexempt purpose.”²⁵

Memorial Hermann appealed to the Fifth Circuit, arguing that the Tax Court had erroneously applied *BBB*’s “substantial purpose” test instead of the regulation’s “primarily engaged” test.²⁶ Like the Tax Court, the Fifth Circuit decided the case on the grounds that Memorial Hermann’s benefits accrued to private insurance companies, private payors, and private providers rather than the greater Houston community.²⁷ It acknowledged that the Fifth Circuit had not previously decided whether the regulation’s “primarily engaged” test or *BBB*’s “substantial purpose” test applied to qualification under section 501(c)(4).²⁸ It introduced the “substantial purpose” test as governing exemption under section 501(c)(3).²⁹ But, it reasoned, “[i]t makes little sense to treat the same phrase differently in two neighboring paragraphs of the same statute.”³⁰ Citing *Loper Bright*, it continued: “Importantly, we no longer are required to provide ‘*Chevron* deference’ to the Treasury’s interpretation of section 501(c)(4) (although we can certainly consider it).”³¹ Later it observed, “the IRS’s embrace of a legal standard cannot supplant our independent interpretation of the statutory text.”³² The court concluded that Memorial Hermann’s “members-only benefits system” and the

²⁴ *Id.*

²⁵ *Memorial Hermann*, T.C. Memo 2023-62 at 5. The Tax Court’s opinion also cited Treas. Reg. § 1.501(c)(4)-1(2)(ii), which provides that an organization “carrying on a business with the general public in a manner similar to organizations which are operated for profit” does not qualify for exemption under § 501(c)(4). *Id.* The Fifth Circuit did not cite this part of the § 501(c)(4) regulations.

²⁶ *Memorial Hermann*, 120 F.4th at 218.

²⁷ *Memorial Hermann*, 120 F.4th at 221.

²⁸ *Memorial Hermann*, 120 F.4th at 218.

²⁹ *Id.*

³⁰ *Memorial Hermann*, 120 F.4th at 219. Like the Tax Court, the opinion also cited § 501(c)(4) cases that had endorsed *BBB*’s “substantial purpose” test. *Id.*

³¹ *Memorial Hermann*, 120 F.4th at 219. The opinion, however, also stated in a footnote: “In any event, in this particular case, applying either test—‘substantial nonexempt’ or ‘primary purpose’—would lead to the same result anyway.” *Memorial Hermann*, 120 Fed. 4th at 219 n.3. I note that the “primarily engaged” test of the § 501(c)(4) regulation is not directly that of purpose. It requires that an entity be primarily engaged in promoting in some way the common good and general welfare of the community.” Treas. Reg. § 1.501(c)(4)-(a)(2). See *infra* Part III for further discussion of this issue.

³² *Memorial Hermann*, 120 F.4th at 220.

“magnitude” of its commercial activities meant that it failed the requirement of section 501(c)(4) that organizations exempt under that provision be “operated exclusively for the promotion of social welfare.”³³ On that basis, the Fifth Circuit affirmed the judgment of the Tax Court.

II. *Inadequate Treatment of Loper Bright*

On the authority of *Loper Bright*, the Fifth Circuit in *Memorial Hermann* did not afford deference or even respect to the current section 501(c)(4) regulations. As noted above, it summarized and applied *Loper Bright* in a brief statement. It is worth repeating: “Importantly, we no longer are required to provide ‘*Chevron* deference’ to the Treasury’s interpretation of § 501(c)(4) (although we can certainly consider it). *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), *overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).”³⁴ Indeed, *Loper Bright* asserts that courts “understand that . . . statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning.”³⁵

Memorial Hermann’s understanding of *Loper Bright*, however, truncates its holding. As a general matter, *Loper Bright*, of course, did overrule *Chevron*. In doing so, it ended judicial deference to guidance from administrative agencies under which silent or ambiguous statutory language served as an implicit delegation of regulatory authority. It instead embraced “the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions.”³⁶ The Fifth Circuit’s independent judgment led it to the “substantial purpose” test of *BBB*. As discussed in Part III below, however, *BBB*’s “substantial purpose” test may be more forgiving than it has come to be understood and thus close to the “primary engaged” test of the regulations that the Fifth Circuit dismissed. In addition, *BBB*’s “substantial purpose” test does not align neatly with the statutory language of section 501(c)(4). Nowhere does *Memorial Hermann* detail how *BBB*’s “substantial purpose,” which leaves room for some amount of nonexempt purpose, constitutes the

³³ *Memorial Hermann*, 120 F.4th at 221.

³⁴ *Memorial Hermann*, 120 F.4th at 219.

³⁵ *Loper Bright*, 603 U.S. at 400.

³⁶ *Loper Bright*, 603 U.S. 394.

“single, best” meaning of the statutory language when it contradicts the statute’s “exclusively” requirement.

Moreover, *Loper Bright* acknowledged that in many statutory provisions, Congress explicitly delegates authority to administrative agencies. As the Supreme Court’s opinion stated, “[i]n a case involving an agency, of course, the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion.”³⁷ If so, agencies rather than courts have primary responsibility for interpreting the statutory language.

Loper Bright sheds little light on the requirements for delegating such discretionary interpretive authority to an administrative agency. As Thomas Merrill, a leading administrative law scholar, has written of this aspect of *Loper Bright*: “What remains highly uncertain is just how broad or narrow the Court will tailor the category of delegations to agencies to interpret.”³⁸

The Fifth Circuit in *Memorial Hermann* had an opportunity to address this crucial issue. The section 501(c)(4) regulations at issue in *Memorial Hermann* were promulgated in 1959,³⁹ under the general grant of authority in section 7805.⁴⁰ Section 7805 reads in pertinent part: “[T]he 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.”⁴¹ The Fifth Circuit in *Memorial Hermann* invoked the primacy *Loper Bright* bestowed on judges. In my view, it had a responsibility to do more – to decide whether the language of section 7805, which applies to the Internal Revenue Code as a whole, constituted an adequate delegation to the IRS and the Treasury under *Loper Bright*.⁴²

³⁷ *Loper Bright*, 603 U.S. at 394 (citations and footnotes omitted).

³⁸ Thomas W. Merrill, *The Demise of Deference – and the Rise of Delegation to Interpret?*, (The Supreme Court – Comments), 138 HARV. L. REV. 227, 244 (2025), <https://harvardlawreview.org/wp-content/uploads/2024/11/138-Harv.-L.-Rev.-227.pdf>. He writes in the same paragraph: “But exactly where the Court will come down on what constitutes a delegation to interpret will have to be worked out in the future.” *Id.*

³⁹ See T.D. 6391 (June 26, 1959). The Notice of Proposed Rulemaking for this regulation, 24 Fed. Reg. 1421 (Feb. 26, 1959), explicitly took the position that the notice-and-comment requirements of the Administrative Procedure Act applied to regulations promulgated under the general authority of § 7805(a).

⁴⁰ *Id.*

⁴¹ Section 7805(a).

⁴² The Supreme Court in *Loper Bright* also wrote: “When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to

This issue has been a matter of intense disagreement among scholars of tax and administrative law. Some, including myself, think that section 7805 is not a sufficiently explicit delegation.⁴³ Others, including leading scholars of administrative law, believe that not only broad explicit delegations, but also even implicit ones, may survive *Loper Bright*.⁴⁴ Treatment of this issue by the Fifth Circuit in *Memorial Hermann* would have served as a first step in the undoubtedly long process of resolving this problematic legacy of *Loper Bright*.

The Fifth Circuit gave no weight to the section 501(c)(4) regulation. It accurately observed that *Loper Bright* permitted, but did not require, courts to consider an administrative agency's interpretation of a statutory text. *Loper Bright* instructed judges to use their independent judgment in interpreting statutory language, but it added that courts were free to “seek aid from the interpretations of those responsible for implementing particular statutes.”⁴⁵ The Fifth Circuit did not do so in this case.

The Fifth Circuit made its choice despite the frequent references in *Loper Bright* to the 1944 case *Skidmore v. Swift & Co.*⁴⁶ In its longest discussion of *Skidmore*, the

independently interpret the statute and effectuate the will of Congress subject to constitutional limits.” *Loper Bright*, 603 U.S. at 395. Thus, even had the Fifth Circuit found § 7805(a) to grant discretionary authority to Treasury and the IRS, it could have concluded that the regulation erred in interpreting the statutory term “exclusively” to mean “primarily.”

⁴³ See Ellen P. Aprill, *Unpacking the Most Important Paragraph in Loper Bright*, NOTICE & COMMENT BLOG (Jan. 15, 2025), <https://www.yalejreg.com/nc/unpacking-the-most-important-paragraph-in-loper-bright-by-ellen-p-aprill/>; Reuven S. Avi-Yonah, *Tax Delegations after Loper Bright*, 116 TAX NOTES INT'L 97 (2024), <https://www.taxnotes.com/tax-notes-international/litigation-and-appeals/tax-delegation-after-loper-bright/2024/10/07/7lmmm>; Mitchell M. Gans, *Has the Supreme Court Already Resolved How Loper Bright Applies to Section 7805 Regulations*, TAX NOTES FEDERAL, May 12, 2025, p. 1069, <https://www.taxnotes.com/tax-notes-today-federal/tax-system-administration/has-supreme-court-already-resolved-how-loper-bright-applies-section-7805-regulations/2025/05/09/7s44q?highlight=gans>; Andy Grewal, *Tax Regulations after Loper Bright* (forthcoming 2024 MICH. ST. L. REV.), [HTTPS://PAPERS.SSRN.COM/SOL3/PAPERS.CFM?ABSTRACT_ID=4933018](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4933018). See generally Kristin E. Hickman and Amy J. Wildermuth, *Harmonizing Delegation and Deference under Loper Bright*, forthcoming NYU L. REV. (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5175305.

⁴⁴ Merrill, *supra* note 38, at 264-265. See also Adrian Vermeule, *Implied Delegations after Loper*, NOTICE & COMMENT BLOG (July 9, 2024), <https://www.yalejreg.com/nc/implied-delegations-after-loper-by-adrian-vermeule/>; Cass Sunstein, *Our Marbury: Loper Bright and the Administrative State*, 74 DUKE L.J. 1893, 1092-1095 (2025), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4246&context=dlj>. Cary Coglianese and Daniel E. Walters, *The Great Unsettling: Administrative Governance After Loper Bright*, 77 ADMIN. L. REV. 1 (2025), consider a possible middle ground. They ask, “Has the *Loper Bright* Court allowed for part of that delegated authority to permit agencies to make reasonable judgments about how to act in the face of statutory silences or even ambiguities—essentially, *Chevron* in *Loper Bright* garb?” *Id.* at 16.

⁴⁵ *Loper Bright*, 603 U.S. at 855, quoting *Skidmore*, 323 U.S. at 388.

⁴⁶ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Court's opinion in *Loper Bright* cites *Skidmore* at 855, 388, 401, 403, and 432.

Supreme Court’s opinion in *Loper Bright* observed that the *Skidmore* Court -- explained that the “interpretations and opinions” of the relevant agency, “made in pursuance of official duty” and “based upon . . . specialized experience,” “constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance,” even on legal questions. . . . The weight of such a judgment in a particular case . . . would “depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁴⁷

Writing about *Skidmore* after *Loper Bright*, Professor Kristin Hickman has observed: “In *Skidmore* analysis, because of the thoroughness and frequency factors, less procedure means less respect or weight for an agency’s interpretation, and more procedure means more respect or weight;” thus, “[a]pplying *Skidmore* to agency interpretations adopted using notice-and-comment rulemaking . . . should result in courts giving agency interpretations respect or weight more often than has been the case” in recent years.”⁴⁸ *Memorial Hermann* did not undertake such an endeavor. Its opinion would have been stronger had it done so, as the next sections explain.

III. “Purpose” and “Activity” in *BBB* and the Regulations

Reliance on *BBB* for qualification under the requirements of section 501(c)(4) is not as straightforward as the Fifth Circuit would have it. In *BBB*, the Supreme Court interpreted requirements for an exemption under the Social Security Act, not the Internal Revenue Code, for organizations that would now be exempt under section 501(c)(3).⁴⁹ The Court in *BBB* denied the organization eligibility for the Social Security exemption. It found “apparent beyond dispute” that “an important if not the *primary* pursuit of petitioner’s organization is to promote

⁴⁷ *Loper Bright*, 603 U.S. at 388, quoting *Skidmore*, 323 U.S. at 139-140 (citations omitted).

⁴⁸ Kristin E. Hickman, *Anticipating a New Modern Skidmore Standard*, 74 DUKE L.J. ONLINE 111, 132 (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4941144. The section 501(c)(4) regulations were adopted pursuant to notice-and-comment. *See supra* note 39 and accompanying text.

⁴⁹ *BBB*, 326 U.S. at 284-285. At the time of the case, the language now found in § 501(c)(3) in the Internal Revenue Code of 1986, as amended, was found in § 101(6) of the Internal Revenue Code of 1939. The Court did observe that the language regarding the Social Security Act exemption “was drawn almost verbatim” from language that is now found in § 501(c)(3). *BBB*, 326 U.S. at 284.

not only an ethical but also a profitable business community.”⁵⁰ The organization, in fact, was exempt as a business league, not as an educational organization.⁵¹ From the facts as described in *BBB*, it seems likely that Better Business League would have failed the “primarily” test embedded currently in both the section 501(c)(3) and section 501(c)(4) regulations. That context sheds doubt on the current reading of *BBB*’s “substantial purpose” test as permitting a far smaller amount of nonexempt operations than the “primarily engaged” test of the regulations. That is, the “substantial” of the *BBB* test may have a meaning far closer to “primarily” test of the section 501(c)(4) regulations than the it has come to be understood. On the facts of *BBB*, which involved an organization that had not sought exemption under the provision imported from the Internal Revenue Code into the Social Security Act, the Supreme Court did not, and did not need to, clarify the meaning of “substantial.”⁵² In the years since *BBB* was decided, its “substantial purpose” test has been taken out of context and given a meaning less forgiving than its use on the facts of the case. Importantly, neither *BBB*’s “substantial purpose” test nor the section 501(c)(4) regulation “primarily engaged” test interpret “exclusively” literally.

The Fifth Circuit, as have other circuit courts, asserted that, because both section 501(c)(3) and section 501(c)(4) employ the language “operated exclusively,” the *BBB* test as to the requirement for exemption applied to both of these kinds of organizations.⁵³ But the same language can have different meanings in different contexts.⁵⁴ Although both statutory provisions make a reference to “operated exclusively,” the statutory language of section 501(c)(3) and section 501(c)(4) are not identical. Section 501(c)(3) exempts entities “organized and operated exclusively” for any of a number of listed “purposes.” The section 501(c)(4)

⁵⁰ *BBB*, 326 U.S. at 283 (emphasis added).

⁵¹ *BBB*, 326 U.S. at 284. At the time of the case, § 101(7) of the Internal Revenue Code of 1939 exempted business leagues. That category of exemption is now found in § 501(c)(6).

⁵² Without suggesting that the Court should have relied on contemporary dictionary definitions in *BBB*, see Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. STATE L.J. 277 (1998), I note that “considerable” is one of the synonyms offered for “substantial.” See, e.g., “*Substantial*,” synonym 3b, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/substantial>.

⁵³ *Memorial Hermann*, 120 F.4th at 219, citing § 501(c)(4) cases from the Second, Fourth, and Tenth Circuits. It separately discusses *Vision Service Plan v. United States*, No. 2:04-CV- 1993, 2005 WL 3406321, at *4 (E.D. Cal. Dec. 12, 2005), *aff’d*, 265 F. App’x 650 (9th Cir. 2008), which had applied the *BBB* test to deny an organization § 501(c)(4) status. *Memorial Herman*, 120 F.4th at 220.

⁵⁴ As Judge Friendly once wrote, : “[W]here the Internal Revenue Code is concerned, no controlling weight can be given to the usual presumption that, when the same words are used in several sections of a statute, they mean the same thing. Rather the Court will look at the Congressional history and purpose in each case.” *Sirbo Holdings v. Commissioner*, 509 F.2d 1220, 1223 (2d Cir. 1975).

statutory language, however, does not refer to “purpose”; it merely requires that such organizations be “operated exclusively for the promotion of social welfare.” Although “social welfare” is a purpose, of course,⁵⁵ I read the section 501(c)(4) language as emphasizing activity more than purpose. At least plausibly, *BBB*’s “substantial purpose” test matches the statutory language of section 501(c)(3) more closely than it does that of section 501(c)(4). Consistent with this view of the text, the section 501(c)(4) regulations, unlike the section 501(c)(3) regulations, emphasize activity in judging an organization’s qualification for exemption.⁵⁶

The relationship between the concepts of “purpose” and “activity” is complicated, of course. Sometimes engaging in an activity permits an inference of purpose.⁵⁷ Sometimes engaging in an activity is a means to an end and not itself a purpose.⁵⁸ At any rate, the concepts are not synonymous. This discrepancy between the language of section 501(c)(3) and that of section 501(c)(4) challenges *Memorial Hermann*’s conclusion that the “substantial purpose” test of *BBB* reflects the “single, best” reading of the text, as *Loper Bright* requires.⁵⁹

Moreover, the adoption in the Internal Revenue Code of the unrelated business income tax (UBIT) in 1950 transformed the legal landscape for section 501(c) organizations.⁶⁰ The UBIT by its terms permits (but taxes) activities that do not themselves advance an entity’s exempt purpose. As section 513(a) explains, “[t]he term ‘unrelated trade or business ‘means . . . any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise

⁵⁵ Professor Mayer has concluded that, when the provision was adopted, “there does not appear to have been a commonly used or accepted legal definition of ‘social welfare’ at the time.” Mayer, *supra* note 4, at 444.

⁵⁶ See, e.g., Raymond Chick and Amy Henchey, *Political Organizations and IRC 501(c)(4)* (1995 E.O. CPE Text), <https://www.irs.gov/pub/irs-tege/eotopicm95.pdf> (“In contrast to the ‘primarily engaged’ standard under Reg. 1.501(c)(4)-1(a)(2)(i), Reg. 1.501(c)(3)-1(c)(1) says an organization will not be regarded as ‘operated exclusively’ for IRC 501(c)(3) exempt purposes ‘if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.’”).

⁵⁷ For example, a 1994 text used by the IRS for training purposes explains the doctrine of “substantial illegal purpose,” which is a basis for denying exemption under § 501(c)(3), in terms of activity. It states: “An organization will not qualify for exempt status if it engages in substantial illegal activity.” Jean Wright & Jay Rotz, “Illegality and Public Policy Considerations,” EO CPE (1994), <https://www.irs.gov/pub/irs-tege/eotopicl94.pdf>.

⁵⁸ For an example, see *infra* note 66 and accompanying text.

⁵⁹ *Loper Bright*, 603 U.S. at 400.

⁶⁰ See Revenue Act of 1950, P.L. 81, 81st Cong. 2d Sess. § 301 (Sept. 23, 1950); H.R. Rep. No. 2319, 81st Congs., 2d Sess. 38 (1950); S. Rep. No. 2375, 81st Cong., 2d Sess. 28-29 (1950). Prior to adoption of the UBIT, unrelated businesses could qualify for exemption if net profits went to an exempt organization or even an exempt purpose. The Supreme Court endorsed the “destination of income” test in the mid-1920’s. See *Trinidad v. Sagrada Orden*, 263 U.S. 578 (1924).

or performance by such organization of its . . . purpose or function constituting the basis for its exemption."⁶¹

Enactment of the UBIT created a potential conflict between sections 501(c)(3) and 501(c)(4). The statutory language in both sections 501(c)(3) and 501(c)(4) referring to operation as well as organization could be understood as referring to activities and requiring that such entities engage exclusively in activities that directly further their exempt purposes. If so, the enactment of the UBIT contradicted the section 501(c) language. After adoption of the UBIT, Treasury adopted regulations under section 501(c)(3) as well as section 501(c)(4) interpreting "exclusively" to mean "primarily." I believe that this regulatory choice, although not expressed as artfully as we might wish, should be understood in the context of the 1950 adoption of the UBIT.⁶² That is, my speculation is that, to avoid inconsistency between this possible reading of the section 501(c) statutory language and the UBIT, IRS and Treasury issued the regulations that interpreted "exclusively" as "primarily."⁶³

The "primarily engaged" test of the regulations was proposed and adopted in 1959 with an effective date of the 1954 Code.⁶⁴ As was standard at the time, neither the notice proposing the "primarily engaged" regulations nor the Treasury Decision adopting these regulations details the reasons for their proposal and adoption. I think the effective date further supports

⁶¹ Section 513(a). Treas. Reg. § 1.513-1(d)(2) explains the statutory requirement further by first quoting the statutory text and then discussing the relationship of unrelated activities, unrelated income, and exempt purpose: "Gross income derives from unrelated trade or business, within the meaning of section 513(a), if the conduct of the trade or business which produces the income is not substantially related (other than through the production of funds) to the purposes for which exemption is granted. The presence of this requirement necessitates an examination of the relationship between the business activities which generate the particular income in question—the activities, that is, of producing or distributing the goods or performing the services involved—and the accomplishment of the organization's exempt purposes."

⁶² Adoption of the UBIT may not be the only impetus for these regulations. See John P. Parsons, et al., *Criteria for Exemption Under Section 501(c)(3)*, from the Filer Commission Research Papers (Vol. IV, 1909, 1996 (endnote 160), citing Stanley S. Weithorn, *Tax Techniques for Foundations and Other Exempt Organizations* § 32.03[1] (1964)): "The less stringent standards imposed by the 'primary activities' test resulted from court decisions which antedated the regulations under section 501(c)(3)." I thank Lloyd Mayer for pointing me to these sources. *BBB*, older cases, and the "primarily engaged" test of the regulations all recognize that interpreting "exclusively" literally is not possible. That both courts and the IRS struggle as how to interpret the unmanageable "exclusively" statutory language of § 501(c)(3) and § 501(c)(4) is a challenge to the assertion in *Loper Bright* of that a text has a "single, best meaning."

⁶³ See Roger Colinvaux, *Political Activity and Tax Exemption: A Gordian's Knot*, 34 VA. TAX. R. 1, 31 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476435; Ellen P. Aprill, *The IRS's Tea Party Row: How "Exclusively" Became "Primarily."* PACIFIC STANDARD (June 7, 2013), <https://psmag.com/news/the-irss-tea-party-tax-row-how-exclusively-became-primarily-59451/>.

⁶⁴ *Id.* The first regulations adopted under the UBIT provisions themselves were adopted in 1958 and 1959. They had varying effective dates depending on the type of exempt organization, with none earlier than taxable years beginning after December 31, 1954. See, e.g., T.D. 6301 (July 8, 1958).

their tie to enactment of the UBIT, even though neither notice of the proposed regulations nor adoption of the final regulations makes any reference to the UBIT.

The section 501(c)(3) regulations try to avoid the tension between activity and purposes by conflating both terms. The applicable language of the section 501(c)(3) regulations states that “[a]n organization will be regarded as operated exclusively for one or more exempt purpose only if it engages *primarily in activities which accomplish one or more of such exempt purposes as specified in section 501(c)(3).*”⁶⁵

The Court in *BBB* did not consider the impact of the UBIT. It would have been impossible for it to do so. The case was decided in 1945, and Better Business Bureau sought refunds of social security taxes paid from 1937 to 1931. Both the year of decision and the years at issue predate adoption of the UBIT.

Given the existence of the UBIT, application of the *BBB* test poses problems. Do organizations engaged in substantial unrelated business taxable activity that produce substantial taxable unrelated income satisfy the *BBB* test because these entities engage in them for the purpose of advancing their exempt purpose? Treasury regulations under section 501(c)(3) touch upon this issue without resolving it. The applicable regulation states an organization may meet the requirements of section 501(c)(3) although it operates a trade or business [as defined in section 512] as a substantial part of its activities, “if the operation of such trade or business is in furtherance of the organization’s purpose or purposes.”⁶⁶ This language treats activity – here, operating a trade or business – and exempt purpose as distinct. The activity is a means to the purpose.

This background to both the “substantial purpose” test of *BBB* and the “primarily engaged” test of the section 501(c)(4) regulations underscores the importance of courts

⁶⁵ Treas. Reg. § 1.501(c)(3)-1(c)(l) (emphasis added). The regulation imports the notion of substantiality as well. It continues: “An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.” *Id.* The section 501(c)(4) regulations nowhere use “substantial” or “insubstantial.” As Chick and Henchey, *supra* note 56, have advised, “[t]he difference between ‘primary’ and ‘insubstantial’ is significant.”

⁶⁶ Treas. Reg. § 1.501(c)(3)-1(e)(l). How to make this determination has always been challenging. For example, would a particular unrelated business that reports tax losses year after year satisfy this condition? At various times over the years, based on Revenue Ruling 64-182, 1964-1 C.B. 186, the IRS has asked whether an entity’s exempt activities are “commensurate-in-scope” with its unrelated income. *See* New York State Bar Association, *Report to Treasury Regarding the “Commensurate in Scope” Test* (2008), <https://nysba.org/wp-content/uploads/2020/03/1169-Report.pdf>. *See also* Preston Quesenberry, How much unrelated business activity is too much? THE TAX ADVISER (June 1, 2021), <https://www.thetaxadviser.com/issues/2021/jun/unrelated-business-activity-substantial-tax-exempt-organizations/>.

accepting the invitation in *Loper Bright* to afford respect to agency interpretations. Agencies must consider a variety of situations to which their regulations apply, not just the particular set of facts and issues raised by litigants and to which courts are limited in deciding a case. They must consider any administrative interpretation in light of all of the statutory provisions of which it will be a part. They must assure themselves that any new administrative ruling will not contradict an existing rule related to the one under consideration. Judicial respect to administrative interpretations will have the indirect effect of adopting interpretive positions that took into account considerations and impact beyond the issues in a particular case before a court, as the next section demonstrates.

IV. Section 501(c)(4) Campaign Intervention after Memorial Hermann

In accepting the *BBB* test, the Fifth Circuit rejected the test of section 501(c)(4) regulations providing that an organization is eligible for exemption under section 501(c)(4) if it is "primarily engaged in promoting in some way the common good and general welfare of the people of the community."⁶⁷ That section 501(c)(4) regulation goes on to state that "the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."⁶⁸ If the *BBB* test were to become law nationally so as to render current regulations meaningless, the consequences for section 501(c)(4) organizations engaged in a significant amount of political campaign intervention is uncertain. *Memorial Hermann*, of course, did not grapple with this aspect of the regulations because the case did not involve campaign intervention.⁶⁹

Many section 501(c)(4) organizations and their advisors, in reliance on approved applications for exemption and IRS guidance,⁷⁰ understand the "primarily engaged" test as

⁶⁷ Treas. Reg. § 1.501(c)(4)-1(a)(2)(i).

⁶⁸ Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii). I note that this provision specifies the ability to qualify for exemption under § 501(c)(4) by looking at activities.

⁶⁹ Freedom Path, the plaintiff in a declaratory judgment action currently being heard by the federal district court in D.C., is challenging its denial of application for exemption under section 501(c)(4). Its challenges include the section 501(c)(4) limits on campaign intervention. *See* Freedom Path, Inc. v. IRS, No. 1:20-cv-0139 (D.D.C.). In that regard, on July 3, 2024, 2024, Freedom Path filed a notice of supplemental authority advising the court of the Supreme Court's decision in *Loper Bright*, <https://storage.courtlistener.com/recap/gov.uscourts.dcd.218275/gov.uscourts.dcd.218275.43.0.pdf>. A hearing on summary judgment was held on July 2, 2025,

https://storage.courtlistener.com/recap/gov.uscourts.dcd.218275/gov.uscourts.dcd.218275.39.0_2.pdf

⁷⁰ *See* IRS Audit Technique Guide – IRC Section 501(c)(4), Civic Leagues, Social Welfare Organizations, and Local Associations of Employees ("If the organization has any political activities or expenditures,

permitting campaign intervention for much as much as 49% of their operations.⁷¹ On one hand, if, after application of *Loper Bright*, as in the current section 501(c)(4) regulation, involvement in elections for public office is deemed to be distinct from the kind of social welfare blessed under section 501(c)(4), section 501(c)(4) organizations engaged in large amounts of campaign intervention would not qualify for exemption under the “substantial purpose” test of *BBB*. On the other hand, the section 501(c)(4) regulations are the only source of authority that social welfare does not include participation in electoral campaigns for public office; if these regulations are no longer the appropriate test for exemption as a section 501(c)(4) social welfare organization, a section 501(c)(4) entity could well argue that it engages in campaign intervention to advance its social welfare purpose by working to elect candidates who support its goals. If so, loss of the test in these regulations would mean that section 501(c)(4) organizations could engage freely in campaign intervention, at least until they become political organizations exempt under section 527.⁷²

Section 527 has two distinct aspects. One aspect sets forth the taxation rules applicable to all political organizations, including political parties and political campaigns, whether or not regulated by the FEC or the states.⁷³ The other aspect regulates entities engaged in campaign

analyze all activities to determine if the primary activity is the promotion of social welfare as opposed to nonexempt political activities.”), https://www.irs.gov/pub/irs-tege/atg_501c4_orgs.pdf; John Francis Reilly, Carter C. Hull, and Barbara A. Braig Allen, *IRC 501(c)(4) Organizations*, E.O. CPE Text 2003, (“Since the test for exemption under IRC 501(c)(4) looks to the organization's primary activities, an organization exempt under IRC 501(c)(4) may engage in substantial non-exempt activities.”), <https://www.irs.gov/pub/irs-tege/eotopici03.pdf>.

⁷¹ As an alert from Covington after *Memorial Hermann* stated, “[f]or over a decade, many 501(c)(4) organizations have taken the position that ‘primarily’ means at least 51 percent. The corollary to that position is that up to 49 percent of an organization’s activities may be in furtherance of a non-social welfare, or nonexempt, activity, such as political activity.” Covington Alert, *501(c)(4) Organizations Could Face Additional Scrutiny Following Court Decision* (Nov. 1, 2024), <https://www.cov.com/en/news-and-insights/insights/2024/11/501-c-4-organizations-could-face-additional-scrutiny-following-court-decision>. How to measure the applicable percentage is uncertain. Do only expenditures matter or does staff and volunteer time also figure into the calculation? See Ellen P. Aprill, *The Section 527 Obstacle to Meaningful Section 501(c)(4) Regulations*, 13 PITT. TAX. REV. 43, 44, 75 (2015), [file:///C:/Users/Ellen/Downloads/admin.+2-Aprill%20\(2\).pdf](file:///C:/Users/Ellen/Downloads/admin.+2-Aprill%20(2).pdf).

⁷² The term used for campaign intervention in § 527 is “exempt function.” Section 527(e)(2). Because use of that term confuses rather than clarifies when § 527 is discussed along with § 501(c) exempt organizations for which campaign intervention is forbidden as an exempt function, I will use the term “campaign intervention” to refer to § 527 exempt function. Although the meaning of the terms used in these two Internal Revenue Code differ somewhat, the reach of the concept under § 501(c)(4) and § 527 overlap considerably. Understanding of the concept of campaign intervention in § 501(c)(4) is crucial to § 527 as well.

⁷³ In broad outline, political organizations pay income tax on gross income, less income related to campaign intervention (including contributions and campaign fundraising events), less deduction for costs not related to campaign intervention. See § 527(c). Section 527 includes a special provision taxing exempt organizations that are not a political organization on the lesser of the amount of their investment income or

intervention not regulated by the FEC or the states.⁷⁴ Section 527 organizations regulated by the IRS, unlike section 501(c)(4) organizations, must publicly disclose both contributions and expenditures at regular intervals.⁷⁵ For both these aspects, section 527 defines “political organization” as an organization organized “*primarily* for the purpose of directly or indirectly accepting contributions or making expenditures, or both,” for campaign intervention activities.⁷⁶

If other circuits follow the Fifth Circuit’s lead to reject taxpayer reliance on the section 501(c)(4) regulations, the consequences under section 501(c)(4) and section 527 would depend on whether campaign intervention is deemed to be a form of social welfare. If it is, section 501(c)(4) organizations may not face limits under section 501(c)(4) but would be able to continue to engage only in 49% or a little more of campaign intervention. A greater percentage would risk their becoming a political organization under section 527’s “primarily” requirement.

If, however, campaign intervention were deemed not to be a form of social welfare, *BBB*’s “substantial purpose” test would limit section 501(c)(4) organizations to some smaller percentage of campaign intervention, perhaps up to 20% of activity.⁷⁷ If so, organizations that engage in such activity above that ceiling, but less than primarily, would

their campaign intervention expenditures. *See* § 527(f).

⁷⁴ *See* § 527(i)(5)(C) and § 527(i)(6).

⁷⁵ *See* § 527(j). Only amounts properly reported are free of income tax. *Id.* Section 527 organizations must also file the publicly available Form 990. *See* IRS, Charities and Nonprofits, *Political organizations required to file Form 990*, <https://www.irs.gov/charities-non-profits/political-organizations/political-organization-annual-reporting-requirements-political-organizations-required-to-file-form-990#:~:text=Which%20political%20organizations%20have%20to,file%20Form%20990%2C%20unless%20excepted.>

⁷⁶ Section 527(e)(1) (emphasis added). Then-Commissioner Koskinen commented to reporters on March 24, 2015: “The framework Congress has is you get to pick where you want to be. . . . If you spend, at this point, less than 49 percent of your money on politics, you can be a (c)(4). . . . If you want to spend all of your money on politics, or more than 50 percent of it, the Congress has provided [section 527] as a place where you can land.” Paul C. Barton, *Koskinen’s Comment on Political Spending of Nonprofit Disputed*, 147 TAX NOTES 31 (April 6, 2015).

⁷⁷ In *Freedom Path*, *see supra* note 69, the government’s Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion for Summary Judgment, April 20, 2021 (on file with author), asserted that campaign intervention activities amounting to 40% of the organization’s expenditures disqualified it from § 501(c)(4) status. The memorandum cited *Church in Bos. v. Comm’r of Internal Revenue*, 71 T.C. 102, 108 (1978), which denied exempt status where 21% of taxpayer’s activities were nonexempt. This litigation position stands in sharp contrast – indeed, contradicts – the IRS position since 2013 that organizations will be eligible for expedited review of applications for exemption under § 501(c)(4) if, among other requirements, it represents that it will spend 40% or less of total expenditures and total time on campaign intervention. *See* IRS Letter 5228 (Sept. 2013), <https://www.irs.gov/pub/irs-tege/letter5228.pdf>.

exist in tax-exemption limbo. They would no longer qualify as tax-exempt section 501(c)(4) entities, but neither would they be eligible for section 527's exemption. They would likely become taxable entities, without the obligation to file Form 990, the annual information return required for almost all tax-exempt organizations, which is available to the public.⁷⁸

Like the UBIT issue, the question of permissible section 501(c)(4) campaign intervention underscores the importance of courts affording respect to administrative interpretations, rather than dismissing them without consideration. Failure to consider regulations and other administrative guidance risks judges making decisions with unintended consequences for issues not part of the case being decided but nonetheless subject to the regulations at issue.

V. Conclusion: Where *Memorial Hermann* Leaves Us

Memorial Hermann is binding only in states within the Fifth Circuit (Mississippi, Louisiana and Texas).⁷⁹ It has nonetheless left practitioners flummoxed as to how to advise current and would be section 501(c)(4) clients, particularly those across the political spectrum that wish to engage in campaign intervention. Practitioners worry that the decision creates ambiguity as to whether 501(c)(4) taxpayers with an IRS exemption letter in response to an exemption application describing more than insubstantial campaign intervention activity may reasonably continue to rely their exemption letter as assurance of

⁷⁸ See Donald B. Tobin, *Political Advocacy and Taxable Entities: Are They the Next "Loophole"?* 6 FIRST AMEND. L. REV. 41 (1997); Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611 (2003). Should these entities become taxable, available precedent indicates that contributions to them would be excluded from income as gifts under § 102 and expenses in connection with campaign intervention and other goals would be deductible. See Harvey P. Dale, Daniel J. Hemel, and Jill S. Manny, *What Are the Real Tax Risks for Harvard*, 187 TAX NOTES FED. 1447, 1449-50 (2025); Ellen P. Aprill, *Once and Future Gift Taxation of Transfers to Section 501(c)(4) Organizations: Current Law, Constitutional Issues, and Policy Considerations*, 15 NYU J. OF LEG. & PUB. POL. 289, 299 notes 55 and 56 (2012).

⁷⁹ The Tax Court is currently hearing a case regarding an entity's qualification as a homeowners association under § 501(c)(4). See *Mira Vista Homeowners Association, Inc. v. Commissioner*, Docket No. 14901-22. In a June 30, 2025, response to the Tax Court's request for supplemental briefing as to the impact of *Memorial Hermann*, the government's brief asserted that, under the Fifth Circuit's decision in *Memorial Hermann*, the circuit to which Mira Vista would appeal, the BBB's no substantial nonexempt purpose test would control. Mira Vista's brief relied on *Loper Bright* to ask for clarity of the meaning of the statutory text in light of a seeming inconsistency between the applicable regulations and the decision in *Memorial Hermann*. See Tax Court Docket, No. 14901-22, <https://dawson.ustaxcourt.gov/case-detail/14901-22>.

their ongoing 501(c)(4) status.

Guidance from the IRS would be welcome. But such guidance faces two distinct kinds of obstacles. The first is the difficulty of drafting guidance as to the meaning of campaign intervention that is workable not only for purposes of section 501(c)(4), but also for purposes of section 501(c)(3) and section 527.⁸⁰ Treasury and the IRS issued lengthy proposed section 501(c)(4) regulations in 2013.⁸¹ These proposed regulations elicited almost 170,000 comments.⁸² Many of these comments pointed out problematic consequences of the interaction of the proposed regulations with the meaning of campaign intervention for section 501(c)(3) and section 527.⁸³ The IRS promised to revise the proposed regulations in light of the comments.⁸⁴ Any renewed attempt, of course, would have encountered similar difficulties.

Congressional action, however, denied the IRS the opportunity to issue revised proposed regulations. The Consolidated Appropriations Act of 2016 included a provision forbidding use of any appropriated funds by the Department of Treasury, including the IRS, “to issue, revise or finalize any regulation, revenue ruling, or other guidance . . . relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4) of the Internal Revenue Code of 1986.”⁸⁵ The prohibition explicitly was applicable to the proposed section 501(c)(4) regulations. It also required use of “the standards and definitions in effect on January 1, 2010.”⁸⁶ All appropriations legislation since then has contained this rider.⁸⁷ As a result, the IRS is unable currently to issue guidance as to how

⁸⁰ As noted earlier, *see supra* note 72, § 527 uses a related but distinct standard for campaign intervention defined as “exempt function.” *See supra* note 72. Because the Johnson Amendment prohibits § 501(c)(3) organizations from engaging in any campaign intervention whatsoever, treatment of the term under § 501(c)(4) needs to be workable with – or clearly distinguished from – that under § 501(c)(3) as well.

⁸¹ Notice of Proposed Rulemaking, “Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities,” 78 Fed. Reg. 71535 (Nov. 29, 2013).

⁸² *See* Aprill, *supra* note 71, at 45.

⁸³ *Id.* at 64-65.

⁸⁴ *Id.* at 45-46.

⁸⁵ *See* Consolidated Appropriations Act, 2016, P.L. 114-113, 129 Stat. 2242 (Dec. 18, 2015), Title I, sec. 127, <https://www.congress.gov/114/plaws/publ113/PLAW-114publ113.pdf>.

⁸⁶ *Id.*

⁸⁷ *See* Further Consolidated Appropriations Act, 2024, P.L. 118-47, 138 Stat. 530 (March 23, 2024), Title I, sec. 123, <https://www.congress.gov/118/plaws/publ47/PLAW-118publ47.pdf>. The Further Consolidated Appropriations Act, 2024 applied only through September 30, 2024. Congress continued this limitation through the fiscal year ending September 30, 2025 by extending the relevant Division of the Further Consolidated Appropriations Act, 2024. *See* Full-Year Continuing Consolidated Appropriations and

to reconcile IRS regulations and other guidance with case law such as *Memorial Hermann*.

Memorial Hermann increases rather than clarifies the uncertainty as to the meaning of section 501(c)(4). Moreover, it exposes the uncertainties that *Loper Bright* has introduced to administrative law. For tax law, guidance as to whether section 7805 constitutes delegated agency authority is of the utmost importance. If it is not, the validity of many regulations, whether or not pro-taxpayer, will be in doubt. If section 7805 is deemed not to be such a delegation, regulations promulgated under its authority will receive at best only some version of *Skidmore* respect and only if a reviewing judge so chooses. *Loper Bright*, however, leaves uncertain the criteria for a sufficient delegation of interpretive authority to an administrative agency.

This examination of *Memorial Hermann* also lays bare other weaknesses embedded in *Loper Bright*.⁸⁸ *Loper Bright* permits but does not require courts to give respect to administrative agency interpretations. Even if courts decide to take the administrative interpretation into account, they are unlikely to have before them the many considerations unrelated to the facts of the case that went into crafting the regulation at issue. The potential impact of *Memorial Hermann*, particularly on the extent of campaign intervention by section 501(c)(4) organizations, exposes what our system of government lost when *Loper Bright* overruled *Chevron*.

In my view, the Supreme Court in *Loper Bright* could – and should – have urged courts more strongly than it did to consult administrative interpretations. Understanding the scope of an interpretation and the considerations that went into it should aid judges in shaping their own single, best interpretation of the statutory text. The usefulness of such assistance is likely to hold even should a court decide to reject a regulation at issue before it. The end of *Chevron* deference need not proscribe judicial learning from an administrative agency. Quite the contrary. It makes such consideration all the more important.

Extensions Act, 2025, Pub. L. No. 119-4, Div. A, §§ 1101(a)(5), 1104, 139 Stat. 9, 11, 12 (2025). Objections to this appropriations rider from Democratic Senators have not had any effect. See Letter of May 12, 2022 to Senator Chris Van Hollen and Rep. Cindy Hyde-Smith, [https://www.whitehouse.senate.gov/wp-content/uploads/imo/media/doc/FY23%20IRS%20Rider%20\(FSGG\)%20w%20sig.pdf](https://www.whitehouse.senate.gov/wp-content/uploads/imo/media/doc/FY23%20IRS%20Rider%20(FSGG)%20w%20sig.pdf).

⁸⁸ Based on my experience of having served in all three branches of the federal government, I confess to being a long-time proponent of *Chevron* deference. See Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51 (1996).

In issuing guidance, Treasury, the IRS, and other administrative agencies, unlike courts deciding a particular case, must work to ensure that their interpretations are not only workable for a variety of different fact patterns, but also consistent with the language and structure of the entire statute to which the interpretation relates. These factors shape all tax regulations, whether or not pro-taxpayer. I read the *Skidmore* factors of informed judgment, thorough consideration and careful reasoning, all of which *Loper Bright* endorsed, as permitting introduction of this information when judges face questions regarding regulatory interpretations. But, as the Fifth Circuit observed, *Loper Bright* does not require a court to consider them. I would hope that government lawyers defending an agency's interpretation would undertake educating judges about these matters. Perhaps judges would be willing to ask for such background, if it is not presented by the parties. At least for more recently promulgated regulations, notices of proposed regulations and preambles of final regulations will likely set forth these considerations.

The government in *Memorial Hermann* did not defend the “primarily engaged” test of the section 501(c)(4) regulation. According to the Fifth Circuit, Treasury, “as party to this case through the Commissioner of Internal Revenue, argues that the substantial nonexempt purpose and primary purpose tests are not meaningfully different.”⁸⁹ The result in particular cases may be the same. Such may well be the result when nonexempt activities constitute a very large percentage of an entity's operations. Although the Fifth Circuit rejected the regulations, it did suggest, in a footnote, that the two tests may well have had the same result in *Memorial Hermann*.⁹⁰ However, as BBB's “substantial purpose” test has come to be understood, it differs from the regulation's “primarily engaged” test at lower percentages. Contrast, for example, the IRS position of granting expedited consideration of section 501(c)(4) exemption applications if no more than 40% of the organization's total expenditures and time on campaign intervention with positions taken by government lawyers in litigation that anything more than 21% of activity defeats qualification for exemption.⁹¹ The government in *Memorial Hermann* did not educate the court on this difference in how these two tests have been applied.

⁸⁹ *Memorial Hermann*, 120 F.4th at 219. Of course, I disagree with its characterization of the § 501(c)(4) regulation test as one that goes to “primary purpose.”

⁹⁰ See *supra* note 31.

⁹¹ See *supra* note 77.

But, as argued throughout this essay, based on its understanding of *Loper Bright*, the Fifth Circuit viewed its duty as interpreting statutory language on a blank slate.⁹² It did not overrule the regulation as inconsistent with the statute. It simply chose not to consider it, except for a brief mention in a footnote.⁹³

Courts writing on a blank slate begin their analysis by ignoring regulations promulgated by an agency.⁹⁴ Under the primacy assigned to the courts, agency regulations can in the first instance be jettisoned as irrelevant. Despite the many references to *Skidmore*, much of the language of *Loper Bright*, along with its overall tone, encourages courts to start with a presumption of disregarding existing regulations. I wish that the Supreme Court had issued a stronger directive that lower courts consult administrative interpretations. Like Professors Hickman and Wildermuth, I read *Loper Bright* as requiring judicial “independent judgment review” for notice-and-comment regulations adopted under a general authority delegation, such as section 7805(a), but hope that any such review would be “influenced by *Skidmore*’s contextual favors.”⁹⁵

Judicial overruling of pro-taxpayer regulations poses particular concerns. Michael Schler has written that “it might be assumed that despite *Loper Bright*, the government would be estopped from challenging the application of its own regulation to a taxpayer on the basis that the regulation was too taxpayer-friendly and therefor invalid under *Loper*

⁹² For example, unlike the Tax Court, the Fifth Circuit in *Memorial Hermann* did not cite, much less consider, a § 501(c)(4) regulation on the basis of which the case might have been decided. Treas. Reg. § 1.501(c)(4)-1(2)(ii) provides that an organization “carrying on a business with the general public in a manner similar to organizations which are operated for profit” does not qualify for exemption under section 501(c)(4).

⁹³ See *supra* note 31 and note 34 and accompanying text.

⁹⁴ In *Seven County Infrastructure Coalition v. Eagle County*, 145 S. Ct. 1497, 1511 (2025), the Supreme Court cited *Loper Bright*, 630 U.S. at 391-92, as standing for this proposition: “As a general matter, when an agency interprets a statute, judicial review of the agency’s interpretation is *de novo*.” Nowhere, however, do those particular pages of *Loper Bright* refer to *de novo* review.

⁹⁵ See Hickman & Wildermuth, *supra* note 43. Professor Hickman has observed that some scholars and practitioners take a different view of general authority delegations such as § 7805(a). That alternative view accepts § 7805(a) as delegated authority to the Treasury Department and the IRS to exercise policymaking discretion. As a result, the role of the courts in cases involving regulations promulgated under the authority of § 7805(a) would not be to engage in *de novo* review, but to evaluate the delegation’s constitutionality, determine its boundaries and then “ensur[e] the agency has engaged in reasoned decisionmaking within those boundaries” using the *State Farm* standard for arbitrary-and-capricious review under APA section 706(2)(A). *Loper Bright*, 603 U.S. at 395; see also *Seven County Infrastructure Coalition v. Eagle County*, 145 S. Ct. 1497, 1511 (2025) (summarizing *Loper Bright* in this way). Under this kind of judicial review, courts have more latitude to defer to the expertise and experience of the IRS and the Treasury Department. (Emails of August 10 and 11, 2025, from Kristin Hickman to author.)

Bright.”⁹⁶ He sees *Memorial Hermann* as destabilizing this assumption. Schler faults both parties in *Memorial Hermann* for not raising this issue in the context of the primarily engaged test of the regulations.⁹⁷ He reasons that the recognized obligation of the IRS not to take a position contrary to a revenue ruling should apply all the more to a regulation.⁹⁸ Indeed, Mitchell Rogovin and Donald Korb, writing in 2008 as former IRS Chief Counsels, assured taxpayers that, in planning transactions, they could rely on “Treasury regulations that are final or temporary . . . in the same manner which they rely upon a provision of the Code.”⁹⁹

If such reliance is no longer the case after *Loper Bright* because courts are now free to ignore pro-taxpayer regulations, the consequences for taxpayers are particularly harsh in ways that new regulatory interpretations in regulations are not. When tax regulations contain new or different interpretation of statutory provisions, the Treasury and the IRS can take reliance interests into account in various ways. Notices of proposed rulemaking convey the substance and often the likely effective date of any new interpretation. At times, regulations defer effective dates. For example, both the proposed and final regulations for reporting by brokers on sales and exchanges of digital assets provided phased-in reporting for various categories of transactions.¹⁰⁰ Similarly, in response to comments on regulations on required minimum distributions from IRAs proposed in 2024, the IRS published in an announcement that certain portions of the final regulations would be postponed until the 2026 distribution calendar year.¹⁰¹ That is, the process of adopting

⁹⁶ Michael L. Schler, *The State of the Federal Income Tax System: Poor*, 187 TAX NOTES FED. 1643, 1657 (2025). I note that the Fifth Circuit did not at any point state that it was invalidating the regulation; it just rejected the taxpayer’s reliance on the test in the regulations. As *Loper Bright* permits, the Fifth Circuit simply did not detail its failings but instead disregarded it except for a mention in a footnote. *See supra* note 31 and note 34 and accompanying text.

⁹⁷ *Id.* In particular, he criticizes the parties in *Memorial Hermann* for failing to raise the estoppel issue. *Id.*

⁹⁸ *Id.* citing *Rauenhorst v. CIR*, 119 T.C. 157 (2002). Schler predicts widespread consequences of such a position. “If *Loper Bright* allows the government to disregard its own pro-taxpayer regulations and impose tax based on a less-taxpayer- friendly statute, significant portions of routine nonabusive [sic] tax practice will be thrown into chaos.” *Id.* at 1658.

⁹⁹ Mitchell Rogovin and Donald L Korb, *The Four R’s Revisited: Regulations, Rulings, Reliance and Retroactivity in the 21st Century: A View from Within*, 46 DUQUESNE L. REV. 323, 328 (2008). I thank Leslie Book for pointing me to this article.

¹⁰⁰ *See* IRS FS-2024-23, *Final Regulations and Related IRS Guidance for Reporting by Brokers on Sales and Exchanges of Digital Assets* (June 2024), <https://www.irs.gov/newsroom/final-regulations-and-related-irs-guidance-for-reporting-by-brokers-on-sales-and-exchanges-of-digital-assets>.

¹⁰¹ *See* Internal Revenue Bulletin 2025-2 (January 6, 2025), *Announcement 2025-2, Anticipated Applicability Date for Future Final Regulations Relating to Required Minimum Distributions*, https://www.irs.gov/irb/2025-02_IRB.

regulations generally gives taxpayers at least some time to adjust to a new regime. Such notice is of special importance for tax regulations because, under the Anti-Injunction Act of section 7421, pre-enforcement challenges to tax regulations are seldom permitted.¹⁰²

Courts do not have such discretion as to the effective date of their decisions or the persons to which it applies. Court cases will become final when the time for appeal has passed. Judicial decisions, particularly from lower courts, generally have retroactive effect as well.¹⁰³ Tax regulations seldom apply retroactively.¹⁰⁴ When regulations are issued, all taxpayers will be affected. Court decisions apply only to the parties in the case, or, at most, to taxpayers within the circuit that decides the case. After a case rejecting reliance on a pro-taxpayer regulation, taxpayers and their advisors, particularly those in other circuits, will be left unsure as to their proper course of action, as the impact of *Memorial Hermann* for campaign intervention by section 501(c)(4) organizations demonstrates. Application of *Loper Bright* to dismiss regulations, particularly those promulgated under a grant of general authority, will likely lead to uneven application of tax laws and sharper divisions among courts than we saw under *Chevron*.¹⁰⁵

We tax lawyers eagerly await further guidance from all three branches of government on the various issues raised by *Memorial Hermann* – from courts as to whether section 7805(a) delegates discretionary authority to Treasury and the IRS, from Congress to permit Treasury and the IRS to issue section 501(c)(4) guidance, and from our tax agencies as to the understanding of section 501(c)(4). Because we cannot expect any of this soon, we will have to learn to live with continued uncertainty.

¹⁰² See Ellen P. Aprill, *The Impact of Agency Procedures and Judicial Review on Tax Reform*, 65 NAT'L TAX J. 917, 919-920 (2012).

¹⁰³ See Samuel Beswick, *Retroactive Adjudication*, 130 YALE L. J. 276 (2020), <https://www.yalelawjournal.org/article/retroactive-adjudication>.

¹⁰⁴ See David Hughes, 5 Key Takeaways: Retroactive Taxation: Legal Framework, State Applications and Policy Implications, Kilpatrick Townsend Legal Insights (May 15, 2025), [https://ktslaw.com/en/insights/perspectives/2025/5/5%20key%20takeaways%20retroactive%20taxation#:~:text=Kilpatrick's%20David%20Hughes%20recently%20moderated,landscape%20surrounding%20retroactive%20taxation%2C%20highlighting;AndrewPruitt,JudicialDeference%20toRetroactiveInterpretiveTaxRegulations,79GEO.WASH.L.REV.1558\(2011\),https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937312](https://ktslaw.com/en/insights/perspectives/2025/5/5%20key%20takeaways%20retroactive%20taxation#:~:text=Kilpatrick's%20David%20Hughes%20recently%20moderated,landscape%20surrounding%20retroactive%20taxation%2C%20highlighting;AndrewPruitt,JudicialDeference%20toRetroactiveInterpretiveTaxRegulations,79GEO.WASH.L.REV.1558(2011),https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937312).

¹⁰⁵ See Sunstein, *supra* note 44, at 1912 (“It seems safe to predict under *Loper Bright*, ideological differences within courts of appeals will increase in cases involving agency interpretations of law. Those differences, compressed by *Chevron*, will decompress.”)