UNITED STATES TAX COURT

J.G. BOSWELL COMPANY AND SUBSIDIARIES,	)	
Petitioner,	)	
v.	)	Docket No. 2408-19
COMMISSIONER OF INTERNAL REVENUE,	)	Judge Greaves
Respondent.	)	

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE AMERICAN CHEMISTRY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae the National Association of Manufacturers is a trade association representing manufacturers across the United States. The National Association of Manufacturers does not have a parent company, and no publicly held company has a 10 percent or greater ownership interest in it.

Amicus curiae the American Chemistry Council is a trade association representing leading companies engaged in the multibillion-dollar business of chemistry. The American Chemistry Council does not have a parent company, and no publicly held company has a 10 percent or greater ownership interest in it.

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INTEREST OF AMICI CURIAE[1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes $2.9 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The American Chemistry Council ("ACC") represents more than 190 of the leading companies engaged in the business of chemistry—an innovative economic growth engine that is helping to solve the biggest challenges facing our country and the world. Its members are companies of all sizes. In the United States, the business of chemistry generates $673 billion annually, and employs 547,000 Americans with average wages of over $100,000 annually. The business supports another 3.2 million

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

jobs and 25 percent of the U.S. Gross Domestic Product. ACC's members are the people and companies creating groundbreaking products that improve the world all around us by making it healthier, safer, more sustainable, and more productive. From consumer products like lotions and deodorants to safety equipment like helmets and eyewear, chemistry plays an essential role in products and technologies used by people every day. The ACC's mission is to advocate for the people, policy, and products of chemistry that make the United States the global leader in innovation and manufacturing. It supports common sense and science-based approaches to major public policy issues.

The Section[2] 41 credit for increasing research activities ("Research Credit") plays a central role in manufacturers' ability to thrive in the United States and to compete in a global economy. In the first quarter of 2024, the NAM surveyed members about their companies' outlook. Ninety-three percent of respondents noted that tax burdens on manufacturing activities would make it more difficult to expand their workforce, invest in new equipment, or expand facilities. NAM Manufacturers' Outlook Survey, First Quarter 2024, *available at*

[2] All "Section" references are to the Internal Revenue Code of 1986 ("I.R.C."), as amended and in effect during the taxable year at issue, and all "Treas. Reg." references are to the Treasury regulations thereunder.

https://nam.org/wp-content/uploads/2024/03/Outlook-Survey-March-2024-Q1.pdf (last accessed Apr. 6, 2026).

It is critical that American manufacturers have clarity on the tax effects of funding research and development in the United States. This case presents the first opportunity for the Court to address: (i) the meaning and effect of the terms "supplies used in the conduct of qualified research" in Section 41(b)(2)(A)(ii) and "indirect research expenditures" for supplies in Treas. Reg. § 1.41-2(b)(1) since the Supreme Court's landmark opinions in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024) (overruling *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)), and *Kisor v. Wilkie*, 588 U.S. 558 (2019) (limiting *Auer v. Robbins*, 519 U.S. 452 (1997)); and (ii) Respondent's misplaced reliance on a nonprecedential memorandum opinion of this Court and an opinion of the Court of Appeals for the Second Circuit that long predate the Supreme Court's opinions in *Loper Bright* and *Kisor*.

The decision in this case will significantly impact United States manufacturers with cases pending before the Court and beyond. Accordingly, the NAM and the ACC respectfully offer their position to the Court on the importance of properly interpreting Section 41(b)(2)(A)(ii) and Treas. Reg. § 1.41-2(b)(1) under current Supreme Court precedent.

ARGUMENT

I. The Code and Treasury Regulations

A taxpayer may treat as qualified research expenses ("QREs") "any amount paid or incurred for supplies used in the conduct of qualified research." I.R.C. § 41(b)(2)(A)(ii). Supplies, in turn, are defined by the statute as "any tangible property other than—(i) land or improvements to land, and (ii) property of a character subject to the allowance for depreciation." I.R.C. § 41(b)(2)(C). Accordingly, any amounts paid or incurred for tangible, non-depreciable personal property "used in the conduct of qualified research" may be treated as QREs for supplies. I.R.C. § 41(b)(2)(A)(ii) and (b)(2)(C). Given the Section 41(b)(2)(A)(ii) requirement that supplies be "used in the conduct of qualified research," the Section 41 Treasury regulations unremarkably note that expenditures "that are indirect research expenditures" are not QREs for supplies. Treas. Reg. § 1.41-2(b)(1). The term "indirect research expenditures" is not found in Section 41 and is neither defined nor illustrated in the Section 41 Treasury regulations.[3] While Treas. Reg. § 1.41-2 is replete with examples illustrating its application, none of those examples disallow as QREs amounts paid or incurred for supplies otherwise used in the conduct of qualified research as "indirect research expenditures" under Treas. Reg. § 1.41-2(b)(1).

[3] While Section 41 contains myriad express grants of rulemaking authority, none apply to the definition of supplies or the definition of QREs for supplies. *See* I.R.C. § 41(b)(2)(A)(iii), (c)(3)(B)(iii), (c)(5)(B), (f)(1)(B), (f)(2), (f)(3), (f)(4), and (h)(6).

II. *Union Carbide I*

The Court previously addressed the definition of QREs for supplies in a nonprecedential memorandum opinion. *Union Carbide Corp. v. Commissioner*, T.C. Memo. 2009-50, 97 T.C.M. (CCH) 1207 (2009) ("*Union Carbide I*"). Notwithstanding that Section 41(b)(2)(A)(ii) unambiguously permits taxpayers to include as QREs "any amount paid or incurred for supplies used in the conduct of qualified research," the Court disallowed as QREs the costs of supplies used at the taxpayer's production facilities on the basis that the taxpayer's research related to manufacturing processes, as opposed to the products it manufactured. The Court arrived at its conclusion based on an unprecedented interpretation of Section 41(d)(2)(C) that was never argued by the Commissioner during the proceeding nor briefed by the parties.

Section 41(d)(2)(C) provides as follows:

> **Special rule for production processes.** Any plant process, machinery, or technique for commercial production of a business component shall be treated as a separate business component (and not as part of the business component being produced).

Section 41(d) addresses the definition of qualified research, and as Petitioner rightly observes in its opening brief, "[i]t is the *only* part of Section 41 that refers to 'business component,' 'process,' or 'product', and the only one *not* to refer to QREs (which, again, are the province solely of section 41(*b*))." Pet. Br. at 69–70 (emphasis

in original).[4] The application of the business component rule to product and process business component activities—and not expenses—is aptly illustrated by Treas. Reg. § 1.41-4(c)(iii), which addresses the exclusion from qualified research for "research after commercial production" under Section 41(d)(4)(A):

> **Activities related to production process or technique.** In cases involving development of both a product and a manufacturing or other commercial production process for the product, the exclusion described in section 41(d)(4)(A) and paragraphs (c)(2)(i) and (ii) of this section applies separately for the activities relating to the development of the product and the activities relating to the development of the process. *For example, even after a product meets the taxpayer's basic functional and economic requirements, activities relating to the development of the manufacturing process still may constitute qualified research, provided that the development of the process itself separately satisfies the requirements of section 41(d) and this section, and the activities are conducted before the process meets the taxpayer's basic functional and economic requirements or is ready for commercial use.*

Treas. Reg. § 1.41-4(c)(iii) (emphasis added). As its text plainly shows, the business component rule *allows for* qualified research on processes used to manufacture products, even where those products are excluded from qualified research because they are in commercial production. It is not a rule that disallows QREs for qualified research on process business components.

[4] Respondent offers no support for his assertion that the business component rule "means process research generally cannot include any *costs* of the products being produced." Resp. Br. at 32 (emphasis added). Section 41(d)(2)(C) makes no reference to costs or QREs whatsoever, nor does Treas. Reg. § 1.41-4(b)(1).

Using Section 41(d)(2)(C) as the misplaced fulcrum for its inquiry, the Court disallowed the taxpayer's QREs for supplies by creating and inserting a two-part rule into Section 41 untethered to the statutory text. *First*, it added a requirement that the cost of supplies used for process business component research can only be treated as QREs if they relate "primarily" to the process business component (as distinct from the product business component). *Union Carbide I*, 97 T.C.M. (CCH) at 1273. *But see, e.g.*, *In re Coltex Loop Central Three Partners, L.P.*, 138 F.3d 39, 43 (2d Cir. 1998) (adding modifying language such as "primarily" to a statute "would work a significant and unwarranted change in the meaning and consequences of the statute"). *Second*, the Court, as a matter of judicial fiat, declared that supplies that result in a product following the conduct of qualified research related to the manufacturing process are assigned primarily to the *product* business component, with the result that the cost of those supplies could never be treated as QREs, even where it is undisputed that those supplies were, in fact, used in qualified research. *Union Carbide I*, 97 T.C.M. (CCH) at 1273. Applying this flawed logic, the Court reached the conclusion that only extraordinary expenditures for supplies qualify as QREs for process business components, holding that "[r]aw materials used to make finished goods that would have been purchased regardless of whether a taxpayer was engaged in qualified research are not used in the conduct of qualified research." *Id.* at 1273 (internal quotation marks omitted).

III. *Union Carbide II*

On appeal of *Union Carbide I* to the Second Circuit, the Commissioner abandoned this Court's unprecedented reading of Section 41(d)(2)(C). Instead, the Commissioner offered a wholly different argument for disallowing the taxpayer's QREs for supplies; namely, that the supply costs at issue were excluded as "indirect research expenditures" under Treas. Reg. § 1.41-2(b)(1). *Union Carbide Corp. v. Commissioner*, 697 F.3d 104, 108–09 (2d Cir. 2012) ("*Union Carbide II*").

In its opinion, the Second Circuit framed the question as "whether [the taxpayer's] costs for the supplies used during these projects that would have been used in the course of [the taxpayer's] manufacturing process regardless of any research performed qualify as 'an amount paid or incurred for supplies used in the conduct of qualified research.'" *Union Carbide II*, 697 F.3d at 107 (quoting Section 41(b)(2)(A)(ii)). In answering this question, the Second Circuit looked to the phrase "used in the conduct of qualified research" in Section 41(b)(2)(A)(ii), stating that the phrase "*suggest[ed]* that the statute *only* covers costs for supplies *purchased for the purpose of* conducting qualified research." *Id.* at 108 (emphasis added; further noting that "until we considered [the taxpayer's] argument, it would not have occurred to us that this credit applies to costs of supplies that [the taxpayer] would have purchased and used in any event."). While the Second Circuit found the phrase "used in the conduct of qualified research" in Section 41(b)(2)(A)(ii) to be "silent or

ambiguous" on this question, *the only* support the court offered for statutory silence or ambiguity in the face of the plain statutory text was the title given to Section 41—the Credit for Increasing Research Activities—which further "suggest[ed]" to the Second Circuit that *only* the cost of supplies "*purchased for the purpose of* conducting qualified research" may be treated as QREs for supplies, regardless of whether such supplies were indeed used in the conduct of qualified research. 697 F.3d at 108 (emphasis added). *But see, e.g.*, *Dubin v. United States*, 599 U.S. 110, 121 (2023) (holding that a statutory title cannot overcome the plain statutory text); *accord* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 222 (2012) ("[A] title or heading should never be allowed to override the plain words of a text.").

Having found silence or ambiguity in the statutory text solely on this single untenable ground, the Second Circuit immediately pivoted to the Supreme Court's now-abrogated opinion in *Chevron*, asking whether the amounts treated by the taxpayer as QREs for supplies were "indirect research expenditures" within the meaning of Treas. Reg. § 1.41-2(b)(1) for the purpose of according *Chevron* deference. 697 F.3d at 108–09. The Second Circuit, however, ruled that Treas. Reg. § 1.41-2(b)(1) was likewise "ambiguous," this time regarding whether the taxpayer's claimed QREs for supplies were—or were not—"indirect research expenditures" under the Treasury regulations. *Id.* at 109.

The Second Circuit, relying on the Supreme Court's now-limited opinion in *Auer*, then simply deferred to the Commissioner's "interpretation" of Treas. Reg. § 1.41-2(b)(1)—advanced for the first time by his appellate counsel on brief—without first exhausting any of the traditional tools of construction to try to resolve this purported ambiguity. 697 F.3d at 109. *But see Kisor*, 588 U.S. at 575 (holding that "before concluding that a rule is genuinely ambiguous" under *Auer* "a court must exhaust all the 'traditional tools' of construction") (quoting *Chevron*, 467 U.S. at 843 n.9).[5] The Second Circuit provided no support for its *ipse dixit* that the Commissioner's proffered interpretation was "not merely a 'convenient litigating position' or a '*post hoc* rationalization advanced by an agency seeking to defend past agency action against attack.'" 697 F.3d at 109 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (declining to grant *Auer* deference)).

Christopher, however, should have directed the Second Circuit to the opposite conclusion. In *Christopher*, the U.S. Department of Labor invoked its interpretation of regulations advanced on brief "to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced."

[5] In a concurring opinion, Judge Pooler observed that "Congress may well have intended to give a tax credit" for supplies that were not purchased for the purpose of conducting qualified research that were nevertheless used in the conduct of qualified research, but that Congress "failed to write the statute in such precise terms so as to preclude either the Commissioner's regulations or his interpretations" under *Chevron* and *Auer*. 697 F.3d at 110.

567 U.S. at 155–56. The Supreme Court ruled that granting *Auer* deference to such a post hoc rationalization "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires." *Id.* at 156 (internal citations and quotation marks omitted). So was the case in *Union Carbide II*—Respondent's appellate counsel invoked the Commissioner's interpretation of Treas. Reg. § 1.41-2(b)(1) on brief to impose a massive tax liability on Union Carbide for conduct that occurred well before that interpretation was ever announced. *Cf. Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007) (deferring to new agency interpretation that "create[d] no unfair surprise" because agency had proceeded through notice-and-comment rulemaking).

The Second Circuit sought to defend its deference to the Commissioner's litigating position by claiming that it was "entirely consistent with the purpose of the research tax credit, which is to provide a credit for the cost that a taxpayer incurs in conducting qualified research *that he would otherwise not incur*." *Union Carbide II*, 697 F.3d at 109. The Second Circuit did not divine this supposed purpose from the statutory text. Nor could it—nothing in the text of Section 41 states or even suggests that QREs must be extraordinary costs that a taxpayer would not otherwise

incur.[6] Instead, the Second Circuit found support for this supposed purpose from a single legislative report. 697 F.3d at 109 (quoting H.R. Rep. No. 97-201, at 111 (1981)). This report, however, addressed a committee bill (H.R. 4242) that was never passed by the House of Representatives. Instead, the House of Representatives voted on and passed the so-called Hance-Conable substitute, which differed materially from H.R. 4242. *See* H.R. 4260, 97th Cong., at 152 (1st Sess. 1981).

In all events, and even assuming the Second Circuit properly applied *Auer* (it did not), *Auer* deference in such circumstances is no longer available under *Kisor*, which requires that an agency's interpretation "must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context." *Kisor,* 588 U.S. at 577 (limiting *Auer*). The Commissioner's appellate counsel in *Union Carbide II* was undisputably no such actor.

[6] Given the lack of any textual support for this supposed purpose, the Second Circuit begged the question in concluding that "[a]ffording a credit for the costs of supplies that the taxpayer would have incurred regardless of any qualified research it was conducting simply creates an unintended windfall." 697 F.3d at 109. The statutory text, however, makes clear that there is no "windfall" so long as those supplies were, in fact, used in the conduct of qualified research.

IV. "Supplies Used in the Conduct of Qualified Research" in Section 41(b)(2)(A)(ii) Means What it Says and Says What it Means

a. The "Single, Best Reading" of Section 41(b)(2)(A)(ii) Includes as QREs All Amounts Paid or Incurred for Supplies Used in the Conduct of Qualified Research, Without Exception

In *Loper Bright*, the Supreme Court held that "statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is fixed at the time of enactment.'" 603 U.S. at 400 (2024) (quoting *Wis. Central Ltd. v. United States*, 585 U.S. 274, 284 (2018)). And in cases requiring statutory interpretation, "instead of declaring a particular party's reading 'permissible' . . . , courts [must] use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." *Id.* Put another way, "in an agency case as in any other . . . even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—the reading the court would have reached *if no agency were involved*." *Id.* (cleaned up and emphasis added). In short, "[i]n the business of statutory interpretation, if it is not the best, it is not permissible." *Id.*

Under Section 41(b)(2)(A)(ii), a taxpayer may treat as QREs "any amount paid or incurred for supplies used in the conduct of qualified research." Supplies, in turn, are defined by the statute as "any tangible property other than—(i) land or improvements to land, and (ii) property of a character subject to the allowance for depreciation." I.R.C. § 41(b)(2)(C). The plain text of the statute, let alone its

"single, best meaning" without any agency deference as mandated by *Loper Bright*, includes all amounts paid or incurred for tangible, non-depreciable property used in the conduct of qualified research, without exception. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that [the] legislature says in a statute what it means and means in a statute what it says there.").[7] Given that Respondent has stipulated that Petitioner's activities in which its supplies were used constitute qualified research, the inquiry properly begins—and ends—there.

V. Treas. Reg. § 1.41-2(b)(1) Does Not Exclude Supplies Otherwise Meeting the Definition of Supplies Under Section 41(b)(2)(A)(ii)

Like statutes, a court must exhaust all the "traditional tools" of construction when interpreting agency regulations. *Kisor*, 588 U.S. at 575. "To make that effort, a court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.* (cleaned up).

Treas. Reg. § 1.41-2(b)(1) provides:

> **In general.** Supplies and personal property (except to the extent provided in paragraph (b)(4) of this section) are used in the conduct of qualified research if they are used in the performance of qualified services (as defined in section 41(b)(2)(B), but without regard to the

[7] Even assuming the interpretive question was "viewed as a close call" (it is not), longstanding precedent requires the Court to construe Section 41(b)(2)(C) against the Commissioner. *Apache Corp. v. Commissioner*, 165 T.C. No. 11 (Nov. 13, 2025), *slip op.* at 18–19 (collecting cases).

> last sentence thereof) by an employee of the taxpayer (or by a person acting in a capacity similar to that of an employee of the taxpayer; see example (6) of § 1.41-2(e)(5)). Expenditures for supplies or for the use of personal property that are indirect research expenditures or general and administrative expenses do not qualify as inhouse research expenses.

By its plain terms, the two sentences comprising Treas. Reg. § 1.41-2(b)(1) do not exclude amounts that otherwise meet the plain statutory definition of QREs for supplies. To the contrary, the first sentence of this Treasury Regulation makes plain that supplies are used in the conduct of qualified research "if they are used in the performance of qualified services . . . by an employee of the taxpayer," with the second sentence observing that "indirect research expenditures" do not qualify as QREs for supplies. Nothing in Treas. Reg. § 1.41-2(b)(1) purports to exclude from the definition of QREs for supplies as "indirect research expenditures" the cost of tangible, non-depreciable property "used in the performance of qualified services . . . by an employee of the taxpayer," let alone exclude such costs based upon either the supplies' "primary" use (as in *Union Carbide I*) or the purpose for which supplies were purchased (as in *Union Carbide II*). As Petitioner aptly observes in its opening brief, "[n]either words to that effect nor the concept appear anywhere in the statute, regulations, or examples, nor does 'business component' or 'process' appear in Treas. Reg. § 1.41-2(b)(1)." Pet. Br. at 68; *see also id.* at 67 ("Supplies have a value (cost). That value is gone once the supplies are used, no matter why they were purchased. If supplies are used in qualified research, then their costs are QREs.").

The structure of Treas. Reg. § 1.41-2(b) further refutes any notion that Treas. Reg. § 1.41-2(b)(1) excludes amounts that otherwise meet the plain statutory definition of QREs for supplies. *See Kisor*, 588 U.S. at 575. The second subparagraph of Treas. Reg. § 1.41-2(b)—Treas. Reg. § 1.41-2(b)(2)—addresses certain utility charges for supplies, and unlike Treas. Reg. § 1.41-2(b)(1), requires that the cost of such utility supplies be "extraordinary," i.e., a cost that would not have otherwise been borne absent the conduct of qualified research. Applying the canon *expressio unius est exclusio alterius* to Treas. Reg. § 1.41-2(b) and irrespective of its invalidity (*see* Arg. VI, *infra*) confirms that Treas. Reg. § 1.41-2(b)(1) contains no such "extraordinary" requirement.[8]

VI. Treas. Reg. § 1.41-2(b)(1) Cannot Exclude Supplies Otherwise Meeting the Definition of Supplies Under Section 41(b)(2)(A)(ii)

Even assuming Treas. Reg. § 1.41-2(b)(1) could be interpreted to exclude amounts otherwise meeting the plain statutory definition of QREs for supplies (it cannot), Treas. Reg. § 1.41-2(b)(1) would be substantively and procedurally invalid.

First, Section 41 contains no grant of specific rulemaking authority to define (or redefine) QREs for supplies, and the general grant of rulemaking authority under Section 7805(a) does not allow the Secretary "to change an unambiguous provision

[8] Once again, and even assuming the interpretive question was "viewed as a close call" (it is not), longstanding precedent requires the Court to construe Treas. Reg. § 1.41-2(b)(1) against the Commissioner. *See Apache Corp.*, *supra* note 7 and accompanying text.

of the statute." *Varian Med. Sys., Inc. v. Commissioner*, 163 T.C. 76, 107 (2024); *see also United States v. Locke*, 471 U.S. 84, 95 (1985) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.") (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

Second, a regulatory exclusion of "indirect research expenditures" that otherwise meet the statutory definition of QREs for supplies would be procedurally invalid under the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946), and properly set aside.[9] An agency must both explain its reasoning and respond to significant comments submitted in response to its proposed rulemaking. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). Significant comments include "challenges to the lawfulness of the proposed rule" or "[c]hallenges to the internal integrity or reasonableness of the regulatory structure." *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 116 (D.C. Cir. 1987).

[9] Notwithstanding that Treas. Reg. 1.41-2(b)(1) was issued as a final rule in May of 1989, its vintage is no impediment to the Court reaching its procedural validity as Petitioner was first injured by final agency action by the issuance of the notice of deficiency in this case. *See Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 603 U.S. 799, 804 (2024) (holding that "[a] claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action.").

When Treas. Reg. § 1.41-2(b)(1) was promulgated as a final rule, no explanation was given for the rule or how the rule related to the statute. *See* T.D. 8251, 54 Fed. Reg. 21203 (May 17, 1989). Moreover, Tax Executives Institute ("TEI") submitted significant comments on the treatment of QREs for utility supplies when Treas. Reg. § 1.41-2(b) was issued as a proposed rule. TEI's comments refuted this Court's and the Second Circuit's later interpretations of Section 41(b)(2)(A)(ii) in *Union Carbide I* and *Union Carbide II*, contending that "[t]he legislative history of the R&D credit (including the rejected 1981 House Report) does not state or imply that an expenditure *must be extraordinary in nature* to qualify *as a supply used in a qualified research activity*."[10] In promulgating Treas. Reg. § 1.41-2(b) as a final rule in T.D. 8251, TEI's comments on this issue were wholly ignored in the Preamble to T.D. 8251, which finalized Prop. Treas. Reg. § 1.41-2(b) without any changes. *Compare* T.D. 8251, 54 Fed. Reg. 21204 (May 17, 1989), *with* L.R.-236-81, 48 Fed. Reg. 2790 (Jan. 21, 1983). Accordingly, and even assuming Treas. Reg. § 1.41-2(b) could be interpreted to exclude amounts otherwise meeting the plain statutory definition of QREs for supplies (it cannot), its

[10] *See* Comment Letter from TEI International President Thomas M. Nee to Commissioner of Internal Revenue Lawrence B. Gibbs (Nov. 6, 1987), *available at* https://www.taxnotes.com/tax-notes-today-federal/tax-executives-institute-urges-redraft-regulations-research-credits/1987/11/23/17xl7?highlight=TEI%20research%20credit (last accessed Apr. 6, 2026) (emphasis added).

procedural defects, which would have rendered it unworthy of deference even before *Loper Bright* abrogated *Chevron*, render it equally unworthy of any "due respect" under *Loper Bright*. 603 U.S. at 403; *see Encino Motorcars*, 579 U.S. at 221 (holding that "where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation.").

CONCLUSION

Congress spoke clearly when it enacted Section 41(b)(2)(A)(ii) defining QREs for supplies, and misplaced appeals to policy and congressional purpose cannot overcome these choices no matter how much Respondent may dislike them. *See Varian*, 163 T.C. at 101–02 (collecting cases). This Court should properly recognize that Congress said what it meant and meant what it said in Section 41(b)(2)(A)(ii)—any amounts paid or incurred for supplies used in the conduct of qualified research are QREs for supplies, without exception.

Respectfully submitted this 6th day of April, 2026.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief complies with Tax Court 151.1, because this brief is less than 25 pages (excluding the cover page, the disclosure statement, the table of contents, the table of authorities, the signature block, and the certificate of service). This brief complies with the typeface requirements of Tax Court Rule 23 because it has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on April 6, 2026, a true and accurate copy of the foregoing filing was electronically served via email and paper served via U.S. mail to the parties' counsel at the following email and postal addresses:

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