No. 22-451

IN THE

Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL., *Petitioners*,
v.
GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* THE FOUNDATION FOR GOVERNMENT ACCOUNTABILITY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The Foundation for Government Accountability (FGA) is a 501(c)(3) non-profit organization that helps millions achieve the American Dream by improving welfare, workforce, health care, and election policy at both the state and federal levels. Launched in 2011, FGA promotes policy reforms that seek to free individuals from the trap of government dependence, restore dignity and self-sufficiency, and empower individuals to take control of their futures. FGA's policy reforms are grounded in the principles of government transparency, the free market, individual freedom, and limited constitutional government.

Since its founding, FGA has helped achieve more than 781 reforms impacting policies in 42 states as well as 27 federal reforms. FGA supports its mission by conducting innovative research, deploying outreach and education initiatives, equipping policy makers with the information they need to achieve meaningful reforms, and by appearing *amicus curiae* before state and federal courts including the U.S. Supreme Court in *Azar v. Gresham*, 141 S. Ct. 1043 (2021), *Biden v. Nebraska*, 600 U.S. __ (2023), and *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 143 S. Ct. 978 (2023).

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[*] Per this Court's Rule 37.6, this brief was not authored in whole or in part by any party, and no one other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

The case at issue here centers on an improper abdication of judicial power to an executive branch agency, the National Marine Fisheries Service (NMFS), under *Chevron*. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* violates the Constitution's structural separation of powers and robs the judiciary of its constitutional right to interpret law, handing that power instead to unelected bureaucrats within the ever-expanding administrative state. *Id.* This abdication of the judiciary's interpretation power to the executive branch has undermined the separation of powers required to maintain a limited, constitutional government. It has also created a legal framework that fosters inconsistent and unpredictable results while raising costs in myriad ways. Given the immense regulatory power NMFS wields over the fishing and other industries, including the individuals and family-owned businesses eking out a living through honest, hard work, free market principles and individual liberty are also severely threatened. Accordingly, this case directly implicates FGA's core mission of promoting limited, constitutional government, a free market, and individual liberty. For these reasons, FGA stands in support of Petitioners.

INTRODUCTION & SUMMARY OF ARGUMENT

Under the U.S. Constitution, judicial power is vested exclusively in Article III courts, and "[i]t is emphatically the province and duty of the judicial department to say what the law is." U.S. CONST. art.

III, §1; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Chevron, however, "precludes judges from exercising that judgment, forcing them to abandon what they believe to be 'the best reading of an ambiguous statute' in favor of an agency's construction." *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)). It "wrests from Courts the ultimate interpretative authority to 'say what the law is'" and hands it over to the Executive." *Id.* at 761 (quoting *Marbury*, 5 U.S. at 177). This abdication of power is clearly at odds with the Constitution and coupled with the doctrine's blatant inconsistency with the statutory language of the Administrative Procedure Act (APA), provides the Court all the justification it needs to overrule *Chevron*. *See* U.S. CONST. art. III, §1; *see also* 5 U.S.C. §706.

Besides violating the Constitution's separation of powers, *Chevron* has created a host of other problems. It has emboldened agencies to unilaterally expand their power, accelerated the growth of the administrative state, weakened Congress and encouraged it to punt difficult political questions to unelected bureaucrats, and has significantly undermined personal liberty.

Chevron has failed to live up to its promise. It has created more costs and promoted far more litigation than it has discouraged, while offering no real protection from unaccountable judges wishing to push their

political preferences. Replacing *Chevron* with a new framework that restores the separation of powers while promoting consistency and predictability in its application will solve more problems than it creates.

Overruling *Chevron* would also make judicial review much more straight forward. It would simplify litigation, reduce costs, and return responsibility for interpreting statutes to the judiciary, where it belongs.

For these reasons and more, this Court should overrule *Chevron*.

ARGUMENT

I. *Chevron* Abdicates the Judiciary's Constitutional and Statutory Duty to Interpret the Law and, in Effect, Delegates that Power to Unelected Bureaucrats

Under the U.S. Constitution, judicial power is vested exclusively in Article III courts, and "[i]t is emphatically the province and duty of the judicial department to say what the law is." U.S. CONST. art. III, §1; *Marbury*, 5 U.S. at 177. As the Framers eloquently noted, "[t]he interpretation of the laws is the proper and peculiar province of the courts." Alexander Hamilton, *The Federalist Papers*, No. 78, (May 28, 1788), The Avalon Project, Yale Law School, Lillian Goldman Law Library, bit.ly/3PYxOhG.

Judicial power is the power to resolve cases or controversies by making an independent judgment of what the law is and applying the law to the facts.

Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 119 (2015) (Thomas, J., concurring). Statutory interpretation in a case or controversy, including those involving an administrative agency, is the exercise of judicial power. *Id.* at 122.

It is of course necessary and proper for the executive branch and its agencies to interpret existing law when performing executive functions, but such interpretation is not the exercise of judicial power and therefore it should have no authority in court. *Id.* at 119-20. A court may, of course, adopt an executive branch interpretation, but only by exercising the judicial power which requires independently judging that the interpretation is correct. *Id.* (citing M. Vile, *Constitutionalism and the Separation of Powers*, 360 (2d ed. 1998)). This form of deference, sometimes called *Skidmore* deference, is not actually deference at all, but rather an independent, reasoned agreement made by a court, with a persuasive interpretation of the executive branch. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

A. *Chevron* robs the judiciary of its power to interpret statutes and hands that power to executive branch agencies

But *Chevron* "precludes judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction." *Michigan*, 576 U.S. at 761 (quoting *Brand X*, 545 U.S. at 983). *Chevron* is, therefore, "no less than a judge-made doctrine for the abdication of the judicial duty." *Gutierrez-Brizuela v.*

Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). It "wrests from Courts the ultimate interpretative authority to 'say what the law is'" and hands it over to the Executive." *Michigan*, 576 U.S. at 761 (quoting *Marbury*, 5 U.S. at 177).

This abdication of power is clearly at odds with the Constitution, even if voluntarily ceded by the judiciary. *See* U.S. CONST. art. III, §1; *New York v. United States*, 505 U.S. 144, 182 (1992). As the Court has made clear, "[t]he Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York*, 505 U.S. at 182. At the end of the day, "the judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (citing *Cohens v. Virginia*, 19 U.S. 264, 257 (1821)). *Chevron* hands that responsibility to executive branch agencies. The Constitution forbids this.

B. *Chevron* is at odds with the APA's judicial review provisions

Apart from the constitutional issues *Chevron* raises, the doctrine's blatant inconsistency with the statutory language of the Administrative Procedure Act (APA) is also problematic. *See* 5 U.S.C. §706.

Chevron deference is premised on the idea that whenever Congress leaves "ambiguity in a statute meant for implementation by an agency" it does so with the understanding that "the ambiguity would be

resolved, first and foremost, by the agency, and [that Congress] desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Michigan*, 576 U.S. at 761. But this premise is hard to reconcile with the plain language of the Administrative Procedure Act (APA), which says nothing about granting agencies such deference. *See* 5. U.S.C. §706. In fact, the APA expressly states the opposite. *Id.*

The APA is, of course, the statute Congress created to govern judicial review of executive agency action based on the agency's interpretation of a statute it administers. *Id.* Yet, nowhere in the text of the APA did Congress even suggest that courts should afford deference to executive agency interpretation of an otherwise ambiguous statute when conducting judicial review. *Id.* Instead, the APA expressly delegates this interpretive power to the courts. *See* 5. U.S.C. §706. The APA states, "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Id.* Lest there be any doubt of what Congress intended through this plain language, it added another provision in §706, stating, "[t]he reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

While the plain language of the APA is all we need to resolve this issue, the legislative history

surrounding the text of the APA also makes clear Congress' expectation that courts, as the Constitution requires, would make independent interpretations of statutory provisions when reviewing APA cases. The author of the House Committee Report on the bill and Chairman of the House Subcommittee on Administrative Law explained to the house shortly before it passed the APA, that the judicial review provision of the APA, 5 U.S.C. §706, "requires courts to determine *independently* all relevant questions of law, including the interpretation of constitutional or statutory provisions." 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter), reprinted in *APA Legislative History of the Administrative Procedure Act*, S. Doc. No. 79-248, at 370 (1946) [emphasis added].

Given the clear inconsistency of *Chevron* with the APA, and *Chevron's* requirement that courts "opt out of exercising their [constitutional duty to] check" the power of the executive branch, undermining the constitutional bedrock principles of separation of powers and checks and balances, the Court has a strong basis to support overruling *Chevron*. *See Perez*, 575 U.S. at 125 (Thomas, J., concurring); s*ee also* 5 U.S.C. §706.

II. *Chevron* Spurs the Growth of the Administrative State, Weakens Congress, and Undermines Our System of Checks and Balances

A. *Chevron* emboldens agencies to unilaterally expand their power and promotes "reflexive deference"

Federal executive agencies possess only those powers conferred upon them by Congress through statute. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). But the "abdication of the judiciary's proper role in interpreting federal statutes. … [has led to a kind] of reflexive deference" where courts seem to blindly agree with agency claims of statutory ambiguity with only a "cursory analysis." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). "So long as Executive Branch officials can identify a statutory ambiguity or silence, [courts] must assume that the law permits them to judge the scope of their own powers and duties—at least so long as their decisions can be said to be 'reasonable.'" *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting) (citing K. Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Constructions*, 30 ARIZ. L. REV. 769, 788-789 (1988)).

Chevron deference, and particularly the "reflexive deference" described by Justice Kennedy, has emboldened agencies to expand the scope of their congressionally delegated power, transforming their agencies into national policymakers rather than administrators of the will of Congress. *See Pereira*, 138 S. Ct. at

2120. Doing away with this reflexive deference and returning the responsibility for interpreting federal statutes to the courts would serve as an important check on the ever-increasing power of federal agencies. It would require a neutral third party, the courts, to independently confirm the authority an agency is claiming to have been delegated, rather than allowing the agency itself to assert such power. The system of checks and balances undermined by *Chevron* would, thus, be restored. "Ambition [would] be made to counteract ambition." James Madison, *The Federalist Papers*, No. 51 (Feb. 8, 1788), The Avalon Project, Yale Law School, Lillian Goldman Law Library, bit.ly/3NidIw1.

More troubling still, *Chevron* has steadily weakened the general presumption that law enforcement should decline to act where the law is silent, and instead, has encouraged executive branch enforcement agencies to actively work to "fill the gaps" in laws wherever their unelected bureaucrats see fit by unilaterally creating new legal requirements outside the legislative process.

The Federal Trade Commission (FTC), for example, has embraced a culture of stretching the limits of its statutory authority to advance the political agenda of the current administration. This is prevalent in areas like anti-trust, where the agency has aggressively challenged a wide range of vertical corporate mergers while waging political battle on big tech companies. *See* Farrington and Greenfield, *Antitrust Scrutiny Intensifies as DOJ and FTC Step Up Enforcement*, White & Case (Jan. 27, 2023), bit.ly/43y7CgT. These

battles are aimed not at protecting consumers or promoting fair competition, but to advance the political agenda of the FTC's current director.

In addition, the FTC has sought to expand its reach into labor regulation by seeking to ban all non-compete agreements across the country, dubiously claiming authority by labeling non-compete agreements as an "unfair method of competition." *See* 88 Fed. Reg. 3482 (Jan. 19, 2023).

Late last year, the FTC announced it will seek to regulate so-called "junk fees," which it loosely defines as any fee charged by any business that falls within FTC's ever-expanding jurisdiction and that is "charged for goods or services that have little or no added value to the consumer." 87 Fed. Reg. 67413 (Nov. 8, 2022). Who decides whether the goods or services provide value to the consumer? Presumably, that's left to the discretion of the FTC director.

Even one of FTC's own former commissioners has voiced concern over its repeated efforts to expand the scope of its power beyond its statutory authority. *Dissenting Statement of Commissioner Noah Joshua Phillips, Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking*, FTC (Aug. 11, 2022), bit.ly/3pWVPeq. The commissioner warned that the FTC is seeking to regulate "common business practices [the FTC] has never before even asserted are illegal" and "to mandate changes across huge swaths of the economy" to "recast the agency as a civil rights enforcer." *Id.*

Examples of other agencies routinely disregarding the limits of their statutorily delegated power abound. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (EPA found to have exceeded its statutory authority under the Clean Air Act); *see also, e.g., Sackett v. EPA*, 143 S. Ct. 1322 (2023) (EPA found to have exceeded its statutory authority under the Clean Water Act).

Clearly, *Chevron* has emboldened more than just the NMFS to unilaterally expand the scope of its power by claiming authority Congress never gave it. It has emboldened all executive branch agencies to do so, and they will not stop until *Chevron* is overruled.

B. The expansion of the administrative state has been accelerated by *Chevron* at great cost

Chevron has also helped to accelerate a dramatic expansion of the administrative state at great cost to the economy, government accountability, and individual liberty. In 1984, the year *Chevron* was decided, there were approximately 316 federal administrative agencies. *The United States Government Manual, 1984-85*, Office of the Federal Register, GS 4.109:984-85 (Jan. 1, 1984), bit.ly/3On1Dr8. Today, there are approximately 514, a more than sixty percent increase in the number of agencies from 1984 to today. *A-Z Index of U.S. Government Departments and Agencies*, USAgov (2023), bit.ly/3PgDYJx.

In 2021 alone, agencies published in the Federal Register more than 75,000 pages of new proposed and final regulations, orders, and notices governing the

conduct of American companies and citizens. Fick *et al*, *Congress Must Rein in President Biden's Regulatory Spending Spree to Tame Inflation*, FGA (Jul. 26, 2022), bit.ly/3j4AP1U. That's roughly 24,000 more pages of rules and regulations than were published in 1984. *Federal Register Pages Published Annually*, LLSDC (2020), bit.ly/3peYBew.

Meanwhile, the Code of Federal Regulations, which codifies all current federal regulations, now spans more than 105 million words across nearly 190,000 pages encompassing more than 1.3 million regulatory mandates and restrictions. Fick *et al*, *Congress Must Rein in President Biden's Regulatory Spending Spree to Tame Inflation*, FGA (Jul. 26, 2022), bit.ly/3j4AP1U.

Creating so much regulation comes at great economic cost. In 2021, Federal taxpayers spent nearly $80 billion to develop, administer, and enforce federal regulations, an amount that has more than tripled since 2000. *Id.* Americans spend more than 10 billion hours every year on regulatory compliance paperwork at an annual cost of more than $140 billion. *Id.* When accounting for compliance costs, economic losses, and other costs, the price tag for federal regulations comes out to a staggering $2 trillion every year. *Id.*

C. Congress has been enervated by *Chevron* and incentivized to punt hard political questions to unaccountable bureaucrats

Another problem with *Chevron* is that it has enervated Congress and incentivized it to pass vague,

open-ended statutes that allow administrative agencies to decide difficult policy questions in place of democratically accountable legislators. While members of Congress benefit from not having to make hard policy choices that could come back to haunt them in November—leaving those choices instead to unelected bureaucrats who they can later blame for unpopular decisions—democratic accountability is lost.

Chevron assumes in part that Congress intentionally embeds ambiguity into statutes to delegate interpretive authority to federal agencies. According to a 2013 survey of 137 congressional staffers drawn from both parties, this assumption is generally true, not in all cases, but in many cases. Gluck & Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation and Canons: Part I*, 65 STAN. L. REV. 901, 996 (2013), bit.ly/3pY7ZUn.

Reaching consensus is difficult, and if the goal for an individual serving in Congress is to be seen as doing something, anything, then it is far better to pass a statute that leaves out the details that cannot be agreed upon, than it is to try to resolve disagreement and come away with nothing. By passing statutes with ambiguous gaps for agencies to fill later, Congressional members can receive credit from their constituencies for taking action while allowing agencies to shoulder the blame for divisive policy choices. *Id*. Overruling *Chevron* would put the onus back on Congress to debate and decide hard political questions, where it belongs.

D. By encouraging the creation of more rules and regulations, *Chevron* has undermined personal liberty

With this abdication of judicial and congressional power has come significant costs to personal liberty. As agencies create more rules and regulations impacting the daily lives of Americans, seizing more of their wealth while increasingly limiting personal freedom, voters are left with no one to hold accountable at the voting booth. With no repercussions, more rules and regulations soon follow.

Meanwhile, agencies, confident that their interpretive decisions will be granted deference, sometimes blindly, often claim authority they know they lack to advance their own personal policy preferences which never could have survived the legislative process, especially in the face of the public backlash their policies would have drawn. *Chevron*, thus, encourages the executive branch "to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016). In the process, unelected agency bureaucrats unilaterally expand the power of their agency, increasingly reaching into the lives of citizens and their businesses in ways Congress never intended.

Liberty is also undermined by the very framework of *Chevron* which assumes legitimacy for authority claimed by an agency even where the court arrives at

the opposite conclusion based on its own interpretation of the statute, so long as the agency's claim is reasonable. As Petitioners eloquently state, "[i]n a liberty-loving Republic, one would expect the rule to be that, when there is doubt about whether the executive has authority over the governed, the tie would go to the citizenry. But *Chevron* quite literally erects the opposite rule for breaking not only ties, but anything that can be fairly deemed ambiguous." *Petitioners' Brief for Cert.*, (Nov. 10, 2022), p. 31, bit.ly/3Om9t46.

Overruling *Chevron* would significantly reduce the myriad costs it has created, restore the Constitution's separation of powers and system of checks and balances, and ultimately, promote liberty.

III. Replacing *Chevron* with a Framework that Restores the Separation of Powers While Promoting Consistency and Predictability in its Application will Solve More Problems than it Creates

A. The supposed costs of abandoning *Chevron* are unfounded

Proponents of *Chevron* generally point to two supposed benefits to *Chevron* deference, but both are specious and neither justify upholding *Chevron*. First, proponents claim there are occasionally cases where *Chevron* deference enables courts to quickly resolve controversies and dispose of the matter. This, they argue, saves resources that might otherwise be wasted on lengthy litigation.

The reality is that *Chevron* has created more costs and promoted far more litigation than it has discouraged. "[T]he uncertainty . . . surrounding the application of *Chevron* and when it applies has forced courts and litigants to expend inordinate resources on arguing over *Chevron* doctrine." Jack M. Beerman, *Article: End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 836 (Feb. 2010). Sure, litigants might be spending fewer resources on arguing the merits of their case, but they are spending far more resources arguing whether *Chevron* should apply, and if it does, the approach the court should take in applying its framework.

Second, proponents often cling to an argument made by the Court in *Chevron* to argue that overruling *Chevron* would undermine democratic accountability as agencies are more accountable to the people than are judges. *See Chevron*, 467 U.S. at 865-66. As the Court argued in *Chevron*, "[w]hile agencies are not directly accountable to the people, the Chief Executive is . . . federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do." *Id.*

But *Chevron* does not save us from unaccountable judges wishing to push their political preferences, nor are most agency bureaucrats subject to any kind of real accountability. Even with *Chevron*, reviewing courts may still impose their policy preferences over those of Congress or the executive branch by simply "brush[ing] off serious challenges to agency decisions based in congressional intent by invoking *Chevron*."

Jack M. Beerman, *Article: End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 836-37 (Feb. 2010). Alternatively, courts can always find a way to avoid applying *Chevron* in a specific case by "deem[ing] the case extraordinary or find[ing] a reason why *Chevron* does not apply under Step Zero." *Id.*

Chevron has, thus, "provided courts with a mechanism for reducing their accountability by hiding their decisions approving agency action behind a veneer of deference." *Id.* at 837. For "close case[s] in which the judges agree with a controversial agency action, rather than approve the action on the merits, the court can employ a deferential version of *Chevron* and plead constraint." *Ibid.* The supposed costs of overruling Chevron are unfounded.

B. *Chevron* takes the duty to interpret statutes away from competent courts and hands it to less capable, biased bureaucrats leading to inconsistent interpretations that change with each new administration

Courts are competent to interpret statutes and possess the unique expertise to do so, even when the statute is poorly written. And when it comes to interpreting the meaning of a statute based on congressional intent, agencies do not possess a special expertise that the judiciary lacks. In fact, the converse is true. Courts are much better situated to interpret statutes because they do so "guided 'by strict rules and

precedents which serve to define and point out their duty in every particular case that comes before them.'" *Perez*, 575 U.S. at 120 (Thomas, J., concurring) (citing *The Federalist* No. 78, at 471 (A. Hamilton)). Under the rule of *stare decisis* and centuries-old principles of statutory interpretation which govern the courts' decision-making process, its interpretations prove far more consistent than those of the executive branch which can shift wildly with every new administration. *See Id.* "When one administration departs and the next arrives, a broad reading of *Chevron* frees new officials to undo the ambitious work of their predecessors and proceed in the opposite direction with equal zeal." *Buffington*, 143 S. Ct. at 20.

The ongoing saga involving short-term, limited-duration insurance (STLDI), often referred to as, "short-term health plans," offers an illustrative example of how agency interpretation of ambiguity in a particular statute can change dramatically between administrations causing significant confusion and costs for citizens and industry.

For decades, short-term health plans were a valuable and effective health insurance option for countless individuals that offered a lower-cost option that fit the needs of certain individuals better than did the average plan in the individual market. *See* 62 Fed. Reg. 16894 (Apr. 8, 1997); *see also* Michael Greibrok, *The Biden Administration's Action on Short-Term Health Plans Will Only Harm Americans*, FGA (Jul. 13, 2023), bit.ly/3pPpDd0. However, worried that the cost savings of short-term health plans might under-

mine the success of ObamaCare, the Obama administration issued a new rule reducing the length of time individuals could purchase these plans, changing the way these plans had been defined for nearly 20 years. *See* 81 FR 38019 (Jul. 10, 2016). Then, under President Trump, the agencies reversed the action they had taken during the Obama administration and increased the option for short-term plans from three months to three years. *See* 83 FR 38212 (Aug. 3, 2018). Now, with the Biden administration in power, these agencies have once again taken up this issue, and have reversed course yet again, proposing a new rule to reduce the length of short-term health plans. *See* 88 Fed. Reg. 44596 (Jul. 12, 2023).

Another recent well-known example of an agency wildly shifting its interpretation of statutory authority between administrations is the Department of Education's actions surrounding student loan cancelation. Under the Trump administration, the Department of Education released a legal memo finding the executive branch lacked authority to unilaterally cancel student loan debt. *Memorandum to Betsy DeVos Secretary of Education, Re: Student Loan Principal Balance Cancelation, Compromise, Discharge, and Forgiveness Authority, U.S. Department of Education, Office of the General Counsel* (Jan. 12, 2021), bit.ly/46TpqWK. Yet, after President Biden took office, the same Department reversed course, releasing a new legal memo reaching the opposite conclusion. *The Secretary's Legal Authority for Broad-Based Debt Cancellation Under the Higher Education Relief Opportunities for Students Act of 2003*, U.S. Department of Education, Office of the General Counsel (Apr. 8,

2021), bit.ly/3OlePg5; *see also Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most, The White House Briefing Room* (Aug. 24, 2022), bit.ly/44O9Z0c.

While the Court was ultimately able to resolve this issue under the Major Questions Doctrine, most of the challenged overreach efforts agencies seek to justify by claiming new authority they suddenly discover within ambiguous statutory language is generally not going to rise to the economic or political level needed to trigger the Major Question Doctrine. *See Biden v. Nebraska*, 600 U.S. __ (2023). To stop most unconstitutional agency overreach the Court must overrule *Chevron*.

C. *Chevron's* confusing framework raises costs while promoting inconsistency and unpredictability in its application

Much of the problem lies in the *Chevron* framework itself which involves multiple analytical steps that courts interpret and apply inconsistently. This makes *Chevron* deference less efficient, consistent, and predictable than pure statutory interpretation. *Chevron* rarely allows for a simple or predictable analysis as it involves three steps (zero, one and two) and at each step, there is room for courts to trip, reaching different results. Given that "different judges have wildly different conceptions of whether a particular statute is clear or ambiguous," consistency and predictability is impossible even at step one of the analysis. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2152 (2016). At the end

of the day, *Chevron* provides less predictability than simply having courts interpret statutes in the first instance.

Lastly, overruling *Chevron* would also make judicial review much more straight forward, simplifying litigation and reducing costs. "Review of agency statutory interpretation would be much simpler if the focus was on the meaning of the statute rather than on whether and how *Chevron* applies to the particular case." Jack M. Beerman, *Article: End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 787 (Feb. 2010).

Replacing *Chevron* with a framework that returns the role of interpreting federal statutes to the judiciary would not only restore the separation of powers and the province of the judiciary, but it would also limit the myriad problems *Chevron* has fostered including inconsistency, unaccountability, and "reflexive deference."

CONCLUSION

For these reasons and more, this Court should overrule *Chevron*.

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