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.

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

## BRIEF OF *AMICUS CURIAE* THIRD PARTY PAYMENT PROCESSORS ASSOCIATION SUPPORTING PETITIONERS


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## QUESTION PRESENTED

Whether the Court should overrule the *Chevron* deference doctrine, *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus Curiae* the Third Party Payment Processors Association ("TPPPA") is a national, not-for-profit association of payment processors and their banks. *Amicus* TPPPA's mission is to help its members operate efficiently and comply with applicable regulations by developing best practices for third-party payment processing.

*Amicus* TPPPA was formed in 2013, largely to facilitate dialogue between *Amicus* TPPPA's members and regulatory agencies, including the Consumer Financial Protection Bureau ("CFPB"). *Amicus* TPPPA has successfully worked with the CFPB and other federal agencies to develop the TPPPA Compliance Management System ("CMS"), a best-practices control framework for payment processors and their banks. The CMS was designed upon the foundation of the CFPB's and the Department of Justice's guidance on Compliance Management Systems, further incorporating Third-Party Risk Management guidance from Federal Banking Regulators, "Culture of Compliance" guidance, and other Financial Crimes Enforcement Network guidance. The end result is a risk-based, documented, compliance-management system that

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[1] Under Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this amicus brief.

addresses Third-Party Risk Management, Consumer Protection, and Bank Secrecy/Anti-Money Laundering principles. The CMS aids *Amicus* TPPPA's members with regulatory compliance for all payment methods with these risk-based, documented compliance management system controls that are tailored to the members' distinct payment-processing programs and their related requirements and responsibilities. In the aggregate, *Amicus* TPPPA's members process over several billions of dollars in payments each year. *Amicus* TPPPA regularly engages in the administrative-rule-making process by responding to Requests for Comments on matters that impact its members. Finally, *Amicus* TPPPA routinely files amicus briefs in cases of importance to its members, including this one. *See, e.g.*, Br. of TPPPA as Amicus Curiae Supporting Cross-Petitioners, *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, 143 S. Ct. 978 (Feb. 27, 2023) (mem.) (No.22-448) (*"CFPB v. CFSAA*"); En Banc Br. of TPPPA as Amicus Curiae in Support of Appellee, *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 17 F.4th 1016 (11th Cir. 2021) (No. 19-14434); Br. of Amicus Curiae by TPPPA in Support of Defendants' Motion to Dismiss, *CFPB v. Intercept Corp.*, No. 3:16-cv-144, 2017 WL 3774379 (D.N.D. Mar. 17, 2017).

*Amicus* TPPPA has experienced the harms associated with agencies relying upon the deference doctrine created by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). For instance, *Chevron* deference encouraged the

CFPB to promulgate its Payday Lending Rule, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. pt. 1041), which is currently the subject of a challenge before this Court, *CFPB v. CFSAA*, No.22-448 (U.S.). Under that rule, a payment processor may not attempt more than two withdrawals on a consumer's account in connection with certain types of consumer debts when those prior attempts failed for insufficient funds, although the consumer had previously authorized such withdrawals consistent with existing regulations. 82 Fed. Reg. at 54,472; *see* Br. of *Amicus Curiae* TPPPA Supporting Respondents, *CFPB v. CFSAA*, at 7–14, No.22-448 (U.S. July 10, 2023) ("TPPPA Amicus Br."). The CFPB promulgated this rule ostensibly under its statutory authority to prohibit "unfair" or "abusive" acts or practices, 12 U.S.C. § 5531; *see* 82 Fed. Reg. at 54,872, and the Fifth Circuit determined that the statutory terms "unfair" and "abusive" reasonably cover withdrawal attempts that a consumer has expressly authorized, without assessing whether the CFPB had offered the best reading of its enabling statute, *Cmty. Fin. Servs. Assoc. of Am., Ltd. v. CFPB*, 51 F.4th 616, 627–28 (5th Cir. 2021). As *Amicus* TPPPA detailed in its amicus brief in *CFPB v. CFSAA*, No.22-448 (U.S.), this rule, which is untethered from the statutory text, imposes significant costs on payment processors and consumers more broadly that Congress never intended. TPPPA Amicus Br.7–16.

## INTRODUCTION AND SUMMARY OF ARGUMENT

*Chevron* has fundamentally transformed how federal agencies approach their duties, in a manner that a bare quorum of this Court never imagined when it decided this then-routine administrative-law case. Given agencies' knowledge that, even if their targets can gather the significant resources necessary to challenge the agencies' regulations in court, the courts will award the agencies with a powerful thumb on the adjudicative scales, many agencies no longer focus their efforts on enforcing Congress' will. Rather, they now often first set their own policy agenda and then search for ambiguities in the statutes at issue, which these agencies then exploit to achieve their own predetermined bureaucratic goals. So, while this Court conceptualized *Chevron*'s deference doctrine as respecting Congress' supposed "implicit" delegations to agencies, the doctrine has, instead, created the opposite result, emboldening Executive Branch lawmaking without regard to Congress' objectives.

There is a better way. Numerous States have rejected deference to agencies' interpretations of state legislative enactments, with no adverse results. These States' experience shows that courts may decline to defer to agencies' interpretations of statutes without undermining the important role that agencies can play in modern governance. And, in the process of ending these deference regimes, these

States have strengthened the rule of law and fostered democratic accountability within their borders.

This Court should overturn *Chevron* and end the pernicious, harmful practice of judicial deference to agency interpretations of statutory text.

## ARGUMENT

### I. *Chevron* Deference Fundamentally Changes Agency Incentives From Advancing Congressional Directives To Advancing The Agency's Own Policies

Although this Court decided *Chevron* without much fanfare, the doctrine for which that decision now stands has since become the fundamental fulcrum in administrative law. *Chevron* deference has incentivized agencies not to execute congressional directives embodied in the statutory text, but rather to follow the agency's own policy preferences, to the detriment of the rule of law.

Under what has become known as *Chevron*'s two-step framework, a federal court must defer to an agency's reasonable interpretation of a statute that it implements, where that statute is ambiguous. *Chevron*, 467 U.S. at 843. So, at the first step, a court must determine whether the statute is ambiguous, asking whether "Congress has directly spoken to the precise question at issue" in the relevant statute. *Id.* at 843 & n.9. If the court concludes that the statute

is "silent or ambiguous," then it proceeds to step two and asks whether the agency's proffered interpretation is a "permissible construction." *Id.* at 843. The court must give "deference to [the] administrative interpretation[ ]" at this step, *id.* at 844, even if the court does not believe that the agency's interpretation is the best reading of the statutory text, *see Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005); *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). This Court justified this approach as respecting Congress' supposed "implicit" delegations of legislative authority, preventing courts from "substitut[ing their] own construction of a statute for a reasonable interpretation made by . . . the agency." *Chevron*, 467 U.S. at 844.

When this Court decided *Chevron* in 1984, however, no one appears to have understood the case as creating a broadly encompassing deferential review framework. *Chevron* was "considered routine by those who made it" and was "little noticed when it was decided." Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 Admin. L. Rev. 253, 257 (2014); *see also Buffington v. McDonough*, 143 S. Ct. 14, 18 (2022) (mem.) (Gorsuch, J., dissenting from the denial of certiorari). When *Chevron* was briefed and argued, "no one thought *Chevron* presented any question about the court-agency relationship in resolving questions of interpretation." Merrill, *supra*, at 257. So, "[i]f

*Chevron* amounted to a revolution, it seems almost everyone missed it. The decision . . . sparked not a single word in concurrence or dissent," and "[b]y many estimations, *Chevron* seemed 'destined to obscurity.'" *Buffington*, 143 S. Ct. at 18 (Gorsuch, J., dissenting from the denial of certiorari) (citation omitted). And just a few years after this Court decided *Chevron*, this Court explained that deference to an agency was inappropriate when the issue was a "pure question of statutory construction for the courts to decide," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987), which is contrary to how *Chevron* subsequently metastasized, *see, e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (under *Chevron*, "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency"); *accord Buffington*, 143 S. Ct. at 18 (Gorsuch, J., dissenting from the denial of certiorari) ("In truth, it took years for *Chevron* to morph into something truly revolutionary.").

Over the past four decades, agencies have seized on what has become *Chevron*'s deferential regime to undermine the basic tenet of administrative law: that federal agencies execute the law enacted by Congress, rather than the policy preferences of unelected bureaucrats. The requirement that federal courts accept any "permissible" interpretation of a congressional enactment provides agencies with a "strong incentive" to "make statutory language seem more complicated than it actually is," to achieve their own policy goals. *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d

1029, 1050 (6th Cir. 2018) (Kethledge, J., concurring); *see* Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 837 (2010). Precisely because *Chevron* requires courts to defer to an agency's construction of an ambiguous or silent statute, "*Chevron* deference may inspire agencies to adopt adventurous interpretations" to pursue their own ends, "far from any good faith reading of Congress's intent." Beerman, *supra*, at 837; *see also* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 Admin. L. Rev. 673, 715 (2007) (*Chevron* gives agencies "every incentive to argue that their organic statutes are vague or ambiguous"). So long as the agency's motivated reasoning could result in a court concluding that the statute is ambiguous, the agency may "push [its] own policy views against a discernible, but not absolutely clear, congressional intent." Beerman, *supra*, at 784. After all, the agency will know (or hope) that courts may "brush off serious challenges to agency decisions by invoking *Chevron* without asking whether the agency is thwarting" Congress' "imperfectly expressed" intent. *Id.*

*Chevron*'s *any* "permissible construction of the statute," *City of Arlington*, 569 U.S. at 307, deference scheme has, accordingly, transformed the way that many federal agencies approach their jobs. The *Chevron* doctrine allows agencies to prioritize their "own interests, their own constituencies, and their

own policy goals," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., concurring), over those of Congress because, under *Chevron*, agencies may effectively "choose their policy first and then later seek to defend its legality" by discovering ambiguities in the statutes that they administer, David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 Harv. Env't L. Rev. 1, 2 (2010). In this way, *Chevron* has ushered in the modern approach to regulation: rather than seeking to enforce congressional directives, agencies now "often think they can take a particular action unless it is *clearly forbidden*." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2151 (2016) (book review); *see* Foote, *supra*, at 715.

With *Chevron* to rely upon, federal agencies have internalized an "extremely aggressive executive branch philosophy of pushing the legal envelope." Kavanaugh, *supra*, at 2152. Under the "safe harbor" of *Chevron* step two, agencies have "increasingly ignored the boundaries of their delegated authority," asserting "broad claims of jurisdiction into areas long thought to be outside their jurisdiction." Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*based Delegations*, 20 Cardozo L. Rev. 989, 996 (1999). Often, and with increasing frequency, these agencies have stretched "ambiguous" statutory terms far past their ordinary and accepted meaning.

The CFPB's Payday Lending Rule, noted above, *supra* pp.2–3, is a recent and particularly egregious

example. In defending the Payday Lending Rule before the Fifth Circuit, the CFPB succeeded in arguing that the statutory terms "unfair" and "abusive" acts or practices, 12 U.S.C. § 5531, "reasonably" encompass a payment processor's account withdrawal attempts *that a consumer has expressly authorized*, *see* Br. of Appellees at 13–14, *Cmty. Fin. Servs. Assoc. of Am., Ltd. v. CFPB*, 51 F.4th 616 (5th Cir. 2021) (No. 21-50826), 2021 WL 6135329. Relying on *Chevron*, the CFPB seized upon undefined, vague statutory terms to advance its own agenda against certain lending and payment-processing practices, *see* TPPPA Amicus Br.8–14, without needing to show that its actions complied with the best reading of its enabling statute, *see Brand X*, 545 U.S. at 983; *see also Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). Worse still, the CFPB knew when drafting the Payday Lending Rule that, if regulated industry challenged the agency over the rule in court—despite *Chevron* stacking the deck against such challengers—this is how the course of judicial review may well play out. The courts would unfairly "precommit[ ]" to the agency's "judgments about the law," contrary to basic notions of due process. Philip Hamburger, Chevron *Bias,* 84 Geo. Wash. L. Rev. 1187, 1212 (2016); *see also Egan v. Del. River Port Auth.*, 851 F.3d 263, 281 (3d Cir. 2017) (Jordan, J., concurring). And because of the cover that *Chevron* provided, the CFPB was able to

choose the Operation-Chokepoint-like[2] regulatory approach in the Payday Lending Rule—an approach where the CFPB tried to put payday lenders out of business by making it prohibitively expensive for banks and payment processors to continue to work with them. *See* TPPPA Amicus Br.8, 12–14.

This post-*Chevron* executive "aggressiveness" undermines the separation of powers, *see* Kavanaugh, *supra*, at 2152, "effectively sever[ing] the tie between federal law and administrative policy" and encouraging federal agencies to usurp Congress' role, Tatel, *supra*, at 2. Whereas Article I vests "[a]ll legislative Powers herein granted" in Congress, U.S. Const. art. I, § 1, while Article II vests the President with the duty to "take Care that the Laws be faithfully executed," *id.*, art. II, § 3, under *Chevron*, it is agencies—not Congress—that "prescribe new rules of general applicability," premised on the agencies' "own preferences about optimal public policy," *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). Thus, *Chevron*'s deference doctrine allows "executive bureaucracies to swallow huge

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[2] *See generally* Frank Keating, *Operation Choke Point Reveals True Injustices Of Obama's Justice Department, The Hill* (Nov. 7, 2018), https://thehill.com/blogs/congress-blog/politics/415478-operation-choke-point-reveals-true-injustices-of-obamas-justice/ (all websites last visited July 23, 2023) (describing program where federal officials would "pressure[ ] banks to close the accounts of businesses solely because they were ideologically opposed to their existence").

amounts of core . . . legislative power," contrary to the Constitution's basic division of labor between Congress and the Executive. *Id.*

## II. The Experience Of Numerous States That Have Rejected Judicial Deference To Agency Interpretation Of Statutes Shows That Taking This Approach Advances The Rule Of Law, Without Any Adverse Consequences

### A. At Least Seventeen States Have Rejected The Practice Of Deferring To Agency Interpretations Of Law

In recent decades, at least 17 States have rejected *Chevron*-style deference through constitutional amendment, state statute, or state-court decisions, restoring their state courts' authority to interpret state statutes administered by executive agencies independently.[3] The 17 States that have rejected *Chevron* or ended their *Chevron*-like experiments are Arizona, Arkansas, Delaware, Florida, Kansas,

[3] *See generally* Luke Phillips, *Chevron in the States? Not So Much*, 89 Miss. L.J. 313 (2020); Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines* (The C. Boyden Gray Center for the Study of the Administrative State, CSAS Working Paper 21-23), available at https://administrativestate.gmu.edu/wp-content/uploads/2021/04/Ortner-the-End-of-Deference.pdf.

Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, Ohio, Tennessee, Utah, Virginia, Wisconsin, and Wyoming. *See, e.g.*, Jeffrey S. Sutton & John L. Rockenbach, *Respect and Deference in American Administrative Law*, 102 B.U. L. Rev. 1937, 1943 (2022).[4] These States represent the growing trend of "states eliminat[ing] deference to state agencies over the meaning of state law by statute," as well as by "constitutional initiative" and state-court decision. *See id.* at 1942–43.

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[4] *See* Ariz. Rev. Stat. § 12-910(F) (2018); *Myers v. Yamato Kogyo Co., Ltd.*, 597 S.W.3d 613, 617 (Ark. 2020); *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999); Fla. Const. art. V, § 21; *Douglas v. Ad Astra Info. Sys., LLC*, 293 P.3d 723, 728 (Kan. 2013); *Bowers v. Firefighters' Ret. Sys.*, 6 So. 3d 173, 176 (La. 2009); *In re Complaint of Rovas Against SBC Mich.*, 754 N.W.2d 259, 271–72 (Mich. 2008); *King v. Mississippi Mil. Dep't*, 245 So. 3d 404, 408 (Miss. 2018); *Burlington N. R.R. v. Dir. of Rev.*, 785 S.W.2d 272, 273 (Mo. 1990); *Aline Bae Tanning, Inc. v. Nebraska Dep't of Rev.*, 880 N.W.2d 61, 65 (Neb. 2016); *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs*, 821 S.E.2d 376, 379 (N.C. 2018); *TWISM Enters., LLC v. State Bd. of Registration for Pro. Engineers and Surveyors*, ___N.E.3d___, 2022 WL 17981386, at *7 (Ohio Dec. 29, 2022); Tenn. Code § 4-5-326 (2022); *Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n*, 322 P.3d 712, 717 (Utah 2014); *Nielson Co. (US), LLC v. Cnty. Bd. Of Arlington Cnty.*, 767 S.E.2d 1, 5–6 (Va. 2015); *Tetra Tech EC, Inc. v. Wisconsin Dep't of Rev.*, 914 N.W.2d 21 (Wis. 2018); *Camacho v. State ex rel. Dep't of Workforce Servs., Workers Comp. Div.*, 448 P.3d 834, 840–41 (Wyo. 2019).

Fourteen of these States have rejected *Chevron*-like deference by judicial decision, with their state courts returning judicial review of an agency's legal determinations to the *de novo* standard. In many of those States, courts had previously adopted some form of deference in cases involving agency interpretations of law, *see, e.g.*, *Tetra Tech*, 914 N.W.2d at 31 (lead op. of Kelly, J.), before returning to *de novo* review of such questions of law, *id.* at 54; *see also Myers*, 597 S.W.3d at 617 (same); *Burlington*, 785 S.W.2d at 273 ("unrestricted, independent judgment" for courts).

Wisconsin's judicial decision ending that State's deference regime is a notable example of this approach. *Tetra Tech*, 914 N.W.2d 21. Prior to the Wisconsin Supreme Court's decision in *Tetra Tech*, state courts in Wisconsin relied upon a three-tiered deference framework when reviewing an agency's interpretation of law. *See id.* at 31 (lead op. of Kelly, J.) (naming the deference levels as "great weight deference," "due weight deference," and "no deference at all"). This deference regime "allowed the executive branch of government to authoritatively decide questions of law in specific cases brought to [the] courts for resolution." *Id.* at 40. Rejecting deference to agency interpretations of law, the Wisconsin Supreme Court announced that Wisconsin courts will henceforth "review an administrative agency's conclusions of law" under a "de novo" standard. *Id.* at 54. The court's lead opinion explained the rejection of the prior deference regime on multiple, powerful

grounds: "[i]t does not respect the separation of powers, gives insufficient consideration to the parties' due process interest in a neutral and independent judiciary, and risks perpetuating erroneous declarations of the law." *Id.* (citations omitted). Further, the court's lead opinion noted that the court "created [the] deference doctrine *ex nihilo*," and so had the power to end it as well. *Id.* at 55. The Wisconsin Legislature subsequently codified *Tetra Tech*'s no-deference rule via statute, providing that "[n]o agency may seek deference in any proceeding based on the agency's interpretation of any law." Wis. Stat. § 227.10(2g) (2018).

Arizona and Tennessee have banned such deference to agency interpretations by statute. In 2018, Arizona legislatively ended judicial deference to agency determinations of law, now mandating that Arizona courts "shall decide all questions of law, including the interpretations of a constitutional or statutory provision or rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency," and likewise "shall decide all questions of fact without deference to any previous determination that may have been made on the question by the agency." Ariz. Rev. Stat. § 12-910(F). That ended the Arizona courts' prior practice of "defer[ring] to an agency's reasonable interpretations of its own regulations" under *Chevron*, *see Pima Cnty. v. Pima Cnty. Law Enf't Merit Sys. Council,* 119 P.3d 1027, 1031 (Ariz. 2005) (citing *Chevron,* 467 U.S. at 844), with the

Arizona Supreme Court now "interpret[ing] applicable statutes without deference to any previous [agency] determination," *Roberts v. State,* 512 P.3d 1007, 1018 (Ariz. 2022) (citing Ariz. Rev. Stat. § 12-910(F)). Tennessee followed suit, abolishing judicial deference to state agencies' interpretations of law via statute in 2022. *See* Tenn. Code § 4-5-326. Tennessee law now provides that courts "shall not defer to a state agency's interpretation of the statute or rule and shall interpret the statute or rule *de novo*." *Id.* The law further instructs courts to first apply "all customary tools of interpretation" and then "resolve any remaining ambiguity *against* increased agency authority." *Id.* (emphasis added). The Tennessee Court of Appeals has noted that, after this statutory change, the "standard of review is *de novo* with no presumption of correctness of the administrative agency's statutory interpretation." *Sevier Cnty. v. Tenn. State Bd. of Equalization*, 2023 WL 3298375, at *3 (Tenn. Ct. App. May 8, 2023) (citation omitted).

Florida, for its part, banned judicial deference to agency interpretations of law in 2018 by constitutional amendment. Fla. Const. art. V, § 21. Prior to 2018, Florida courts "defer[red]" to agency interpretations of law unless those interpretations were "clearly erroneous." *Verizon Fla. Inc. v. Jacobs*, 810 So.2d 906, 908 (Fla. 2002). After decades of this *Chevron*-like regime, the people of Florida responded, amending their state constitution to require that, "[i]n interpreting a state statute or rule, a state court . . . may not defer to an administrative agency's

interpretation of such statute or rule, and must instead interpret such statute or rule de novo." Fla. Const. art. V, § 21. This constitutional amendment received broad popular support, capturing nearly 62% of the vote. Fla. Amendment 6, BallotPedia.[5]

### B. The States That Have Ended This Practice Have Strengthened The Rule Of Law Without Disrupting The Essential Functions Of Their Agencies

1. The States that have ended their *Chevron*-like practice of deferring to agency interpretations of law bolstered the rule of law that is the foundation of our Nation's republican forms of government. U.S. Const. art. IV, § 4.

Multiple States have recognized that in ending their *Chevron*-like regimes, they have restored the proper balance between the judicial and executive branches—to the benefit of the rule of law. The Wisconsin Supreme Court explained that eliminating deference promotes the rule of law by preventing the "executive branch [from] authoritatively decid[ing] questions of law." *Tetra Tech*, 914 N.W.2d at 40 (lead op. of Kelly, J.). As the *Tetra Tech* lead opinion explained, "patrolling the borders between the

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[5] Available at https://ballotpedia.org/Florida_Amendment_6,_Marsy%27s_Law_Crime_Victims_Rights,_Judicial_Retirement_Age,_and_Judicial_Interpretation_of_Laws_and_Rules_Amendment_(2018).

branches" is not just a matter of "efficient and effective government": the separation of powers "provides structural protection against depredations on our liberties." *Id.* at 41; *accord Myers,* 597 S.W.3d at 617 ("By giving deference to agencies' interpretations of statutes, the court effectively transfers the job of interpreting the law from the judiciary to the executive. This we cannot do."). Or, as the Ohio Supreme Court articulated, deference "turns over to one party the conclusive authority to say what the law means," "flying in the face" of the core separation-of-powers principle that "no man ought to be a judge in his own case." *TWISM*, ___N.E.3d___, 2022 WL 17981386, at *6 (citation omitted). And similar concerns animated the Mississippi high court's decision to "abandon the old standard of review giving deference to agency interpretations of statutes." *See King*, 245 So. 3d at 408; *accord Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 379 P.3d 1270, 1275 (Utah 2016) ("[I]t makes little sense for us to defer to the agency's interpretation of law of its own making. If we did so we would place the power to write the law and the power to authoritatively interpret it in the same hands."). By rejecting *Chevron*-like deference, these States have strengthened the rule of law by preserving "what it means to be a court" in a tripartite system of government. *Tetra Tech*, 914 N.W.2d at 43 (lead op. of Kelly, J.); *see Rovas*, 754 N.W.2d at 272 ("[T]he unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with the

separation of powers . . . by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government.").

States that have abandoned *Chevron*-like deference regimes have also helped restore democratic accountability. As the state courts have noted, legislatures remain free (and are now perhaps encouraged) to write more precise, less ambiguous laws. *See TWISM*, ___N.E.3d___, 2022 WL 17981386, at *7 (noting that "one might think it more likely that an ambiguous law is the result of poorly considered or hasty legislative action rather than a deliberate policy choice to surrender power to an agency"). Legislatures may also ratify an agency's prior interpretation of a statute. *See Silver v. Pueblo Del Sol Water Co.*, 423 P.3d 348, 356 (Ariz. 2018) ("The amendment prohibits courts from deferring to agencies' interpretations of law. The amendment does not, however prevent the *legislature* from adopting an agency's interpretation of a term of art."). That is how it should be: legislatures are accountable to the people and should be the ones that write the laws. *See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) ("If Congress could hand off all its legislative powers to unelected agency officials, it would dash the whole scheme of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives." (citation omitted)).

Several States that have eliminated *Chevron*-like deference have also noted the rule-of-law benefits associated with more consistent standards for reviewing agency action. As the Michigan Supreme Court explained, the "vagaries of *Chevron* jurisprudence do not provide a clear road map for courts in this state to apply when reviewing administrative decisions." *Rovas*, 754 N.W.2d at 271–72; *see also* Beerman, *supra*, at 783 ("Currently, the application of the *Chevron* doctrine is highly unpredictable, and the decision itself is cited for opposing propositions."). In doing away with these "difficult to apply" deference doctrines, *Rovas*, 754 N.W.2d at 271, these States have adopted review regimes better suited to producing consistent results in the administrative-law context, thereby promoting legal stability, *see King*, 245 So.3d at 408 ("abandon[ing] the old standard of giving deference to agency interpretations of statutes" as "vague and contradictory"); *Ellis-Hall Consultants*, 379 P.3d at 1273 (noting that, prior to abandoning its deference doctrine, Utah's "caselaw was riddled with tension on the question of the standard of review that applies to judicial review of agency action"); *Tetra Tech*, 914 N.W.2d at 54 (lead op. of Kelly, J.) ("We are leaving our deference doctrine behind because it is unsound in principle . . . and risks perpetuating erroneous declarations of the law." (citation omitted)).

2. In eliminating the practice of deferring to agency interpretations on questions of law, these States have helped advance the essential functions of

their agencies: enforcing the will of the state legislature that gave the agencies their authority.

The States that have rejected *Chevron*-like deference still have robust administrative states, which now must finally promulgate regulatory regimes within their statutory mandates. While some States abolished *Chevron*-like deference relatively recently, *see, e.g.*, *TWISM*, __ N.E.3d ___, 2022 WL 17981386, at *7; *Myers*, 597 S.W.3d at 617; *Camacho v. State ex rel. Dep't of Workforce Servs., Workers' Comp. Div.*, 448 P.3d 834, 840–41 (Wyo. 2019), others have been functioning without a mandatory deference regime for longer, *see, e.g.*, *Burlington*, 785 S.W.2d at 273; *Pub. Water Supply Co.*, 735 A.2d at 382; *Rovas*, 754 N.W.2d at 271–72, with no evidence of the weakening of their administrative regimes or of any popular effort in these States to enact legislation requiring courts to apply a *Chevron*-like standard of review, *see* Ilya Somin, The Volokh Conspiracy, *Chevron Matters—But Not as Much as You Might Think*, Reason.com (May 1, 2023).[6] Indeed, today, those States without an agency-deference regime continue to regularly "create[ ] rulemaking authority" of various breadths for their administrative agencies "to pursue the legislature's policy" via regulation. Leslie Corbly & Michael R. Davis, *Rejecting Judicial Deference: Restoring The Judicial And Legislative*

[6] Available at https://reason.com/volokh/2023/05/01/chevron-matters-but-not-as-much-as-you-might-think/.

*Departments To Their Proper Role* 12–19, Working Paper: State Judicial Deference Research Roundtable (October 2021) (surveying legislative enactments of new rulemaking authority for agencies from no-agency-deference States in 2020).[7]

A comparison study between Michigan and Ohio suggests that the elimination of agency deference does not dictate "the size and scope" of regulatory agencies that the state legislature may create. Alison Somin, *et al.*, *The Effects Of Judicial Deference On The Size And Scope Of The Regulatory State: Michigan v. Ohio, A Comparison* 1, 7–9, Working Paper, State Judicial Deference Research Roundtable (October 2021) (explaining that Michigan and Ohio are "culturally, economically and demographically similar Midwestern states").[8] Comparing the status of occupational licensing boards in Ohio (before it had ended its agency-deference regime) and in Michigan (after it had ended its agency-deference regime), the study concluded that "judicial deference does not appear to have a discernable impact on the balance of regulatory changes in occupational regulatory agencies." *Id.* at 7–8. Specifically, the study found no significant difference between Michigan and Ohio in

[7] Available at https://pacificlegal.org/wp-content/uploads/2022/01/Rejecting-Judicial-Deference-Restoring-the-Judicial-and-Legislative-Departments-to-Their-Proper-Role.pdf.

[8] Available at https://pacificlegal.org/wp-content/uploads/2022/10/StateJudDefPaperforPostingtoWebsite.pdf.

"employment numbers, revenue, expenses, administrative code changes, and enforcement actions" of their occupational-licensing administrative agencies. *Id.* at 6. That finding suggests that, regardless of the State's agency-deference regime, the legislature may select the "size and scope of regulatory agencies" according to the policies it considers best, so long as it does so with sufficiently clear statutory text. *See id.* at 9; *accord* James Broughel & Patrick McLaughlin, *Quantifying Regulation In US States With State Regdata 2.0*, Mercatus Ctr. (Aug. 31, 2020) (showing that, in 2020, two years after Wisconsin abandoned judicial deference, it remained one of the most heavily regulated States in the United States).[9]

The experience of Arizona, which, as explained above, ended its deference regime via statute in 2018, *see supra* pp.15–16, provides a helpful case study of the continued role of state administrative agencies after the adoption of a no-deference regime. Although Arizona has only recently departed from its deference regime, early evidence shows that its agencies may continue to take regulatory action implementing the policy goals embodied in the state statutes that they administer without undue interference. One study into the early effects of Arizona's deference-ending statute found ten opinions from the Arizona appellate

[9] Available at https://www.mercatus.org/research/data-visualizations/quantifying-regulation-us-states-state-regdata-20.

courts, including two from the Arizona Supreme Court, that cited and applied the new law. Jonatahan Riches, *Deference Doctrines And A State Legislative Solution* 6–7, n.20, Working Paper, State Judicial Deference Research Roundtable (October 2021).[10] Only one of those decisions ruled against the agency,[11] after applying *de novo* review to the agency's interpretation of law, concluding that the agency's particular regulation fell outside of its statutory authority "to adopt rules" and thus "contravene[d]" the State's statutes. *Saguaro Healing*, 470 P.3d at 639; *see also* Riches, *supra* at 8 (also discussing *Maricopa Cnty.*, 490 P.3d at 388, where the court noted that agency guidelines are neither mandatory

[10] Available at https://pacificlegal.org/wp-content/uploads/2022/01/Deference-Doctrines-and-a-State-Legislative-Solution.pdf.

[11] *Compare Saguaro Healing LLC v. State*, 470 P.3d 636 (Ariz. 2020), *with Simms v. Ariz. Racing Comm'n*, 482 P.3d 1049 (Ariz. Ct. App. 2021); *Maricopa Cnty. v. Viola*, No. 1 CA-SA 21-0023, 2021 WL 2005913 (Ariz. Ct. App. May 20, 2021); *Gelety v. Ariz. Med. Bd.*, No. 1 CA-CV 20-0387, 2021 WL 734735 (Ariz. Ct. App. Feb. 25, 2021); *Heritage At Carefree LLC v. Ariz. Dep't of Health Servs.*, 471 P.3d 658 (Ariz. Ct. App. 2020); *Carter Oil Co., Inc. v. Ariz. Dep't of Rev.*, 460 P.3d 808 (Ariz. Ct. App. 2020); *JH2K I LLC v. Ariz. Dep't of Health Servs.*, 438 P.3d 676 (Ariz. Ct. App. 2019); *Ruben v. Ariz. Med. Bd.*, No. 1 CA-CV 18-0079, 2019 WL 471031 (Ariz. Ct. App. Feb. 7, 2019); *Waltz Healing Ctr., Inc v. Ariz. Dep't of Health Servs.*, 433 P.3d 14 (Ariz. Ct. App. 2018); *Silver*, 423 P.3d 348.

nor subject to deference).[12] Further, three of those ten decisions considered the Arizona Department of Health Service's implementation of the relatively recent Arizona Medical Marijuana Act ("AMMA"), passed by voter initiative in 2010, which decisions together show that this state agency may take effective regulatory action so long as it is consistent with the policy goals embedded in the text of the AMMA. *Compare JH2K I LLC*, 438 P.3d at 310–12 (upholding the agency's regulation regarding medical marijuana dispensary registration certificates, after *de novo* review, as consistent with the AMMA), *and Waltz Healing Ctr.*, 433 P.3d at 17–19 (similar), *with Saguaro Healing*, 470 P.3d at 639 (reversing agency's application of regulation governing medical marijuana dispensary registration certificates, after *de novo* review, where the application exceeded the bounds of the AMMA).

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[12] Arizona's experience since this study is in accord. In *Gonzales v. Arizona State Bd. of Nursing*, 528 P.3d 487 (Ariz. Ct. App. 2023), decided just this year, the court reversed an agency's revocation of a nurse's license after the agency held an evidentiary hearing on 13-days' notice, rather than the 30-days' notice explicitly required by the Arizona Legislature in the governing statute. *Id.* at 490–91. And in *T.P. Racing, L.L.L.P. v. Arizona Dep't of Gaming*, No. 1 CA-CV 22-0224, 2022 WL 17684565 (Ariz. Ct. App. Dec. 15, 2022), the court affirmed an agency's denial of an application for an "event wagering operator license" since, under *de novo* review, the agency's interpretation of the relevant statute best "g[a]ve effect to legislative intent." *Id.* at *1–3 (citations omitted).

Nor has case law from States that have rejected or eliminated *Chevron*-like deference shown that ending such deference prevents agencies from successfully defending their actions in court. Indeed, in *Tetra Tech*, the Wisconsin Supreme Court rejected its *Chevron*-like deference regime and still held in favor of the administrative agency on the specific statutory-interpretation question presented in that very case. *See* 914 N.W.2d at 40 (lead op. of Kelly, J.).

The same results are likely to follow at the federal level, should this Court correctly overrule the *Chevron*-deference doctrine. Empowering federal courts to review agency interpretations of law *de novo* will strengthen the rule of law, since this will result in regulated parties being governed by the "fairest reading of the law that a detached magistrate can muster," rather than whatever self-serving reading a federal agency itself can convince a court to accept as "reasonable." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). And overruling *Chevron* will not undermine the federal administrative state; rather, agencies will now need to advance Congress' goals, not their own bureaucratic objectives. "We managed to live with the administrative state before *Chevron*. We could do it again." *Id.* at 1158.

## CONCLUSION

This Court should overrule the *Chevron*-deference doctrine and vacate the decision below.

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