No. 22-451

IN THE

Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, et al.,

Petitioners,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Court should overrule *Chevron* 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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STATEMENT OF INTEREST [1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community. The Chamber's members have an interest in ensuring that each branch of government performs its proper constitutional role, thus restraining administrative agencies from imposing unlawful burdens on private parties.

SUMMARY OF ARGUMENT

Businesses value predictability and stability in the law. To make effective strategic and investment decisions, businesses must operate in a regulatory environment that remains relatively consistent over time and enables them to know their legal obligations in advance. Congress promotes that kind of regulatory environment when it appropriately exercises its Article I powers by enacting statutes that clearly define legal responsibilities *ex ante*. By

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[1] Pursuant to Supreme Court Rule 37.6, the Chamber states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

contrast, when Congress shirks its constitutional responsibility by delegating essentially legislative functions to the Executive Branch, predictability, stability, and ultimately the rule of law are seriously undermined.

The Court's decision in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), could be understood as an effort to promote stability and predictability in the law by keeping policymaking out of the hands of unelected judges, thereby upholding the separation of powers. Unfortunately, as the doctrine has evolved and been applied in practice, modern *Chevron* deference—coupled with permissive non-delegation precedent—has actually eroded the separation of powers. Applying an overbroad reading of *Chevron*, courts have effectively given federal agencies free rein to enact their own new regulatory requirements through sweeping rulemakings or after-the-fact enforcement actions. Under this expansive understanding of *Chevron*, agencies need only "reasonably" interpret the terms of an existing statute to impose onerous new burdens on businesses. This understanding leads in contemporary practice to a reflexive form of deference on judicial review.

This lenient approach to *Chevron* also incentivizes Congress to outsource core policy decisions (particularly controversial ones) to agencies through broadly worded statutes, rather than resolving these issues in the legislative process and taking responsibility for the outcome. And it enables agencies to change positions, expand their own authority, and add regulatory burdens with relative ease. As a result, many of today's most significant and controversial business regulations are imposed by executive agencies (and, even more dangerously,

"independent" agencies such as the SEC and the FTC), with minimal congressional involvement and limited judicial oversight.

That distortion of the respective branches' proper roles has helped to foster an unpredictable, unstable regulatory landscape defined by an ever-growing number of federal regulations. Such a regime is harmful to businesses. Instability, uncertainty, and lack of accountability in the law generate tremendous deadweight loss in productivity, investment, and innovation. Businesses cannot effectively plan for the future when agencies are free to unilaterally change the basic rules at any time.

Accordingly, it is "appropriate" for the Court to "reconsider . . . the premises that underlie *Chevron* and how courts have implemented that decision," and to ensure that the "rules for interpreting statutes and determining agency jurisdiction and substantive agency powers . . . accord with constitutional separation-of-powers principles and the function and province of the Judiciary." *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring). The Court has adopted some limitations on the worst excesses of modern *Chevron* doctrine, but that is not enough; reflexive deference continues to be the norm in the lower courts. If *Chevron* can be salvaged at all, the only path to doing so is by adhering faithfully to the Constitution's design for the separation of powers.

In our constitutional structure, Congress must make the policy judgments that govern private conduct by passing clear statutes that prospectively put regulated entities on notice of their specific obligations. The Executive's role is to *execute* those clear statutes, making relatively minor, gap-filling interpretive judgments as needed when applying law

to facts. And the Judiciary must say what the law is, using traditional tools of statutory construction to faithfully apply statutes as written without second-guessing valid policy judgments. The Court can enforce those structural limitations by rejecting the all-too-ready use of *Chevron* deference and enforcing non-delegation principles, including by making clear that statutory silence or ambiguity, by itself, is insufficient to delegate authority to an agency. And the Court can reinvigorate *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), which allows courts to give due respect to longstanding agency interpretations while allowing the Judiciary to say what the law is. Keeping each branch of government in its proper sphere of authority will preserve freedom and enable American industry to operate in a clear and predictable regulatory environment.

ARGUMENT

I. Modern *Chevron* doctrine undermines, rather than protects, the separation of powers.

Our tripartite constitutional structure reflects the longstanding principle that separating the legislative, executive, and judicial powers protects against despotic and arbitrary government. *See*, *e.g.*, 1 William Blackstone, *Commentaries* *150–51; John Locke, *The Second Treatise of Government* 82 (Thomas P. Peardon ed., Prentice-Hall, Inc. 1997) (1690); *The Federalist No. 51* (Madison). *Chevron* itself could be viewed as vindicating that principle insofar as it restrained improper judicial policymaking. However, the modern phenomenon of reflexive judicial deference to the legal "interpretations" of administrative agencies has taken on a life of its own. All too often, courts applying

Chevron assume that Congress has delegated sweeping lawmaking power to agencies through vague or seemingly open-ended statutory provisions, and they readily defer to aggressive new rules that agencies impose under these statutes on the ground that they reflect arguably "reasonable" constructions. So applied, today's *Chevron* doctrine thus affirmatively threatens the separation of powers, exacerbates non-delegation concerns, and contributes to the expansion of unduly burdensome, unlawful regulations.

A. The *Chevron* decision itself can be understood as an effort to prevent Article III courts from engaging in policymaking, rather than a reallocation of legislative and judicial functions to agencies.

The Court's 6-0 decision in *Chevron* had a far more limited reach in 1984 than it has come to assume in modern administrative law. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 Admin. L. Rev. 253, 275 (2014) (noting that Justice Stevens, the author of *Chevron*, characterized the decision as a "simpl[e] . . . restatement of existing law, nothing more or less"). At issue in *Chevron* was the meaning of the term "stationary source" in the Clean Air Act Amendments of 1977. 467 U.S. at 859. The Act required permits for "new or modified major stationary sources" of air pollution, but did not define the phrase "stationary source" for purposes of the permitting program. *See id.* at 859–60. The EPA adopted a regulation taking a plantwide view of the term "source," meaning that an existing plant with several pollution-emitting components could install or modify equipment

without obtaining a permit as long as the alteration did not increase total emissions from the plant. *See id.* at 858. But the D.C. Circuit rejected the EPA's interpretation, on the ground that a component-specific approach would more effectively serve the "purpos[e]" of the statute: "to improve air quality." *NRDC v. Gorsuch*, 685 F.2d 718, 726–27 & n.39 (1982) (reasoning that in the absence of a statutory definition, "the purposes of the nonattainment program should guide our decision").

In reversing the D.C. Circuit, this Court explained that the lower court had "misconceived the nature of its role." *Chevron*, 467 U.S. at 845. Once the court of appeals had "decided that Congress itself had not commanded" a component-specific definition of "stationary source," the court was not at liberty to impose that definition based on its own policy views. *Id.* at 842. "When a challenge to an agency construction of a statutory provision, fairly conceptualized, *really centers on the wisdom of the agency's policy*"—rather than the legal meaning of the statute—"federal judges . . . have a duty to respect legitimate policy choices" made by agencies. *Id.* at 866 (emphasis added). Unlike courts, an agency to which Congress has properly delegated authority to make policy "may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." *Id.* at 865. By contrast, "[j]udges are not experts in the field," and the "policy arguments" made by the parties were "more properly addressed to legislators or administrators, not to judges." *Id.* at 864–65.

Chevron's central conclusion—that courts should defer to agencies' legitimate policy-based decisions filling narrow statutory gaps properly left open by

Congress—thus was rooted in respect for the separation of powers. But it was based on two critical assumptions. *First*, this Court accepted the D.C. Circuit's view "that Congress did not actually have an intent" on the specific question at issue, meaning that the question could not properly be resolved by a court. 467 U.S. at 845. According to the Court, Congress had "left a gap for the agency to fill"—a "narrow issue" that arose "in a technical and complex arena." *Id.* at 843, 862–63 (quotation marks omitted).[2] *Second*, the Court implicitly assumed that this statutory gap was not so large as to violate the non-delegation doctrine—the NRDC had not raised a non-delegation challenge, and the Court took the view that the EPA's plant-wide view of "stationary sources" was the type of relatively minor, interstitial "formulation of policy" that is "necessarily require[d]" when an agency "administer[s] a congressionally created program." *Id.* at 843 (ellipsis and quotation marks omitted). *See also id.* at 865 (explaining that several factors supported conclusion that agency interpretation "represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision

[2] Since 1984, when *Chevron* was decided, this Court has adopted a more robust method of statutory interpretation that looks to the original, public *meaning* of the statutory text—not to subjective legislative intent—and gives far less (or no) weight to legislative history in interpreting statutes. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). As a result, *Chevron* deference as originally articulated should apply to far fewer questions now than may have been true in 1984.

involves reconciling conflicting policies" (footnotes omitted)).

The Court thus concluded that by stepping in and rejecting the agency's decision, the D.C. Circuit had improperly engaged in judicial policymaking. So understood, *Chevron* reflected an effort to prevent Article III courts from overstepping the bounds of the Judiciary's proper role.

B. Modern *Chevron* doctrine has fostered the aggrandizement of the Executive at the expense of other branches.

Whatever one might say of the *Chevron* decision as an original matter, it is clear that today's *Chevron* doctrine does not serve the separation of powers. Far too often, courts applying *Chevron* have found latent ambiguity in statutes and thus deferred to sweeping new agency rules asserting broad powers that purport to "interpret" that ambiguity, without fully deploying the traditional tools of statutory interpretation or carefully policing limits on congressional delegations of authority. Unsurprisingly, agencies fare significantly better in *Chevron* cases than in cases under *de novo* review. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017) (agencies prevailed in 77.4% of cases surveyed where a lower court applied the *Chevron* framework, but prevailed in only 38.5% of cases under *de novo* review).

In practice, modern *Chevron* doctrine's reflexive deference to administrative agencies' aggressive statutory interpretations undermines the separation of powers in at least three ways.

First, easy deference to agency statutory interpretations incentivizes Congress to adopt—or

leave in place—open-ended or vague statutes that operate as broad delegations of legislative authority. This practice is at odds with our government's basic structural design. The Constitution vests "*[a]ll* legislative Powers" in Congress. U.S. Const. art. I, § 1 (emphasis added). The core of that legislative power is "to enact laws, or, in other words, to prescribe rules for the regulation of the society." *The Federalist No. 75*, at 449 (Hamilton) (Clinton Rossiter ed., 2003). The text of Article I "permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *accord Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (Marshall, C.J.) ("It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative."). And where the Constitution *does* permit the Executive to participate in lawmaking, it carefully circumscribes that participation—the President may either approve and sign a bill, or otherwise return it to Congress. *See* U.S. Const. art. I, § 7. This process of bicameralism and presentment ensures democratic accountability, and largely limits the Executive to executing laws that Congress enacts. While some interpretive judgment may be necessary for the Executive to apply statutes to particular facts, the Constitution does not allow unilateral lawmaking in the Executive Branch.

Modern *Chevron* doctrine, supported by permissive non-delegation precedent, subverts this prohibition by allowing administrative agencies to enact rules governing private conduct based on strained interpretations of general language in existing statutes. The Court's non-delegation precedents have been interpreted to allow Congress to delegate vast rulemaking power to agencies, so long

as Congress provides some sort of "intelligible principle" to purport to guide their discretion. *See generally Gundy v. United States*, 139 S. Ct. 2116, 2138–42 (2019) (Gorsuch, J., dissenting) (tracing this development). Shielded from rigorous enforcement of non-delegation principles, agencies have routinely claimed broad authority to adopt new rules governing regulated entities. Congress allows—and, by enacting broad statutes, even invites—agencies to do so because many courts applying *Chevron* do not carefully analyze whether an agency's interpretation of a statutory provision comports with the correct reading of that provision. Instead, courts all too quickly find "ambiguities" in statutory provisions – and then readily conclude that agencies' interpretations of such provisions are "reasonable." *See, e.g.*, *Pereira*, 138 S. Ct. at 2120–21 (Kennedy, J., concurring).

In practice, this has meant that the Executive Branch can sidestep Congress and accomplish many policy objectives through agency rulemakings and enforcement actions without authorization by Congress. *Cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023) ("The Secretary's assertion of administrative authority has conveniently enabled him to enact a program that Congress has chosen not to enact itself." (brackets and quotation marks omitted)). And Congress, for its part, is incentivized to write statutes that deflect political heat and judicial scrutiny, knowing that agencies can seize upon vaguely worded or poorly drafted provisions to adopt rules that enjoy unique leeway in the courts and will still be treated as having the "'force and effect of law.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (citation omitted). The combined effect of these

strategic interests reverses the constitutional allocation of legislative power: The Executive becomes the primary engine of new "laws," and—so long as the President supports those decisions—future congressional majorities cannot undo them without mustering a supermajority to enact new legislation that can override the President's veto. Particularly in a gridlocked government, that "check" on Executive lawmaking power is cold comfort for regulated entities.

Second, modern *Chevron* doctrine allows administrative agencies to claim significant powers based on congressional silence or even poor drafting, in effect requiring courts to *presume* that Congress delegated interpretive and rulemaking authority simply because a statute could be clearer. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (noting that *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps"). This paradoxically leads courts to "bas[e] their deference on statutory authorization while presuming such authorization from what the statutes do not say." Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1192 n.15 (2016). And it contravenes the longstanding principle that the Executive may not promulgate rules governing primary conduct without the legislature's say-so. *See, e.g.*, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Case of Proclamations*, [1610] EWHC K.B. J22 (Coke, C.J.) (vacating the King's economic proclamations because he could not lawfully "change any part of the common

law, nor create any offence by his proclamation, which was not an offence before, without Parliament").

Third, lenient deference undermines federal courts' constitutionally assigned duty to interpret the law. Article III vests "[t]he judicial Power" in this Court and "in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. The core of the judicial power is "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see Perez*, 575 U.S. at 119–20 (Thomas, J., concurring in the judgment). By giving undue deference to agencies' statutory interpretation, courts reallocate primary interpretive authority (*i.e.*, the judicial power) to the Executive. This undercuts the independence and neutrality contemplated in Article III by placing a "finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else." *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of cert.). All too often, courts have relied on *Chevron* to abdicate their constitutionally assigned role of statutory interpretation by allowing the Executive to bind them to something other than the best reading of the law.

For similar reasons, inferring a delegation of power from statutory silence, or otherwise deferring readily to agencies' less-than-fully-persuasive interpretations of statutory provisions that they administer, is in major tension with the Administrative Procedure Act (APA). *Cf.* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 995–99 (2017); Michael B. Rappaport, Chevron *and Originalism: Why* Chevron *Deference Cannot Be*

Grounded in the Original Meaning of the Administrative Procedure Act, 57 Wake Forest L. Rev. 1281, 1289–96 (2022). The APA expressly requires that *courts* "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. While § 706 does not preclude the Executive from performing its own constitutionally assigned duties in executing the law, it assumes the Judiciary will perform a law-interpreting role. To the extent that reflexive deference transfers law-interpreting power to the Executive, it contravenes Congress's command in § 706.

These separation-of-powers and APA concerns are only compounded in the context of deference to so-called "independent" agencies. Such agencies raise additional constitutional issues insofar as they are insulated from executive control—*i.e.*, the ability of the President to remove agency heads—and thus from political accountability. *See Myers v. United States*, 272 U.S. 52, 163–64 (1926) ("[A]rticle 2 grants to the President the executive power of government—*i.e.*, the general administrative control of those executing the laws, including the power of appointment and removal[.]"); 1 Annals of Cong. 463 (1789) (remarks of James Madison) ("[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."). In recent years, these agencies have been particularly aggressive in asserting regulatory authority over American businesses, proposing significant rules, which often raise major legal and policy questions on which Congress would be expected to have a view, without specific congressional

authorization. *See*, *e.g.*, FTC, *Non-Compete Clause Rule*, 88 Fed. Reg. 3482 (Jan. 19, 2023) (proposing wholly to ban noncompete clauses in employment contracts as an "unfair method of competition"); SEC, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 29059 (May 12, 2022) (proposing to require publicly traded companies to make broad array of disclosures related to greenhouse gas emissions and climate-related risks). Modern *Chevron* doctrine thus exacerbates the threats to the Constitution's allocation of power that are posed by independent agencies. These politically unaccountable agencies claim vast authority to make sweeping, legislation-like rules based on long-extant, vaguely worded statutes, hoping to survive minimal judicial scrutiny of the resulting regulations.

In short, modern *Chevron* deference and overly permissive non-delegation precedents have shifted lawmaking power away from Congress to administrative agencies, while curtailing the Judiciary's power to determine what the law is. While *Chevron* itself may have aimed to promote political accountability, today's practice of reflexive deference has undermined the separation of powers.

C. Modern *Chevron* doctrine has contributed to an unpredictable, unstable regulatory environment.

Since *Chevron* was decided in 1984, agencies' regulatory reach has grown. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010) (noting administrative state now "touches almost every aspect of daily life"). "The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative

agencies now hold over our economic, social, and political activities." *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (citation omitted). Hundreds of Executive Branch and independent agencies or components now make policy through rulemaking, to say nothing of adjudications for which agencies sometimes claim deference. *See generally* Federal Register, *Agencies*, https://www.federalregister.gov/agencies.

As a result, the scope of *Chevron*'s potential applicability has also expanded. The Code of Federal Regulations has ballooned from just over 110,000 pages in 1984 to more than 180,000 pages as of 2021, a 64% increase in the pages of regulations binding American companies and individuals. *See* Geo. Wash. Univ., Regul. Stud. Ctr., *Total Pages Published in the Code of Federal Regulations*, https://tinyurl.com/bdex48mk. And the Federal Register has grown from roughly 50,000 pages in 1984 to well over 80,000 in 2022, a 60% increase. *See* Geo. Wash. Univ., Regul. Stud. Ctr., *Total Pages Published in the Federal Register*, https://tinyurl.com/bdd3cbzw.

By fostering sweeping deference to agencies, modern *Chevron* doctrine has exacerbated the qualitative problems inherent in this quantitative explosion of regulations. The doctrine has allowed agencies to accrete more and more power that properly belongs under Article I without judicial oversight under Article III. Emboldened by *Chevron* deference, agencies have adopted increasingly aggressive interpretations of the statutes they enforce, frequently finding "unheralded power to regulate" in seemingly open-ended language. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

Consider the EPA's effort to fundamentally restructure "the Nation's overall mix of electricity generatio[n] to transition from 38% coal to 27% coal by 2030" based on "the vague language of an ancillary provision of" the Clean Air Act. *West Virginia v. EPA*, 142 S. Ct. 2587, 2607, 2610 (2022) (brackets and quotation marks omitted). Or the CDC's effort to institute a nationwide eviction moratorium based on a "wafer-thin reed" of textual authority. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam). Or the Department of Labor's attempt to "transform the trillion-dollar market for IRA investments, annuities and insurance products," and to "regulate in an entirely new way hundreds of thousands of financial service providers and insurance companies" in that market. *Chamber of Com. v. U.S. Dep't of Labor*, 885 F.3d 360, 363, 387 (5th Cir. 2018).

The result is bad for free enterprise. Today's morass of regulations, aggravated and encouraged by the expansion of *Chevron*, imposes astronomical costs in compliance, lost productivity, and higher prices, reaching as high as $1.9 trillion per year. *See generally* U.S. Chamber of Com. Found., *The Regulatory Impact on Small Business: Complex. Cumbersome. Costly.* 4 (2017). The costs are higher on average for smaller businesses. *Id.* The current *Chevron* regime also undermines stability and predictability for businesses because they cannot ascertain their regulatory obligations based on the laws that Congress has enacted. Rather, regulatory obligations today turn on unstable agency statutory interpretations, sometimes through prospective rulemaking and other times without any prior notice at all, in after-the-fact adjudications. When the stakes are high or politically

controversial, the risk of instability only increases, as agency leadership changes from administration to administration. *See, e.g., Sackett v. EPA*, 143 S. Ct. 1322, 1332–35 (2023) (discussing long history of EPA and U.S. Army's changing interpretations of "waters of the United States" in the Clean Water Act, 33 U.S.C. § 1362(7)); *West Virginia*, 142 S. Ct. at 2603–06 (discussing EPA's reversal from one administration to another on regulation of power plants' carbon dioxide emissions).

The citizenry's ability to elect congressional representatives means little "if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes" that one must guess at their content. *The Federalist No. 62*, at 379 (Madison). Today's regulatory environment is not far from fitting that description. The endless cycle of what amounts to Executive Branch lawmaking raises transaction costs for businesses by introducing unresolvable regulatory instability into investment and strategic decisions. When agencies can unilaterally exercise core legislative power by exploiting general language in statutes to make rules of great economic significance, and later flip-flop on those rules, the resulting uncertainty makes it hard for businesses to plan for the future.

II. Although this Court's recent decisions have limited *Chevron*'s excesses, the Court should reinforce the proper constitutional roles of Congress, the Executive, and the Judiciary.

This Court has recently reaffirmed important limitations on *Chevron*, emphasizing the separation of powers in general and the primacy of the courts in interpreting the law in particular. But because lower courts continue to apply the doctrine expansively, this Court should take this opportunity to shore up the separation of powers. Specifically, the Court should explain that Congress must provide clear *ex ante* guidance to regulated entities through statutory commands that set the rules of the road for private conduct. The Court should emphasize that the Executive's constitutional role is to execute laws that Congress has enacted, not to engage in lawmaking itself via administrative agencies. The Constitution does not contain an exception to Article I for technocrats. And the Court should affirm that federal courts are charged with using all available tools of statutory construction, including appropriate interpretive canons, to ascertain the meaning of statutes. This means that, if *Chevron* survives, judicial deference to agencies' statutory interpretation should be strictly limited to properly delegated, gap-filling policy judgments of a type that necessarily arise when the Executive implements rules set by Congress. Otherwise, an agency's interpretation of a statute should be accepted only insofar as it has the "power to persuade," *Skidmore*, 323 U.S. at 140, based on the best reading of the statute.

A. The Court has limited the excesses of modern *Chevron* doctrine in important ways.

In recent years, the Court has adopted and reaffirmed important constraints on the expansive approach to *Chevron* taken by lower courts. These decisions make clear that reflexive deference to agencies is never appropriate, and the Court should reaffirm that foundational point.

Some of the most significant limitations on *Chevron* occur at "step zero"—the threshold inquiry that determines whether *Chevron*'s analytical framework applies *at all*. At the outset, "before a court may grant [an agency] deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue." *City of Arlington,* 569 U.S. at 317 (Roberts, C.J., dissenting); *accord Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). Congressional silence, of course, is not itself a delegation of authority to an agency to do anything.

Accordingly, this Court has required Congress to speak clearly if it intends to delegate to administrative agencies power to regulate on questions of great "economic and political significance." *Brown & Williamson*, 529 U.S. at 160. The Court has recognized that in such "major questions" cases, "both separation of powers principles and a practical understanding of legislative intent" require clear congressional authorization for

the power claimed by the agency. *West Virginia*, 142 S. Ct. at 2609–10. Other interpretive canons and principles serve similar purposes. For example, when the EPA asserted authority to "significantly alter the balance between federal and state power and the power of the Government over private property" in promulgating regulations enforcing the Clean Water Act, it needed to point to an "exceedingly clear" statutory basis. *Sackett*, 143 S. Ct. at 1341 (quotation marks omitted). Of course, even in a run-of-the-mill statutory interpretation case, a court may not afford *Chevron* deference to an agency interpretation of a statute unless the court *first* concludes that Congress has delegated authority to the agency "to definitively interpret" the "particular provision" at issue. *City of Arlington,* 569 U.S. at 320, 322 (Roberts, C.J., dissenting) (quotation marks omitted).

Relatedly, agencies cannot claim deference when they seek to regulate on matters outside their expertise. *See Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *cf. King v. Burwell*, 576 U.S. 473, 486 (2015). For this reason, deference is unwarranted where, for instance, an agency interprets a statute that applies generally across Executive agencies. *See*, *e.g.*, *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) ("[A]n agency has no interpretive authority over the APA"). And a congressional delegation of authority cannot be assumed for informal agency interpretations, where the agency has not spoken authoritatively on the matter. *United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001).

The Court has also made clear that courts, not agencies, have primary competence in interpreting statutes. Thus, an agency's claim to interpretive authority must always receive careful judicial

scrutiny. *Chevron* itself made clear that "step one" is rigorous, requiring courts to exhaust the "traditional tools" of statutory interpretation. 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). To that end, courts must give full effect to "(1) the words themselves, (2) the context of the whole statute, and (3) any other applicable semantic canons." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2145 (2016); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) ("Where, as here, the canons supply an answer, '*Chevron* leaves the stage.'" (citation omitted)). *All* the tools of construction must be used.

Some statutes may be hard to parse. But the mere fact that "disputed regulatory language is complex" or "not immediately accessible" does not mean deference is warranted. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 706–07 (1991) (Scalia, J., dissenting). Statutory interpretation is the Judiciary's charge under Article III, and that goes for hard texts as well as easy-to-understand texts—perhaps *especially* the hard ones. *See Marbury*, 5 U.S. (1 Cranch) at 177. And it will be a "rare occasion" on which legal texts are "truly ambiguous—meaning susceptible to multiple, equally correct legal meanings." *Gamble v. United States*, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring); *see Pauley*, 501 U.S. at 707 (Scalia, J., dissenting) (ambiguity requires "more than one reasonable interpretation").

The Court has also made clear that *Chevron*'s "step two" does not yield automatic deference.

Agencies may not shoehorn ill-fitting interpretations into statutory text simply because there are multiple plausible readings of the text. *See Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 525 (2009) ("[T]he presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation[.]"); *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment) ("Whether a particular statute is ambiguous makes no difference if the interpretation adopted by the agency . . . is clearly beyond the scope of any conceivable ambiguity."). And poor statutory drafting does not open the door to expansive interpretation. Claims to deference that involve more than minor, technical gap-filling should be met by judicial skepticism in applying both step one and step two of *Chevron*. *Cf. Util. Air Regul. Grp.*, 573 U.S. at 324; *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 226, 229, 231 (1994) (rejecting invocation of *Chevron* deference for agency interpretation that would have "eliminat[ed] . . . the crucial provision of the statute for 40% of a major sector of the industry").

In addition, whether under *Chevron* step two or *State Farm* arbitrary-and-capricious review, administrative agencies must offer "reasoned explanation[s]" supporting their interpretation of the statutes they administer. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The agency's interpretation must be "based on a consideration of the relevant factors" and must not reflect a "clear error of judgment." *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Put simply, the interpretation must fall within the bounds

of a permissible delegation to the agency *and* be grounded in a rational application of the agency's substantive expertise. *See id.* at 52.

B. The Court should go further than it has in its prior decisions to shore up the separation of powers.

Despite the above-described safeguards that this Court has adopted against the expansive application of *Chevron*, lower courts have continued to readily extend deference to agencies, ignoring separation-of-powers principles. This lenient approach to *Chevron* incentivizes Congress to abdicate its lawmaking role, and allows courts to abdicate their interpretive obligations. The Court should take this opportunity to eliminate those incentives for constitutional mischief. *See Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring). While *Chevron* was unquestionably correct to say that courts should not make policy, deference to agencies has gone too far.

This Court should reaffirm that Congress is required to carry out its constitutional responsibility under Article I to pass clear statutes that set the rules governing private conduct and put regulated persons on notice of their legal obligations. *See Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting denial of cert.). Congress cannot punt on policy choices by explicitly or implicitly delegating lawmaking authority to the Executive Branch, and it certainly cannot delegate authority through mere silence or lack of clarity in a statute. For this and other reasons, rigorous "step zero" analysis is essential if *Chevron* survives. Exacting application of steps one and two is also

required. While courts may of course consider agency interpretations and practice, any deference to an agency's application of a statute must be narrowly confined to properly delegated, gap-filling determinations, founded on the agency's specialized experience and expertise, that merely implement the law that Congress has enacted. Without at least these limitations, *Chevron* jurisprudence cannot possibly be reconciled with the separation of powers.

The Court should also reinforce *Skidmore* deference. In a wide range of cases, *Skidmore* deference is perfectly appropriate and sufficient to resolve interpretive questions relating to statutes administered by agencies. Under *Skidmore*, an agency's interpretation of a statute, "while not controlling upon the courts by reason of [its] authority," does "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" and can receive deference based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

Skidmore has a long historical pedigree that recognizes agency expertise and tradition, and affords them appropriate respect, without impinging on the judicial power to say what the law is. As the Court explained as early as *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206 (1827): "In the construction of a doubtful and ambiguous law, the *cotemporaneous construction* of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Id.* at 210 (emphasis added). Similarly, the Court has

long recognized the importance of continuing agency practice: "A regulation of a department . . . cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, *unless such construction has been continuously in force for a long time*." *Merritt v. Cameron*, 137 U.S. 542, 551–52 (1890) (emphasis added); *see also Kisor*, 139 S. Ct. at 2426 (Gorsuch, J., concurring in the judgment); Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, *supra*, at 943–47; Rappaport, Chevron *and Originalism*, *supra*, at 1287–88. Under *Skidmore*, agency interpretations of statutory provisions must be given the weight they actually deserve, but no more. Agencies are simply not allowed to displace the role of courts in determining the meaning of legislative enactments.

The *Skidmore* considerations can be particularly important to regulated entities, who rely on the predictability and stability afforded by agency interpretations that reflect thorough and careful consideration, are well reasoned, and remain consistent over time. That much has been clear for decades. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 457–58 (1978); *McLaren v. Fleischer*, 256 U.S. 477, 480–81 (1921). Investment and other decisions that private parties make in reliance on considered, consistent agency interpretations should not be lightly disrupted by oscillation in agency policy preferences. *See United States v. Chi., N. Shore & Milwaukee R.R. Co.*, 288 U.S. 1, 14 (1933); *cf. Udall v. Tallman*, 380 U.S. 1, 4, 18 (1965). And, as this Court more recently explained, "unfair surprise" would result if a new interpretation gave rise to "potentially massive liability . . . for conduct that occurred well

before that interpretation was announced." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012) (quotation marks omitted).

CONCLUSION

Modern *Chevron* doctrine has distorted the separation of powers for too long. The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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