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 OF AMICUS CURIAE MOUNTAIN STATES LEGAL FOUNDATION 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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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Mountain States Legal Foundation (Mountain States) is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. Mountain States is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, Mountain States attorneys have been active in litigation on the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (Mountain States serving as lead counsel); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (amicus curiae in support of petitioner); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (amicus curiae in support of petitioner).

[1] Per Supreme Court Rule 37.6, the undersigned affirm that no counsel for a party authored this brief in whole or in part, and no person or entity made a monetary contribution for the preparation or submission of this brief.

Mountain States' clients seek predictability and fairness from the lower courts when those courts resolve disputes between our clients and federal regulators. In a sense, one of the courts' tools to promote predictability and fairness is the interpretive tool of stare decisis. But lower courts have misapplied this tool to haphazardly employ another, more devious tool to resolve disputes in favor of federal regulators and against private parties: "*Chevron* deference." The lower courts' invocation of "precedent" or *stare decisis* as justifying their default, pro-regulator favoritism defies the fairness baked into the Constitution and does not lead to any meaningfully predictable results. In other words, the lower courts' uses of "*Chevron* deference" defeat the laudable goals of s*tare decisis*.

It is important for Mountain States and our clients to have a clear understanding of how lower courts will apply "*Chevron* deference" in cases like the one before the Court. With a clear rule set forth by the Court, our clients will be better able to argue against agency interpretations of statutes with the understanding that our arguments will be given similar weight as those of the federal regulators we are arguing against. Specifically, Mountain States asks the Court to give clear guidance to the lower courts that they must put "*Chevron* deference"—if it survives as a "tool" at all—at the bottom of their collective statutory-interpretation toolbox.

To secure these interests, Mountain States files this brief urging this Court to reverse the holding of the D.C. Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT

This case involves the appropriateness of courts engaging in "*Chevron* deference" when sitting in judgment of administrative agencies' interpretations of congressional statutes. More specifically, this case asks the Court whether *Chevron* should be overruled, or at least whether the Court should instruct lower courts that they must not reflexively defer to the executive branch's interpretation of a statute in any given interpretation dispute against private parties. Inevitably, such questions raise the specter of stare decisis, and it is stare decisis with which this amicus curiae brief is concerned.

The purpose of the stare decisis doctrine, which has been an important concept in Anglo-American law for hundreds of years, is to provide predictability and fairness to litigants; to assure individuals that what the law is does not shift with the whims of judges. A respect for precedent is essential for a republic that intends to be ruled by laws, rather than men.

The problem here is that "*Chevron* deference" was not a decision made by this court. "*Chevron* deference" is not, itself, a precedent, but merely a method used by the Court to reach its decision in the *Chevron* case. It is not a statement of what the law is, so much as a canon of construction, one tool among many that courts have at their disposal when called to interpret the meaning of a federal statute.

This Court does not treat interpretive deference regimes like the one applied in *Chevron* as precedents owed stare decisis—indeed, "*Chevron* deference" itself has been inconsistently applied, ignored, and reformulated by various Justices of this Court over the years, with even *Chevron*'s author refusing to adopt a consistent approach to the doctrine. There is very little predictability regarding how "*Chevron* deference" is likely to be applied in any particular case, and treating the doctrine as a precedent requiring stare decisis has ironically done a profound disservice to the principles of predictability and fairness that stare decisis is intended to defend.

Mountain States is a non-profit legal foundation that regularly represents farmers, ranchers, recreationists, energy producers, and other private parties who must deal with federal regulators every day—particularly here in the West. Our clients often find themselves in disputes with these regulators over what federal statutes allow, require, and forbid, and they need predictability to earn their livelihoods. For example, imagine a cattle ranch using public land that straddles a border both between two states and two judicial circuits—that happens here in the West. On one side of the ranch, courts reflexively defer to agency interpretations of statutes, while on the other, courts defer only as a last resort. Depending on how various statutes such as the Endangered Species Act or Clean Water Act are interpreted, the same activity on one side of the ranch may be perfectly legal, while on the other side of the ranch it's a felony with potential penalties including thousands of dollars per day in fines or even prison time.

This Court should provide clear guidance to the lower courts that they are not bound to use the "*Chevron* deference" tool as a matter of stare decisis, and that stare decisis applies only to what this Court says the law is, not the process it used to get there in a particular case. "*Chevron* deference," to the extent its use is appropriate at all, is only one tool at the bottom of the statutory-interpretation toolbox, to be used only after all traditional tools of statutory construction are exhausted (as was done in *Chevron* itself). Reflexively deferring to agencies is unfair to the private parties entrusting their livelihoods to the American legal system because in doing so, courts place their thumbs on the scales in favor of federal regulators who already possess every advantage. Mountain States' clients need real predictability of Court guidance so that they can engage federal regulators knowing that they have meaningful recourse to an Article III court.

ARGUMENT

I. *STARE DECISIS* DOES NOT APPLY TO DEFERENCE REGIMES SUCH AS "*CHEVRON* DEFERENCE"

Stare decisis is a term that has been used in American and English jurisprudence for over two centuries and has been present as an idea even before that. See, e.g., *Ex parte Bollman*, 8 U.S. 75, 87, 89, 93 (1807) (using the Latin term stare decisis and calling it a "fundamental maxim"). William Blackstone remarked on the idea of precedent in 1765 in his commentaries:

> For it is an established rule to abide by former precedents, where the same points come again in litigation; as well [1] to keep the scale of justice even and steady, and [2] not liable to waver [sic] with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.

Blackstone, William, 1 Commentaries 69 (3d ed. 1768) (annotations and emphasis added).

Black's Law Dictionary (11th ed. 2019) defines stare decisis as "to stand by things decided. The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." For example, in *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842, 866 (1984), after using many tools to discern the meaning of the term "source" in the Clean Air Act, the Court held that the federal Environmental Protection Agency's (EPA) definition of the term "source" was a permissible construction of the statute. That's what the Court decided.

But this case is not about "stand[ing] by" the Court's determination of what a Clean Air Act "source" is, see *Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction"); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."), but whether the Court should provide clear guidance to lower courts regarding when and (if ever) how to use the reasoning that the Court used to reach its holding in *Chevron*. That is, when and (if ever) how should lower courts use so-called "*Chevron* deference" in discharging their duties to interpret laws?

We urge the Court to provide clear direction to the lower courts that "*Chevron* deference" itself is not a matter of binding precedent warranting stare decisis effect; instead, it is a statutory-interpretation canon that a lower court should use in a relevant case only after that court has exhausted all other traditional means of determining what the law is, *Marbury*, 5 U.S. at 177. And even then, only where its interpretive weight supplies an answer that is clearly better than the potential answers supplied by any other interpretation canons that are relevant to the issue before the court. See *Chevron*, 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."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2145 (2016) (Kavanaugh) ("[D]etermining the best reading of the statute is not always easy. But we have tools to perform the task . . . . Why layer on a whole separate inquiry – is the

statute clear or ambiguous? – that does not help uncover the best reading . . . ?").

"*Chevron* deference" was not a decision made by the Court; instead, it was the way the Court came to its decision in *Chevron*. "*Chevron* deference" is not a precedent, it is a canon of construction. Kavanaugh 2150–54. This Court does not treat interpretive deference regimes such as "*Chevron* deference" "as matters of stare decisis." Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1751, 1817 (2010) (Raso & Eskridge, Jr.). And it does not warrant the lower courts' "judicial abdication" of their *Marbury* duties in favor of reflexive deference to federal-agency arguments. *See Buffington v. McDonough*, 143 S. Ct. 14, 16 (2022) (Gorsuch, J., dissenting from the denial of certiorari); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring) ("we owe our colleagues on the lower courts more candid and useful guidance than this").

As can be discerned from its definition and from Blackstone's remarks, stare decisis has been used to ensure fairness and predictability in the United States legal system. When the Supreme Court says what the law is, future cases on that same question of statutory construction must be decided in accordance with the precedent that was laid out unless the Court has a compelling reason to deviate, which it then must explain, and which then becomes binding precedent for future Courts. *Ramos v. Louisiana,* 140 S. Ct. 1390, 1408 (2020) (Sotomayor, J., concurring). There

is an important distinction between precedents that appear in this manner and "*Chevron* deference."

Even though some Justices have advocated for "*Chevron* deference" to be applied as precedent, e.g., *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 243–47 (2005) (Scalia, J., concurring), the doctrine itself is not a precedent that the Supreme Court is bound to follow in future cases. As explored further in Argument Part III, infra, "*Chevron* deference" has not been treated as precedent, even by its staunchest supporters, as there are cases where it has not been adhered to, and not overruled, and other cases where it likely could apply but has not even been mentioned. See Raso & Eskridge, Jr. 1760, Figure 2; see, e.g., *City of Jackson, Miss.*, 125 S. Ct. at 1539–46 (Stevens, J., plurality opinion) (failing to cite or discuss *Chevron*); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (dealing with ambiguous statutory language but failing to cite or mention *Chevron*); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (declining to apply "*Chevron* deference" because "regular interpretive method" left no ambiguity regarding the statute at issue). This would not be permissible if "*Chevron* deference" were true precedent subject to stare decisis.

"*Chevron* deference" has also not contributed to uniformity or predictability in resolving disputes between federal regulators and private parties. On the contrary, different Justices have applied the interpretive canon differently in a variety of cases since the 1984 decision. *See* Raso & Eskridge, Jr. 1756, 1761. Deference regimes such as "*Chevron* deference" are one way of reasoning through and

thinking about a case, but the way in which one Justice develops his or her reasoning is not subject to stare decisis, especially if that reasoning is later found to be questionable or unworkable. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citing *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). Rather, this Court and the lower courts are bound to follow decisions in cases and established precedents.

II. THE *CHEVRON* COURT DEFERRED TO AGENCY INTERPRETATION AS A LAST-DITCH INTERPRETIVE TOOL

In *Chevron*, this Court dealt with a regulation created by the EPA that allowed states to treat all pollution-emitting devices within the same industrial grouping as though they were part of the same single "bubble." *Chevron*, 467 U.S. at 840. This "bubble concept" was challenged as being unlawful. *Id.* On appeal, the Court faced the issue of whether Congress allowed the EPA and the States to apply this "bubble concept." *Id.* In the opinion authored by Justice Stevens, the Court laid out stated what is now referred to as "*Chevron* deference," but it was not applied in the way that many courts use it today. *Id.* at 838; cf. Raso & Eskridge, Jr. 1749 ("Because it lacks the resources to review more than a small fraction of cases, the Court must delegate to lower courts. The lower courts may exploit this dynamic to skirt precedent in favor of their own preferences").

In *Chevron*, Justice Stevens applied his statutory-interpretation method: first, "employ [the] traditional tools of statutory construction" as all courts must do, *see Marbury*, 5 U.S. at 177, to divine

the meaning of the statute. 467 U.S. at 842–43, 843 n.9. Second, and only if after exhausting all the "traditional tools" the Court can divine no meaning of the statute, the Court may lean on its other canons of construction. *Id.* at 843, 843 n.9.

There is nothing remarkable about Justice Stevens' approach. Justice Stevens himself seems not to have treated the "*Chevron* doctrine" in such a way. See Raso & Eskridge, Jr. 1732 ("Indeed, Justice Stevens's plurality opinion in *City of Jackson* failed to cite or discuss *Chevron* (an opinion Justice Stevens himself wrote), a move virtually unthinkable if *Chevron*'s holding were binding as a matter of stare decisis. By not citing *Chevron* and by treating deference as a 'plus' factor for the result reached in his opinion, Justice Stevens seemed to treat agency deference doctrine as a canon of statutory construction, rather than as binding precedent.") (citing *City of Jackson*, 544 U.S at 240–43). And courts that find themselves shrugging their collective shoulders as to statutory interpretation employ last-ditch interpretive canons all the time, including in the face of textual ambiguities. See Kavanaugh, *supra*, 2135 n.87, 2145–56.

But context is important, especially when dealing with questions arising from congressional delegations of authority to the executive branch, the judicial branch's review of the same, and the separation of powers. *See Biden v. Nebraska*, 600 U.S. __ (2023) (Barrett, J., concurring) (explaining that the "major questions" deference canon, "emphasize[s] the importance of context when a court interprets a delegation to an administrative agency."); see also *Id.*

at 26 n.3 (Kagan, J., dissenting) (quoting the "importance of context" when assessing Congress's delegations of authority to the executive branch) (emphasis in originals).

And *Chevron*'s context was important—it introduced an opportunity to add another consideration to the last-ditch interpretive canons when a court—there, the Court—really could not figure out what Congress meant using the "traditional tools" of construction. *Chevron*, 467 U.S. at 843 n.9; Kavanaugh 2153 n. 175; Raso & Eskridge, Jr. 1732. In that context, why not consider the interpretive opinion of the agency that Congress charged with implementation of the statute? *Chevron*, 467 U.S. at 843 n.9; Ryan D. Doerfler, *How Clear is "Clear*?", 109 Va. L. Rev. 651, 663 (2023) (Doerfler).

Put simply, Justice Stevens merely recognized an added tool for the Court's toolbox when interpreting a statute in the context of administrative-delegation questions when the "traditional tools" of statutory interpretation did not fit the job. *Chevron*, 467 U.S. at 843 n.9.

Justice Stevens did not instruct the lower courts to reflexively put their thumbs on the scales in favor of administrative-agency statutory interpretations. Raso & Eskridge, Jr. 1732; Kavanaugh 2135; *Buffington*, 143 S. Ct. at 16 (Gorsuch, J., dissenting from the denial of certiorari). Justice Stevens did not instruct the lower courts to seek out ambiguities to implement their policy choices, Kavanaugh 2140; Raso & Eskridge, Jr. 1727, and did not authorize "judicial abdication" of the courts' collective duty to

say what the law is. *Buffington*, 143 S. Ct. at 18–19; cf. *Marbury*, 5 U.S. at 177.

The lower courts are not "'bound by . . . administrative construction[s]' of the law and those constructions may 'be taken into account only to the extent that [they are] supported by valid reasons.'" *Buffington*, 143 S. Ct. at 18 (quoting *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932) (Gorsuch, J., dissenting from the denial of certiorari)). True, sometimes Congress instructs an administrative agency to decide, for example, what is "reasonable." E.g., 47 U.S.C.A. § 303(q) (giving authority to the Federal Communications Commission to require the painting or illumination of radio towers if the towers are a menace to air navigation or if there is a reasonable possibility that they may be a menace to air navigation). And that might be a valid reason for a court to defer to—or at least consider—the agency's determination of what is reasonable. Kavanaugh 2153. But that is nothing new—it is a use of the "traditional tools" in the toolbox for statutory interpretation, and it is not "*Chevron* deference." *Id.* at 2145 ("To be sure, determining the best reading of the statute is not always easy. But we have tools to perform the task and communicate it to the parties and public in our opinion"); *Buffington*, 143 S. Ct. at 17.

Chevron, where the Court applied this same "traditional" approach, is notable only for recognizing another last-ditch tool of interpretation when the "traditional tools" did not get the job done. The Court looked at the statutory language at issue and the legislative history (another last-ditch interpretive

tool, *see* Kavanaugh 2135) prior to turning to the EPA's interpretation of the statute. *See Chevron*, 467 U.S. at 859–64. After exhausting the traditional tools, the Court said and found, "We agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases and conclude that the EPA's use of that concept here is a reasonable choice for an agency to make." *Id.* at 845 (emphasis added). Only after the Court decided that the specific question at issue could not be answered by using other principles of statutory construction did it then look at the agency's interpretation as evidence of statute's meaning. Doerfler 663.

The Court's recognition of the tool we call "*Chevron* deference" is not precedent that requires lower courts to reflexively defer to administrative agencies. Instead, the idea of deferring to the agency in the manner done in *Chevron* should be seen simply as an added interpretive canon such as the rule of lenity; and it belongs lower in the toolbox than tools like lenity, which at least favor the governed over the governors. *See* Kavanaugh 2135. The way that the Justices on the Court reason through the opinion is not precedent and does not need to be deferred to as such for the principles of stare decisis to be upheld. Ramos, 140 S. Ct. at 1408.

III. THE COURT HAS NOT APPLIED "*CHEVRON* DEFERENCE" IN THE UNIFORM MANNER ACCORDED TO TRUE PRECEDENT

The Court's obligation in this case to give guidance to the lower courts is doubly important, because whether "*Chevron* deference" is entitled to "double canon" deference as stare decisis has not always been clear. *See, e.g., City of Jackson*, 544 U.S. at 243–44 (Scalia, J., concurring) (saying "the EEOC's reasonable view that the ADEA authorizes disparate-impact claims is deserving of deference"). In practice, "*Chevron* deference" has often been treated as canon and not as precedent. *See*, e.g., *id.* at 239 (failing to cite or even discuss *Chevron*); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps. Of Eng'rs, 531 U.S. 159 (2001) (SWANCC)* ("We find § 404(a) to be clear, but even were we to agree with respondents, we would not extend *Chevron* deference here"). But the Court has not been consistent.

In *City of Jackson*, the Court dealt with the issue of salary increases for younger public safety officers in the city of Jackson, Mississippi. 544 U.S. at 230. Older officers in the city challenged the policy as violating the Age Discrimination in Employment Act (ADEA). *Id.* The main issue the Court dealt with was whether the ADEA authorized recovery in "disparate impact" cases. *Id.* at 232. In reasoning through the opinion, the Court found that the ADEA did allow for recovery in disparate-impact cases, contrary to the way the EEOC interpreted the statute. *City of Jackson*, 544 U.S. at 230, 232. Had the Court applied "*Chevron* deference," as Justice Scalia asserts in his

concurrence would have been the right thing to do, then the Court would have concluded that the ADEA does not allow for recovery in disparate-impact cases. *Id.* at 244–45.

But Justice Stevens—again, *Chevron*'s author—used the EEOC's interpretation of the statute in the same way one would employ it as a "bottom of the toolbox" canon of construction. The agency's interpretation of the statute was considered only after the Court looked at the statutory text, as presented in an earlier case, and language from a "reasonable factors other than age" provision. *Id.* at 233–40. Thus, the agency's interpretation was a factor for Justice Stevens, that he used in making his ultimate determination, but he did not reflexively defer to the agency's interpretation. *Id.* In contrast, Justice Scalia seemed to argue for a reflexive elevation of "*Chevron* deference" over the traditional tools as a matter of stare decisis. *Id.* at 243–47 (Scalia, J., concurring); see also Raso & Eskridge, Jr. 1737–38. So, it is no wonder that lower courts are unclear about the role "*Chevron* deference" should play—or worse, follow Justice Scalia's lead in elevating the canon to a pre-textual decision tool. Doerfler 665. Compare that again with Justice O'Connor, who gave the EEOC's interpretation no weight whatsoever because it interpreted a part of the statute that, in her view, was not at issue in the case. *Id.* at 262–67 (O'Connor, J., concurring). This case illustrates the different ways that "*Chevron* deference" can be viewed and applied, and the confusion that it has created even on this Court.

As another example, in *SWANCC*, the Court dealt with a challenge to the United States Army Corps of Engineers' (the Corps) interpretation that, in accordance with § 404(a) of the Clean Water Act (CWA), the agency had jurisdiction over abandoned sand and gravel pits because, according to the agency, those features were included under the definition of "navigable waters" subject to federal jurisdiction. *SWANCC*, 531 U.S. at 163. But the Court held that the Corps' rule that extended the definition of "navigable waters" under the CWA to include intrastate waters used as habitat for migratory birds exceeded the authority granted to the Corps under the CWA. *Id.* at 162. For present purposes, the important analysis is how much (if at all) the Court deferred to the Corps, and at what point.

In the case, the Corps argued that regardless of the original intent of the CWA in 1972, Congress approved a regulatorily pliable and more expansive definition of "navigable waters," which the Corps adopted in 1977, by later not passing a bill which would have overturned the Corps' regulation and assumed extension of regulatory jurisdiction. *Id.* at 168–69. In rejecting this argument, the Court did not give so much weight to congressional acquiescence to administrative interpretations of statutes—it took more care. *Id.* at 169. The Court also said that the respondents would "face a difficult task in overcoming the plain text and import of § 404(a)." *Id.* at 170. It was argued that § 404(g) of the CWA, and its use of the term "other . . . waters" must incorporate the Corps' 1977 regulation. *Id.* at 171. The Court was not persuaded by this argument and, though it declined to determine the exact meaning of § 404(g), it stated that

"§ 404(g) does not conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act . . . ." *Id.* (quoting *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 n.11 (1985)). With both of their other arguments failing, the respondents in *SWANCC* contended that, at the very least, Congress did not clearly define § 404(a)'s scope, and therefore did not address the precise question at issue in the case, therefore invoking "*Chevron* deference." *Id.* at 172.

But the Court did not reflexively defer to the agency in *SWANCC*—in essence, it refused to pick up "*Chevron* deference" as the first tool in its toolbox—and stated instead that § 404(a) had a clear meaning, but even if it didn't, the Court would not extend "*Chevron* deference." *Id.* Justice Stevens this time wrote a dissent in *SWANCC* in which he criticized the majority for not applying "*Chevron* deference." *Id.* at 191 (Stevens, J., dissenting). Unlike the opinion he wrote in *City of Jackson*, Justice Stevens' dissent in *SWANCC* seems to be advocating for reflexive application of "*Chevron* deference" to the facts of *SWANCC*, instead of using it as a canon. *Id.* It's no wonder there is confusion.

Over the course of the past four decades, the Justices seem to have applied "*Chevron* deference" differently in the various agency-deference cases. Raso & Eskridge, Jr. 1761. The only uniformity that can be discerned over this period is that it's not clear whether any Justice adheres to, or refrains from adhering to, "*Chevron* deference" consistently. *Id.* Rather, a variety of factors seem to play a role in how and when Justices will apply "*Chevron* deference"—or

maybe the Court's and the lower courts' applications of "*Chevron* deference" is truly haphazard. Either way, the Court should give clear guidance that the lower courts should not veil their haphazard choices by reference to stare decisis—it is the last tool in the toolbox.

Again, these examples show a lack of uniformity in the way that "*Chevron* deference" has been applied by the Supreme Court. In some decisions, the Court sought to establish a more concrete rule for the application of "*Chevron* deference." *See, e.g., U.S. v. Mead Corp.*, 533 U.S. 218, 236 (2001). *Mead*, however, did not have the intended effect of simplifying the process. Following *Mead*, it seems like lower courts were even more confused about how to apply "*Chevron* deference," as an interpretive tool, than they were before. *See* Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1491–92 (2005) (analyzing how lower courts have been confused by *Mead*). What the Court tried to do in *Mead* is what the lower courts need, even if the proposal in *Mead* is not exactly consistent with the prescription we offer in this brief.

In one instance, the Court has set out clear rules for when to apply another agency deference regime. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (limiting the scope of Auer deference to cases where all "traditional tools" of construction are exhausted and stating that "a court must consider the text, structure, history, and purpose of a regulation before resorting to deference").

Given the confusion and varied application of "*Chevron* deference" since the 1984 *Chevron* decision, we are asking the Court to establish a concrete rule for deference to agencies in cases of statutory interpretation, in the same spirit that the Court established a rule for applying "Auer deference" in *Kisor*. We further urge the Court to make it clear that "*Chevron* deference" is a last-ditch tool only available to a court that really cannot make "heads or tails" of a statute.

IV. THE COURT SHOULD INSTRUCT LOWER COURTS THAT THEY SHOULD ONLY USE "*CHEVRON* DEFERENCE" AS A LAST-DITCH INTERPRETIVE CANON

The question in this case is not "what is a 'stationary source,'" *Chevron*, 487 U.S. at 841, but whether the Court should provide clear guidance to lower courts regarding when (if ever) and how to use the reasoning that the Court used to reach its holding in *Chevron*.

As Justice Thomas has said:

> Although the Court has appeared to treat our agency deference regimes as precedents entitled to *stare decisis* effect, some scholars have noted that they might instead be classified as interpretive tools. See, e.g., C. NELSON, STATUTORY INTERPRETATION 701 (2011). Such tools might not be entitled to such effect. Because resolution of that issue is not necessary to my conclusion here, I leave it for another day.

Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 114 n.1 (2015) (Thomas, J., concurring).

This case offers an opportunity for the Court to offer clear direction to the lower courts that "*Chevron* deference" itself is not a matter of binding precedent warranting *stare decisis* effect; instead, it is a statutory-interpretation canon that a lower court should use in a relevant case only after that court has exhausted all other traditional means of determining what the law is. *See Marbury*, 5 U.S. at 177. And even then, a lower court should only use that canon where its interpretive weight supplies an answer that is clearly better than the potential answers supplied by any other interpretation canon that are relevant to the issue before the court. *See Chevron*, 487 U.S. at 842–43 (saying that, *after reviewing the legislation and legislative history*, the EPA's use of the bubble concept was reasonable); *see also*, Kavanaugh 2144.

Deference regimes and other tools of statutory interpretation do not work well as binding precedent. Raso & Eskridge, Jr. 1807–08. Simply put, this is because Justices do not apply deference regimes or other tools of statutory interpretation in a consistent manner. *See Id.* at 1787–90.

If predictability and some measure of fairness are the goals, as the principles of *stare decisis* suggest, then this Court needs to take this opportunity to define clear boundaries for when "*Chevron* deference" should and should not be applied to a particular case. As of now, courts seem to be conflating the precedential holding of *Chevron* with the non-precedential method that Justice Stevens recognized

in his opinion, where he directed lower courts to add another tool to their toolboxes *only after* the "traditional tools" left them shrugging their shoulders—but Justice Stevens still demanded that the lower courts do the work the Constitution requires. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) ("This analysis suggests an abdication of the Judiciary's proper role in interpreting federal statutes); *Buffington*, 143 S. Ct. at 16.

But as we see it, the lower courts are using "*Chevron* deference" to avoid the hard work of statutory interpretation in favor of demurring to whatever the agency says. *Id.* As Justice Thomas has noted, the power given to agencies through "*Chevron* deference" offers a chance for the executive branch to usurp the authority of the judicial branch. *See Baldwin v. United States*, 140 S. Ct. 690, 691–92 (2020) (Thomas, J., dissenting from denial of certiorari). Of course, it also usurps the legislative branch. The job of courts is to interpret statutes and say what the law is, not immediately go to what the agency thinks and then decide whether that is reasonable. *See Marbury*, 5 U.S. at 177.

On this point, "*Chevron* deference" should be used, if at all, only as an added tool of statutory interpretation. In this way agency interpretations can be relied upon as evidence of congressional intent. This sort of reliance, though, cannot happen reflexively. The agency's interpretation can only be used after all other traditional tools and other potentially relevant tools have been used to determine the meaning of the statute at issue. And of course, the

context drives this, because Justice Stevens was responding to a somewhat new issue as the "administrative state" increasingly was "touch[ing] almost every aspect of our daily life." *Buffington*, 143 S. Ct. at 21 (citing *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010)).

This case offers a unique opportunity for this Court to lay out clear rules for the interpretive process at the lower courts when it comes to cases where the administrative agencies are against private entities. Providing clear guidance to the lower courts on fixing statutory interpretation can return us to a place of uniformity where, regardless of who is doing the judging, the process will at least nearly be the same, uninfluenced by political fallout of the ultimate outcome of a case. *See* Kavanaugh 2121. For Mountain States and its clients, this area of the law is in desperate need of a defined "strike zone." *Id.* And of course, we respectfully ask the Court to set the "strike zone" as we have laid it out in this brief.

CONCLUSION

For the foregoing reasons, this Court should declare that "*Chevron* deference" isn't a tool to be reflexively applied to agency-deference cases. Rather, we ask the Court to provide clear direction to the lower courts that "*Chevron* deference" itself is not a matter of binding precedent warranting *stare decisis* effect; instead, it is a statutory-interpretation canon that a lower court should use—if at all—in a relevant case *only after* that court has exhausted all other traditional means of determining what the law is, and

even then, only where its interpretive weight supplies an answer that is clearly better than the potential answers supplied by any other interpretation canons that are relevant to the issue before the court.

Respectfully submitted,

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