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 *AMICI CURIAE* FPC ACTION FOUNDATION AND FIREARMS POLICY COALITION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

FPC Action Foundation (FPCAF) is a nonprofit organization dedicated to preserving the rights and liberties protected by the Constitution. FPCAF focuses on research, education, and legal efforts to ensure that the freedoms guaranteed by the Constitution are secured for future generations.

Firearms Policy Coalition (FPC) is a nonprofit organization devoted to advancing individual liberty and defending individual rights, including those protected by the Constitution. FPC accomplishes its mission through legislative, regulatory, legal, and grassroots advocacy, education, and outreach programs.

This case interests *amici* because it provides the Court an opportunity to revisit *Chevron*, which threatens the liberties secured by the Constitution.

SUMMARY OF ARGUMENT

The political theorists most influential to the Founders recognized the danger of accumulating governmental powers in one body. They understood that a division of power best establishes stability and protects liberty. As the theories of Polybius, Aristotle, and Cicero developed over millennia into those of Sidney, Montesquieu, and Blackstone, they benefitted from scrutiny and experience. By the time of the

[1] No counsel for any party authored this brief in any part. No person or entity other than *amici* funded its preparation or submission.

American Revolution, the necessity of a separation of powers to a free and stable government was axiomatic.

The Americans' experiences with King George III confirmed their predecessors' assurances that an accumulation of power leads to tyranny. The Declaration of Independence lamented the king's abuses of the legislative, executive, and judicial powers. Thus, when the new states created their constitutions, they were adamant that the legislative, executive, and judicial powers be separated. Five of the states established the separation of powers in a declaration of rights, further demonstrating that the Founders viewed the separation of powers as a safeguard for liberty against arbitrary power.

The United States Constitution is unequivocal in distributing and securing the legislative, executive, and judicial powers: all legislative powers are vested in the Congress, the executive power is vested in the President, and the judicial power is vested in this and inferior Courts. The independence of the branches reflects the Founders' widely held belief that accumulating these powers in the same hands epitomizes a despotic government.

The Founders disagreed, however, over the best method of securing the separation of powers. The Antifederalists preferred a complete separation of the legislative, executive, and judicial branches—and an express statement to that effect in the Constitution. The Federalists believed just as strongly in the separation of powers, but argued that the doctrine would be best secured through a minimal amount of overlap ensuring that each branch could adequately check the others. The debates over the Constitution

make clear that both the Federalists and Antifederalists would have opposed the accumulation of powers that *Chevron* deference allows—which the Constitution neither explicitly nor implicitly permits.

After the ratification of the United States Constitution, every state that joined the Union or enacted new constitutions ensured that the legislative, executive, and judicial functions were separate and distinct. As these constitutions reflect, the separation of powers has been viewed as an inviolable principle in the theory of American governance throughout American history.

Chevron deference violates the federal Constitution's separation of powers and thus undermines the Framers' constitutional design. *Chevron* violates Article III by transferring from the judiciary to the executive the ultimate interpretative authority to say what the law is. It violates Article I by incentivizing Congress to abdicate its legislative duties and delegate legislative authority to the executive. As a result, *Chevron* accumulates legislative, executive, and judicial powers in a single branch of government—which the Founders considered the very definition of tyranny. *Chevron* should be overruled.

ARGUMENT

I. The political theorists who most influenced the Founders advocated for a division of governmental powers.

"The greatest lights of humanity, ancient and modern, have approved" of dividing the powers of government, John Adams explained in 1787. 1 John Adams, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 97 (1787).

The Greek historian Polybius famously wrote about the "cycle of political revolution," in which governments with accumulated powers degenerate and collapse, "are transformed, and finally revert to their original form," at which point the cycle begins again. Polybius, THE RISE OF THE ROMAN EMPIRE 308–09 (Ian Scott-Kilvert trans., 1979). The "best governments," by contrast, divide powers, "so that no one principle should become preponderant" and "the power of each element" is "counterbalanced by the others." *Id.* at 310. Sparta created a "constitution according to these principles" in the 9th century BC, and "the result . . . was to preserve liberty for the Spartans over a longer period than for any other people of whom we have records." *Id.* at 311.

Aristotle believed that "the constitution is better which is made up of more numerous elements." Aristotle, POLITICA bk. IV, ch. 14, *in* 10 THE WORKS OF ARISTOTLE 1266[a] (W. D. Ross ed., Benjamin Jowett trans., rev. ed. 1921). Specifically, Aristotle identified "three elements," which when "well-ordered, the constitution is well-ordered": "One element which

deliberates about public affairs," one "concerned with the magistracies—the questions being, what they should be[and] over what they should exercise authority," and one "which has judicial power." *Id.* at 1297[b]–98[a]. Additionally, John Adams argued that Aristotle's "observations" about the "mutability of simple governments" with accumulated powers "strengthen" the case for a separation of powers by demonstrating the "necessity of mixtures of different orders, and decisive balances, to preserve mankind from . . . horrible calamities." Adams, DEFENCE OF THE CONSTITUTIONS, at 310–11.

Cicero built on the lessons of the Greeks. He lamented the tendency of governments with accumulated powers to degenerate and preferred "an even and judicious blend" of such powers for the "stability" and "widespread element of equality" it provided. Cicero, THE REPUBLIC AND THE LAWS 32 (Niall Rudd trans., Oxford Univ. Press 2008); *see also id.* at 20–21. Adams argued that as the greatest ever "statesman and philosopher united in the same character," Cicero's "decided opinion in favour of three branches" carries "great weight." Adams, DEFENCE OF THE CONSTITUTIONS, at xxi.

Rome, along with Sparta, achieved "the best of all existing constitutions," according to Polybius, when it formed a mixed government after "lessons learned from many struggles and difficulties" with accumulated powers. Polybius, THE RISE OF THE ROMAN EMPIRE, at 311. "[T]he elements by which the Roman constitution was controlled were three in number": the power was divided between the consuls, the senate, and the people. *Id.* at 312. According to

Adams, "the authority of the three estates being duly proportioned and mixed together, gave it the highest degree of perfection that any commonwealth is capable of attaining[.]" Adams, DEFENCE OF THE CONSTITUTIONS, at 147. Indeed, the Roman Republic lasted nearly 500 years (509 BC to 27 BC).

The ancient support for mixed government was echoed in medieval Europe by Thomas Aquinas. He contended that "the best form of polity" was "partly kingdom," "partly aristocracy," and "partly democracy." 2 St. Thomas Aquinas, SUMMA THEOLOGICA pt. i-ii, q. 105.1, at 1092 (Fathers of the English Dominican Province trans., Benziger Bros. 1948) (Christian Classics 1981 reprint). "Such was the form of government established by the divine Law," he wrote, as "Moses and his successors" constituted "a kind of kingdom," 72 "wise and honorable" men appointed as rulers added "an element of aristocracy," and other "rulers [who] were chosen from all the people" established "a democratical government." *Id.* (quoting *Deuteronomy* 1:15 and *Exodus* 18:21).

Niccolò Machiavelli endorsed the idea of dividing governmental power in the 16th century and from there it developed into the separation of powers that became fundamental to American constitutions. *See generally* Mortimer N. S. Sellers, *Niccolò Machiavelli: Father of Modern Constitutionalism*, 28 RATIO JURIS 216 (2015). Machiavelli determined that dividing power so that "each of the three [orders of government] serves as a check upon the other" made a government "more stable and lasting." Niccolò Machiavelli, DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS 16 (Ninian Hill Thomson trans., 1883). In *Defence of the*

Constitutions, Adams reproduced Machiavelli's chapter on mixed governments from *Discourses* nearly in its entirety. Adams, DEFENCE OF THE CONSTITUTIONS, at 141–47. Additionally, Machiavelli and Adams both lauded the Republic of Venice's mixed government. Machiavelli, DISCOURSES, at 27–33; Adams, DEFENCE OF THE CONSTITUTIONS, at 64 ("Great care is taken in Venice, to balance one court against another, and render their powers mutual checks to each other."). Supporting the theory that mixed governments are "more stable and lasting," the Republic of Venice lasted 1,100 years (697 AD to 1797 AD).

"Seventeenth-century Englishman James Harrington was the modern advocate of mixed government most influential in America." Carl J. Richard, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 129 (1995). "An equal Commonwealth," according to Harrington, "is a Government . . . arising into the superstructures" of "the Senate debating and proposing, the people resolving, and the Magistracy executing[.]" James Harrington, THE COMMONWEALTH OF OCEANA 23 (1656).

Later in the 17th century, Algernon Sidney wrote that "there never was a good government in the world" that was not mixed. Algernon Sidney, DISCOURSES CONCERNING GOVERNMENT 166 (Thomas G. West ed., rev. ed. 1996). Rather, "those nations that have wanted the prudence rightly to balance the powers of their magistrates, have been frequently obliged to have recourse to the most violent remedies, and with much difficulty, danger and blood, to punish the

crimes which they might have prevented." *Id.* at 544. Thomas Jefferson identified Sidney, along with Aristotle, Cicero, and John Locke, as forming the American consensus on rights and liberty in the founding era. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 117–19 (Andrew A. Lipscomb ed., 1903).

Among America's founding generation, Montesquieu was perhaps the most celebrated proponent of a separation of powers. He argued that:

> When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty. . . .
>
> Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.
>
> Miserable indeed would be the case, were the same man, or the same body . . . to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.

1 M. de Secondat, Baron de Montesquieu, THE SPIRIT OF LAWS 216 (1750).

William Blackstone—whose *Commentaries* were "possessed & understood by every one" in early America, Letter from Thomas Jefferson to Thomas Cooper (Jan. 16, 1814), *in* 7 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES 127 (J. Jefferson Looney ed., 2010)—echoed Montesquieu:

> In all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. . . . But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject.

1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 142 (1765). Moreover, Blackstone "thought a delegation of lawmaking power to be 'disgraceful.'" *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 73–74 (2015) (Thomas, J., concurring in the judgment) (quoting 4 Blackstone, COMMENTARIES, at 424) (brackets omitted).

John Adams began warning about the dangers of accumulated governmental power in 1763: "No simple Form of Government [with accumulated powers], can possibly secure Men against the Violences of Power." 1 PAPERS OF JOHN ADAMS 83 (Robert J. Taylor ed., 1977). In 1772, he wrote that "[t]he best Governments of the World have been mixed." *Notes for an Oration at Braintree, Spring 1772*, *in* 2 DIARY AND

AUTOBIOGRAPHY OF JOHN ADAMS 58 (L. H. Butterfield ed., 1962). Then in 1776, Adams published "the most influential pamphlet in the early constitution-making period," Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 203 (1998), urging states to establish a separation of powers in their constitutions, John Adams, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES (1776). From 1787 to 1788, Adams published his three volume *Defence of the Constitutions*, "which remains the fullest exposition of mixed government theory by an American." Richard, THE FOUNDERS AND THE CLASSICS, at 133. Discussing nearly all the above theorists and several others, "Adams was particularly emphatic concerning the necessity of a high degree of separation of powers in a mixed government." *Id.* at 134.

The primary objective of a mixed government is to prevent an accumulation of power in the same body. America's Framers improved upon the mixed governments of the past by incorporating a separation of powers into their "mixed constitution." THE FEDERALIST NO. 40 (James Madison). By dividing government functions among independent branches with defined and limited powers, the Framers established a system of checks and balances to prevent any concentration of power.

II. The Declaration of Independence and early state constitutions exhibit the importance of the separation of powers from this nation's inception.

The Declaration of Independence complained that King George III had frustrated the exercise of the colonies' legislative, executive, and judicial powers, effectively accumulating those powers himself. King George "refused his Assent to Laws," "suspended [laws] in their Operation" by "utterly neglect[ing] to attend to them," and "made Judges dependent on his Will alone." THE DECLARATION OF INDEPENDENCE paras. 3, 4, 11 (U.S. 1776). The colonists' experience, therefore, confirmed their predecessors' assurances that the accumulation of such power leads to tyranny.

When the new states began creating their constitutions, they were adamant that the legislative, executive, and judicial powers be separated.

Virginia's 1776 constitution stated that "[t]he legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time[.]" 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3815 (Francis Newton Thorpe ed., 1909). Elsewhere, it declared that "the legislative and executive powers of the State should be separate and distinct from the judiciary." *Id.* at 3813.

Maryland's 1776 constitution provided that "the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other[.]" 3 *id.* at 1687.

North Carolina used nearly identical language in its 1776 constitution: "the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other." 5 *id.* at 2787.

Georgia's 1777 constitution similarly ensured that "[t]he legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." 2 *id.* at 778.

Massachusetts's 1780 constitution—today, the world's oldest functioning written constitution, drafted by John Adams—provided:

> [T]he legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

3 *id.* at 1893.

"In the government of this state," New Hampshire's 1784 constitution provides, "the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate

from and independent of each other, as the nature of a free government will admit[.]" 4 *id.* at 2457.

Vermont's 1786 constitution declared that "[t]he legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." 6 *id.* at 3755.

"The constitution of New York," from 1777, "contains no declaration on this subject; but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments." THE FEDERALIST NO. 47 (James Madison); *see* 5 THE FEDERAL AND STATE CONSTITUTIONS, at 2623–38. The same is true for New Jersey's 1776 constitution, *id.* at 2596 (establishing a legislature, a judiciary, and a "Governor" who "shall have the supreme executive power"); Pennsylvania's 1776 constitution, *id.* at 3084 (vesting the "supreme legislative power" in "a house of representatives," the "supreme executive power" in "a president and council," and providing for the establishment of "[c]ourts of justice"); and Delaware's 1776 constitution, 1 *id.* at 562–63 (establishing a bicameral legislature, a judiciary, and a "president" to exercise executive powers).

Five of these pre-1787 constitutions—Virginia's, Maryland's, North Carolina's, Massachusetts's, and New Hampshire's—established the separation of powers in a declaration of rights, demonstrating that the founding generation viewed the separation of powers as securing liberty against arbitrary power. When the Constitutional Convention convened in 1787, its members shared the same understanding. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149

(10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he founders considered the separation of powers a vital guard against governmental encroachment on the people's liberties, including all those later enumerated in the Bill of Rights.").

III. The debates over the Constitution demonstrate a universal understanding that the separation of powers is essential to a free government.

A. United States Constitution.

The United States Constitution is unequivocal in distributing and securing the legislative, executive, and judicial powers. "All legislative Powers herein granted shall be vested in a Congress of the United States[.]" U.S. CONST. art. I, § 1. "The executive Power shall be vested in a President of the United States[.]" U.S. CONST. art. II, § 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

Indeed, as Thomas Jefferson asserted, "[t]he leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other[.]" Letter from Thomas Jefferson to George Hay (June 20, 1807), *in* 10 THE WORKS OF THOMAS JEFFERSON 404 (Paul Leicester Ford ed., 1905); *see also* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1391 (John P. Kaminski et al. eds., 2000) (James Bowdoin, Jr. at the Massachusetts Convention: That "the powers of

government, are separated . . . and mutually check each other" are "fundamental principles, in the federal Constitution.").

The independence of the branches reflects the Founders' widely held belief, as Alexander Hamilton put it, that "the definition of [despotism] is, a government, in which all power is concentrated in a single body." 22 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 1725 (New York Convention); *see also* Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA 195 (1787) ("concentrating" the "legislative, executive, and judiciary" powers "in the same hands is precisely the definition of despotic government"); Tully, BALT. MD. GAZETTE, Apr. 4, 1788, *in* 12 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 478 ("[A] single body with all the three branches of government . . . would lay the most proper foundation for tyranny [that] ever was in the world."); 30 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 416 (Richard Dobbs Spaight at the North Carolina Convention: "All will agree that the concession of power to a government so constructed [where 'the three branches of government are blended together'], is dangerous.").

The independence of the branches also reflected the Founders' belief that the separation of powers was necessary to protect the people's rights. "It is now generally understood," James Winthrop wrote in 1788, "that it is for the security of the people, that the powers of the government should be lodged in different branches." Agrippa XVI, MASS. GAZETTE, Feb. 5, 1788, *in* 5 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 864; *see also* Federal Farmer,

Letter VI, Dec. 25, 1787, *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 984–85 (Including among the "unalienable or fundamental rights in the United States" that "[t]he legislative, executive, and judicial powers, ought always to be kept distinct."). Some even suggested that the protections provided by the separation of powers precluded the need for a Bill of Rights. For example, "Agricola" emphasized: "If we even fail our attempts to get a constitutional amendment, still we have the government remaining," which "has all the settled distributions of power, and all the real and substantial checks[.]" *Agricola's Opinion*, POUGHKEEPSIE COUNTRY JOURNAL, Apr. 1, 1788, *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 887.

What the Founders disagreed over was whether the mixture of powers that the Constitution *explicitly authorized* was too dangerous. The Antifederalists wanted a complete separation of the legislative, executive, and judicial branches. The Federalists, however, argued that a minimum amount of overlap would provide the greatest protection by ensuring that the branches check one another. Certainly, as demonstrated below, they all would have opposed the accumulation of powers that *Chevron* deference allows, which the Constitution neither explicitly nor implicitly permits.

B. Antifederalist criticism.

The Antifederalists criticized the mixture of powers that—unlike *Chevron* deference—the Constitution expressly authorized. "The great

objection" to the Constitution, William Findley said, "is the blending of executive and legislative power. Where they are blended, there can be no liberty." 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 512 (Pennsylvania Convention). The character of the Antifederalists' objections demonstrates just how far of a departure *Chevron* deference is from the Constitution.

Many Antifederalists objected to the Senate's power to ratify treaties made by the President. *See* U.S. CONST. art. II, § 2, cl. 2. At the Pennsylvania Convention, John Smilie argued that it "contradicts the leading principles of government" to allow the Senate "to concur with the President in making treaties." *Id.* at 466. Robert Whitehill called it "[a]n inconsistency between the 1st and 2nd articles" of the Constitution. *Id.* at 460; *see also* CUMBERLAND GAZETTE, Nov. 22, 1787, *in* 4 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 296.

A second objection was that "blend[ing] the legislative and executive departments" by granting the Vice President the tiebreaking "vote in the Senate" will make the Vice President "a dangerous officer." 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 512 (Robert Whitehill at the Pennsylvania Convention); *see* U.S. CONST. art. I, § 3, cl. 4.

A third objection was over the appointment and confirmation of officers. *See* U.S. CONST. art. II, § 2, cl. 2. According to William Findley, this created an improper mixture of powers because the "President in appointing officers will generally nominate such persons as will be agreeable to the Senate." 2

DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 513 (Pennsylvania Convention); *see also Cato V*, N.Y. JOURNAL, Nov. 22, 1787, *in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 278 ("the senate and president are improperly connected, both as to appointments, and the making of treaties").

A fourth objection was over the Senate's power to try impeachments. *See* U.S. CONST. art. I, § 3, cl. 6. Samuel Spencer argued at the North Carolina Convention that,

> [T]he combining in the Senate, the power of legislation with a controuling share in the appointment of all the officers of the United States, except those chosen by the people, and the power of trying all impeachments that may be found against such officers, invests the Senate at once with such an enormity of power, and with such an overbearing and uncontroulable influence, as is incompatible with every idea of safety to the liberties of a free country, and is calculated to swallow up all other powers, and to render that body a despotic aristocracy.

30 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 334–35.

George Mason declined to sign the Constitution at the Constitutional Convention in part because the Senate's "Influence upon & Connection with the supreme Executive" in "the Appointment of Ambassadors, & all public Officers, in making Treaties, & in trying all Impeachments . . . will destroy

any Balance in the Government, and enable them to accomplish what Usurpations they please upon the Rights & Libertys of the People." *George Mason's Objections to the Constitution of Government formed by the Constitution*, *in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 43–44.

Elbridge Gerry, by contrast, declined to sign the Constitution at the Constitutional Convention over a concern "that the executive is blended with & will have an undue influence over the legislature." 4 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 98.

Delegates from Pennsylvania's Convention who voted against ratification explained their objections to the Constitution, including that:

> [T]he constitution presents . . . the undue and dangerous mixture of the powers of government; the same body possessing legislative, executive, and judicial powers. The Senate is a constituent branch of the legislature, it has judicial power in judging on impeachments, and in this case unites in some measure the characters of judge and party, as all of the principal officers are appointed by the president general, with the concurrence of the senate and therefore they derive their offices in part from the senate. . . . And the senate has, moreover, various and great executive powers, viz.: in concurrence with the president general, they form treaties with foreign nations, that may control and abrogate the constitutions and laws of the several states.

The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 634.

The Antifederalists frequently called for language—like that in many state constitutions—expressly declaring that the powers of government be kept forever separate and distinct. *See, e.g.*, A Democratic Federalist, PENNSYLVANIA HERALD, Oct. 17, 1787, *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 198; An Officer of the Late Continental Army, INDEPENDENT GAZETTEER, Nov. 6, 1787, *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 211; 30 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 333 (Samuel Spencer at the North Carolina Convention); 2 *id.* at 503 (William Findley at the Pennsylvania Convention); *Cincinnatus IV: To James Wilson, Esquire*, N.Y. JOURNAL, Nov. 22, 1787, *in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 286; *A Countryman V*, N.Y. JOURNAL, Jan. 22, 1788, *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 636.

Thus, North Carolina's Convention proposed an amendment stating "[t]hat the legislative, executive and judiciary powers of government should be separate and distinct[.]" 30 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 453. And Pennsylvania's dissenting delegates proposed an amendment declaring "[t]hat the legislative, executive, and judicial powers be kept separate." 2 *id.* at 624.

Yet even the opponents of the Constitution—who did not shy away from hyperbole—could not contemplate any mixture of powers approaching that which *Chevron* deference allows.

C. Federalist response.

The Federalists' response to the Antifederalists' concerns further illustrates how out of step *Chevron* deference is with the Constitution. James Madison, "the Father of the Constitution," emphasized the importance of the separation of powers in THE FEDERALIST NOS. 47–51. He believed that the Constitution, through its structural design, provided the greatest possible protections.

Addressing the Antifederalists' complaints about the powers being too blended under the Constitution, Madison acknowledged that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded." THE FEDERALIST NO. 47 (James Madison). "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *Id.*

"Were the federal constitution, therefore, really chargeable with this accumulation of power," he conceded, "no further arguments would be necessary to inspire a universal reprobation of the system." *Id.* But "the charge cannot be supported," *id.*, because the Constitution permits only as much overlap as is

necessary for each branch of government to check the others: "unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim [of separation of powers] requires, as essential to a free government, can never in practice be duly maintained," THE FEDERALIST NO. 48 (James Madison). In other words, "[a]mbition must be made to counteract ambition." THE FEDERALIST NO. 51 (James Madison).

By providing these checks, Madison argued, the federal Constitution provides even greater security for the separation of powers than the state constitutions that expressly required the legislative, executive, and judicial powers to be forever kept separate and distinct. The latter, despite their express guarantees, were nevertheless "violated by too great a mixture, and even an actual consolidation of the different powers," THE FEDERALIST NO. 47 (James Madison)—thus proving the insufficiency of mere "parchment barriers," THE FEDERALIST NO. 48 (James Madison). The federal Constitution, by contrast, precludes too great a mixture "by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." THE FEDERALIST NO. 51 (James Madison). Thus, each branch of government fulfilling its own duties under the Constitution will ensure that none of them "possess[es], directly or indirectly, an overruling influence over the others in the administration of their respective powers." THE FEDERALIST NO. 48 (James Madison).

In sum, Madison recognized that it "is admitted on all hands to be essential to the preservation of liberty" for the "exercise of the different powers of government" to be "separate and distinct." THE FEDERALIST NO. 51 (James Madison). He believed that the Constitution provided the best possible safeguards to secure the separation of powers by ensuring that "each department . . . have a will of its own." *Id.*

James Iredell—a Justice on the first Supreme Court[2]—made a similar argument at the North Carolina Convention: "The best writers, and all the most enlightened part of mankind, agree that it is essential to the preservation of liberty, that such distinction [between the 'executive, legislative, and judicial powers'] should be made. But this distinction would have very little efficacy, if each power had not means to defend itself against the encroachment of the others." 30 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 294–95.

James Wilson—another Justice on the first Supreme Court—answered several of the Antifederalists' concerns. Although "the Senate possess the power of trying impeachments," it is "under a check" as "the House of Representatives possess the sole power of making impeachments." 2 *id.* at 561 (Pennsylvania Convention). In ratifying treaties, the Senate is "also under a check, by a constituent part of the government, . . . the President of the United States." *Id.* "The same observation applies in the appointment of officers. Every officer

[2] President Washington nominated Iredell after his original nominee, Robert Harrison, declined to serve.

must be nominated solely and exclusively by the President." *Id.* at 562. Thus, while Wilson recognized that it is a "principle so necessary to preserve the freedom of republics, that the legislative and executive powers should be separate and independent," he believed, like Madison, that the Constitution effectively preserved the separation of powers. *Id.* at 567.

The Supreme Court's first Chief Justice, John Jay, explained that,

> [R]emembering the many instances in which Governments vested solely in one man, or one body of men, had degenerated into tyrannies, they [the members of the Constitutional Convention] judged it most prudent that the three great branches of power should be committed to different hands, and therefore that the executive should be separated from the legislative, and the judicial from both. Thus far the propriety of their work is easily seen and understood, and therefore is thus far *almost* universally approved[.]

A Citizen of New-York, *An Address to the People of the State of New York*, Apr. 15, 1788, *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 932.

Alexander Hamilton echoed Madison at New York's Convention, arguing that due to the "mutual checks" built into the "structure of this constitution," "all [the] apprehension[s] of the extent of powers are unjust and imaginary." 22 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 1953.

The Federalists believed as strongly in the separation of powers as their Antifederalist opponents, but argued that the doctrine would be best secured through a minimal amount of overlap ensuring that each branch could adequately check the others. That overlap constituted one branch having the limited authority to prevent another branch from exercising some power, not an overlap that allows one branch to exercise the exclusive power granted to another. Like their Antifederalist opponents, the Federalists never contemplated any mixture of powers approaching that which *Chevron* deference allows.

IV. The separation of legislative, executive, and judicial powers is built into every state government in the Union.

After the ratification of the United States Constitution, every state that joined the Union or enacted new constitutions ensured that the legislative, executive, and judicial functions were separate and distinct.[3]

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[3] *See, e.g.*, 1 THE FEDERAL AND STATE CONSTITUTIONS, at 99 (Alabama 1819), 120 (Alabama 1865), 136 (Alabama 1867), 157 (Alabama 1875), 271 (Arkansas 1836), 291 (Arkansas 1864), 310 (Arkansas 1868), 338 (Arkansas 1874), 393 (California 1849), 415 (California 1879), 478 (Colorado 1876), 538 (Connecticut 1818); 2 *id.* at 666 (Florida 1838), 687 (Florida 1865), 707 (Florida 1868), 735 (Florida 1885), 791 (Georgia 1798), 811 (Georgia 1865), 843–44 (Georgia 1877), 920–21 (Idaho 1889), 972 (Illinois 1818), 986 (Illinois 1848), 1015 (Illinois 1870), 1059–60 (Indiana 1816), 1077 (Indiana 1851), 1125–26 (Iowa 1846), 1139 (Iowa 1857), 1183 (Kansas 1855), 1202 (Kansas 1857), 1225 (Kansas 1858); 3 *id.* at 1264–65 (Kentucky 1792), 1277 (Kentucky 1799), 1292 (Kentucky

Most of these constitutions included a statement like Indiana's 1816 constitution, which prohibited any mixture of powers not "expressly permitted":

> The powers of the Government of Indiana shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to-wit; Those which are Legislative to one, those which are Executive to another, and those which are Judiciary to another; and no person or collection of persons, being of one of those departments, shall exercise any power

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1850), 1318 (Kentucky 1890), 1381 (Louisiana 1812), 1392 (Louisiana 1845), 1411 (Louisiana 1852), 1429–30 (Louisiana 1864), 1472 (Louisiana 1879), 1524 (Louisiana 1898), 1651 (Maine 1819), 1713 (Maryland 1851), 1742 (Maryland 1864); 4 *id.* at 1932 (Michigan 1835), 1945 (Michigan 1850), 1995 (Minnesota 1857), 2035 (Mississippi 1817), 2051 (Mississippi 1832), 2071 (Mississippi 1868), 2090 (Mississippi 1890), 2151 (Missouri 1820), 2200 (Missouri 1865), 2233 (Missouri 1875), 2304 (Montana 1889), 2363 (Nebraska 1875), 2405 (Nevada 1864), 2475 (New Hampshire 1792); 5 *id.* at 2601 (New Jersey 1844), 2640–47 (New York 1821), 2801 (North Carolina 1868), 2823 (North Carolina 1876), 2856–68 (North Dakota 1889), 2901–07 (Ohio 1802), 3002 (Oregon 1857), 3123–37 (Pennsylvania 1873); 6 *id.* at 3226 (Rhode Island 1842), 3283 (South Carolina 1868), 3308 (South Carolina 1895), 3358 (South Dakota 1889), 3429 (Tennessee 1834), 3453 (Tennessee 1870), 3549 (Texas 1845), 3571 (Texas 1866), 3593 (Texas 1868), 3624 (Texas 1876), 3706 (Utah 1895), 3765 (Vermont 1793); 7 *id.* at 3975–87 (Washington 1889), 3821 (Virginia 1830), 3832 (Virginia 1850), 3854 (Virginia 1864), 3875 (Virginia 1870), 4014 (West Virginia 1863), 4039 (West Virginia 1872), 4081–89 (Wisconsin 1848), 4120 (Wyoming 1889), 4162 (Maine 1819), 4188–89 (New Jersey 1844), 4277–78 (Oklahoma 1907); ARIZ. CONST. art. III (1910); N.M. CONST. art. III, § 1 (1911); ALASKA CONST. arts. II–IV (1956); HAW. CONST. arts. III–V (1959).

> properly attached to either of the others, except in the instances herein expressly permitted.

2 THE FEDERAL AND STATE CONSTITUTIONS, at 1059–60.

As reflected in the federal Constitution and every state constitution, the separation of powers is an inviolable principle in the theory of American governance.

V. *Chevron* deference violates the Constitution's separation of powers and undermines the Framers' constitutional design.

Chevron deference violates the separation of powers—and thus undermines the Framers' constitutional design—by granting the executive branch ultimate judicial powers in addition to legislative powers.

"If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 & n.11 (1984)). Thus, "the agency may indeed exercise delegated legislative authority to overrule a judicial precedent in favor of the agency's preferred interpretation."

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143 (10th Cir. 2016).

The Constitution does not permit such a mixture of legislative, executive, and judicial powers. Indeed, it plainly forbids it.

A. *Chevron* deference violates Article III.

"The complete independence of the courts of justice is peculiarly essential in a limited constitution." THE FEDERALIST NO. 78 (Alexander Hamilton). But as Justice Thomas explained, *Chevron* deference transfers the judiciary's power "to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), to the executive branch:

> "The judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." Interpreting federal statutes—including ambiguous ones administered by an agency—"calls for that exercise of independent judgment." *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is "the best reading of an ambiguous statute" in favor of an agency's construction. It thus wrests from Courts the ultimate interpretative authority to "say what the law is," and hands it over to the Executive. Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.

Michigan v. E.P.A., 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) (citations and brackets omitted).

For most of western political history, judicial power was considered part of the executive branch. To avoid the perils that this mixture of powers regularly produced, the Founders were careful to keep them separate. "A Farmer" explained that: "The *judiciary* power, has generally been considered as a *branch* of the *executive*, because these two powers, have been so frequently united;—but where united, there is no liberty.—In every *free* State, the judiciary is kept separate [and] independent[.]" *A Farmer IV*, BALT. MD. GAZETTE, Mar. 21, 1788, *in* 11 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 410.

Moreover, the Founders recognized that "all possible care is requisite to enable [the judiciary] to defend itself against [the executive and legislative branches'] attacks," because "there is no liberty, if the power of judging be not separated from the legislative and executive powers." THE FEDERALIST NO. 78 (Alexander Hamilton). "[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." *Id.* Therefore, "[t]o the founders, the legislative and judicial powers were distinct by nature and their separation was among the most important liberty-protecting devices of the constitutional design, an independent right of the people essential to the preservation of all other rights later enumerated in the Constitution and its amendments." Honorable Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of*

Justice Scalia, 66 CASE W. RES. L. REV. 905, 912 (2016).

Chevron deference's encroachment on judicial powers is especially problematic when considering the encroachment it also allows on legislative powers, discussed below. The Founders were adamant that those who create the law must have no role in expounding the law. This was reflected in the debates at the Constitutional Convention. Rufus King emphasized the need for judges to "expound the law as it should come before them, free from the bias of having participated in its formation." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 98 (Max Farrand ed., 1911). And, as Madison noted, "Mr. STRONG thought, with Mr. GERRY, that the power of making, ought to be kept distinct from that of expounding, the laws. No maxim was better established. The Judges in exercising the function of expositors might be influenced by the part they had taken in passing the laws." JOURNAL OF THE CONSTITUTIONAL CONVENTION, KEPT BY JAMES MADISON 400 (E. H. Scott ed., 1898); *see also* A Bostonian, AMERICAN HERALD, Feb. 4, 1788, *in* 5 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 850–51 ("Is it not contradictory to every precept of human wisdom and inconsistent in its nature, that the expounders of law . . . should be the framers thereof?").

What is more, in violating Article III, *Chevron* deference transfers judicial power from what the Founders considered "the least dangerous [branch] to the political rights of the Constitution" to the executive, "which holds the sword of the community."

THE FEDERALIST NO. 78 (Alexander Hamilton). The Founders knew from history the perils of mixing such powers and deliberately forbade it by vesting "[t]he judicial Power of the United States" exclusively in this and inferior courts. U.S. CONST. art. III, § 1.

B. *Chevron* deference violates Article I.

"The deference required by *Chevron* not only erodes the role of the judiciary, it also diminishes the role of Congress." *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in the judgment). "Statutory ambiguity . . . becomes an implicit delegation of rule-making authority, and that authority is used . . . to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress." *Michigan*, 576 U.S. at 762 (Thomas, J., concurring). "The consequent aggrandizement of federal executive power at the expense of the legislature" incentivizes Congress "to pass vague laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues." *Egan*, 851 F.3d at 279 (Jordan, J., concurring in the judgment). The effect of *Chevron*, therefore, is a transfer of legislative power from the legislative branch to the executive branch. The Founders were wary of legislative and executive powers in the same hands, however, and intentionally prevented it.

The Founders understood that "the separation of the executive from the legislative" is "a principle which pervades all free governments." 30 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION,

at 319 (William Davie at the North Carolina Convention). As Richard Henry Lee explained, "[i]t has hitherto been supposed a fundamental maxim that in governments rightly balanced, the different branches of legislature should be unconnected, and that the legislative and executive powers should be separate[.]" Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), *in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 61. Conversely, where "the blending of executive and legislative power" exists, "there can be no liberty." 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 211 (William Findley at the Pennsylvania Convention). Thus,

> Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution's deliberative process was viewed by the Framers as a valuable feature, not something to be lamented and evaded.

Dep't of Transp., 575 U.S. at 61 (Alito, J., concurring) (citations omitted).

Under *Chevron*, there is a blending of executive and legislative powers. That is, a blending of the department that "holds the sword of the community," and "the legislature," which "prescribes the rules by which the duties and rights of every citizen are to be regulated." THE FEDERALIST NO. 78 (Alexander Hamilton). This dangerous combination contravenes

the safeguards for liberty that the Constitution secured by granting "[a]ll legislative Powers" to the "Congress of the United States." U.S. CONST. art. I, § 1.

CONCLUSION

Thomas Jefferson declared that "the government we fought for" is one "in which the powers" are "so divided and balanced" that no branch "could transcend their legal limits, without being effectually checked and restrained by the others." Jefferson, NOTES, at 195. *Chevron* disrupts the Constitution's division and balance of powers, thereby eroding a vital safeguard for liberty and against despotic government.

This Court should overrule *Chevron* and reverse the judgment below.

Respectfully submitted,

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