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* AMERICAN FREE ENTERPRISE CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Formed in 2022, the American Free Enterprise Chamber of Commerce ("AmFree") is a 501(c)(6) organization that represents hard-working entrepreneurs and businesses across all sectors to serve as the voice for pro-business and free market values. AmFree conducts research and develops policy initiatives designed to support free, fair, and open markets that spur economic growth.

For decades, AmFree's members have been saddled with overly burdensome regulations and harmed by the insatiable expansion of the federal bureaucracy. In response, AmFree recently launched the Center for Legal Action ("CLA") to address these issues in court. Spearheaded by two-time former U.S. Attorney General Bill Barr, the CLA's mission is to return power to the people and their elected representatives.

To that end, the CLA challenges the barrage of federal regulations that raise energy costs, reduce employment, restrict basic freedoms, and erode the constitutional rights of individuals and businesses. The CLA also files amicus briefs in important regulatory and constitutional cases to support reining in the administrative state. Curtailing such bureaucratic overreach is imperative for the growth, prosperity, and competitiveness of the American economy.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Two hundred twenty years ago, this Court affirmed its power and its duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The judges "who apply the rule to particular cases must, *of necessity* expound and interpret the rule." *Id.* (emphasis added). The judgment of "other high functionaries" may be entitled to "great respect," but in "a government of laws, and not of men," the Constitution imposes upon the judicial department "the solemn duty to interpret the laws in the last resort," and "it is not at liberty to surrender, or to waive" that judgment. *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 161–62 (1840) (Story, J.).

Forty years ago, however, this Court did just that. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court adopted a regime of mandatory judicial deference to agencies on questions of statutory interpretation. And it did so without any discussion of its constitutional or statutory duties. Because *Chevron* deference violates the Constitution and the Administrative Procedure Act ("APA"), this Court should abandon it and make clear that courts, not functionaries, have conclusive authority to interpret the law in the cases before them.

Our Constitution separates powers. The commingling of executive, legislative, and judicial power threatens "this essential precaution in favor of liberty." The Federalist No. 47, at 297 (James Madison) (Clinton Rossiter ed., 1961). But, as reflected in the decision below, *Chevron* deference has invited federal agencies to read statutory silence as a

blank check to rewrite the law in the guise of interpretation. And the people have no recourse to check that arrogation of power in court. The judiciary stands idly by, refusing to ascertain "the meaning of [the] act proceeding from the legislative body" while granting the bureaucratic revision the force of law. The Federalist No. 78, at 466 (Alexander Hamilton). Such deference to executive agencies violates Article I's vesting of "[a]ll legislative Powers" in Congress and undermines the judicial power. It also offends fundamental principles of due process, depriving regulated parties of fair notice and defying the age-old principle that no one shall be the judge in his own case.

Beyond these constitutional infirmities, *Chevron* deference violates the APA's unequivocal command that reviewing courts "shall decide *all* relevant questions of law" and "interpret constitutional and statutory provisions." 5 U.S.C. § 706 (emphasis added). If Congress had intended a deferential standard of review on certain legal questions, it would have said so—just as it did elsewhere in the APA for some agency findings of fact. *See id.* § 706(2)(E). Yet nothing in the APA suggests that Congress wanted statutory ambiguity to trigger deference; in fact, the APA's plain text refutes that idea.

Nor can *Chevron* deference be justified based on an agency's supposed political accountability. When it comes to *interpreting* law, our Constitution demands not accountability, but independence. And when it comes to *making* law, our Constitution demands the political accountability of a representative and democratically elected legislature. The President's legislative role begins and ends with the presentment

requirement, and unelected bureaucrats have *no* legislative power under that system.

In recent years, members of this Court have recognized *Chevron*'s fundamental flaws. But rather than abandon that approach, in recent cases, the Court has simply ignored it. *See, e.g.*, *Becerra v. Empire Health Found.*, 142 S. Ct. 2354 (2022); *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022). This Court may now decide cases as though *Chevron* were not precedent, but lower courts have no such luxury. If one of this Court's precedents "'has direct application in a case' . . . a lower court 'should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Mallory v. Norfolk S. Rwy. Co.*, 143 S. Ct. 2028, 2038 (2023) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). Lower courts thus remain forced to apply an erroneous deference doctrine that has proven unworkable in practice.

"[T]he time has come to face the behemoth." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Rather than sidestep *Chevron* once again, this Court should jettison the doctrine, direct lower courts to decide *all* relevant questions of law, and free judges "to find the best reading of the statute." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2144 (2016).

The Court's traditional *stare decisis* factors support this approach. As a "judge-made rule," it is "particularly appropriate" that this Court revisit *Chevron* in light of the Constitution and statutory text that the decision ignored. *Pearson v. Callahan*, 555

U.S. 223, 233 (2009). "The Court's precedents . . . pronouncing the Court's own interpretive methods and principles typically do not fall within th[e] category of stringent statutory *stare decisis*." *Allen v. Milligan*, 143 S. Ct. 1487, 1517 n.1 (2023) (Kavanaugh J., concurring) (citation omitted). And there is no good reason to retain *Chevron*. The decision was "egregiously wrong" from the start, and it has since proven "deeply damaging" to both the people's liberty and the rule of law. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022).

Abandoning *Chevron* "would not upset expectations" either. *Pearson*, 555 U.S. at 233. Members of this Court have repeatedly expressed grave doubts about *Chevron* in recent years. And given the unpredictability of *Chevron* deference, "[n]o one rationally orders their affairs in reliance" upon it. Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why it Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 785 (2010). Far from protecting reliance interests, retaining *Chevron* deference would undermine them. Fixed laws allow citizens to plan their conduct, to invest in the future, and to rest knowing that they have complied with the law. But *Chevron* leaves the law in a state of perpetual uncertainty. It forces the people to guess how agencies might expand or contract Congress's commands and hopelessly speculate whether those interpretive shifts might carry the force of law. A single misstep can spell commercial disaster—or even criminal penalties.

Four decades of experience have also demonstrated that the *Chevron* framework cannot "be understood

and applied in a consistent and predictable manner." *Dobbs*, 142 S. Ct. at 2272. It is simply unworkable. Judges cannot agree what is "ambiguous" enough for step one or "reasonable" enough for step two, *see* Kavanaugh, *supra*, at 2136, let alone whether *Chevron* applies at all at "step zero," *see United States v. Mead Corp.*, 533 U.S. 218 (2001). And agencies have capitalized upon those vagaries to push the legal envelope and claim new powers beyond those Congress has granted.

Chevron was an experiment whose time has come and gone. The Court's intent to promote accountability in statutory interpretation has had the opposite effect, undermining the constitutional role of Congress and the courts, and inviting regulatory overreach. And recent experience in the states that have abandoned *Chevron*-like deference regimes confirms that ending *Chevron* deference is consistent with sensible rulemaking, economic growth, and the rule of law. Rather than prune around the edges, this Court should repudiate *Chevron*'s unwarranted delegation of the legislative and judicial powers once and for all. The Constitution demands it. The APA demands it. And this Court's precedent on precedent demands it.

ARGUMENT

I. The Court Should Abandon *Chevron* Deference Because It Is Egregiously Wrong And Deeply Damaging To The Rule Of Law.

Chevron deference was a grievous mistake when the Court adopted it. Experience has confirmed this, and the Court need not perpetuate the error. *Chevron*'s regime of administrative deference defies

the constitutional separation of powers and the due process rights of regulated parties. And it cannot be squared with the APA's plain text.

A. *Chevron* Deference Defies The Separation of Powers.

The Framers recognized that the "separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty." The Federalist No. 51, at 318 (James Madison). So they "separated the three main powers of Government—legislative, executive, and judicial—into the three branches created by Articles I, II, and III." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring). The Constitution vests Congress with "[a]ll legislative Powers" granted therein. U.S. Const. art. I, § 1. It tasks the President with "faithfully execut[ing]" the laws Congress enacts. *Id.* art. II, § 3. And it vests "[t]he judicial Power of the United States" in the federal courts alone. *Id.* art. III, § 1. Thus, since the Founding, it has been understood that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 137; *accord* The Federalist No. 78, at 466 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts.").

The Framers insisted that this interpretive duty remain with the judiciary in cases before the courts. "[O]ther branches of Government have the authority and obligation to interpret the law, but only the judicial interpretation would be considered authoritative in a judicial proceeding." *Perez*, 575 U.S. at 119–20 (Thomas, J., concurring). The Framers

"were painfully aware of the dangers of executive and legislative intrusion on judicial decision-making." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437 (2019) (Gorsuch, J., concurring). And experience had shown that the political branches "may be swayed by popular sentiment to abandon the strictures of the . . . rules of law." *Perez*, 575 U.S. at 122 (Thomas, J., concurring); *see Plaut v. Spendthrift Farm*, 514 U.S. 211, 219–23 (1995); The Federalist No. 81, at 482–83 (Alexander Hamilton). Judges, by contrast, are insulated from such pressures by life tenure and salary protections. *See United States v. Hatter*, 532 U.S. 557, 567–69 (2001). And those counter-majoritarian safeguards grant judges a unique capacity to "secure a steady, upright, and impartial administration of the laws." The Federalist No. 78, at 464 (Alexander Hamilton).

The Constitution thus created a system to keep the judiciary "truly distinct from both the legislature and the executive." *Id.* at 465. And, for nearly two centuries, that division of authority governed in the federal courts. This Court confirmed early on that "it is not at liberty to surrender" its "solemn duty to interpret the laws." *Dickson*, 40 U.S. at 162. And, "certainly," this Court explained, it "would not be bound to adopt [a statutory] construction given by the head of a department" charged with enforcing the law. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840). Courts instead had to "decide for themselves" what is "the meaning of a statute." *Chicago, Milwaukee & St. Paul Rwy. Co. v. McCaull-Dinsmore Co.*, 253 U.S. 97, 99 (1920). That principle was "well established." *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932).

Then *Chevron* came along. There, a bare quorum of this Court fashioned a two-step framework for "review[ing] an agency's construction of the statute which it administers." 467 U.S. at 842. Under that framework, a court first asks "whether Congress has directly spoken to the precise question at issue." *Id.* If it has, "the unambiguously expressed intent of Congress" must be respected. *Id.* at 843. But, "if the statute is silent or ambiguous with respect to the specific issue," then the reviewing court need only determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* So long as the agency's construction is a "reasonable one," the court must defer to it—even when that interpretation is not the best one. *Id.* at 843–44 & n.11.

Such deference to agencies on questions of law violates the Constitution. As Justice Breyer once observed, *Chevron* allows for "a greater abdication of judicial responsibility to interpret the law than seems wise." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 381 (1986). The Framers would agree. Through Article III, they "establishe[d] a structure for providing parties with the independent judgment of the judges" that would decide their cases. Philip Hamburger, *Is Administrative Law Unlawful?* 316 (2014). *Chevron* deference's abdication of that responsibility amounts to "an abandonment of judicial office." *Id.* It grants to executive agencies the "judicial Power of the United States," U.S. Const. art. III, § 1, even though that power cannot be "shared with the Executive Branch," *United States v. Nixon*, 418 U.S. 683, 704 (1974); *see Dickson*, 40 U.S. (14 Pet.) at 162; *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C. Va. 1833) (Marshall, C.J.).

Statutory ambiguities do not justify this unconstitutional shift of power. After all, "[t]hose who ratified the Constitution knew that legal texts would often contain ambiguities." *Perez*, 575 U.S. at 119 (Thomas, J., concurring); *see, e.g.*, The Federalist No. 37, at 225 (James Madison). But the Framers extended the judicial Power to "all Cases" arising under the Laws of the United States. *See* U.S. Const. art. III, § 2. They thus understood Article III to vest judges with the authority to "resolve these ambiguities over time" in the cases or controversies that came before the courts. *Perez*, 575 U.S. at 119 (Thomas, J., concurring); *see also* The Federalist No. 22, at 146 (Alexander Hamilton) (explaining that the "true import" of "all" this Nation's laws "must . . . be ascertained by judicial determinations"). In ceding the "judicial Power" to the Executive, *Chevron* deference violates that original understanding.

The *Chevron* Court did not even try to reconcile its shift of judicial responsibility with Article III. Instead, it mistakenly articulated its deference regime as though it were well-settled, *see* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 1000 (2017), and defended it by citing our Constitution's vesting of policymaking "in the political branches," *Chevron*, 467 U.S. at 866 (citation omitted). But it does not follow that courts must defer to agencies on questions of law. Once a policy choice has been made through a duly enacted law, courts must always "fulfill[] their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations." *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring).

Moreover, *Chevron* blurred the critical question of *which* political branch's policy choices matter. "[W]hen it comes to the Nation's policy, the Constitution gives Congress the reins." *Biden v. Nebraska*, 143 S. Ct. 2355, 2381 (2023) (Barrett, J., concurring). That body possesses "[a]ll legislative Powers" under the Constitution. U.S. Const. art. I, § 1. And Article I's text "permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Accordingly, only Congress may exercise the legislative power "to prescribe rules for the regulation of the society." The Federalist No. 75, at 449 (Alexander Hamilton); *see Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.). And to carry the force of law, those rules must survive the gauntlet of bicameralism and presentment. *See* U.S. Const. art. I, § 7, cl. 2. Executive agencies have no place in that "single, finely wrought and exhaustively considered, procedure." *INS v. Chadha*, 462 U.S. 919, 951 (1983).

But *Chevron* deference inverts these principles by transferring the lawmaking power to agencies. When "Congress [does] not actually have an intent," *Chevron* allows the agency to moonlight as legislator with any "reasonable policy choice" it wishes to advance. 467 U.S. at 845. That is true not only when Congress "did not consider the question," but also when "Congress was unable to forge a coalition on either side." *Id.* at 865. Congressional elections are the place to resolve that deadlock and to decide whether, for instance, the Clean Air Act should be amended. The confirmation hearing for a new Administrator for the Environmental Protection Agency is not. Yet, under *Chevron*, new agency heads have carried with them

effective authority to make "reasonable policy choices" that change the law under the pretense of interpretation.

By allowing Members of Congress to punt hard questions to agencies, *Chevron* deference short-circuits the difficult and deliberative process for legislation that the Framers thought necessary for the preservation of liberty. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2202–03 (2020). And the inevitable result is that the people must endure the "excess of lawmaking" that has plagued our government. The Federalist No. 62, at 376 (James Madison); *see Kisor*, 139 S. Ct. at 2446–47 (Gorsuch, J., concurring) (detailing the "explosive growth of the administrative state over the last half-century").

In short, *Chevron* deference is "more than a little difficult to square with the Constitution of the [F]ramers' design." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J, concurring). It "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power." *Id.* And that "accumulation of all powers, legislative, executive, and judiciary, in the same hands," is precisely what the Framers set out to prevent when they carefully separated those powers. The Federalist No. 47, at 301 (James Madison). This Court should restore that well-established division of authority and put *Chevron* deference to rest.

B. *Chevron* Deference Violates Due Process.

The constitutional problems with *Chevron* deference do not stop with the separation of powers. *Chevron* deference also "invites the very sort of due

process" concerns that "the [F]ramers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

The "'first essential of due process of law' [is] that statutes must give people 'of common intelligence' fair notice of what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). But, under *Chevron*, "[f]air notice gives way to vast uncertainty." *Buffington v. McDonough*, 143 S. Ct. 14, 20 (2022) (Gorsuch, J., dissenting from the denial of certiorari). Agencies flip-flop their statutory interpretations "almost as often as elections change administrations." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement respecting denial of certiorari).

And the effect of that interpretive ping-pong is that the people have trouble keeping up. Not only must they "conform their conduct to the fairest reading of the law they might expect from a neutral judge," they must also "guess whether the statute will be declared ambiguous;" "guess again whether the agency's initial interpretation of the law will be declared 'reasonable';" and then "guess again whether a later and opposing agency interpretation will also be held 'reasonable.'" *Id.* (emphasis omitted). Those fair notice problems are bad enough for sophisticated parties with teams of lawyers. But they only get worse for ordinary Americans who are subject to the administrative state's ever-expanding grasp over "almost every

aspect of daily life." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

Chevron is troubling in another respect. "Due process guarantees 'an absence of actual bias' on the part of a judge." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). But *Chevron* deference requires judges to forsake their "duty of independent judgment" and embrace "a form of systematic bias" toward that "most powerful of parties"—the federal government. Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1203–04, 1212 (2016). It is simply not "fair in a court of justice for judges to defer to one of the litigants," much less the government, on questions of law. *United States v. Havis*, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring), *rev'd en banc*, 927 F.3d 382 (per curiam). That ceding of the judicial power allows the agency "to be a judge in [its] own cause." The Federalist No. 10, at 74 (James Madison). And it deprives regulated parties of their due process right to a "neutral and detached adjudicator." *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 618 (1993).

C. *Chevron* Deference Flouts The APA's Text.

Just as *Chevron* deference runs afoul of the Constitution, it also violates the APA. The statute provides that the "reviewing court," not the agency, "shall decide all relevant questions of law." 5 U.S.C. § 706. And it buttresses that command by tasking the "reviewing court," not the agency, with "interpret[ing] constitutional and statutory provisions." *Id.* The "clear mandate" of this language is that questions of law "shall be decided by the reviewing Court for itself,

and in the exercise of its own independent judgment." John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 ABA J. 434, 516 (1947). And, after exercising that judgment, the court must "hold unlawful and set aside" any agency action "not in accordance with law." 5 U.S.C. § 706(2)(A); *see also id.* § 706(2)(C) (directing the same, for agency action "in excess of statutory jurisdiction, authority, or limitations"). There is no place for *Chevron* deference in that statutory scheme.

This is only reinforced by the fact that "section 706 established deferential standards of review for issues *other* than 'relevant questions of law.'" Bamzai, *supra*, at 985 (emphasis added); *see* 5 U.S.C. § 706(2)(A) ("arbitrary, capricious, [or] an abuse of discretion"); *id.* § 706(2)(E) ("substantial evidence"). Thus, "Congress knew how to write a deferential standard into [the] statute when it wanted to do so." Bamzai, *supra*, at 985. That it did not for questions of statutory interpretation is telling. Congress instead chose to "place the court's duty to interpret statutes on an equal footing with its duty to interpret the Constitution, and courts never defer to agencies in reading the Constitution." *Baldwin v. United States*, 140 S. Ct. 690, 692 (2020) (Thomas, J., dissenting from the denial of certiorari) (citation omitted).

Rather than heed the unmistakable command of § 706, *Chevron* ignored it. The Court "did not even bother to cite" the APA anywhere in its analysis. *Id.* (citation omitted). It instead justified deference to administrative constructions on two grounds: *first*, that "statutory ambiguity represents an 'implicit' delegation to an agency to 'interpret a statute which it

administers'"; and, *second*, that "'policy choices' should be left to Executive Branch officials" who have expertise and are "'directly accountable to the people.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629–30 (2018) (quoting *Chevron*, 467 U.S. at 841, 844, 865). Neither justification is persuasive.

Take the implicit delegation rationale. "[W]here exactly has Congress expressed this intent" that a statutory ambiguity constitutes a delegation to the agency? *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring). The answer is nowhere. "Congress so rarely discloses (or, perhaps, even has) a view on" the proper amount of judicial deference in this context "as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases." David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 203.

The *Chevron* Court cited no empirical basis for its "casual equation of ambiguity with a deliberate delegation." Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 475 (1989). And none has materialized in the decades since. While some congressional staffers acknowledge an awareness of *Chevron* deference, they have also made clear that "their knowledge of *Chevron* does not mean that they intend to delegate whenever ambiguity remains in finalized statutory language." Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 996 (2013).

At any rate, even if there were an empirical basis for *Chevron*'s "fictionalized statement of legislative desire," Barron & Kagan, *supra*, at 212, there is no lawful reason to elevate such amorphous intent into the legal rule that *Chevron* adopted. After all, "[t]he text is the law, and it is the text that must be observed." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Federal System* 22 (1997). If legislators do not translate their desires into statutory text, those desires are not law. Far from adopting *Chevron* deference, Congress has enacted the contrary and "unqualified command" of § 706, which "instructs reviewing courts to 'decide *all* relevant questions of law'"—"by [their] own lights." *Kisor*, 139 S. Ct. at 2432 (Gorsuch, J., concurring) (emphasis added) (quoting 5 U.S.C. § 706). This Court "cannot replace th[at] actual text with speculation as to Congress' intent." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017) (citation omitted).

Nor should the Court stand by *Chevron*'s claim that it increases accountability. In reality, *Chevron* deference *undermines* the political accountability of our constitutional structure. "[B]y careful design," the Framers prescribed a deliberative legislative process with "many accountability checkpoints." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring). They "insisted that any proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting). In that way, the Framers ensured that

"[t]he sovereign people would know, without ambiguity, whom to hold accountable for the laws" they must follow. *Id.*

"It would dash th[at] whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints." *Ass'n of Am. R.Rs.*, 575 U.S. at 61 (Alito, J., concurring). But *Chevron* deference does precisely that. It invites Congress to pass the buck on hard policy choices. *See Chevron*, 467 U.S. at 865. And it incentivizes agencies "to be extremely aggressive in seeking to squeeze [their] policy goals into ill-fitting statutory authorizations and restraints." Kavanaugh, *supra*, at 2150. With more interpretive leeway, and thus more authority to fill alleged statutory gaps, those agencies assume more lawmaking power—contrary to the structure of our Constitution.

Indeed, the *Chevron* Court acknowledged that "agencies are not directly accountable to the people." 467 U.S. at 865. Agency heads are not themselves elected, and although Article II "empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence." *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting); *see also* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2250 (2001) ("[N]o President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.").

As such, agencies may not usurp the legislature's power to make the laws that restrict the people's liberty. Nor can they usurp the judiciary's power to

interpret the law on the basis of "expertise." *Chevron*, 467 U.S. at 865. "[C]ourts, not agencies, are the true experts" in matters of statutory interpretation. *Arangure v. Whitaker*, 911 F.3d 333, 342 (6th Cir. 2018) (Thapar, J.). And that is why Congress, through the APA, confirmed the judicial department's power to "interpret . . . statutory provisions" and "decide all relevant questions of law." 5 U.S.C. § 706.

* * *

In sum, *Chevron* deference "has no basis in the Administrative Procedure Act." Kavanaugh, *supra*, at 2150. It is "an atextual invention by courts," *id.*, and it represents "a judge-made doctrine for the abdication of the judicial duty," *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). *Chevron* deference is unconstitutional through and through, and even on its own terms, its reasoning is "exceedingly weak." *Dobbs*, 142 S. Ct. at 2270. The time has come to correct this error and restore the balance of powers under our Constitution.

II. The Traditional *Stare Decisis* Factors Cannot Save *Chevron* Deference.

In addition to being egregiously wrong, *Chevron* deference undermines reliance interests, has proven unworkable, and has led to absurd results. It is no wonder that eight state supreme courts within the last quarter-century have discarded precedents that once enshrined *Chevron*-like deference regimes. This Court should also repudiate *Chevron* deference as inconsistent "with the Constitution, the APA, and over 100 years of judicial decisions." *Baldwin*, 140 S. Ct. at

691 (Thomas, J., dissenting from the denial of certiorari).

A. *Chevron* Deference Undermines Reliance Interests.

Chevron deference upends predictability and undermines reliance interests by forcing the citizenry to play a make-or-break guessing game. It requires a person to guess first the meaning of a statute; guess second whether the statute is "ambiguous"; guess third whether an agency's interpretation of the ambiguity is "reasonable"; and guess fourth whether the agency might alter course and change its prior interpretation. Guess wrong at any turn and a person may find themselves subject to civil or even criminal liability. *See Guedes*, 140 S. Ct. at 790–91 (Gorsuch, J., statement respecting denial of certiorari).

Try as it might, the judiciary offers the public little repose from this considerable fair notice problem. Even after a court has offered its best reading of the statutory text, this Court has held that it "follows from *Chevron* itself" that an agency may switch interpretive gears and reverse the court's construction. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). *Chevron* therefore impairs "reliance on judicial decisions" and "the evenhanded, predictable, and consistent development" of the law—the very interests *stare decisis* is meant to protect. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). An agency shifting from one "reasonable" interpretation to another leaves citizens unsure whether today's lawful conduct will become next week's lawbreaking. The citizenry has no assurance that an agency will not pull the rug out "from under them tomorrow, the next

day, or after the next election." *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring). And this concern is hardly theoretical: The government changes its mind all the time. *See, e.g.*, Tr. of Oral Arg. 35, *Jones v. Hendrix*, 599 U.S. ___ (2023) (No. 21-857) (Gorsuch, J.) (noting that the government had, in the past, taken diametrically opposed positions on the meaning of a statute and then sought to offer a different one entirely).

Chevron deference also undermines regulatory predictability and fosters commercial instability. Financial markets thrive when the law does not change along with agency heads. *See Nat'l Bank v. Whitney*, 103 U.S. 99, 102 (1880) ("The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed."). But the interpretive shapeshifting that *Chevron* permits "makes it impossible for individuals, corporations, and prospective investors to make wise decisions." Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 Duke L.J. Online 91, 103 (2021). Whether it be "more important that the applicable rule of law be settled than that it be settled right," *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (citation omitted)), *Chevron* deference ensures that some questions will never be settled at all.

Reliance considerations thus tip decidedly against *Chevron*. The Court has long recognized that reliance interests are at their zenith for *stare decisis* purposes when property and contractual rights are at stake. *See Payne*, 501 U.S. at 828. Those, however, are precisely the sorts of interests that *Chevron* upsets.

And while agencies might have promulgated rules assuming they would receive *Chevron* deference in the courts, *stare decisis* hardly exists to ensure that government agencies can retain unlawful power. Simply put, there are no "legitimate reliance interests" here that might justify retention of the doctrine—particularly because *Chevron* does not provide "a clear or easily applicable standard" upon which anyone can rely. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2086 (2018) (alteration adopted; citation omitted).

B. *Chevron* Deference Has Proven Unworkable And Has Produced Absurd Results.

Determining whether a statutory phrase is "ambiguous" for *Chevron* purposes has proven anything but predictable. As this Court has recognized, "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language." *United States v. Turkette*, 452 U.S. 576, 580 (1981). "One judge's clarity is another judge's ambiguity." Kavanaugh, *supra*, at 2137. As a result, *Chevron*'s application varies wildly across the bench, fostering uncertainty, yielding absurd results, and creating an all-around unworkable doctrine. *Compare Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (criticizing the "cursory analysis" and "reflexive deference" of lowers courts too ready to find ambiguity), *with* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017) (noting that, in almost a decade of service, he has never reached step two of *Chevron*).

Two recent decisions from this Court illustrate the point. In *American Hospital Association*, 142 S. Ct. 1896, the D.C. Circuit applied *Chevron* deference to the question whether the Department of Health and Human Services could, under the Medicare Act, adjust the reimbursement rate of certain outpatient drugs. *See Am. Hosp. Ass'n v. Azar*, 967 F.3d 818, 828 (D.C. Cir. 2020). The D.C. Circuit deemed the statute ambiguous and the agency's interpretation reasonable. *Id.* This Court reversed, concluding that the statute foreclosed the agency's interpretation. *See Am. Hosp. Ass'n*, 142 S. Ct. at 1903–06. Yet, in doing so, this Court declined to even mention the deference framework that had provided the basis for the decision below, "disinfecting the question presented of any direct reference to *Chevron*" and sterilizing its opinion altogether of "a host of *Chevron*ian buzzwords." *Leading Case:* American Hospital Ass'n v. Becerra, 136 Harv. L. Rev. 480, 480, 483 (2022).

Empire Health Foundation unfolded in a similar manner. 142 S. Ct. 2354. There, the Ninth Circuit split from its sister circuits, which had deferred to the agency at *Chevron* step two, in concluding that the relevant statute was unambiguous. *See Empire Health Found. for Valley Hosp. Med. Ctr. v. Becerra*, 958 F.3d 873, 884–86 (9th Cir. 2020). This Court reversed, holding that the relevant statute disclosed a "surprisingly clear meaning"—not the one chosen by the Ninth Circuit, but "the one chosen by HHS." *Empire Health Found.*, 142 S. Ct. at 2362. Again, this Court provided no further explanation about how the lower courts should assess *Chevron*'s elusive contours. It simply ignored the doctrine altogether. Thus, in addition to being unworkable, the *Chevron* framework

has done no work at all in this Court's recent decisions.

But "Schrödinger's *Chevron*" continues to foster uncertainty in the lower courts. *Leading Case*, *supra*, at 486. It remains good law even as this Court has all but stopped applying it. The Fifth Circuit's decision in *Mexican Gulf Fishing Co. v. United States Department of Commerce*, 60 F.4th 956 (5th Cir. 2023), illustrates this confusion. There, a Fifth Circuit panel disagreed about how to interpret this Court's disregard of *Chevron* in *American Hospital Association* and *Empire Health Foundation*. The majority explained that "*Chevron* has become something of the-precedent-who-must-not-be-named," left "unmentioned by the Supreme Court in two recent decisions addressing the reasonableness of agency action," but it felt duty-bound to apply it "until and unless it is overruled by our highest Court." *Id.* at 963 n.3. Meanwhile, Judge Oldham wrote separately to contend that the Supreme Court had "directed us to use 'the traditional tools of statutory interpretation' in lieu of *Chevron*." *Id.* at 976 (Oldham, J., concurring) (quoting *Am. Hosp. Ass'n*, 142 S. Ct. at 1906).

The dispute over whether and how to apply "the Lord Voldemort of Administrative Law," *Aposhian v. Wilkinson*, 989 F.3d 890, 896 (10th Cir. 2021) (Tymkovich, C.J., dissenting), is compounded by the government's increased reluctance in recent years to invoke *Chevron* in the first place, *see Cargill v. Garland*, 57 F.4th 447, 465–69 (5th Cir. 2023) (en banc) (cataloguing cases in which the government has declined to invoke *Chevron*); *see also* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*,

116 Mich. L. Rev. 1 (2017) (compiling evidence of *Chevron*'s inconsistent application in the lower courts). And that uncertainty is only heightened by the threshold need for lower courts to determine at so-called "step zero" whether *Chevron* even applies. *See Mead*, 533 U.S. at 241 (Scalia, J., dissenting) (castigating the majority's "totality of the circumstances" approach for deciding whether *Chevron* applies); *see also King v. Burwell*, 576 U.S. 473, 485–86 (2015) (carving out "question[s] of deep economic and political significance" from *Chevron*'s reach (quotation marks omitted)).

Indeed, the facts of this case illustrate the absurd results that flow from *Chevron*. All agree that the Magnuson-Stevens Act requires vessel owners to make room onboard for federal observers so that they may ensure compliance with a slew of federal regulations. *See* 16 U.S.C. § 1853. But without any express statutory authorization, the National Marine Fisheries Service ("NMFS") has required Petitioners to *fund* the government's inspection regime. *See* Pet.App.13 (conceding that no provision of the Act "explicitly allows the Service to pass on to industry the costs of monitoring requirements included in fishery management plans"); *see also* Pet.App.29. The court below nevertheless endorsed the agency's position, concluding that *Chevron* deference allowed the agency to seize power that Congress had not granted it. *See* Pet.App.16.

The D.C. Circuit not only reached the wrong result on the statute, but the opinions below encapsulate *Chevron*'s incoherence. Purporting to apply *Chevron* faithfully, the four judges who considered this case

reached three different positions. The district court found the statute unambiguous in granting NMFS authority. Pet.App.62. The D.C. Circuit majority found it ambiguous and so deferred to the agency. Pet.App.5. And Judge Walker in dissent viewed the statute as unambiguous in favor of petitioners. Pet.App.21.

The decision below is hardly anomalous in exposing the absurdities that *Chevron* has created. In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), the Second Circuit concluded that the "ordinary meaning of the [Clean Water Act's] text" required persons to obtain a permit to transfer water from one body of water to another when pollutants would be added along the way. *Id.* at 493. The court noted, however, that had the EPA's contrary position "been adopted in a rulemaking or other formal proceeding," the case may have come out the other way. *Id.* at 490. Fast forward to 2017. By then, the EPA had issued a rule adopting the agency's preferred interpretation that conflicted with the Second Circuit's prior interpretation. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 503 (2d Cir. 2017). The Second Circuit acquiesced, deferring under *Chevron* even though it had previously "rejected the [EPA's interpretation] based on the plain language of the Act." *Id.* at 545 (Chin, J., dissenting).

These cases illustrate how *Chevron* deference ossifies uncertainty. It invites absurd outcomes unsupported by the actual text of the relevant statutes. And it engenders inconsistency in the lower courts. Abandoning *Chevron* is the only way to correct

course. Even though this Court may have departed from *Chevron* deference *sub silentio*, lower courts possess no latitude to do the same. *See Mallory*, 143 S. Ct. at 2038.

C. The Experience In States That Have Repudiated Similar Deference Doctrines Confirms That There Is No Good Reason To Preserve *Chevron*'s Unlawful Regime.

If the Court required any more reasons to jettison *Chevron* deference, then it might rely on the experience of the many states that have recently rejected similar deference regimes under state law. *See* Jeffrey S. Sutton, *Who Decides?: States as Laboratories of Constitutional Experimentation* 224–25 (2022). In fact, in the last twenty-five years, the highest courts of at least eight states have either overruled or walked back precedent allowing for administrative deference akin to *Chevron*. And no other state has moved in the opposite direction.

The states that have eschewed *Chevron*-like deference regimes range from the small to the large, from the agricultural to the industrial, and from the conservative to the progressive. They include the jurisdiction of choice for businesses across the country (Delaware), *see* Delaware Secretary of State Jeffrey W. Bullock, Delaware Division of Corporations: 2022 Annual Report, bit.ly/3XYQEHr, the state with the greatest percentage population increase under the 2020 census (Utah), *see* United States Census Bureau, 2020 Census: Percent Change in Resident Population for the 50 States, the District of Columbia, and Puerto Rico: 2010 to 2020, bit.ly/3Dph9wo, and some of the fastest growing state economies in the country

(including Wisconsin, Michigan, Colorado, and Arkansas), *see* Bureau of Economic Analysis, Gross Domestic Product by State and Personal Income by State, Year 2022, bit.ly/3D4Lujl.

Consider, as one example, the State of Wisconsin. Over the course of decades, Wisconsin courts had created a legal framework in which the judiciary would, depending on the circumstances, afford an agency's statutory interpretation either "great weight" or "due weight." *Harnischfeger Corp. v. Lab. & Indus. Rev. Comm'n*, 539 N.W.2d 98, 102 (Wis. 1995). That changed with the Wisconsin Supreme Court's decision in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 914 N.W.2d 21 (Wis. 2018). After declaring that "[t]he principle of stare decisis counsels that we depart from our precedents only when circumstances unavoidably superannuate our commitment to them," the Wisconsin court evaluated numerous *stare decisis* factors to decide whether to reconsider its deference decisions. *Id.* at 54. Based largely on the consideration that the precedent was "unsound in principle," the court scuttled its deference regime because it "[did] not respect the separation of powers, [gave] insufficient consideration to the parties' due process interest in a neutral and independent judiciary, and risk[ed] perpetuating erroneous declarations of the law." *Id.* (citation omitted). The court also declared that upholding erroneous precedents often does "more damage to the rule of law" and "perpetuat[es] injustice," which cautioned in favor of returning the "judicial power ceded by [the] deference doctrine . . . to its constitutionally-assigned residence." *Id.* (citation omitted).

Other state supreme courts have also rejected precedent and returned judicial power to the judiciary. Take the State of Delaware. In *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 (Del. 1999), the Delaware Supreme Court confronted a line of decisions that promised "substantial weight to the [agency's] interpretation of a statute it is empowered to enforce, provided that construction is not clearly erroneous." *E. Shore Nat. Gas Co. v. Del. Pub. Serv. Comm'n*, 637 A.2d 10, 15 (Del. 1994). The Delaware Supreme Court "overruled" those cases, because "[s]tatutory interpretation is ultimately the responsibility of the courts." *DiPasquale*, 735 A.2d at 382. And it went further still by declining to embrace *Chevron* "with respect to review of an agency's interpretation of statutory law." *Id.* at 383. The court instead doubled down on the proper role of the judiciary: "plenary" review of statutory questions. *Id.*

Mississippi adds to the noteworthy pattern. The State's precedent once called for granting "great deference to [an] agency's interpretation" of a statute. *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So.3d 600, 606 (Miss. 2009). But Mississippi's supreme court changed gears just a few years ago. In *King v. Mississippi Military Department*, the court took the opportunity to "step fully into the role the [Mississippi] Constitution of 1890 provides for the courts and the courts alone, to interpret statutes." 245 So. 3d 404, 408 (Miss. 2018). A contrary conclusion would turn "the role of the judicial branch," which is to interpret duly enacted statutes, on its head. *Id.*

The Michigan Supreme Court has sung a similar tune, declining to import "the vagaries of *Chevron* jurisprudence" into its own. *In re Complaint of Rovas Against SBC Mich.*, 754 N.W.2d 259, 271 (Mich. 2008). As that court explained, *Chevron* conflicts with "separation of powers principles" because it delegates "the judiciary's constitutional authority to construe statutes to another branch of government." *Id.* at 272.

Although Ohio seldom likes to come in second to Michigan, the Buckeye State has added its voice to this chorus. The Ohio Supreme Court recently rejected all forms of mandatory deference and cited, among other state supreme courts, that of Michigan. *See TWISM Enters., L.L.C. v. State Bd. of Registration for Prof. Eng'rs and Surveyors*, ___ N.E.3d ___, 2022 WL 17981386, at *8 (Ohio Dec. 29, 2022). Thus, the Ohio court concluded that while judges may consider an agency's view, "[w]hat a court may not do is outsource the interpretive project to a coordinate branch of government." *Id.*

Those are not the only state courts that have abandoned prior *Chevron*-like deference regimes; Kansas, Colorado, and Arkansas have too. *See Douglas v. Ad Astra Info. Sys., L.L.C.*, 293 P.3d 723, 728 (Kan. 2013) (declining to follow earlier precedent that called for granting deference to state agency's interpretations because the Kansas Supreme Court has "abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated [that approach] to the history books"); *Nieto v. Clark's Market, Inc.*, 488 P.3d 1140, 1149 (Colo. 2021) (holding, despite prior precedent that "appeared to embrace *Chevron*-style deference," that Colorado

courts need not "defer to a reasonable agency interpretation of an ambiguous statute . . . if a better interpretation is available"); *Myers v. Yamato Kogyo Co.*, 597 S.W.3d 613, 617 (Ark. 2020) (declaring that "[b]y giving deference to agencies' interpretations of statutes, the court effectively transfers the job of interpreting the law from the judiciary to the executive," and abrogating prior precedent that granted deference to state agencies). And Utah has "openly repudiated" *Chevron*'s misguided approach from the start. *Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n*, 322 P.3d 712, 717 (Utah 2014) (Lee, J.).

Indeed, the past quarter century reflects a remarkable trend among the state courts in rejecting *Chevron* deference and restoring the judiciary's primacy in statutory interpretation. Notably, no state high court has grown meaningfully more deferential to agencies during the period. *See* Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines*, at 3 n.3 (2020), https://bit.ly/3NgTaoB. But many state courts, when confronted with contrary precedent, have honored their duty to "say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. This Court should remove any doubt that federal courts must do the same.

CONCLUSION

Amicus respectfully urges this Court to repudiate *Chevron* deference, vacate the judgment below, and remand for the lower courts to do what the Constitution and APA both demand of them—to discern and expound the best interpretation of the statute.

Respectfully submitted,

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