No. 22-451

In The
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL.,
Petitioners,

v.

GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b), the Pacific Legal Foundation respectfully requests leave to submit a brief as amicus curiae in support of the petition for writ of certiorari filed by Loper Bright Enterprises, Inc., et al. As required under Rule 37.2(a), amicus provided notice to all parties' counsel of its intent to file this brief more than 10 days before its due date. Petitioners gave blanket consent. On November 29, 2022, counsel for amicus curiae requested timely consent from Respondents. To date, no response has been received.

PLF frequently participates as lead counsel and as counsel for amici in cases addressing the separation of powers and administrative law. It writes in support of Petitioners here because the questions presented raise significant issues concerning the proper scope of agency power and the courts' duty to say what the law is.

Below, PLF draws on its nearly 50 years of experience and provides a discussion of first principles that will inform the Court's consideration of the Petition.

Accordingly, PLF respectfully asks the Court to grant it leave to file this amicus brief.

DATED: December 2022.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether, under a proper application of *Chevron*, the Magnuson–Stevens Fishery Conservation and Management Act grants the National Marine Fisheries Service the power to force domestic vessels to pay the salaries of the monitors they must carry.

2. Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established to litigate matters affecting the public interest.[1] PLF provides a voice for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases involving the role of the judiciary as an independent check on the executive and legislative branches under the Constitution's Separation of Powers. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (*Auer* deference); *Gundy v. United States*, 139 S. Ct. 2116 (2019) (non-delegation); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same).

INTRODUCTION AND SUMMARY OF ARGUMENT

There is a troubling disparity in how the *Chevron* doctrine operates (or does not) in the federal judiciary. Although this Court seems to have shelved *Chevron*

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[1] No party's counsel authored any part of this brief. No person or entity, other than Amicus Curiae and its counsel, paid for the brief's preparation or submission. Petitioners have given blanket consent. On November 29, 2022, counsel for amicus curiae requested timely consent from Respondents. To date, no response has been received.

deference, lower courts continue to apply the doctrine as a first resort. The unfortunate upshot is that there are two versions of the *Chevron* framework, depending on the venue. Worse, the government is perpetuating the divide. Before this Court, the Solicitor General has been deemphasizing, and sometimes disavowing, the *Chevron* doctrine. But in these same controversies, the government pressed for deference in the courts below.

Regardless of whether these discrepant deference claims are an intentional strategy, the Justice Department is driving a vertical split in the federal courts. By muting her *Chevron* arguments, the Solicitor General decreases the likelihood this Court would employ (or even acknowledge) the doctrine, and the status quo is preserved. Meanwhile, government lawyers continue to encourage overbroad readings of *Chevron* in the lower courts. Amicus urges the Court to take this case and end the doctrinal division wrought by the government's inconsistent *Chevron* arguments.

ARGUMENT

I. There Is a Vertical Split over the *Chevron* Doctrine

Justice Gorsuch recently stated that "Members of this Court" and "lower federal courts" have "largely disavowed" overbroad readings of *Chevron* deference. *Buffington v. McDonough*, 143 S. Ct. 14, 21 (2022) (dissenting from the denial of certiorari). Respectfully, he is only half right.

It is true that the *Chevron* doctrine has "more or less fallen into desuetude" at the Supreme Court, which hasn't employed the famous "two step"

framework in more than five years. *Id.* at 15. In the lower courts, however, "cursory" textualism and "reflexive deference" remain the norm. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring); *see also* Richard J. Pierce, Jr., *Is* Chevron *Deference Still Alive?*, The Regulatory Review (July 14, 2022), https://bit.ly/3QjtvdO ("It is much easier for a judge to apply the relatively simple *Chevron* standard and to uphold an agency interpretation of a statute as reasonable than it is to write a lengthy opinion.").

Perhaps the best evidence of the deference dichotomy is the growing list of *Chevron* cases that this Court has declined to review since last applying the doctrine. Over the past five years, the Court denied certiorari for controversies in which lower courts:

- "bypassed any independent review of the relevant statutes" before deferring, *Buffington*, 143 S. Ct. at 14 (Gorsuch, J., dissenting from the denial of certiorari);
- deferred to an agency rule promulgated through an adjudicative order with retroactive effect, *Szonyi v. Barr*, 141 S. Ct. 444 (2020) (denying certiorari);
- accorded *Chevron* deference to a regulation with criminal sanctions, *see Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789 (2020); *see id.* at 790 (Gorsuch, J., statement respecting the denial of certiorari) ("[*Chevron*] has no role to play when liberty is at stake.");

- deferred to an agency's interpretation that conflicted with the court's best reading of the statute, *see Baldwin v. United States*, 140 S. Ct. 690 (2020) (denying certiorari); *see id.* at 692 (Thomas, J., dissenting) ("Perhaps worst of all, *Chevron* deference undermines the ability of the Judiciary to perform its checking function on the other branches.").
- applied the *Chevron* framework to a "procedurally defective" regulation, *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 941 F.3d 1200, 1210 (9th Cir. 2019) (Smith, J., dissenting from denial of en banc rehearing) (objecting to the court's recourse to *Chevron*); *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 141 S. Ct. 131 (2020) (denying certiorari); *c.f. Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016) ("*Chevron* deference is not warranted" for "'procedurally defective' regulation"); and,
- granted deference to an agency's "self-interested" interpretation, *Scenic Am., Inc. v. Dep't of Transp.*, 138 S. Ct. 2, 3 (2017) (Gorsuch, J., statement respecting denial of certiorari).

In these cases—and many others where the regulated parties did not seek certiorari—the lower courts applied versions of the *Chevron* doctrine that would be unrecognizable to the Supreme Court bar. The same holds true for the decisions below. The district court, for example, performed a sloppy *Chevron* step one that made it impossible to know whether the statute is ambiguous. *See* App.69 (leaving unanswered "if Plaintiffs' arguments were enough to raise an ambiguity in the statutory text"). On appeal,

the D.C. Circuit's *Chevron* methodology suffered a distinct but equally glaring flaw in that the court took the statute's silence as giving the agency "carte blanche to speak in Congress's place." App.26 (Walker, J., dissenting).

In sum, there is a vertical split in the judiciary over the *Chevron* doctrine. Despite this Court's shunning of *Chevron*, lower courts remain "habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first." *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting); *see also Voigt v. Coyote Creek Mining Co.*, 980 F.3d 1191, 1203 (8th Cir. 2020) (Stras, J., dissenting) ("The threat to the judiciary's interpretive power is once again right out in the open."); *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring) ("[*Chevron*] require[s] us at times to lay aside fairness and our own best judgment and instead bow to the nation's most powerful litigant, the government, for no reason other than that it is the government."); *Oregon Restaurant & Lodging Ass'n v. Perez*, 843 F.3d 355, 359 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing en banc) ("This is a caricature of *Chevron*.").

II. The Justice Department's Inconsistent Arguments Drive the Vertical Split Over *Chevron* Deference

Lately, the government has been making very different *Chevron* arguments in and out of the Supreme Court. When addressing the lower courts, the Justice Department fights for *Chevron*. When addressing the Supreme Court, the Solicitor General pulls her punches.

The government's disparate *Chevron* strategies were evident last term in *American Hospital Association v. Becerra*. *See* 142 S. Ct. 1896 (2022). Before the D.C. Circuit, the government sought *Chevron* deference, and the court ruled in favor of the agency based on deference. *See Am. Hosp. Ass'n v. Azar*, 967 F.3d 818, 828–31 (D.C. Cir. 2020). But when the Supreme Court granted certiorari, the government suddenly treated *Chevron* like a liability. During the oral arguments, the Solicitor General went so far as to say, "I do not think *Chevron* is necessary in this case," even though the court below had decided in the government's favor on the strength of deference alone. Tr. of Oral Arg. at 69, *Becerra*, 142 S. Ct. 1896 (No. 20-1114). Ultimately, the Court elided the *Chevron* doctrine in ruling against the government.

Something similar happened in *Becerra v. Empire Health Foundation*. 142 S. Ct. 2354 (2022). At the Ninth Circuit, the government's brief led with an argument for "heightened deference" under the *Chevron* framework. Br. for Defendant-Appellant/Cross-Appellee at 14, *Empire Health Foundation v. Azar*, 958 F.3d 873 (9th Cir. 2020) (Nos. 18-35845, 18-35872). Before this Court, however, the Solicitor General muted her *Chevron* claim, focusing instead on how the Court should "uphold [the agency's] interpretation simply because it is the better one, without addressing the additional weight due under *Chevron*." Br. for Petitioner at 26, *Becerra v. Empire Health Foundation*, 142 S. Ct. 2354 (2022) (No. 20-1312).

The government's Janus-faced *Chevron* claims were further evident last term in *National Federation of Independent Business v. Occupational Safety &*

Health Administration, 142 S. Ct. 661, 662 (2022). In this Court, the Solicitor General's brief mentioned neither *Chevron* nor deference. Resp. in Opp. to the Applications for a Stay, 142 S. Ct. 661, 662 (2022) (No. 21A243). But before the Sixth Circuit, the Justice Department sought "substantial [*Chevron*] deference" in arguing the government was likely to win on the merits. Resp. Mot. to Dissolve Stay at 17, *In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021) (No. 21-7000); *see also In re MCP No. 165*, 20 F.4th 264, 280–81 (6th Cir. 2021) (Sutton, J., dissenting from initial hearing en banc) ("The [assistant secretary] claims that uncertainty about the meaning of the statute allows him to construe the statute to exercise more power, not less.").

In *Barton v. Barr*, 140 S. Ct. 1442 (2020), the Solicitor General informed this Court that the government "does not claim *Chevron* deference on the question presented," Br. for Respondent at 39, *Barton v. Barr*, 140 S. Ct. 1442 (2020) (No. 18-725). At the Eleventh Circuit, however, the Justice Department had argued its interpretation "is entitled to *Chevron* deference." *Barton v. U.S. Att'y Gen.*, 904 F.3d 1294, 1302 n.5 (11th Cir. 2018), aff'd sub nom. *Barton v. Barr*, 140 S. Ct. 1442 (2020) (doubting the government's *Chevron* claim without deciding the matter).

County of Maui, Hawaii v. Hawaii Wildlife Fund, which was published the same day as *Barton v. Barr*, is another controversy where the government did an about-face in its *Chevron* arguments. 140 S. Ct. 1462 (2020). As amicus, the Justice Department told the Ninth Circuit that the agency's interpretation "is entitled to *Chevron* deference." Am. Br. in Support of

Plaintiffs-Appellees at 12, *Hawaii Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737 (9th Cir. 2018), vacated and remanded sub nom. *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020) (No. 15-17447). But in this Court, the government's amicus brief completely ignored the deference doctrine. See Am. Br. in Support of Petitioner, *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020) (No. 18-260).

In *Preap v. Johnson*, the Justice Department argued to the Ninth Circuit that the statutory text "is ambiguous" and the agency's interpretation "is entitled to *Chevron* deference because it is a permissible interpretation of the statute." *See* Br. for Defendants-Appellants at 17–18, 831 F.3d 1193 (9th Cir. 2016), rev'd and remanded sub nom. *Nielsen v. Preap*, 139 S. Ct. 954 (2019), and vacated sub nom. *Preap v. McAleenan*, 922 F.3d 1013 (9th Cir. 2019) (Nos. 14-16326, 14-16779). Yet after this Court took the case, the Solicitor General pivoted to arguing that the agency's "interpretation is unambiguously correct," and an ancillary claim for *Chevron* deference was crammed into the brief's final few pages. *See* Br. for Petitioners at 12, *Nielson v. Preap*, 139 S. Ct. 954 (2019) (No. 16-1363); *see id.* at 38–41.

In the present controversy, the Justice Department can be expected to continue this dubious pattern of presenting two faces on the *Chevron* two-step, were the Court to grant the petition for certiorari. Below, of course, the government told the court that, "[t]his statutory interpretation question is subject to the familiar two-step *Chevron* framework." Br. for Defendants/Appellees at 21, *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir.

2022) (No. 21-5166). Given the recent history discussed above, it seems likely, if not certain, that the Solicitor General would silence, or even discard, any *Chevron* claims before this Court.

It is not necessary for the judiciary to determine whether the Justice Department is coordinating these inconsistent *Chevron* claims at different stages of litigation. Still, this Court should not be blind to the result. In the lower courts, Justice Department lawyers abet overbroad readings of *Chevron*. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298 (2018) (noting the general receptivity of circuit judges to government-made deference arguments). Yet if one of these *Chevron* controversies comes before this Court, the Solicitor General tries to take deference off the table, which increases the likelihood that the doctrine will remain unchecked below, where judges remain receptive to calls for generous *Chevron* deference. Thus, the government is facilitating deference run amok in the lower courts.

Enough is enough. It is well past time for this Court to "acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts." *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from the denial of certiorari).

CONCLUSION

For the above reasons, the Court should issue the writ of certiorari and use this case to impart uniformity to *Chevron* deference in the federal judiciary.

DATED: December 2022.

Respectfully submitted,

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