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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Should the Court overrule *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?

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INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts 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.

This case addresses federal courts' constitutional power to say what the law is. *Chevron* deference nullifies that power and should therefore be overruled. PLF has an interest in demonstrating to the Court why overruling *Chevron* upholds the duty vested by the sovereign people in the judicial branch, protects the core constitutional and individual liberties of the people, and faithfully and impartially implements the Constitution's checks and balances and separation of powers.

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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.

SUMMARY OF THE ARGUMENT

Federal courts have the power to decide "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. Courts must, of necessity, "say what the law is" to decide cases and controversies. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Under *Marbury*, federal courts have the "duty," *id.*, to interpret statutes enacted by the people's representatives in Congress and apply them as written. "The interpretation of the laws is the proper *and peculiar* province of the courts." *The Federalist No. 78* (emphasis added). And "however disagreeable the duty may be," federal courts are "not at liberty to surrender, or to waive it." *United States v. Dickson*, 40 U.S. 141, 162 (1841).

Interpretation is hard. But the Court has at its disposal any number of ordinary canons of statutory interpretation designed to make sense of written words. If a statute's words are ambiguous or silent, a court applying canons of construction concludes simply that the statute does not stretch to cover a novel scenario, however desirable it may be to the executive to apply an existing statute to a situation not contemplated by the statute. That is so because ambiguity or silence means there was no majority support in Congress for any particular policy choice, nothing more. Congress remains free at any time to amend a statute so construed by the courts.

This Court should end *Chevron* deference and not attempt to mend it. The Court disserves the Constitution each day it allows *Chevron* deference, the "Lord Voldemort of administrative law," to exist. *Aposhian v. Wilkinson*, 989 F.3d 890, 896 (10th Cir. 2021) (*en banc*) (Tymkovich, J., dissenting).

This amicus brief lists twenty-seven grievances against *Chevron*.[2] It proceeds by addressing arguments propounded in support of *Chevron* to bust a few *Chevron* myths. The hope is that the brief proves useful as a frequently-asked-questions guide to the Court.

ARGUMENT

1. *Chevron* Guts Bicameralism and Presentment

The Constitution has established one method to enact the law of the land—bicameralism and presentment. U.S. Const. art. I, § 7, cl. 2. But *Chevron* permits agencies to get around bicameralism and presentment. It instead enables enactment of laws for the nation by agencies that suggest "an administrative interpretation," *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), via rulemaking, creative enforcement, or in-house adjudication. Federal courts then implement as "permissible" such agency-created law. *Id.* In this conflict between the Constitution and *Chevron*, the Constitution must prevail.

2. *Chevron* Is Incompatible with Article III's Case-or-Controversy Requirement

The judicial power of federal courts extends to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. To decide cases and controversies, federal courts must necessarily "say what the law is." *Marbury*, 5 U.S. at 177. Indeed, it is a federal court's "duty" to do so. *Id.* But under *Chevron* an agency interpretation of

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[2] *Cf.* Decl. of Independence (1776) (listing 27 grievances); U.S. Const. amends. I–XXVII (containing 27 amendments).

a statute "bind[s] the courts, and oblige[s] them to give it effect." *Id.*

It is doubtful under *Marbury*'s reasoning whether even Congress could enact a statute saying courts should defer to executive interpretations of statutes. Even unanimous support in Congress for such a statute would be incompetent to alter federal courts' duty, imposed by the Article III case-or-controversy requirement, to interpret statutory text *de novo* without deference to agency interpretation of the same. *Marbury* recognized that this constitutional duty flows from Article III, which cannot be altered other than through Article V's constitutional amendment process.

3. *Chevron* Permits Belated and Executive-Officer Veto of Article I Pronouncements

Chevron, in practice, acts as an executive-officer veto of Article I pronouncements. But the President can only veto a statute passed by Congress "within ten Days (Sundays excepted)" from its presentment. U.S. Const. art. I, § 7, cl. 2. *Chevron* permits executive-branch officers to line-item veto Article I pronouncements years, even decades, after presentment.

More fundamentally, the President's veto power is not delegable to any other officer, except as set forth in the Twenty-Fifth Amendment. U.S. Const. amend. XXV. But under *Chevron*, an officer of the United States, or even an executive employee,[3] can amend

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[3] Angela C. Erickson & Thomas Berry, *But Who Rules the Rulemakers? A Study of Illegally Issued Regulations at HHS* (Apr. 29, 2019), https://perma.cc/7EYQ-PMS3 (showing that

enacted statutes through new interpretations, and federal courts must give effect to such extra-congressional amendments of congressionally enacted statutes.

4. *Chevron* Enables Executive Veto of Article III Pronouncements

Congress can always override, using bicameralism and presentment, Article II and Article III officers' statutory interpretations. *See, e.g.*, Congressional Review Act of 1996, *codified at* 5 U.S.C. §§ 801–808 (giving mechanism to override some Article II statutory interpretations); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5 (2009) (overruling *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)). Congress can check the judiciary's statutory pronouncements through bicameralism and presentment—and the judiciary's constitutional pronouncements through the Constitution's amendment process, U.S. Const. art. V. Those are the checks and balances the Constitution has established.

In this regard, the President only has the vested power to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Article II officers have the power to override neither Congress's nor the federal courts' pronouncements. The Constitution does not provide for the presentment of the judiciary's pronouncements to the President, nor permit the

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nearly 75% of HHS rules (of 2,952 rules reviewed in the study) are unconstitutional because they were issued by low-level officials and employees with no authority to issue rules).

President or other executive officers to overrule or veto them.[4]

Courts, by deferring to agency interpretations under *Chevron*, thus permit all three branches to ignore the Constitution's procedure for establishing the law of the land: (1) *Chevron* undermines Congress's vested power to pass laws by permitting agencies to pass laws instead. (2) *Chevron* undermines the President's vested power to faithfully execute the law by permitting executive-branch officers to instead legislate laws into being. (3) And *Chevron* undermines the judiciary's vested power to say what the law is by instead requiring judges to acquiesce in an agency's resolution of a question of law.

5. *Chevron* Creates a System of Presentment Without Bicameralism

Under the Constitution's checks and balances, bicameralism must come before presentment. U.S. Const. art. I, § 7, cl. 2. But *Chevron* allows a system of presentment without bicameralism. That is, agency rules that have significant impact must be presented for approval to the Office of Information and Regulatory Affairs (OIRA), which is answerable to the President. E.O. 12866, 58 Fed. Reg. 51735 (Sept. 30,

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[4] *Compare National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) (condoning Article II override of Article III pronouncements), *with Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of cert.) (stating that "*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions"), *and United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012) (concluding that *Chevron* permits agencies to overrule lower federal court and some Supreme Court pronouncements).

1993). So, the argument in favor of *Chevron* goes, there are adequate checks and balances in place to make sure the President, who has the duty to take care that the laws are faithfully executed, gives his assent, through OIRA, to "significant" rules issued by the agencies. *Id.* § 3(f). On this view, courts should defer to agency rules that have gone through such presentment. *Cf.* Nestor M. Davidson & Ethan J. Leib, *Regleprudence—At OIRA and Beyond*, 103 Geo. L.J. 259 (2015).

The argument is ultimately self-defeating. OIRA's review of a rule is not equivalent to both houses of Congress cooperating to reach an agreement and then presenting the enactment for the President's approval. Neither is OIRA approval a substitute for *de novo* judicial review of agency interpretations. More fundamentally, such a system, by dispensing with bicameralism, does not even pretend to comply with the system of lawmaking devised by the Constitution.

6. *Chevron* Encourages Congressional Passivity

Some suggest that the *Chevron* doctrine is needed because Congress is broken. Must-pass legislation,[5] emergency legislation,[6] or a variety of barnacles attached to appropriations bills[7]—those are increasingly the way things get done in Congress. Individual legislators, therefore, have an outsized

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[5] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

[6] *See, e.g.*, American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

[7] *See, e.g.*, Consolidated Appropriations Act, Pub. L. No. 117-328, 136 Stat. 4459 (2023).

incentive to get the President or executive officers to exercise legislative power. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015). Perhaps this mode of lawmaking is easier and faster than working to build coalitions or relying on a political party to gather majority support. So, some argue, this Court should continue to allow agencies to pour new wine out of old bottles because of a dysfunctional Congress.

To state the argument is to refute it. *Chevron* has encouraged not just a flight, but a permanent emigration of legislative power from the hands of democratically accountable people's representatives in Congress to unaccountable administrative agencies. *Chevron* has mis-calibrated the Constitution's separation of powers and checks and balances. The state of affairs cries out for error correction.

7. *Chevron* Incentivizes Congress to Pass Ambiguous Laws

There are notable differences in the degree to which legislators are democratically accountable as compared to bureaucrats. A generalist and democratically accountable Congress cannot easily be swayed by special interests. To become legislators and retain their posts, legislators must obtain majority support for the policy positions they espouse and vote upon in Congress. And they remain answerable to the people.

Specialist agency officials, on the other hand, are necessarily more cognizant of a small slice of issues the agency is tasked with overseeing. Sure, many

agency officials go through Senate confirmation, and many are subject to the President's unrestricted removal power. But these structural guardrails designed to make executive officials somewhat democratically accountable are orders of magnitude more modest and removed from the kind of direct democratic control the people exercise over Congress. As a result, agency officials are more in touch, not with the people, but with particular industry insiders. Special interests often hold oversized sway over the bureaucrat's decision-making. The insiders often influence agency officials in ways that would be extremely difficult if not impossible to accomplish in Congress.

Under the *Chevron* system of writing laws, most laws are written not by a Congress that represents "We the People," U.S. Const. Preamble, but by specialist executive officials. Congress thus churns out statutes that give administrative agencies the power to issue all manner of necessary rules to implement a plethora of ambiguous laws. Ambiguity becomes a convenient substitute for "whatever pleases the bureaucrat." And under *Chevron*, federal courts show remarkable apathy toward such corruption of the lawmaking power that the Constitution has entrusted to "a Congress of the United States," U.S. Const. art. I, § 1. *Chevron* thus transfers power from "We the People" to "We the Bureaucrats."

8. *Chevron* Empowers Agencies to Invade and Neutralize the Judicial Power of the United States

Under *Chevron*, agencies dictate what the law is, and courts willingly relinquish the "judicial Power," U.S. Const. art. III, § 1, and "duty … to say what the

law is," *Marbury*, 5 U.S. at 177, to the agencies. *Chevron* transfers the job of saying what the law is from the judiciary to the administrative agencies, which leads to "more than a few due process … problems." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring). *Chevron* deference thus, far from promoting the Constitution's checks and balances, only promotes the administrative state checking the judicial branch.

Chevron goes further. Agencies can "say what the law is" using procedures that are entirely foreign and inferior to those used by the judiciary. The agencies can then apply that interpretation to facts found using procedures that would make every independent jurist that ever wrote the words "due process of law" blush skin through bone. *Cf. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977). Even the choice of which procedures to use or discard to say what the law is and find facts, and whether to make law case-by-case or evenhandedly is left entirely to the agency. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) ("*Chenery II*"); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

Through *Chevron*, this Court has allowed administrative agencies to occupy the judiciary's and Congress's domain and plunder the "judicial Power" that the Constitution has only ever vested in the courts. U.S. Const. art. III, § 1.

9. *Chevron* Effects an Unconstitutional Delegation of Power to Agencies

Chevron rests in part on the fiction that Congress gave general-prospective as well as case-by-case decision-making power to administrative agencies.

467 U.S. at 843–44. It is doubtful whether Congress can give away that which *it* does not have. The power to decide "Cases" and "Controversies" is the "judicial Power of the United States," U.S. Const. art. III, §§ 1, 2. That power is not Congress's to delegate or give away because it is power that the Constitution has vested, not in Article I, but in Article III. *Nemo potest facere per alium quod per se non potest*: no one can do through another what he cannot do by himself. *Black's Law Dictionary* 1985 ¶ 1740 (Deluxe 11th ed. 2019).

So, as to an agency's power to interpret statutes through case-by-case decision-making, if we assume that Congress has not delegated (because it cannot delegate) such power to the agencies, then we must conclude that this Court through *Chevron* has. *Chevron* thus operates as a delegation doctrine whereby this Court has given away its "judicial Power," U.S. Const. art. III, § 1, and "duty to say what the law is," *Marbury*, 5 U.S. at 177, to entities and persons that operate entirely outside Article III. But "[t]he interpretation of the laws is the proper and peculiar province of the courts," not of any other governmental body. *The Federalist No. 78.*

As to an agency's power to "elucidate a specific provision of the statute by regulation," *Chevron*, 467 U.S. at 844, that Congress "implicitly or explicitly … delegat[ed]," *id.* at 843, to the agency (assuming Congress can delegate such power to an agency), such delegation does not operate to *divest* an Article III court's judicial power to say what the law is. So, even if one were to construe *Chevron* as resting on some valid "delegation," *id.*, of some power by Congress to an agency, that premise does nothing to displace an Article III court's power and duty to interpret statutes

independently, without regard to the interpretation offered by any agency or litigating party to the court.

10. *Chevron* Adds Judicial Bias to Agency Bias

Chevron deference operates to switch off an Article III court's power to interpret a statute when an agency interprets a "statute which [the agency] administers." 467 U.S. at 842. Scholars have ably demonstrated how *Chevron* deference creates "systematic judicial bias in favor of" the agency's interpretation. Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1189 (2016). But there is another bias at play. Agencies that interpret the scope of the statutes they are tasked with enforcing have a systemic and inherent bias in interpreting such statutes to favor the agency.

Take an analogy to Article III diversity jurisdiction. The Constitution did not trust state-court judges in diversity cases to be "impartial" because they could not be "expected to be unbiased" in interpreting laws; they were considered predisposed to favor their home state or citizens. *The Federalist No. 80*. It is "natural" that agency operatives, like state-court judges, tasked with interpreting the laws "should feel a strong predilection to … their own" claims. *Id.* The logic of that argument applies with equal force, if not more forcefully, to a federal agency whose officials interpret the "statute which it administers," *Chevron*, 467 U.S. at 842, who naturally have a strong predilection to interpreting laws in favor of the agency.

Chevron heaps judicial bias on top of agency bias. Reveling amidst ambiguity, and even finding

ambiguity[8] where none exists, *Chevron*'s bias-squared worldview cannot be squared with the Constitution's. The latter document places "separate and distinct … powers of government" in separate hands because doing so is "essential to the preservation of liberty." *The Federalist No. 51*.

11. *Chevron* Rests on the Mistaken Notion of Agency Monopoly on Expertise

Agencies do not have a monopoly on expertise. And it is not always the case that agency interpretations of statutes are based solely on expertise as opposed to other factors such as a President's zealous use of the pen and the phone.[9] Agencies do not even have the same procedural and evidentiary tools at their disposal that Article III courts have to access expertise: *Frye* or *Daubert* testing of experts,[10] robust cross-examination at trial, proving facts to a jury of non-expert peers, rigorous rules of evidence distilled over centuries to ascertain veracity, and so forth.

The argument from expertise is hard to justify under the Constitution's checks and balances that embody a more evolved understanding of human nature—(1) the value of an adversarial trial where all parties must prove facts that are testable in open

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[8] *See, e.g.*, *Foster v. Dep't of Agriculture*, 68 F.4th 372, 376–77 (8th Cir. 2023) (reflexively finding ambiguous the word "until" in the Swampbuster Act and therefore deferring to the agency's interpretation of the word to impose procedural hurdles not contained in the act).

[9] Tamara Keith, *Wielding a Pen and a Phone, Obama Goes It Alone* (Jan. 20, 2014), https://perma.cc/B8B8-GW9R.

[10] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

court; and (2) the value of pitting faction against faction, sifting through the expected cacophony of a multitude of voices and viewpoints to enact laws that bind the public through the people's representatives assembled in Congress.

Because the agency rulemaking system cannot avail of the benefits of either of these two systems, the rules it promulgates, even if they are written by the most brilliant expert in that subject matter on the planet, do not enjoy the same legitimacy as questions settled using Article III adjudication or Article I bicameralism and presentment.

12. *Chevron* Replaces Interpretive Rigor with Interpretive Sloppiness

Chevron mandates that the government litigant win so long as its preferred interpretation seems "reasonable," even if it is inferior. *Chevron*, 467 U.S. at 844. Agencies often do not even bother to engage in a traditional statutory construction analysis when they interpret statutes. But this Court requires lower courts to engage in rigorous statutory construction to interpret statutes. *Chevron* thus replaces rigorous court interpretation with sloppy agency interpretation, which makes *Chevron* inconsistent with ordinary interpretive methodology carefully calibrated to language and cognition.

13. *Chevron* Incentivizes Retroactive Lawmaking and Undermines Reliance

Federal appellate review of district court decisions is *de novo* on questions of law, but not federal court review of agency decisions. No justification can be found for treating agency decisionmakers with such

special solicitude that even lower Article III judges do not enjoy.

Agency interpretations made during in-house adjudication "impose present legal consequences for past actions, making deference in such instances retroactive in its orientation and undermining reliance interests." Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 Duke L.J. 931, 971 (2021). Laws "which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Deferring to an agency's novel legal interpretation announced in an adjudication "would seriously undermine the principle that agencies should provide regulated parties fair warning" without which the agency's pronouncement "result[s] in precisely the kind of unfair surprise against which [Supreme Court] cases have long warned." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (simplified). Narrowing *Chevron*'s domain by excluding agency adjudications from *Chevron*'s reach is dictated by the Fifth Amendment's Due Process Clause. Hickman & Nielson, 70 Duke L.J. at 971–77; U.S. Const. amend. V.

Agency adjudication is not the only mechanism agencies use to announce new interpretations. *Chenery II* allows agencies to choose either case-by-case adjudication or rulemaking to interpret statutes. 332 U.S. 194. That free choice itself creates the kind of unfair surprise that the Due Process Clause proscribes. *Chevron* concentrates power in administrative agencies and thereby upends the "policy of supplying, by opposite and rival interests,

the defect of better motives" by distributing federal power in three branches where neither branch can wield a tool entrusted in the hands of either of its sisters. *The Federalist No. 51*.

14. *Chevron* Condones Contempt of Court

Some agencies plainly and openly instruct their officers to *not* follow decisions by federal courts of appeals: "Administrative Law Judges must follow and apply Board precedent, *notwithstanding contrary decisions by courts of appeals*, unless and until the Board precedent is overruled by the Supreme Court or the Board itself."[11] Disrespect for court decisions that bind the agency as a party litigant would not be possible without *Chevron*. In ordinary circumstances, if a litigating party to whom a court's judgment directly applies were to ignore or decide not to follow that court ruling, that litigating party would be in contempt of court. But *Chevron* allows agencies to willfully disregard court orders with impunity. An agency interpretation that ignores or disregards a prior court interpretation receives *Chevron* deference.[12] *Chevron* permits agencies to bake disobedience of court interpretations into its rulebook.

15. *Chevron* Emboldens Agencies to Ignore *Stare Decisis*

Chevron undermines *stare decisis*. It empowers agencies to eviscerate court precedents they do not like. Given that the vast majority of cases involving agency interpretations do not receive Supreme Court

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[11] NLRB Division of Judges Bench Book § 13-100 (Apr. 2023), https://perma.cc/73G5-CXYZ (emphasis added).

[12] *See Brand X*, 545 U.S. 967.

review, agencies can conveniently replace unfavorable federal-court precedents by providing only cursory justification for the changes.

But "special justification" is necessary to overcome *stare decisis*. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019). Adherence to and respect for *stare decisis* therefore should warrant non-deference.

Chevron deference allows agencies to undercut predictability, stability, fair notice to parties, reasonable reliance, and settled expectations—values that *stare decisis* and the Fifth Amendment's Due Process Clause protect. U.S. Const. amend. V. When agencies, secure from being overruled by federal courts under *Chevron*, erase their loss in a particular circuit, *Chevron* gives the agencies a powerful do-over without being shackled by a difficult-to-obtain motion for reconsideration in federal court. Fed. R. Civ. P. 60; Fed. R. App. P. 35, 40. Agency circumvention of established federal-court reconsideration procedure does not promote respect for the rule of law; it frustrates it.

16. *Chevron* Undercuts Judicial Finality

Agency nonacquiescence in federal circuit-court decisions is often coupled with efforts to defeat the grant of certiorari.[13] At least the D.C. Circuit has ordered agencies to pay attorney fees to the nongovernmental litigant for such bad faith. *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016). Perhaps agency

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[13] *See* William Yeatman & Aditya Dynar, *The Justice Department's Two Faces on the* Chevron *Two-Step*, 2023 Regent Univ. L. Rev. Pro Tem. No. 2 (June 17, 2023), https://perma.cc/EKL3-PFHP.

nonacquiescence is justified in limited instances where, alongside complying with a decision rejecting the agency's interpretation, the agency makes a concerted effort to obtain either sister-circuit agreement with the agency's interpretation or a circuit-split with a view to obtaining this Court's review. But even that justification evaporates where the agency asserts no intention to seek certiorari or works actively to defeat certiorari.

Judge Janice Rogers Brown wrote for the D.C. Circuit majority that "nonacquiescence is justifiable only as a means to judicial finality, not agency aggrandizement." 838 F.3d at 22. Nonacquiescence "is divorced from its purpose when an agency asserts it with no stated intention of seeking *certiorari*." *Id.*

Agencies wield nonacquiescence as a sword to repeatedly wipe away one side of a circuit split running against the agency. And thanks to *Brand X*, a circuit confronting a court interpretation alongside a differing agency interpretation must give *Chevron* deference to the agency interpretation even at the cost of rejecting a sister-circuit and a home-circuit precedent that is contrary to the interpretation supplied by the agency.[14] *Chevron* leaves no room for circuit splits to occur, and no room for questions to sufficiently percolate in the federal courts, all with the practical effect of ossifying the agency's interpretation

[14] *See, e.g.*, *Baldwin v. United States*, 921 F.3d 836 (9th Cir. 2019) (overruling the Ninth Circuit's decision in *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992), and rejecting one side of a mature circuit split, in order to defer to a new agency interpretation of the relevant statute).

while defeating "meaningful judicial review,"[15] plus defeating certiorari by claiming lack of circuit disagreement and percolation.

17. *Chevron* Makes Court Decisions Advisory

Chevron renders advisory each court decision the agency ignores. When courts apply *Chevron* deference to an agency interpretation, courts violate the Article III case-or-controversy requirement by issuing a provisional decision that can be ignored, overruled, or disregarded by the agency whenever it so wishes. *Chevron* demotes court opinions into mere advisory opinions and promotes agency *ipse dixit* into governing law. In such an upside-down world, court rulings are "necessarily provisional and subject to correction when the agency chooses to adopt its own interpretation of the statute." *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 531 (9th Cir. 2012) (*en banc*) (Kozinski, J., "disagreeing with everyone"). Under *Chevron*, "[a]gencies … alone can speak … as to what the law means." *Id.* *Chevron* in reality is not mere judicial deference to agency interpretation but judicial acquiescence in agency non-deference to judicial statements of "what the law is." *Marbury*, 5 U.S. at 177. *Chevron* is a direct assault on judicial authority, judicial independence, and Article III.

18. *Chevron* Instructs Circuit Courts to Override *Stare Decisis*

Chevron deference also undermines the rule that each circuit must follow its own precedent, and only that court sitting *en banc* or the Supreme Court can override a circuit precedent (absent congressional

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[15] *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 489 (2010).

amendment of the circuit court's statutory pronouncements).[16] *Chevron* enables an agency to function as the equivalent of a circuit court sitting *en banc*. No messy Federal Rules of Appellate Procedure controlling when *en banc* review can be granted. *See* Fed. R. App. P. 35. In reality, *Chevron* makes the agency *superior* to a circuit court sitting *en banc* because it gives the agency the power to wipe away even *en banc* decisions, depending on which step of *Chevron* the *en banc* court happened to invoke or which "magic words" (ambiguous, unambiguous, silent) it failed to utter. *Home Concrete*, 566 U.S. at 493 (Scalia, J., concurring in part and concurring in the judgment).

A circuit court is free to consider sister-circuit precedent as "persuasive authority at most." *United States v. Strahan*, 134 F. App'x 709, 709 (5th Cir. 2005). But an agency wielding *Chevron* gets to operate as a kind of a super-court: the agency can sweep aside a sister circuit's precedent it does not like and demand deference to its new rule, depriving a circuit of the free choice of whether to agree with an agency rule or a sister-circuit rule as more persuasive.

More fundamentally, thanks to *Chevron*, a circuit court that finds sister-circuit precedent more persuasive than an agency's interpretation must defer to the agency interpretation. And a three-judge panel of a circuit court that must follow home-circuit three-judge and *en banc* precedent due to *stare decisis* must override, even by a two-judge majority, their own

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[16] *See, e.g.*, *Baisley v. International Association of Machinists & Aerospace Workers*, 983 F.3d 809, 811 (5th Cir. 2020); *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001).

circuit's precedent by giving *Chevron* deference to the agency's overriding interpretation.

19. *Chevron* Protects Agency Interpretation of and Nonacquiescence in Court Decisions

Agencies often interpret or distinguish away court precedents to justify not acquiescing in them. The practice is in some tension with *Hayburn's Case*, 2 U.S. 408 (1792).

The Pensions Act of 1792 established a scheme for disabled veterans of the American Revolution to apply for pensions to federal courts and authorized the Secretary of War to stay any such court decision. Five of the then-six Justices riding circuit declared the Pensions Act unconstitutional because executive officials such as the Secretary of War cannot be authorized to revise or review decisions of an Article III court. Put differently, an Article III judge has no power to decide cases that will be subject to revision or review by an officer of an executive agency. "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). But *Chevron* institutes a system of executive revision and review of court decisions akin to that outlawed within half a decade of the Constitution's ratification.

Short of outright revision or review of court decisions, agencies often suggest, sometimes disingenuously, that a particular problem has been addressed neither by courts nor by Congress. The agency interpretation, agencies argue, is justified as triage in such situations. *Chevron* takes these *ad hoc*

agency interpretations and gives them greater precedential force than court precedent or the plain meaning of statutes.

20. *Chevron* Erodes Congressional Accountability for Policies that Bind the People

This Court has increasingly voiced skepticism of the President's pen-and-phone tactic to get agencies to enact law. The tactic prevents Congress from acting where Congress would (and should) have otherwise acted. For example, there was bipartisan interest in Congress to enact immigration reform[17] or a bump stock ban.[18] But because the agencies acted before Congress could on these issues, it destroyed the will of Congress to legislate.

Some Congressmen even prefer the President's pen-and-phone lawmaking system because it insulates Congressmen from voting on legislation that hurts their chances of getting reelected. But when the branch that is meant to be the most politically accountable to the people—Congress—disrobes itself under the notion, blessed by this Court, that an unelected bureaucrat will do Congress's difficult work in its stead, that is evidence of the imploded system of checks and balances that *Chevron* has wrought. *Chevron* exacerbates the problem of a dysfunctional Congress shackled by a zealous, unchecked, and first-to-act executive branch because it instructs the

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[17] The National Law Review, *Senators Propose Immigration Reform* (Jan. 29, 2013), https://perma.cc/UYK6-HFDB.

[18] H.R. 4168, Closing the Bump-Stock Loophole Act, 115th Congress (Oct. 31, 2017), https://perma.cc/ZX9J-UFU7.

judicial branch to turn a blind eye to such abuse of power that the Constitution was written to prevent.

Chevron has distracted the President from the Take Care Clause, U.S. Const. art. II, § 3, and incentivized the executive department to make laws in place of Congress. The garment-by-garment denuding of the Constitution's checks and balances has been brought forth by *Chevron*. Getting rid of *Chevron* is part of the solution to making Congress accountable to the people again.

21. *Chevron* Transfers Blame from Congress to the Judiciary

Chevron supporters say that Congress may not have majority votes to amend a statute it thinks an Article III court has wrongly interpreted. So, they say, agencies need to be able to ever so slightly tweak the statute in Congress's stead and courts must defer to that considered judgment.

Chevron has stretched the executive's Take Care power to a Faithfully Tweak power. However faithful and earnest the tweak may be, it is the work product of Article II, not of Article I as it ought to be.

Chevron's special vice is that it transfers to this Court the unearned and undeserved blame for Congress's inaction. There is no legitimate way to forge a Northwest Passage around the Constitution's structural protections. Congress can amend statutes it has written at any time. And this Court applies statutes as written.

When agency-crafted laws are challenged in court, under *Chevron*, that litigation becomes an exercise to obtain Article III's assent (seldom if ever a veto) to Article II's revision of Article I's work product.

Instead, if federal courts were to apply the statutes as written, that would mark a return to the Constitution's checks and balances and separation of powers.

22. *Chevron* Thrusts This Court into Making Policy Choices for the Nation

Courts have been pushed into the political arena thanks to *Chevron*. Agencies reinterpret statutes—abortion funding, bump stock bans, you name it—precisely because even Congressmen do not have the fortitude to touch these politically sensitive issues. Naturally, this circumvention of legislative lawmaking is brought to federal courts. Federal courts are thrust into deciding such politically charged issues not because they have any particular affinity to jump into the fray. Far from it. Federal courts must step into the political arena because of politically unaccountable agency action. And *Chevron* calls on courts to put the judiciary's stamp of approval on policy choices enacted by the President's representatives in lieu of the people's.

Rejecting *Chevron* will make agencies more careful before creating generally applicable standards on hot-button issues in the face of Congress's silence or ambiguity. That in turn reduces the pressure on this Court and federal courts in general in having to decide these issues. That is not to say that suits will cease to be brought to challenge Article I's handiwork. They most certainly will. And it is not to say that if *Chevron* disappears, then agencies will overnight turn non-effervescent. Practically speaking, discarding *Chevron* will return this Court to saying what the written text of the law means and empower federal courts to bow out of supplicating to policy choices

made by the nation's bureaucrats. Rejecting *Chevron* will bring about an end to the negotiated transfer of policymaking to the administrative state or to this Court.

23. *Chevron* Weakens the Legitimacy of the Judiciary

Chevron's effect is to make this Court look more, rather than less, political. Some view the deployment of deference doctrines as a tool to avoid interbranch strife. But the diffusion of power in three separate departments necessarily requires disunity amongst the three branches so that "[a]mbition … counteract[s] ambition." *The Federalist No. 51*. Judicial objectivity is a necessary part of "the great security against a gradual concentration of the several powers in the same department." *Id.*

The way to preserve the Constitution's structure is not judicial abdication but judicial objectivity: applying statutes as written.[19] The judiciary's legitimacy is grounded in the Constitution's case-or-controversy requirement.[20] Discarding *Chevron* will enhance the Court's legitimacy by returning lawmaking and policymaking power to Congress.

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[19] Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 St. John's L. Rev. 303 (2017) (quoting Justice Kagan's remarks at Harvard Law School's *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes* (Nov. 25, 2015), https://perma.cc/37EY-YUXE).

[20] *See Biden v. Nebraska*, 143 S. Ct. 2355 (2023); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

24. *Chevron*'s Alchemy Converts Ambiguity and Silence into Agency-Pronounced Clear Statements

The Court should not create a seven-step *Chevron* Step Zero as it did for *Auer* deference in *Kisor*.[21] The ask-the-author argument that seemed to sway some Members of this Court in *Kisor* does not work for *Chevron*. 139 S. Ct. at 2412. The authors of statutes are staffers who transiently occupy the Capital's office buildings. To interpret statutes, this Court no longer plumbs legislative history, and that is as it should be.

When tasked with making sense of statutory ambiguity, federal courts have any number of tried and tested tools at their disposal—canons of construction, the rule of lenity, *contra preferentum*, the major-questions doctrine, the nondelegation doctrine. Federal courts steer clear of making policy judgments when they use ordinary tools of interpreting text; using *Chevron* on the other hand thrusts courts into deciding whether the agency-espoused or a private-party-endorsed policy wins.

At day's end, ambiguity only means there was no majority support in Congress for any particular policy choice. Does the ambiguous phrase "other measures" in a list giving "fumigation" and "disinfection" power to an agency encapsulate a majority vote in Congress giving that agency the power to enact a nationwide

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[21] *Kisor*, 139 S. Ct. at 2415–18 (giving seven evaluative steps: "genuinely ambiguous," "exhaust all the 'traditional tools' of construction," "the agency's reading must still be 'reasonable,'" "character and context of the agency interpretation entitles it to controlling weight," "agency's 'authoritative' or 'official position,'" "implicate [agency's] substantive expertise," "[agency's] 'fair and considered judgment'").

eviction moratorium? Unquestionably not.[22] Ambiguity means no agreement. *Chevron*, however, encourages agencies to mine ambiguity for new power. However well-crafted or welcome the agency's interpretation may be, it is no substitute for a clear statement from Congress.

25. *Chevron* Breaks Article II's and Article III's Internal Checks and Balances

The President can always solicit advisory opinions from agency heads: "[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. Const. art. II, § 2. Article II provides the President access to the agency heads' considered opinions to help the President make an informed decision. *Chevron* not only breaks Article II's internal checks and balances. But it also permits Article III courts to add its advisory opinion to the mix.

President Washington, through his Secretary of State Thomas Jefferson, wrote a letter to this Court asking if its Members would be willing to render opinions on a number of legal questions of "considerable difficulty."[23] Chief Justice John Jay responded, "The lines of separation drawn by the Constitution between the three departments of government … and our being judges of a court in the

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[22] *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021).

[23] Letter from Thomas Jefferson, Sec'y of State, to Chief Justice John Jay and Associate Justices (July 18, 1793), *reprinted in* Richard Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* 50–51 (7th ed. 2015).

last resort … are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to."[24] In support of the argument that Article III does not permit the President to solicit and the federal courts to issue advisory opinions to the President, Chief Justice Jay's letter relied on the Opinion Clause of Article II: "[T]he power given by the Constitution to the President of calling on the heads of departments for opinions, seems to have been purposely as well as expressly limited to executive departments."[25] The letter is not reported in the Court's official reports. But the Court has cited it as the source of the rule against Article III advisory opinions.[26]

Almost half a century later, Justice Joseph Story, writing for the Court, did not permit the treasury department's interpretation of an act of Congress "to conclude the judgment of a court of justice." *United States v. Dickson*, 40 U.S. 141, 161 (1841). When an agency interprets a statute, "there is no opportunity to question or revise [that interpretation] by those who are most interested in it as officers, deriving their salary and emoluments therefrom." *Id.* When a proper case or controversy arrives at a federal court, "the judicial department has imposed upon it by the constitution, the solemn duty to interpret the laws, in the last resort." *Id.* at 162. "[H]owever disagreeable

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[24] Letter from Chief Justice Jay and Associate Justices to President George Washington (Aug. 8, 1793), *reprinted in Hart and Wechsler's*, *supra*, at 52 (capitalization altered).

[25] *Id.* (capitalization altered).

[26] *Vieth v. Jubelirer*, 541 U.S. 267, 302 (2004); *Flast v. Cohen*, 392 U.S. 83, 96 n.14 (1968); *Muskrat v. United States*, 219 U.S. 346, 354 (1911).

the duty may be, in cases where [the court's] own judgment shall differ from that of other high functionaries, [the court] is not at liberty to surrender, or to waive it." *Id.*

Chevron converts Article II advisory opinions into governing law by obtaining judicial acquiescence in executive pronouncements and converts Article III decisions issued under the case-or-controversy clause into advisory opinions by making optional executive acquiescence in them.

26. *Chevron* Induces Agencies to Control Congress's Power over the Purse

The people's representatives control the purse. U.S. Const. art. I, § 7, cl. 1; art. I, § 9, cl. 7. And controlling agency funding is one practical constraint on agency abuse of power. But *Chevron* enables agencies to argue and federal courts to conclude that a statute or two is ambiguous enough to create an entire procedural morass for the regulated community.

Foster, 68 F.4th 372, for example, concluded without analysis that a statute providing that a wetland certification "shall remain valid and in effect … until such time as the person affected by the certification requests review," was ambiguous. *Id.* at 376 (quoting 16 U.S.C. § 3822(a)(4)). The Eighth Circuit acknowledged that the word "until" means that a farmer's review request "in and of itself voids a prior certification without the need to follow any procedural requirements like those enumerated in the" agency regulation interpreting the statute. *Id.* at 376–77. The agency interpreted the statute to create an entire administrative adjudication mechanism

with complicated procedural hurdles that must be exhausted before a certification can be voided. *Id.* at 375 (discussing 7 C.F.R. § 12.30(c)(6)). Applying *Chevron* deference by skipping Step One, the court found the agency regulation "imposes reasonable procedural requirements a farmer must follow." *Id.* at 378.

It is easy for an agency to extrapolate and featherbed itself. Once the agency creates such a procedural labyrinth out of ambiguous or silent statutes, it may turn to Congress to seek ever greater funding for the program. If Congress does not appropriate the requisitioned funds, the agencies create industry funding or self-funding anyway. *See* 83 Fed. Reg. 55665 (Nov. 7, 2018). Sometimes Members of Congress will create an unconstitutional funding structure.[27] All this dilutes Congress's control over the purse. It lets bureaucrats control the public fisc. And federal courts, using *Chevron*, encourage the practice.

27. *Chevron* Cannot Be Mended

It should be plain by now that this Court should end *Chevron* and not attempt to mend it. The Petitioners' question leaves open the option for this Court to mend *Chevron*. But there is nothing in *Chevron* that can be mended in a manner that would bring the doctrine in compliance with the

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[27] *See Collins v. Yellen*, 141 S. Ct. 1761, 1772 (2021) (discussing how the Federal Housing Finance Agency "is not funded through the ordinary appropriations process"); *Community Financial Services Association of America, Ltd. v. CFPB*, 51 F.4th 616 (5th Cir. 2022) (concluding that CFPB's self-funding structure created by Congress violates the Appropriations Clause and the separation of powers).

Constitution. Should *Chevron* footnote 9 be saved? 467 U.S. at 843 n.9. Answer: It does not need saving, for the judiciary's final authority to employ traditional tools of statutory construction to ascertain the meaning of statutes is now a firm feature of this Court's jurisprudence—despite *Chevron*.

Chevron's presumption that Congress relinquished a measure of its legislative power to agencies is simply unsupportable. *Chevron* fatigues federal courts and Congress into compliance with agency diktat. It dissolves the legislative and executive powers into one concoction. And it obstructs the administration of justice by disarming the judicial power of the United States. *Chevron* by another name will remain just as violative of the Constitution's entwined checks and balances. It is imperative that this Court repudiate *Chevron*.

CONCLUSION

This Court should overrule *Chevron*.

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Respectfully submitted,

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