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
United States Court of Appeals
for the District of Columbia Circuit

## BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that structural provisions of the Constitution must be upheld in order to protect individual liberty. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *West Virginia v. EPA*, 142 S.Ct. 2587 (2022); *Kisor v. Wilke*, 139 S.Ct. 2400 (2019); *Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015), *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); and *Christopher v. SmithKline Beecham, Corp.*, 567 U.S. 2156 (2012), to name a few.

## SUMMARY OF ARGUMENT

The Framers and Ratifiers of the Constitution were not attempting to design an efficient government structure. Instead, they sought to design a federal government with authority to act, but that was bound by "checks and balances" as a means of protecting individual liberty. The design they settled on, that is still present in our Constitution today, is a finely tuned separation of powers. The powers of legislation, execution, and judicial review are housed in separate and competing branches of government.

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[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

The Framers and Ratifiers recognized that the power of legislation was the biggest threat to individual liberty, and so they incorporated procedural hurdles to slow down the process of lawmaking. Congress is granted *all* legislative power authorized under the Constitution, but that power is constrained by bicameralism and presentment requirements. The exclusivity of the Vesting Clause and the restrictions on how the legislative power may be exercised prohibit delegation of that power to the Executive. That the problem that Congress seeks to address is complex is irrelevant. The Framers and Ratifiers did not include a "complexity" exception to these checks and balances.

As demonstrated in this case, administrative agencies are a threat to the design of separation of powers if they operate in an atmosphere divorced from the structural separation of powers. This Court noted just last term that executive agencies are more than capable of asserting "sweeping and consequential authority" never contemplated by Congress. *West Virginia v. EPA*, 142 S.Ct. at 2609 (2022); *see also*, *Alabama Ass'n of Realtors v. Department of Health and Human Services*, 141 S.Ct. 2485, 2489 (2021); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). But it is not just cases affecting areas of "political and economic significance" that require judicial oversight. Any exercise of a power to "formulate legally binding rules" on "matters of private conduct" is lawmaking and is reserved to Congress under the Constitution. *See Michigan v. EPA*, 576 U.S. 743, 762 (2015) (Thomas, J. concurring).

Judicial review is the necessary check on whether Congress has improperly delegated its lawmaking

power or whether an executive agency has improperly usurped Congress's power. This requires the judiciary to engage in its assigned task of interpreting legal texts. Nothing in the Administrative Procedures Act purports to displace this constitutionally assigned role for the judiciary.

The issue presented in this case is whether the judiciary should defer to the executive on the meaning of congressional enactments granting power to administrative agencies to make legally binding rules. On its face, the question answers itself. The Constitution assigns interpretation of legal texts to the Judiciary, not the Executive. Further, the question in statutory interpretation is what Congress said – not what power the agency wants to exercise. What Congress said is reflected in the text of the law. That text is the only sure way of divining the intent of the hundreds of individual Senators and Representatives who participated in enacting the law. The opinion of administrative agencies on what the law means is no more persuasive, as a matter of constitutional law, than the opinion of regulated parties. Once enacted, the question of interpretation rests with the Judiciary and only the Judiciary. This Court should reclaim its role of judicial review and overrule the rule of deference under *Chevron*.

## ARGUMENT

### I. Deference to Executive Agencies on the Meaning of Congressional Enactments Disrupts the "Finely Wrought" Separation of Powers Structure of the Constitution.

#### A. The Constitution protects individual liberty through its separation of powers structure.

Under *Chevron* deference, courts must accept an agency's "reasonable" interpretation of an "ambiguous" statute that the agency administers. *Michigan v. EPA*, 576 U.S. at 751. This rule contravenes the separation of powers structure of the Constitution.

Separation of powers is the design of the Constitution, not simply an abstract idea. It protects individual liberty more surely than the Bill of Rights. *See e.g.*, *Ass'n of American Railroads*, 575 U.S. at 61 (Alito, J. concurring); *Stern v. Marshall*, 564 U.S. 462, 483 (2011); *Bond v. United States*, 564 U.S. 211, 222 (2011); *see also Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The notion that separation of powers lies at the core of the Constitution is not a modern judicial invention. The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. *Ass'n of Am. Railroads*, 575 U.S. at 75 (Thomas, J., concurring). In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See, e.g.*, Montesquieu, THE SPIRIT OF THE LAWS

152 (Franz Neumann ed., Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 150-51 (William S. Hein & Co., Inc. 1992) (1765); John Locke, THE SECOND TREATISE OF GOVERNMENT 82 (Thomas P. Reardon ed., Prentice-Hall, Inc. 1997) (1690).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. *See* FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter, ed., 1961); FEDERALIST NO. 47, *supra*, at 301-02 (James Madison); FEDERALIST NO. 9, *supra*, at 72 (Alexander Hamilton); *see also* Letter from Thomas Jefferson to John Adams (Sept. 28, 1787), in 1 THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in the Supreme Court and lower federal courts. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. FEDERALIST NO. 48, *supra* at 308 (James Madison). Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id.* This requires other branches, especially the Judiciary, to exercise their constitutionally delegated powers.

Judicial review of executive agency action is especially important to ensure that agencies are not exercising legislative power. The executive branch has no authority to enact laws. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). And Congress has no authority to delegate its lawmaking power. *Gundy v. United States*, 139 S.Ct. at 2133 (plurality op.); *Field v. Clark*, 143 U.S. 649, 692 (1892); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825). Delegation of lawmaking power defeats the structural protections of liberty in the Constitution.

Separation of powers is at risk (if not completely destroyed) when the judiciary defers to the executive on the proper interpretation of Acts of Congress. No wonder, then, that members of this Court have become increasingly uncomfortable with the type of deference granted to administrative agencies under so-called *Chevron* deference. *See*, *e.g.*, *Buffington v. McDonough*, 143 S.Ct. 14 (2022) (Gorsuch, J., dissenting from denial of certiorari); *Michigan v. EPA*, 576 U.S. 743, 760-64 (2015 (Thomas, J., concurring); *Arlington v. FCC*, 569 U.S. 290, 312-28 (2013) (Roberts, C.J., dissenting (joined by Justices Alito and Kennedy)). There is good reason for this discomfort. Deference to an agency's interpretation of a statute has administrative agencies usurping the judicial role of interpreting legal texts (allowing the agency to be a judge in their own case) and the congressional role of enacting legislation. If the legislation is so vague as to have multiple or no discernable meaning, the agency is effectively exercising Congress' lawmaking power when it "interprets" the legislation. Agencies are allowed to make policy that Congress never considered or perhaps could never muster a majority to

enact. When agencies bypass Congress to make law, they circumvent the constitutional limitations on law-making of bicameralism and presentment. Important checks on the exercise of government power are simply ignored.

This administrative action is further insulated from meaningful review when the judiciary defers to the agency interpretation. The agency becomes a court of last resort in its own case on matters of legal interpretation. This regime of deference creates the perfect storm for destruction of the separation of powers limits that are embedded in the structure of the Constitution.

Employing *Chevron* deference to defer to agency interpretation of ambiguous statutory texts breaches the core doctrine of separation of powers in two fundamental ways. First, it allows executive agencies to exercise Congress's power to legislate, a power which the Constitution vests solely in Congress and strictly limits how those laws can be made. Second, *Chevron* deference impermissibly allows executive agencies to exercise the Judiciary's well-settled power "to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

### B. Exercise of the legislative power is constrained by procedural requirements of Bicameralism and Presentment.

As this Court noted in *Chadha*, Congress may only exercise its power under the Constitution in accordance with "a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951. That procedure is intentionally difficult. The founding generation was not interested in making it easy or

efficient to pass new laws. They were more interested in protecting individual liberty.

Justice Alito noted, "[p]assing legislation is no easy task." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 472 (2015) (Alito, J. dissenting). This was intentional on the part of the Framers and Ratifiers of the Constitution. The founding generation was acutely aware that the "supreme power" of government was in making the laws. James Kent, Commentaries 1:207-10 (1826), *reprinted in* 2 The Founders' Constitution 39. Thus, it was important that significant checks be placed on that power in order to preserve liberty. The solution they came up with was to slow the legislative process – to make it difficult to enact legislation too quickly. *Id.*

They accomplished this by splitting Congress into two houses, both of which must concur before a legislative proposal can be adopted, and requiring that that the legislatively approved measure be presented to the President for approval. One house serves as a check on the other. William R. Davie, North Carolina Ratifying Convention (1788) *reprinted in* 2 THE FOUNDERS' CONSTITUTION 36; Federal Farmer No. 11 (1788) *reprinted in* 1 THE FOUNDERS' CONSTITUTION 350. Requiring consent of two different bodies was thought more likely to produce consensus in line with the will of the citizenry, something well worth the increased time and effort involved. *See* Benjamin Rush, Observations on the Government of Pennsylvania (1777) *reprinted in* 1 THE FOUNDERS' CONSTITUTION 364; James Wilson, Of Government, The Legislative Department, Lectures on Law (1791) *reprinted in* 1 THE FOUNDERS' CONSTITUTION 377.

The chief benefit of requiring two different bodies to approve proposed legislation is that it slows the process down and inhibits "rash" and "hasty" decisions. Joseph Story, Commentaries on the Constitution 2:§ 550 (1833), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 379; The Essex Result (1778) *reprinted in* 2 THE FOUNDERS' CONSTITUTION 365. Justice Gorsuch noted these same points in his dissent in *Gundy*. He wrote that the "framers went to great lengths to make lawmaking difficult." *Gundy*, 139 S.Ct. at 2134 (Gorsuch, J., dissenting). To those who argue that the bicameralism and presentment requirements of Article I make the enactment of federal law arduous and slow the Framers and Ratifiers would have responded that that was the point. It is in that slow process that liberty is best protected. *Id.*

Delegation of lawmaking power to an administrative agency circumvents this arduous process mandated by the Constitution. This Court has, however, approved delegations of lawmaking power to administrative agencies under the theory that the agencies are "constrained" by an "intelligible principle" set out by Congress. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 488 (2001) (Thomas, J. concurring). Yet the standards laid down by Congress in many delegations of its lawmaking power are not intelligible at all. The Court has upheld delegations of lawmaking power so long as the agency determined that its rules were required by """public interest, convenience, or necessity."""" *Mistretta v. United States*, 488 U.S. 361, 374 (1989).

Moreover, this Court has frankly acknowledged that Congress has delegated to administrative agencies the power to make complex policy choices, and

that the practice of *Chevron* deference counsels that the Court should defer to the executive agency's policy choices. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995) ("The proper interpretation of a term such as 'harm' involves a *complex policy choice*. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of *wise policy* for his." (emphasis added)).

Whether or not there exists an intelligible principle, laws are still being made outside of the process set forth in the Constitution. The Court, in some cases, seems to grant Congress authority to delegate its lawmaking power because the subject of the regulation is too complex for our elected representatives to manage. There is, however, no complexity exception to the procedure laid down in Article I for the making of laws.

### C. There is no complexity exception to the exclusive delegation of lawmaking Power to Congress or to the constitutional limits on how that power may be exercised.

This Court has vacillated on whether it views Congress as capable of handling complex matters. In a number of cases, the Court has approved broad delegations of lawmaking power based on the theory that Congress cannot deal with complex problems on its own. *See*, *e.g.*, *Mistretta*, 488 U.S. at 372 ("our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives"); *Am. Trucking Ass'ns v. Atchison, T. & S.F. Ry. Co.*, 387

U.S. 397, 409 (1967) ("The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms."); *United States v. Storer Broad. Co.*, 351 U.S. 192, 203 (1956) ("The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers.").

In other cases, by contrast, this Court recognizes Congress's capability to deal with exceedingly complex matters. *See*, *e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S.Ct. 1891, 1924 (2020) ("Congress has provided for relief from removal in *specific and complex ways. This nuanced detail* indicates that Congress has provided the full panoply of methods it thinks should be available." (emphasis added)); *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973) ("The subjects of modern social and regulatory legislation often by their very nature *require intricate and complex responses from the Congress*." (emphasis added)); *First Agr. Nat. Bank of Berkshire Cnty. v. State Tax Comm'n*, 392 U.S. 339, 352 (1968) ("'Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the *greatest difficulty and delicacy. Such complex problems* are ones which Congress is best qualified to resolve.'" (emphasis added)); *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527 (1941) ("It is for Congress alone" to make decision based on the "*complexity of engineering data*." (emphasis added)).

This is not to say that Congress must determine for itself scientific matters, such as whether and at what dosage a particular chemical is toxic. But it is

for Congress, and Congress alone to determine the policy – including the cost that will be imposed on citizens for the level of regulation. *Cf. West Virginia*, 142 S.Ct. at 2608 (the Court hesitates before concluding Congress meant to delegate authority to an executive agency over matters of "economic and political" significance); *see Industrial Union Dept. AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 673 (1980) (Rehnquist, J., dissenting) (the case involves the most difficult choice confronting a decisionmaker and "Congress, the governmental body best suited and most obligated to make the choice … has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.").

Congress has demonstrated its ability time and again to enact complex statutory schemes to regulate matters within its purview. Nothing less should be expected from the People's elected representatives. No doubt hard choices need to be made. But Congress, the body answerable to the electorate, is the constitutionally designated body to make those hard choices. *See Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice…").

No doubt the agency here, and in most cases, believes that it is acting in best interest of the public. "But our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S.Ct. at 2490; *see also Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve the public

condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way…"). A desire to pursue the public good is not enough to circumvent the procedures for lawmaking set out in the Constitution. This is true even if the problem to be addressed is complex.

There is no "complexity exception" to either the separation of powers structure of the Constitution or the nondelegation doctrine.

### D. Deference to the agency allows the Executive to exercise legislative power.

The courts have recognized that agencies are clearly involved in lawmaking when they enact substantive rules that are subject to *Chevron* deference. *See United States. v. Mead Corp*, 533 U.S. 218, 233 (2001). Substantive rules are "law"—they are substantive legal obligations (or prohibitions) that bind individuals. *Michigan*, 576 U.S. at 762 (Thomas, J., concurring). Pursuant to the *Chevron* doctrine, courts may not interfere with agency lawmaking so long as the congressional enactment is ambiguous, the agency has both expertise and rulemaking authority, and the agency's interpretation is at least a possible interpretation of the law. *Id.* at 751. There are two problems with deference in this regard. First, the Constitution assigns lawmaking exclusively to Congress. U.S. Const. art. I, § 1. Second, reflecting the Founders' fears over the power of legislative branch, the Constitution specifies a particular procedure through which laws are to be made. U.S. Const. art. I, § 1, cl.1, § 7, cl. 2. Agencies do not follow that procedure when promulgating regulations. *See* 5 U.S.C. § 553

Article I, section 1, clause 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." This is the first of the three "vesting clauses" that set out the basic plan of government under the Constitution and that provide the framework for the scheme of separated powers. Powers vested in one branch under a vesting clause cannot be ceded to or usurped by another. *Ass'n of Am. Railroads*, 575 U.S. at 67-68 (Thomas, J., concurring).

The legislative power is the power to alter "the legal rights, duties and relations of persons." *See Chadha*, 462 U.S. at 952. This is the same definition given to "substantive rules" adopted by administrative agencies. Section 551 of the Administrative Procedure Act defines the term "rule" as an agency statement that prescribes "law or policy." These are "laws" that impose "legally binding obligations or prohibitions" on individuals. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 123 n.4 (Thomas, J., concurring). It is difficult to see much space between agency "rules" and the "legislation" that Article I of the Constitution reserved exclusively to Congress. Deference under *Chevron* and related deference doctrines makes any such space evaporate and results in the Executive exercising Congress's power to make law.

## II. Deference to Agency Interpretation of Statutory Texts Allows the Executive to Exercise Judicial Power.

Article III, § 1 of the Constitution vests the "judicial power" in the "Supreme Court and in such inferior Courts as the Congress may . . . establish." In a scheme of separated powers, the key to judicial power

is the "interpretation of the law." FEDERALIST No. 78, *supra* at 465 (Alexander Hamilton); *Perez*, 575 U.S. at 119-20 (2015) (Thomas, J., concurring). This is a power that must be separated from both execution and legislation. Quoting Montesquieu, Justice Story notes "there is no liberty, if the judiciary power be not separated from the legislative and executive powers." Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION, § 1568 (1833), reprinted in 4 THE FOUNDERS' CONSTITUTION 200. The purpose of the judiciary is to stand as a neutral arbiter between the legislative and executive branches—a necessary check on the political branches of government. FEDERALIST No. 78, *supra* at 467 (Alexander Hamilton). The separate judicial power allows the courts to serve as "bulwarks" for liberty. *Id*. This requires that judges have the power to "declare the sense of the law." *Id*., *see Chadha*, 462 U.S. at 944.

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. FEDERALIST No. 51, *supra* at 322 (James Madison). In order to keep the political branches in check, the courts may not surrender their power to interpret the law to either of the political branches. Each branch of government must support and defend the Constitution and thus must interpret the Constitution. *United States v. Nixon*, 418 U.S. 683, 704 (1974). The Courts may not, however, cede their judicial power to interpret the laws to the Executive. *See id*. The judicial branch accomplishes its role by ruling on the legality of the actions of the executive and giving "binding and conclusive" interpretations to acts of Congress. William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES, reprinted in 4 THE FOUNDERS' CONSTITUTION

195. Had the Constitution not assigned such a role to the judiciary as a separate branch, the plan of government "could not be successfully carried into effect." *Id*.

*Chevron* deference, however, alters this framework in a way that the separation of judicial from executive power is no longer enforced. It is no longer the exclusive province of the courts to interpret congressional enactments. Instead, the court now treats the existence of an "ambiguity" as meaning that Congress intended the agency, and only the agency, to interpret the statute. So long as the agency interpretation is "reasonable," *Chevron* requires the courts to cede their judicial power to the executive and approve the agency interpretation.

This Court took this line of argument to its logical extreme in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). There, this Court ruled that *Chevron* deference applied to the FCCs decision that cable internet providers did not provide "telecommunications service" as defined by the Communications Act, and thus were exempt from common carrier regulation. *Id*. at 977, 981. That part of the decision is not surprising. The innovation introduced by *Brand X* is that the agency interpretation of Communications Act ran contrary to a Court of Appeals interpretation of the same provision in a prior case. *Id*. at 981. The Court ruled that *Chevron* required the Court of Appeals to ignore its prior ruling interpreting the Communications Act and instead defer to the Commission's new interpretation. *Id*. at 982-83. In effect, this Court ruled that the agency had the power to overrule an Article III court on a question of statutory interpretation. The Court justified this by asserting that the agency was

not engaged in statutory interpretation but rather "gap-filling." *Id*.

Any deference to the agency on issues of statutory construction ignores the constitutional role of the courts to interpret legal texts. It also ignores the provisions of the Administrative Procedure Act that assign interpretation of the statute to the courts, not the agencies.

This Court should overrule the doctrine of *Chevron* deference and reinstate the scheme of separated powers.

## III. Employing the Traditional Tools of Statutory Interpretation is the Surest Means of Ensuring that the Actions Executive Agencies are Authorized by Congress.

Justice Scalia noted that the basis for *Chevron* deference is found in the Report of the Attorney General's Committee on Administrative Procedure: "the administrative interpretation is … the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it." S. Doc. No. 8, 77th Cong, 1st Sess. 90-91 (1941), quoted in Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 3 Duke L.J. 511, 513 (1989). But this does not explain what Congress actually intended with a particular law so much as what authority the agency would like to have in order to address that problem. Not infrequently, however, this Court has noted that the agency has strayed far beyond the text of the statute. *West Virginia*, 142 S.Ct. at 2609; *Alabama Ass'n of Realtors*, 141 S.Ct. at 2489; *Utility Air Group*, 573 U.S. at 324; *FDA v. Brown & Williamson Tobacco Group*, 529 U.S. at 159.

The good intentions of the agency are not a defense to actions beyond the scope of their authority. These cases have come to the Court's attention because the regulation was one that would have great political and economic significance. How many other cases of such overreach never come before the Court? Even if a regulation does not have nationwide economic impact, if it is an exercise of Congress's lawmaking power it raises an issue of constitutional significance and endangers the core protection of individual liberty.

As noted above, the Constitution prescribes an arduous process for the exercise of the lawmaking power vested in Congress. This means that the ultimate result of the legislation is not simply the product of the sponsor or some limited group of legislators. *See United States v. Hayes*, 555 U.S. 415, 435 (2009) (Roberts, C.J., dissenting). The process of enacting a law always entails a "balancing of interests and often demands compromise." *Hernandez v. Mesa*, 140 S.Ct. 735, 742 (2020). It is the text of the law, not the "purpose," that determines that law's meaning. *See Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S.Ct. 883, 893 (2018) ("Our analysis begins with the text … and we look to both the language itself [and] the specific context in which the language is used."); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Even if we assume that the agency is pursuing Congress's purpose (rather than the agency's purpose), "'no legislation pursues its purposes at all costs.'" *Am. Exp Co. v. Italian Colors Rest.*, 570 U.S. 223, 233 (2013) (*quoting Rodriquez*, 480 U.S. at 525-26). Focusing on "purpose" of the law, as recounted by the agency, rather than the text, transfers legislative power away from Congress and to the agency. *See*

*Hernandez*, 140 S.Ct. at 741 ("But when a court recognizes an implied claim for damages on the ground that doing so furthers the "purpose" of the law, the court risks arrogating legislative power.").

The decisions cited above in *American Express*, *Hernandez*, *Merit Management*, and *Rodriquez* show that this Court is no stranger to the task of statutory interpretation. When confronted with a question of statutory interpretation, the Court does not require the advice of an executive agency on the meaning of an Act of Congress.

Suppose, however, a federal law directs an agency to regulate in a manner that is "practical" or "reasonable?" Again, the agency is in no position to dictate the trade-offs that Congress was willing to accept for a particular regulation. *See Hernandez*, 140 S.Ct. at 742; *Rodriguez*, 480 U.S. at 526. Indeed, regulated entities, as the ones who must both run a business and comply with a regulation, are in a far better position to inform the Court what may be "practical" or "reasonable."

But what if the statute provides absolutely no guidance on what is "practical," "feasible," or "reasonable?" If there is no guidance in the legislation, then such terms are entirely precatory, and the words only serve to delegate legislative authority to an executive agency in violation of the Constitution. As then Justice Rehnquist opined, the Court "ought not to shy away from [its] judicial duty to invalidate unconstitutional delegations of legislative authority." *Industrial Union*, 448 U.S. at 686 (Rehnquist, J., dissenting). Congress has no authority to delegate its lawmaking authority to either an executive agency or to the

courts. A congressional enactment that resists all efforts of statutory interpretation must be rejected.

## CONCLUSION

The Court should end the *Chevron* experiment. Interpretation of legal texts is a job for the courts. If meaning of statutory provisions are so opaque as to defy the tools of statutory of interpretation, it is up to Congress, not the Executive and not the Courts, to rewrite the law.

July 2023

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