No. 22-451

IN THE
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL.,

Petitioners,

v.

GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF U.S. SENATOR TED CRUZ, CONGRESSMAN MIKE JOHNSON, AND 34 OTHER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are United States Senator Ted Cruz, Representative Mike Johnson, and 34 other members of Congress. The full list is below.

As members of Congress, *amici* have a strong interest in judicial interpretations that preserve the legislative powers that Article I of the Constitution vests exclusively in Congress. *Amici* also have an interest in ensuring that the judiciary serves as an appropriate check on the Article II executive in accordance with the vesting clause of Article III and also with the Administrative Procedure Act's review requirement that courts, not executive agencies, "shall decide all relevant questions of law," including "interpret[ing] … statutory provisions" and determining whether agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

The full list of amici is:

Sen. Ted Cruz
Rep. Mike Johnson
Leader Mitch McConnell
Sen. Marsha Blackburn
Sen. Ted Budd
Sen. John Cornyn
Sen. Tom Cotton
Sen. Kevin Cramer

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici*'s counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Sen. Steve Daines
Sen. Joni Ernst
Sen. Charles E. Grassley
Sen. Cindy Hyde-Smith
Sen. John Kennedy
Sen. Michael S. Lee
Sen. Cynthia M. Lummis
Sen. Eric Schmitt
Sen. Rick Scott
Sen. Tim Scott
Sen. Roger Wicker
Rep. Andy Barr
Rep. Cliff Bentz
Rep. Dan Bishop
Rep. Ben Cline
Rep. Byron Donalds
Rep. Jeff Duncan
Rep. Scott Fitzgerald
Rep. Russell Fry
Rep. Bob Good
Rep. Lance Gooden
Rep. Michael Guest
Rep. Harriet H. Hageman
Rep. Darrell Issa
Rep. Ronny Jackson
Rep. Barry Moore
Rep. Randy Weber
Rep. Daniel Webster

SUMMARY OF THE ARGUMENT

The Court should unequivocally abandon the contemporary *Chevron* deference doctrine because it contradicts Articles I, II, and III of the Constitution. Decades of application of *Chevron* deference have facilitated the exercise of functions by the executive branch that more properly belong to the legislative and judicial branches. Agencies exploit general or broad terms in statutes to engage in policymaking functions of questionable legality with the assumption that courts will grant deference and not independently evaluate the lawfulness of those agency interpretations. *See* Part I.A, *infra*.

The "Founders expected that the Federal Government's powers would remain separated—and the people's liberty secure—only if the branches could check each other." *Baldwin v. United States*, 140 S. Ct. 690, 691–92 (2020) (Thomas, J., dissenting from denial of certiorari). Therefore, "[t]he Constitution carefully imposes structural constraints on all three branches," and "the exercise of power free of those accompanying restraints subverts the design of the Constitution's ratifiers." *Id.* at 691.

Chevron deference effectuates such subversion by relieving legislators of significant aspects of their duty to legislate and judges of their duty to fully adjudicate questions of law. Consequently, agencies themselves are engaged in legal determinations without being fully subject to review or accountability, embodying Montesquieu's cautionary description that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there

can be no liberty." 1 *The Complete Works of M. De Montesquieu* bk. 11, ch. VI, at 199 (1777) (observing that "those who "enact tyrannical laws" would "execute them in a tyrannical manner").

Not only does the modern framework of *Chevron* deference offend the fabric of the Constitution, it also contradicts the Administrative Procedure Act. Section 706 of the Act provides that courts are obliged to decide all questions of law including statutory interpretation when reviewing agency action for lawfulness. *See* Part I.B, *infra*.

The Court should end this "atextual invention." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016). *Chevron* deference is eminently worthy of abandonment. *See* Part II, *infra*. It has led to increasingly chaotic shifts in administrative regulations that affect millions of Americans, and it puts a thumb strongly on the scale in favor of the executive branch when its actions are challenged in court. Eliminating *Chevron* deference would have a significant stabilizing effect on the law, as courts would once again become the independent arbiters of the statutory boundaries of agency discretion, and executive agencies would have to comply with those interpretations, rather than enjoying an incentive to issue drastically different regulations each time the political winds change.

Jettisoning *Chevron* deference would therefore restore not just critical constitutional separation of powers principles but also favor the citizenry themselves, who have often suffered harms because of the lack of full representative democratic

accountability that *Chevron* enables. Other *stare decisis* considerations, even assuming they apply to interpretive frameworks like *Chevron* deference, likewise favor eliminating deference to agencies' interpretations of statutes. *See* Part II, *infra*.

ARGUMENT

I. *Chevron* Deference Contradicts Constitutional Principles and Structure and Also Violates the Administrative Procedure Act.

In contrast to the judicial review scheme that Congress enacted in the Administrative Procedure Act in 1946, *Chevron* deference has yielded "the wholesale transfer of legal interpretation from courts to agencies—in violation of the APA and of the most basic notion of judicial review that it is the province of the courts to say what the law is." Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & Liberty 475, 507 (2016). *Chevron* deference also in effect transfers aspects of the Article I legislative power to the executive by authorizing agencies to write their own legally binding, policy-based rules that will be applicable to the general public without full-throated judicial review. Because no branch can delegate its core constitutional powers to another branch, *Chevron* runs headlong into constitutional separation of powers.

A. Modern *Chevron* Deference Is in Severe Tension with the Separation of Powers Framework Underlying Articles I, II, and III of the Constitution.

The Constitution "is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers themselves considered how much commingling [of governmental powers] was, in the generality of things, acceptable, and set forth their conclusions in the document." *Mistretta v. United States*, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting)

1. Article III vests the judicial power exclusively in the federal courts. U.S. Const. art III, § 1. "The judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (alterations and quotation marks omitted). "The interpretation of the laws is the proper and peculiar province of the courts." The Federalist No. 78 (Alexander Hamilton). Or as Chief Justice Marshall emphasized, courts possess the ultimate authority to "say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), and "[t]he rise of the modern administrative state has not changed that duty," *City of Arlington v. FCC*, 569 U.S. 290, 316 (2013) (Roberts, C.J., dissenting).

The judicial power applies equally to ambiguous laws. The Framers recognized that "[a]ll new laws, though penned with the greatest technical skill, and

passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal." The Federalist No. 37 (James Madison).

To ensure the judiciary carried out this obligation independently, with neither fear nor favor, the Framers "shielded judges from both the 'external threats' of politics and 'the internal threat of human will' by providing tenure and salary protections during good behavior and by insulating judges from the process of writing the laws they are asked to interpret." *Baldwin*, 140 S. Ct. at 691–92 (Thomas, J., dissenting from denial of certiorari); *see* Philip Hamburger, *Law and Judicial Duty* 507–08 (2008).

Chevron deference "precludes judges from exercising th[e] judgment" vested by Article III by "forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction." *Michigan*, 576 U.S. at 761 (Thomas, J., concurring). This has the effect of not only denying courts the power Article III has vested in them as provided for by Congress but effectively transfers to the Article II executive the power "to exercise the judicial power" of the United States by pronouncing "interpretations [that] are definitive in cases and controversies." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 122, 124 (2015) (Thomas, J., concurring in the judgment).

2. Nor is it any answer to cast *Chevron* deference as judicial recognition of agencies' supposed power to formulate legally binding rules based on the agencies' policy judgments. "If that is true, then agencies are unconstitutionally exercising 'legislative Powers'

vested in Congress." *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of certiorari). Article I vests "[a]ll legislative powers herein granted" with Congress, not the executive. U.S. Const. art I, § 1. The legislative power is the authority to "adopt generally applicable rules of conduct governing future actions by private persons." *Gundy v. United States*, 139 S. Ct. 2116, 2133 & nn.17–18 (2019) (Gorsuch, J., dissenting); *see Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) ("[M]ajor national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch."). At most, agencies have policy discretion only to the extent that the terms of enacted statutes grant a constitutionally appropriate measure of discretion in carrying out congressionally determined policies. But resolving statutory ambiguity is not a proper role for the executive branch within the constitutionally mandated structural order of the three federal branches.[2]

Because the legislative power is "a positive voluntary grant" by the people to the legislature, and that grant was "only to make laws, and not to make legislators," a legislature "can have no power to transfer their authority of making laws, and place it in other hands." John Locke, *Two Treatises of Government* bk. II, ch. XI, § 141, at 381 (1690). As

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[2] Federal agencies do not exist but for the enactment of the statutes creating them, and therefore if there were a proper rule of interpretation in cases of legislative ambiguity, it would be to conclude that federal agencies lack any such inherent authority.

members of this Court have previously noted, *Chevron* deference essentially does just that by "permit[ting] a body other than Congress to perform a function that requires an exercise of the legislative power." *Michigan*, 576 U.S. at 762 (Thomas, J., concurring).

Like with the judicial power, the Framers imposed constraints on the legislative power. Not only is it vested exclusively in Congress, but it is further divided "between two Houses that check each other, one of which was kept close to the people through biennial elections." *Baldwin*, 140 S. Ct. at 692 (Thomas, J., dissenting from denial of certiorari).

But "[w]hen the Executive exercises judicial or legislative power" pursuant to *Chevron* deference, "it does so largely free of the[] safeguards" imposed on the Article III judiciary and the Article I legislative. *Id.* Unlike judges, "[t]he Executive is not insulated from external threats, and it is by definition an agent of will, not judgment." *Id.* And "[t]he Executive also faces election less frequently than do Members of the House, and its power is vested in a single person." *Id.*

As a result of *Chevron* deference, members of this Court have recognized that there has been "a massive shift of lawmaking from the elected representatives of the people to unelected bureaucrats." *Justice Samuel Alito's Remarks at the Claremont Institute, 2/11/2017*, ScotusMap (Feb. 13, 2017), https://bit.ly/35FYAGp. When citizens "confront thousands of pages of regulations" promulgated by an agency, they "can perhaps be excused for thinking that it is the agency really doing the legislating." *Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting).

3. Even when Congress expressly delegates authority to an agency, judicial deference to agency interpretations of legal meaning is inconsistent with the Constitution's structure and the terms of the APA. The reason is straightforward: Congress itself does not possess the power "to issue a judicially binding interpretation of the Constitution or its laws," and thus Congress cannot delegate such power to the executive through the enactment of statutes, regardless of whether the delegation is apparently express or implied. *Perez*, 575 U.S. at 132 (Thomas, J., concurring in the judgment). At most, Congress may authorize agencies to use policymaking discretion within constitutionally appropriate standards, and the APA provides for such agency determinations to be reviewed under the arbitrary or capricious standard, *see* 5 U.S.C. § 706(2)(C), but this circumscribed power does not extend to issuing binding interpretations of law, *see Perez*, 575 U.S. at 132 (Thomas, J., concurring in the judgment); *see also Gundy*, 139 S. Ct. at 2133 (Congress cannot delegate to an agency "the power to prescribe the rules by which the duties and rights of every citizen are to be regulated, or the power to prescribe general rules for the government of society") (internal alterations and quotation marks omitted).

In other words, it would be no solution to artificially narrow *Chevron* as a legal deference doctrine to those instances where Congress has expressly delegated so-called policy- or rule-making authority to an agency.

* * *

The *Chevron* deference framework applied in the decades since the initial decision is not only in tension with the text and structure of Articles I, II, and III, but also operates largely unhindered by the constraints the Constitution imposes on the proper exercise of judicial and legislative powers. *Chevron* deference is an anomaly in every way and should be eliminated from the Court's interpretive toolkit.

B. The APA Requires Courts Independently to Decide All Relevant Questions of Law.

Chevron deference for questions of law is also in tension with the Administrative Procedure Act, which provides that "the reviewing court shall decide all relevant questions of law" and "interpret constitutional and statutory provisions." 5 U.S.C. § 706. The APA further instructs courts to "hold unlawful and set aside" any agency action or conclusions found to be "in excess of statutory jurisdiction, authority, or limitations" and does not qualify this review with any deference standard. *See id.* § 706(2)(C).

Section 706's text and structure confirm the error of deferring to agencies' legal interpretations of statutes. Doing so is inconsistent with the courts' congressionally assigned role in § 706 to decide "all" questions of law and "interpret" statutes. *Id.* Section 706 further structurally distinguishes statutory interpretation from the "agency action, findings, and conclusions" to which courts must apply deferential standards of review. *Id.* § 706(2); *see Baldwin*, 140 S.

Ct. at 692 (Thomas, J., dissenting from denial of certiorari).

Further, the notion that § 706 authorizes deference to agency construction of statutes proves too much. The APA "places the court's duty to interpret statutes on an equal footing with its duty to interpret the Constitution," yet "courts never defer to agencies in reading the Constitution." John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 194 (1998); *see Baldwin*, 140 S. Ct. at 692 (Thomas, J., dissenting from denial of certiorari).

Chevron deference also contradicts the understanding of the judicial function at the time the APA was enacted, when "the meaning of a statute was considered a question of law." *Baldwin*, 140 S. Ct. at 692 (Thomas, J., dissenting from denial of certiorari). As Justice Thomas and others have explained, in the days before *Chevron*, courts applied "traditional interpretive canons" to ambiguous statutes," *id.* at 693–94, dating back to Blackstone and even well before, *see, e.g.*, 1 William Blackstone, *Commentaries on the Laws of England* 59–61 (1765); 2 Samuel von Pufendorf, *De Officio Hominis Et Civis Juxta Legem Naturalem Libri Duo* 83–86 (Frank Gardner Moore transl. 1927) (1682); *see also* 2 *Annals of Cong.* 1945–46 (1791).

But *Chevron* "differs from historical practice in at least four ways." *Baldwin*, 140 S. Ct. at 694 (Thomas, J., dissenting from denial of certiorari). "First, it requires deference regardless of whether the interpretation began around the time of the statute's

enactment (and thus might reflect the statute's original meaning). Second, it requires deference regardless of whether an agency has changed its position. Third, it requires deference regardless of whether the agency's interpretation has the sanction of long practice. And fourth, it applies in actions in which courts historically have interpreted statutes independently." *Id.* Judicial deference to agency interpretations of law thus lacks historical roots.

* * *

Chevron deference has no basis in law, history, or logic. It flaunts basic textual and structural protections of the Constitution and is directly at odds with the APA. "The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary. *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

II. Eliminating *Chevron* Deference Will Enhance Stability in the Law and Favor the Citizenry.

The Court should overrule *Chevron* deference and eliminate it from the courts' interpretive canon. As explained next, no half measures will suffice, as any test would be subject to similar conceptual and legal flaws as *Chevron* itself. To avoid further perpetuating the uncertainty *Chevron* has left in its wake, the Court should overrule it unequivocally.

1. Because *Chevron* deference is a court-created interpretive tool, it is not "entitled to stare decisis treatment." *Baldwin*, 140 S. Ct. at 691 n.1 (Thomas, J., dissenting from the denial of certiorari); *see also Allen v. Milligan*, 143 S. Ct. 1487, 1517 n.1 (2023) (Kavanaugh, J., concurring). The Court should overrule and abandon *Chevron* deference in unmistakable terms because it is not just wrong but "pose[s] a serious threat to some of our most fundamental commitments as judges and courts," as demonstrated above. *Buffington v. McDonough*, 143 S. Ct. 14, 18 (2022) (Gorsuch, J., dissenting from denial of certiorari).

2. The Court should eliminate *Chevron* deference even if it were entitled to stare decisis treatment. *See Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2265 (2022) (listing stare decisis factors).

Chevron *Deference Is Gravely Erroneous and Illogical.* As noted above, *Chevron* deference is gravely erroneous from both constitutional and statutory perspectives. *See* Part I, *supra*. Further, as scholars across the spectrum have recognized, *Chevron* deference is illogical and poorly reasoned even on its own terms. It assumes that when Congress "left ambiguity in a statute," it "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Michigan*, 576 U.S. at 761 (Thomas, J., concurring) (citation omitted). But that is a "fictionalized statement of legislative desire," as recognized by then-professors David Barron and Elena Kagan. David J. Barron & Elena Kagan,

Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212 (2001).

"Although Congress can control applications of *Chevron*, it almost never does so, expressly or otherwise; most notably, in enacting a standard delegation to an agency to make substantive law, Congress says nothing about the standard of judicial review." *Id.* Deference, therefore, "in the end must rest on the Court's view of how best to allocate interpretive authority," rather than on Congress's view. *Id.* There is certainly no reason to maintain such a troubling doctrine when its own premise contradicts legislative reality.

Overruling* Chevron *Would Greatly Enhance Stability. Under the *Chevron* regime, "individuals can never be sure of their legal rights and duties. Instead, they are left to guess what some executive official might 'reasonably' decree the law to be today, tomorrow, next year, or after the next election." *Buffington*, 143 S. Ct. at 20 (Gorsuch, J., dissenting from denial of certiorari). That uncertainty remains even when "every relevant actor may agree" that the agency's interpretation is not the best one. Kavanaugh, *supra*, at 2151. And this uncertainty is only exacerbated by the "wildly different" approaches that courts take to whether a statute is actually ambiguous—and thus whether it is subject to *Chevron* in the first instance. *Id.* at 2152. Even the Office of the Solicitor General has not proven up to the task of identifying when a statute is sufficiently ambiguous. *See* Tr. of Oral Arg. at 71–72, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (No. 20-1114) (Assistant to the Solicitor General stating, "I don't

think I can give you an answer to th[e] question" of "[h]ow much ambiguity is enough").

Recognizing this level of unpredictability, the executive branch has an incentive to push the interpretive envelope ever further, yielding wild swings in binding regulations over time, especially when administrations change. *See* Kavanaugh, *supra*, at 2150 (deference doctrines "encourage[] the Executive Branch … to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints"); Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 Duke L.J. Online 91, 92 (2021) (arguing *Chevron* has become "a source of extreme instability in our legal system").

Thus, "[f]ar from proving a clear and stable rule," *Chevron* deference "has left behind only a wake of uncertainty." *Buffington*, 143 S. Ct. at 20 (Gorsuch, J., dissenting from denial of certiorari). Eliminating *Chevron* deference would ensure that Courts decide for themselves what statutes mean, and agencies would have to act accordingly across time and across administrations, discouraging wild fluctuations in a variety of areas of law. Moreover, rather than stretching the bounds of statutory language, *see* Kavanaugh, *supra*, at 2150, agencies would now have a countervailing incentive to develop and adopt the most persuasive interpretations of statutes, in the hopes of convincing a reviewing court deciding the statutory interpretation question *de novo*.

***Reliance Interests Favor Overruling* Chevron.** "*Chevron*'s very point is to permit agencies

to upset the settled expectations of the people by changing policy direction depending on the agency's mood at the moment." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

And any putative reliance interests are even further minimized by this Court's recent reluctance to invoke *Chevron* after several Justices questioned its foundations, as discussed further below. *See, e.g.*, *Pereira*, 138 S. Ct. at 2120–21 (Kennedy, J., concurring); *Michigan*, 576 U.S. at 760–64 (Thomas, J., concurring); *Perez*, 575 U.S. at 109–10 (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela*, 834 F.3d at 1149–58 (Gorsuch, J., concurring); Kavanaugh, *supra*, at 2150–54.

Chevron *Deference Imposes Serious Harms on the Citizenry.* The administrative state "touches almost every aspect of daily life." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). "And often it is ordinary individuals who are unexpectedly caught in the whipsaw of all the rule changes a broad reading of *Chevron* invites." *Buffington*, 143 S. Ct. at 21 (Gorsuch, J., dissenting from denial of certiorari).

But modern *Chevron* deference "place[s] a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else." *Buffington*, 143 S. Ct. at 19 (Gorsuch, J., dissenting from denial of certiorari). "[T]his deferential judicial posture creates a systematic bias in favor of the government and against the citizen." Ginsburg & Menashi, *supra*, at 498. *Chevron*

deference is therefore not just anti-Constitution and anti-APA, but also anti-fairness and anti-citizenry.

3. The Court should clearly eliminate *Chevron* deference because any half-measure will result in similar flaws as *Chevron* itself.

As then-Judge Kavanaugh explained, "[T]here is often no good or predictable way for judges to determine whether statutory text contains 'enough' ambiguity to cross the line beyond which courts may resort to … *Chevron* deference." Kavanaugh, *supra*, at 2136. "One judge's clarity is another judge's ambiguity," and therefore "[i]t is difficult for judges (or anyone else) to" define "ambiguity" "in a neutral, impartial, and predictable fashion." *Id.* at 2137. "The simple and troubling truth is that no definitive guide exists for determining whether statutory language is clear or ambiguous." *Id.* at 2138; *see United States v. Turkette*, 452 U.S. 576, 580 (1981) ("[T]here is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language.").

Even beyond disagreements about ambiguity, other conceptual problems plague *Chevron*. For example, judges disagree about whether alleged congressional acquiescence in an agency's interpretation of a statute should be considered at step one, step two, or not at all. *See Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164, 203 n.10 (D.C. Cir. 2022) (Henderson, J., concurring in part and dissenting in part), *cert. filed*, No. 22-1071 (docketed May 4, 2023). Judges also disagree about whether *Chevron* can be waived. *See, e.g.*, *Martin v. Soc. Sec. Admin.*, 903 F.3d 1154, 1161

(11th Cir. 2018) (noting circuit split). And scholars disagree even on conceptual aspects of the framework, such as how many steps are involved in the application of the *Chevron* deference framework. *See, e.g.*, Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 Va. L. Rev. 597, 597 (2009) ("*Chevron*, properly understood, has only one step.").

Further, when it comes to applying *Chevron*, there is a disconnect between this Court's theoretical retention of the doctrine and its application by the lower courts, suggesting that only a clear overruling will turn the tide.

The Court has created an ever-growing list of exceptions to and substitutes for *Chevron*, most notably the major-questions doctrine, pursuant to which the Court has stated that "[i]n extraordinary cases, … there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *King v. Burwell*, 576 U.S. 473, 486 (2015); *see also, e.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016) (declining to apply *Chevron* deference "where the regulation is 'procedurally defective'"). On occasion, the Court has even appeared to invoke the exact opposite of *Chevron* deference. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) ("[S]ometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion.").

This Court's "frequent disregard" of *Chevron* is a factor in favor of overruling it, *Hohn v. United States*, 524 U.S. 236, 252 (1998), and that is especially the case given the lower courts' dramatically different approach. One study demonstrated that the circuit courts apply *Chevron* deference in more than 75% of cases where it should be applicable under current doctrine. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 1 (2017). By comparison, studies as far back as 2008, before even some of this Court's more recent expansive generation of exceptions to the doctrine, suggested that this Court had been applying *Chevron* only 25% of the time when it appeared to be applicable. *See* William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1124–25 (2008). Some scholars have described this dichotomy as "*Chevron* Supreme and … *Chevron* Regular." Barnett & Walker, *supra*, at 6.

Rather than continuing to "simply ignor[e] *Chevron*" or attempt to maintain it in some other form, *Pereira*, 138 S. Ct. at 2121 (Alito, J., dissenting), the Court should cleanly overrule it and its progeny. Absent a clear statement from this Court, lower courts will continue invoking *Chevron* whenever a particular statute seems ambiguous enough to a majority of the presiding judges.

Failure to unequivocally reject *Chevron* deference will only continue to "offer[] false hope" to parties, "distort[] the law, mislead[] judges, and waste[] the

resources of" attorneys and courts alike. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021).

4. Finally, some may contend that Congress has acquiesced to *Chevron* and that it is too late in the day for this Court to abandon it now. But such a serious constitutional separation of powers violation cannot be absolved even if "the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992). But of course Congress has not approved of *Chevron* deference. In fact, Congress has addressed the matter of judicial deference by stating in the APA that courts shall decide all questions of law, including statutory interpretation. *See* Part I.B, *supra*. Jettisoning *Chevron* fully comports with Congress's intent as expressed in the text of the statutes it has passed. It is *Chevron*'s unsupported transfer of power to the executive, based only on statutory silence or ambiguities, that contradicts congressional intent.

Then-professors Barron and Kagan have explained why it is "improbable" that Congress's "silence on this matter may express agreement with a broad rule of deference to agency interpretations." Barron & Kagan, *supra*, at 216. They note that Congress was similarly "passiv[e] on this issue prior to *Chevron*," and that (as discussed above in the APA section) Congress "certain[ly] appreciat[ed]" the distinction between, for example, fact-bound "administrative decision-making processes" to which deference is owed, and the interpretation of statutes to which no deference is owed. *Id.*

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In the similar context of whether to overrule his own opinion in *Auer v. Robbins*,[3] Justice Scalia eventually exclaimed, "Enough is enough." *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part). It did not matter from his standpoint that the Court had been granting *Auer* deference "[f]or decades." *Id.* What mattered was that there was "no good reason" for having done so—or continuing to do so. *Id.* The same is true for *Chevron*. *See also* Adam White, *Scalia and* Chevron*: Not Drawing Lines, But Resolving Tension,* Yale J. on Reg.: Notice & Comment (Feb. 23, 2016), http://yalejreg.com/nc/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white/.

"[T]he Judiciary has one primary check on the excesses of political branches. That check is the enforcement of the rule of law through the exercise of judicial power." *Perez*, 575 U.S. at 124 (Thomas, J., concurring in the judgment). But deferring to agency legal interpretations amounts to an abdication of that constitutionally mandated role. "At this late hour, the whole project deserves a tombstone no one can miss." *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of certiorari). The Court should unequivocally bury *Chevron* deference.

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[3] 519 U.S. 452 (1997); *see Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse.

Respectfully submitted,

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