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

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BRIEF OF EIGHT NATIONAL BUSINESS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici address the following question:

Whether the Court should overrule *Chevron*.

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BRIEF OF EIGHT NATIONAL BUSINESS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

Amici are the American Farm Bureau Federation, American Coatings Association, American Forest & Paper Association, Agricultural Retailers Association, National Association of Home Builders, National Cattlemen's Beef Association, National Pork Producer's Council, and the North American Meat Institute.[1] *Amici*'s members grow, process, and sell plentiful and affordable meat, produce, and fiber that feed and clothe Americans, manufacture sustainable paper and wood products from renewable resources that are used every day by millions of people, build the homes that house our population, and manufacture paint and coatings used throughout our economy.[2]

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission.

[2] Each *amicus* advocates for regulatory standards and policies that enable the success of the industry members that they represent. See **American Farm Bureau Federation** https://www.fb.org (AFBF is the "voice of agriculture" formed to represent farm and ranch families); **Agricultural Retailers Association**, https://www.aradc.org (ARA "unites its members and their interests to advocate and educate on their behalf, provide services to improve their businesses, and preserve their freedom to operate and innovate, ensuring a safe and plentiful food supply for all"); **American Coatings Association**, https://www.paint.org ("ACA engages on legislative, regulatory and judicial issues at the federal, state and local levels to represent and advocate for the U.S. paint and coatings industry"); **American**

Amici's members are subject to regulation by federal agencies in virtually every aspect of their businesses. They devote enormous resources to monitoring and complying with rules and regulations governing labor and employment, product safety, consumer rights, land use, the environment, trade, and a host of other areas that reach into every nook and cranny of their businesses. *Amici* assist their members by commenting on proposed federal rules, and often by litigating when those rules exceed the authority of the agency involved. *Amici* believe that their decades of experience engaging with the federal rule-making and rule-enforcing bureaucracy on behalf of their members, before agencies and Congress and in the courts, will assist this Court in resolving this important case.

INTRODUCTION AND SUMMARY OF ARGUMENT

As petitioners' Question Presented suggests, this case could be decided within the *Chevron* framework

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Forest & Paper Association, https://afandpa.org/afpa-mission-and-vision (AF&PA advances "a sustainable U.S. pulp, paper, packaging and wood products manufacturing industry through fact-based public policy and marketplace advocacy"); **National Association of Home Builders**, https://www.nahb.org (NAHB advocates on the "key issues that must be addressed to ensure a robust housing market"); **National Cattlemen's Beef Association**, https://www.ncba.org/about ("NCBA is a producer-directed organization focused on industry advocacy, promotion, education and research"); **National Pork Producers Council**, http://nppc.org/about-us (NPPC is the global voice for the Nation's 60,000 pork producers with the mission to "fight[] for reasonable legislation and regulations" that protect the livelihood of pork producers); **North American Meat Institute**, https://www.meatinstitute.org (NAMI advocates for member "companies that process 95 percent of beef, pork, veal and 70 percent of turkey products in the US and their suppliers").

on the narrow and unexceptional basis that congressional silence concerning powers expressly granted elsewhere in the statute, but not in the relevant provision, does not constitute an ambiguity requiring judicial deference to an agency interpretation. Rather, that silence plainly indicates that Congress did not intend to grant those powers.

Amici urge this Court to go further and to take this opportunity to overrule *Chevron*. *Chevron* deference lacks a historical grounding, violates the separation of powers doctrine, is inconsistent with the Administrative Procedure Act, and has in practice led to an unwarranted expansion of bureaucratic power beyond anything authorized by Congress. A decisive overruling of *Chevron* is necessary because that precedent's current state of limbo causes substantial confusion and harm that only this Court can bring to an end. In this brief, we give examples of that harm as illustrated by recent decisions.

This Court's practice in recent years of deciding cases involving challenges to agency regulations or interpretations without any discussion of the *Chevron* framework[3] has proved unsatisfactory, plunging courts, counsel, and the regulated community into a twilight zone of uncertainty. On the one hand, this Court's silence leaves lower courts bound by *Chevron*, at least in theory. As this Court recently explained, "'[i]f a precedent of this Court has direct application in a case,' * * * a lower court 'should follow the case

[3] See, *e.g.*, *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2176-2181 (2021) (examining meaning of the term "extension" in provision of Clean Air Act allowing small refineries to petition EPA for extension of hardship exemption from renewable fuel program without discussion of *Chevron* or deference to EPA's interpretation).

which directly controls, leaving to this Court the prerogative of overruling its own decisions,' * * * even if the lower court thinks the precedent is in tension with 'some other line of decisions.'" *Mallory* v. *Norfolk Southern Railway Co.*, 143 S. Ct. 2028, 2038 (2023), quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). On the other hand, members of this Court[4]—and the Court itself by not relying on *Chevron*—have given enough indicators that *Chevron*'s end is near that some lower court judges decide regulatory cases without reference to *Chevron*. Some courts of appeals, like the D.C. Circuit, often adhere to *Chevron*, other circuits less so; some panels divide over that issue; and some courts decide cases relying on *Chevron*, only to be reversed by this Court in an opinion that does not discuss *Chevron*.

From a practical litigation perspective, this is a strange and unsatisfactory situation. Sophisticated counsel in this Court generally avoid *Chevron* arguments. See, *e.g.*, U.S. Br., *Biden* v. *Nebraska*, 143 S. Ct. 2355 (2023) (No. 22-506) (Jan. 4, 2023) (arguing for broad agency authority under a statutory grant of power to "waive or modify" student loan programs without once citing *Chevron*); *Biden* v. *Nebraska*, 143 S. Ct. 2355 (2023) (ruling on that issue without citing *Chevron*); *Cnty. of Maui, Hawaii* v. *Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) (noting that "[n]either the Solicitor General nor any party has asked us to give what the Court has referred to as *Chevron* def-

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[4] *E.g.*, *Buffington* v. *McDonough*, 143 S. Ct. 14, 22 (2022) ("No measure of silence (on this Court's part) and no number of separate writings (on my part and so many others) will protect [regulated parties]. At this late hour, the whole [*Chevron*] project deserves a tombstone no one can miss.") (Gorsuch, J., dissenting from the denial of certiorari).

erence to EPA's interpretation of the statute"). But litigants in the lower courts must continue to present their cases using the *Chevron* framework. See, *e.g.*, U.S. Br., at 32, *Texas* v. *EPA*, No. 3:23-cv-17 (S.D. Tex. Mar. 4, 2023) (Dkt. 40) (arguing for *Chevron* deference to the "waters of the United States" rule); *cf. Sackett* v. *EPA*, 143 S. Ct. 1322 (2023) (rejecting agency interpretation of "waters of the United States" without citing *Chevron*). Litigation would be far more coherent and efficient if this Court laid down a clear position on *Chevron* deference rather than leave the lower courts and parties to guess at the precedent's current status.

The practical implications for *amici*'s members are far worse than simply not knowing what arguments to make in a brief. The regulated community should not be "required to guess whether [a] statute will be declared 'ambiguous' (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed 'reasonable'"—guesses on which substantial investments and owners' and employees' livelihoods may depend. *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); see also Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152-2154 (2016).

This problem is all the more severe because "these days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations." *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement on denial of certiorari); see, *e.g.*, *National Ass'n of Home Builders* v. *EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (upholding under *Chevron* an EPA lead paint rule that contradicted the

prior rule where no more had changed than "the inauguration of a new President and the confirmation of a new EPA Administrator").

"How, in all this, can ordinary citizens be expected to keep up * * * [a]nd why should courts, charged with the independent and neutral interpretation of the laws Congress has enacted, defer to such bureaucratic pirouetting?" *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., statement on denial of certiorari). Regulated entities deserve a clear decision overruling *Chevron*, which will assist them in making predictions about litigation outcomes and, still more important, curtail adventurous agency actions of the sort encouraged by a profligate doctrine of deference.

There is no doubt that *Chevron* distorts the results of litigation. That doctrine puts a heavy thumb on the scale on the side of agencies when a less constrained judicial inquiry would favor the challengers—as reversals by this Court clearly attest. *Chevron* incentivizes a finding of statutory ambiguity, rather than a deep inquiry into the meaning of statutory language. See *Pereira* v. *Sessions*,138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). And that bias to find ambiguity in a statutory provision in order to apply *Chevron* deference is well documented: courts of appeals applying *Chevron* concluded that the statute was ambiguous 70% of the time, and in 93.8% of those cases upheld agency interpretations. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 32-34 (2017). The result is that truly outlandish statutory interpretations that vastly expand agency authority over *amici*'s members are upheld by lower courts—and not every one of those decisions can be corrected by this Court. See *The Statistics*, 136 Harv. L. Rev. 500, 508 (2022) (during the

2021 Term, this Court granted review in only 74 cases of 5104 petitions acted upon).

Chevron deference also is an unnecessary doctrine. Just as this Court's focus in statutory cases is always on statutory language, *Bartenwerfer* v. *Buckley*, 143 S. Ct. 665, 674-675 (2023), that also should be the focus in deciding the scope of delegated agency authority. A deference rule, as experience shows, makes it far too easy for agencies and courts to throw up their hands when faced with difficult statutory language and rely on deference rather than careful textual analysis.[5] But there are ample tools to extract meaning from less-than-crystal-clear-text, which agencies and courts alike should be required to use in place of an easy determination that a statute is ambiguous. And when text runs out, there are many other tools available to ensure that an agency's interpretation is reasonable, like those described in *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019), and *Sackett*, 143 S. Ct. at 1338-1340, 1342-1343.

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[5] That, indeed, is the incentive *Chevron* creates. As courts have come to apply *Chevron*, an agency's determination that statutory text is unambiguous, and its interpretation is the only permissible option, will result in non-deferential review. If, however, the agency stops short of a rigorous textual analysis and declares that it is interpreting an ambiguous statute, that reading will likely receive deferential review. The practical consequence is that agencies are encouraged to read statutes in a way that gives them discretion to choose one of multiple decisions. See, *e.g.*, *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 944, 995 (D.C. Cir. 2021), *rev'd on other grounds*, *West Virginia* v. *EPA*, 142 S. Ct. 2587 (2022). And that in turn results in agency interpretations that shift with the Administration's policy preferences, to the detriment of the regulated community.

The Court has already made great strides in curtailing agency overreach and restoring the separation of powers by reinvigorating the "major questions doctrine." See, *e.g., Biden* v. *Nebraska*, 143 S. Ct. at 2372-2374; *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2610, 2614-2616 (2022). But most agency errors are more mundane, involving misreadings of or insufficient attention to statutory text, not the unauthorized determination of major policy questions. In those more run-of-the-mill cases the *Chevron* doctrine continues to endorse unwarranted agency interpretations not intended by Congress. It is time for this Court to overrule *Chevron*.

ARGUMENT

I. *CHEVRON* IS IRRECONCILABLE WITH JURISPRUDENTIAL HISTORY, THE CONSTITUTIONAL DESIGN, AND THE ADMINISTRATIVE PROCEDURE ACT

Chevron should be retired. The decision is at odds with the Nation's legal history, the Framers' constitutional design, and the Administrative Procedure Act (APA).

In articulating the *Chevron* doctrine, this Court departed from the use of well-established canons of statutory construction, and in the wake of that decision a "troubling" culture of "reflexive deference" to agency interpretations has taken root in the lower courts. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring). The consequences of that deference—the judiciary gives deference to executive interpretations of legislative enactments, which in turn incentivizes Congress to delegate legislative power to the executive through purposefully ambiguous statutes—cannot be reconciled with the constitutional allocation of power among the three branches of government.

It is time to correct the *Chevron* error and give clear guidance to lower courts, regulators, and the regulated that such deference is unwarranted.

A. *Chevron* is not supported by a history of broad judicial deference to executive interpretation of ambiguous legislative acts.

Chevron purports to rest on a "long[-]recognized" principle that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron USA, Inc.* v. *Nat. Res. Def. Council,* 467 U.S. 837, 844 & n.14 (1984). That "principle of deference to administrative interpretations," *id.* at 844, however, "is inconsistent with accepted principles of statutory interpretation from the first century of the Republic." *Baldwin* v. *United States*, 140 S. Ct. 690, 693 (2020) (Thomas, J., dissenting from denial of certiorari). Instead, "[w]hen 18th- and 19th-century courts decided questions of statutory interpretation in common-law actions or under federal-question jurisdiction, they did not apply anything resembling *Chevron* deference." *Ibid*.

According to *Chevron*, the origin of the principle of deference was *Edwards' Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206 (1827). *Chevron*, 467 U.S. at 844 n.14. But as members of this Court and commentators alike have recognized, *Edwards' Lessee* did not sanction broad deference to an agency interpretation but rather announced a narrow rule "that accorded respect to certain contemporaneous, consistent interpretations of statutes by executive officers." *Baldwin*, 140 S. Ct. at 693 (Thomas, J., dissenting from denial of certiorari).

In *Edwards' Lessee*, the Court held that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." 25 U.S. (12 Wheat.) at 210. This decision "announced a doctrine of deference to *contemporaneous* and *customary* interpretations, not a doctrine of deference to *executive* interpretations." Aditya Bamzai, *The Origins Of Judicial Deference To Executive Interpretation*, 126 Yale L.J. 908, 916 (2017); see *ibid.* ("It was the pedigree and contemporaneity of the interpretation, in other words, that prompted 'respect'; the fact that the interpretation had been articulated by an actor within the executive branch was relevant, but incidental"). That approach is consistent with the "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary * * * meaning * * * at the time Congress enacted the statute.'" *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 535 (2019).

This canon of construction, "requir[ing] that statutory interpretation be consistent and uniform—and, hence, customary or contemporaneous" with the statute's enactment "was repeatedly invoked to reject the executive branch's changed construction of a statute." Bamzai, *supra*, at 944-945; see *Baldwin*, 140 S. Ct. at 693 (Thomas, J., dissenting from denial of certiorari). As this Court later articulated the interpretative canon, "[w]here the meaning of the act [is] doubtful * * * the rule is universal that the contemporaneous construction of such statute is entitled to great respect, especially where it appears that the construction has prevailed for a long period, and that a different interpretation would impair vested rights." *The*

City of Panama, 101 U.S. 453, 461 (1879); see Bamzai, *supra*, at 946-947.

Meanwhile, other pre-*Chevron* interpretative canons held that an agency's shifting or inconsistent interpretation of a legislative act was *not* entitled to respect. *Baldwin*, 140 S. Ct. at 693 (citing *Merritt* v. *Cameron*, 137 U.S. 542, 552 (1890)). In *Merritt*, the Court examined a Department of Treasury regulation interpreting a statute regarding the timeliness of a challenge to a tax levy. The Treasury had adhered to its initial interpretation for 9 years and then changed course. The Court interpreted the tax statute using traditional interpretative tools and without any deference to the Treasury. 137 U.S. at 544-552. In rejecting the argument that the Treasury's construction should be given weight, the Court explained that "[t]here is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will" cause the Court to respect the construction. *Id.* at 552 (citing, among others, *Edwards' Lessee*).

Chevron, however, guarantees deference to an agency's construction of a statute regardless of whether it was contemporaneous with the enactment, reflects the understanding of statutory terms at the time of their enactment, or has been uniform since that time. See *Baldwin*, 140 S. Ct. at 694 (Thomas, J., dissenting from denial of certiorari). It thus goes far beyond the nineteenth-century precedents it purports to follow.

Chevron thwarts too another long-established principle. "From the beginning of the Republic, the American people have rightly expected our courts to resolve disputes about their rights and duties under law without fear or favor to any party—the Executive

Branch included." *Buffington* v. *McDonough*, 143 S. Ct. 14, 16 (2022) (Gorsuch, J., dissenting from denial of certiorari). *Chevron* deference, however, "introduce[s] into judicial proceedings a 'systematic bias toward one of the parties'"—and not "in favor of just any party," but "in favor of the most powerful of litigants, the federal government, and against everyone else." *Id.* at 19, quoting Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1212 (2016). That pro-government bias—involving rules that often carry criminal and severe civil penalties for violations—squarely contradicts the "ancient doctrines of lenity and *contra proferentem*" that, "[f]rom the founding," have led courts to "constru[e] ambiguities in penal laws *against* the government and with lenity toward affected persons." *Buffington*, 143 S. Ct. at 19; see also *Sackett*, 143 S. Ct. at 1343.

As discussed below, far from favoring the executive in matters of statutory interpretation, this Court has made clear since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), that questions of statutory interpretation are for courts to resolve as a matter of law. And that is the position Congress enshrined in the Administrative Procedure Act.

B. *Chevron* is irreconcilable with the allocation of power between the branches of government.

1. *Chevron* cannot be squared with the constitutional separation of powers. Article III, § 1 states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, §1. This Clause, together with the separate legislative and executive

Vesting Clauses in Article I, § 1 and Article II, § 1, articulate the separation of powers principle embedded in the Constitution. See *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2229 (2020) (Kagan, J., concurring in part) (separation of powers principle is "carved into the Constitution's text" in the "first three articles").

Under the separation of powers, the "[j]udicial power" is exercised "always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law." *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 866 (1824). James Madison acknowledged that the legislature's enactments will often be ambiguous when he wrote 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, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications" by the courts. The Federalist No. 37, at 183 (Madison). Alexander Hamilton envisaged "that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." The Federalist No. 78, at 404 (Hamilton). In that view, "[t]he interpretation of the laws is the proper and peculiar province of the courts" and it is the courts' job to ascertain "the meaning of any particular act proceeding from the legislative body." *Ibid*. In short, "[t]he judicial power was understood to include the power to resolve [statutory] ambiguities over time." *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in judgment).

Chevron improperly "wrests from Courts the ultimate interpretive authority to say what the law is" and "hands it over to the Executive." *Michigan* v. *EPA*,

576 U.S. 743, 761-762 (2015) (Thomas, J., concurring). See *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of certiorari) ("*Chevron* compels judges to abdicate the judicial power without constitutional sanction"). *Chevron* deference requires judges to forego their basic adjudicative function and to "thro[w] up our hands and le[t] an interested party—the federal government's executive branch, no less—dictate an inferior interpretation of the law that may be more the product of politics than a scrupulous reading of the statute." *BNSF Railway Co.* v. *Loos*, 139 S. Ct. 893, 908-909 (2019) (Gorsuch, J., dissenting).

Chevron, by requiring deference to a "reasonable"—but not the best—interpretation of ambiguous statutory language undermines the authority of Congress for no good reason. Courts unquestionably possess the ability to construe complicated, obscure statutory language and affix meaning to legislative pronouncements. And they do so without the incentives that may lead regulators into interpretations that are driven by political considerations or a desire to expand their own authority. One has only to contrast the starkly different interpretations of the phrase "waters of the United States" in the CWA that were set forth in the last Administration's 2020 Rule and this Administration's January 2023 Rule to understand the practical dangers of deference and the need for judicial primacy in interpreting statutes. See *Sackett*, 143 S. Ct. at 1341 (holding agencies' latest rule to be "inconsistent with the text and structure of the CWA"); compare *The Navigable Waters Protection Rule*, 85 Fed. Reg. 22250 (Apr. 21, 2020) with *Revised Definition of "Waters of the United States,"* 88 Fed. Reg. 3004 (Jan. 18, 2023).

2. There is another constitutional problem with *Chevron*: it rests on the assumption that Congress

may either explicitly or implicitly delegate authority to executive agencies to fill gaps through the enactment of ambiguous statutes. 467 U.S. at 843 (citing *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created [and funded] program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.")). See also *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1778 (2019) ("*Chevron* deference is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps") (internal quotation marks omitted).

By its plain text, Article I's Vesting Clause contains an *exclusive* grant of authority to Congress to exercise the "legislative powers" of government. Simply, "[w]hen the Government is called upon to perform a function that requires an exercise of legislative * * * power, only the vested recipient of that power can perform it." *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring). And "[n]o one, not even Congress, ha[s] the right to alter that arrangement." *Gundy* v. *U.S.*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

The Constitution does not authorize Congress to sub-delegate that power to another branch of government. See *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2511 (2019) (Kagan, J., dissenting) ("Republican liberty demands not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people") (cleaned up). Congressional delegation of the legislative power, thus, threatens the republican form of government guaranteed by the Constitution. See U.S. Const. Art. IV, § 4 ("The United States shall guarantee to every

State in this Union a Republican Form of Government"); *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government").

This Court's jurisprudence requires Congress to provide an "intelligible principle" to govern an agency's exercise of discretion in performing its delegated duties. *Mistretta*, 488 U.S. at 372. *Chevron* works directly against this key element of the non-delegation doctrine because it promotes enactment of vague statutory language than can be repeatedly interpreted and re-interpreted by agencies according to their current policy interests without serious fear that their shifting interpretations will be invalidated. Knowing that there is a thumb on the scale in favor of their interpretation of ambiguous statutory language, agencies are incentivized to encourage Congress to adopt vague statutory regimes with plenty of "gaps" for the agencies to fill according to their desires and then to "write ever more ambitious rules on the strength of ever thinner statutory terms, all in the hope that some later court will find their work to be at least marginally reasonable." *Buffington*, 143 S. Ct. at 20 (Gorsuch, J., dissenting from denial of certiorari). See Christopher J. Walker, *Legislating in the Shadows*, 165 U. Pa. L. Rev. 1377, 1419 (2017) (discussing agency incentives to propose flexible, broad, and ambiguous statutes to Congress).

Also knowing this, Congress can avoid making the hard choices often involved in the legislative process and instead enact vague statutes. See, *e.g.*, *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) (explaining that "Congress could have limited [the Health Resources

and Services Administration's] discretion" to implement the Affordable Care Act "in any number of ways, but it chose not to do so"); *id*. at 2382 ("it was Congress' deliberate choice to issue an extraordinarily broad general directive to HRSA to craft the Guidelines, without any qualifications as to the substance of the [Preventative Care] Guidelines or whether exemptions were permissible") (internal quotation marks omitted). Justice Gorsuch has explained that "often enough, legislators will face rational incentives to pass problems to the executive branch." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). *Chevron* encourages exactly that.

C. *Chevron* is irreconcilable with the APA.

The Administrative Procedure Act of 1946 governs judicial review of agency action; and in the APA Congress made clear that it is for the judiciary to interpret statutes authorizing agency action *de novo*.

Section 706 of the APA states that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. As a contemporary commentator observed, that language was a "clear mandate" for a court to decide questions of law "for itself, and in the exercise of its own independent judgment." John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 516 (1947); see Bamzai, *supra*, at 991-999 (discussing the APA and its aftermath); *Buffington*, 143 S. Ct. at 17 (Gorsuch, J., dissenting from denial of certiorari). Indeed, before *Chevron* "many prominent judicial opinions in the decades following

the adoption of the APA never even *mentioned* Executive Branch interpretation of disputed statutory terms." *Buffington*, 143 S. Ct. at 17 (Gorsuch, J., dissenting) (citing J. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 792 (2010)).

"Heedless of the original design of the APA," *Chevron* prevents courts from carrying out the APA's mandate. *Perez*, 575 U.S. at 109 (Scalia, J., concurring). Under *Chevron*, "[s]o long as the agency does not stray beyond the ambiguity in the text being interpreted, deference *compels* the reviewing court to 'decide' that the text means what the agency says" it means. *Id*. at 110. Instead of courts applying their independent judgment to decide questions of law, as the APA shows Congress intended, courts under *Chevron* reflexively defer to agency interpretations of statutory provisions. See *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring).

For these reasons, *Chevron* deference is legally baseless and dangerously undermines the separation of powers and the constitutional and statutory authority of the courts.

II. LOWER COURTS ARE HARMING THE REGULATED COMMUNITY BY APPLYING *CHEVRON* TO REACH INCORRECT DECISIONS.

The harms caused by *Chevron* are not theoretical. Both the deference doctrine itself, and the current legal limbo in which it lies, lead to businesses like *amici*'s members being bound by rules that Congress never intended, as well as to uncertainty over whether courts will correct an agency's errors.

The distorting effect of *Chevron* deference is evident, for example, in litigation over the meaning of key environmental statutes, where the doctrine has routinely driven lower courts into erroneous decisions that this Court has had to correct. But for those cases that are not reviewed by this Court, the effect of *Chevron* is to create "a 'systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else.'" *Kisor*, 139 S. Ct. at 2425 (2019) (Gorsuch, J., concurring in judgment). And because the "administrative state 'touches almost every aspect of daily life,' * * * 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).

Take the *SWANCC* litigation over the U.S. Army Corps of Engineers' 1986 "migratory bird rule." By deferring to the Corps' interpretation under *Chevron*, the Seventh Circuit upheld a Clean Water Act (CWA) rule defining "waters of the United States" that vastly expanded agency jurisdiction to cover isolated ponds used by migratory birds. Finding the term "waters of the United States" to be ambiguous, the court of appeals held that it was required by *Chevron* to "defer to the agency interpretation so long as it is based on a reasonable reading of the statute." And it held the migratory bird rule to be a reasonable interpretation "because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds." *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Engineers*, 191 F.3d 845, 851 (7th Cir. 1999).

This Court reversed. *Id.*, 531 U.S. 159 (2001). It held that the Clean Water Act is "clear" that isolated

features are not "waters of the United States" and that the migratory bird rule "exceeds the authority granted to [the agencies] under §404(a) of the CWA" because it was too far removed from the jurisdictional term "navigable waters." *Id.* at 172, 174. Shorn of the requirement of "deference," standard methods of textual analysis and principles of statutory interpretation—as applied by this Court when it reversed—would surely have resulted in lower courts recognizing that the migratory bird rule was unlawful. Yet that rule controlled CWA jurisdiction, and imposed massive permitting costs on land users, for 15 years before this Court struck it down.

Another example. Despite the term "critical habitat" in the Endangered Species Act having the very plain meaning that whatever is designated as "critical habitat" for an endangered species must actually be "habitat" for that species, the Fifth Circuit held otherwise. Relying entirely on *Chevron* deference, the court of appeals held that the agency could designate as critical habitat for the endangered Dusky Gopher Frog land that admittedly could not support the frog's lifecycle, *i.e.*, was not its habitat. *Markle Interests, LLC* v. *U.S. Fish & Wildlife Service*, 827 F.3d 452 (5th Cir. 2016). This Court unanimously reversed. *Weyerhaeuser* v. *U.S Fish & Wildlife Service*, 139 S. Ct. 361, 368 (2018) ("According to the ordinary understanding of how adjectives work, 'critical habitat' must also be 'habitat.' * * * Only the 'habitat' of the endangered species is eligible for designation as critical habitat"). Had this Court not stepped in, it observed, the costs to the landowner plaintiffs of the Fifth Circuit's deference to the agency's mistaken interpretation would have been between $20 and $34 million. *Id.* at 367.

This sequence of events—in which lower courts uphold agency action by deferring under *Chevron*, and this Court then steps in to correct the error—is entirely unsatisfactory. It delays the correct resolution of challenges to agency action, which is costly for regulated entities that must operate under an unlawful agency interpretation. It increases the parties' litigation costs by generating additional levels of judicial review, which also wastes judicial resources. And because this Court cannot step in to correct every erroneous decision deferring under *Chevron*, it means that some manifestly erroneous agency actions survive far longer than they should.

In addition, the prospect of deference leads agencies to rely on it rather than engage in rigorous analysis of statutory text. Indeed, it is not unheard of for an agency to "abandon any pretense of interpreting the statute's terms and retreat to policy arguments and pleas for deference." *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1485 (2021). A deference doctrine encourages not just overreaching by agencies, but repeated overreaching. See *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (FCC "has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends") (Scalia, J., concurring).

The "waters of the United States" saga illustrates the problem. Despite this Court holding in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), that CWA jurisdiction extends to wetlands that actually abut and are indistinguishable from navigable waters, and despite this Court in *SWANCC* striking down the migratory bird rule as a "clear" violation of the statute, EPA and the Corps continued to assert expansive jurisdiction over isolated ponds or

only sometimes-wet areas, and lower courts upheld those agency actions under *Chevron*. See *Sackett*, 143 S. Ct. at 1333 ("Deferring to the agencies' localized decisions, lower courts blessed an array of expansive interpretations of the CWA's reach").

In particular, the agencies asserted that a single Justice's concurring opinion in *Rapanos* v. *United States*, 547 U.S. 715 (2006), supported their decision to base jurisdiction on a concept—a "significant nexus" to navigable waters—that appears nowhere in the CWA; devised an open-ended, all-encompassing test for significant nexus; and insisted that *Chevron* required deference to their interpretation of the statute. See, *e.g.*, EPA Br. at 42-43, *Murray Energy Corp.* v. *EPA*, No. 15-3751 (Dkt. 149-1) (6th Cir. Jan 13, 2017) (arguing that *Chevron* required "heightened" deference to the agencies' 2015 Rule defining "waters of the United States" to include all features with a significant nexus to navigable waters).

Bolstered by entirely unwarranted deference, the significant nexus rule, which imposed federal permitting requirements on use of virtually any wet patch in the Nation, held sway from post-*Rapanos* guidance issued in 2008 until this Court last Term definitively disapproved its latest iteration. See *Sackett*, 143 S. Ct. at 1341 (refusing "to defer to [the agencies'] understanding of the CWA's jurisdictional reach, as set out in its most recent rule defining 'the waters of the United States'" because it "is inconsistent with the text and structure of the CWA" as well as "'background principles of construction'"). So thanks to *Chevron* deference, *amici*'s members and the rest of the regulated community have for 15 years labored under an unlawfully broad agency interpretation of a

key statute, at great expense in terms both of compliance costs, lost opportunities, and the costs of repeatedly litigating to try to right that wrong.[6]

With *Chevron* still on the books, lower courts continue to reflexively defer to agency interpretations of statutes. For instance, in *Foster* v. *U.S. Dep't of Ag.*, 68 F.4th 372 (8th Cir. 2023), the Eighth Circuit was called upon to examine whether a USDA regulation regarding a property owner's right to request review of a wetland certification conflicted with the enabling statute, the Swampbuster Act. After a brief discus-

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[6] See also, *e.g.*, *White Stallion Energy Center, LLC* v. *EPA*, 748 F.3d 1222, 1236 (D.C. Cir. 2014) (D.C. Circuit deferred to EPA's refusal to consider the costs of a Clean Air Act emissions regulation that was statutorily required to be "appropriate and necessary"), reversed, *Michigan* v. *EPA*, 576 U.S. 743, 752-754 (2015) ("appropriate and necessary" requires attention to costs); see *id.*, 576 U.S. at 763 ("we should be alarmed that [EPA] felt sufficiently emboldened by [*Chevron*] to make the bid for deference that it did here") (Thomas, J., concurring). Often, an agency that engages in the required close reading of a statute, in context and making use of canons of statutory interpretation, will find ample authority without resort to deference. See, *e.g.*, *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 217-223 (2009) ("extended consideration of the text of § 1326(b), and comparison of that with the text and statutory factors applicable to four parallel provisions of the Clean Water Act, leads … to the conclusion" that Act's phrase "best technology available for minimizing adverse environmental impact" was reasonably read to mean "the technology that *most efficiently* produces some good," because "[i]n common parlance one could certainly use the phrase 'best technology' to refer to that which produces a good at the lowest per-unit cost"). See also, *e.g.*, *Michigan* v. *EPA*, 576 U.S. at 750, 752 (the fundamental principal that rational rulemaking requires an agency to consider all relevant factors leads to the conclusion that the statute requires the agency to consider the costs and benefits of its action (citing *Motor Vehicle Mfrs. Assn.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983))).

sion, the court determined that the operative provision of the Act, 16 U.S.C. § 3822(a)(4), was ambiguous. *Id.* at 376. The court found that the statutory provision could be read in two ways and, therefore, it adopted the agency's interpretation, which limited the right of farmers to request review of wetland certifications, because it was "reasonable." *Id.* at 377-378. This is so despite the fact that the court possesses the ability to resolve statutory ambiguity as part of its traditional interpretative toolkit.

For *amici* and their members, the issue presented here is urgent. A host of recently proposed or finalized rules assert extravagant agency powers untethered from statutory language, and often depart from prior agency understandings of their authority. Those rules promise more of the same—years of uncertainty and of litigation over whether deference is warranted—unless *Chevron* is now put to rest.

With *Chevron* and more generally, courts, federal regulators, and the regulated community would benefit greatly if this Court were to correct lower courts' errors in interpreting this Court's decisions before they become entrenched. It should not take "nearly 50 years" for this Court to announce that an "undue hardship" in an employer providing a religious accommodation under Title VII does not mean a "more than *de minimis*" hardship but instead a "substantial increased cost in relation to [the employer's] conduct of its particular business." *Groff* v. *DeJoy*, 143 S. Ct. 2279, 2286-2287, 2295 (2023) (correcting a virtually universal lower court misreading of *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977)). And forty years of *Chevron*, in which lower courts have used that case to avoid close readings of statutory text and context and careful application of principles of statutory construction, is more than enough.

III. AGENCY DECISIONS CAN BE ACCORDED THEIR PROPER WEIGHT THROUGH NORMAL STATUTORY CONSTRUCTION PRINCIPLES.

Abandoning *Chevron* does not mean that an agency's interpretation of a statute it administers is worthless. To the contrary, a well-reasoned interpretation of statutory language by an agency with subject matter expertise is entitled to respectful consideration and may prove persuasive to the court. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight" a court affords an agency's interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"); *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U. S. 380, 390 (1984) (principles of deference "have particular force" where the "subject under regulation is technical and complex" and the agency "has longstanding expertise in the area"); *Entergy Corp.*, p. 23 n.6, *supra*. As Justice Gorsuch has explained, "no one doubts that courts should pay close attention to an expert agency's views on technical questions in its field. Just as a court would want to know what John Henry Wigmore said about an issue of evidence law or what Arthur Corbin thought about a matter of contract law, so too should courts carefully consider what the Food and Drug Administration thinks about how its prescription drug safety regulations operate." *Kisor*, 139 S. Ct. at 2442 (Gorsuch, J., concurring in the judgment) (cleaned up).

In other words, courts will give due consideration to a well-reasoned agency interpretation. But the final say about what a statute means must remain with the

judiciary: "while courts should of course afford respectful consideration to the expert agency's views, they must remain open to competing expert and other evidence supplied in an adversarial setting." *Id.* at 2443.

This approach—providing respect or "particular attention" to a well-reasoned agency decision—is consistent with interpretative canons dating back to *Edwards' Lessee*. In the absence of *Chevron* deference, a court may find an agency's construction of an ambiguous statute "particularly persuasive" if, for instance, the interpretation "was made contemporaneously with the enactment of the statute itself," the agency "has not since interpreted the statute in a way that directly contradicts that contemporaneous interpretation," and the regulated industry did not object to the interpretation. *Wisconsin Central Ltd.* v. *United States*, 138 S. Ct. 2067, 2078 (2018) (Breyer, J., dissenting). Far from undermining regulation, dismantling *Chevron* deference will incentivize agencies to conduct careful statutory analysis that will persuade a court of its correctness, rather than rely on rote judicial deference, and thereby improve the quality of regulation and agency adherence to congressional intent.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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