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 STRIVE ASSET MANAGEMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Strive Asset Management ("Strive") is an asset management company whose mission is to maximize value for its clients by leading the companies it invests in to focus on excellence. Strive advocates for shareholder primacy—an unwavering mandate that the purpose of a for-profit corporation is to maximize its long-run value to its shareholders. This longstanding principle is enshrined in American jurisprudence and essential to the proper functioning of free market capitalism. It is also under siege by unelected bureaucrats in government, academia, and elsewhere who would have American corporations privilege non-shareholder "stakeholders," such as employees, customers, communities, or the environment, when making business decisions. Proponents of this so-called "stakeholder capitalism" model include many federal government agencies, which have increasingly reached beyond their congressional mandates to encourage, pressure, and even coerce companies to adopt environmental, social, and governance-aligned investing and related corporate behaviors.

In this case, the Court has an opportunity to rein in such agency overreach by overruling the *Chevron* doctrine, which affords agencies significant deference in defining and expanding their own powers. Strive and its clients have a direct and substantial interest in this question. As an asset manager, Strive is subject to extensive federal regulation. Strive's aim to

[1] No part of this brief was authored by counsel for any party, and no person or entity other than *amicus* made any monetary contribution to its preparation or submission.

maximize value for its clients is also negatively impacted by expansive federal regulations that direct its portfolio companies to serve non-shareholder stakeholder interests. Strive is thus uniquely positioned to assess the potentially far-reaching consequences of the Court's decision in this case beyond the fishing industry, particularly as they relate to the financial sector and capital markets.

SUMMARY OF ARGUMENT

There is no question that the *Chevron* doctrine, particularly as it's been applied by the lower courts, has allowed executive agencies to amass incredible power. Nor is there much doubt that this centralization of power is antithetical to the separation of powers that is fundamental to our constitutional framework. As then-Judge Gorsuch explained in a Tenth Circuit opinion, *Chevron* "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power … in a way that seems more than a little difficult to square with the Constitution and the framers' design." *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

But what has been underappreciated is just how radically this consolidation of power in the executive branch has affected and threatens to affect the American economy and financial markets, and how little the other branches of government—namely, the legislature and the judiciary—are able to do about it.

The Department of Labor's recently enacted rule allowing pension fund managers to consider environmental, social, and governance (ESG) factors in a broader range of circumstances when investing

retirement funds provides an excellent case study in how *Chevron* has emboldened executive agencies to reach far beyond their congressional mandates, knowing that those harmed by the agencies' actions will have little recourse through either the legislative process or the courts.

The consequences of such unaccountable agency action on American businesses—and the everyday Americans who invest in them through their pensions, retirement funds, and other investment accounts—are immediate and grave. Further, they reflect the danger of consolidating immense power in agencies and unelected officials within the executive branch—dangers that the founders considered and sought to avoid. This Court should therefore overrule the *Chevron* doctrine to restore our constitutional framework and protect American businesses and investors from agency overreach.

ARGUMENT

I. *CHEVRON* TURNS THE CONSTITUTION'S SEPARATION OF POWERS ON ITS HEAD

"It is often acknowledged, 'if only half-heartedly honored,' that one of the motivating principles of our Constitution is the separation of powers." *Trump* v. *Mazars USA, LLP*, 140 S. Ct. 2019, 2045–46 (2020) (Thomas, J., dissenting) (quoting *Dep't of Transp.* v. *Ass'n of Am. R.Rs.*, 575 U.S. 43, 74 (2015) (Thomas, J., concurring in judgment)). Put simply, the legislature enacts laws, the executive branch enforces them, and the judicial branch interprets them. *See id.* But after *Chevron*, much of the power to legislate has been transferred from Congress to executive agencies. That's because under *Chevron*, courts will read

congressional silence as ambiguity that gives agencies *carte blanche* to enact rules that then have the force of law. *See Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *see also* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1500 (2009). The result is what Justice Scalia quipped was the creation of "a sort of junior-varsity Congress." *Mistretta* v. *United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

But this junior-varsity Congress is far more dangerous than its varsity counterpart, as agencies are even less constrained by processes requiring consensus and checks by the other branches of government. When Congress passes a law, it requires support from hundreds of congressional members representing populations across the country, and it is subject to a check by the executive branch via a presidential veto. *See* U.S. Const. art. I, § 7. But when an executive agency promulgates a rule, that rule is subject only to unilateral agency decision making and the possibility of Congress passing a resolution of disapproval under the Congressional Review Act (CRA) or new legislation overturning the agency action.

Critically, both a resolution under the CRA and new legislation are constitutionally required to comply with bicameralism and presentment. *See INS* v. *Chadha*, 462 U.S. 919 (1983). That means the

executive branch has power to defeat the legislature's check on agency rulemaking through the Presidential veto power.

Of course, as others have recognized, "a President is unlikely to sign into law a resolution disapproving a rule that his or her administration issued." Paul J. Larkin, *The Congressional Review Act and Judicial Review*, 39 Yale L. & Pol'y Rev. Inter Alia 1 (2021). Just this year, the President has already vetoed *five* CRA resolutions sent to his desk by Congress, each of which would have invalidated recent agency regulations. *See* S.J. Res. 11, 118th Cong. (2023); H.J. Res. 45, 118th Cong. (2023); H.J. Res. 30, 118th Cong. (2023); H.J. Res. 27, 118th Cong. (2023); H.J. Res. 39, 118th Cong. (2023). As a practical matter, this neutralizes Congress's ability to rein in rogue agency action unless it can muster two-thirds support in both the House of Representatives and the Senate to override a presidential veto. *See* U.S. Const. art. I, § 7.

The result is a *de facto* legislative power that the Framers would not recognize: Rather than having Congress make laws and the President have the power to sign or veto them, executive agencies today have the power to unilaterally promulgate rules to the same effect, subject only to a potential legislative "veto" that effectively requires a supermajority of Congress to deploy.

Worse still, because *Chevron* often requires judges to defer to agencies on interpretations of statutory silence, agency action is often able to thwart meaningful judicial checks as well. *See* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). Accordingly, so long as the junior-varsity Congress is acting "reasonab[ly]," courts will not

interfere in how agencies are interpreting their own grants of power. *Chevron*, 467 U.S. at 843–44; *see City of Arlington* v. *FCC*, 569 U.S. 290, 307 (2013). This deference thus acts to transfer judicial power to the executive agency, again undermining the constitutional separation-of-powers framework. *See* Charles J. Cooper, *The Flaws of* Chevron *Deference*, 21 Tex. Rev. L. & Pol. 307, 310–11 (2016) ("*Chevron* is an impermissible abdication of judicial duty."); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative State,* 10 N.Y.U. J.L. & Liberty 475, 497–507 (2016) ("[W]hat *Chevron* has accomplished is the wholesale transfer of legal interpretation from courts to agencies—in violation of … the most basic notion of judicial review that it is the province of the courts to say what the law is."). In the words of Justice Gorsuch, "[r]ather than say what the law is, [judges] tell those who come before [them] to go ask a bureaucrat." *Buffington* v. *McDonough*, 143 S. Ct. 14, 18–19 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

Chevron has therefore become the single most powerful tool that agencies can and do use to accrete power, while insulating themselves from the system of checks and balances the Constitution demands. This is not a hypothetical concern. As discussed in Part II below, the Department of Labor's recent rulemaking sheds light on how unaccountable bureaucratic agencies are regulating vast sectors of the American economy more boldly and ambitiously than ever before—as well as how difficult it is for the other branches of government to keep agency power in check.

II. THE DEPARTMENT OF LABOR'S RECENT RULEMAKING HIGHLIGHTS THE DANGERS OF *CHEVRON* DEFERENCE

The Department of Labor's recent ESG rulemaking is illustrative, revealing how agencies have used *Chevron* to regulate far beyond their congressional mandate and what little recourse the other branches of government—and the American people—have to fix the problem.

On his first day in office, President Biden instructed every federal agency to revisit their rules with an eye towards making them more ESG friendly. Through an executive order, President Biden mandated an "ambitious whole-of-government equity agenda" and instructed every federal agency to "assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color," among other things. Exec. Order 13985 of Jan. 20, 2021, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009, 7009 (2021). Another executive order then directed executive-branch agencies "to immediately commence work to confront the climate crisis" through rulemaking, including rules "to reduce greenhouse gas emissions" and "to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." Exec. Order 13990 of Jan. 20, 2021, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037, 7037 (2021). The same day, President Biden also signed an instrument of acceptance to rejoin the Paris Agreement. Statement on Acceptance of the Paris Agreement on

Climate Change on Behalf of the United States, 2021 Daily Comp. Pres. Doc. 49 (Jan. 20, 2021), https://www.govinfo.gov/content/pkg/DCPD-202100049/pdf/DCPD-202100049.pdf.

Additional ESG mandates to the executive agencies soon followed. *See, e.g.*, Exec. Order 14008 of Jan. 27, 2021, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (2021); Exec. Order 14030 of May 20, 2021, Climate-Related Financial Risk, 86 Fed. Reg. 27967 (2021); *see also, e.g.*, Exec. Order 14091 of Feb. 16, 2023, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 88 Fed. Reg. 10825 (2023). Through these orders, President Biden sought to use executive agencies to push through the Green New Deal and other social policies that had stalled in Congress, thereby circumventing the legislative process.

The Department of Labor was one of the first agencies to respond. Under the Employee Retirement Income Security Act of 1974 (ERISA), the Department has the power to regulate retirement plans, including individual retirement accounts, in private industry. *See* 29 U.S.C. §§ 1002, 1003. When President Biden took office, the Department had regulations in place providing that fund managers may not sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals, consistent with ERISA's requirement that pension fund money be managed "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." *Id.* § 1104(a)(1)(A). But in December 2022, the Department promulgated a new

regulation allowing (and even seeming to encourage) pension fund managers to consider ESG factors such as "climate change" and "collateral benefits other than investment returns" in broader circumstances. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022).

Congress acted immediately. A bipartisan majority of both the House of Representatives and the Senate invoked the CRA to invalidate the Department of Labor's regulation. *See* H.J. Res. 30, 118th Cong. In so doing, members of Congress expressed concerns about the rule, including that "[b]y paving the way for ESG investing in employer-sponsored retirement plans, President Biden is threatening the retirement savings of Americans," and that the change "flips ERISA on its head." 118 Cong. Rec. H933 (Feb. 28, 2023) (statement of Rep. Foxx). President Biden nonetheless vetoed the joint resolution. *See* Message to the House of Representatives–President's Veto of H.J. Res. 30, White House Briefing Room (Mar. 20, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/03/20/message-to-the-house-of-representatives-presidents-veto-of-h-j-res-30/. Unable to muster a super-majority of both houses to override the veto, Congress was left powerless to stop the executive branch from usurping legislative power and imposing legal standards with which a bipartisan majority of both houses of Congress disagreed.

But the constitutional absurdity doesn't end there. Other opponents of the new regulation—including 26 states—took their fight to the judicial branch, arguing that because ERISA requires pension plan fiduciaries

to consider only the pursuit of financial benefits for plan participants, the Department of Labor's regulation violated that statute and exceeded the agency's power. *See Utah* v. *Walsh*, No. 2:23-cv-00016-Z (N.D. Tex. 2023); *see also Braun* v. *Walsh*, No. 23-cv-234 (E.D. Wis. 2023).

The Department of Labor responded in relevant part by invoking *Chevron*. According to the Department, its "reasoned interpretation is entitled to deference" because "Congress has not 'directly spoken to the precise question at issue.'" *See* Opp'n to Mot. for Prelim. Inj. at 25, *Utah* v. *Walsh*, No. 2:23-cv-16 (N.D. Tex. Mar. 28, 2023).[2] In other words, it is the Department's position that it can impose virtually any pension-related regulation *unless* Congress has specifically forbidden it, subject only to a "reasonableness" check by the courts.

This is backwards. "[A]n agency literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986). Allowing agencies to rely on statutory silence to promulgate substantive regulations inverts this fundamental legal principle. And requiring courts to give deference to agency interpretations of law compounds the problem, undermining not only Congress's legislative authority

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[2] While the plaintiffs in *Utah* v. *Walsh* disagree that ERISA is silent or ambiguous on this issue, and while the district court has not yet ruled on the merits of the case, the fact that the Department of Labor is even making these arguments is a testament to how *Chevron* has emboldened executive agencies to issue regulations far beyond what Congress likely anticipated when creating them or could survive the legislative process today.

but also a judge's ability to "say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

It's true this Court has already placed some limitations on agency deference, such as rejecting a presumption that Congress intended to delegate major questions to agencies. *See West Virginia* v. *EPA*, 142 S. Ct. 2587 (2022); *see also Biden* v. *Nebraska,* 143 S. Ct. 2355, 2374 (2023) ("[I]magine instead asking the enacting Congress a more pertinent question: 'Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?' We can't believe the answer would be yes."). And the major questions doctrine may very well be sufficient to resolve the pending case challenging the Department of Labor's new regulation. But sometimes, it will not. The true effects of an agency rulemaking are often apparent only after the fact, meaning it will frequently prove difficult for courts to determine whether a proposed regulation falls under the major questions doctrine until the damage is well underway. And more fundamentally, the framers did not create a system of government where the power to enact, interpret, and enforce "minor" laws affecting only limited segments of the population or having lesser economic impact would be vested in a single, omnipotent executive branch, whereas "major" laws would be subject to the separation of powers. The major questions doctrine therefore does not provide a sufficient safeguard against agency usurpation of legislative and judicial power.

III. THE IMPLICATIONS OF *CHEVRON* ARE DANGEROUS AND FAR-REACHING

While the Department of Labor's regulations are among the most expansive in using *Chevron* as a shield while trying to impose ESG objectives on American investors and businesses, they are not alone. The Securities and Exchange Commission, for example, has proposed rules that would require public companies to issue reports on their greenhouse-gas emissions, turning the SEC into a not-so-mini EPA. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022); *see also* Hester M. Peirce, *We Are Not the Securities and Environment Commission—At Least Not Yet* (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321. It has also proposed other rules that would push asset managers to impose more ESG requirements on American businesses. *See* Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (June 17, 2022); Investment Company Names, 87 Fed. Reg. 36594 (June 17, 2022). The Department of Labor and SEC rules, if enacted and allowed to stand, would radically transform the American economy, funneling private capital to businesses aligned with the Biden Administration's policy goals.

The Court's decision in this case will therefore have consequences that reach far beyond the fishing industry, including to the financial industry and the American economy as a whole. Strive therefore respectfully requests that the Court take the current opportunity to overrule the *Chevron* doctrine.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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