No. 22-451

IN THE

Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, INC., ET AL.,

Petitioners,

v.

GINA RAIMONDO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONERS

Devin Watkins
Counsel of Record
Dan Greenberg
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, D.C. 20005
(202) 331-1010
devin.watkins@cei.org

July 24, 2023

Attorneys for Amicus Curiae

QUESTION PRESENTED

Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Statutes

Rules

INTEREST OF *AMICI CURIAE*[1]

The Competitive Enterprise Institute ("CEI") is a nonprofit 501(c)(3) organization incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation.

This case concerns *amicus* because *Chevron* rejects originalism, puts a thumb on the scale of justice, and unsettles the law in favor of the government. Additionally, agencies' use of *Chevron* to bypass Congress's power of the purse emphasizes the constitutional problems of *Chevron*. It threatens constitutionally limited government by merging legislative and executive powers. *Amicus* agrees with James Madison that allowing such a mechanism would "justly be pronounced the very definition of tyranny." Federalist No. 47.

SUMMARY OF ARGUMENT

Chevron did not come from Congress. In fact, it is directly contrary to Congress's express statutory command that courts "shall decide *all* relevant questions of law, interpret constitutional and statutory provisions." 5 U.S.C. § 706 (emphasis added).

Chevron encourages agencies—not neutral and impartial judges—to interpret the law, and sometimes those agencies are afflicted with institutional self-

---

[1] Rule 37 Statement: No party's counsel authored any part of this brief; no person other than *amici*, their members, or their counsel funded its preparation or submission.

interest. A judge with a similar pecuniary interest would not be allowed to issue a binding interpretation of law. The notion that a party can neutrally and impartially serve as a judge in its own case is inherently implausible.

Chevron encourages instability in the law. *Chevron* allows changes every few years without the involvement of Congress and thereby increases uncertainty in the path of the law. This encourages agencies to generate rules of minimal clarity that judicial decisions will struggle to illuminate. This maximizes deference to agencies and minimizes legal certainty.

Chevron undermines the separation of powers by allowing the executive to seize powers that Congress never authorized. This case presents a perfect example: here, the executive branch seized the power of the purse. The government claims that when it encounters statutory silence, it can force businesses to fund private law enforcement officers. If *Chevron* gives the executive such unconstitutional powers based on statutory silence, it should end.

Chevron should be overturned. All citizens are entitled to a neutral system of justice—in which courts are free of institutional biases and the best comes out on top. That system's interpretations should control unless and until Congress acts.

ARGUMENT

I. *CHEVRON* IS NOT ORIGINALIST

Our Constitutional structure is founded on the principle expressed by John Dickinson at the Constitutional Convention that "the Judges must

interpret the Laws[;] they ought not to be legislator." 1 The Records of the Federal Convention of 1787, 109 (Max Farrand ed., 1911). However, the doctrine in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) was created entirely by judicial actions that appear more legislative than interpretive.

Chevron is vulnerable to multiple originalist criticisms: not only is it a judicially created doctrine, but it is also directly contrary to Congress's express statutory command. Specifically, the Administrative Procedures Act requires 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 (emphasis added). The word "all" logically implies that courts are to interpret statutes even after agencies have provided their interpretation.

In issuing this statute, the Senate Committee on the Judiciary explained that the statute "provides that questions of law are for courts rather than agencies to decide in the last analysis." S. Rep. No. 752, 79th Cong., 1st Sess. 28 (1945), *reprinted in* Administrative Procedure Act: Legislative History 185, 214 (1946), https://www.justice.gov/sites/default/files/jmd/legacy/2014/03/20/senaterept-752-1945.pdf. That same committee later explained "that 'interpretative' rules—as merely interpretations of statutory provisions—are subject to *plenary judicial review*, whereas 'substantive' rules involve a maximum of administrative discretion." S. Comm. on the Judiciary, 79th Cong. (Comm. Print 1945), *reprinted in* Administrative Procedure Act: Legislative History, S. Doc. 248, at 18 (1944 – 1946),

https://coast.noaa.gov/data/Documents/OceanLawSearch/Senate%20Document%20No.%2079-248.pdf. Such plenary judicial review, as envisioned by Congress, rejects any deference given to the agency's views of the meaning of statutes.

It is the courts, and only the courts, that the Constitution has designated to interpret statutes. Agency expertise and rulemaking are important, but only as they relate to factual questions; such factual questions are not within a court's expertise. Agencies may determine, for instance, how many animals of a species exist, but a judge must determine the legal implications of those facts regardless of the agency's views.

The agency must do its best to interpret the statute before any case is brought before a court. In doing so, the agency can issue interpretive rules that inform the public what the agency believes the law to be. We can hope that the agency and the public will agree on what the statute means, thus eliminating any need for court involvement. But where there is a dispute between an agency and a citizen, courts must resolve that dispute impartially without privileging either.

II. *CHEVRON* UNCONSTITUTIONALLY PUTS A THUMB ON THE SCALE OF JUSTICE IN FAVOR OF ONE PARTY

The foundation of our Anglo-American justice system is the "first principle: '[N]o man shall be a judge in his own cause.'" *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (Kennedy, J., concurring) (citing Sir Edward Coke in *Bonham's Case*, 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (1610)). However, *Chevron* violates that foundational principle.

In a dispute between an agency and a citizen over an ambiguous statutory provision, *Chevron* requires that agency interpretations be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. It prohibits a court from "substitut[ing] its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*

There is necessarily more than one reasonable interpretation of any ambiguous provision; that is what makes it ambiguous. The Due Process Clause, U.S. Const. amend. V, requires an impartial and disinterested court to make such a decision if that decision is to be fair to all parties. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

Under our Constitution, Article III judges are the impartial and disinterested third party that makes such determinations. "For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 W. Blackstone, Commentaries on the Laws of England, 361 (1768).

Agency personnel are not typically neutral or unbiased. The executive is elected to execute the law in a given way. In other words, executives are chosen expressly because of their departures from political neutrality. This encourages the government to act in accordance with the will of the people. But when the President favors the perspective of the voters who chose him (or her), it should come as no surprise.

Furthermore, the agency is often a party to the case, actively arguing in favor of its interpretation of the statute before the judge. Such behavior, *inter alia*, demonstrates a bias in favor of its own interpretation rather than that of the citizen: this is yet another reason why courts should not give deference to the agency. Any such deference impairs the court's own impartiality.

The executive is also biased in favor of its own power. The law often reflects a delicate balance between the powers of the United States that Congress chooses to exercise and those that are "reserved to the States respectively, or to the people." *See* U.S. Const. amend. X. When a court is presented with a statute that is ambiguous as to whether Congress has chosen to exercise a given power, the court must typically decide whether the executive was assigned that power or whether it was left to the states. But when courts defer to executive rulemaking, it is the executive that must determine the locus of that power. In that circumstance, the decision may be tainted by institutional self-interest.

A judge must recuse from interpreting a statute if he or she has even a dollar at stake in the litigation. An agency has no such constraint—even if an action before it might jeopardize millions or billions of dollars of its own budget. Whether an agency has an institutional bias or even a pecuniary bias in such a case, *Chevron* allows that agency to provide a binding interpretation of the law. In contrast, a judge with a pecuniary interest in the action would be barred from any involvement in it.

To ensure a fair and unbiased interpretation of the law, agency deference should be rolled back and *Chevron* should be overturned.

III. *CHEVRON* UNSETTLES THE RULE OF LAW BY REDUCING STABILITY IN THE LAW

When a court interprets a statute, *stare decisi*s ensures that such interpretations are not changed easily. "*Stare decisis* . . . serves many valuable ends." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2261–62 (2022). "It protects the interests of those who have taken action in reliance on a past decision." *Id.* at 2262. "It reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Id.* "It fosters 'evenhanded' decisionmaking by requiring that like cases be decided in a like manner." *Id.* "It contributes to the actual and perceived integrity of the judicial process." *Id.* "And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past." *Id.*

Chevron, when it applies, eliminates all the benefits of *stare decisis*. Instead, it allows, and sometimes encourages, instability in the law.

With *Chevron*, the meaning of statutes can change dramatically every four to eight years, when a new president is elected. This change occurs even when such agency interpretation contradicts existing court interpretation. *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). The author of *Brand X*, Justice Thomas, later recognized the problems such deference caused:

> Regrettably, *Brand X* has taken this Court to the precipice of administrative absolutism. Under its rule of deference, agencies are free to invent new (purported) interpretations of statutes and then require courts to reject their own prior interpretations. *Brand X* may well follow from *Chevron*, but in so doing, it poignantly lays bare the flaws of our entire executive-deference jurisprudence.

Baldwin, et ux. v. United States, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting from denial of certiorari).

Consider, for instance, the decades of conflicting regulations over what the "waters of the United States" means in the Clean Water Act. It started with the Federal Water Pollution Control Act Amendments of 1972, which used the term "navigable waters" and defined it in this way: "The term 'navigable waters' means the waters of the United States, including the territorial seas." P.L. 92-500 § 502(7), 86 Stat. 816, 886 (codified in 33 U.S.C. § 1362(7)). The following is the result of *Chevron*:

- EPA defined "navigable waters" in May 1973. 38 Fed. Reg. 13528, 13,529 (1973) (codified at 40 C.F.R. § 125.1(p) (1974)).
- The Army Corps of Engineers defined the same statutory term in an entirely different way. 39 Fed. Reg. 12,115, 12,119 (April 3, 1974) (codified in 33 C.F.R. § 209.120(d)(1) (1974)).
- The D.C. District Court ruled that the Corps definition was too narrow, but didn't specify what the actual meaning of the statutory term

was. *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

- The Corps expanded its rule. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977) (codified 33 C.F.R. §323.2(a) (1978)).
- In 1977, EPA and the Corps disagreed substantially over the proper statutory definition of "navigable waters" and which agency could define the term.
- EPA issued regulations redefining "navigable waters" and when a permit was required. Final Rule, Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,424 (May 19, 1980) (codified in 40 C.F.R. § 122.3 (1981)).
- The Corps adopted EPA's definition in 1986, marking the first time the two agencies agreed. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed Reg. 41,206, 41,250 (1986) (codified in 33 CFR § 323.3 (1987)).
- In 1986, EPA and the Corps expanded the scope of the interpretation to include all waters that were or may have been used by migratory birds. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986); Final Rule: Clean Water Act Section 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20,764, 20,765 (June 6, 1988). The Corps also issued the first wetlands delineation manual in 1987.
- In 1989, the EPA and Corps issued a revised federal wetlands delineation manual which,

without a rulemaking, expanded the scope of covered lands.

- In 2000, the Corps issued guidance in response to the court holding in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) that actual rather than potential connection to interstate or foreign commerce was required. The Corps limited the application of this doctrine to the Fourth Circuit; it also expanded the definition of "navigable waters" to include intermittent and ephemeral streams of water.
- In 2001, this Court rejected the Corps definition in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 162 (2001), as applied to isolated water that had become a habitat for migratory birds.
- In 2003, EPA and the Corps started to redefine the term yet again. Advanced Notice of Proposed Rulemaking on the Clean Water Regulatory Definitions of "Waters of the United States," 68 Fed. Reg. 1,991, 1,996 (January 15, 2003).
- Before they could finish, this Court heard the case of *Rapanos v. United States*, 547 U.S. 715 (2006). While many justices agreed the Corps definition was flawed, no majority of this Court agreed as to the proper interpretation. Justice Scalia, joined by four justices, proposed one interpretation, and Justice Kennedy proposed another.
- EPA and the Corps adopted the interpretation that if either test proposed was met then they would assert jurisdiction. Mem. from Envtl.

Prot. Agency & Dep't of the Army on *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (June 5, 2007), https://www.epa.gov/sites/production/files/2016-04/documents/rapanosguidance6507.pdf.

- In 2015, EPA and the Corps issued yet another definition. Final Rule, Clean Water Rule, Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,057 (June 29, 2015).
- Just earlier this year, in 2023, EPA and the Corps revised the rule again in Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (January 18, 2023).
- Within months, this Court invalidated critical aspects of that rule in *Sackett v. EPA*, 143 S. Ct. 1322 (2023), and adopted an interpretation similar to Justice Scalia's in *Rapanos*.

These events were not an unusual "one-off," but a direct result of *Chevron*. Similar regulatory uncertainty is likely to recur in other high-profile regulatory contexts. Each time a President was elected from a new party during this era, they attempted to remake the last administration's definition of the "waters of the United States." The same dynamics will recur with any high-profile regulation, causing the law to swing wildly back and forth every four or eight years.

This Court has described the regulations issued by EPA and the Corps as a "system of 'vague' rules that depended on 'locally developed practices.'" *Sackett*, 143 S. Ct. at 1333. This *Chevron* interpretation "gives rise

to serious vagueness concerns in light of the CWA's criminal penalties." *Id.* at 1342. There is nothing accidental about that; *Chevron* directly caused it.

EPA and the Corps knew that lowers courts would be "[d]eferring to the agencies' localized decisions," due to *Chevron*, so they drafted vague rules to ensure that expansions happened on a case-by-case basis so that "lower courts blessed an array of expansive interpretations of the CWA's reach." *See Id.* at 1333. Expanding agency authority was the goal; vague regulations expanded on a case-by-case basis were the means, all enabled by *Chevron* deference. This vagueness is far from unprecedented, and it will continue to occur as long as *Chevron* exists.

Don't expect this Court's decision in *Sackett* to end the matter. EPA and the Corps are drafting revised regulations right now to expand their authority, despite the Court's ruling in *Sackett*. No court decision is safe as long as *Chevron* exists; there is always some ambiguity that the agency will try to exploit under *Chevron* to expand its power. Usually, this occurs on a case-by-case basis, in which the Supreme Court does not have time to monitor such minutiae. Nonetheless, each such case slowly establishes greater agency power.

Chevron regularly injects uncertainty into our legal system. *Chevron* prevents people from planning their lives and knowing what the law will allow or require beyond the next presidential election. *Chevron* discourages and unsettles planning and investment, essentially because it makes such activities less attractive and less worthwhile.

As this Court noted in *Sackett*, "once in court, the landowner would face an uphill battle under the deferential standards of review that the agencies enjoy." *Id.* at 1336. The battlefield should be levelled, because the landowner, along with all other citizens, is entitled to a neutral system of justice—in which courts give neither side's proposed interpretation of the law greater weight and the best interpretation comes out on top. Such correct interpretations should then control until Congress decides to change the statute, ensuring that everyone can know what the law is and what it will be until Congress changes it.

IV. IN THIS CASE, *CHEVRON* ALLOWED THE EXECUTIVE TO IMPROPERLY SEIZE THE POWER OF THE PURSE.

In this case, Congress exercised its authority under the Property Clause to write rules and regulations governing the coastal seas owned by the Federal Government. This allowed agencies in the Department of Commerce to create fishery management plans which are "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. § 1853(a)(1)(A).

The statutory phrase "necessary and appropriate" has a parallel function to the constitutional phrase "necessary and proper" that governs congressional authority to assign incidental powers to executive officials. But such assignment can only "carry into execution" the power Congress exercised—in this case, the power arising from the Property Clause.

Nonetheless, the agency did not confine itself to the exercise of incidental powers that had been assigned

to it. On the contrary, the agency developed a fishery management plan that required private fishermen to pay for agency-mandated monitors. Creation of this plan through rule was an attempt by the agency to exercise the great (and non-incidental) power of Congress to lay duties. U.S. Const. Art. I, § 8, clause 1.

The court below held that statutory "text makes clear the Service may direct vessels to carry at-sea monitors but leaves unanswered whether the Service must pay for those monitors or may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan." Pet. App. 6. In other words, the D.C. Circuit asked who was to pay the bill and found that the question was "unanswered." The statute lacks any text that would give the agency authority to extract such duties from the fishermen; furthermore, Congress lacks the authority to hand over this great power to the agency. *See Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 357 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). Nonetheless, due to *Chevron*, the lower court interpreted the agency's authority as including both the incidental power to write rules so as to execute Congress's exercise of the Property Clause and to allow the agency to exercise a separate great (and, again, non-incidental) power: the power of the purse.

Not only does the statute not give the agency authority to extract such duties from the fishermen, but Congress also cannot assign this great power to the agency. Congress must decide that duties should be imposed and for what purpose; only then can the details be assigned to the agency. Under our constitutional system, which justly prizes self-

government and public accountability, it is impossible for Congress to assign the authority to impose duties without bearing the responsibility for doing so. Agencies cannot have the authority of raising taxes or spending money without Congress's direction. In short, because Congress did not exercise its great power of laying duties for monitors, the agency did not have the power to do so on its own.

In short, *Chevron* has brought us closer to a world in which "the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." *See* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213–14 (1833). Any private individual could be faced with financial obligations created through executive action in the absence of any congressional policy decisions.

The Constitution requires that the "House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government." Federalist No. 58. The court below said *Chevron* requires otherwise. Many agencies have been assigned rulemaking authority that contain no express limits that might prohibit financial extraction from the public. The implication of the lower court's decision—that any of those agencies can require private individuals to provide "supplies requisite for the support of government" policies without any consideration by Congress—is, quite literally, radical.

The agency's rule also avoided the political accountability that, under our system, is attached to the congressional appropriation of agency funds. If Congress had appropriated money for the agency to hire fishing monitors, a future Congress would have

the option of defunding the program. But by forcing others to fund these monitors directly, the agency sidesteps the congressional accountability that our system of self-government requires.

Consider this example: for decades, the Securities and Exchange Commission ("SEC") has asked Congress to give it the ability to "self-fund" through fees on regulated entities. Commissioner Luis A. Aguilar, *Creating Reform That Is Sustainable for Investors*, 10 J. Int'l Bus. & L. 115, 121 (2011); Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 Nova L. Rev. 233, 259 (2004). But it appears that the SEC has instead decided that it has the independent authority to raise such revenues: apparently, the Commission's leadership has concluded that congressional silence and its preexisting rulemaking authority are all that is needed to engineer a new funding stream. The SEC is now planning to require private companies to pay outside entities it selects to ensure compliance with its mandates. Notice of Proposed Rulemaking, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 FR 21334, 21399 (April 11, 2022) (requiring "assurance of GHG emissions disclosure by independent service providers should also improve the reliability of such disclosure.").

Courts have seen that deferring to agency actions implies significant risk, in that it allows an end run around the constitutional requirements imposed by the congressional power of the purse. *Bell Atl. Tel. Companies v. F.C.C.*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("*Chevron* deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use

statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen."). Yet, here, the lower court deferred to the agency's assumption of the awesome taxing power. *Cf. Nicol v. Ames*, 173 U.S. 509, 515 (1899) ("The power to tax is the one *great power* upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.") (emphasis added).

Chevron should be overturned to protect the Constitution's enduring balance of powers. *See also* Joe Biden, S. Rep. No. 104-5, at 27 (1995) ("The founders also intended the power of the purse to be one of the legislative branch's strongest bulwarks against incursions by the executive, and the key to maintaining an enduring balance of powers.").

CONCLUSION

For the foregoing reasons, this Court should overturn *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984).

Respectfully submitted,

Devin Watkins
Counsel of Record
Dan Greenberg
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, D.C. 20005
(202) 331-1010
devin.watkins@cei.org
Attorneys for Amicus Curiae

July 24, 2023