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

BRIEF OF PROFESSOR ADITYA BAMZAI AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

ADITYA BAMZAI
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
(434) 243-0698
abamzai@law.virginia.edu

Counsel 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.

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INTEREST OF *AMICUS CURIAE*[*]

Aditya Bamzai is a professor at the University of Virginia School of Law. He teaches and writes about civil procedure, federal courts, and administrative law, and he has an interest in the sound development of these fields.

SUMMARY OF ARGUMENT

This Court should establish a principled, consistent, and fair set of criteria to govern when federal courts place weight on administrative agencies' legal and policy determinations. That question is one that courts have confronted—and that they will continue to confront—in literally thousands upon thousands of cases. In recent years, this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has been the relevant touchstone for courts conducting such an analysis. Petitioners ask this Court to overrule *Chevron*.

But whether the Court retains the label "*Chevron* deference" is not particularly significant. What ultimately matters is the substance of the analytical

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[*] No party or party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. The University of Virginia School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

framework that courts employ, whether that framework is called "*Chevron*" or referred to by some other name. *Amicus* respectfully submits that, with as much clarity as possible, this Court should establish a sound framework for those lower court decisions.

To begin, the *Chevron* opinion itself contains a tension between two of its footnotes—with one requiring courts to employ all the "traditional tools of statutory construction," *id.* at 843 n.9, and the other cautioning that a court "need not conclude that the agency construction was . . . even the reading the court would have reached if the question initially had arisen in a judicial proceeding," *id.* at 843 n.11. This tension has prompted different approaches to the application of *Chevron*. The Court could go a long way to clarifying the area by engaging with this tension—and resolving it in favor of the "footnote 9 approach."

For some, the internal logic of caselaw suffices to establish the merits of the "footnote 9 approach." But in arguing for *Chevron*'s overruling, petitioners have also invoked the Constitution and the Administrative Procedure Act ("APA"), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). *Amicus* believes that the Constitution does not establish the scope of review under all circumstances and, therefore, the Court should be wary before it invokes any constitutional principles to resolve this case. But the APA's scope-of-review provision *is* relevant. It indicates that the standard of review for legal questions is de novo in the sense that a reviewing court should give statutory text the "best" reading possible, assuming one exists, using the traditional tools of construction.

ARGUMENT

I. The Court should clarify that statutory text is subject to traditional rules of interpretation and policy issues are subject to arbitrary-and-capricious review.

A. There is a tension between footnotes 9 and 11 of *Chevron*.

Over the years—both before and after the *Chevron* decision—the standard of review for legal questions has varied. In this sense, it is hard to point to a single "*Chevron* doctrine," rather than shifting approaches to parceling out deference changing over time. Equally important, *Chevron* contained two critical footnotes—footnotes 9 and 11—that are in tension with one another.

1. In the decades before *Chevron*, courts addressed the topic of judicial deference to agency interpretation in a variety of ways. As late as 1969, Justice Black, writing in dissent, claimed that an agency's interpretation of a statute "is in no way binding on us." *INS v. Stanisic*, 395 U.S. 62, 83 (1969) (Black, J., dissenting) (addressing an "ambiguity in [a] regulation" that was "precisely the same as the ambiguity in the statutory provision from which the wording of the regulation was drawn" and contending that "the way in which the [agency] has applied the regulation has been determined by its interpretation of the statute, an interpretation that is in no way binding on us").

In 1976, eight years before this Court decided *Chevron*, Judge Henry Friendly addressed "the ever troubling question" whether the interpretation of a

statute "is the kind of question which justifies or requires judicial deference." *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976). Judge Friendly recognized that, as of 1976, "there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand." *Id.* He then listed "[l]eading cases supporting the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis." *Id.* He contrasted these cases with "an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term." *Id.* (citing *Office Employees International Union, Local No. 11 v. NLRB*, 353 U.S. 313, 318–20 (1957), and *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 156 (1944); *see id.* (noting that *Morton v. Ruiz*, 415 U.S. 199, 237 (1974), observed that deference was warranted where the agency interpretation is "'consistent with the congressional purpose,'" and contending that "this very nearly eliminates the 'deference' principle as regards statutory construction altogether since if the agency's determination is found by a court to be consistent with the congressional purpose, it presumably would be affirmed on that ground without any need for deference").

As Judge Friendly's opinion indicates, the immediate pre-*Chevron* caselaw was not entirely consistent on the question of judicial deference. Courts sometimes deferred to agency legal determinations and sometimes did not. When courts deferred, they identified several factors for doing so.

For example, an article by Professor Diver remarked that "whether to grant deference [to an agency's legal interpretation] depends on various attributes of the agency's legal authority and functions and of the administrative interpretation at issue." Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549, 562 (1985). The article identified ten factors as relevant to this inquiry: contemporaneousness, long-standing duration, consistency, reliance, importance of the issue, complexity, presence of rulemaking authority, the need for agency action to implement the statute, congressional ratification, and the quality of agency explanation. *See id.* at 562 n.95; *see also Pittston Stevedoring*, 544 F.2d at 49–50 (denying deference based on such factors).

2. In *Chevron*, the Court appeared to introduce a simplified two-step process for deferring to an agency construction of a statute it administers. *Chevron* said that the first step was "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. "If the intent of Congress is clear," the court must give that intent effect. *Id.* A court should ascertain that congressional intent "employing traditional tools of statutory construction." *Id.* at 843 n.9. But Congress could "explicitly [leave] a gap for the agency to fill" through "an express delegation of authority," or it could do so "implicit[ly]." *Id.* at 843–44. If "Congress has not directly addressed the precise question at issue," *Chevron* instructed that "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Id.* at 843 (footnote omitted). Rather, the second step of *Chevron* asked "whether the agency's answer is based on a

permissible construction of the statute." *Id.* In this fashion, *Chevron* indicated that "[t]he court need not conclude that the agency construction was . . . even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11.

On the face of the *Chevron* opinion, there was a tension between the approach suggested in footnote 9 and the one suggested in footnote 11. In footnote 9, *Chevron* indicated that a court would approach interpretation "employing traditional tools of statutory construction." But in footnote 11, the Court suggested that a reviewing court might abandon "the reading the court would have reached if the question initially had arisen in a judicial proceeding" in the face of an agency construction.

Although parts of *Chevron* suggest an attempt to establish a simplified two-step process to deference, it is not clear that the *Chevron* Court itself intended to change the underlying multifactor approach. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 Admin. L. Rev. 253, 275–76 (2014). Indeed, a few years later, in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Court appeared to step back from a broad reading of *Chevron*, describing the issue before it as "a pure question of statutory construction for the courts to decide." *Id.* at 446–48.

3. A decade and a half later, in *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court qualified *Chevron* by holding that the measure of deference that a court gives to an agency interpretation depends in part on the formality of the agency's procedures. *See id.* at 230–31. In doing so, the Court reasoned that

"[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Id.* at 228 (footnotes omitted). *Mead* explained that this approach "has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other." *Id.* (citations omitted). Describing this Court's precedents, *Mead* contended that the Court had "tailor[ed] deference to variety," with a recognition of "more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference." *Id.* at 236–37. *Mead*'s approach thus eschewed the simplicity of a two-step process. *See, e.g.*, *id.* at 239 (Scalia, J., dissenting) (characterizing *Mead* as "an avulsive change" and claiming that "[w]hat was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority . . .").

Thus, leaving to one side its precise holding, *Mead* shows how the "*Chevron* doctrine" ebbed and flowed in the two decades following the Court's decision. Rather than one consistent approach, the Court adopted several different perspectives on parceling out deference to agency legal interpretation.

B. The Court should embrace the "footnote 9" approach.

The tension identified above between footnote 9 and footnote 11 of the *Chevron* opinion has caused

confusion. Some of this Court's opinions have suggested that *Chevron* requires a court to abandon a "best interpretation" of a statute (even where one exists) for a "permissible" alternative. Some lower courts have embraced this perspective, though others have not. The Court can go a long way to clarifying the appropriate approach to agency interpretations by clarifying this particular question.

1. In *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), this Court reasoned that, "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* at 980 (citing *Chevron*, 467 U.S. at 843–44, 843 n.11); *see id.* at 1016–17 (Scalia, J., dissenting) (agreeing that the logical consequence of the Court's *Brand X* opinion was that an agency could reject the best interpretation of a statute); *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Souter, J., concurring) (similar); *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (noting that a judge might under *Chevron* "uphold the agency's interpretation even though it is not the best interpretation").

Brand X arose out of a dispute over the meaning of a statute that subjects providers of "telecommunications service[s]" to mandatory common-carrier regulation. 47 U.S.C. § 153(44) (2000) (current version at 47 U.S.C. § 153(51)); *see generally* Communications Act of 1934, 47 U.S.C.

§§ 151–664. In the order under review, the Federal Communications Commission concluded that cable companies selling broadband Internet service do not provide "telecommunications service[s]" and, hence, were exempt from mandatory common-carrier regulation under the Communications Act. *See Brand X*, 545 U.S. at 979. In rejecting the Commission's interpretation, the court of appeals relied on one of its precedents holding that cable modem service was a "telecommunications service" and, in doing so, the court of appeals did not analyze the permissibility of the Commission's construction under *Chevron*'s deferential framework. *See id.* at 979–80 (summarizing proceedings before the Ninth Circuit).

This Court concluded that the court of appeals had mistakenly determined that its own precedent's construction "overrode the Commission's." *Id.* at 982. According to *Brand X*, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only of the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* That is because, according to the Court, the court of appeals' "prior decision . . . held only that the *best* reading of [the relevant statute] was that cable modem service was a 'telecommunications service,' not that it was the *only permissible* reading of the statute." *Id.* at 984; *cf. id.* at 985–86 (addressing Supreme Court precedents); *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012).

Brand X thus contemplates that an agency's permissible construction can displace the best construction of a statute under some circumstances.

In the views of the *Brand X* Court, "[t]his principle follows from *Chevron* itself." 545 U.S. at 982. As *Brand X* explained: "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Id.* at 983. To the contrary, "the agency may, consistent with the court's holding, choose a different construction [from the court], since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Id.*

2. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court addressed the question of the meaning of ambiguity in the closely related context of an agency's interpretation of its own regulations. The Court explained that "the possibility of deference can arise only if a regulation is genuinely ambiguous . . . even after a court has resorted to all the standard tools of interpretation." *Id.* at 2414; *see also id.* at 2415 (citing, for this proposition, *Christensen*, 529 U.S. at 588, and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Court was not asked to directly confront the meaning of ambiguity in *Kisor*, and the majority opinion did not further define exactly what it meant by "genuine ambiguity."

Some parts of the *Kisor* opinion read as though a reviewing court must adopt the best interpretation available to it after applying the tools of construction. For example, the Court explained that "[i]f uncertainty does not exist, there is no plausible reason for deference," because "[t]he regulation then just means what it means—and the court must give it effect, as the court would any law." *Id.* at 2415. Or as the Court put it: "[S]ometimes the law runs out, and policy-laden choice is what is left over. But if the law

gives an answer . . . then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Id.* (citation omitted). And the Court instructed that, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction," likening this approach to ambiguity in the regulatory context to the approach it has taken in the statutory context. *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9). Finally, the Court explained that "only when th[e] legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'" *Id.* (alteration in original) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1990)). These statements suggest that genuine ambiguity may be found only where there is no single, best interpretation of a text.

Other parts of *Kisor*, arguably, could be read to suggest that, like *Brand X*, the Court was instructing lower courts to abandon the "best" interpretation, given ordinary tools of statutory construction, for an agency's different, albeit reasonable, interpretation. For example, *Kisor* said that "deference gives an agency significant leeway to say what its own rules mean." *Id.* at 2418. Moreover, a plurality in *Kisor* contended that deference applies when "after performing [a] thoroughgoing review, the regulation remains genuinely susceptible to multiple reasonable meanings and the agency's interpretation lines up with one of them." *Id.* at 2419 (plurality). And the *Kisor* plurality spoke of a "zone of ambiguity" in which an "agency's reading" may "fall[]," *id.* at 2420, perhaps suggesting that a court can abandon the best interpretation for a permissible one.

In a nutshell, *Kisor* did not change the approach to ambiguity embraced by *Brand X*. Rather, *Kisor* left in place the ambiguity over the place of ambiguity in the *Chevron* framework.

3. Several lower courts have embraced and reiterated *Brand X*'s understanding of ambiguity under *Chevron*. Consider the following examples from the Fifth, Ninth, and D.C. Circuits—three courts of appeals that adjudicate a significant portion of the Nation's administrative law docket.

In *Acosta v. Hensel Phelps Construction Company*, 909 F.3d 723 (5th Cir. 2018), the Fifth Circuit reasoned that "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* at 730 (quoting *Elgin Nursing & Rehab. Ctr. v. HHS*, 718 F.3d 488, 492 n.3 (5th Cir. 2013)). In *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013), the Ninth Circuit reasoned that "[i]f the [agency's] construction is reasonable, we must accept that construction under *Chevron*, even if we believe the agency's reading is not the best statutory interpretation." *Id.* at 1087. And in *American Council on Education v. FCC*, 451 F.3d 226 (D.C. Cir. 2006), the D.C. Circuit reasoned that it could not "set aside the Commission's reasonable interpretation of the Act in favor of an alternatively plausible (or an even better) one." *Id.* at 234; *see also Citizens Coal Council v. Norton*, 330 F.3d 478, 482 (D.C. Cir. 2003) ("Even assuming the correctness of [an alternative interpretation], the ambiguity of the statute in combination with the *Chevron* doctrine eclipses the ability of the courts to substitute their preferred

interpretation for an agency's reasonable interpretation.").

There is no reason to fault the judges on these various courts for their approach to *Chevron*. After all, they were relying on statements by this Court on the kind of ambiguity that might trigger deference—either statements in *Brand X* or in cases that preceded it. Moreover, in a sense, they were relying on the underlying logic of *Chevron*'s footnote 11, which suggests that there exists some category of cases where an agency's permissible interpretation prevails over the court's best interpretation.

At the same time, it appears that other judges do *not* treat ambiguity under *Chevron* in this fashion. For example, Judge Kethledge has remarked that he has "personally . . . never had occasion to reach *Chevron*'s step two in any of [his] cases[.]" Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017); *cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 Duke L.J. 511, 521 (discussing the relationship between statutory interpretation and the triggering requirements for *Chevron* deference). That remark suggests a robust perspective on how to "employ[] traditional tools of statutory construction" that leaves little room for permissible alternatives. *Chevron*, 467 U.S. at 843 n.9.

4. The Court should embrace the "footnote 9" approach. If the Court were to do so, it would effectively adopt the conception of ambiguity that requires courts to follow the best interpretation of a statute in the face of an alternative permissible

interpretation embraced by an agency. As Justice Kavanaugh explained in *Kisor*, "[i]f a reviewing court employs all of the traditional tools of construction"—as *Chevron*'s footnote 9 directs—then "the court will almost always reach a conclusion about the best interpretation of the [legal text] at issue." 139 S. Ct. at 2448 (Kavanaugh, J., concurring in the judgment) (citing *Chevron*, 467 U.S. at 843 n.9). At that point, a court "will have no need to adopt or defer to an agency's contrary interpretation." *Id.*

At the same time, "some cases involve [legal text] that employ broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.'" *Id.* In general, absent contrary indications in the organic statute, "[t]hose kinds of terms afford agencies broad policy discretion," *id.*, subject to the APA's arbitrary-and-capricious standard, *see* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Under these circumstances, it would make sense to say that a legal text does not speak to an issue, which would imply that any questions left unresolved by the text were questions of policy, not legal interpretation.

Put slightly differently, the cases where the two approaches to *Chevron*—what we might describe as the "footnote 9 approach" and the "*Brand X* approach"—differ are those where a statutory provision is amenable to a "best" interpretation using all the ordinary tools of statutory construction, but there nevertheless exist "permissible" alternative interpretations. Under Justice Kavanaugh's concurrence in *Kisor* (the "footnote 9 approach"), such a statute would be given its "best" interpretation. (And if there were no "best" interpretation, the agency

decision would be subject to arbitrary-and-capricious review under *State Farm*.) Under the *Brand X* approach, the agency's "permissible" alternative interpretation would govern. The Court should clarify this topic by embracing the "footnote 9 approach"—which would require a form of de novo review for legal questions and arbitrary-and-capricious review for policy questions.

II. The APA, but not the Constitution, requires a form of de novo review.

For some, the understanding of *Chevron* stressing the "tools of statutory construction" is manifestly correct and suffices to establish the scope of review going forward. Others, however, might seek to base that understanding in either the Constitution or the APA. The issues are complex, but *amicus* respectfully submits that the Constitution does not compel de novo review in all cases. Rather, the Constitution gives Congress latitude in many cases to establish a different standard of review. By contrast (and again, understanding the issues are complex), the APA is best understood to direct reviewing courts to give statutes, where possible, the "best" available construction—much like footnote 9.

A. The Constitution does not bar judicial deference to executive statutory interpretation in all circumstances.

Some have argued that various provisions of the Constitution—specifically, the vesting of "judicial power" in Article III courts and the Due Process Clause—require de novo review of, and bar judicial deference to, executive statutory interpretation in all circumstances. U.S. Const. art. III, § 1, amend. V.

Justice Brandeis once appeared to articulate this perspective, reasoning that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); *see id.* at 73–74 (Brandeis, J., concurring) (reasoning that due process requires that an administrative order "may be set aside for any error of law, substantive or procedural"). Respectfully, *amicus* does not agree with Justice Brandeis on this point. Terms like "judicial power" and "due process" do not define themselves. They must be assessed against historical practices to identify the proper boundaries of judicial authority. Against the relevant backdrop, the Court should hesitate before adopting a *general* rule that the Constitution compels de novo judicial review of statutes *in all circumstances*.

To see why, consider that Congress can, in appropriate circumstances, preclude judicial review altogether. *See* 5 U.S.C. § 701(a)(1). And historically, in certain settings, Congress adopted just such a preclusive "res judicata" model—conferring finality on agency action without further judicial review. *See* Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 Admin. L. Rev. 197, 200, 209–24 (1991). If Congress can preclude judicial review, it stands to reason that it can authorize judicial review in circumstances more limited than full de novo review of legal questions. Here, the greater power (preclusion) naturally includes the lesser (limited review). Consider, also, the history of mandamus review of executive action. Without significant constitutional objection, for much of the nineteenth century, judicial review occurred in

certain areas using a writ of mandamus, under which an Article III court would not resolve questions of law de novo. *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 947–58 (2017) [hereinafter, "*Origins of Judicial Deference*"]; *Mead*, 533 U.S. at 242–43 (Scalia, J., dissenting) (observing that under mandamus practice some "[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive"); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 514–15 (1840). That practice suggests that deferential review of legal questions (again, in some areas) can be consistent with the Constitution.

To be sure, the Constitution might require a de novo standard of review in certain, targeted areas. Specifically, this Court's non-Article III adjudication cases address the interaction of Article III and the appropriate standard of review for factfinding. For example, *Crowell v. Benson*, 285 U.S. 22 (1932), held that Article III required de novo review of some agency factfinding in "private right" cases. *See id.* at 50–54. Similarly, *Stern v. Marshall*, 564 U.S. 462 (2011), held that Article III prohibited a "clearly erroneous" standard for federal-court review of factfinding by a non-Article III bankruptcy court in "private right" cases. *See id.* at 487–95. At the same time, *Stern* explained that "there was a category of cases involving 'public rights' that Congress could constitutionally assign to" non-Article III bodies like administrative agencies. *Id.* at 485.

Similar logic could explain the circumstances in which Article III requires a de novo standard of review for legal questions. To take an extreme example, it seems doubtful that Congress could make

Department of Justice legal determinations conclusive in criminal cases. But at a minimum, this Court should confront these nuances before holding that the Constitution requires a reviewing court's de novo consideration of legal questions in this case.

B. Section 706 of the APA should be understood to require courts to give statutory text, where possible, the "best" construction.

Entitled "Scope of review," section 706 of the APA sets forth a series of standards that courts should employ when reviewing agency action.

1. As an initial matter, a prefatory clause to the section provides 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. To *amicus*' knowledge, Congress had not used these phrases—"shall decide all relevant questions of law" and "interpret constitutional and statutory provisions"—in statutory provisions prior to the APA.

As a textual matter, many have viewed this language as requiring some form of de novo review. For example, five years after the APA's passage in 1946, the Ninth Circuit reasoned that, "[i]n enacting the Administrative Procedure Act Congress did not merely express a mood that questions of law are for the courts rather than agencies to decide—it so enacted with explicit phraseology." *SEC v. Cogan*, 201 F.2d 78, 86–87 (9th Cir. 1951). *See, e.g.*, THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE

47 (2022) (noting that the APA appears "unequivocally to instruct courts to apply independent judgment on all questions of law"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 194 & n.408 (1998); John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 516 (1947).

To the extent that legislative history might be relevant to understanding section 706, it tends to cut in favor of this approach. Before passage of the bill that became the APA, Representative Francis Walter, the chairman of the House Subcommittee on Administrative Law, described the scope-of-review provision as "requir[ing] courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions. . . ." 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter). Moreover, in the context of a discussion of why "interpretative rules" were exempted from the APA's notice-and-comment requirements, *see* 5 U.S.C. § 553(b)(3)(A), a Senate Judiciary Committee print indicated that agency statutory interpretations "are subject to plenary judicial review." S. Doc. No. 248, 79th Cong., 2d Sess. 11, 18 (1946); *see generally Origins of Judicial Deference* 988–90 (summarizing other portions of the legislative history).

2. The listed standards of review contained in section 706 bolster this understanding of the prefatory language. Specifically, after the prefatory language, section 706 provides that the reviewing court "shall . . . compel agency action unlawfully withheld or unreasonably delayed; and . . . hold unlawful and set

aside agency action, findings, and conclusions found to be" in violation of a series of listed standards. 5 U.S.C. §§ 706(1)–(2). The first subsection then provides that reviewing courts shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Moreover, a later subsection contemplates deferential "substantial evidence" review of factfinding in certain agency proceedings. *Id.* § 706(2)(E). These provisions establish a distinction between the standard of review for questions of "law" and "fact" that would have been familiar in the mid-1940s. *Origins of Judicial Deference* 959–62, 971–76.

Congress had previously used the phrase "not in accordance with law" in a statutory review provision in 1926 to describe the authority of federal courts over the newly constituted Board of Tax Appeals—an executive agency and the predecessor of the U.S. Tax Court. *See* Revenue Act of 1926, § 900, 44 Stat. 9, 105–06, 110; *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U.S. 716, 721 (1929) (tracing statutory history). The Revenue Act of 1926 authorized courts of appeals to exercise direct judicial review of the Board of Tax Appeals through "exclusive jurisdiction to review the decisions of the Board." § 1003(a), 44 Stat. at 110. In conducting such review, federal courts were given the "power to affirm or, *if the decision of the Board is not in accordance with law*, to modify or to reverse the decision of the Board." § 1003(b), 44 Stat. at 110, codified at 26 U.S.C. § 1226 (emphasis added). During the same congressional session that Congress enacted the Revenue Act of 1926, it used the same language to authorize federal courts to review orders issued under the

Longshoremen's and Harbor Workers' Compensation Act, § 21(b), 44 Stat. 1424, 1436 (1927), codified as amended at 33 U.S.C. §§ 901–50.

The Supreme Court first addressed the meaning of this phrase in *Crowell v. Benson*. In *Crowell*, although Chief Justice Hughes' majority and Justice Brandeis' dissent disagreed on the scope of review of factual questions, they agreed on its application to questions of law. Chief Justice Hughes reasoned that the question of scope of review at issue in the case "relate[d] only to determinations of fact," because authority over "legal questions" was reserved to federal courts. 285 U.S. at 49. As Chief Justice Hughes explained: "Rulings of the [agency official] upon questions of law are without finality. So far as the latter [*i.e.*, 'questions of law'] are concerned, full opportunity is afforded for their determination by the federal courts through proceedings to suspend or to set aside a compensation order." *Id.* at 45–46. "The Congress did not attempt to define questions of law," Chief Justice Hughes observed, but the statute left "no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category." *Id.* at 50.

In his dissent, Justice Brandeis observed that "[t]he initial question" that he would address was "one of construction of the Longshoremen's Act." 285 U.S. at 66 (Brandeis, J., dissenting). He noted that the Longshoremen's Act provided that "'if *not in accordance with law*, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings . . . instituted in the Federal district court.'" *Id.* at 67; *see also id.* (observing that

"[t]he phrase in [the Longshoremen's Act] providing that the order may be set aside 'if not in accordance with law' was adopted from the statutory provision, enacted by the same Congress, for review by the Circuit Courts of Appeals of decisions of the Board of Tax Appeals"). Justice Brandeis agreed that, under the statute, the agency's "conclusions are, as a matter of right, open to re-examination in the courts on all questions of law." *Id.* at 88. And Justice Brandeis described "the prevailing practice" under the review provisions of the Longshoremen's Act as "confin[ing]" judicial review "to questions of law." *Id.* at 93. Thus, as a statutory matter, Justice Brandeis frankly agreed that federal courts could freely reexamine "questions of law" under the "not in accordance with law" standard.

3. In the era immediately surrounding the passage of the APA, several Supreme Court cases undercut a sharp distinction between "questions of law" and "questions of fact" for purposes of the standard of review. *Origins of Judicial Deference* 977–81. In *Dobson v. Commissioner*, 320 U.S. 489 (1943), the Court shifted course on this issue while interpreting the "not in accordance with law" language in the Revenue Act. *See id.* at 494. Without citing *Crowell*, the Court read into the statutory review provision a deferential standard, reasoning that "when the Court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand," and that "[i]n deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter." *Id.* at 502. In doing so, *Dobson* remarked that "[p]erhaps the chief difficulty

in consistent and uniform compliance with the congressional limitation upon court review lies in the want of a certain standard for distinguishing 'questions of law' from 'questions of fact.'" *Id.* at 500–01; *see, e.g.*, *John Kelley Co. v. Commissioner*, 326 U.S. 521, 527 (1946) (relying on *Dobson* and remarking on the difficulty "in drawing a line between questions of fact and questions of law").

Two years after enacting the APA (with the "not in accordance with law" language contained in section 706(2)(A)), Congress overturned *Dobson* by statute. Act of June 25, 1948, § 36, 62 Stat. 869, 991 (providing that the courts of appeals should review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury"), codified as amended at 26 U.S.C. § 7482(a)(1). Supporters of the bill, such as Representative Sam Hobbs (the author of the Administrative Orders Review Act, otherwise known as the Hobbs Act, 28 U.S.C. § 2342) contended that "[p]rior to the *Dobson* decision it was assumed by all the courts, including the Supreme Court, that on appeal from the Tax Court all questions of law were fully reviewable . . . ." 93 Cong. Rec. App. 3281 (1947); *see also* 94 Cong. Rec. 8501 (1948) (statement of Rep. Reed) (similar).

Some other (though not all) Supreme Court cases from this era echoed *Dobson*'s reasoning. *See Origins of Judicial Deference* 977–81; *see, e.g.*, *Gray v. Powell*, 314 U.S. 402, 411–12 (1941); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). For example, in *Hearst*, the Court rejected the argument that it could "import wholesale the traditional common-law conceptions" into the statutory term

"employee," instead reasoning that the agency construction "is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.* at 125, 130–31. *Hearst* seems out of step with how the Court ordinarily treats a common-law term ("employee") incorporated into a statute; moreover, Congress reversed the Court's precise holding on the meaning of "employee" three years later. *See* CALEB NELSON, STATUTORY INTERPRETATION 621–22 (2011).

Although the relationship between cases like *Hearst* and the APA's scope-of-review provision is admittedly complex, the most plausible interpretation is that, much like with its statutory repudiation of *Dobson*, Congress sought to establish the traditional scope-of-review for legal questions when it enacted section 706. In doing so, Congress sought to repudiate then-recent innovations regarding the standard of review. But even if one were to reject that understanding of section 706, it would still mean that, at most, "mixed questions of law and fact" (as in *Hearst* and *Dobson*) would receive deference. The better approach, however, is to read section 706 as consistent with footnote 9 of *Chevron*, thus requiring a reviewing court to give statutory text the "best" interpretation that it can, if one is possible.

C. Section 706 is tempered by the "contemporary" and "customary" canons of construction.

By its very nature, "de novo" review incorporates traditional canons of construction, including the classical canons giving weight to contemporaneous and customary understandings of legal text. Those canons apply to constitutional analysis and should apply to statutory analysis in similar fashion.

1. The very same year that it decided *Crowell*, the Court, in an opinion by Chief Justice Hughes, addressed the question whether a foreign territory was a "foreign country" within the meaning of a federal revenue statute. *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 4–5 (1932). The Court explained that the "word 'country,' in the expression 'foreign country,' is ambiguous," because it could "be taken to mean foreign territory or a foreign government." *Id.* at 5. In its analysis, the Court alluded to the "familiar principle . . . that great weight is attached to the construction consistently given to a statute by the executive department charged with its administration." *Id.* at 16. But the Court identified a "qualification of that principle" that was "as well established as the principle itself"—namely, that the Court was "not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons." *Id.*

Chief Justice Hughes' approach was consistent with cases decided before and after 1932. Consider Justice Brandeis's statement in *Iselin v. United States*, 270 U.S. 245 (1926), that the agency's "construction was neither uniform, general, nor long-continued; neither is the statute ambiguous. Such departmental construction cannot be given the force and effect of law." *Id.* at 251. Or consider Justice Cardozo's reasoning the year after *Burnet* in *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933). In that case, Justice Cardozo explained the then-current state of the law as follows: "True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True

it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion. . . ." *Id.* at 315 (citations omitted); *see also United States v. Vowell*, 9 U.S. (5 Cranch) 368, 372 (1810) ("If the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department . . ."); *United States v. Moore*, 95 U.S. 760, 762–63 (1878) (noting a construction of a statute that had "always heretofore obtained in the" agency was "entitled to the most respectful consideration, and ought not to be overruled without cogent reasons"); *cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). Justice Cardozo's approach thus stressed that administrative practice ("consistent and generally unchallenged" custom) and "contemporaneous construction" are relevant to construing statutes.

Then-Professor Griswold wrote an article in 1941 summarizing what he described as the "regulations problem." Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398 (1941). Griswold explained that then-current law depended on two factors that "can be compressed into two long words: contemporaneousness, and long-continuedness." *Id.* at 404. Although Griswold's article dealt specifically with the question of the effect to "be given to Treasury Regulations in the construction and application of the Federal Revenue Acts," *id.* at 398, he based his reasoning on the broader principle that "contemporaneousness is a

significant factor in evaluating an administrative regulation [that] goes back to the earliest considerations of the problem, *id.* at 405 (citing *Edwards Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827) ("In 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.")). As Griswold put it, reference to contemporaneous administrative interpretation was warranted, because "unless the language of the statute is very general, the primary problem is to ascertain the meaning of the statute as of the time it was enacted." *Id.* "Contemporaneous regulations may thus represent actual evidence of the elusive legislative intent." *Id.* at 405–06 (listing cases, as well as other reasons justifying the principle); *see id.* at 408–11 (discussing cases addressing long-continuedness); *see also White v. Winchester Country Club*, 315 U.S. 32, 41 & n.17 (1942) (relying on Griswold's article for the proposition that an agency's "substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times . . .").

Griswold's approach paralleled Sutherland's in his treatise on statutory interpretation. *See* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (1891). Sutherland devoted a section to "contemporaneous construction," claiming that "[t]he aid of contemporaneous construction is invoked where the language of a statute is of doubtful import and cannot be made plain by the help of any other part of the same statute . . . ." *Id.* § 307, at 391. Sutherland devoted several sections to "general usage," *see* §§ 308–12, at 392–97, most pertinently

explaining that "[a] practical construction, of long standing, by those for whom the law was enacted, will not be lightly questioned . . .," *id.* § 309, at 392. Other treatise authors echoed these points. *See Origins of Judicial Deference* 962–65.

To be sure, there were cases that seemed not to fit the pattern of contemporaneousness and long-continuedness. *See, e.g.*, *Bates & Guild Co. v. Payne*, 194 U.S. 106, 107–10 (1904). Notably, in *Bates*, Justice Harlan's dissent pointed out that the government's then-current position conflicted with its longstanding one and that the Court had "overthrown" the "settled" principle that "the established practice of an Executive Department charged with the execution of a statute will be respected and followed—especially if it has been long continued." *Id.* at 111 (Harlan, J., dissenting); *see also Origins of Judicial Deference* 966–68 & n.253 (discussing *Bates* and citing other similar cases). Out of the thousands upon thousands of statutory cases decided by the Supreme Court before the APA's passage, it is unsurprising to find some that break the mold or some that stretch the established principles. But the general pattern identified by Griswold and Sutherland reflects the pre-1940s consensus, before cases like *Dobson* and *Hearst* sought to tinker with the rules regarding the line between questions of law and questions of fact.

2. Acknowledging the force of these classical canons in the construction of statutes would harmonize statutory with constitutional and regulatory interpretation. Indeed, some recent opinions appear to rely on these canons in statutory interpretation. *See Entergy Corp. v. Riverkeeper, Inc.*,

556 U.S. 208, 224 (2009) (observing that, though "not conclusive," the fact that the "agency has been proceeding in essentially this fashion for over 30 years" tended to show "reasonable[ness]"); *Sackett v. EPA*, 143 S. Ct. 1322, 1365 (2023) (Kavanaugh, J., concurring in judgment) (reasoning that a "longstanding and consistent agency interpretation reflects and reinforces the ordinary meaning of the statute"). Making the canons part of the framework would both regularize interpretive principles generally and cohere with the APA's instruction that courts should "interpret constitutional and statutory provisions." 5 U.S.C. § 706.

In the realm of constitutional interpretation, the Court often relies on contemporaneous or customary understandings of the text. There are many examples, but consider Justice Breyer's opinion in *NLRB v. Noel Canning*, 573 U.S. 513 (2014), which in the course of interpreting the Recess Appointments Clause relied on a set of United States Attorney General opinions from 1868. *See id.* at 528–29. As *Noel Canning* illustrates, there is a form of "respect" for certain persuasive executive branch practice that is built into the structure of constitutional interpretation itself. *See id.* at 525 ("[T]his Court has treated practice as an important interpretive factor . . .").

In addition, in the realm of regulatory interpretation, this Court has embraced a version of these principles. In *Kisor*, the Court reasoned that "a court may not defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties," which can occur "when an agency substitutes one view of a rule for another."

139 S. Ct. at 2417–18. The Court thus observed that it had "only rarely" deferred "to an agency construction 'conflict[ing] with a prior' one." *Id.* at 2418. Although these portions of *Kisor* may not reflect precisely the same interpretive principles discussed above, they are consistent with them.

More broadly, the question posed by these examples and the *Chevron* doctrine is whether, and how, interpretive principles ought to differ for different sorts of legal text—constitutions, statutes, and regulations. In this area, *amicus* respectfully suggests that greater consistency across the domains of legal interpretation would assist the federal courts and the public.

3. The approach articulated in this brief also has attractive practical consequences. Where statutory text has a "best" interpretation, a court must give it that interpretation, subject to the contemporaneous and customary canons of construction. That would have the overall effect of settling the meaning of legal text over time. The approach in *Chevron* countenances the opposite. *See Brand X*, 545 U.S. at 981 ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."); *Smiley v. Citibank (S.D.), N.A.*, 51 U.S. 735, 742 (1996) ("[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."); *Chevron*, 467 U.S. at 863–64.

By contrast, where Congress used more open-ended terms in an organic statute—like "reasonable," "appropriate," "feasible," or "practicable"—the agency's actions under that statute, including any decisions to change course, would generally be subject to arbitrary-and-capricious review under *State Farm*. Legal meaning would settle, but policy determinations need not.

CONCLUSION

Respectfully, the Court should decide this case consistent with the principles described in this *amicus* brief.

Respectfully submitted.

ADITYA BAMZAI
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
(434) 243-0698
abamzai@law.virginia.edu

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