No. 22-451

IN THE

Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL.,
Petitioners,

v.

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

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

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

HAROLD C. BECKER
(*Counsel of Record)*
MATTHEW GINSBURG
ANDREW LYUBARSKY
815 Black Lives Matter Plaza, N.W.
Washington, D.C. 20006
(202) 637-5310
cbecker@aflcio.org

Counsel for American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

September 22, 2023

Mosaic - (301) 927-3800 - Cheverly, MD

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STATEMENT OF INTEREST

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 60 national and international labor organizations with a total membership of over 12.5 million working people.[1] The AFL-CIO has played a central role in advocating for and enforcing federal laws that protect American workers from before the enactment of the National Labor Relations Act of 1935 (NLRA) until today. The AFL-CIO has frequently appeared before federal agencies designated by Congress to elaborate, administer and enforce those laws—the National Labor Relations Board (NLRB), the Occupational Safety and Health Administration (OSHA), and others. Finally, the AFL-CIO has frequently appeared in court, including in this Court, arguing for and against deference to such agency action under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its precursors.

The AFL-CIO believes that *Chevron* is both a constitutionally permissible and practically necessary part of a functional system of government in the 21st century. We file this brief so that the federal government can continue effectively to protect American employees and employers, elaborate their respective rights, and improve their well-being.

SUMMARY OF ARGUMENT

We use this Court's precedent under the NLRA as an example to demonstrate the following:

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

First, this Court has uniformly applied the principles systematized in *Chevron* both before and after that decision.

Second, *Chevron* deference is consistent with and, indeed, required by the Constitution. Congress may and often must legislate in broad terms and designate an agency to elaborate those terms in order to effectively exercise its authority under Article I. Congress' instruction that an agency has discretion to elaborate the broad terms of a statute is part of what "the law is," and thus part of what the judicial branch has a duty to articulate and apply. This Court has recognized that the Constitution permits Congress to do its job in an increasingly complex society via this necessary degree of delegation to agencies. Congress properly designates agencies to elaborate the broad terms of statutes, as such elaboration often involves a balancing of interests that is appropriate for the political branches, but not the judiciary.

Third, Congress has sound reasons for designating an agency to elaborate the broad terms of a statute, including the promotion of uniform application of federal law and the development and utilization of subject matter expertise.

Fourth, *Chevron* has not created a judicial rubber stamp. Courts have overturned agency actions under both prongs of *Chevron* and this Court has developed a set of adjacent doctrines that further constrain agency action.

Finally, overturning *Chevron* would unsettle decades of precedent, increase the workload of the federal courts, and dramatically increase partisan division in judicial decisions, thus further eroding public confidence in the courts.

ARGUMENT

I. This Court Has Uniformly Applied the Principles of Deference Systematized in *Chevron* under the NLRA Both Before and After that Decision

Chevron was not a novel holding but instead restated long-standing principles of deference to administrative agencies. *See Chevron*, 467 U.S. at 845-46. The Court cited three labor cases as precedents for its holding, *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); and *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). *Hearst Publications*, decided four decades prior to *Chevron*, states a virtually identical standard:

> where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [T]he Board's determination . . . is to be accepted if it has . . . a reasonable basis in law.

322 U.S. at 131. This Court reiterated that standard numerous times under the NLRA in the following decades. *See, e.g., Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) ("Of course, the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute."). Indeed, the principles rearticulated in *Chevron* are so well-established under the NLRA that this Court has repeatedly applied them post-*Chevron* without citing *Chevron* but rather

only pre-*Chevron* NLRA cases.[2] For example, in *Pattern Makers League of North America v. NLRB*, 473 U.S. 95, 114 (1985):

> The Board has the primary responsibility for applying "'the general provisions of the Act to the complexities of industrial life.'" *Ford Motor Co. v. NLRB,* 441 U.S. 488, 496 (1979), quoting *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 236 (1963), in turn citing *NLRB v. Steelworkers,* 357 U.S. 357, 362–363 (1958). Where the Board's construction of the Act is reasonable, it should not be rejected "merely because the courts might prefer another view of the statute." *Ford Motor Co. v. NLRB, supra,* 441 U.S., at 497.

See also, e.g., Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987); *Auciello Iron Works Inc. v. NLRB,* 517 U.S. 781, 787-88 (1996).

II. *Chevron* Deference Under the NLRA and Other Federal Statutes is Consistent With And, Indeed, Required by the Constitution

A. Congress May Legislate in Broad Terms and Designate an Agency to Elaborate Those Terms

The NLRA cases decided both before and after *Chevron* make clear that deference is required when (1) Congress speaks in broad terms that require further elaboration for the law to be administered and enforced and (2) Congress vests authority in a specific agency to elaborate the law's broad terms through

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[2] For this reason, Petitioners' suggestion that the Court has "voted with its feet" by not citing *Chevron* in recent decisions is misguided. Pet. Br. 35.

rulemaking or adjudication. *Chevron* states that deference is required when "the statute is silent or ambiguous with respect to the specific issue." 467 U.S. at 843. The paradigmatic instance of when deference is required is when a statute speaks in broad terms that do not themselves provide an answer to the specific question at issue and Congress delegates interpretive authority to an agency. As Justice Scalia explained, "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013).

Even before *Hearst*, this Court made that rationale for deference under the NLRA clear:

> A statute expressive of such large public policy as that on which the [NLRB] is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. . . . [C]ourts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). Two decades later, this Court reiterated that point,

quoting *Phelps Dodge*'s admonition concerning the "broadly phrased" nature of the NLRA and adding, "[w]here Congress has in the statute given the Board a question to answer, the courts will give respect to that answer." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499-500 (1960) (cleaned up). And, in the decade before *Chevron*, this Court continued repeatedly to defer to the Board's construction of the broad terms of the NLRA. In 1977, for example, this Court stated, "regardless of how we might have resolved the question as an initial matter, the appropriate weight which must be given to the judgment of the agency whose special duty is to apply this broad statutory language to varying fact patterns requires enforcement of the Board's order." *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 304 (1977).

The NLRB's statutory authority to conduct elections to determine if employees wish to be represented for the purpose of collective bargaining with their employer is a clear example of the type of broad congressional directive, the implementation of which unavoidably and necessarily involves the exercise of discretion in the further elaboration of the statutory terms. The NLRA provides only that, under appropriate circumstances, the NLRB "shall direct an election by secret ballot and shall certify the results thereof." 29 U.S.C. § 159(c)(1). Congress said nothing further about how the Board should conduct such elections. Rather, Congress delegated authority to the Board to interpret those broad terms by rulemaking or adjudication. *See* 29 U.S.C. § 156; *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969). And the Board has elaborated what it means to conduct "an election by secret ballot" through both means. *See, e.g.*, 29 C.F.R. § 102.60 *et seq.* (2019) (general rules governing elections); *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966) (hold-

ing employer must provide union a list of eligible voters prior to an election).

Based on the broad language of the Act and the specific charge given the Board, this Court has long recognized that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This Court summarized this jurisprudence in upholding the Board's requirement that an employer provide a list of employees eligible to vote in an election to the union:

> We have held in a number of cases that Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives. . . . The disclosure requirement furthers this objective by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the Board, and not for this Court, to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present.

Wyman-Gordon, 394 U.S. at 767.

This Court has held that judges may not interfere with the Board's exercise of the discretion granted by Congress, which legislated in broad terms respecting the conduct of elections (and other subjects) and vested in the Board authority to elaborate those terms. "The control of the election proceedings, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone. Interference in those matters con-

stituted error on the part of the court below." *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940) (footnotes omitted).

Imagining that courts had to review the decisions of the NLRB in this area *without Chevron*-like deference makes clear why that would be untenable. As explained above, the Board has held (and now codified in a regulation) that an employer must provide a union a list of eligible voters and specified when the list must be provided and its contents. *See Excelsior*, 156 NLRB at 1239-40; 29 C.F.R. § 102.62(d) (2019). Using all the traditional tools of statutory construction, a court simply cannot determine if that agency elaboration of the broad statutory terms, "direct an election by secret ballot," is correct or incorrect. Judges could only make such a determination based on their own view of wise labor-relations policy. That is precisely why Congress vested the authority to elaborate the broad statutory terms in the NLRB and why this Court has properly deferred to the agency's construction.[3]

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[3] Although it was a constitutional and not a statutory case, the logic of *Nixon v. United States*, 506 U.S. 224 (1993), applies equally here. In that case, Judge Nixon argued that the procedures accorded him by the Senate did not comply with the Constitution's vesting of authority in the Senate to "try all Impeachments." U.S. CONST. art. I, § 3, cl. 6. This Court rejected Nixon's argument, reasoning, "courts possess power to review . . . executive action that transgresses identifiable textual limits," but when a broad statutory term "does not provide an identifiable textual limit on the authority which is committed to" another branch, courts must not intervene. 506 U.S. at 238. The term "try," this Court concluded, "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions." *Id.* at 230. The Board's broad charge to "direct an election by secret ballot" is parallel to the Senate's to "try all Impeachments." In both instances courts may not second guess reasonable constructions by the coordinate branch charged with implementing the broad textual term.

Thus, in the context of the NLRA, it has been established since 1935 that (1) Congress necessarily legislated in broad terms in order to address the pressing labor relations issues it faced in the middle of the Great Depression, (2) Congress delegated the authority to construe, elaborate, and apply those broad terms and conduct the balancing of interests inherent therein to the NLRB, and (3) the NLRB's construction of the broad terms of the NLRA is subject to only limited judicial review.

B. "What the Law Is" Includes Congress' Instruction that an Agency Has Discretion to Define and Elaborate the Broad Terms in a Statute

Petitioners' central argument is based on language from *Marbury v. Madison*, 5 U.S. 137, 177 (1803): "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" Pet. Br. 24. But "the law," in all cases in which *Chevron* applies, includes Congress' instruction that an agency has discretion to define and elaborate the broad terms in a statute. As Chief Justice Roberts explained in *City of Arlington*:

> We do not ignore that command [from *Marbury*] when we afford an agency's statutory interpretation *Chevron* deference; we respect it. We give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities "with the force of law."

569 U.S. at 317 (Roberts, C.J., dissenting) (quoting *United States v. Mead Corp.,* 533 U.S. 218, 229 (2001)). And the majority in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019), reiterated, "Congress, when first enact-

ing a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme." Indeed, in *Marbury* itself, the Court made clear, "[q]uestions . . . which are, by the . . . laws, submitted to the executive, can never be made in this court." 5 U.S. at 170. This Court cannot expand the province of the judiciary in the name of fidelity to the Constitution by simply reading this form of congressional instruction out of "the law."[4]

The NLRA clearly vests this form of interpretive authority in the NLRB. The law gives the NLRB both adjudicatory and rulemaking authority. *See* 29 U.S.C. §§ 156, 160. And the Senate Report on what became the NLRA clearly states:

> Section 10(a) gives the [NLRB] exclusive jurisdiction to prevent and redress unfair labor practices. . . . Thus it is intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining.

S. Rep. No. 74-573, at 15 (1935). Congress gave the NLRB authority not simply to apply the law, but to "develop" the law. As this Court has long recognized, Congress "charge[d the Board] to develop national labor policy . . . through interstitial rulemaking that is

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[4] For the same reason, *Chevron* is not inconsistent with the instruction in the Administrative Procedure Act that, "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law," 5 U.S.C. § 706, when the "law" instructs the reviewing court to defer to the agency's answer to the question of law. Moreover, the APA does not apply "to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

'rational and consistent with the Act.'" *Auciello Iron Works*, 517 U.S. at 788 (1996) (quoting *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 787 (1990)).

Chevron deference is thus parallel to two other forms of deference common in labor law—deference to arbitrators and trust plan administrators. Like *Chevron* deference, both of those forms of deference are rooted in an instruction in the legal document requiring construction. Thus, while courts ordinarily have authority to construe the provisions of contracts no less than statutes, if the parties agree to "settle by arbitration a controversy" arising out of the contract, the Federal Arbitration Act requires courts to enforce the arbitrator's judgment except in narrow circumstances. 9 U.S.C. §§ 2, 9, 10. And this Court has instructed that:

> [t]he function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 567–68 (1960).[5]

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[5] Notably, this Court has upheld deference to arbitrators against challenge under Article III even when Congress mandates arbitration of disputes, the disputes require application of a statutory standard, and the statute limits judicial review. In *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), the Court rejected an Article III challenge to a provision of the Federal Insecticide, Fungicide and Rodenticide Act, 7

Likewise, while courts ordinarily have authority to construe the terms of trust instruments, this Court has held, under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq*. (ERISA), that, "[i]f the trust documents give the trustee 'power to construe disputed or doubtful terms, . . . the trustee's interpretation will not be disturbed if reasonable.'" *Conkright v. Frommert*, 559 U.S. 506, 512 (2010) (quoting *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 111 (1989)). Notably, this Court has held that the deferential standard of review should not be abandoned even if the trustee has a material interest in the construction of the instrument. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008).[6]

As in a contract with an arbitration clause and a trust document authorizing the trustee to construe its terms, part of "the law," as that phrase is used in *Marbury*, is Congress' instruction that a specific agency further elaborate the law's broad terms. As Justice Scalia explained:

> *Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of

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U.S.C. § 136 *et seq*. that requires parties to submit certain disputes over compensation (for pesticide registrants' use of proprietary data generated by earlier registrants) to arbitration. *Id*. at 585. The Act limits judicial review of the arbitrator's decisions to correcting "fraud, misrepresentation, or other misconduct." *Id*. at 574. Nevertheless, the Court rejected the argument that the limits on judicial review were inconsistent with Article III, reasoning, "we do not think this system threatens the independent role of the Judiciary in our constitutional scheme." *Id*. at 591.

[6] Rather, a court must "take account of the conflict when determining whether the trustee, substantively or procedurally, has abused his discretion." *Id*.

> reasonable interpretation, not by the courts but by the administering agency. . . . Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.

City of Arlington, 569 U.S. at 296.

In the NLRA, Congress both spoke in "capacious terms" and, by expressly authorizing the NLRB to construe and apply those terms, "enlarge[]d [the] agency['s] discretion." As this Court has repeatedly explained, "Congress met the[] difficulties" of drafting a law that could not address every future eventuality "by leaving the adaptation of means to end to the empiric process of administration." *Phelps Dodge*, 313 U.S. at 194. "The exercise of the process was committed [by Congress] to the Board, subject to limited judicial review." *Id*. In *NLRB v. Erie Resistor Corp.,* this Court recognized that the Board "was attempting to deal with an issue which Congress had placed in its hands." 373 U.S. 221, 236 (1963). And in *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978), this Court stated emphatically:

> It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy. Because it is to the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,' . . . that body, if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.

This long-standing reasoning was summed up in *ABF Freight Sys., Inc. v. NLRB*:

> When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.' Because this case involves that kind of express delegation, the Board's views merit the greatest deference. This has been our consistent appraisal of the Board's remedial authority throughout its long history of administering the Act.

510 U.S. 317, 324 (1994) (quoting *Chevron*, 467 U.S. at 844).

Chevron thus honors *Marbury*'s command.

C. The Constitution Gives Congress the Authority to Enact Legislation that Can Be Effective in a Complex, Dynamic, Modern Society

The Founders did not intend the Constitution to be a straight-jacket that would strangle the newly constituted federal government as the nation grew and developed. While Petitioners quote the foundational Chief Justice Marshall opinion in *Marbury*, equally foundational is Marshall's holding in *McCulloch v. Maryland*:

> [T]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

17 U.S. 316, 421 (1819).

As this Court recently recognized in *Gundy v. United States*, "the Constitution does 'not 'deny[ ] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s].'" 139 S. Ct. 2116, 2123 (2019) (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1944)). And, as specifically relevant here, this Court stated, "'[I]n our increasingly complex society, replete with ever changing and more technical problems,' . . . 'Congress simply cannot do its job absent an ability to delegate power.'" *Id.* (quoting *Mistretta v. United States.,* 488 U.S. 361, 372 (1989)). Congress may "'obtain[ ] the assistance of its coordinate Branches'—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws." *Id.* (quoting *Mistretta*, 488 U.S. at 372). "'In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination.'" *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 406 (1928)).

Congress faced a daunting task in 1935—preventing industrial strife that was rocking the nation and protecting the rights of both employees and employers. Moreover, Congress sought to adopt a law that would continue to serve those purposes in a dynamic, market economy where change in products and work practices is constant. Thus, "[t]he Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice." *Republic Aviation*, 324 U.S. at 798. Rather, Congress in "that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged

as violative of its terms." *Id.* Thus, Congress provided for "administrative flexibility within appropriate statutory limitations . . . to accomplish the dominant purpose of the legislation." *Id.*

When it enacts statutes, Congress cannot conceive of all possible applications of the law and cannot write the law with complete clarity. "Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999). Moreover, Congress cannot predict all future developments that may be relevant to application of the law and the achievement of its ends. An agency, with congressional authorization, can adapt its construction of the law to changing circumstances, but courts cannot. An agency can discard a reasonable construction that has proven ineffective in or counterproductive to furthering a statute's aims on policy grounds, but courts cannot.

For that reason, Justice Scalia predicted that even a narrowing of the application of *Chevron*'s principles would

> lead to the ossification of large portions of our statutory law. [In contrast, w]here *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion.

Mead Corp., 533 U.S. at 247 (Scalia, J., dissenting).

In the dynamic context of labor relations, this Court has long recognized that "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted [by Congress] to the Board." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). *Chevron* per-

mits that necessary adaptation. Overturning *Chevron* would prevent it and thereby gradually render the NLRA and many other statutes obsolete, contrary to Congress' intent.

Petitioners suggest Congress is neglecting its duty and attempting to shift responsibility to make hard decisions to the executive branch. Pet. Br. 36-37. But this Court has long recognized Congress can *only* perform its duty via some degree of delegation of interpretive authority to agencies.

D. Performing the Legislatively Assigned Task of Further Specifying the Broad Terms of a Law is Appropriate for Agencies, But Not Courts

Congress cannot anticipate all the circumstances under which a statute may apply nor can it legislate with complete clarity. In short, "what the law is" is not always determinable even using all the traditional tools of statutory construction. Construction of statutes in some instances unavoidably involves the exercise of discretion. The exercise of that discretion is appropriately located in the executive, not the judicial branch. That is exactly what *Chevron* held and it has long been recognized under the NLRA.

In *Chevron*, the Court reasoned:

> Judges are not . . . part of either political branch of the Government. . . . In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely ap-

> propriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

467 U.S. at 865-66.

A quarter century earlier, this Court similarly observed under the NLRA:

> The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [NLRB], subject to limited judicial review.

NLRB v. Truck Drivers Loc. Union No. 449, 353 U.S. 87, 96 (1957). Three years later, even while reversing the Board, this Court again stated:

> We recognize without hesitation the primary function and responsibility of the Board to resolve the conflicting interests that Congress has recognized in its labor legislation. Clearly, where the 'ultimate problem is the balancing of the conflicting legitimate interests' it must be remembered that 'The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [NLRB], subject to limited judicial review.'

Ins. Agents, 361 U.S. at 499 (quoting *Truck Drivers*, 353 U.S. at 96).

Exercising the discretion delegated by Congress to further elaborate the broad terms in statutes unavoidably involves some degree of "policy-making," "balancing," and "resol[ution of] . . . conflicting interests." The exercise of that form of discretion is appropriate for executive branch agencies, but not for courts.

The example of employees' long-standing, limited right to engage in union organizing on their employer's premises is illustrative. The NLRA says nothing specifically about such a right. Rather, Congress stated in broad terms that it is an unfair labor practice for employers to "interfere with . . . employees in the exercise of the rights guaranteed in section [7 of the Act]", including "the right . . . to form . . . labor organizations." 29 U.S.C. §§ 158(a)(1), 157. Deferring to the NLRB, this Court held in *Republic Aviation* that, absent "unusual circumstances," employers interfere with employees' rights if they prevent employees from soliciting support for a union during nonwork time in nonwork areas of their workplace even if the prohibition is pursuant to a nondiscriminatory no-solicitation policy. 324 U.S. at 804. This Court recognized that the cases before it "bring here for review the action of the [NLRB] in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." *Id.* at 797-98. In other words, elaboration of the broad term "interfere" in order to answer the question of whether employees have a right to solicit support for a union on their employer's premises and, if so, at what times and in what places, requires the "balancing of the conflicting legitimate interests," a balancing of interests appropriately conducted by an executive branch agency, but not a court. *Beth Israel Hosp.*, 437 U.S. at 501 (quoting *Truck*

Drivers, 353 U.S. at 96) (deferring to Board's modification of the *Republic Aviation* rule as applied in hospitals). "[I]t is the Board upon whom the duty falls in the first instance to determine the relative strength of the conflicting interests and to balance their weight." *Id*. at 504.

Congress vested this constrained policy-making role in the NLRB and it would be inconsistent with the judicial function to usurp that role.

III. Congress Vests the Task of Further Specifying the Broad Terms of Laws in Agencies for Sound Reasons

A. Elaboration by a Single Agency and the Required, Accompanying Deference Promotes the Uniform Application of Federal Law

Congress created a single *National* Labor Relations Board for a reason—to elaborate the broad terms of the NLRA in a uniform manner throughout the nation. The Senate Report on what became the law makes that clear:

> [T]his bill is . . . intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining.

S. Rep. No. 74-573, at 15. Congress did not create regional labor boards or a board for each judicial circuit. But overruling *Chevron* would lead to a similar result, contrary to Congress' intent.

This Court has repeatedly recognized Congress' intent to preserve a uniform construction of the NLRA

in the context of applying principles of federal labor law preemption. In *Garner v. Teamsters, Chauffeurs & Helpers Loc. Union No. 776*, 346 U.S. 485, 490 (1953), this Court explained:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules . . . .

In other words, Congress vested "primary" interpretive authority in a single agency, the NLRB, rather than in "tribunal[s] competent to apply law generally," in order to "obtain uniform application of its substantive rules." *Id.*

In *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 288 (1971), this Court again identified that congressional intent:

> [W]hen it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the [courts].

Overturning *Chevron* would undermine that clear legislative intent to authorize the NLRB to "develop" a "comprehensive" system of labor law applying uniformly across the country.

This Court's concern about abandoning the comparable deference accorded trustees applies even more strongly here. This Court recognized in *Conkright* that such "deference serves the interest of uniformity, helping to avoid a patchwork of different interpretations of a plan . . . that covers employees in different jurisdictions." 559 U.S. at 517. The "uniformity problems" that would arise from abandoning that form of deference are similar to what would arise here: employers would "be placed in an impossible situation" and "employees could be entitled to different benefits [or rights] depending on where they live." *Id*. at 520.

The possibility of final review of agency action in this Court cannot possibly preserve uniformity because of the limits of this Court's docket compared to the number of *Chevron* cases heard by the lower federal courts. As Professor Peter Strauss observes:

> The Supreme Court's practical inability in most cases to give its own precise renditions of statutory meaning virtually assures that circuit readings will be diverse. By removing the responsibility for precision from the courts of appeals, the *Chevron* rule subdues this diversity, and thus enhances the probability of uniform national administration of the laws.

Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987). Only deference to agency construction can create the uniformity Congress intended.

Abandoning *Chevron* would balkanize federal labor policy and many other federal policies mandated by Congress to apply uniformly across the nation.

B. Administrative Agencies Have Expertise that the Courts Lack

Congress also vests discretion to elaborate broad statutory terms in agencies like the NLRB because agency personnel have expertise in the areas regulated by the statutes they administer that generalist judges lack. *Chevron* explained:

> [T]he principle of deference to administrative interpretations . . . . "has been consistently followed by this Court whenever . . . a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

Chevron, 467 U.S. at 844 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)).

Under the NLRA, this Court has long recognized, "[t]he Act . . . entrusts to an expert agency the maintenance and promotion of industrial peace." *Phelps Dodge*, 313 U.S. at 194. Congress sought to "[a]ttain[] . . . a great national policy through expert administration in collaboration with limited judicial review . . . ." *Id.* at 188. Indeed, "[o]ne of the purposes" Congress had in "the creation of such boards is to have decisions . . . under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Republic Aviation*, 324 U.S. at 800. "[T]he board was created for the purpose of using its judgment and its knowledge." *Seven-Up Bottling*, 344

U.S. at 348 (quoting *Chi., Burlington & Quincy Ry. Co. v. Babcock*, 204 U.S. 585, 598 (1907)).

Sometimes agency expertise is scientific, as in the case of OSHA, and sometimes it is based on long, accumulated experience, as in the case of the NLRB. As this Court recognized in *Seven-Up Bottling*:

> 'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.

344 U.S. at 349. "Everyday experience in the administration of the statute gives [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers." *Hearst Publ'ns*, 322 U.S. at 130. This Court has repeatedly recognized "the Board's special understanding of . . . industrial situations" and of the "actualities of industrial relations" and its "special competence in dealing with labor problems." *Steelworkers*, 357 U.S. at 363; *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965).

Through long and varied experience in labor relations, NLRB members and staff gain a deep understanding of the real-world consequences of varying constructions of the broad terms of the Act and are thus better able to effect congressional intent than judges who have only sporadic opportunities to apply federal labor law. The Board's "special competence in

this field is the justification for the deference accorded its determination." *Weingarten*, 420 U.S. at 266.[7]

IV. *Chevron* Deference Does Not Create a Judicial Rubber Stamp

Critics of *Chevron* argue it represents an abnegation of judicial oversight. But that is not the case. In the labor context, as in others, this Court and the lower federal courts have often overturned agency action post-*Chevron*. *See, e.g., NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 714-21 (2001); *NLRB v. Health Care & Ret. Corp. of Am.,* 511 U.S. 571, 578-80 (1994); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745-54 (1988).

In addition to the constraints on agency discretion imposed by *Chevron* itself, this Court's decisions constrain agency discretion in several other manners. The courts will not defer if the agency action addresses a "major question." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607-09 (2022). The courts will not defer if the agency's action trenches on a statute it does not administer. *See, e.g., Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018); *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 144 (2002); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 46 (1942). The courts will not defer if the agency's construction raises serious

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[7] Professor Strauss observes, "one can compare the sporadic and case-specific character of judicial encounters with issues of statutory meaning, with an agency's continuing responsibilities and policy-implementing perspectives. Just as the generalist courts have particular strengths in dealing with issues, such as constitutional questions, that involve integration between an agency's specialty and the general legal structure, agencies are especially well-placed to appreciate the interrelationships of issues and the impacts of alternative approaches within the framework of statutes specifically under their charge." Strauss, *supra*, at 1126.

constitutional questions that may be avoided with a different construction. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577-78 (1988). The courts will not defer if the agency does not articulate a rationale for its action and the courts will only uphold agency action based on the rationale articulated by the agency itself. *See, e.g., NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 289–290 (1974); *SEC v. Chenery Corp.,* 318 U.S. 80, 87–88 (1943). The courts will not defer if the agency announces one rule but applies another. *See, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB,* 522 U.S. 359, 374 (1998).

Chevron thus does not prevent meaningful judicial review.

V. Overturning *Chevron* Would Unsettle Decades of Precedent Under the NLRA and Numerous Other Statutes, Increase the Workload of Federal Judges, and Erode Public Confidence in the Courts

Under the NLRA and countless other federal statutes, the courts have upheld agency action under step two of the *Chevron* standard in hundreds if not thousands of cases. Overturning *Chevron* would not only subject future agency actions to heightened scrutiny, it would open up each of those prior agency constructions to new judicial scrutiny under whatever standard this Court adopts.

This Court made that clear in *Kisor*, when considering whether to narrow another form of deference—deference to agency construction of its own regulations (so-called *Auer* or *Seminole Rock* deference): "[A] decision [to overrule *Auer v. Robbins*, 519 U.S. 452 (1997)] would allow relitigation of any decision based on *Auer*,

forcing courts to 'wrestle [with] whether or not *Auer'* had actually made a difference." 139 S. Ct. at 2422. The Court cited the Solicitor General's statement that "every single regulation that's currently on the books whose interpretation has been established under [*Bowles v.*] *Seminole Rock [& Sand Co.*, 325 U.S. 410 (1945)] now [would have] to be relitigated anew." *Id.* The Court's observation in *Kisor* is equally true here: "It is the rare overruling that introduces so much instability into so many areas of law, all in one blow." *Id.*

In other words, overturning *Chevron* would unsettle decades of reliance in countless areas governed by federal statutes.[8] And Petitioners are wrong when they state that "any case decided under step two cannot generate *justifiable* reliance given the executive's ability [to] revisit matters under [*Nat'l Cable & Telecomms. Ass'n v.] Brand X [Internet Servs.*, 545 U.S. 967 (2005)]." Pet. Br. 41. That is because the vast majority of agency actions upheld under *Chevron* and its predecessors are never revisited by agencies. While the NLRB has reversed some prior constructions of the broad terms of the NLRA after changes in the composition of the Board based on "the incumbent administration's views of wise policy," *Chevron*, 467 U.S. at 865, core decisions of the NLRB that have been affirmed under *Chevron* and earlier versions of the same deference principles have stood for decades. *See, e.g.*, *Republic Aviation*, 324 U.S. 793 (rules for where on employer's premises employees can solicit union membership and distribute union literature

[8] Moreover, overturning *Chevron* would present parties with an additional compliance problem as the uniform construction of federal laws promoted by the decision would be fractured and parties would be required to comply with different versions of the law in different districts and circuits as explained *supra*.

have existed since 1945); *Seven-Up Bottling*, 344 U.S. 344 (rule establishing how backpay is calculated has existed since 1953); *Wyman-Gordon*, 394 U.S. 759 (rule providing that employer must provide a list of eligible voters to union prior to an election has existed since 1969); *Weingarten*, 420 U.S. 251 (rule that employer must allow employee to have union representative present at pre-disciplinary interview has existed since 1975).

Moreover, more is at stake here than private parties' reliance interests. The result of overturning *Chevron* would be frustration of the legislative will, an invasion of the authority of the executive, and lawmaking by the judiciary with a corresponding increase in the workload of federal judges and fall in public confidence in the courts.

In *City of Arlington*, Justice Scalia forecast what the effect of overturning *Chevron* would be:

> The effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts. We have cautioned that "judges ought to refrain from substituting their own interstitial lawmaking" for that of an agency. That is precisely what *Chevron* prevents.

569 U.S. at 304-05 (quoting *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 568 (1980)). While dissenting in *City of Arlington*, Chief Justice Roberts agreed: "*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive." *Id*. at 327 (Roberts, C.J., dissenting).

Similarly, under the NLRA, this Court explained:

> the dissenting Justices [like Petitioners here] would have us substitute our judgment for those of the Board with respect to the issues that Congress intended the Board should resolve. This we are unwilling to do. If the courts are to monitor so closely the agency's assessment of the kind of factors involved in this case, the role of the judiciary in administering regulatory statutes will be enormously expanded and its work will become more complex and time consuming. We doubt that this is what Congress intended in subjecting the Board to judicial review.

Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 418 (1982).

By definition, if *Chevron* is overturned, the cases that will be opened anew for more exacting judicial scrutiny will involve questions concerning which courts have already determined that Congress did not speak clearly. If this Court extends judicial authority to encompass answering those questions *de novo*, it is inevitable that judges will answer them "on the basis of the judges' personal policy preferences" given the absence of clear congressional guidance. *Chevron*, 467 U.S. at 865. In fact, the largest empirical study to date demonstrates exactly that. In a study of more than 1,600 cases over eleven years, Professors Barnett, Boyd and Walker found that following *Chevron* "has a powerful constraining effect on partisanship in judicial decisionmaking." Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1524 (2018). Their analysis provides "compelling evidence that the *Chevron* Court's objective to reduce partisanship in judicial decisionmaking has been

quite effective." *Id.* Overturning or narrowing *Chevron*, the scholars warn "could result in partisanship playing a larger role in judicial review of agency statutory interpretations." *Id.* at 1470.

Overturning *Chevron* will thus further the growing public perception that the Court is not a neutral, apolitical body.

This case thus cries out for realism on the part of the Court. Realism concerning effective law-making in a complex and dynamic society and realism concerning the limits of courts' interpretive powers. Petitioners state it is the duty of the judicial branch to say what the law is "even when the authorities at issue are murky or silent," Pet. Br. 24, but we all know that is not possible. It is a "reality that for some purposes statutes will be indeterminate." Strauss, *supra*, at 1124. Pretending otherwise will damage the Court and thereby its ability to fulfill its crucial function to "say what the law is" when Congress has *not* vested authority in executive branch agencies to further elaborate the broad terms of a law and when such agencies act in clear violation of the law.

CONCLUSION

For the above-stated reasons, this Court should reaffirm *Chevron* and affirm the decision below.

Respectfully submitted,

/s/ Harold C. Becker
HAROLD C. BECKER
(*Counsel of Record)*
MATTHEW GINSBURG
ANDREW LYUBARSKY
815 Black Lives Matter Plaza, N.W.
Washington, D.C. 20006
(202) 637-5310
cbecker@aflcio.org