No. 22-451

IN THE

# Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, *et al.*,
*Petitioners,*
v.
GINA RAIMONDO, SECRETARY OF COMMERCE, *et al.*,
*Respondents.*

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

## BRIEF OF DISTRICT OF COLUMBIA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTERESTS OF *AMICI CURIAE*

*Amici curiae* the District of Columbia and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin (collectively, "*Amici* States") submit this brief in support of Respondents. *Amici* States urge this Court to reaffirm the framework established by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), while clarifying the doctrine's limits.

*Amici* States have extensive experience with the *Chevron* framework. They have joined with the federal government to defend reasonable agency action, *see, e.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014), and have challenged agency action that strays beyond what Congress has authorized, *see, e.g.*, *New York v. Nat'l Highway Traffic Safety Admin.*, 974 F.3d 87 (2d Cir. 2020). They also cooperate with the federal government to jointly administer a host of cooperative federalism programs, from policing to disaster relief efforts. Many of these programs require that *Amici* States work with the federal government to develop complex and highly technical regulatory regimes, often over the course of decades. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012). *Chevron* offers a necessary foundation of stability for those programs.

The *Chevron* framework strikes an appropriate balance between, on the one hand, confining agencies to the parameters set by Congress, and on the other, allowing them to operate effectively within those

parameters. Agencies are, of course, bound to follow Congress's unambiguous directions. *See Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). But as *Amici* States know, it is impossible to legislate every detail needed for the implementation and enforcement of a complex statute. Expert agencies have the technical knowledge, research capabilities, and on-the-ground experience to fill in the gaps left by the legislature to best accomplish the goals of regulatory programs.

Rather than overruling *Chevron*, causing doctrinal upheaval and injecting uncertainty into the regulatory sphere, this Court should reaffirm the *Chevron* framework while clarifying its proper scope.

## SUMMARY OF ARGUMENT

I. As this Court has consistently acknowledged, Congress is not well positioned to legislate the minute details of complex governmental programs. Instead, it often delegates responsibility for filling in those gaps to federal agencies, which have the expertise and experience necessary to carry out Congress's vision. With increasing frequency, Congress has chosen to include the states as partners in these efforts, directing state and federal agencies to work together to implement federal law. Under this cooperative federalism framework, both states and the federal government benefit from shared knowledge, efficient use of resources, and local flexibility.

The nature of cooperative federalism programs makes stability and a measure of predictability essential. States must create plans and allocate

resources far in advance, and unforeseeable changes in a program mid-stream can make its successful implementation impossible. *Chevron*, under which courts defer to federal agencies' reasonable interpretations of ambiguous statutes, fosters stability in two main ways. First, when federal agencies offer fair interpretations of the law to fill statutory gaps left by Congress, *Chevron* allows states to rely on those interpretations in developing their implementation plans. Second, once those plans are approved by the federal agency, *Chevron* offers states some reassurance that the implementation process is unlikely to be derailed by a third-party legal challenge. Overruling *Chevron* would undermine these important government programs and increase costs for both states and regulated entities.

II. As *Amici* States' experiences demonstrate, deferring to agencies' interpretations of truly ambiguous statutes advances several important values. It respects legislators' decision to delegate policymaking discretion to politically accountable agencies rather than to courts. It acknowledges that agencies possess technical expertise that courts do not, better positioning them to make key policy determinations. And given that Congress has been legislating with the *Chevron* framework as its backdrop for decades, preserving the doctrine helps safeguard congressional intent.

That is not to say that deference to agencies leaves courts with no role to play. As *Chevron* itself emphasizes, deference is due only *after* a court determines that Congress has delegated authority to an agency to resolve the relevant question. The Court should take this opportunity to reiterate and clarify

the limits of *Chevron* deference, emphasizing that it applies in the limited circumstances where Congress actually intended that an agency exercise interpretive authority, and only when the interpretation offered is reasonable in light of the statutory scheme.

## ARGUMENT

This Court should reject Petitioners' invitation to discard the longstanding framework of *Chevron*. Contrary to Petitioners' claims, *Chevron* is not a "reliance-destroying doctrine." Pet'rs Br. 16-17. Indeed, *Amici* States have long relied on the stability *Chevron* provides. Under the *Chevron* framework, states need not guess which reading of a genuinely ambiguous statute a particular court might conclude is best. Instead, they have assurance that an agency's reasonable interpretation of a statute it administers is likely to be upheld—albeit only where the interpretation is truly reasonable and the statute is truly ambiguous. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017).

The *Chevron* framework is particularly important to the continued efficacy of cooperative federalism programs. States partner with the federal government to administer a wide range of complex regulatory programs, and they need to be confident that they can rely on federal agencies' reasonable efforts to fill statutory gaps. Overruling *Chevron* would inject uncertainty into the process, threatening states' ability to successfully develop and implement long-term plans. The Court should affirm the decision below and make clear that the *Chevron* framework—

subject to the limitations that *Chevron* itself sets forth—remains good law.

## I. *Chevron* Promotes Successful Cooperative Federalism Programs.

As sovereigns, *Amici* States have a duty to protect the health, safety, and welfare of their populations. *See, e.g.*, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (discussing states' "sovereign power" to "promote the health, safety, morals, and general welfare of its people"). Often, they do so as independent sovereigns, acting within their traditional regulatory spheres to develop and implement their own state-level programs. More and more frequently, however, states work together with the federal government to jointly administer regulatory programs, especially those that are highly complex or require specialized technical expertise. *See* Abbe R. Gluck, *Interstatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 Yale L.J. 534, 552 (2011). Indeed, many of the nation's largest regulatory programs, from communications infrastructure to pollution control, involve cooperation between state and federal agencies. *See* Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 Yale L.J. 1320, 1323 (2023).

These complex and technical statutes often involve either thorny ambiguities or gaps left by Congress for the agency to fill. In those circumstances, *Chevron* is crucial. To successfully develop and implement the multifaceted, long-term plans these programs require, states must be able to rely on federal

agencies' reasonable interpretations of ambiguous statutes. This does not require "reflexive deference" to agencies. Pet'rs Br. 33 (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring)). But it does leave room for agencies to exercise their expert judgment, provided that there is an ambiguity in the statute and the agency's path is reasonable. If a federal agency can demonstrate that its interpretation meets these parameters, then deference is both appropriate and important.

### A. *Chevron* offers predictability in the limited circumstances where a statute is genuinely ambiguous.

Over the past century, Congress has increasingly adopted a regulatory model that allocates authority jointly to federal agencies and state partners. *See* Dave Owen, *Cooperative Subfederalism*, 9 U.C. Irvine L. Rev. 177, 178-79 (2018); *see also* Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. Pitt. L. Rev. 607, 643 (1985) ("Congress . . . can combine federal and state regulatory power through any form of cooperative or creative federalism it finds appropriate to a particular field of regulation."). Under this model, the federal government sets program mandates and goals, and states are given the option of taking the lead on implementation within their borders. *See* Owen, *Cooperative Subfederalism*, *supra*, at 179. The two then continue to work together, with the federal government exercising an oversight role and the states offering feedback and amendments to the implementation plan based on their experiences and local needs. *See id*.

The *Chevron* framework is vital to the success of cooperative federalism efforts: if states could not predict that reasonable federal agency interpretations of ambiguous statutes would survive judicial review, or if they were subject to conflicting mandates from various federal courts, it would result in costly chaos that would undermine the purposes of these programs. But *Chevron* is far from a blank check for agencies. At Step One, for example, deference is due only *after* a court determines that Congress has delegated authority, implicitly or explicitly, for an agency to resolve a genuine ambiguity in the law or fill a gap left by Congress. *See Chevron,* 467 U.S. at 844; *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). Before contemplating deference, judges must "apply[] the ordinary tools of statutory construction" to determine the meaning of the statute. *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (citing *Chevron*, 467 U.S. at 842-43). When textual "canons" of interpretation "supply an answer, '*Chevron* leaves the stage'" and no deference is due. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (quoting *NLRB v. Alt. Ent., Inc.*, 858 F.3d 393, 417 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part)).

And Step Two—where deference occurs—applies only where a court has "employ[ed] traditional tools of statutory construction" and come up short. *Chevron*, 467 U.S. at 843 n.9. Even then, to warrant deference an agency interpretation must be "permissible" and "reasonable." *Id.* at 843-44 & n.11. This Court has held that an agency's interpretation of even an ambiguous provision must "account for both 'the

specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Util. Air*, 573 U.S. at 321 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Similarly, courts will not affirm a change in an agency's interpretation unless it "display[s] an awareness that it *is* changing position" and "show[s] good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). If the agency's interpretation is unreasoned or represents an unexplained flip-flop, judges should reject it.

However, where a statute is genuinely ambiguous—or where Congress has clearly delegated a task to an agency—and the agency acts reasonably, *Chevron* plays an important role. And those circumstances arise often in cooperative federalism's sprawling and complex statutory schemes. Technical statutes often direct the federal agencies to set standards that are "reasonable" or "appropriate." *See, e.g.*, *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 (1983) (discussing the statutory requirement that FERC set rates that are "just and reasonable to the electric consumers of the electric utility and in the public interest" (quoting 16 U.S.C. § 824a-3(b))); *Texas v. EPA*, 983 F.3d 826 (5th Cir. 2020) (explaining that the Clean Air Act's cooperative federalism program directs EPA to promulgate new air quality standards "as may be appropriate" (quoting 42 U.S.C. § 7409(d)(1))). And cooperative federalism statutes describe the requirements of state plans with "words like 'consistent,' 'sufficient,' 'efficiency,' and 'economy,' without describing any specific steps a State must take in order to meet those standards." *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1247-48

(9th Cir. 2013); *see also Nat'l Parks Conservation Ass'n v. EPA,* 759 F.3d 969, 971 (8th Cir. 2014) (describing the Clean Air Act's requirement that state implementation plans "assure reasonable progress toward the CAA's national visibility goals" (internal quotation marks and citation omitted)). When federal agencies issue reasonable regulations interpreting these capacious terms, *Amici* States should be able to rely on them.

It is true that *Chevron* creates its own opportunities for instability. As other *Amici* have noted, *Chevron* allows federal agencies to change course, with their new interpretations receiving deference so long as they are reasonable and align with the statutory text. *See* Br. of West Virginia et al. as *Amicus Curiae* in Support of Pet'rs 12-13. But these changes in position are relatively infrequent and generally occur after there has been a change in administration. *See* Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 Admin. L. Rev. 163, 172 (2009) (noting that "political and legal obstacles prevent extensive repeal" of agency regulations); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. Rev. 471, 497 (2011) (explaining that new administrations may seek to alter rules). And the process of rescinding a rule or promulgating a new one can be lengthy—even more so if the rule gets bogged down in litigation. *See* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. Pa. L. Rev. 923, 945 (2008) (finding that rulemakings tend to last between one and two years). While the risk that a federal agency may change its interpretation after four to eight years creates *some* uncertainty for states, that

uncertainty is far outweighed by the day-to-day predictability that *Chevron* promotes. *See City of Arlington*, 569 U.S. at 307 (noting the "stabilizing purpose of *Chevron*"). After all, if an agency intends to undo a prior statutory interpretation, states will often have years of notice and time to prepare prior to the change. *See id.* But when a court strikes down an agency's interpretation and the regulations that rely on it, the result can be abrupt and chaotic.

### B. The *Chevron* framework is foundational to cooperative federalism programs.

While not every problem requires federal intervention, cooperative federalism programs are critical to addressing regulatory problems that "are so complex that they cannot be resolved by one level of government acting alone." Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1699 (2001) (quoting Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 Yale L. & Pol'y Rev. 187, 215 (1996)). They also offer several benefits over the traditional federal-only regulatory model. Cooperative federalism builds on state agencies' technical knowledge and pre-existing regulatory structures, maximizing resources and making programs more efficient. *See* Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 Ariz. L. Rev. 205, 213 (1997) (explaining that partnerships with states "result in resource savings and economies of scale"). It also allows for flexibility in the design and implementation of programs, which permits more experimentation among the states and better reflects

local conditions and needs. *See* Weiser, *Federal Common Law*, *supra*, at 1699 ("The federal government simply does not have the know-how and resources to tailor broad standards to local circumstances.").

Cooperative federalism programs are not, as other *Amici* have suggested, simply a mechanism by which federal agencies exercise "control" over state and local governments. Br. of West Virginia et al. as *Amicus Curiae* in Support of Pet'rs 21. To the contrary, cooperative federalism programs are *more* respectful of state interests and autonomy than traditional regulatory schemes. "Rather than preempting the authority of state agencies and supplanting them with federal branch offices, cooperative federalism programs invite state agencies to superintend federal law." Weiser, *Federal Common Law*, *supra*, at 1695; *see also* Sarnoff, *Cooperative Federalism*, *supra*, at 212-13 (noting that cooperative federalism programs "preserve and protect traditional state regulatory roles"). Although federal agencies still exercise some control in cooperative federalism schemes—including setting baseline rules and supervising implementation efforts—state agencies retain discretion "to implement the federal law, supplement it with more stringent standards, and, in some cases, receive an exemption from federal requirements." Weiser, *Federal Common Law*, *supra*, at 1696. Cooperative federalism programs are thus best understood as "a sharing of regulatory authority between the federal government and the states." Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 665 (2001).

The result of this shared regulatory authority is a system of "intricate statutory and administrative regimes" developed cooperatively "over the course of many decades." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 581 (discussing Medicaid programs). State and federal agencies engage in dynamic, iterative planning processes to develop cooperative federalism programs, drawing on both technical knowledge and policy expertise to create regulatory requirements and long-term implementation plans. *See* Fahey, *Coordinated Rulemaking*, *supra*, at 1333-43. Given the importance, complexity, and forward-looking nature of these programs, predictability is key—state agencies need to be confident about the parameters within which they are developing and implementing their regulatory schemes. *Chevron* deference enables states to rely on reasonable federal agency interpretations in both developing their state plans and in implementing those plans.

*First*, *Chevron* deference creates a predictable regulatory environment in which states can develop long-term plans. Federal agency interpretations of relevant statutory provisions set the parameters that states must abide by in crafting their plans. *See id.* at 1336-37. As they invest time and resources in designing their regulatory programs, states must be reasonably confident that a federal agency's interpretation is likely to endure—provided, of course, that it aligns with the clear language of the statute and is otherwise reasonable. In the absence of that settled expectation, states would be left to develop complex, long-term plans within a constantly shifting regulatory environment.

For example, the Telecommunications Act of 1996, 47 U.S.C. §§ 251 *et seq*., established a cooperative federalism program that gives state public utility commissions considerable discretion in opening local telephone markets to competition. *See generally* Weiser, *Federal Common Law*, *supra*, at 1694. Under the Act, state commissions have responsibility for approving certain agreements between telephone companies. *See* 47 U.S.C. § 252(e). The FCC interpreted this language to encompass not only approval of such agreements, but also their interpretation and enforcement, *see In re Starpower Commc'ns, LLC*, 15 F.C.C. Rcd. 11277 (2000), which courts have found to be a natural reading of the statute, *see Sw. Bell Tel. Co. v. Pub. Util. Comm'n of Tex.,* 208 F.3d 475, 479-80 (5th Cir. 2000) ("[T]he Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved."). States acted in reliance on the FCC's reasonable interpretation, investing resources to ensure that their commissions would be able to handle both approval and enforcement responsibilities. *See* Weiser, *Federal Common Law*, *supra*, at 1738 n.240 (noting that "the nature of the project" and the role of state agencies was "dramatically different from the historic regulatory project").

The FCC's interpretation granting states this responsibility was challenged in several circuits. *See, e.g.*, *BellSouth Tel., Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1273 (11th Cir. 2003) (en banc) (addressing the question whether a state commission had authority to interpret and

enforce agreements it had previously approved); *Core Commc'ns, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 338-44 (3d Cir. 2007) (addressing a telecommunications company's argument that it was not required to litigate its claim for breach of an agreement before the public utility commission because it did not fall within the commission's statutory responsibility); *Sw. Bell Tel. Co. v. Brooks Fiber Commc'ns of Okla., Inc.*, 235 F.3d 493, 496 (10th Cir. 2000) (discussing as a jurisdictional matter whether the state commission had the authority to interpret an agreement); *Sw. Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 946-47 (8th Cir. 2000) (similar). Applying *Chevron*, the reviewing courts unanimously upheld the FCC's determination as a reasonable interpretation of ambiguous language in the Telecommunications Act. *See BellSouth*, 317 F.3d at 1276-77 (noting that the FCC's determination was entitled to *Chevron* deference and that no court had held otherwise).

The *Chevron* framework fostered clarity for both state and federal participants, who could be confident about their respective jurisdiction and overall role in the program. *See Core Commc'ns*, 493 F.3d at 342 (explaining that the FCC's interpretation established a clear role for the state commissions in deciding intermediation and enforcement disputes, which advanced the Act's goal of cooperative federalism); *see also Global NAPS, Inc. v. FCC*, 291 F.3d 832, 837-39 (D.C. Cir. 2002) (upholding an FCC decision not to preempt a state commission because the relevant determination was in the state's sphere of responsibility rather than the federal government's). As a result, the states' investment in enforcement mechanisms did not go to waste. And *Chevron* was also beneficial to the regulated entities, who gained

clarity about the proper decisionmaker and review process, "saving the time and expense of simultaneous litigation on multiple fronts" and avoiding the confusion of a patchwork of approaches in different circuits. *Global NAPS*, 291 F.3d at 838.

*Second*, *Chevron* fosters stability in the implementation of state plans. Although states rely on federal agency interpretations in developing their regulatory proposals, they must also fill in some gaps themselves. The state proposals, along with the interpretive choices on which they rely, are then subject to review by the federal agency. *See* Fahey, *Coordinated Rulemaking*, *supra*, at 1372. If the federal agency determines that the proposal complies with all regulatory and statutory requirements, it will grant its approval, allowing the state to begin the implementation process.

Federal agency approvals of state plans are analyzed under *Chevron*. *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (applying *Chevron* to review a permit issued by EPA under the Clean Water Act that incorporated Oklahoma's state water quality standards); *Luminant Generation Co. v. EPA*, 714 F.3d 841, 853 (5th Cir. 2013) (applying *Chevron* to EPA's approval of Texas's State Implementation Plan under the Clean Air Act); *Perry v. Dowling*, 95 F.3d 231, 237 (2d Cir. 1996) (applying *Chevron* to review of a state Medicaid plan that "received prior federal-agency approval"). As this Court has explained, when a federal statute "commits to the federal agency the power to administer a federal program" and "the agency has acted under this grant of authority" by approving a state plan, "[t]hat decision carries

weight." *Douglas v. Indep. Living Ctr. of S. Cal.*, 565 U.S. 606, 614-15 (2012).

To take just one example, the efficacy of Medicaid—the largest cooperative program in the nation—depends on the predictability engendered by *Chevron*. Medicaid is "a $627 billion program of public insurance that claims double-digit shares of state and federal budgets, enrolls seventy-four million people, and has an administrative footprint to match." Fahey, *Coordinated Rulemaking*, *supra*, at 1334. Its governing statutes "permit each government to pursue a range of programmatic goals," so to initiate a state Medicaid program, the Department of Health and Human Services ("HHS")[1] and the state Medicaid agency "must negotiate a state program that complies with each agency's legislative authorization." *Id.* These negotiations are memorialized in an intergovernmental agreement known as a Medicaid state plan, which may be modified through state plan amendments ("SPAs") proposed by the states and approved by the federal government. *See id.* at 1334-37.

Even after the state and federal agencies "agree to the general program," they must still fill in an

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[1] Congress delegated responsibility for administering the Medicaid program and reviewing state Medicaid plans and amendments to the Secretary of HHS. *See* 42 U.S.C. § 1396a(b). The Secretary, in turn, delegated that responsibility to the regional administrator for the Center for Medicare and Medicaid Services ("CMS"). *See* 42 C.F.R. § 430.15(b). CMS therefore operates as the federal agency partner in practice.

overwhelming array of details about how the program will function. *Id.* at 1335. Regulators "decide who is eligible for the program, what they are eligible to receive, . . . how eligibility will be determined," and much more. *Id.* State Medicaid plans and SPAs are, as a result, highly detailed and complex regulatory documents that reflect the investment of enormous amounts of time and resources. *See id.* at 1338 (describing the "almost dizzying array of state processes" required to craft an SPA); *id.* at 1343 (noting that "HHS invests significant effort in evaluating proposed plan amendments"). To be willing to make such an investment, it is key that regulators feel confident that their efforts to interpret obvious statutory gaps are likely to withstand judicial scrutiny as long as they are reasonable.

California's experience attempting to cut costs by implementing reduced reimbursement rates for certain Medicaid services illustrates the importance of *Chevron* deference. In 2011, Medi-Cal, California's Medicaid program, submitted two SPAs to the Center for Medicare and Medicaid Services ("CMS"), each of which proposed rate reductions for certain services covered by Medicaid. *See Managed Pharmacy Care*, 716 F.3d at 1240. While developing the SPAs, the state agency "studied the potential impact of rate reductions on many Medi-Cal services, reviewing data collected and analyzed over several years in the process." *Id.* at 1242. In support of its proposed amendments, the state agency "submitted access studies for each of the affected services" and "studies of providers' costs with respect to some of the services." *Id.* It also "submitted an 82-page monitoring plan, which identified 23 different

measures" the state agency planned to "study on a recurring basis to ensure the SPAs d[id] not negatively affect beneficiary access." *Id.*

CMS approved both SPAs. *Id.* at 1243. Shortly thereafter, various providers and beneficiaries filed suit to challenge the rate reductions, claiming that the state had violated the Medicaid Act because it had not performed cost studies, which the challengers argued the statute required. *Id.* The Ninth Circuit disagreed. It explained that "through her approvals of the SPAs," the Secretary had reasonably interpreted the Medicaid Act not to require "any particular methodology a State must follow before its proposed rates may be approved." *Id.* at 1245. After all, the "statute sa[id] nothing about cost studies" or "any particular methodology." *Id.* at 1249. It stated only that "reimbursement rates must be consistent with efficiency, economy, and quality care." *Id.* Considering the breadth of that language, the gaps it left, and the reasonableness of the agency's interpretation, the court held that *Chevron* deference applied. *Id.* at 1247.

In reaching this conclusion, the Ninth Circuit emphasized the detailed, elaborate nature of state plans and the expertise that the federal agency must draw on to evaluate them. State plans and amendments must "compl[y] with a vast network of specific statutory requirements." *Id.* at 1248 (quoting *Pharm. Rsch. & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 821-22 (D.C. Cir. 2004)). And "[d]etermining a plan's compliance" with federal statutes "is central to the program"—"a State cannot participate in Medicaid without a plan approved by the Secretary."

*Id.* That highly technical determination, the court concluded, is best left to the expert agency, which "has been giving careful consideration to the ins and outs of the program since its inception" and "is the expert in all things Medicaid." *Id.*

Other *Amici*'s insistence that courts should defer to *state* agencies rather than federal agencies because state agencies may be more expert on the particular regulation at issue, *see* Br. of West Virginia et al. as *Amici* Curiae in Support of Pet'rs 21, only affirms how important *Chevron* is to cooperative federalism programs. Whichever agency's interpretation is entitled to deference, the essential point remains the same—deference to the interpretive viewpoint of at least *one* of the expert partners in a cooperative federalism program is necessary for the program to function as intended. In the absence of such deference, there would be no foundation of stability on which the program could rest, making it difficult (or impossible) to design and implement these complex regulatory schemes.

### C. Overruling *Chevron* would be costly and chaotic.

The destabilization of cooperative federalism programs that would result from overruling *Chevron* would undermine these programs' important goals and place substantial burdens on states, the federal government, and regulated entities. Though *Amici* States may not always agree with federal agencies' interpretations, states' role in cooperative federalism programs requires them to work within the boundaries established by federal agencies. Without the stability that *Chevron* affords, states could no

longer be assured that the regulations they planned around would remain in effect for any substantial period—particularly when each reviewing court would have to interpret vague terms like "efficiency," "quality," or "public interest" anew. States would be left to contend with uncertainty about the requirements their plans should meet, and as a result may put off the development of those plans or choose not to participate in cooperative federalism programs at all. *See, e.g.*, Gluck, *Interstatutory Federalism*, *supra*, at 540 (explaining that after the Affordable Care Act passed, a number of states held off on developing and implementing state exchanges until HHS had promulgated regulations to guide their efforts).

States that did move forward with developing and implementing their plans would find it difficult to predict whether a reasonable plan endorsed by their federal partners would survive judicial review. In the highly complex and technical world of cooperative federalism programs, adjusting to a new understanding of the statute could require years of additional research, analysis, and collaboration with the federal agency. State budgets, which are developed months in advance and require coordination between the governor, the legislature, and agencies, may not be flexible enough to adjust to a last-minute shift in interpretation. *See State Budget Basics*, Ctr. On Budget & Pol'y Priorities (May 24, 2022), https://tinyurl.com/f8tbuv5y (noting that state funds are allocated to cooperative federalism programs like Medicaid, highway programs, and public transit as part of the budgeting process). And it may also be difficult for regulated entities and

program beneficiaries to adjust to last-minute changes, especially since they too may have made plans in reliance on the agencies' original approach. *See* Ryan Stoa, *From the Clean Power Plan to the Affordable Clean Energy Rule: How Regulated Entities Adapt to Regulatory Change and Uncertainty*, 47 Hofstra L. Rev. 863 (2019) (explaining that "[r]egulated entities often struggle to adapt to regulatory change and uncertainty," particularly in sectors where "the scope and scale of project-level planning and management are broad, and changes to these processes can be highly disruptive").

Nor is there any guarantee of national uniformity in the absence of *Chevron* deference. While state-level flexibility is a hallmark of cooperative federalism programs, so too are "uniform federal standards" that set a baseline for state experimentation. Weiser, *Federal Common Law*, *supra*, at 1696. If each circuit were empowered to determine its own best reading of the federal statute, it is likely that this shared baseline would disappear. Instead, federal agencies would have to administer the same program under as many as a dozen different (and potentially conflicting) statutory interpretations, and states would be forced to operate within different regulatory environments than their peers. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 861 (2001). The results would likely be both inequitable and chaotic, frustrating Congress's vision for these programs. *See City of Arlington* , 569 U.S. at 307 ("Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*.").

## II. The Court Should Clarify *Chevron*, Not Overrule It.

A. *Chevron* is not merely a fundamental ingredient in cooperative federalism programs—it is a foundational decision in administrative law. Courts, Congress, and regulated entities alike have relied on *Chevron* for decades. It is one of the most cited decisions in history, appearing in over 15,000 cases. *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 Geo. Wash. L. Rev. 1392, 1394 n.5 (2017). Plus, Congress has long legislated against the backdrop of *Chevron* and has declined several opportunities to legislatively abrogate it. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 994 (2013) (finding that 82% of surveyed congressional staffers knew of *Chevron* and most employed it while drafting); *see generally* Br. of Law Profs. Kent Barnett & Christopher J. Walker as *Amici Curiae* in Support of Neither Party 8-13. For the last 40 years, as Congress has passed statutes and created regulatory programs, leaving regulatory gaps for agencies to fill, it has done so under the assumption that *Chevron* would apply to the agencies' interpretations. *See* Bressman & Gluck, *Statutory Interpretation*, *supra*, at 997 (finding that 91% of surveyed congressional staffers "reported that one reason for statutory ambiguity is a desire to delegate decisionmaking to agencies"); *City of Arlington*, 569 U.S. at 296 ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."). And regulated entities—including states in some cases, *see*

*supra*, Parts I.B & C—have depended on *Chevron* and the stability it creates when planning how to comply with federal law. In short, *Chevron* is a deeply entrenched decision, and one that has shaped the behavior of legislators, government agencies, judges, regulated entities, and the public alike for decades. *See* Cass R. Sunstein, Chevron *as Law*, 107 Geo. L.J. 1613, 1670 (2019) ("[O]verruling *Chevron* would create an upheaval—a large shock to the legal system, producing confusion, more conflicts in the courts of appeals, and far greater politicization of administrative law.").

*Chevron* also advances a host of important values. Agencies possess technical and policymaking expertise, which makes them better positioned to determine how best to advance Congress's legislative goals than non-expert courts. *See Chevron,* 467 U.S. at 865 ("Judges are not experts in the field, and 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."); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) ("Agencies (unlike courts) have 'unique expertise,' often of a scientific or technical nature, relevant to applying a regulation 'to complex or changing circumstances.'" (quoting *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991))). Deferring to agencies' resolution of gaps in federal statutes also advances political accountability. "While agencies are not directly accountable to the people, the Chief Executive is." *Chevron*, 467 U.S. at 865. "[F]ederal judges—who have no constituency—have a duty to respect

legitimate policy choices made by those who do." *Id.* at 866; *see also Kisor*, 139 S. Ct. at 2413 ("[A]gencies (again unlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public."). And deference also maintains the separation of powers, with the judiciary respecting the legislature's determination about how to allocate policymaking responsibility. *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 6 (1983).

Political accountability and technical expertise are particularly important when agencies are asked to make value judgments. For example, in evaluating applications for radio station licenses, the Federal Communications Commission is directed by statute to determine "whether the public interest, convenience, and necessity will be served" by granting the application. 47 U.S.C. § 309(a). The Federal Energy Regulatory Commission must set rates for the sale of natural gas that are "just and reasonable." 15 U.S.C. § 717c(a). And the Surface Transportation Board is charged with regulating railroads to "encourage the purchase, acquisition, and efficient use of freight cars." 49 U.S.C. § 11122(a). It would make little sense for non-expert federal courts to decide de novo which licensees will act in the public interest, which natural gas rates are reasonable, or how freight cars may be most efficiently used.

B. *Amici* States' own experiences illustrate how deference to agencies advances these important interests. In many states, courts have adopted some form of deference to state agency interpretations. *See* Aaron Saiger, Chevron *and Deference in State*

*Administrative Law*, 83 Fordham L. Rev. 555, 559 (2014). Consistent with states' role as laboratories of democracy, these deference regimes vary in form. Collectively, however, they demonstrate that there are good reasons to value an agency's interpretation of an ambiguous statute.

State courts have highlighted circumstances in which the need for deference is most acute. The Alaska Supreme Court, for example, emphasizes that deference to agencies is particularly important "when the interpretation at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions." *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011). The California Supreme Court has similarly affirmed the need to "consider the agency's specialized knowledge and expertise—[which is] especially relevant where the statute at issue is a complex, technical one." *Cal. Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist.*, 362 P.3d 792, 797 (Cal. 2015). And Oregon's highest court has held that deference is warranted when a statute "calls for completing a value judgment" by using terms like "good cause," "fair," "undue," or "unreasonable." *Springfield Educ. Ass'n v. Springfield Sch. Bd.*, 621 P.2d 547, 555 (Or. 1980). The use of such "delegative terms," the court noted, grants a "choice of policy" to the agency, and deference to the agency's determination respects that legislative delegation. *Id.* at 556.

C. To be sure, unthinking and "reflexive deference" does not advance the interests that underpin *Chevron* or its state-court analogues. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring). But Chevron does not

call for reflexive deference. *See supra* pp. 7-8. Instead, it contains important safeguards that ensure deference is granted only when warranted. And to the extent there are "problems" with *Chevron*, *see* Pet'rs Br. 7, they are the result of *misapplication* of the doctrine rather than the doctrine itself, *see Buffington v. McDonough*, 143 S. Ct. 14, 19-20 (2022) (Gorsuch, J., dissenting from denial of certiorari) (explaining the dangers of "[o]verreading *Chevron*"). If the Court believes that lower courts are misinterpreting *Chevron*, it should clarify the doctrine's bounds, not overrule it.

Start with Step One. At the outset, a court must determine whether, based on the statutory text, "the intent of Congress is clear." *Chevron*, 467 U.S. at 842-43. If so, no deference is due. If not, the court moves on to the next step. In the context of an *express* delegation, Step One is straightforward. If, for example, a statute requires an agency to set "reasonable" rates or act in the "public interest," then the delegation to the agency is clear. *See Chevron*, 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). And when Congress "has assigned [a] decision to an executive branch agency . . . the courts should stay out of it." Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge As Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907, 1912-13 (2017).

Absent an express delegation, however, courts have the responsibility to carefully parse "whether the statute speaks to the issue at hand." Philip J.

Weiser, Chevron*, Cooperative Federalism, and Telecommunications Reform*, 52 Vand. L. Rev. 1, 8 (1999). This Court could make that task simpler by reiterating that, before turning to Step Two, judges should "apply[] the ordinary tools of statutory construction"—all of them—to determine whether "Congress has directly spoken to the precise question at issue." *City of Arlington*, 569 U.S. at 296 (quoting *Chevron*, 467 U.S. at 842-43). At this step, courts must "tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies' authority." *Id.* at 307. They should not merely "throw up their hands in the face of a complex regulatory scheme." Weiser, Chevron*, supra*, at 49. Applying this careful approach consistently would address Petitioners' concerns about whether courts are fulfilling their duties under Article III. *Cf.* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2154 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)).

The Court could similarly make clear that Step Two is not a "blank check" for agencies. Pet'rs Br. 44. Not every agency interpretation is "permissible" or "reasonable." *Chevron*, 467 U.S. at 843-44 & n.11. For example, this Court has already held that an agency's interpretation must be in accordance with the statutory scheme as a whole. *See Util. Air Regul. Grp.*, 573 U.S. at 321. Similarly, courts need not defer to an agency that "failed to provide even [a] minimal level of analysis" so that "its path may reasonably be discerned." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). And arbitrary or capricious interpretations also do not warrant deference. *Judulang v. Holder*,

565 U.S. 42, 52 n.7 (2011). These constraints, when taken seriously, effectively cabin agency discretion.

By contrast, there are a few situations in which agency deference may be particularly appropriate at Step Two—for example, if the statute is extremely technical or deals with a subject matter that requires scientific or other specialized expertise. *See Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (noting that factors like "the related expertise of the Agency" and "the complexity of [the] administration" help "indicate that *Chevron*" applies). In those scenarios, the rationale for deference is at its apex. Still, the agency's action must always be in harmony with the statutory purpose and cannot be arbitrary. This Court could say as much and guard against future misapplication of *Chevron*.

Indeed, there are plenty of cases on the books where agency action has been invalidated under *Chevron*. In *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009), for example, the D.C. Circuit vacated a retroactive order issued by the Federal Energy Regulatory Commission, explaining that it "flatly violate[d] the plain language" of the statute and therefore failed at *Chevron* Step One. *Id.* at 522; *see also Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 142-43 (D.C. Cir. 2006) (vacating EPA approval of annual water quality standards when the statute required that they set a daily rate). And in *Friends of Animals v. Haaland*, 997 F.3d 1010 (9th Cir. 2021), the Ninth Circuit vacated a Fish and Wildlife Service rule at *Chevron* Step Two, holding that the rule was "inconsistent with the statutory scheme" of the Endangered Species Act. *Id.* at 1013; *see also Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1025 (5th Cir.

2019) (vacating a portion of EPA's rule under the Clean Water Act because it conflated standards "in a way not permitted by the statutory scheme"). These cases show that, properly applied, the doctrine is not toothless.

In sum, *Amici* States urge the Court to clarify *Chevron* rather than overrule it. Doing so would acknowledge the important role *Chevron* plays in applicable cases—and the reliance interests it has generated—while guarding against misapplication.

## CONCLUSION

The Court should decline to overrule *Chevron* and instead clarify its scope and application.

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