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 *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Table of Contents

Table of Contents

Page

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

Page

STATUTES AND REGULATIONS

Page

Page

Page

Page

OTHER AUTHORITIES

Page

Page

Page

Cited Authorities

Page

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* joining this brief are civil rights organizations committed to ensuring that federal administrative agencies make real the promises of our nation's civil rights laws through Congressionally authorized rulemaking and enforcement. They therefore have an interest in this Court's decision on the continued viability of *Chevron* deference, a doctrine delivering greater certainty, predictability, and appropriate allocation of authority in addressing how statutes are applied in particular contexts to and by the bodies that have the greatest expertise and ability to consider empirical data. The civil rights community relies upon agency rulemaking to clarify the scope of individuals' rights to those who may be subjected to discrimination and to increase the likelihood that regulated entities will refrain from engaging in unlawful conduct because of education and training informed by the content of regulations. A decision overturning *Chevron* risks making this critical work materially more difficult and would provide no real countervailing benefit.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to secure equal justice for all through the rule of law,

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1. Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

targeting the inequities confronting Black Americans and other people of color. The Lawyers' Committee uses legal advocacy to achieve racial justice to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. The Lawyers' Committee has for decades advocated for federal administrative agencies to play a robust role in the implementation of our nation's civil rights laws, both through rulemaking that clarifies the scope of anti-discrimination protections and by engaging in proactive enforcement. Administrative agencies play a crucial role in advancing the Lawyers' Committee's goal of preventing discrimination in employment, housing, education, and other areas that affect broader access to opportunity.

The Lawyers' Committee is joined by additional civil rights organizations identified in Appendix A.

SUMMARY OF ARGUMENT

Congress has designed a robust system of federal civil rights protections and complementary laws that provide significant protections to communities of color, women, persons with disabilities, and other groups that have historically been subjected to discrimination. Congress entrusts federal agencies with the responsibility of developing the infrastructure necessary to make those rights real. Enabled by clear congressional delegations of authority, federal agencies have translated Congress's aims into workable standards that clarify to the public what the law requires in a level of detail essential for those laws to achieve the intent of Congress. These regulations yield benefits for individuals and groups that

have historically been subject to discrimination, regulated entities that must understand their obligations under the law, and courts that must interpret and enforce these laws.

Rulemaking of this kind has been crucial to the advancement of civil rights to the benefit of the entirety of our society. Notable agency regulations address explicit illustrations of conduct that violates anti-discrimination laws and other key statutes. Such regulations fulfil the legislative aims of Congress in enacting landmark laws such as the Fair Housing Act ("FHA"), the Fair Labor Standards Act ("FLSA"), and the Violence Against Women Act ("VAWA"). In the absence of agency rulemaking that addresses points on which underlying statutes are silent or purposely broad, our society's ability to realize the benefits of the protections enshrined in this nation's landmark civil rights statutes would be significantly impeded.

Any assessment of the *Chevron* doctrine, first defined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and refined most pertinently in *United States v. Mead*, 533 U.S. 218 (2001), must give due weight to the benefits of its requirement that courts defer to agency regulations that fill gaps or resolve ambiguities in statutes and that are reasonable. In *Mead Corp.*, this Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226. Even in the absence of such predicates, some deference to the

agency is warranted nonetheless, "given the 'specialized experience and broader investigations and information' available to the agency and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Id.* at 234. History demonstrates that deference to the hard-earned expertise of agencies carries with it substantial benefits.

Congress acts with a rational appreciation of the complexity of interpretation and implementation of its statutes, a pragmatic reliance on the rulemaking process, and a reasoned determination that implementation requires some leeway for agencies to interpret statutes that cannot exhaustively map out every detail of the vast landscape of issues Congress chooses to address. Congress does so because it is aware that it does not have the depth of expertise or thousands of personnel necessary to replicate the expertise of the agencies that implement its mandates. Congress also understands that if the interpretation of a statute by the executive branch is construed as unreasonable by the judicial branch under the current state of the law, the interpretation of the judicial branch will control. Properly applied, the *Chevron* doctrine is of vital consequence to the functional operation of government.

For those who rely upon the protections of the regulations that implement the civil rights, fair housing, and workplace protections that follow from statutes such as the FHA, 42 U.S.C. §§ 3601-3619, and FLSA, 29 U.S.C. §§ 201-219, and for those who must operate within the regulations implementing those statutes, *Chevron* deference has far-reaching benefits of certainty and adaptability to changed circumstances and new data.

This Court should decline to overturn *Chevron*, a decision adopted unanimously by the deciding justices, which embodies principles that have successfully guided the federal courts through a remarkably broad array of controversies for decades, and which facilitates the effective implementation of civil rights laws.

ARGUMENT

I. Congress Has a Long-Standing and Wholly Rational Reliance Interest in the Durability of *Chevron*.

A. *Chevron* is a Constitutionally Endued Doctrine Demonstrating the Longstanding and Constitutionally Correct Separation of Powers.

Deference to the executive branch is traceable to the origins of the Republic. *See United States v. Vowell & M'Clean*, 9 U.S. 368 (1809) (Marshall, J.) (discussing that the Court should "respect[] the uniform construction" of agencies on "doubtful questions"); *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1920) ("It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision.").

The anti-accumulationist view that, in light of Federalist No. 47, the executive branch may not exercise any quasi-judicial or legislative functions without running afoul of the separation of powers principles in the Constitution is a profound misunderstanding of the

document and the separation of powers as conceived by the Framers. *See City of Arlington V. FCC*, 569 U.S. 290, 304, n.4 (2013) (Scalia J.) (When agencies exercise "legislative" and "judicial" power, "[t]hese activities take 'legislative' and 'judicial' forms, but they are exercises of - indeed, under our constitutional structure they must be exercises of - the 'executive Power.'"); *see also* M. Herz & K.M. Stack, *The False Allure of the Anti-Accumulation Principle*, 102 B.U.L. Rev 925, 943, 946-49 (2022).

Congress could amend the Administrative Procedure Act ("APA") to overrule *Chevron* but has chosen not to do so. In continuing to leave *Chevron* intact for decades, the legislature has been neither negligent nor incompetent. As this Court's many prior decisions applying *Chevron* have concluded:

> *Chevron* is rooted in a background presumption of congressional intent: namely, "that Congress, when it left ambiguity in a statute" administered by an agency, "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of 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 (internal citations omitted).

"Broad delegation to the Executive is the hallmark of the modern administrative state; agency rulemaking powers are the rule rather than, as they once were, the exception...." A. Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 516 (1989). One can bemoan that decision by Congress, but one cannot ignore it in an effort to frustrate that Congressional prerogative by elevating that choice to a constitutional infirmity.

Overruling *Chevron*, and in the process effecting a total reversal of the course that this Court has charted for decades, is unnecessary after *Mead Corp.* and potentially reckless. "If the *Chevron* rule is not a 100% accurate estimation of modern congressional intent, the prior case-by-case evaluation was not so either-and was becoming less and less so, as the sheer volume of modern dockets made it less and less possible for the Supreme Court to police diverse application of an ineffable rule." *Id.* at 517. And when "the fair measure of deference" is held to vary with the circumstances based upon the "agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position," *id.* at 228, and with the inescapable acknowledgment that "[t]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *id.* at 227 (quoting *Bragdon* v. *Abbott,* 524 U.S. 624, 642 (1998) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 139-140 (1944)), reversal of *Chevron* risks leaving no place for agency expertise or the Congressional delegation

of authority, a position which cannot be reconciled with common sense or this Court's precedents going back to 1809. *See Vowell*, 9 U.S. at 368.

Among the many casualties befallen from the abandonment of established principles of deference will first be the public—especially the most vulnerable—who will face uncertainty in exercising their essential protections, and second, the federal courts, which absent deference to agency determinations, will be flooded with litigation by parties emboldened by the news that the experience and expertise of the executive branch will not be given deference.

B. Congress' Capacity to Legislate Effectively Depends on the Institutional Competence of Administrative Agencies to Build Out Robust Statutory Protections.

1. Through comprehensive delegation, Congress recognizes that agencies have expertise, informed by data and empirical analysis, that equip them to develop comprehensive civil rights enforcement schemes and elucidate examples of conduct that violates civil rights laws.

Often described as the 'practical justification for the *Chevron* doctrine,' *see e.g.,* Scalia, *supra*, at 514—though admittedly not its "theoretical justification"—agencies' institutional competence to effectively implement the laws enacted by Congress serves as a compelling reason not to overturn *Chevron*. Indeed, the Court in *Chevron* acknowledged that agencies—as experts in their fields and

as politically accountable entities—are better suited than Congress to work out the minutia required to effectuate statutes and are better suited than courts to reconcile policy choices necessary for the administration of federal laws. *See Chevron*, 467 U.S. at 865-66. The *Chevron* doctrine recognizes the functional strengths of agencies in the context of interpretive rulemaking as "mak[ing] for good government" and "stressed…the virtues of placing interpretive decisions in the hands of accountable and knowledgeable administrators." Elena Kagan and David J. Barron, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212, 223 (2001).

Congress does not have the time, staff resources, or subject matter expertise to include the detail and complexity in legislation that executive agencies are well-positioned to spell out through rulemaking. Federal agencies have vast technical expertise, experience, and resources in their respective fields, *see, e.g., Chevron*, 467 U.S. at 865; *Mead Corp.*, 533 U.S. at 234 (recognizing agencies' specialized experience and ability to investigate and collect information); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (recognizing the substantive technical expertise of agencies required to administer regulations in complex circumstances), and the modern legislature does not. *See* Rachel E. Barkow, *The Wholesale Problem with Congress: The Dangerous Decline of Expertise in the Legislative Process*, 90 Fordham L. Rev. 1029, 1048-49 (2021) (discussing the decline in number and substance of congressional hearings since the 1970s).

2. The Structure of the Administrative State Incorporates Sufficient Checks on an Agency's Delegated Authority to Ensure Executive Action Remains Transparent and Accountable to the Public and the Co-Branches.

When Congress grants an agency rulemaking authority, the agency still must follow the APA to promulgate rules. The APA specifies the procedures under which agencies develop and implement rules as well as a framework for judicial review of the exercise of this delegated authority to ensure agencies act appropriately within their power.

The APA limits agencies' delegated authority in several ways. First, the APA's "notice and comment" requirements for rulemaking prescribe transparency through public involvement, allowing a critical opportunity for the public to inform agencies about the impact of a proposed agency action.

The APA's rulemaking procedures are triggered when agencies engage in the process of "formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). An agency must initiate this process first by notifying the public: the agency must issue a "[g]eneral notice of proposed rulemaking," ordinarily by publication in the Federal Register. 5 U.S.C. § 553(b). Then, in most instances, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). Agencies are required to take seriously comments received by responding to significant comments. *See Citizens to Preserve Overton*

Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Once an agency issues its final rule, the rule must include "a concise general statement of [its] basis and purpose." 5 U.S.C. § 553(c).

The APA requires agencies not only to consider the varying interests of those to be regulated by their actions, but to explain the basis for its action and how it accounted for those interests in doing so. This aspect of rulemaking is critical for agency actions affecting civil rights, as protected individuals and regulated entities both have a direct opportunity to drive agency decision-making in the identification and redress of conduct that violates federal civil rights laws. The requirement to directly consider the input of individuals and groups engaged in the subject being regulated is unique to this executive function—no such requirement exists in proceedings before the judicial branch, which require only standing before a tribunal, or in interactions with the legislative branch, which rely on representative decision making. Through the APA, agency rulemaking is transparent and accountable to the public to a unique degree.

The procedural requirements for rulemaking under the APA are extensive. As a result, "[r]ules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'" *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281–303 (1979)). Because of the accountability built into the rulemaking process, these rules are rightly afforded deference. So long as an agency complies with the APA's rulemaking procedures in creating its own rules and procedures, a court may not "'impose upon [an] agency

its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.' To do otherwise would violate 'the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'" *Perez,* 575 U.S. at 101-02 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 549 (1978)).

The APA speaks also to judicial review, communicating Congress's view that such review is not, and should not be, an unfettered right to undo agency actions that comply with the procedures of the APA and Congressional intent. *See* 5 U.S.C. § 706. The detailed mapping of judicial review in § 706 confirms the important role of agency delegation and deference to agency discretion, while providing a tailored mechanism to overturn agency actions that exceed that authority: the arbitrary-and-capricious standard has been used effectively by this Court its review of recent regulations and policies. *See, e.g.*, *Biden v. Missouri*, 142 S. Ct. 647, 653–654 (2022) (per curiam); *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021)*; Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 215 (2016).

Congress retains the authority to step in. The Congressional Review Act ("CRA") provides an opportunity for direct Congressional intervention to undo agency actions with which the legislative branch disagrees. *See* 5 U.S.C. §§ 801-808.[2] Any challenge to *Chevron* deference

2. The CRA has been in effect since 1996 and has been used to overturn a total of 20 rules. Congressional Research Service, *The Congressional Review Act (CRA): A Brief Overview*, Feb. 27, 2023, https://crsreports.congress.gov/product/pdf/IF/IF10023.

must acknowledge the reality of the CRA, the APA's procedures, and the voices of others with vested interests who have expressed views contrary to others, including through the APA's notice-and-comment process. Congress could intervene in any dispute over the implementation of its statutes at any time but chooses in the vast majority of cases not to do so. This Court should not give insufficient weight to the complexity of governance that is surely a factor in those Congressional decisions and, as a result, give too little credit to the foundation and benefits of *Chevron* deference.

C. When Drafting Civil Rights Laws, Congress Legislates with a Presumption of Deference Towards Agency Judgments.

1. Chevron operates as a "background principle" assumed by Congress when it drafts civil rights laws.

Congress can legislate to meet the needs of the complex and growing American society because it knows that the administrative agencies charged with implementation of those laws will take up the torch and administer Congress's purpose. *Morton v. Ruiz*, 415 U. S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known." Scalia, *supra*, at 517.

Deference to administrative agency expertise began long before the *Chevron* ruling. *See, e.g.*, *United States v. Moore*, 95 U.S. 760, 763 (1877) ("The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."); *Potter v. Hall*, 189 U.S. 292, 300 (1903) ("We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution."); *United States v. Cerecedo Hermanos y Compania*, 209 U.S. 337, 339 (1908) ("In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.").

Abandoning *Chevron* deference would disrupt the status quo relied upon by Congress and impede the modern functioning of a complex government addressing important issues such as civil rights. *Chevron* deference empowers Congress to draft laws regarding civil rights without needing to anticipate every detail of what the law will require to be implemented, leaving the filling of gaps to the expertise of the agency with delegated authority. The doctrine has allowed Congress to focus on the overarching needs of society because administrative agencies are able to use their expertise to execute the details. Scalia, *supra*, at 514 ("Agencies are more likely to know what is required of the statute than the courts based on subject matter expertise and familiarity with the legislation in question."). Furthermore, this Court has recognized that Congress has been aware of and legislated based on the precedent of deference to agency interpretations of statutes. *See, e.g., Nat'l Cable &*

Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 992 (2005) (noting Congress drafts terms in statutes with consideration to regulatory history defining such term); *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 159, (1993) (noting the presumption that Congress is aware of "settled judicial and administrative interpretation[s]" of terms when it enacts a statute).

2. Congress expressly delegated rulemaking authority to HUD under the Fair Housing Amendments Act and to the Consumer Financial Protection Bureau under the Equal Credit Opportunity Act, and the Court should not disregard these delegations.

Chevron deference is essential to the functioning of our civil rights laws. The protections against discrimination in various aspects of our lives, from banking to housing to employment to voting, depend on vigorous by agencies to which *Chevron* deference is integral. Were this Court to do away with the *Chevron* doctrine, uncertainty would surround agency regulation advancing the protections of core components of the Civil Rights Act and similar enactments, potentially limiting the authority and efficacy of agencies such as the Department of Housing and Urban Development ("HUD"), Consumer Financial Protection Bureau ("CFPB"), and the Department of Justice to act as Congress intended. The Court should not disrupt this delegation by upending the presumption of deference, as the result would be more far-reaching than a decrease in the effectiveness of regulations protecting Atlantic herring populations and the livelihoods of those who

harvest them, but in compromised protections for people seeking a place to call home, lines of credit, or reliable employment—to name a few.

The FHA outlaws discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability, 42 U.S.C. §§ 3604-3606, and the Equal Credit Opportunity Act ("ECOA"), administered by CFPB, enhances this protection of civil rights in housing by banning discrimination in in all types of credit transactions, including home mortgages, on similar grounds. 15 U.S.C. §§ 1691 – 1691f. When Congress amended the FHA in 1988, it gave broad rulemaking authority to HUD to promulgate rules to "carry out" the Act, *id.* § 3614a, and, independent of the FHA, Congress has assigned to the Secretary of HUD the power to "make such rules and regulations as may be necessary to carry out [their] functions, powers, and duties" in its organic statute. *Id.* § 3535(d). Congress has thereby made clear its intent to arm HUD with robust authority to promulgate regulations "to provide…for fair housing throughout the United States" and to ensure "the general welfare and security of the Nation and the health and living standards of our people" by "eradicate[ing] discriminatory practices within a sector of our Nation's economy." *See Id.* §§ 3601, 3531; *Texas Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 539.

Even 12 years before its articulation of the *Chevron* doctrine this Court recognized the language of the FHA to be "broad and inclusive," and HUD's consistent administration and construction of the FHA to be "entitled to great weight," *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-10 (1972), and "command[ing of] considerable deference." *Gladstone Realtors v. Vill. Of*

Bellwood, 441 U.S. 91, 107 (1979). This enables HUD to promulgate particularized regulations contained within 24 C.F.R. pt. 100 to address the intent of Congress to combat housing discrimination through the FHA in an array of contexts necessary to securing Congress's objectives, which CFPB has done as well to regulate lenders' behavior. *See, e.g.*, 12 C.F.R. § 1002.4(b); 12 C.F.R. § 1002.5(b-e); 12 C.F.R. § 1002.6.

Because housing discrimination manifests in different ways depending on the local context and is constantly evolving, HUD and CFPB must be afforded deference in promulgating regulations to address it, in fulfillment of the duties and responsibilities imposed by Congress. To illustrate this point, the regulations of both the FHA and ECOA outlaw the discriminatory practice of "redlining," which is the refusal to make residential loans or imposition of more onerous terms on loans made because of the predominant race or national origin of the residents of the neighborhood in which the property is located. *See Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,266, 18,268 (April 15, 1995); 24 C.F.R. §§ 100.110-135 (unlawful discriminatory practices); *cf. e.g., Nationwide Mut. Ins. v. Cisneros,* 52 F.3d 1351 (6th Cir. 1995) (insurance redlining), *cert. denied*, 516 U.S. 1140 (1996); *NAACP v. American Family Mut. Ins.*, 978 F.2d 287 (7th Cir. 1992*)* (same), *cert. denied*, 508 U.S. 907 (1993); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924 (8th Cir. 1993) (mortgage redlining); *Laufman v. Oakley Building & Loan Co.,* 408 F. Supp. 489 (S.D. Ohio 1976) (mortgage redlining). Unfortunately, the history of the fight for civil rights teaches that one door frequently opens when another is closed, and alternative forms of housing discrimination emerge to circumvent existing

regulations; for example, "reverse redlining" is a type of discrimination not foreseen by Congress in the FHA and ECOA, that involves targeted, predatory lending of "too much easy access to high-cost credit" to communities of color and Black neighborhoods in particular, rather than the outright denial of credit. *See* Robert G. Schwemm, Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 392 (2010) (citing *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000)). Courts have acknowledged the existence of this practice and its potential violation of the FHA. *See, e.g.*, *Baker v. F&F Inv.*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970); *Horne v. Vi*, 2018 U.S. Dist. LEXIS 11194 (N.D. Ga. March 20, 2018) (setting forth the elements of a reverse redlining claim in the Eleventh Circuit).

Agency authority is essential to protecting Americans from both traditional redlining and reverse redlining, and enforcing the FHA and ECOA as the regulations describe above provides guidance to the courts—which are not designed to provide timely policy responses to newly developing discriminatory practices—as to the illegality of those practices. The elimination of the *Chevron* doctrine from U.S. jurisprudence could shift the onus of competent administration of these and similar protections from well-equipped agencies to the courts. However, it is not *the agencies* that will suffer the inequities of housing insecurity, abusive debt, or unemployment. Rather, the uncertainty resulting from the erosion of agency authority will harm ordinary individuals and families to the disproportionate detriment of the people of color, women, and persons with disabilities. The wholesale abandoning of *Chevron* deference will certainly do more harm than good.

II. Abandoning Chevron Deference Undermines Critical Protections Necessary to Advance The Civil Rights of Vulnerable Communities.

A. Federal Agencies Such as HUD Enhance the Protective Force of Civil Rights Laws.

1. HUD's Regulatory Interpretation of the FHA Captures Pernicious Forms of Housing Discrimination the Statute Is Designed to Eradicate.

HUD's administration of the FHA is just one example of the beneficial impact of agencies implementing broad but necessary non-specific federal statutes via regulatory enactments and enforcement, and the timeliness, effectiveness, and benefits of doing so could be undermined if *Chevron* deference is abandoned. There is strong consensus among the federal courts that those motivated by a discriminatory purpose rarely admit their invidious intent publicly. *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (explaining that while discriminatory conduct persists, violators have learned not to leave the proverbial "smoking gun" behind"); *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) (recognizing that "[d]efendants of even minimal sophistication will neither admit discriminatory animus or leave a paper trail demonstrating it"). The flexibility afforded to agencies like HUD ensures they can act nimbly in the face of evolving threats to civil rights crafted to avoid detection. Through the FHA, as amended in 1988, Congress empowers HUD to issue regulations in furtherance of the statutory goal of eliminating discrimination in the housing market and pursuant to statutory provisions that prohibit certain

conduct. 42 U.S.C. § 3614(a); *see also* 42 U.S.C. §§ 3604, 3605, 3606, 3617. The statute broadly describes the type of discriminatory activities it seeks to outlaw, but HUD's regulations translate them into more discernably enforceable directives. 24 C.F.R. Pt. 100.

HUD supplemented this broad proscription by identifying examples of unlawful conduct that the agency has recognized, through its experience, as both inconsistent with Congress's goals and as violative of the FHA upon application of the tests commonly used by courts to determine whether discrimination has occurred. 24 C.F.R. §§ 100.50-100.90; 54 Fed. Reg 3,240 (Jan. 23, 1989) (discussing regulatory purpose to illustrate practices prohibited by FHA). The methods of discrimination are so varied that the FHA seldom identifies specific practices. For example, HUD has consistently interpreted 42 U.S.C. § 3604 to prohibit the practice of "steering" based on protected characteristics, which HUD recognized as a pervasive discriminatory housing practice engaged in by real estate brokers, landlords, and property managers. 24 C.F.R. § 100.70(c)(1)-(4); Margery Austin Turner et al., *Housing Discrimination Study: Analyzing Racial and Ethnic Steering*, HUDUSER (Oct. 1991), Steering remains all too common today. Ann Choi et al., *Long Island Divided*, NEWSDAY (Nov. 17, 2019), https://projects.newsday.com/long-island/real-estate-agents-investigation/. The Newsday data revealed that in nearly 40 percent of paired tests, real estate brokers treated Black home seekers worse than white home seekers by informing Black home seekers of half the listings of white home seekers and routinely limiting the scope of listings based on conformity of the individual's race with the residential patterns of a given neighborhood. *Id.*

In response, HUD's regulations target fine-grained examples of steering practices known to be common from its experience. For instance, HUD's regulations prohibit specific acts like "exaggerating drawbacks" or withholding "information on desirable features of a dwelling, or of a community neighborhood, or development" to "discourage the purchase or rental of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.70(c)(2)-(3). The Act does not ban these practices by name; in fact it is silent on whether steering, *per se*, is prohibited, but the statute's description on the types of discriminatory conduct that, when applied, logically leads to the conclusion steering is prohibited. 42 U.S.C. § 3604; *see also Gladstone Realtors,* 441 U.S. at 111 (permitting steering claim that defendant's "sales practices actually have begun to rob [the neighborhood] of its racial balance and stability"); *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 774 F.2d 135, 140 (6th Cir. 1985) (affirming steering as a violation of the FHA in accordance with Supreme Court precedent).

For victims of discrimination and their advocates, the regulations make it easier to know their rights and streamline the administrative enforcement process. For those in the real estate industry, the regulations make it easier to avoid engaging in unlawful conduct through ignorance and facilitate effective training and education.

2. HUD's Regulations Provide Accessibility and Design Standards that Expand Housing Opportunities for People with Disabilities.

When Congress amended the FHA to confer rulemaking authority on HUD, Congress also enacted

new substantive protections to ensure equal housing opportunity for persons with disabilities. Pub. L. No. 100-430, tit. VIII, 102 Stat. 1619 (1988). Most relevant here, Congress required the design and construction of covered multifamily dwellings in accordance with certain accessibility standards. 42 U.S.C. § 3604(f)(3)(C). For instance, § 3604(f)(3)(C)(i) states "the public use and common use portions of such dwellings [must be] readily accessible to and usable by…persons [with disabilities]," and § 3604(f)(3)(C)(ii) requires doors be "sufficiently wide to allow passage by…persons [with disabilities] in wheelchairs," but Congress gave no further guidance on what areas are "common" and was silent on precise doorframe metrics.

HUD has filled in these gaps through rulemaking. 24 C.F.R. §§ 100.201, 100.205. Reading the regulations, the definitions may seem mundane, but they are of real consequence—even in the context of a refuse room as a "common use area." For example, these regulations allow a wheelchair user to understand their rights of access and for multifamily developers to understand unclear accessibility requirements resolved by HUD's definition. HUD's rulemaking reinforces the independence of a person with a disability in undertaking an activity of daily living and avoids unnecessary litigation risk for the developer. *See* Centers for Disease Control & Prevention, *Common Barriers to Participation Experienced by People with Disabilities*, CDC (last visited Sep. 12, 2023), https://www.cdc.gov/ncbddd/disabilityandhealth/disability-barriers.html.

It would be unrealistic to expect Congress to codify this level of detail, especially when combined with a similar

level of regulatory detail as applied to other technical facets of design and construction such as ramp gradients and countertop heights, into statute. Instead, allowing HUD to elucidate these specifications by regulation is a sound approach. In addition to its civil rights expertise, see 42 U.S.C. § 12741; 42 U.S.C. § 3610 (charging the Secretary with investigating administrative complaints alleging violations of the FHA), HUD is deeply involved in the development of multifamily housing through its administration of grant programs, and has dedicated staff to engage in empirical study of pressing issues in the housing market. U.S. Department of Housing & Urban Development, *PD&R Mission and Background*, HUDUSER (last visited Sep. 12, 2023), https://www.huduser.gov/portal/about/mission_and_background.html. Thus, HUD can make decisions like those reflected in 24 C.F.R. § 100.205 in a thoughtful, data-driven manner. Leaving such details open in the statutory text while empowering HUD to fill them in through rulemaking also ensures that the law keeps pace with changes in technology, design, and construction methods. *See* Fair Housing Act Design and Construction Requirements; Adoption of Additional Safe Harbors, 85 Fed. Reg. 78,957 (Dec. 8, 2020) (designating new editions of the International Building Code as safe harbors). Such adaptability is furthered by *Chevron* deference, so each evolution does not become the subject of litigation by interests intent on disrupting the enforcement of the FHA or whose economic interests make them resistant to ongoing improvement of standards. This is true across the federal landscape.

B. Federal Agencies Reduce Violence Against Survivors of Domestic Abuse Clarifying the Process through which Survivors Can Vindicate Their Housing Rights.

The Violence Against Women Act ("VAWA"), most recently reauthorized in 2022, explicitly recognizes the housing precarity that survivors of domestic violence endure and the impossible choice they must often confront between remaining with an abuser and experiencing homelessness. 34 U.S.C. § 12471(12); U.S. Dep't of Hous. & Urb. Dev.., *Case Study: Supportive Housing Helping Domestic Violence Survivors and Their Children Recover and Thrive in the Bronx*, HUDUSER (May 10, 2023), https://www.huduser.gov/portal/casestudies/study-051023.html; Matthew Desmond, Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship, MacArthur Foundation (2014), https://www.macfound.org/media/files/hhm_research_brief_-_poor_black_women_are_evicted_at_alarming_rates.pdf. Given the frequency with which abusers manipulate finances to control their victims, Congress determined that access to housing is commonly weaponized in abusive relationships, and while the Act covers all individuals regardless of gender, it is well documented that women are disproportionately likely to experience domestic violence. 34 U.S.C. § 12471(10); Laura L. Rogers, *Transitional Housing Programs and Empowering Survivors of Domestic Violence*, Office On Violence Against Women (Nov. 1, 2019), https://www.justice.gov/ovw/blog/transitional-housing-programs-and-empowering-survivors-domestic-violence; *Understanding the Power and Control Wheel*, Domestic Abuse Intervention Programs (Apr. 22, 2021), https://www.theduluthmodel.

org/wheels/. Exacerbating this trend, Congress found that survivors often faced further victimization when landlords reject applicants based on their status as survivors or evict them for domestic violence crimes perpetrated against them. 34 U.S.C. § 12471(3). Significant among Congress's reasons for passing VAWA was its legislative finding of "strong links" between domestic violence and homelessness as evidenced by numerous studies including one estimating that around 44 percent of unhoused individuals traced their lack of housing to this source. 34 U.S.C. § 12471(1). To reduce domestic violence and prevent homelessness, Congress codified housing rights for survivors in federally assisted housing and enlisted the agencies responsible for administering these programs, including HUD, to "implement" these federal protections. 34 U.S.C. § 12491(b); 34 § U.S.C. 12491(g).

While VAWA states what conduct violates it, as well as who may avail themselves of the law's protections, the statute does not describe in detail how a survivor can invoke these protections effectively. For instance, the statute authorizes HUD to "develop a notice of the rights" of survivors requiring federally assisted landlords to provide that notice to their tenants, but it is silent on the precise content of that notice. 34 U.S.C. § 12491(d)(1)-(2). To fill in this statutory gap, HUD's accompanying regulations incorporate by reference the content of the notice requirements developed and contained in HUD Form 5380 (12/2016) to which funding grantees and their subrecipients must adhere when pursuing eviction. 24 C.F.R. § 5.2005(a)(1)(i). Courts readily enforce HUD's VAWA notice requirements and have dismissed eviction proceedings for a federally assisted landlord's failure to comply with this "strict notice" requirement—even

when the tenant did not know to claim this protection themselves. *DHI Cherry Glen Assocs., L.P. v. Gutierrez*, 46 Cal. App. 5th Supp. 1, 10 (Cal. Super. Ct. App. Dep't 2019) (dismissing eviction action where landlord failed to give VAWA notice regardless of tenant's status as survivor).

As a secondary buffer to housing displacement, the statute provides a lease bifurcation remedy for survivors to exercise when the survivor tenant is not named on the lease but faces eviction tied to a domestic violence-based lease termination. 34 U.S.C. § 12491(b). The law directs the landlord to give the survivor tenant the opportunity to establish eligibility or find alternative housing within a "reasonable time as determined by the appropriate agency." *Id.* at (b)(3)(B)(ii). Though the statute delegates the determination of reasonableness to the agency, it provides no instruction to the agency on what qualifies as a "reasonable" timeframe for resolving this issue and omits instructions for landlords on how to proceed when this remedy is chosen. Those specifics are detailed in the regulation. 24 C.F.R. § 5.2009(b)(2)-(c). Based on this system of protections, courts have permitted tenants to raise VAWA as a defense to eviction and relied in part on the regulations to guide their understanding of the protections afforded by VAWA. *Bos. Hous. Auth. v. Y.A.*, 482 Mass. 240, 245-7 (2019).

Relatedly, under the same delegation of authority to HUD to develop the notice, Congress also directed the agency to incorporate terms relating to "the right to confidentiality and the limits thereof" into its regulations to address privacy risks associated with disclosing one's survivor status. 34 U.S.C. § 12491(d)(1). HUD has discharged this duty by providing specific details on the

privacy protections afforded to survivors of domestic violence and the stringent standards a federally assisted landlord must follow to protect confidential information shared with them by a survivor who is exercising their rights. 24 C.F.R. § 5.2007.

Collectively, HUD's VAWA regulations ground the statutory protections in the practical details of the assisted housing market and provide bright-line standards that enable survivors and landlords to mutually benefit from the law.

C. The Department of Labor's Regulations Implementing the Fair Labor Standards Act Help Protect Historically Disadvantaged Laborers.

In passing the Fair Labor Standards Act of 1938 ("FLSA"), Congress instituted a federal minimum floor for wages and maximum hour restrictions that guaranteed vulnerable workers across the country just compensation for their labor. 29 U.S.C. §§ 206-07. However, despite certain successes, the FLSA fell short of protecting the rights of many laborers most in need of these base line safeguards, particularly laborers involved in sectors where racial or sex-based marginalization and exploitation characterize industry practice. *See* Marc Linder, *Farm Workers and the FLSA: Racial Discrimination in the New Deal*, 65 Tex. L. Rev. 1335 at 1337 (June 1987); Susan B. Mettler, Federalism, *Gender and the Fair Labor Standards Act*, 26 *Polity* 4, 635, 643 (1994); Vivien Hart, *Minimum Wage Policy and Constit. Inequality: the Paradox of the FLSA of 1938*, 1 J. of Pol'y Hist. 3, 319, 327 (July 1989). Domestic workers specifically confronted a dual assault on their right to labor protections, contending

with the racially biased dimension of labor exploitation as well as the legacy of gender-based discrimination that historically devalued and ignored labor performed in the home in what is often described as "care work." Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, 30 Berkeley J. Emp. & Lab. L. 404, 454 (2009); *Hart, supra,* at 336.

In 1974, Congress amended the FLSA to reflect its evolved understanding that the "employment of persons in domestic service in households affects commerce," thus giving domestic service workers access to the material advantages provided under the banner of federal minimum wage and hour protections that their predominantly white male counterparts had gained over a quarter-century before. 29 U.S.C. § 202, as amended in Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259 § 7, 88 Stat. 55, 62 (1974). Despite the gains effectuated by these more expansive protections, under this amended regime, Congress still chose to exempt companionship services from the minimum wage and maximum hour rules as well as to deny overtime pay to live-in domestic workers. 29 U.S.C. §§ 13(a)(15), 13(b)(21). It then entrusted the Department of Labor ("DoL") with responsibility for defining the terms "domestic service employee" and "companionship services" under a broadly conferred delegation, stating only "as such terms are defined and delimited by regulations of the Secretary" to reflect this statutory change. 29 U.S.C. § 213(a)(15).

Consistent with its statutory mandate and in light of substantial new evidence, DoL chose to revise its definitions and "delimi[t]" these same terms in 2013 to strengthen protections for domestic service workers.

29 U.S.C. § 213(a)(15); Application of the Fair Labor Standards Act to Domestic Service Workers, 78 Fed. Reg. 60,454 (Oct. 1, 2013). Turning to its previous exemptions for "companionship services" and "domestic service workers," 29 C.F.R. §§ 552.6 & 552.109, the agency conceded that its regulations no longer captured its understanding of the care industry and undermined the welfare of an emerging class of professional domestic services employees involved in in-home medical care by excluding them from the statute's protective scope, 78 Fed. Reg. at 60,455; because, by this time the prevailing system for private in-home care depended on a professional work force of home healthcare aids and nurses equipped with the medical expertise to manage the serious long-term healthcare needs of patients (including the elderly and individuals with disabilities) who preferred to reside in home and community-based settings. A.E. Benjamin, *Consumer-Directed Services at Home: A New Model for Persons with Disabilities*, 20 HEALTH AFF. 80, 80 (2001) (reporting that a majority of long-term care recipients are elderly individuals who receive care primarily in their homes); Jon Pynoos et al., *Aging in Place, Housing, and the Law*, 16 ELDER L. J. 77, 78 (2008) (discussing the recent changes in federal policy leading to increasing numbers of the elderly being cared for at home and the barriers they face to do so); Julie Lipitt, *Protecting the Protectors: A Call for Fair Working Conditions for Home Health Care Workers*, 19 ELDER L. J. 219, 220 (2011).

In the absence of regulatory changes corresponding to this industry-wide shift in care management, private agencies and employers exploited this regulatory loophole by routinely mis-categorizing in-home health care workers as providers of "companionship services" to exempt these employees from federal minimum wage, maximum hour,

and overtime protections. 78 Fed. Reg. at 60,459; *see* Nat'l Emp. L. Project, *Independent Contractor Classification in Home Care*, NELP (2015), https://www.nelp.org/wp-content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf [https://perma.cc/2FK3-CGSZ] (identifying misclassification as a threat to home care workers' ability to assert their rights). This abusive practice disproportionately degraded the working conditions of and denied labor rights to the Black and Latina women who make up a substantial portion of the home healthcare aid workforce. *Lippitt, supra,* at 225.

The public outcry and a concerted advocacy campaign by home healthcare aides to push DoL to revise its regulatory definition eventually came to a head before this Court in *Long Island Care at Home., Ltd. v. Coke*. 551 U.S. 158, 165 (2007). Despite the significant implications for the welfare of workers and patients alike and the notable public opposition to the continued mistreatment of home healthcare aides allowed for by the regulation, this Court, in a unanimous decision, unequivocally declared its fidelity to *Chevron*—including in the face of statutory silence—and deferred to DoL's interpretation maintaining that:

> FLSA explicitly leaves gaps, for example, as to the scope and definition of statutory terms such as "domestic service employment" and "companionship services." 29 U.S.C. § 213(a)(15). It provides the Department with the power to fill these gaps through rules and regulations. The subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and it concerns an interstitial matter, *i.e.*, a portion of a broader definition, the details of which,

> as we said, Congress entrusted the agency to work out.

Id.

Subsequently exercising the interpretive power that the Court recognized in *Long Island Care at Home, Ltd.*, DoL undertook rulemaking following careful study of the care industry as a whole and the associated rise in substandard wage and inhabitable working conditions for home health care workers endemic to the system. 78 Fed. Reg. 60,454-60,458-70. The agency recognized, given the present working conditions, its interpretation no longer embodied the protective intent of Congress and revised the regulatory definition of "companionship services" to exclude workers engaged in the "performance of medically related services provided for the person" and make clear to the industry and to home healthcare aides that they are entitled to the wage and hour protections promised by the statute. 29 C.F.R. § 552.6(d).

The DoL has given meaningful effect to the aims of Congress by expanding worker protections for a rapidly growing class of laborers who are likely to become a fixture of the care industry as the elderly population continues to swell and more people choose to receive care in their homes. Bureau of Labor Statistics, *U.S. Dep't of Labor, Occupational Outlook Handbook, Home Health and Personal Care Aides*, BLS.gov (visited Sep. 6, 2023), https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm (noting continued growth of workers in the industry); U.S. Dep't of Health and Human Serv's, *The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation: Report to Congress*, ASPE (May 13, 2003), *http://aspe.hhs.gov/*

daltcp/reports/ltcwork.pdf. It is unlikely that DoL could respond to the changes in economic circumstance in this industry or in other complex labor markets and implement regulations that give full force to these statutory guarantees as swiftly, successfully, and effectively without the backdrop of and reliance on *Chevron* deference, including its clear limitations and guidelines.

CONCLUSION

In light of the importance of the *Chevron* doctrine and of deference to agency rulemaking to the effective implementation of civil rights laws, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX — LIST OF ADDITIONAL *AMICI CURIAE*

Center for Responsible Lending

Justice in Aging

Lambda Legal

Leadership Conference on Civil and Human Rights

National Association for the Advancement of Colored People (NAACP)

National Community Reinvestment Coalition (NCRC)

National Employment Law Project (NELP)

National Fair Housing Alliance