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 *AMICUS CURIAE* OF ENVIRONMENTAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Environmental Defense Fund is a nonprofit public interest organization dedicated to protecting people's health, stabilizing the climate, and strengthening people's and nature's ability to thrive – anchored in science, economics, and law. EDF has hundreds of thousands of members across the United States, including members in each of the 50 states and the District of Columbia.

As part of that work, EDF advocates for effective and stable implementation of federal statutes such as the Clean Air Act, Food Safety Modernization Act, Magnuson-Stevens Fishery Conservation and Management Act, Natural Gas Pipeline Safety Act, Federal Power Act, and Toxic Substances Control Act. EDF has participated in scores of administrative rulemakings and judicial review proceedings under these and other statutes. EDF has been a party in this Court's leading cases interpreting federal environmental and energy statutes. See, *e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Michigan v. EPA*, 576 U.S. 743 (2015); *Util. Air Regul. Group v. EPA*, 573 U.S. 302 (2014); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014); *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007); *City of Chicago v. EDF*, 511 U.S. 328 (1994), and has participated as *amicus curiae* in many others. See, *e.g.*, *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260 (2016); *Alaska Dep't of*

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel contributed monetarily to the preparation or submission of this brief.

Env't Conservation v. EPA, 540 U.S. 461 (2004); *Whitman v. Am. Trucking Assn's*, 531 U.S. 457 (2001). EDF and its members have an interest in how these critically important measures are administered and in ensuring that the standards courts employ in performing their congressionally assigned task of reviewing agency decisions are principled, coherent, and consistent.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners and their supporters urge the Court to make sweeping changes in how federal courts review administrative agencies' interpretations of statutes and to dispense with the framework expressed in this Court's most-cited administrative law decision, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). The Court should decline petitioners' invitation; it should not overrule *Chevron*.

It is an irony that a neutral rule of judicial restraint, announced in a case upholding a Reagan Administration regulatory amendment designed to reduce burdens on industrial polluters, *id.* at 857–58, has morphed into the ultimate quarry of a campaign to effect a judicially-driven downgrading of the role of administrative agencies. This campaign is marked by the kind of sloganeering, argument by anecdote, and sacrifice of empirical rigor that are all too familiar in hardball politics but out of place in legal argumentation. Like any shrewd campaigners, petitioners and their supporters seek to "drive up the negatives" by misstating what *Chevron* instructs. For instance, this Court's decision in no way established that "[i]f the statute is silent, the government wins." Pet. Br. 44. In

fact, *Chevron* only authorizes agencies to interpret statutes in a manner consistent with how a court, applying all the "traditional tools of statutory construction," would construe it, 467 U.S. at 843 n.9, and even then, conditions acceptance on the court's determination that the agency's reading is reasonable.

The Court should avoid being drawn in by shrill attacks on regulatory programs that members of petitioners' coalition have long opposed for their own reasons. It should avoid debates imported from arguments conducted, along nakedly partisan lines, in the political arena over whether there is "too much" federal regulation. The Court should instead reaffirm that, however one regards the wisdom of administrative agencies' actions, choices about how to implement federal legislative policy—including the identity of the implementing body; the constraints under which that body must operate; and standards for judicial review, if any, of its decisions—are matters for Congress. Tectonic changes in the standards that have been the foundation for generations of congressional legislation, administrative rulemakings, and judicial review proceedings should come only after appropriately broad-lens legislative inquiry, debate, and voting.

Congress has, in fact, proven fully capable of enacting deregulatory laws when it so chooses.[2] In

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[2] *See, e.g.*, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, 91 Stat. 4 (1977); Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) (substantially deregulated the railroad industry);

addition to measures addressing particular industries or agencies, Congress has enacted "structural" changes to the administrative process to shape and constrain how the Executive Branch implements statutory commands. See, *e.g.*, Regulatory Flexibility Act, Pub. L. 96-354 (1980), *codified as amended at* 5 U.S.C. § 601 *et seq.*; Congressional Review Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), *codified as amended at* 5 U.S.C. §§ 801 *et seq.* Presidents too have made significant efforts to eliminate unnecessary regulation, promote regulatory flexibility, and reduce costs.[3] Altering longstanding judicial review standards—at best, a blunt instrument of deregulation in any event—should be left to Congress.

Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980); Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995); Telecommunications Act of 1996, Pub. L. No. 104-104, § 401 *et seq.*, 110 Stat. 56 (1996) (removed various regulatory burdens from the telecommunications sector); Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (eliminated Glass-Steagall Act's limits on commercial banks' ability to engage in investment banking); Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, Pub. L. No. 115-174, 132 Stat. 1296 (2018) (cabined some financial regulations imposed after the 2008 financial crisis).

[3] Presidents of both parties have issued executive orders to streamline the regulatory process with a focus on removing unnecessary, redundant, or overly burdensome regulations. *See, e.g.*, Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993); Exec. Order 13,258, 67 Fed. Reg. 9,385 (2002); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (2011); Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (2017); Exec. Order No. 14,094, 88 Fed. Reg. 21,879 (2023).

Despite extravagant rhetoric about "[t]he destruction that *Chevron* has wrought," Pet. Br. 36, petitioners' case for undoing one of the Court's bedrock precedents is remarkably thin–and far short of the case that should be required to overcome such a deeply rooted precedent. It is hardly surprising, for example, that a decision addressing a topic as common as judicial review of administrative interpretations has, over the course of decades, generated some controversial or mistaken applications. And this Court has never treated *Chevron* as infallible writ. To the contrary, it has handed down numerous decisions articulating clarifications of and limitations on *Chevron*'s review framework. *Infra.* 7–8.

While the *Chevron* framework has proven amenable to refinement, core aspects of Justice Stevens's opinion for the Court remain unassailably sound. *Chevron* crisply articulated what remains common ground: that when application of ordinary rules of statutory construction yields a definitive answer, the reading of the reviewing court—"the final authority on issues of statutory construction"—controls. 467 U.S. at 843 n.9; *id.* at 865. But *Chevron also* correctly recognized that Congress often purposefully calls upon agency discretion and expertise to implement statutes. *Id.* at 843–44, 865–66. The opinion made no great leap in concluding that, when the court concludes the agency's interpretation of Congress's direction is reasonable (even if not inevitable), the agency's interpretation should be respected. *Id.* at 866.

In cataloging *Chevron*'s alleged sins and advocating its overthrow, petitioners fail meaningfully to address the question all denouncers of the status quo

should have to answer: "compared to what?" See Merrill Br. 28. For example, there would be much for all stakeholders to dislike about a regime where agencies' reasonable, considered interpretations of complex, nationally uniform regulatory statutes that Congress entrusted to their administration must yield to determinations by myriad federal courts across the country. See *id.* at 28–29. It seems very likely that, stare decisis considerations aside, petitioners' proposed overruling of *Chevron* would generate far more uncertainty, disuniformity, confusion, and cost than it could forestall.

For all the foregoing reasons, as well as the numerous other compelling reasons outlined by respondents, the Court should decline petitioners' invitation to overrule or significantly narrow *Chevron*. EDF urges that three critical values should guide this Court's consideration of this case:

First, **respect for Congress's choices to delegate interpretive responsibility to the Executive Branch**. It is undeniably true that Congress frequently elects to delegate to Executive Branch officers the power to interpret statutory ambiguities and gaps as part of their responsibility to implement the statute. Courts should honor that legislative decision.

Second, **respect for the distinct constitutional status, expertise, and resources of Executive Branch officials whom Congress has empowered to implement statutes, including recognition of the substantial checks that constrain them.**

Finally, **respect for the people the laws serve—including statutory beneficiaries and**

regulated entities alike—by promoting stability, uniformity, and predictability in statutory administration.

Each of these principles counsels strongly against disturbing *Chevron*'s basic framework.[4]

ARGUMENT

I. Judicial Review Standards Should Effectuate Congressional Intent—Including When Congress Delegates Responsibility to an Agency.

Chevron is based upon the premise that when Congress delegates to an agency responsibility to administer a statute, Congress should be understood also to have delegated responsibility to resolve relevant statutory ambiguities in a reasonable manner—with reviewing courts' serving as the final arbiters of whether there is a genuine ambiguity and whether the agency's resolution is reasonable. 467 U.S. at 843–44, 865–66. Even when they might not have resolved the ambiguity the same way, courts upholding reasonable agency interpretations are not abdicating their role, but rather "respect[ing]" Congress's directives about who decides in those circumstances. See*, e.g.*, *City of*

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[4] Petitioners' alternative suggestion that the Court announce a more limited rule of nondeference for what they call "statutory silence" concerning "controversial powers" (Pet. Br. i, 43–44) should be rejected. "Controversy," the *sine qua none* for any federal litigation, would provide an unhelpfully amorphous and manipulable test.

Arlington v. FCC, 569 U.S. 290, 317 (2013); see also Merrill Br. 24.

And in a line of post-*Chevron* cases, the Court has instructed that deference is unwarranted in circumstances where Congress is found *not* to have delegated interpretive authority as to particular topics, decisionmakers, or contexts. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–650 (1990); *Christensen v. Harris County*, 529 U.S. 576, 586–88 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *King v. Burwell*, 576 U.S. 473, 486–86 (2015); *Smith v. Berryhill*, 139 S. Ct. 1765, 1778–79 (2019); *Salinas v. United States Railroad Retirement Board*, 141 S. Ct. 691, 700 (2021); *West Virginia*, 142 S. Ct. at 2607–08; see also *City of Arlington*, 569 U.S. at 321–22 (Roberts, C.J., dissenting, joined by Kennedy and Alito, JJ.) (arguing that the threshold question whether Congress has delegated policy-making authority to the agency should be reviewed de novo).

The Court has instructed reviewing courts to at least "hesitate" before concluding that ambiguous statutory language amounts to congressional authorization of "unheralded" and "transformative" agency actions with "vast economic and political significance." See *West Virginia*, 142 S. Ct. at 2608–10; see also *Biden v. Nebraska*, 143 S. Ct. 2355, 2373–74 (2023). Courts' special responsibility, in the "extraordinary cases" that trigger the major questions doctrine, to scrutinize with skepticism improbably bold, novel, and scantily supported agency actions, *West Virginia*, 142 S. Ct. at 2608, undercuts arguments for a general rollback of *Chevron*.

But petitioners and many *amici* ask the Court to do something fundamentally different from continuing to determine, in particular contexts, whether Congress sought to delegate the interpretive authority in question. They seek, instead, to overthrow the entire framework of judicial review, overturning countless, pre- and post-*Chevron* precedents affirming Congress's power to delegate to Executive officers appropriately delineated interpretive tasks, and to hold that, however plain its intent to do so, Congress simply may not delegate to agencies interpretive and policy-making authority. For petitioners deny that "affirmatively delegating [to the Executive branch] power to make policy" is "consistent with our constitutional scheme." Pet. Br. 26.

This extreme submission is mistaken. It depends upon a novel, supercharged version of the nondelegation doctrine and on tossing out all three branches' centuries-old understandings of Congress's powers. It would be inimical to effective modern government in a vast and complex nation. And if it did not rampantly annul commonplace statutory delegations, by directing courts to decide for themselves a vast array of difficult, technical, and value-laden statutory questions, petitioners' approach would greatly increase the risk of "the Judiciary['s] arrogating to itself policymaking properly left, under the separation of powers, to the Executive." *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting). Petitioners' argument is in essence a call to invalidate long-recognized, core powers of Congress and the Executive, powers exercised in virtually all important legislation; indispensable to effective government; and, within long-recognized bounds, both constitutional and routine.

Congress has delegated broad authority to Executive Branch officers since the Founding. See Julian Mortensen & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 281–82 (2021). And over the centuries, this Court repeatedly has affirmed Congress's constitutional authority to "use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (unanimous opinion per Taft, C.J.); *id.* at 407–08 (explaining that Congress may direct the Executive to set "just and reasonable" interstate-carrier rates because "[i]f Congress were to be required to fix every rate, it would be impossible to exercise the power at all"). The Court has recognized that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). And as Justice Scalia emphasized, this Court has "ha[s] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

Indeed, delegation of the power to formulate policy, including by interpreting legislative acts, is indispensable to modern government. A recent review of more than 440 significant federal statutes enacted between 1948 and 2016 found that "more than 99

percent" "contain delegations to federal agencies." Pamela J. Clouser McCann & Charles R. Shipan, *How Many Major U.S. Laws Delegate to Federal Agencies? (Almost) All of Them,* 10 Pol. Sci. Rsch. & Methods 438, 438–44 (2021). Taken seriously, petitioners' suggestion that Congress cannot delegate policy discretion to agencies would, in an instant, taint as constitutionally suspect hundreds of federal statutes.

Chevron recognizes and respects that Congress's constitutional authority to legislate under its enumerated powers—for example to regulate interstate commerce—includes the authority to delegate responsibility for implementing Congress's directives. That power is squarely with Congress's broad power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. A rule of judicial review that overrode Congress's choices as to how and by whom its statutes should be carried into execution would directly contravene this constitutional disposition.

Congress's choice to delegate to an agency—and what and how to structure the agency's decisions—are integral aspects of statutory design. Substantial delegation is essential in any large public or private organization—let alone in governing a wealthy continental nation of a third of a billion people.[5] Congress chooses to delegate in order to make use of agencies'

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[5] *See* Beau J. Baumann, *Americana Administrative Law*, 111 Geo. L. J. 465, 516 (2023).

distinctive institutional capacities and characteristics, including scientific and technical expertise; the flexibility to adjust policies to changing circumstances; the ongoing ability to account for the interaction of related public policies and programs; and political responsibility, based upon presidential control.[6]

A world in which congressional delegations conferred no meaningful interpretive authority would be far out of step with the expectations and intentions of Congress. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 906–07, 927–28 figs. 1–2 (2013). For decades, Congress has drafted and enacted legislation on the understanding that agency interpretations of statutory language would receive judicial deference, provided they were consistent with the statute and reasonable (as determined by the federal courts). And Congress is also well aware of how to limit agency discretion under *Chevron*: "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. Against that

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[6] *See, e.g.*, Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Political and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va. L. Rev. 431, 446–49 (1989) (recounting the policy challenges that led Congress to delegate certain powers under the Clean Air Act); Matthew C. Stephenson, *Statutory Interpretation by Agencies*, *in Research Handbook on Public Choice and Public Law* 287–88 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) ("agencies may have better access to information about the connection between policy choices and actual outcomes").

background, Congress has in some instances chosen to provide for de novo review, or other standards different from *Chevron*'s reasonableness test. Barnett & Walker Br. 8–11. And Congress has rejected many proposals to undo or alter *Chevron*. Barnett & Walker Br. 11–12; U.S. Br. 30.

The Court should not accept facile claims that Congress's decisions to delegate policy–making discretion to agencies are mere products of institutional lassitude or a desire to avoid political responsibility—such that all that a ruling for petitioners would mean is that Congress would have to "work a little harder on occasion." West Virginia Br. 28. Far more often, Congress (like other principals in the public and private worlds alike) chooses to delegate for sound, public-regarding reasons, such as that it determines that it cannot pre-ordain all the implementation-level decisions necessary to administer a statute, what adjustments shifting circumstances may call for, or that it wishes to call upon agency factfinding or analytic expertise. And *Chevron*'s rule that statutory silence or ambiguity on a particular point should normally be deemed to confer authority was realistic even before many decades of experience made it the settled background rule. It is implausible indeed that Congress would routinely decide that an administrative agency should have responsibility for implementing a statute, but that a federal court—or 93 different ones—should have sole and conclusive responsibility to determine the meaning of statutory gaps and ambiguities.

The Court should also reject petitioners' argument (Pet. Br. 28–29) based on the 1947 Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq*. Surely the

many Congresses that delegated policymaking authority to agencies in the hundreds of statutes enacted in the decades after *Chevron* was handed down could not have thought that it would be unlawful for federal courts to follow *Chevron*'s instructions regarding deference. Even as an original matter, it seems implausible to maintain that the APA, which was intended to "restate the law of judicial review," *Attorney General's Manual on the Administrative Procedure Act* 9 (1947), rejected the teachings of *J.W. Hampton* and other pre-APA cases affirming that courts should respect administrators' reasonable interpretive choices. See Ronald M. Levin, *The APA and the Assault on Deference*, 106 Minn. L. Rev. 125, 130 (2021); Cass R. Sunstein, Chevron *as Law*, 107 Geo. L. J. 1613, 1654–56 (2019). And longstanding practice under the APA would weigh strongly against an about-face even if the question were closer. See U.S. Br. 41–44.

The APA's *text* certainly does not mandate de novo judicial review even when Congress has delegated implementation responsibility to the Executive Branch. The APA tasks courts with deciding questions of law "to the extent necessary to decision," 5 U.S.C. § 706; limits them to deciding "relevant" issues of law, *id.*; withholds judicial review *entirely* (making the agency the only interpreter) when "statutes preclude review" or when "agency action is committed to agency discretion by law," and instructs that certain agency decisions be reviewed under the "arbitrary, capricious, and abuse of discretion" standards. *Id.* §§ 701, 706(2)(A). The APA's text refutes the proposition that it requires that federal courts decide de novo all questions of law related to statutory implementation.

Petitioners are ultimately asking this Court to override *Congress's* choices about how its enactments should be administered. Doing so would dramatically transfer authority from the two elected branches of government to federal judges. The power to make that sweeping change belongs to Congress, not the courts.

II. Judicial Review Standards Should Respect the Constitutional Status, Institutional Capacities, and Accountability of Executive Officials Charged with Implementing Acts of Congress.

In addition to honoring Congress's choices regarding statutory implementation, both the Constitution's allocation of responsibilities among branches and the branches' relative institutional capacities counsel a review standard that gives appropriate weight to Executive officials' interpretations of statutes Congress has charged them with implementing.

Petitioners' *amici* take aim at the public officials charged by Congress with implementing statutes, who are derided as "unaccountable" (Pacific Legal Found. Br. at 8), "power-hungry" (Gun Owners of America, Inc. et al. Br. 11), "bureaucrats" (New Civil Liberties Alliance Br. 4)—ignoring that the Executive officers who administer statutes have their own constitutional status—including explicit recognition of their subject-matter expertise, see U.S. Const., art. II, § 2 (Opinion Clause), are sworn to the Constitution just like members of the other branches, art. VI, cl. 3, and are subject to an unequalled array of constraints that includes substantial checks from the only officer elected by the whole Nation and substantial checks from the other two branches. Cf. *Chevron*, 467 U.S. at 865–66

(noting that federal courts have "no constituency" or special policy or technical expertise).

The people whom petitioners' *amici* call "bureaucrats" (*e.g.*, West Virginia et al. Br. 13; Pacific Legal Found. Br. 8, 9, 25, 30) are public servants who are themselves, or are directed by, constitutional officers. They typically have extensive expertise and are no less dedicated to following the law and serving the public than are other federal officers, including federal judges, who take the same oath. Executive officers strive to act in ways that are simultaneously consistent with their statutory authority—as understood through "institutional memory" provided by career staff—and with policy guidance and prioritization conveyed by the Nation's highest elected official.

Petitioners and their supporters disregard the significant ways in which Executive Branch delegatees' interpretations of statutes are (1) informed by extensive subject-matter expertise, uniquely robust resources, institutional memory, and comments from the broad public rather than merely the arguments and evidence adduced by the parties to case-by-case litigation; and (2) limited by multiple, substantial constraints in addition to the prospect of judicial review itself.

Modern federal agencies are structured to govern through principles of expertise and political accountability. The control of regulatory policy by Presidential appointees who oversee staffs of career civil servants facilitates effective policy based on technical and legal knowledge and capability, with guardrails of transparency and accountability to both Congress and the public. See Anya Bernstein & Christina Rodríguez,

The Accountable Bureaucrat, 132 Yale L. J. 1600, 1633–34 (2023).

First, developing effective policy that takes account of the immense real-world complexities and implications of modern governance depends on a large number of interdisciplinary experts. Agencies are structured to enable specialization and coordination in service of policymaking guided by goals set by the democratically elected Presidential administration. *Id.* They are also designed to allow the President and other politically responsible decision-making officers to draw on the knowledge of federal research scientists, economists, social science researchers, policy and industry experts, technologists, and lawyers, all of whom are sources of both practical expertise and institutional memory. See *id.* at 1634, 1643–44.

Second, long-tenured agency lawyers provide essential knowledge of the intricate statutory, regulatory, and constitutional frameworks within which agencies develop policy, as well as the judicial canons that govern review of agency actions, thus respecting and effectuating separation of powers principles. See *id.* at 1635. Tenured lawyers are conscious of their agency's responsibilities to the courts, the regulated public, and Congress, and work to enhance their institutions' reputations with diverse audiences. Thomas W. Merrill, *High Level, "Tenured" Lawyers*, 61 L. & Contemp. Probs. 83, 93 (1998). Career agency lawyers provide "a unique vantage point for understanding the factual details underpinning the constitutional implication of particular policies, [and] the interaction between a complete federal statutory scheme" and state laws that are at risk of preemption. Kenneth A.

Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L. J. 64, 96–97 (2008). Agencies' legal experts also provide training to political appointees, regardless of party, and to junior civil servants, amplifying an agency's ability to create policy consistent with statutory and constitutional obligations. See Merrill, *supra*, at 104. Agencies are an indispensable part of the rule of law.

An empirical study of career civil servants found that agency lawyers understand that their primary job is to serve as faithful agents to Congress. See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1066 (2015). Agencies typically interpret statutory mandates with keen awareness of their constitutional obligation to carry out the wishes of Congress as expressed through legislative text, using interpretative guidance provided by federal courts. *Id.* Furthermore, coordination between technical and legal experts helps both long-serving lawyers and Presidential appointees to understand the real-world impacts—and constitutional and statutory implications—of given policy options. Gillian E. Metzger, *Administrative Constitutionalism*, 91 Tex. L. Rev. 1897, 1923 (2013).

Finally, federal agencies' structure facilitates democratically accountable policy through ongoing contact with affected parties, including businesses, trade associations, state and local governments, nonprofits, unions, academic experts, and others. See *id.* at 1928. This communication occurs through formal mechanisms like notice-and-comment rulemaking as well as informal interactions that allow affected parties to participate in policymaking *and* provide further

opportunities for oversight from Congress. Bamberger, *supra*, at 98.

Far from "black box" policy-making, modern federal administration typically enables continuous contact with affected stakeholders, giving the public a voice in shaping policy. See Bernstein & Rodríguez, 132 Yale L. J. at 1656–58. The career civil servants connect political officials with their networks of stakeholders, giving the administration direct access to national constituencies. See *id.* at 1628.

The slogan that agency officials charged with authoritatively interpreting federal statutes are "unaccountable" (*e.g.*, West Virginia et al. Br. 5; Chamber of Com. of the U.S. Br. 14) is wildly unfounded, and is not a sound basis for according less weight to agencies' interpretations of statutes under their administration.

In fact, Executive officers responsible for implementing statutes operate under a suite of constraints that, together, are as at least as robust and confining as those faced by any other participants of our constitutional system. These include:

> (1) Agencies are dependent on Congress for their very continued existence and on congressional appropriations for their budgets and for specific initiatives;[7]

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[7] *See* Curtis W. Copeland, Cong. Rsch. Serv., *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions* 7–10 (2008) (analyzing the ways in which Congress influences agency rulemaking through appropriations); Gillian E. Metzger, *Taking Appropriations Seriously*, 121 Colum. L. Rev. 1075, 1086 (2021) (noting that Congress and the

(2) Agency officials are subject on an ongoing basis to congressional oversight, including congressional demands for information and required testimony before committees;[8]

(3) Agency officials must undergo Senate confirmation, U.S. Const. art. II, § 2, cl. 2, providing protections against "the appointment of unfit characters" while promoting "stability in the administration;"[9]

President are "increasingly resorting to appropriations to advance their policy agendas and exert control over" agencies); *id.* at 1093–94 (describing Congress's use of appropriations riders to influence agency policy).

[8] *See* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. Penn. L. Rev. 1541, 1581, 1591–94 (2020) (explaining how the Joint Committee on Taxation and the Government Accountability Office facilitate ongoing congressional oversight of agencies); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power* 41–42 (U.C.L.A. L. Sch. Research Paper No. 02-24, 2002), http://ssrn.com/abstract_id=324482 (describing how congressional committees provide ongoing oversight of agency policy); Molly E. Reynolds & Jackson Gode, *Tracking Oversight in the House in the 116th Congress*, 66 Wayne L. Rev. 237, 241–44 (2020) (detailing methodology for tracking House oversight of the Executive Branch); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2259–60 (2001) (discussing congressional review of agency action at the committee and subcommittee level).

[9] The Federalist No. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Note, *Developments in the Law—Presidential Authority*, 125 Harv. L. Rev. 2057, 2147–53 (2012) (recounting recent conflicts between the President and Congress regarding appointments to agency and explaining the importance of the Senate's advice and consent power); William G. Ross, *The Senate's Constitutional Role in Confirming Cabinet Nominees and Other Executive Officers*, 48 Syracuse L. Rev.

(4) Agency officials are subject to oversight by the President, who is accountable to the national electorate, and keenly interested in avoiding political liabilities from any corner of their administration;[10]

(5) Agency actions must follow congressionally prescribed public rulemaking processes, *e.g.*, 5 U.S.C. § 553; 42 U.S.C. § 7607(d), including requirements to publish formal proposals, which limit the permissible contours of final decisions; to solicit and respond to public comment on the proposals; to publicly docket records; and to provide written explanations for administrative choices;[11]

1123, 1196–99 (1998) (arguing that the Senate confirmation process provides a crucial public forum for agency accountability).

[10] Kagan, *supra*, at 2331–33 (explaining how presidential control over agency action promotes accountability and transparency in the Executive Branch); *id.* at 2335 ("[B]ecause the President has a national constituency, he is more likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests."); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1144–45 (2012) (explaining that the President bears the most visible political risk from failed interagency coordination); *id.* at 1175–81 (2012) (detailing the administrative mechanisms and structures Presidents employ to create public interagency coordination).

[11] *See* Bernstein & Rodríguez, *supra*, at 1650–62 (detailing formal and informal ways agencies interact and seek input from regulated parties throughout the rulemaking process); David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 Harv. Env't L. Rev. 1, 6 (2010) (discussing the kind of explanations required for a notice-and-comment rulemaking to withstand scrutiny under *Chevron* step two).

(6) Interagency review by the Office of Management and Budget and other Executive Branch entities provides a formal mechanism for White House supervision of agency proposals and opportunity for additional public input and for comment from other agencies;[12] and

(7) The Congressional Review Act, 5 U.S.C. §§ 801 *et seq.*, provides Congress a specially structured, streamlined ability to overturn major federal rules (and prospectively bar agencies from adopting similar rules) without super-majority cloture requirements.[13]

All of these constraints are in addition to the fact that agencies' actions are presumptively subject to judicial review. See *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (citing *Abbott*

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[12] Cass R. Sunstein, *Commentary: The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1840–44 (2013) (summarizing the role of OIRA in rulemaking, particularly in ensuring transparency and interagency coordination); Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 Yale L. J. 2182, 2209 (2016) (detailing the Office of Management and Budget's "three levers that affect agency policy making during the budget-preparation process"); *id.* at 2189–91 (explaining how Resources Management Offices within OMB play an important role in directing and overseeing agencies).

[13] *See* Maeve P. Carey & Christopher M. Davis, Cong. Rsch. Serv., *The Congressional Review Act (CRA): Frequently Asked Questions* 6–10 (2021); Maeve P. Carey & Christopher M. Davis, Cong. Rsch. Serv., *The Congressional Review Act (CRA): A Brief Overview* 1–3 (2023). "The CRA has been used to overturn a total of 20 rules." *Id.* at 1.

Laboratories v. Gardner, 387 U.S. 136, 140 (1967)); 5 U.S.C. § 702.

III. Judicial Review Standards Should Promote Stability and Predictability for the Public, Including Statutory Beneficiaries and Regulated Entities Alike.

Judicial review principles should foster stability and predictability for the public, including both beneficiaries and objects of agency rules. Petitioners reject those values in proposing a radical break from decades-long practice and abrupt repudiation of one of the most relied-upon cases of all time. See Merrill Br. 26. Petitioners' breezily dismissive tally of the beneficiaries of *Chevron*—"some governmental officials" who would be "inconvenience[d]" if the current regime were eviscerated, Pet. Br. 17—is likewise severely deficient.

This Court, in contrast, must acknowledge and weigh the full range of consequences of any altered regime. Cf. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423 (2019). And such evaluation inevitably will reveal that a ruling significantly disrupting *Chevron* would have acute disruptive effects for the law and impose corresponding costs across the economy, and any likely alternative standard would produce profound, chronic, and costly uncertainty.[14]

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[14] *See* Jiwon Lee, David Schoenherr, & Jan Starmans, *The Economics of Legal Uncertainty* 47 (Eur. Corp. Governance Inst., Law Working Paper No. 669/2022, 2022),

Were the court to overrule *Chevron*, its decision could immediately destabilize vast legal regimes that have been established during *Chevron*'s nearly 40-year tenure as settled law. It would invite new challenges based upon the proposition that decades-old judicial decisions upholding agency policies were (or may have been) wrongly decided. Lower federal courts might well be inundated with petitions to reopen long-settled agency rules and policies. The costs would be enormous, as parties shift resources away from other priorities to challenge or defend established regulatory programs and key precedent. Critical permits, product approvals, and other core regulatory programs could be disrupted or jeopardized, with untold consequences for the people and businesses that rely on them. As the United States correctly notes, the "prospect of cascading uncertainty" is "another reason to leave any substantial changes to Congress, which could act prospectively." U.S. Br. 34.

Over the long term, any replacement methodology also would likely generate greater uncertainty and follow-on costs as compared to *Chevron*.[15] Many regulated entities—particularly national corporations—particularly value regulatory stability and uniformity. *Chevron* serves those values better than a regime of de novo interpretation in every federal judicial district

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https://ssrn.com/abstract=4276837 (finding that "legal uncertainty has a detrimental effect on economic activity").

[15] Petitioners claim that occasional issues arising over 40 years under *Chevron* establish "unworkability," Pet. Br. 34, but fail to provide any reason to expect that an abruptly reconfigured regime would generate less uncertainty, legal risk, or complexity as it is applied in hundreds of cases annually.

(or, more precisely, in every district judge's courtroom). See Merrill Br. 26–27. A rule that permits (and requires) more than 650 federal district judges to invalidate agencies' decisions whenever the judge interprets an ambiguous statute differently would produce chaos, frustrate effective administration of Congress's directives, and invite forum- and judge-shopping. Lower courts with large caseloads would suffer in their attempts to apply standards that are less uniform and require greater interpretive effort. See *id.* For Congress, *Chevron*'s status as "a stable background rule against which [it] can legislate" would be lost. See *City of Arlington*, 569 U.S. at 296; see also U.S. Br. 28–29; Barnett & Walker Br. 14–16. Also injured would be private parties who have made investments and other commitments in reliance on the *Chevron* framework and judicial and administrative decisions under it. See U.S. Br. 32–33.

Petitioners' new regime would complicate the numerous cases where legal, factual, and policy determinations are intertwined. Executive officials' statutory interpretations are often interwoven with determinations that are undisputedly reviewable under the strongly deferential "substantial evidence" or "arbitrary and capricious" standards. See 5 U.S.C. § 706(2)(A). Under current law, little turns on reviewing courts' ability to distinguish definitively between determinations that might fairly be deemed legal, factual, or policy judgments: As this Court has previously noted, arbitrary and capricious review and *Chevron*'s step-two reasonableness inquiry are often "the same." *Judulang v. Holder,* 565 U.S. 42, 52 n.7 (2011); see *Sorenson Commc'ns, LLC v. FCC*, 897 F.3d 214, 230 (D.C. Cir. 2018).

But a new, high-stakes dichotomy between the review standards for legal interpretation and policy judgments would generate legal uncertainty and extensive litigation—with no reason to expect different courts would resolve the potentially outcome-determinative classification questions consistently. A regime that would make the standard of review careen from reasonableness to de novo based upon such notoriously murky and contestable distinctions would be cumbersome, disuniform, and uncertain.

Similarly, many statutory terms simply do not have a single meaning that can be determined through application of the tools of statutory construction alone. For example, the Clean Air Act predicates certain requirements on whether there has been an "increase[]" in a pollution source's emissions, see 42 U.S.C. § 7411(a)(4), but does not say whether, in determining whether such an increase has occurred, one should compare present emissions to those of five years ago, six months ago, two weeks ago, 10 minutes ago, or something else. See *New York v. EPA*, 413 F.3d 3, 22-23 (D.C. Cir. 2005). *Chevron* yields a practical and sensible way of addressing these common situations. Petitioners offer no workable alternative.

Overturning *Chevron* would seriously undermine the uniformity of federal law. U.S. Br. 37. One reason Congress frequently chooses to delegate responsibility to an agency is to ensure uniform national interpretation and application of the law. See also Barnett & Walker Br. 27–28. Deference to the agency's reasonable interpretation of ambiguous language protects this objective. In contrast, de novo interpretations of ambiguous statutory language by hundreds of federal

judges are likely to yield a multiplicity of differing answers, undermining stability. See Merrill Br. 26 (noting "the differential capacity of this Court and the lower federal courts to engage in *de novo* review of all questions of statutory interpretation arising on judicial review").

The nature of the statutory terms through which Congress frequently delegates policy-making authority to agencies—terms that are often at once broad and *designed* to be given a unitary meaning by the specialized agency—are inherently likely to result in a plethora of different and possibly inconsistent meanings when interpreted (diligently and reasonably) by multiple different federal courts.

For example, suppose a statute directs an agency to promulgate a rule ensuring that dock workers be protected from "unsafe conditions." Different reviewing courts empowered (and required) to measure an agency rule against the judges' own blank-slate interpretation of such a term would be almost certain to arrive at a wide array of understandings. If the implementing regulation is one that details specific requirements (e.g., mandated safety equipment, or maximum heights for stacked cargo, etc.), it would be a minor miracle if courts' de novo answers accorded with the agency's (or with each other's).[16]

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[16] Even narrower and more mundane delegations intended for a single agency are likely to produce disparate results in the hands of multiple judges reviewing without deference. If the statute tells an agency to ensure that warning signs are painted "bright yellow," different judges are likely to have differing conceptions of what hues, tones, tints, and shades that term includes

Again, petitioners are plainly wrong when they describe those harmed by overruling *Chevron* as "government officials" alone. Pet. Br. 17. In fact, the government "represents [] citizens' interests," U.S. Br. 41, as reflected in the statutes it is charged with administering. Indeed, petitioners' cynical accounting cuts the intended beneficiaries of Congress' scores of policy-delegating statutes out of the stare decisis reliance calculus. Yet Congress enacts agency-administered statutes to protect the American people from diverse hazards such as poisonous food and drugs, financial fraud, stock market collapses, toxic pollution, electricity blackouts, telephone spam, cyberattacks, perilous working conditions, defective airbags and infant car seats, and much more. Congress chooses to delegate because it believes that agencies' capabilities and expertise make them best suited to vindicate Congress's protective purposes effectively; overriding Congress's chosen means of implementing its laws would very likely harm the public in serious ways.

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and excludes. *Cf. United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) ("'yellow' is ambiguous") (Scalia, J., concurring in part and concurring in the judgment).

CONCLUSION

This Court should affirm the judgment of the court of appeals.

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