

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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LOPER BRIGHT ENTERPRISES, ET AL., )  
  ) Petitioners, )  
  ) v. ) No. 22-451  
GINA RAIMONDO, SECRETARY )  
OF COMMERCE, ET AL., )  
  ) Respondents. )  
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Petitioners, )

v. ) No. 22-451

GINA RAIMONDO, SECRETARY )

OF COMMERCE, ET AL., )

Respondents. )

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Washington, D.C.

Wednesday, January 17, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:20 p.m.

APPEARANCES:

PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on behalf of the Petitioners.

GEN. ELIZABETH B. PRELOGAR, Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(12:20 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 20 -- Case 22-451, Loper Bright Enterprises versus Raimondo.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

This case well illustrates the real-world costs of Chevron, which do not fall exclusively on the Chevrons of the world but injure small businesses and individuals as well.

Commercial fishing is hard. Space onboard vehicle -- vessels is tight, and margins are tighter still. Therefore, for the -- for the -- for my clients, having to carry federal observers on board is a burden, but having to pay their salaries is a crippling blow.

Congress recognized as much by strictly limiting the circumstances in which domestic fishing vessels could be saddled with monitoring costs and capping them at 2 to 3 percent of the value of the catch. But the

1 agency here showed no such restraint, requiring  
2 monitoring on 50 percent of the trips at a cost  
3 of up to 20 percent of their annual returns.  
4 Nonetheless, the court below deferred to the  
5 agency because it viewed the statute as silent  
6 on the "who pays" question.

7           There is no justification for giving  
8 the tie to the government or conjuring agency  
9 authority from silence. Both the APA and  
10 constitutional avoidance principles call for de  
11 novo review, asking only what's the best reading  
12 of the statute. Asking, instead, is the statute  
13 ambiguous is fundamentally misguided. The whole  
14 point of statutory construction is to bring  
15 clarity, not to identify ambiguity.

16           The government defends this practice  
17 not as the best reading of the APA but by  
18 invoking stare decisis. That is doubly  
19 problematic. First, at issue here is only  
20 Chevron's methodology, which is entitled to  
21 reduced stare decisis effect. We have no beef  
22 with Chevron's Clean Air Act holding, and we  
23 could not take issue with its APA holding  
24 because it failed to mention that statute.

25           But, second, all the traditional stare

1       decisis factors point in favor of overruling  
2       Chevron's methodology. The doctrine is  
3       unworkable as its critical threshold question of  
4       ambiguity is hopelessly ambiguous. It is also a  
5       -- a reliance-destroying doctrine because it  
6       facilitates agency flip-flopping.

7                 So the reality here is the Chevron  
8       two-step has to go and should be replaced with  
9       only one question: What is the best reading of  
10      the statute?

11                I welcome the Court's questions.

12                JUSTICE THOMAS: Mr. Clement, you  
13      heard the government's, the General -- General's  
14      arguments with respect to the use of mandamus as  
15      a basis for sort of deference.

16                Could you comment on that? Because my  
17      understanding of mandamus is that a duty has to  
18      be clear before it actually lies, but I'd like  
19      your comment on that.

20                MR. CLEMENT: Absolutely, Justice  
21      Thomas. So I think mandamus is a critical  
22      recognition of the fact that, of course,  
23      Congress can limit the remedies available in  
24      particular circumstances, and that's the right  
25      way to understand the mandamus standard.

1                   But that's quite different from  
2                   telling the courts that they're to engage in  
3                   statutory construction, as Congress clearly did  
4                   in Section 706 of the APA, but then say there's  
5                   a point at which you can't actually give us your  
6                   best answer because you're deferring.

7                   And I think it's important from a  
8                   separation of powers to under -- purpose to  
9                   understand that it's not just remedies are  
10                  different. There's an accountability  
11                  difference, because I suppose Congress tomorrow  
12                  could decide that we're going to go back to a  
13                  world where the only review of executive branch  
14                  action is mandamus. But then Congress would be  
15                  fully responsible for that highly unpopular  
16                  decision.

17                  But -- so that's the difference, I  
18                  think, the fundamental difference from a  
19                  separation-of-powers standpoint, between a  
20                  limitation on remedies, where Congress does it  
21                  specifically, and essentially telling the courts  
22                  in the APA specifically you have the  
23                  interpretive authority over statutes no less  
24                  than constitutional issues but then overlaying a  
25                  doctrine that says what we're doing is

1 interpretation.

2           And that's the critical thing about  
3 the interchange between Footnote 9 and Footnote  
4 11. Footnote 9 tells you as clearly as you can  
5 what you're doing in a Chevron case is statutory  
6 interpretation. But then, in Footnote 11, it  
7 says, at a certain point, you stop doing  
8 statutory interpretation, even though you think  
9 there's a better answer, and you defer to a  
10 different branch of government. And it's not  
11 the branch of government the Framers gave the  
12 interpretive authority to. It's the branch of  
13 government that the Framers gave the  
14 implementing authority.

15           So I think, from that standpoint,  
16 Chevron is a fundamental egregiously wrong  
17 decision that just gets it wrong --

18           JUSTICE SOTOMAYOR: There's -- this is  
19 --

20           MR. CLEMENT: -- on the basis of  
21 separation of powers.

22           JUSTICE SOTOMAYOR: There's such a  
23 tension in this. Interpretive authority,  
24 everybody seems to concede, means discretion.  
25 It means there's multiple meanings that you can



1 take from something, and someone has to choose  
2 among those meanings.

3           It seems like most people agree, if  
4 the court -- if the statute uses "reasonable,"  
5 that Congress is delegating the definition of  
6 "reasonable" to the agency, and the agency is  
7 deciding what is reasonable within some outer  
8 limit either set within the statute or -- or  
9 within the law.

10           But the point is that I don't -- it's  
11 great rhetoric, Mr. Clement, but we do delegate,  
12 we have recognized delegations to agencies from  
13 the beginning of the founding of interpretation.  
14 And so I -- I -- I --- I'm at a loss to  
15 understand where the argument comes from.

16           MR. CLEMENT: Well, let me try to  
17 clarify. I think there is a difference between  
18 recognizing discretion and recognizing  
19 delegation. There are certain statutory terms,  
20 as you yourself point out, that have -- that --  
21 that, properly construed by the courts  
22 definitively, would give the agency a realm of  
23 discretion in which to operate.

24           But there are other terms in which it  
25 is really a binary question. And the problem,

1 the fundamental failing of Chevron is it doesn't  
2 do a good job of distinguishing between the two.

3 And the best example is Brand X.

4 Broadband communications are either an  
5 information service or they are a  
6 telecommunication service. It might be hard to  
7 figure out which one, but they can't be one on a  
8 Tuesday and the next on a Thursday.

9 JUSTICE SOTOMAYOR: Well, wait a  
10 minute. That's -- that's --

11 MR. CLEMENT: It's a binary question.

12 JUSTICE SOTOMAYOR: -- that -- it may  
13 be binary to you, but I do know that with the  
14 development of technology and with the  
15 development of how that is implemented in terms  
16 of transmission and the Internet, that over time  
17 that's going to change.

18 MR. CLEMENT: But, Justice Sotomayor  
19 --

20 JUSTICE SOTOMAYOR: And just the same  
21 issue even in the case that we're in right now,  
22 there were two areas that Congress looked at and  
23 knew that monitors were critical, okay, foreign  
24 sea travel for obvious reasons because there's  
25 very little that, outside, once those ships

1 leave, that people -- that the U.S. Government  
2 can do to them, and the other was the -- I think  
3 it was the North Pacific area, but the point is  
4 that that doesn't mean that similar problems  
5 didn't arise later and that the broad words  
6 giving the Secretary the power to monitor and  
7 implement measures to ensure that its  
8 conservation goals were being followed wasn't  
9 given to the agency.

10 Those are the facts of what we should  
11 be looking at, in my judgment, is, is -- is this  
12 measure commensurate with what drove the similar  
13 measure, not identical, in the other two  
14 examples and the agency should have first crack  
15 at that.

16 MR. CLEMENT: So I disagree --

17 JUSTICE SOTOMAYOR: If they're not  
18 similar, the Court will look at it and say your  
19 decision was arbitrary and capricious. If they  
20 are similar, we might say, okay, this is all  
21 right. I don't know the answer to that because  
22 we really haven't dug into that, but it's just a  
23 point I'm making --

24 MR. CLEMENT: So --

25 JUSTICE SOTOMAYOR: -- which is that

1 things change on the ground --

2 MR. CLEMENT: So --

3 JUSTICE SOTOMAYOR: -- and a  
4 definition you give today may not hold up to new  
5 facts.

6 MR. CLEMENT: So facts do change on  
7 the ground. That is part of the problem with  
8 Chevron and Brand X. If there's a difficulty in  
9 classifying broadband today, the difficulty is  
10 that the statute was last passed in 1996, so  
11 figuring out whether 2023 broadband is a 1996  
12 information service or a 1996 telecommunication  
13 service is a granddaddy of a problem, but it  
14 does have a binary answer. It's one or the  
15 other.

16 Now, bringing it home to this statute,  
17 what I would say is, if you do the Chevron  
18 ambiguity test, you find a word like  
19 "appropriate" in the statute or maybe for some  
20 people "carry," though I think that one's pretty  
21 clear, and you say that word is ambiguous, so  
22 I'm going to go to step two. That's what the  
23 court below did.

24 But, if you look at the statute as a  
25 whole and if you looked at it the way you would

1 in any other context, I think what you would see  
2 is this is a classic case for  
3 exclusius/inclusius -- I forget the exact Latin  
4 phrase -- but the point is you have a situation  
5 where, in the most commercially well-heeled  
6 fishery in the country, Congress did two things.  
7 It said you may, not must, have monitors paid  
8 for by the industry. But you must, if you do  
9 that, cap the fees at 2 to 3 percent of the  
10 value of the catch.

11 Now a Congress that did that with the  
12 most well-heeled fishery in the nation I do not  
13 think possibly conveyed the authority to the  
14 agency to say with a much different fishery in  
15 the Atlantic, where it's small businesspeople,  
16 we're going to let you do effectively the same  
17 thing, but we are going to let you do it to the  
18 tune of 20 percent of their annual returns.

19 I think, if you strip away Chevron,  
20 this is a fairly easy case where you just say,  
21 wow, Congress had this question in mind in one  
22 place or, actually, three places to be specific,  
23 and with every domestic fishery, they only gave  
24 it in two instances, and in both instances, they  
25 said it can be no more than 2 or 3 percent of

1 the value of the catch.

2 CHIEF JUSTICE ROBERTS: You're just --  
3 you're just -- you're just arguing that the  
4 statute's not ambiguous on that question.

5 MR. CLEMENT: I am arguing that the  
6 best reading of the statute is that my client  
7 wins. Now, if I have to, I will go through --

8 CHIEF JUSTICE ROBERTS: Well, but it  
9 seems -- it seems to me that you're not  
10 contemplating the possibility of another reason,  
11 another result. And that may be right. What  
12 you're saying is that this is not a case where  
13 there can be a number of different  
14 interpretations. But I don't think that's  
15 coming to grips with the Chevron question.

16 MR. CLEMENT: Well, I hope it is, Your  
17 Honor, because what I would say is exactly what  
18 I heard Justice Kavanaugh saying, which is I  
19 don't think there is a different rule of  
20 statutory construction in cases where agency is  
21 a party, in cases when agency is not a party.

22 In both cases, you just can't get to a  
23 certain point and say: Gosh, this is hard. I  
24 think the law has run out. In both cases, you  
25 are supposed to take it all the way to coming up

1 with your best answer.

2 Now, if you --

3 CHIEF JUSTICE ROBERTS: Well, you were  
4 just saying, I mean, that the principle of  
5 exclusio unios answers the question. And if it  
6 answers the question, I -- I guess I don't  
7 understand how you even get to the Chevron  
8 issue, because Chevron, step one, you would give  
9 the same answer.

10 MR. CLEMENT: Maybe you would, Your  
11 Honor, but nobody knows where step two ends and  
12 step two begins. And, you know, for -- I mean,  
13 I suppose now taking the hints from Kisor, which  
14 is about Auer, not Chevron, you would say:  
15 Well, of course, you apply all the canons of  
16 statutory construction before you get to step  
17 two.

18 But -- but the point is, in every  
19 other case, you apply all those canons, and if  
20 you're not sure about the answer, you dust off  
21 the back of Scalia and Garner and you see if  
22 there aren't some other canons.

23 JUSTICE KAGAN: Well, because you have  
24 no other option. I mean, what -- what Chevron  
25 is is it's a recognition that in certain cases

1 you apply all those tools and the conclusion you  
2 come up with is Congress hasn't spoken to this  
3 issue. And if you had no other option, you're a  
4 court, there's a case before you, you try as  
5 hard as you can, even though you know you're  
6 basically on your own.

7 But, with -- when Chevron comes in,  
8 when there is an agency, what Chevron says is  
9 now there are two possible decision-makers,  
10 there's the agency and there's the court, and  
11 what we think is that Congress would have  
12 preferred the agency to resolve this question  
13 when congressional direction has -- cannot be  
14 found because of the agency's expertise, because  
15 of the agency's experience, because the agency  
16 understands how this question fits within the  
17 statutory scheme.

18 So it's not a question of the court  
19 couldn't do it. It's a question of, once  
20 congressional direction can't be found, who does  
21 Congress want to do it.

22 MR. CLEMENT: So, Justice Kagan, I  
23 don't agree with you that the law runs out in  
24 those circumstances, even -- even though there's  
25 an agency there, but I will give you this: If I



1 did believe it, I would say at that point let's  
2 give the tie to the citizen. Let's not give the  
3 tie to the agency.

4 And I think it's important --

5 JUSTICE KAGAN: See, I don't think  
6 it's like what we would do; you would give the  
7 tie to the citizen and I would give the tie to  
8 the agency. Chevron is about what Congress  
9 wants.

10 And you can call it fictional all you  
11 want, but we have lots of presumptions that  
12 operate with respect to statutory  
13 interpretation, and this is just one of them.  
14 It's just saying Congress understands as well as  
15 anybody different institutional's comparative  
16 attributes and comparative virtues, and it does  
17 not want courts making -- you can -- I mean,  
18 it's law, but it's policy-laden judgments  
19 once -- once Congress's direction can't be  
20 found.

21 MR. CLEMENT: So, Justice Kagan, if  
22 we're going to talk about what Congress wants,  
23 we probably should at least avert to the fact  
24 that we do have an amicus brief in this case  
25 from the House in its institutional capacity,

1 and it doesn't want Chevron. It's on our side  
2 of the case, and it certainly --

3 JUSTICE KAGAN: If it doesn't want  
4 Chevron, it has total control over Chevron. It  
5 can reverse Chevron tomorrow with respect to any  
6 particular statute and with respect to statutes  
7 generally, and it hasn't. For 40 years, it has  
8 acceded to Chevron. Except in super-rare cases,  
9 it has basically said this is the background  
10 rule, it gives us a stable default rule from  
11 which to write statutes, and we've accepted  
12 that.

13 MR. CLEMENT: So let me say three  
14 things about that.

15 First of all, I'm not sure everybody  
16 in Congress wants to overrule Chevron because  
17 it's really -- it's --

18 JUSTICE KAGAN: Well, everybody in  
19 Congress doesn't want to do everything --  
20 anything.

21 MR. CLEMENT: But my point is it's  
22 really convenient for some members of Congress  
23 not to have to tackle the hard questions and to  
24 rely on their friends in the executive branch to  
25 get them everything they want.

1           I also think Justice Kavanaugh is  
2 right that even if Congress did it, the  
3 president would veto it.

4           And I think the third problem is, and  
5 -- and fundamentally even more problematic, is  
6 if you get back to that fundamental premise of  
7 Chevron that when there's silence or ambiguity,  
8 we know the agency wanted to delegate to the  
9 agency.

10           That is just fictional, and it's  
11 fictional in a particular way, which is it  
12 assumes that ambiguity is always a delegation.  
13 But ambiguity is not always a delegation. And  
14 more often, what ambiguity is, I don't have  
15 enough votes in Congress to make it clear, so  
16 I'm going to leave it ambiguous, that's how  
17 we're going to get over the bicameralism and  
18 presentment hurdle, and then we'll give it to my  
19 friends in the agency and they'll take it from  
20 here.

21           And that ends up with a phenomenon  
22 where we have major problems in society that  
23 aren't being solved because, instead of actually  
24 doing the hard work of legislation where you  
25 have to compromise with the other side at the

1 risk of maybe drawing a primary challenger, you  
2 rely on an executive branch friend to do what  
3 you want. And it's not hypothetical.

4 When I hear you talk about --

5 JUSTICE SOTOMAYOR: You said you end  
6 up in gridlock, which we have now.

7 MR. CLEMENT: No. What I'm saying is  
8 Chevron is a big factor in contributing to  
9 gridlock. And let me give you a concrete  
10 example.

11 I would think that the uniquely 21st  
12 Century phenomenon of cryptocurrency would have  
13 been addressed by Congress, and I certainly  
14 would have thought that would have been true in  
15 the wake of the FTX debacle. But it hasn't  
16 happened. Why hasn't it happened? Because  
17 there's an agency head out there that thinks  
18 that he already has the authority to address  
19 this uniquely 21st Century problem with a couple  
20 of statutes passed in the 1930s.

21 And he's going to wave his wand and  
22 he's going to say the words "investment  
23 contract" are ambiguous, and that's going to  
24 suck all of this into my regulatory ambit, even  
25 though that same person, when he was a

1 professor, said this is probably a job for the  
2 CFTC.

3 JUSTICE BARRETT: Mr. Clement?

4 MR. CLEMENT: That's --

5 JUSTICE BARRETT: Oh, sorry. I was  
6 just going to ask you to address stare decisis.  
7 Let's say -- let's -- let's assume for the sake  
8 of argument that I agree with you that in 706  
9 Congress has spoken to the problem, that we're  
10 not applying a fictional presumption but that  
11 Congress has told us, you know, we want courts  
12 to decide questions of law.

13 The -- the Solicitor General in the  
14 last argument talked about how litigants will be  
15 lining up for cases that were decided under step  
16 two to seek to reopen challenges to the agency's  
17 interpretation.

18 What do you have to say about the  
19 disruptive consequences of overruling?

20 MR. CLEMENT: So I think the Solicitor  
21 General, with all due respect, will be saying  
22 the exact opposite if this Court overrules the  
23 decision and will be saying, no, you've got to  
24 look at it at the right level of generality.

25 What I would say is this Court has

1 moved away dramatically from certain methods of  
2 interpretation, more dramatically than just we  
3 look at legislative history less now than we  
4 used to. Implied causes of action, as far as I  
5 can tell, are dead. But that didn't mean that  
6 every decision that was decided in the bad old  
7 days was overruled ipso facto.

8 JUSTICE BARRETT: But that's a little  
9 bit different because those implied causes of  
10 action, the Court was saying this is what the  
11 statute means, like Title IX implies a cause of  
12 action or whatever.

13 This would be different because the  
14 Court would just be saying may not be the best,  
15 but the agency's interpretation is reasonable.  
16 So it doesn't settle it in the same way that  
17 maybe some of those old implied cause-of-action  
18 cases did.

19 MR. CLEMENT: If you don't want there  
20 to be disruption, all you have to do is make the  
21 precise level-of-generality move that you  
22 alluded to, which is I would think in every one  
23 of these Chevron cases, the question is, is the  
24 agency's interpretation of the statute lawful?  
25 And if the court has already held yes, it is

1 lawful, I would think that would settle the  
2 matter.

3           And as I say, in our brief, the only  
4 reason I have any doubt about that is because of  
5 Brand X. And Brand X is a huge embarrassment  
6 for the government and the government's friend.  
7 I looked through the bottom side amicus. I  
8 counted 13 amicus briefs on the bottom side,  
9 only two of them cited Brand X, because, gosh,  
10 it would be nice for that decision to just go  
11 away, wouldn't it? Wouldn't it?

12           JUSTICE BARRETT: Sorry, Justice  
13 Thomas.

14           (Laughter.)

15           MR. CLEMENT: But that absolutely  
16 makes clear that, you know, this is a  
17 reliance-destroying doctrine. And, frankly, if  
18 you said that Chevron is over and all of those  
19 step two cases that were decided are going to  
20 have stare decisis effect because of the level  
21 of generality point I made, you would be giving  
22 new stability to the law. It would be improving  
23 stability.

24           And that's an important distinction  
25 from Kisor. In Kisor -- you know, the Kisor

1 doctrine -- the Auer doctrine, rather, never had  
2 its Brand X moment where this Court made clear  
3 that the agency could flip 180 degrees. And,  
4 indeed, in Kisor itself, it suggested the  
5 opposite. But, here, with Chevron, we know this  
6 is a -- a reliance-destroying doctrine.

7           Here's another thing to think about in  
8 terms of Kisor. As I read the Court's decision,  
9 in addition to the fact that we know it doesn't  
10 directly speak to Chevron thanks to the Chief  
11 Justice, I also read it as all -- all it says is  
12 you need a special justification. Well, I think  
13 we've offered you special justifications in  
14 droves and special justification beyond the  
15 decision being wrong. And I don't know of a  
16 case where you would defer on stare decisis  
17 grounds when the relevant decision didn't cite  
18 the relevant statute at all.

19           I mean, look, this would be a  
20 different world if Chevron went in and wrestled  
21 with Section 706 and said, despite all contrary  
22 textual indications, that it forecloses de novo  
23 review of statutes. I suppose I'd have to be  
24 here making every single stare decisis argument.  
25 But that is not what Chevron did. It didn't



1 even mention the relevant statute.

2 Now, of course, I don't want to be  
3 seen as running away from the stare decisis  
4 factors because I'm happy to walk through all of  
5 them because I think all of them cut in our  
6 favor. The decision is tremendously unworkable.  
7 Nobody knows what ambiguity is. Even my learned  
8 friend on the other side says there's no formula  
9 for it. And that's an elaboration on what the  
10 government said the last time up here, which is  
11 that nobody knows what "ambiguity" means. But  
12 that's just workability.

13 Let's talk about reliance. I talked  
14 about the Brand X problems, which are very  
15 serious problems. And, like, I love the Brand X  
16 case because broadband regulation provides a  
17 perfect example of the flip-flop that can  
18 happen, but it's not my only example. There are  
19 amicus briefs that talk about the National Labor  
20 Relations Board flip-flopping on everything.  
21 Ask the Little Sisters about stability and  
22 reliance interests as their fate changes from  
23 administration to administration. It is a -- it  
24 is a disaster. And then you get to the  
25 real-world effects on citizens that Justice

1 Gorsuch alluded to.

2           But I'd like to emphasize its effect  
3 on Congress because, honestly, I think, when the  
4 Court was originally doing Chevron, it was  
5 looking only at a comparison between Article II  
6 and Article III and who's better at resolving  
7 these hard questions. I think it got even that  
8 question wrong, but it failed to think about the  
9 -- the incentives it was giving the Article I  
10 branch.

11           And that's what 40 years of experience  
12 has shown us, and 40 years of experience has  
13 shown us that it's virtually impossible to  
14 legislate on meaningful issues, major questions,  
15 if you will, because right -- because, right  
16 now, roughly half of the people in Congress at  
17 any given point are going to have their friends  
18 in the executive branch. So their choice on a  
19 controversial issue is compromise and forge a  
20 long-term solution at the cost of maybe getting  
21 a primary challenger or, instead, just call up  
22 your buddy, who used to be your co-staffer, in  
23 the executive branch now and have him give  
24 everything on your wish list based on a broad  
25 statutory term.

1           And my friends asked for empirical  
2 evidence. I think you just have to look at this  
3 Court's docket. It's been one major rule after  
4 another. It hasn't been one major statute after  
5 another. I would have thought Congress might  
6 have addressed student loan forgiveness if that  
7 were really such an important issue to one party  
8 in the -- in -- in -- in Congress. I would have  
9 thought maybe they would have fixed the -- the  
10 eviction moratorium. I could go on and on on  
11 these issues. They don't get addressed because  
12 Chevron makes it so easy for them not to tackle  
13 the hard issues and forge a permanent solution.

14           My friends on the other side also talk  
15 about, you know, this is -- this is great  
16 because it leads to uniformity in the law.  
17 Well, I don't think that's an end in itself.  
18 Again, if it were up to me, if we -- if we think  
19 uniformity is so great, let's have uniformity  
20 and let's have the thumb on the scale on the  
21 side of the citizen.

22           But the reality is the kind of  
23 uniformity that you get under Chevron is  
24 something only the government could love because  
25 every court in the country has to agree on the

1 current administration's view of a debatable  
2 statute. You don't get the kind of uniformity  
3 that you actually want, which is a stable  
4 decision that says this is what the statute  
5 means.

6 JUSTICE ALITO: Mr. Clement, can I ask  
7 you the same question I asked Mr. Martinez about  
8 why Chevron was initially popular? People who  
9 were very sophisticated and had a deep  
10 understanding of how judges decide what a  
11 statute means and a deep understanding of how  
12 administrative agencies work thought that  
13 Chevron would be an improvement because it would  
14 take judges out of the business of making what  
15 were essentially policy decisions.

16 Now were they wrong then? And if they  
17 weren't wrong then, what, if anything, has  
18 changed since then?

19 MR. CLEMENT: So, Justice Alito, I  
20 think they were partially right then. So let me  
21 say what's changed and what hasn't changed,  
22 i.e., what the Court missed back in Chevron.

23 What has changed is we've come a long  
24 way in statutory interpretation. And, you know,  
25 if Chevron was a response to some of the

1 excesses of the D.C. Circuit in the freewheeling  
2 days of the late '70s and the use of legislative  
3 history and, oh, by the way, the text of the  
4 statute appears in the margin of my opinion, and  
5 I'm not going to talk about it again because I'm  
6 off to the races, we now, I think, are all  
7 textualists. The focus is much greater on the  
8 text of the statute.

9           And once you recognize that, you  
10 recognize the problem with deferring at a  
11 certain point to the agencies. And let's look  
12 at the track record of the agencies before this  
13 Court. If they are so expert, they should be  
14 able to persuade you in case after case that  
15 they're getting these statutes right. By my  
16 count and by the Cato Institute in their -- in  
17 their amicus brief, since the Court last cited  
18 Chevron, the administration is batting about 300  
19 in these cases.

20           So expertise is not all what it's  
21 cracked up to be. And that's true even in the  
22 most complicated cases. Look at the American  
23 Hospital Association's case. I don't think  
24 you're going to find a statute that's more  
25 complicated than that one. But yet, this Court

1 had no trouble unanimously saying that you can't  
2 have hospital chain-specific pricing without  
3 first doing a survey.

4 JUSTICE ALITO: Well, I don't know  
5 whether you can say we had no trouble.

6 (Laughter.)

7 JUSTICE KAVANAUGH: I -- I was going  
8 to say that, but yeah.

9 CHIEF JUSTICE ROBERTS: So was I.

10 (Laughter.)

11 MR. CLEMENT: No one was troubled to  
12 write a dissent.

13 (Laughter.)

14 MR. CLEMENT: Let me -- let me put it  
15 that way. But -- and I can use other examples.  
16 Encino, a case where this Court said that  
17 Chevron wasn't applicable because of a  
18 procedural defect. Now it split the Court 5 to  
19 4, but how did it decide the case? It decided  
20 the case with the distributive canon. Do you  
21 think the Labor Department Wage and Hour  
22 Division is the experts on the distributive  
23 canon, or do you think the courts are?

24 CHIEF JUSTICE ROBERTS: Thank -- thank  
25 you, Mr. Clement.

1           The answer from Mr. Martinez on  
2           several questions about what happens when you,  
3           you know, get rid of Chevron in this case was  
4           Skidmore. And if Skidmore is going to occupy a  
5           more prominent role going forward, I -- I'd like  
6           to know exactly what your understanding of that  
7           principle is.

8           MR. CLEMENT: So my understanding of  
9           Skidmore, consistent with Justice Kavanaugh's,  
10          is it's not actually a deference doctrine. Call  
11          it a doctrine of weight or persuasiveness.

12          And then the beauty of -- of Skidmore,  
13          as I understand it -- I suppose the defect as  
14          well, Justice Scalia called it the totality of  
15          the circumstances -- but I think the Skidmore  
16          test allows you to consider the weight of the  
17          agency's views but then consider is it something  
18          that it came up with like right after the  
19          statute was passed, so it actually sheds light  
20          on the original public meaning of the statute,  
21          or is it something that they didn't adopt for 20  
22          years later, or did they adopt one policy right  
23          after the statute was passed and actually flip  
24          it over 20 years later?

25          All of that is something that Skidmore

1 can account for that Chevron has never been  
2 caused to account for. Now you can modify it,  
3 you know, à la Kisor and try to add all of that  
4 to it, but I do think that the Chevron  
5 experiment has failed.

6 CHIEF JUSTICE ROBERTS: Well, it's  
7 usually described as a deference doctrine.  
8 People talk about Skidmore deference.

9 MR. CLEMENT: Yes, they do, Mr. Chief  
10 Justice, and that puzzled me a little bit. And  
11 I went to the dictionary and I looked up  
12 "deference" and the most common definition is  
13 "yielding to the will of another."

14 And I think, if that's the definition  
15 of -- of "deference," then you shouldn't apply  
16 Chevron -- Skidmore, rather -- in a way where  
17 you actually say: All right, this is super  
18 close, and I think I have the right answer, but  
19 I'm going to yield to the position of the  
20 executive branch.

21 JUSTICE GORSUCH: That's never what  
22 Skidmore has been understood to mean or said.  
23 It said that the persuasiveness of the  
24 government's interpretation depends upon the  
25 circumstances. And some of those you



1 enumerated.

2 MR. CLEMENT: Absolutely.

3 JUSTICE GORSUCH: Call it what you  
4 will, that's what it is, right?

5 MR. CLEMENT: Look, I don't mean to be  
6 pedantic, but I do think that calling it  
7 deference --

8 JUSTICE GORSUCH: I -- I -- I --

9 MR. CLEMENT: -- sort of gets you to  
10 Footnote 11 land in a junior varsity way, and I  
11 think that would be unfortunate.

12 JUSTICE GORSUCH: Yeah.

13 MR. CLEMENT: And the other great  
14 thing about Skidmore is it --

15 JUSTICE KAGAN: We're out of order.

16 MR. CLEMENT: Oh. Sorry.

17 JUSTICE KAGAN: Skidmore, I mean, what  
18 does Skidmore mean? Skidmore means, if we think  
19 you're right, we'll tell you you're right. So  
20 the idea that Skidmore is going to be a backup  
21 once you get rid of Chevron, that Skidmore means  
22 anything other than nothing, Skidmore has always  
23 meant nothing.

24 MR. CLEMENT: Justice Jackson, the  
25 earlier one, would beg to differ with you on

1 that score. He thought it was quite important.  
2 And I think, you know, if you look at the  
3 Skidmore case itself, I mean, it took into  
4 account the Wage and Hour Division's view of  
5 waiting time and, ironically enough in that  
6 case, said, you know, we can't have a  
7 bright-line test one way or another because the  
8 agency has looked at this and thought a lot of  
9 time, and it's really going to be more  
10 fact-dependent than that and we can take that  
11 into account.

12 I think, in some of these situations,  
13 you are going to be able to look at the agency's  
14 expertise and make a judgment that this is in  
15 their bailiwick. They've really made some  
16 pretty good points. But, in other contexts,  
17 you're going to see that what the agency wants  
18 you to defer to is its own view that lands it in  
19 this case, we ran out of money and it sure would  
20 be nice if we can just impose this fine and  
21 continue to monitor these people at a 50 percent  
22 rate by making them pay for it instead of us  
23 having to pay for it.

24 CHIEF JUSTICE ROBERTS: Thank you.

25 MR. CLEMENT: I mean, that's --

1 there's no expertise there.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas?

4 Justice Alito?

5 Justice Sotomayor?

6 Justice Kagan?

7 JUSTICE KAGAN: I guess what I'm  
8 struck by, Mr. Clement, and -- and -- and this  
9 follows from this Skidmore thing, because  
10 Skidmore is not a doctrine of humility, but  
11 Chevron is.

12 Chevron is a doctrine that says, you  
13 know, we recognize that there are some places  
14 where congressional direction has run out, and  
15 we think Congress would have wanted the agency  
16 to do something rather than the courts.

17 We accept that because that's the best  
18 reading of Congress and also because we know in  
19 our heart of hearts that Congress -- that  
20 agencies know things that courts do not. And  
21 that's the basis of Chevron.

22 And then you take that doctrine of  
23 humility and you put on top of it stare decisis,  
24 another doctrine of humility, which is to  
25 suggest we don't willy-nilly reverse things

1 unless there's a special justification. Here,  
2 Kisor said it's even more than that, there's  
3 even more reason not to reverse something  
4 because there have been 70 Supreme Court  
5 decisions relying on Chevron, because there have  
6 been 17,000 lower court decisions relying on  
7 Chevron.

8           And you're saying blow up one doctrine  
9 of humility, blow up another doctrine of  
10 humility, and then expect anybody to think that  
11 the courts are acting like courts.

12           MR. CLEMENT: With respect, Your  
13 Honor, this Court has on multiple occasions  
14 corrected its own errors when it comes to  
15 statutory interpretation, how to deal with  
16 qualified immunity, implied causes of action.

17           In the Encino Motor cases -- Motor  
18 case, there was a canon of construction that  
19 said exemptions to FLSA provisions should be  
20 construed narrowly. This Court overruled that  
21 and said that should have no role to play in  
22 interpreting the FLSA. It didn't run through  
23 the stare decisis factors.

24           So I think there is, I don't know  
25 whether you call it humility or just clarity,

1 but when the question is judicial methodology, I  
2 think it's very weird to ask Congress to fix  
3 your problems for you. I don't think you  
4 actually want to invite, in all candor, that  
5 particular fox into your hen -- henhouse and  
6 tell you how to go about interpreting statutes  
7 or how to go about dealing with qualified  
8 immunity defenses.

9 JUSTICE KAGAN: But Kisor, five  
10 Justices, a majority of this Court, made clear  
11 that Auer deference was subject to normal  
12 judicial -- normal principles of stare decisis.  
13 And to the extent that there was a ratchet up or  
14 a ratchet down, it ratcheted them up because it  
15 understood that that deference decision  
16 supported, was the basis for tens, hundreds,  
17 thousands of other decisions.

18 MR. CLEMENT: So I'm going to be at a  
19 disadvantage in debating what exactly Kisor  
20 held, but the way I read Kisor is it said that  
21 you need a special justification beyond the  
22 decision being wrong. I think we've given you  
23 that in spades.

24 Kisor did not, with all due respect,  
25 wrestle with Saucier against Katz. It didn't --

1 it didn't wrestle with Gaudin in the opinion.  
2 So I think I can -- I can reconcile all your law  
3 by saying: All right, when it's a procedural  
4 rule or a court-made rule of interpretation,  
5 maybe we look to some of the same factors, but  
6 they don't apply with the same weight as they  
7 would if it were a substantive result.

8 And that does make sense because, at  
9 least under our view of the world, when you move  
10 on from a bad methodology, you don't overturn  
11 all those decisions, those substantive  
12 decisions. They still stay there.

13 So Section 1982 still has an implied  
14 cause of action. Section 1981 still has a cause  
15 of action. I can go on and on. Those cases  
16 don't get overturned.

17 JUSTICE KAGAN: Thank you, Mr.  
18 Clement.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Gorsuch?

21 JUSTICE GORSUCH: One lesson of  
22 humility is admit when you're wrong. Justice  
23 Scalia, who took Chevron, which nobody  
24 understood to include this two-step move as  
25 originally written, turned it into what we now

1 know, and late in life, he came to regret that  
2 decision.

3 What do we make of that lesson about  
4 humility?

5 MR. CLEMENT: No. Look, I do think  
6 that, you know, reconsidering particularly a  
7 methodological error is part of judicial  
8 humility. And I do think, if you look at  
9 Justice Scalia's Perez opinion, the mortgage  
10 banker cases, one of the things he said there  
11 most clearly but he said all along was our  
12 decision in Chevron was completely heedless of  
13 Section 706 of the APA.

14 And if you're looking for a special  
15 justification to overturn an opinion, I think  
16 whiffing on the underlying statute entirely has  
17 got to be at the top of the list.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Kavanaugh?

21 JUSTICE KAVANAUGH: A couple  
22 questions. First, on Skidmore, I just want to  
23 say how I've thought about it, and you can tell  
24 me whether this is wrong, that it respects  
25 contemporaneous and consistent interpretations

1 as evidence of the proper original meaning of  
2 the statute because that's kind of common sense  
3 in statutory interpretation more generally, that  
4 if an interpretation was contemporaneous and  
5 consistent, it's more likely to be correct.

6 So that's respect, but the word  
7 "deference" I wouldn't have -- wouldn't have  
8 used there.

9 MR. CLEMENT: I think you have that  
10 exactly right. And one of the virtues of  
11 looking at Skidmore that way is it is consistent  
12 with a principle that this Court articulated in  
13 the Christopher against SmithKline Beecham case,  
14 which is sometimes the industry is the one with  
15 a consistent, long-term understanding of the  
16 statute that goes all the way back and sheds  
17 light on the original public meaning.

18 And it seems to me Skidmore allows you  
19 to say, if the industry says -- has taken a  
20 position that's consistent from the beginning  
21 and the agency flips 25 years into the  
22 enterprise, Skidmore gives you the tools for  
23 saying, all right, agency, you're going to lose  
24 that case, Chevron doesn't.

25 JUSTICE KAVANAUGH: Right. A big



1 difference between Skidmore and Chevron -- there  
2 are others -- is, when the agency changes  
3 position every four years, that's going to still  
4 get Chevron deference, but Skidmore, with  
5 respect to that interpretation, would drop out  
6 because it's not been a consistent and  
7 contemporaneous -- consistent from the  
8 contemporaneous understanding of the statute.

9 MR. CLEMENT: Absolutely.  
10 Flip-flopping is a huge Skidmore minus and it's  
11 a matter of indifference -- or, actually, if you  
12 look at some of the things that Justice Scalia  
13 said in the beginning, when he was enthusiastic  
14 about the doctrine, the fact -- he viewed the  
15 fact that agencies could flip-flop under Chevron  
16 as being an affirmative virtue.

17 JUSTICE KAVANAUGH: Then Justice Kagan  
18 raises an important point about judicial  
19 restraint or humility in terms of Chevron, and  
20 that -- that's an important concern for any  
21 judge.

22 I think the flip side, why this is  
23 hard, the other concern for any judge is  
24 abdication to the executive branch running  
25 roughshod over limits established in the

1 Constitution or, in this case, by Congress.

2           So I think we've got to find the --  
3 that's -- that's why it's hard, find the right  
4 balance between restraint and letting the  
5 executive get away with too much.

6           On that front, do you -- there was  
7 questions earlier, do judges really rely on  
8 Chevron? You want to speak to that?

9           MR. CLEMENT: No, I'd love to speak to  
10 that, because I think that's an important  
11 consideration. I mean, one of the premises of  
12 one of Justice Kagan's questions in the first  
13 argument was that, you know, you rarely get to  
14 Chevron step two, but there are statistics on  
15 this.

16           There is a -- you know, the most  
17 exhaustive survey of over a thousand cases by  
18 Barnett and Walker we cited on page 33 of the  
19 blue brief. It found that courts were reaching  
20 70 -- were reaching step two in 70 percent of  
21 the cases, 70 percent of the cases.

22           The Cato Institute brief -- you might  
23 think, well, things have gotten better because  
24 that was a longitudinal study over a number of  
25 years. You might think, well, things are

1 getting a lot better because we've signaled that  
2 Chevron is on sort of life support. But the  
3 Cato ran the numbers for, like, 20 -- 2020 and  
4 2021, and it's down to 60 percent. But it's  
5 still well over half the time your average judge  
6 in the court of appeals is getting to step two,  
7 and Judge Kethledge, you know, he hasn't updated  
8 that speech, but, as far as I know, Judge  
9 Kethledge still hasn't gotten to step two once.

10           And, you know, that's an -- that's --  
11 that's an unsettlement in the law, that's a  
12 disconnect in the law that is very hard to get  
13 your fingers around. Like, at least if, you  
14 know, one circuit says the statute means X and  
15 another circuit says Y, everybody can see that,  
16 cert can be granted, this Court can resolve the  
17 case.

18           But, if courts are deciding some cases  
19 step one, some cases step two, in ways that are  
20 radically different, I don't even know how you  
21 really unearth that. So I think that's another  
22 huge problem with this.

23           JUSTICE KAVANAUGH: One last question.  
24 If Chevron were overruled, I think your brief  
25 says, we should go ahead and decide the issue,

1 the statutory issue in this case. Can you speak  
2 very briefly to why?

3 MR. CLEMENT: Very briefly, because I  
4 think it would give a great illustration of how  
5 to do plain old-fashioned statutory  
6 construction. It would also be a useful object  
7 lesson in how far very good judges get astray by  
8 applying Chevron, because another problem with  
9 Chevron -- I'll still try to be brief -- it  
10 tends to focus on one or two terms and asks  
11 whether they're ambiguous, and you lose the  
12 context of the statute.

13 I think, if you have the context of  
14 the statute and the fact that the only other  
15 places they put these kind of fees on domestic  
16 fisheries, they put a -- a serious cap, and then  
17 they did it only for the most well-heeled  
18 fisheries or in special circumstances, this is  
19 an easy case doing good old-fashioned --

20 JUSTICE KAVANAUGH: Thank you.

21 MR. CLEMENT: -- statutory  
22 construction.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Barrett?

1                   JUSTICE BARRETT: So we have a host of  
2                   canons, clear statement rules, some of which are  
3                   constitutionally inspired, and when I asked the  
4                   Solicitor General in the last argument about  
5                   whether Chevron should be thought -- thought of  
6                   as part of that package, she said that Chevron  
7                   kind of stood distinct, that Chevron was unique.

8                   Can you address that?

9                   MR. CLEMENT: I think she's right  
10                  about that. I think it -- it sits out there  
11                  like an island, and that's part of the reason to  
12                  overrule it. And I think all the other canons  
13                  --

14                  (Laughter.)

15                  MR. CLEMENT: -- I think all the other  
16                  canons that I can think of are fully consistent  
17                  with de novo statutory interpretation. I might  
18                  be missing one, but the ones I think of is, when  
19                  you're doing de novo statutory construction, you  
20                  take into account all of those canons.  
21                  Chevron's the only one I know that says that at  
22                  a certain point you just stop the de novo stuff  
23                  and you sort of surrender, even under  
24                  circumstances where, if the agency weren't a  
25                  litigant, you would keep going. Only Chevron

1 does that.

2 JUSTICE BARRETT: One last question.  
3 You said -- you know, you pointed out that on  
4 our docket we've had multiple cases in which the  
5 Major Questions Doctrine has come up. Do you  
6 think that overruling Chevron is going to solve  
7 that problem? Because, in a lot of those cases,  
8 the agency has hung its hat on words like  
9 "appropriate," you know, on the kind of language  
10 which I think -- and you can tell me if you  
11 disagree about this -- I think you agree that  
12 when a statute uses a word that leaves room for  
13 discretion, like "appropriate," "feasible,"  
14 "reasonable," that that is a delegation of  
15 authority to the agency.

16 So don't you think agencies will still  
17 continue to rely on words like that in ways that  
18 might not, you know, limit our emergency docket?

19 MR. CLEMENT: I -- I'm not so naive to  
20 say that overruling Chevron is going to solve  
21 all the problems with the emergency docket, but  
22 it is going to make it a lot better because,  
23 sure, there are some places where they use  
24 "appropriate" or they try to use "modify," which  
25 was bold in light of AT&T, but whatever, they

1 picked some of these words that are more  
2 capacious.

3 But that broadband case has come in  
4 here. That's a case that shouldn't be  
5 Chevronized. You know, some -- someday,  
6 somebody's going to litigate whether crypto is  
7 an investment contract. Justice Kagan's  
8 confident that, you know, AI is going to get  
9 here because of a statute. I think it's more  
10 likely that Congress is going to say, well,  
11 there's some scientific officer in Commerce,  
12 we'll let them fix the problem.

13 But -- so -- so my -- my own view of  
14 this is it's not going to -- it's not a  
15 cure-all, but it's going to move things very  
16 much in the right direction.

17 JUSTICE BARRETT: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you.

19 General Prelogar, welcome back.

20 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

21 ON BEHALF OF THE RESPONDENTS

22 GENERAL PRELOGAR: Thank you, Mr.

23 Chief Justice, and may it please the Court:

24 Throughout this litigation and at  
25 times this morning, Petitioners have sought to

1 characterize this case as presenting a  
2 fundamental question of the separation of powers  
3 and a test of Article III: Will courts continue  
4 to say what the law is?

5           But I think, stepping back, I want to  
6 make sure that what doesn't get lost in the  
7 shuffle is that Petitioners have made an  
8 important concession that I think illustrates  
9 that the issue here is actually far narrower and  
10 that their attacks on Chevron lack merit and are  
11 unnecessary.

12           The concession is this: Petitioners  
13 acknowledge that Congress can expressly delegate  
14 to agencies the authority to define statutory  
15 terms and fill gaps. Imagine, for example, if  
16 the statute said, in Chevron, "stationary  
17 source" as defined by the Administrator. I take  
18 both Petitioners to give that up and recognize  
19 that is a delegation and courts should respect  
20 that.

21           The role of the court in that  
22 circumstance is to make sure that the agency has  
23 followed the proper procedures and stayed what  
24 -- within whatever outer bounds Congress itself  
25 has set. And all of that complies with the



1 Constitution, of course, because Congress has  
2 Article I authority to delegate gap-filling  
3 authority to agencies, and the executive has  
4 core Article II authority to fill in those gaps.  
5 That's a core exercise of the executive power.  
6 And then the Article III courts are just  
7 fulfilling their judicial role when they give  
8 effect to what Congress has done in its choice  
9 to rely on the agency in that regard.

10           But I think what all of this shows is  
11 that the constitutional attacks on Chevron and  
12 the suggestion that it's egregiously wrong in  
13 that regard lack merit because there is no  
14 constitutional distinction between that kind of  
15 express delegation and the delegations  
16 recognized in Chevron.

17           If Congress can expressly vest an  
18 agency with authority to interpret the law  
19 through an express delegation, then it can do  
20 the same thing implicitly, especially in a world  
21 where Congress has to provide the agency with  
22 the express authority to carry the statute into  
23 operation with the force and effect of law.

24           Now we can debate, of course, whether  
25 Chevron drew the right line in identifying

1 exactly when these delegations have occurred. I  
2 think the Court got that right for all of the  
3 reasons I tried to explain this morning. But I  
4 think it's important to recognize that that  
5 debate doesn't have a constitutional dimension  
6 to it that falls out of the equation. Instead,  
7 it's just a question of whether the Court drew  
8 the right line in identifying when a delegation  
9 has occurred.

10           And if you recognize that, then I  
11 think what's left over are the practical  
12 concerns that have been raised about Chevron.  
13 And I don't want to diminish the force of the  
14 concerns that some members of the Court have  
15 articulated, but I also think that those  
16 concerns are manageable. The Court could do in  
17 this case what it did in *Kisor*. It could  
18 clarify and articulate the limits of Chevron  
19 deference without taking the drastic step of  
20 upending decades of settled precedent.

21           And I think that's the right thing to  
22 do here. You know, my -- my friends in their  
23 briefs both said judges should aspire to be like  
24 umpires, calling balls and strikes. But *stare*  
25 *decisis* is part of the rules of the game here

1 too. And in this case, I think all of the stare  
2 decisis factors counsel in favor of retaining  
3 Chevron.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: How do you -- how do  
6 we discern statutory -- delegation from  
7 statutory silence?

8 GENERAL PRELOGAR: So, Justice Thomas,  
9 I think that it would be wrong to suggest that  
10 you can neatly categorize cases as those  
11 involving silence and those involving ambiguity.  
12 And -- and the reason for that -- I recognize  
13 that -- that Chevron itself used both of those  
14 terms, but I think that the Court was just  
15 trying to be comprehensive about those kinds of  
16 circumstance where Congress hasn't itself  
17 directly resolved an issue.

18 There's never going to be total  
19 silence in a statute. At the very least, the  
20 agency is going to have to be able to point to  
21 the express delegation of rulemaking authority,  
22 the directive from Congress to put the statute  
23 into effect with the force of law. So that will  
24 always be at least a baseline in this context.  
25 And then, in the mine-run case, you'll be able

1 to point to any number of additional features of  
2 a statute that help to signal the agency's  
3 authority.

4 And, actually, this case is the  
5 perfect example because my friend said that the  
6 Magnuson-Stevens Act here is silent on the issue  
7 of whether the industry can be required to pay  
8 for monitors. But we have four different  
9 provisions of the Act that we've pointed to that  
10 undergird the agency's authority.

11 There's the provision that expressly  
12 says that the agency can require the vessels to  
13 carry the monitors. Then there's the -- the  
14 definition of what a monitor is under the  
15 statute. It can include a private third party.  
16 Then there's the penalty provision that says, in  
17 a circumstance where the vessel owner has  
18 contracted with a private third party and not  
19 paid, the agency can penalize. And, finally,  
20 there's the residual authority to enact  
21 necessary and appropriate terms in these Fishery  
22 Management Plans. So we don't think that this  
23 is a case about silence at all.

24 JUSTICE GORSUCH: General, yeah,  
25 that's really good -- again, we're back to the

1 same question the Chief had of -- of Mr.  
2 Clement. That's a really good statutory  
3 interpretation argument, sounds like exactly the  
4 bread and butter of what we do every single day.  
5 And we can resolve that, right?

6 GENERAL PRELOGAR: We think that you  
7 could find that the statute is clear, but I  
8 think that --

9 JUSTICE GORSUCH: The fact that you  
10 think it's clear and Mr. Clement thinks it's  
11 clear but a court below thought it was ambiguous  
12 should tell us something, shouldn't it?

13 GENERAL PRELOGAR: No, I disagree with  
14 that, and I should say that I think, actually,  
15 if you look at both what the D.C. Circuit and  
16 the First Circuit were doing in these cases,  
17 they recognized the force of the arguments. The  
18 D.C. Circuit, it's true, in *Loper Bright*  
19 acknowledged that, ultimately, it couldn't  
20 conclude with confidence that the statute  
21 definitely authorized the agency explicitly --

22 JUSTICE GORSUCH: But you think it  
23 does.

24 GENERAL PRELOGAR: We think that there  
25 is a lot in the statute to -- yes --

1 JUSTICE GORSUCH: You think yes --

2 GENERAL PRELOGAR: -- to support the  
3 agency's interpretation.

4 JUSTICE GORSUCH: -- yes, you think  
5 you win under step one, and so does Mr. Clement.  
6 And yet here we are.

7 GENERAL PRELOGAR: I don't think it's  
8 at all unusual to find a case where the  
9 government thinks it has both the -- the clear  
10 interpretation of the statute on its side and  
11 that the agency has acted reasonably.

12 JUSTICE GORSUCH: Yeah, because we  
13 have this ambiguous ambiguity trigger that  
14 nobody knows what it means.

15 GENERAL PRELOGAR: Well, Justice --

16 JUSTICE GORSUCH: Now let me just ask  
17 you about the delegation, your -- your -- your  
18 example in -- in the opening, which is  
19 interesting.

20 GENERAL PRELOGAR: Yeah.

21 JUSTICE GORSUCH: I -- I totally  
22 understand a statute that does delegate, you  
23 know, you make up what rate you think, and --  
24 and -- and that might pose a delegation problem,  
25 might not, fine, but we know Congress delegated

1 it. That's one thing.

2 What you're asking us to do is infer  
3 from a linguistic ambiguity that may not be the  
4 product of any intent at all, Pulsifer, "and"  
5 might mean "or" in some circumstances and infer  
6 from that not that we should go to look at  
7 statutory context and other clues within the --  
8 the statute itself to determine who has the  
9 better reading, but the government should always  
10 win that case.

11 GENERAL PRELOGAR: No, not at all. Of  
12 course, you should look at context.

13 JUSTICE GORSUCH: That seems to me  
14 very different --

15 GENERAL PRELOGAR: That's part of the  
16 tools of --

17 JUSTICE GORSUCH: Just to -- sorry,  
18 just to finish up. I -- I understand the  
19 delegation in one context, but I struggle to see  
20 that we should infer the fiction of delegation  
21 in the second always and necessarily. All  
22 right. I'm sorry. Have at it.

23 GENERAL PRELOGAR: So I -- I disagree  
24 that there is a fiction of delegation in the  
25 circumstances that trigger Chevron. At the

1     outset, I want to make perfectly clear that, of  
2     course, the statutory context and structure is  
3     one of the important tools of interpretation  
4     that a court should use at step one.

5             So, if we are in a world where the  
6     Court can walk through those factors and  
7     ascertain that Congress spoke to the issue, let  
8     me just be very clear, we recognize the Court  
9     then should give effect to what Congress is  
10    saying.

11            And if what you're suggesting then is  
12    that in a world where Congress hasn't actually  
13    spoken to the issue the Court should give no  
14    respect at all to the agency's interpretation, I  
15    disagree that that is faithfully implementing  
16    Congress's intent, because what Chevron  
17    recognized is, in a circumstance where Congress  
18    hasn't spoken to the issue, given the express  
19    grant of -- of adjudicatory or rulemaking  
20    authority to the agency, and necessarily  
21    recognize that the agency is going to have to  
22    fill the gap along the way, it is perfectly  
23    sensible to presume that Congress would want the  
24    agency to do it.

25            JUSTICE GORSUCH: Let me just ask you



1 about Michigan versus EPA too, because that had  
2 a very broad -- it was somewhere between the  
3 example you gave of agency, go forth and come up  
4 with rules and a linguistic ambiguity about the  
5 meaning of the word "and," and it said  
6 essentially appropriate, necessary.

7 Yet the Court found there were outer  
8 boundaries even there that -- that can be  
9 exceeded, right?

10 GENERAL PRELOGAR: Yes, absolutely.  
11 And we're not suggesting that in a world where  
12 you're at --

13 JUSTICE GORSUCH: So courts can -- can  
14 do that, right?

15 GENERAL PRELOGAR: But what I'm  
16 disputing is the idea that there is always a  
17 binary answer either way rather than a vesting  
18 of discretion to take up an issue.

19 JUSTICE GORSUCH: There was a binary  
20 answer in Michigan versus EPA, right?

21 GENERAL PRELOGAR: There was a  
22 particular agency regulation that was under  
23 review, but if I understood my friend correctly  
24 today, he seems to suggest that in all statutory  
25 contexts, you can look and say, Congress

1 dictated it, there is a binary answer with  
2 respect to broadband or there's a binary answer  
3 with respect to how to define "stationary  
4 source."

5 And what Chevron recognized and what I  
6 think is just absolutely true as a matter of the  
7 on-the-ground realities and how Congress  
8 legislates is that Congress doesn't actually  
9 decide all of these issues.

10 What Chevron recognizes is that when  
11 Congress hasn't decided it and some follow-on  
12 person is going to have to fill in the gap and  
13 it's a question of whether it should be the  
14 courts or the agency, there is a presumption  
15 here that Congress intended it to be the agency  
16 but always subject to those guardrails about  
17 making sure the agency's construction is  
18 reasonable.

19 JUSTICE SOTOMAYOR: Mr. Clement --

20 JUSTICE BARRETT: General --

21 JUSTICE SOTOMAYOR: -- Mr. Clement  
22 suggested that we should ignore Chevron because  
23 it didn't deal with 706.

24 Do you have a theory as to why it  
25 didn't address 706 and -- and how do you respond

1 to that part of his argument?

2 GENERAL PRELOGAR: Yes. So my theory  
3 for why Chevron didn't address 706 is because  
4 706 has never been understood at any time, at  
5 the time it was enacted or in any of the eight  
6 decades since, to have dictated a de novo  
7 standard of review for all statutory  
8 interpretation questions.

9 So there was no inherent tension  
10 between Section 706 and Chevron. I think it's  
11 actually just further confirmation of what the  
12 APA's own history shows.

13 As I was trying to explain in the  
14 first argument, you know, this is a situation  
15 where the Court has recognized that the APA  
16 wasn't meant to create dramatic changes, and it  
17 would have been a dramatic change, going from  
18 all of the deference principles that had been  
19 deployed, particularly in cases of ambiguity in  
20 the case law, including immediately leading up  
21 to the APA, to a de novo standard on a  
22 prospective basis going forward would have been  
23 a big change in the relationship of how judicial  
24 review occurs for agency action.

25 But no one mentioned that. No one

1 suggested at the time that that was the right  
2 way to interpret the APA. It's never how this  
3 Court has interpreted it.

4 And I think this is an important  
5 point, Justice Barrett, in response to your  
6 questions about the APA. You know, it -- it's  
7 not as though this has just been a one-off  
8 decision. The Court has had any number of  
9 decisions, over 70, applying Chevron, and I  
10 think, in each and every one of those, it's  
11 important to recognize that there hasn't been  
12 this kind of inherent tension between the APA  
13 and Chevron itself, which just I think further  
14 shows the Court's own understanding of  
15 Section 706 is entitled to some weight here.

16 JUSTICE BARRETT: So I have a question  
17 about the relationship between Brand X and your  
18 suggestion that we "Kisorize" Chevron  
19 essentially.

20 So I understand Brand X to say that a  
21 court must let go of its best interpretation of  
22 a statute if an agency advances an inferior but  
23 plausible one. But you told us that one way to  
24 handle this would be to emphasize Footnote 9 and  
25 say what we said in the Kisor context that, no,

1 you know, use all the tools in the toolkit and  
2 come up with your best interpretation.

3 So why wouldn't adopting your approach  
4 require us to essentially repudiate Brand X?

5 GENERAL PRELOGAR: So, if you  
6 understand Brand X to hold that the Court can  
7 think it has a best interpretation, it has  
8 figured out what Congress was saying about this  
9 issue and Congress spoke and nevertheless has to  
10 adopt some inferior agency interpretation, then  
11 that is inconsistent with our approach.

12 We -- we don't read Brand X that way.  
13 I understand Brand X to be distinguishing  
14 between step one and step two holdings. So, if  
15 there is a step one holding where, in fact, you  
16 know, the -- the Court has got it at the end of  
17 the day and recognizes that Congress spoke to  
18 the issue, there's no room under Brand X to let  
19 an agency come along after the fact and say the  
20 statute should be understood some different way.

21 It's only in the circumstance where  
22 there was Chevron deference granted under step  
23 two, and part and parcel of that is recognizing  
24 that that's because the statute was interpreted  
25 at the first time to not actually supply an

1 answer dictated by Congress and instead to give  
2 the agency direction -- I'm sorry, discretion.

3 JUSTICE BARRETT: But could the Court  
4 have a best answer if it's a step two question?  
5 I mean, it seems to me that having a best answer  
6 suggests that you engaged in a question of  
7 statutory interpretation, came up with your best  
8 answer, and it might just be really hard.

9 So sometimes, if a court outside of  
10 the agency context confronts a difficult  
11 question of statutory interpretation, it might  
12 say, look, I'm 90 percent confident or I'm  
13 95 percent confident, but, I mean, I -- I -- I  
14 think your reading of Brand X might depend on  
15 what the trigger for ambiguity is, right?

16 GENERAL PRELOGAR: Well, I -- I do  
17 think that it's kind of clearly demarcating the  
18 lines between step one and step two holdings.  
19 And so at least the -- the rules of the road are  
20 clear with respect to when an agency might have  
21 been granted discretion to revisit its prior  
22 conclusions.

23 You know, if you're suggesting that  
24 there's a way to read Brand X to say that even  
25 in a circumstance factoring into the equation

1 the possibility that Congress meant to delegate  
2 to the agency that there is a better  
3 interpretation, a best interpretation that  
4 Congress actually resolved it, I just don't  
5 think you would ever get into the Brand X  
6 scenario because that sounds to me like a step  
7 one ruling.

8           And I take the point that there is  
9 some inherent, you know, lack of precision in a  
10 term like "ambiguity." That's not something  
11 that's uniquely created by Chevron. Of course,  
12 there are ambiguity triggers in the laws and in  
13 all kinds of contexts.

14           But it's also that kind of  
15 indeterminacy that might be worrying you is not  
16 anything that's cured by overruling Chevron  
17 because, as I was saying to Justice Kagan in the  
18 first argument, I think it will just open up a  
19 world where there is a lot of indeterminacy and  
20 inconsistency in how judges are applying the  
21 principles in a case of ambiguity.

22           JUSTICE KAVANAUGH: On that -- on that  
23 point, some of the amicus briefs and the briefs  
24 point out the experience of some of the states  
25 with Chevron. Some states don't have Chevron,

1 and other states have had something like Chevron  
2 but have eliminated it in recent years and  
3 decades, and their experience, they say, has  
4 shown that it's plenty workable in such a  
5 regime.

6 So I just want to make sure you can  
7 respond to that.

8 GENERAL PRELOGAR: Yes. So my  
9 understanding is about half the states still  
10 have something akin to a principle of deference.  
11 There might be some variance with respect to how  
12 much it looks like Chevron. But I acknowledge  
13 that some states have abolished any form of  
14 deference to administrative agencies.

15 I do think that there is a lot less  
16 concern at the state level about the lack of  
17 uniformity or consistency, so one of the values  
18 that Chevron implements and recognizes for why  
19 Congress would prefer for an agency to be able  
20 to set these rules and for the courts to respect  
21 that is the value in ensuring that there are  
22 uniform rules throughout the country. And I  
23 don't think that that same experience exists at  
24 the state level.

25 And I will just add as well, in a lot



1 of states, I think the political accountability  
2 rationales could differ as well because many  
3 state court judges are elected.

4 CHIEF JUSTICE ROBERTS: Did I  
5 understand you in response to a question from  
6 Justice Thomas to say that Chevron doesn't apply  
7 to constitutional questions?

8 GENERAL PRELOGAR: Yes. It's only a  
9 doctrine that applies in the context of  
10 statutory interpretation.

11 CHIEF JUSTICE ROBERTS: Well, I know.  
12 But how you interpret statutes certainly can  
13 have an effect in raising particular First  
14 Amendment questions or otherwise.

15 Does it apply in that situation?  
16 Department of Education has some rule. This  
17 applies to, you know, all -- all schools, you  
18 know, and it doesn't -- it can apply to  
19 religious schools because this is how we  
20 interpret, you know, whatever the impact of the  
21 rule is, and when we interpret it that way, we  
22 don't think it raises any free exercise  
23 problems.

24 So is there Chevron deference there?

25 GENERAL PRELOGAR: So I think that if

1 the -- a particular interpretation would create  
2 serious constitutional problems, then the  
3 doctrine of constitutional avoidance is one of  
4 the traditional tools that the Court can consult  
5 in order to understand whether Congress spoke to  
6 the issue.

7 CHIEF JUSTICE ROBERTS: Yeah, and the  
8 agency says we don't think this causes  
9 particular constitutional problems. That's our  
10 expertise about how we apply this provision, and  
11 given that, we think there's no free exercise  
12 problem.

13 GENERAL PRELOGAR: No, a court would  
14 not defer to that because this is all happening  
15 at step one. I think that this is part of the  
16 process of the court determining whether  
17 Congress spoke to the issue. And the court has  
18 been very clear that deference doesn't come in  
19 at all until you get to step two.

20 So, for example, the agency's view  
21 that it deserves Chevron deference or, you know,  
22 its kind of take on one of those step one  
23 issues, it's not itself meritorious of getting  
24 any deference at that stage of the case.

25 CHIEF JUSTICE ROBERTS: Okay.

1           GENERAL PRELOGAR: I do want to take  
2 another shot at trying to explain why I believe  
3 Petitioners are wrong to have characterized  
4 Chevron as resting on a fiction. And I think  
5 what they have tried to say is that this doesn't  
6 really reflect what Congress is intending. But  
7 I see three principal problems with that.

8           The first is that I think that,  
9 actually, looking at it from a -- a matter of  
10 first principles, there is a lot of merit and  
11 weight to the recognition that in a situation of  
12 genuine ambiguity, there are good reasons for  
13 Congress to want to vest the expert agency with  
14 this kind of authority.

15           It's the recognition that agencies, of  
16 necessity, are going to have to fill in the  
17 gaps, and many of these programs are complex,  
18 they're technical, they're going to require the  
19 agency to draw on its longstanding experience  
20 with a program and the expertise it's  
21 accumulated in working within that regulated  
22 industry in order to make a sensible regulation  
23 that also will encompass, I think, inherently  
24 some policy considerations.

25           Congress would know that the agency

1 can run a centralized decision-making process in  
2 doing this. Chevron only applies in  
3 circumstances where there is a sufficient level  
4 of formality in the agency's decision-making.  
5 That's usually notice-and-comment rulemaking,  
6 and that's a process where all comers can come  
7 in and tell the agency here are our views,  
8 here's what you should think about in terms of  
9 regulating --

10 JUSTICE GORSUCH: Well, that -- that  
11 -- that notice point is very important, it seems  
12 to me, to your argument because the rationality  
13 of a supposition that Congress would want to  
14 favor the government, rather than a supposition,  
15 equally rational, that it would want to favor  
16 individual liberty is made a little more weighty  
17 if you assume that the government's provided  
18 everybody a notice and opportunity to be heard.

19 But often the government seeks  
20 deference for adjudications between individual  
21 parties and then apply that to everybody without  
22 notice to them, or deference for interpretive  
23 rules for which no notice-and-comment, let alone  
24 formal rulemaking or adjudicatory proceedings,  
25 is required.

1                   And so there are many circumstances in  
2                   which the government does seek deference for a  
3                   view of the law that affected parties had no  
4                   chance to be heard about.

5                   What do we do with that?

6                   GENERAL PRELOGAR: So I think, with  
7                   respect to the category of interpretive rules,  
8                   it's -- it's true that the Court hasn't ruled  
9                   out that those can receive deference in  
10                  appropriate circumstances, but in --

11                  JUSTICE GORSUCH: So you'd have us  
12                  Kisorize that?

13                  GENERAL PRELOGAR: Well, I -- I would  
14                  just have the Court reiterate what it said in  
15                  Mead, which is it's not as though any agency  
16                  pronouncement is necessarily going to warrant  
17                  deference --

18                  JUSTICE GORSUCH: Well, nobody knows  
19                  what Mead means. I mean, it's got seven factors  
20                  to it, and the lower courts complain about that  
21                  too. So I'm not -- I don't -- I don't know  
22                  about that. I mean, you know, is that another  
23                  factor we're going to add to Mead?

24                  GENERAL PRELOGAR: I think that Mead  
25                  is an important check on ensuring not only that

1 there's been a delegation here but that the  
2 agency has used the appropriate process and  
3 procedures and articulated --

4 JUSTICE GORSUCH: Okay. So --

5 GENERAL PRELOGAR: -- intention of  
6 regulation.

7 JUSTICE GORSUCH: -- so interpretive  
8 rules would be out under your new --

9 GENERAL PRELOGAR: So I think they  
10 raise a much harder question and this Court  
11 itself has said that --

12 JUSTICE GORSUCH: A harder question,  
13 but do -- are they ruled in or out on your  
14 theory?

15 GENERAL PRELOGAR: I think the Court  
16 has not ruled them out under Mead. If you  
17 thought that this was a --

18 JUSTICE GORSUCH: What would you have  
19 us do?

20 GENERAL PRELOGAR: I would have you  
21 retain Mead, which recognizes that --

22 JUSTICE GORSUCH: What would you have  
23 us do with interpretive rules, is my question,  
24 not Mead. I mean, I don't know what to do with  
25 Mead, but --

1           GENERAL PRELOGAR: Well, I don't think  
2 that you can treat them as a class. I think  
3 it's going to depend --

4           JUSTICE GORSUCH: Some -- some --

5           GENERAL PRELOGAR: -- on the nature of  
6 the particular interpretive rule. And  
7 oftentimes --

8           JUSTICE GORSUCH: -- sometimes notice  
9 is required and sometimes it isn't. How about  
10 -- how about adjudications? You keep those in,  
11 I'm sure.

12          GENERAL PRELOGAR: Yes.

13          JUSTICE GORSUCH: Yeah.

14          GENERAL PRELOGAR: We certainly think  
15 that Chevron has core application to  
16 adjudications, and I agree that in that  
17 circumstance, there's not the same ability to  
18 take the input from all comers. But the Court  
19 has emphasized that in the mine-run case where  
20 it has been applying Chevron deference, there is  
21 this possibility at least of a centralized  
22 decision-making process in order to ensure that  
23 the agency at least is gathering the facts and  
24 has the tools at its disposal.

25                 And the alternative to each of these,

1 Justice Gorsuch, is to have the courts do it  
2 through piecemeal litigation. At the very  
3 least, I think that it's easy to see why  
4 Congress might think that that is not as good of  
5 an alternative in a circumstance where the  
6 Court's pronouncements could come out of nowhere  
7 with respect to a particular party. You know,  
8 we have an amicus brief from the Small Business  
9 Association --

10 JUSTICE GORSUCH: Except for everybody  
11 gets to litigate their case, everybody --

12 GENERAL PRELOGAR: But -- but I think  
13 that it's important to recognize that --

14 JUSTICE GORSUCH: -- until there's a  
15 final decision by this Court.

16 GENERAL PRELOGAR: -- particular  
17 decisions can have impacts on parties who are  
18 outside --

19 JUSTICE GORSUCH: As a matter of  
20 precedent possibly within that jurisdiction, but  
21 even that person who's bound by the precedent  
22 can appeal it all the way to the Supreme Court.  
23 Everybody gets their day in court.

24 GENERAL PRELOGAR: Absolutely.

25 JUSTICE GORSUCH: Versus, under --



1 under your view, many people without notice, any  
2 notice or any chance to be heard, are bound.

3 GENERAL PRELOGAR: No. So my concern  
4 and what I was focusing on with respect to the  
5 prospect of disrupting expectations with respect  
6 to litigation is that it's not as though every  
7 party who might stand to be affected by a case  
8 is necessarily going to know about it. Look at  
9 the amicus brief that was filed by the Small  
10 Business Association. They say they can't track  
11 it --

12 JUSTICE GORSUCH: Well, of course,  
13 they're not going to have notice about somebody  
14 else's case, but when the government comes for  
15 them, they get to take their case to court.  
16 They get a neutral judge.

17 GENERAL PRELOGAR: Obviously, when  
18 they are a party, they have an opportunity --

19 GENERAL GORSUCH: They get to -- they  
20 get to appeal.

21 GENERAL PRELOGAR: -- to participate.

22 JUSTICE GORSUCH: Okay.

23 GENERAL PRELOGAR: But Congress has  
24 often expressed a preference for not having  
25 these kinds of issues resolved piece by piece in

1 different courts around the country with the  
2 prospect of the disuniformity that that would  
3 create.

4 JUSTICE GORSUCH: Yes. It has  
5 provided for notice and -- it provided for  
6 formal and informal -- formal rulemaking and  
7 adjudications, and it anticipated most rules  
8 would be resolved that way. In fact, they  
9 aren't. For a long time, the -- those processes  
10 haven't been used, and -- and agencies rely on  
11 informal adjudications and informal rulemakings.  
12 And really now today, perhaps as a product of  
13 Chevron at two, agencies have -- have abdicated  
14 that and are moving more and more toward  
15 interpretive rules where they don't have to  
16 provide notice-and-comment.

17 GENERAL PRELOGAR: But I think that  
18 does circle us back to the fact that the Court  
19 has not suggested that interpretive rules are  
20 necessarily going to trigger deference. And so  
21 I think, at least in the mine-run case that this  
22 Court has looked at, it's the product of --

23 JUSTICE GORSUCH: Okay. Thank you.

24 GENERAL PRELOGAR: -- a formal process  
25 from the agency, and I think it's an important

1 process.

2 JUSTICE KAVANAUGH: On -- on the  
3 adjudications front, I think one of the amicus  
4 briefs talks specifically about the NLRB in  
5 particular and kind of how that agency moves  
6 from pillar to post fairly often and the concern  
7 raised there because that is a situation you --  
8 you can't adjust your behavior ahead of time  
9 necessarily based on a new rule, a new changed  
10 interpretation, when it's done in the particular  
11 case and affects the people who didn't have  
12 notice. Do you have any response to that brief  
13 or that scenario, or want to tell me why that's  
14 wrong?

15 GENERAL PRELOGAR: Well, I guess my  
16 overarching response to that set of concerns is  
17 that the agency has to justify its  
18 decision-making with respect to whatever tool  
19 it's using to implement the statute in the way  
20 that Congress directed. So, if Congress is  
21 telling the agency you should adjudicate or you  
22 should conduct notice-and-comment rulemaking or  
23 giving it its authority to choose between those  
24 tools, the agency in either context is going to  
25 have to justify what it's doing.

1                   And, in particular, my friends have  
2 focused a lot on the idea of agencies changing  
3 their minds. You know, there are burdens in  
4 this context. The agency has to take account of  
5 reliance interests. A lot of this gets put into  
6 State Farm, of course. But I think also, at  
7 Chevron step two, with respect to  
8 reasonableness, a court can permissibly take  
9 those kinds of considerations into account.

10                   JUSTICE KAVANAUGH: Thank you.

11                   JUSTICE KAGAN: Did you want to finish  
12 your answer about what you would say to your  
13 friend's view of fictionalized intent?

14                   GENERAL PRELOGAR: Yes. So I was  
15 trying to defend Chevron as a matter of first  
16 principles, and that was kind of the first-order  
17 answer on this, that there are often really good  
18 reasons why Congress would want an expert agency  
19 to take the first crack at filling in the law.

20                   And there's no way around it, if the  
21 agency is administering the statute, the agency  
22 has got to do it. And this Court has said that  
23 a core feature of executing the law is  
24 interpreting statutes along the way,  
25 understanding, for the agency, what the law

1 means.

2           The second point I wanted to make is  
3 that even in the situation where you think  
4 there's more room for doubt about exactly what  
5 was happening in 1984 and what Congress would  
6 have expected, this is a really foundational  
7 precedent from the Court. It's not like Chevron  
8 has flown under the radar and Congress is  
9 unaware of it and doesn't realize it's out there  
10 and kind of setting the ground rules for how  
11 this Court and lower courts are going to  
12 understand what Congress is doing.

13           This is one of the most frequently  
14 cited decisions from the Court, and in that  
15 context in particular, I would think that the  
16 inference of legislative intent becomes all the  
17 more sound because Congress has not chosen to  
18 displace it and, as well, it triggers, I think,  
19 that critical strong form of stare decisis that  
20 the Court applied in Kisor when it recognized  
21 that in a situation where Congress is actually  
22 the best institutional actor to do something  
23 about it, it matters. It matters that Congress  
24 hasn't sought to change Chevron in any kind of  
25 fundamental way.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 JUSTICE SOTOMAYOR: It's okay.

4 CHIEF JUSTICE ROBERTS: All right.  
5 Anything further?

6 JUSTICE KAGAN: I do have one more.  
7 I'm sorry.

8 JUSTICE SOTOMAYOR: Hold on. I -- I  
9 -- I did. I was waiting.

10 JUSTICE KAGAN: I'm sorry. Sorry.  
11 Sorry. Sorry.

12 (Laughter.)

13 JUSTICE SOTOMAYOR: I was waiting for  
14 us to go around.

15 I know this is not a heady  
16 intellectual question, but how do you respond to  
17 Mr. Clement's point about the interpretation of  
18 this particular statute and his reliance on the  
19 theory that this Congress definitely, when it  
20 capped big industry paying 2 or 3 percent,  
21 whatever the number is, would not have wanted  
22 small fishermen to pay 20 percent?

23 GENERAL PRELOGAR: So I have a range  
24 of reactions to that. My first is, as I was  
25 suggesting to Justice Gorsuch, we think -- and

1 to Justice Thomas, we think that there is a lot  
2 in this statute to support the agency's exercise  
3 of regulatory authority here, and I want to  
4 point in particular to the penalty provision,  
5 which specifically contemplates that the -- the  
6 regulated vessels might have a contractual  
7 relationship with third-party monitors and,  
8 therefore, might be in a situation where they  
9 haven't paid, and it says the Secretary can  
10 sanction in that circumstance.

11 So it's premised on the idea that  
12 there will be certain circumstances when there  
13 is that direct relationship.

14 JUSTICE SOTOMAYOR: Just as a footnote  
15 in the schedule, in the way that Congress did  
16 the other two monitors, they were always  
17 government monitors, not independent monitors,  
18 correct?

19 GENERAL PRELOGAR: Yes. So, in the --  
20 the -- so there are three fee-based programs  
21 that my -- my friends have relied on to try to  
22 support this idea that there's a negative  
23 inference you should draw from the statute.

24 Two of those apply in the domestic  
25 context and those operate as pure fee-based

1 programs, so it's very different. Ultimately,  
2 they pay fees to the government. The government  
3 provides a range of services, including  
4 providing the monitors, entering into the  
5 contractual relationship, and having those  
6 monitors be government contractors.

7           And those programs also pay for  
8 particular administrative expenses that would  
9 not be a part of this program. The -- the  
10 foreign vessel program, likewise, operates in  
11 this fee-based way. There is a residual part of  
12 that program which contemplates that in a  
13 circumstance where there aren't sufficient  
14 funds, it might be possible that the regulated  
15 vessel will then, through a supplementary  
16 authority, be required to contract with the  
17 monitors directly.

18           And I think my friends would say:  
19 Well, that's the whole explanation for the  
20 penalty provision. But it doesn't work because  
21 Congress put that penalty provision in an  
22 overarching section of the Act that applies to  
23 domestic vessels too.

24           If this was really just meant to be a  
25 tendril to tack on to the foreign vessel



1 program, that would be completely inexplicable.  
2 So I think that they don't have a persuasive  
3 response to the penalty provisions here.

4 Now they say, to -- to wrap this up,  
5 that, you know, it's -- it's unheard of to  
6 charge 20 percent. I do want to be really  
7 clear, they are latching on to a part of the  
8 rule that acknowledged that earlier versions or  
9 studies had suggested that costs could go  
10 potentially up to 20 percent. But then the  
11 agency acted in response to that. It created  
12 waivers. It created exemptions.

13 And with respect to some of the types  
14 of fishing at issue in these cases, the  
15 estimated costs were more in the range of 2 to  
16 3 percent. So it's -- this is all, you know,  
17 something that courts can look at and review.  
18 They, in fact, pressed arguments that this rule  
19 was arbitrary and capricious for neglecting to  
20 give full attention to the costs. The lower  
21 courts rejected those arguments and I think  
22 rightly so.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 JUSTICE KAGAN: Justice Barrett asked  
25 before about Kisorizing Chevron, and I just

1 wanted to ask, what would that mean? I mean,  
2 would it mean doing exactly what Kisor did to  
3 Auer deference, to Chevron deference? Would  
4 there be adjustments that would be necessary?  
5 Would one want to go further in any respect?  
6 What -- what does it mean to Kisorize Chevron?

7           GENERAL PRELOGAR: So I think that the  
8 Court in this case, if it has some concerns  
9 about the implementation issues, could do four  
10 critical things, which draw heavily on Kisor but  
11 I think look a little different in their  
12 particulars.

13           The first thing the Court could do  
14 would be to reemphasize the rigor of the step  
15 one analysis. Now this is drawn directly from  
16 Kisor. As I mentioned before, we've seen  
17 results in the lower courts where they are now  
18 following this Court's direction with respect to  
19 that.

20           So, in this regard, what the Court  
21 would be saying is don't wave the ambiguity flag  
22 too readily. Don't give up just because the  
23 statute is dense or hard to parse. Instead,  
24 there are a lot of hard questions out there that  
25 can be solved and reveal Congress's intent if

1 the court applies all of the tools and really  
2 exhausts them. So that would take care of a  
3 whole category of cases.

4 Then, at step two, I think the Court  
5 could again do what it did in *Kisor*, which was  
6 to reinforce that reasonableness is not just  
7 anything goes. And Justice Gorsuch, I think, at  
8 times has said it just means the government  
9 wins. But that is not actually the standard.

10 Even at that step two stage, it's  
11 obviously deferential, but the Court should be  
12 enforcing any outer bounds in the statute and  
13 making sure that the agency hasn't transgressed  
14 those.

15 I think the third thing the Court  
16 could do is emphasize that this whole enterprise  
17 only gets off the ground in a *me-type* situation  
18 where you have the agency being directly  
19 empowered by Congress to speak with the force of  
20 law and then exercising appropriately a formal  
21 level of authority in implementing the statute.

22 And so I think that that is an  
23 important principle as well, that there are  
24 certain contexts in which the agency is not  
25 actually speaking with the force of law or in a

1 way that would be fitting with the delegation  
2 Congress has provided.

3 And then, finally, the fourth thing  
4 that the Court could do, and I think this is a  
5 little bit different from Kisor, would be to  
6 emphasize that it's always important to look at  
7 any other statutory indication that Chevron  
8 deference was not meant to apply.

9 And what I'm thinking here of are --  
10 are things like situations where the nature of  
11 the statutory question as the Court has said in  
12 other cases isn't one where you would expect  
13 Congress to give that to the agency. There's a  
14 flavor of this in the Major Questions Doctrine  
15 case, and I don't want to rule out other  
16 scenarios that could come up because part of our  
17 -- our central argument here is Congress can  
18 adjust, Congress can react, Congress can take  
19 statute-specific steps, and so courts should pay  
20 attention to that. And there is nothing in  
21 Chevron that dictates that this presumption is  
22 irrevocable. Instead, it's fully rebuttable.

23 JUSTICE KAGAN: And is there anything  
24 you would say about the matter of changed  
25 interpretations?

1           GENERAL PRELOGAR:  So I think that  
2     changed interpretations already are an area  
3     where the agency is under additional burdens to  
4     justify its decision-making.  I think they get a  
5     harder look.

6           And the Court has made clear that in a  
7     circumstance where an agency is changing its  
8     regulatory approach, one of the things it has to  
9     do is take full account of the reliance  
10    interests and explain why those shouldn't alter  
11    what it's doing in -- in -- in the kind of  
12    revised approach.

13           The agency also frequently, if it's  
14    come from a notice-and-comment rulemaking, has  
15    to run that process all over again.  That's a  
16    time-intensive process.  It takes a substantial  
17    investment of agency resources.  So I think, in  
18    that context too, the Court could police the  
19    bounds of that and make sure that the agency is  
20    following the procedural requirements to ensure  
21    that it's informed decision-making.

22           But, at the end of the day, if the  
23    agency can run the gauntlet and survive those  
24    hurdles, then the fact that it has some  
25    discretion under the statute to change its

1 approach, I think, is not something to say is --  
2 is, you know, kind of a bug in the statute.  
3 Instead, it's a feature because there are all  
4 kinds of circumstances where Congress would want  
5 to give the agency the ability to adapt to  
6 changing circumstances, to new factual  
7 information, or to the experience it's  
8 accumulated under the prior program.

9 JUSTICE KAGAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Gorsuch?

12 Justice Kavanaugh?

13 Justice Barrett?

14 Thank you, counsel.

15 Rebuttal, Mr. Clement?

16 REBUTTAL ARGUMENT PAUL D. CLEMENT

17 ON BEHALF OF THE PETITIONERS

18 MR. CLEMENT: Just a few points in  
19 rebuttal, Your Honor.

20 First, my friend started with express  
21 delegations. I think express delegations show  
22 all the problems with this fictional implied  
23 delegation because the great thing about an  
24 express delegation is you have some text.

25 What an express delegation generally

1 does textually is delegate implementing or  
2 executing authority. It doesn't do what Chevron  
3 purports to do, which is to delegate  
4 interpretive authority.

5 But, better yet, once you have text,  
6 you can put limits on the text. And Michigan  
7 against EPA is a perfect example of that. And,  
8 of course, all of these delegations do raise  
9 Article I non-delegation concerns. And if you  
10 have text, you can check for that as well. But  
11 I can't think of anything that's more  
12 antithetical to an intelligible principle than  
13 ambiguity and silence.

14 And I will say in terms of the -- you  
15 know, this premise, I think it's entirely  
16 fictional. I think in most cases a statute is  
17 ambiguous because the proponent did not have  
18 enough votes to make it any clearer.

19 My friend at one point said that I  
20 viewed the whole world as every statute has a  
21 binary answer. To be clear, my position was the  
22 opposite. There are statutes like that,  
23 reasonableness, appropriateness. There are also  
24 things like information services,  
25 telecommunication services, a service advisor.

1 Is it a salesperson who is involved in the  
2 servicing of cars? I'd say yes, but you could  
3 say no, but it's binary.

4 The terrible thing about Chevron is it  
5 can't tell the two apart because, at a certain  
6 point, they both look ambiguous. But if you --  
7 you know what can tell the two apart? Good  
8 old-fashioned statutory construction. Find out  
9 as the courts what the words mean. "Reasonable"  
10 is a term of capaciousness and elasticity.  
11 "Telecommunication service" is not. Good  
12 old-fashioned statutory interpretation can do  
13 the job.

14 Now let me say one thing about the  
15 mystery of why Section 706 did not appear in the  
16 Chevron decision. There's a really easy answer.  
17 It was a Clean Air Act case.

18 The Court sort of stumbled into these  
19 pronouncements about how as a meta matter you  
20 should go about statutory consideration. It was  
21 a mistake. It didn't wrestle with the relevant  
22 statute at all.

23 That is a special justification to  
24 revisit the decision and to get the decision  
25 right.



1           Let me say one word about expertise.  
2   Expertise and deference do not have to go hand  
3   in hand in a way that precludes de novo review.  
4   We have things called tax courts. We have  
5   things called bankruptcy courts. We have the  
6   Court of International Trade. They all deal  
7   with technical specialized issues. Every one of  
8   them, the legal questions are reviewed de novo.  
9   That's the basic understanding with a statute  
10  like 77 -- Section 706.

11           Lastly, let me say this. You cannot  
12  Kisorize the Chevron doctrine without overruling  
13  Brand X. The fact that you could take into  
14  account if the agency had flip-flopped was part  
15  of the rationale of Kisor, many factors before  
16  you applied Auer.

17           That is a feature, my friend correctly  
18  admits, that is a feature of the Chevron  
19  doctrine, and you really can't Kisorize it  
20  without overruling Brand X. And if you're  
21  overruling Brand X, well, then stare decisis  
22  just went out the window and we might as well  
23  get this right.

24           Chevron imposed a two-step rubric that  
25  was fundamentally flawed. The right answer here

1 is a one-step rubric that simply asks how is the  
2 statute best read. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel, General.

5 The case is submitted.

6 (Whereupon, at 1:37 p.m., the case was  
7 submitted.)

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