No. 22-1219

In the

Supreme Court of the United States

RELENTLESS INC., *et al.*,
Petitioners,
v.
U.S. DEPARTMENT OF COMMERCE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, The Buckeye Institute, was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

Through its Legal Center The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs.

SUMMARY OF ARGUMENT

The Court should formally abandon *Chevron*.

Chevron has allowed the judiciary to forego its rule as the neutral decision maker. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Instead of placing both parties on equal footing before

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* made any monetary contribution toward the preparation or submission of this brief.

the court, *Chevron* gives government agencies a leg up.

Chevron advocates assert that this deference is justified because it makes the law uniform and agency experts have a comparative advantage over judges in addressing technical and scientific issues. Both assertions are wrong.

First, *Chevron* deference delivers uniformity primarily in that the government almost uniformly wins when courts apply *Chevron* (i.e. a 94 percent success rate). Apart from that homogenous outcome, courts do not apply *Chevron* uniformly. Circuit courts vary amongst themselves in their application of *Chevron*, which—of course—means that at least some of them differ from this Court's application thereof.

Assuming that uniformity in the law is an important value, uniformity should be attained by judges deciding "all relevant questions of law, interpret[ing] constitutional and statutory provisions, and determin[ing] the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. This means de novo review of all legal issues—not *Chevron* deference.

Second, *Chevron* deference advocates assert that agencies have a comparative advantage over judges when it comes to technical or scientific expertise. But Article III judges have a comparative advantage in evaluating experts. They know how to assess the experts' qualifications, knowledge, biases, and methodologies. Thereafter, the factfinder—either a jury or the judge—evaluates the credibility of each side's expert and makes a decision. Agencies' experts

are hidden from the public and final rules issued by the agencies are essentially formulated and finalized in a "black box of government." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2332 (2001).

Accordingly, the Court should replace *Chevron* with de novo review of legal determinations and genuinely equal evaluation of agency experts as compared to the regulated parties' experts.

INTRODUCTION AND ARGUMENT

I. Introduction.

American courts recognize various levels of review. Appellate courts respect factual findings of lower courts unless the court has "abused its discretion." See *Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 604 (6th Cir. 2005). But lower courts' interpretations of the law are reviewed de novo. *Id.* And so it should be with agency interpretations of the law. "[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Indeed, "[m]ore explicit words to impose this mandate could hardly be found than those . . . employed" in section 706. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 994 (2017) (citing John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 ABA J. 434, 516 (1947)). And so "[a]fter the APA's passage, courts more or less followed this mandate faithfully for

decades." *Buffington v. McDonough*, 143 S. Ct. 14, 17 (2022) (Gorsuch, J., dissenting from denial of cert.).

But under *Chevron*, courts have abdicated their responsibility to conduct a de novo review. Indeed, at least one amicus suggests that courts must defer to agency interpretations of the law to provide for stability. Br. of *Amicus Curiae* Envtl. Def. Fund at 6, *Loper Bright Ent. v. Raimondo*, Case No. 22-451 (Sept. 22, 2023). The government justifies this deference as a "*tradition* of judicial deference to reasonable Executive interpretations." Br. of Resp'ts at 8, *Loper Bright Ent. v. Raimondo*, Case No. 22-451 (Sept. 15, 2023) (emphasis added). But *traditions* do not supersede the law. Despite this basic legal concept, some appellate courts approve of greater deference to agency interpretations of the law than they give to their fellow Article III judges. See, *e.g., Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 896 (6th Cir. 2021), *cert. denied*, 143 S. Ct. 83 (2022) (White, J., writing in support of affirming the district court judgment) (disagreeing *en banc* with an equal number of dissenting judges and the panel opinion). The government justifies this deference citing, in part, uniformity and comparative advantage. See, *e.g.*, Br. of Resp'ts at 16–18, *Loper Bright Ent. v. Raimondo*, Case No. 22-451 (Sept. 15, 2023). Neither rationale justifies the continued application of *Chevron* deference.

A. Uniformity of application should not trump correctness of interpretation.

Defenders of deference assert that continued application of *Chevron* is necessary to promote uniformity, because if statutory interpretation is left

to the judiciary, different courts will decide the same question differently. Br. of *Amicus Curiae* Envtl. Def. Fund at 25, *Loper Bright Ent. v. Raimondo*, Case No. 22-451 (Sept. 22, 2023). And, they assert, when it comes to federal regulations, everyone should be regulated the same way. *Id.* So, courts across the country should abdicate their traditional judicial interpretive function to agency experts. See *id.* at 25–27.

While uniformity in the law is a legitimate objective of the judiciary, it does not supersede the need to get it right. "Arriving at sound judgments often takes time, and a rush to uniformity will not invariably provide it." J. Harvie Wilkinson III, *If It Ain't Broke . . .* , 119 Yale L.J. Online 67, 70 (2010).

Judges are designed to be uninterested objective arbiters. "Judges are like umpires." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States). But "[a]gencies are not neutral bystanders in the setting of government policy; rather, they are self-interested players." Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era,* 32 B.C. L. Rev. 757, 810 (1991). "In this country, we like to boast that persons who come to court are entitled to have independent judges, not politically motivated actors, resolve their rights and duties under law." *Buffington*, 143 S. Ct. at 18 (Gorsuch, J., dissenting from denial of cert.). Hence, neutral judges are more likely to reach the correct decision based on

legal reasoning rather than an agency with a stake in the outcome. Indeed, "judges often render decisions that achieve a result they do not like and enforce laws they do not agree with." Theodore A. McKee, *Judges as Umpires*, 35 Hofstra L. Rev. 1709, 1709 (2007).

And the Constitution does not anticipate the executive also exercising legislative power. "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. Const. art. I, § 1. Similarly, "the ultimate authority to render definitive interpretations of the law" rests "exclusively in the judicial power." *TWISM Enterprises, L.L.C. v. State Bd. of Registration for Pro. Engineers & Surveyors,* 2022-Ohio-4677, ¶ 33 (quoting *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021)). This "separation of powers is designed to preserve the liberty of all the people." *Id.* at ¶ 31. "[T]he American experiment has long been thought to rest on the idea that 'there can be no liberty . . . 'if the power of judging, be not separated from the legislative and executive powers.'" *Id.* (quoting The Federalist No. 47, at 251 (James Madison) (Gideon Ed. 2001)). But "[w]hen a court defers to an agency's interpretation of the law, it hands to the executive branch the judicial authority 'to say what the law is . . . .'" *Id.* at ¶ 34 (citing *State v. Parker*, 157 Ohio St.3d 460, 2019-Ohio-3848, ¶ 31 (lead opinion)).

Further, there are dangers to uniformity. "When [an agency] overreaches or otherwise errs, the impact of its errors is felt throughout the land." Wilkinson*, supra,* at 68. And if court rulings on agency interpretations vary, then "it may be more appropriate for Congress, a democratic body, to resolve [differing

rulings on agency rules] through legislation" than just deferring to the agency for the sake of uniformity. *Id.* at 70.

Both our federal and state judicial systems anticipate and expect this lack of uniformity in legal decision-making. This process by which courts may reach different results is a feature, and not a glitch—one which allows percolation through trial and error to arrive at better and more rigorously tested results. The system anticipates that judges in different jurisdictions will make their own independent decisions.

But there is a reason this Court often awaits a circuit split before accepting jurisdiction over a case to resolve a legal issue. U.S. S. Ct. R. 10(a). The Court is letting the lower courts flesh out the issues, so that *all* the relevant arguments are considered.

In reality, the most uniform aspect of *Chevron* deference is that the government nearly always wins. When the courts reach *Chevron* step two, they adopt the agency interpretation at a rate of nearly ninety-four percent. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 32–33 (2017).

This certainly gives regulated parties notice that any challenge to the agency mandate is almost certain to fail. Given these poor odds, only a large company with a significant legal budget, or one with access to pro bono help, has the resources to challenge these regulations. And then, it is usually only worth it if the regulation is going to destroy the business. A sliver of a chance of a successful rule challenge may

beat certain destruction of the business, but otherwise a reasonable business calculation would be to throw in the towel. Agencies should not have that much unchecked (or deferentially checked) power. And by vesting sole power to "say what the law is" in the judiciary, the Constitution ensures that they do not. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Moreover, any claim of universal application under *Chevron* is illusory. Take, for example, the nonuniform application of *Chevron* to another agency determination that the Court has recently decided to address, the Bureau of Alcohol, Tobacco, Firearms and Explosives' bump stock rule. In *Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023), *cert. granted*, No. 22-976 (Nov. 3, 2023), twelve members of the Fifth Circuit found that the rule of lenity, rather than *Chevron*, should be applied; eight members found that the federal law at issue fails to cover non-mechanical bump stocks, making *Chevron* irrelevant; and three members agreed with the panel opinion that the rule is the best interpretation of the statute. Similarly, the Sixth Circuit *en banc* split evenly on the question of whether *Chevron* applied to the review of that same rule, resulting in a decision that conflicts with the Fifth Circuit *en banc* decision addressing that rule. *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890 (6th Cir. 2021), *cert. denied*, 143 S. Ct. 83 (2022). Numerous judges on the D.C. Circuit and the Tenth Circuit have also disagreed on the proper application of *Chevron* to the bump stock rule. *Cargill v. Garland*, 20 F.4th

1004, 1006 n. 2 (5th Cir. 2021), *reh'g en banc granted, opinion vacated*, 37 F.4th 1091 (5th Cir. 2022).

"The lack of uniformity within the circuit courts is just one reason, albeit a big one, why the Supreme Court should rethink or revise the *Chevron* doctrine." Jamie G. Judefind, *Trouble in the Tribunals: Exploring the Effects of* Chevron *One "Step" at A Time*, 27 Widener L. Rev. 63, 78 (2021).

> "[W]hatever *Chevron* means in circuit courts, the circuit court version differs from the Supreme Court version in many ways. The glaring inconsistencies between the Supreme Court's approach to *Chevron* and the approach (more accurately the approaches) of the circuit courts raise the question whether a doctrine can, or should, survive in circuit courts when it bears no relation to the version of the doctrine that exists in the Supreme Court."

Id. (quoting Richard Pierce, *Circuit Courts Do Strange Things with Chevron*, Jotwell (Sept. 6, 2016), https://adlaw.jotwell.com/circuit-courts-do-strange-things-with-Chevron/).

Assuming that uniformity in the law is an important value, *Chevron* is not the right way to do it. Rather, uniformity in the administrative law arena should be attained just as in all other areas of law. The courts—not agencies—"shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5

U.S.C. § 706. This means de novo review of all legal issues—nothing less.

B. Judges should evaluate the expertise of the agencies' experts as compared to that of the regulated parties' experts.

Some courts have asserted that "[a] reviewing court must be most deferential to an agency where . . . its [Final Rule] is based upon its evaluation of complex scientific data within its technical expertise." *Sierra Club v. EPA*, 939 F.3d 649, 680 (5th Cir. 2019) (citations omitted) (deferring to the agency interpretation of a 2017 final rule without explicitly citing *Chevron*).

The government claims that in the course of rulemaking agencies encounter scientific or technical issues that they can better evaluate as they formulate a new rule or regulation:

> *Chevron* respects the "'unique expertise,' often of a scientific or technical nature," that federal agencies can bring to bear when adopting gap-filling measures or otherwise resolving a statutory ambiguity. Federal judges are frequently 'not experts in the field,' *Chevron*, 467 U.S. at 865, and they lack the experience, resources, and procedures available to agencies.

Br. of Resp'ts at 17, *Loper Bright Ent. v. Raimondo*, Case No. 22-451 (Sept. 15, 2023) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (plurality opinion)). The government lauds Chevron as having "played a crucial role in resolving many interpretive

questions in complex and technical areas of federal law . . . ." *Id*. Supposedly then, courts should defer to agency rules that are based on the agency's superior technical analysis.

The government's claim here is peculiar, suggesting that superiority in scientific or technical details serves as a proper basis for deference to an agency's legal interpretation of a statute. Comparative advantage in the former does not give agencies either authority or advantage in the latter.

There is no question that judges are not technical experts. Those who justify *Chevron* deference based on agency technical expertise try to compare agency technical or scientific expertise to judges' lack thereof.[2] *Chevron* advocates call this "comparative advantage." But that is the wrong comparison. Article III judges' expertise is in *evaluating* the technical experts. So, when Article III judges encounter issues involving technical or scientific expertise, they consider expert testimony from both parties to an action and evaluate the experts' qualifications, knowledge, biases, and methodologies. The judge then acts as a gatekeeper to whether that expert is qualified. Thereafter, the factfinder—either a jury or the judge—evaluates the

[2] Of course, there is no basis to assert that agencies have a comparative advantage when it comes to legal interpretation. Judges are experts on legal interpretation. Agencies—while they may have in-house counsel—certainly are not impartial arbiters of the law and have no edge over Article III judges vetted by the President and confirmed by the United States Senate.

credibility of each side's expert and makes a decision based on the evidence presented.

While agencies often have internal expertise on the areas they regulate, they do not have a monopoly on that expertise. And when they are defending their rules in court under the standards of the APA, they can present their internal experts to support their views. Similarly, the regulated parties, usually businesses, are experts on their businesses and on the technical issues they encounter in their businesses. And when in court they can, and often will, hire expert witnesses to assist the court from their perspective.

The government's defense of *Chevron* deference assumes, without proof, that every regulation involving technical issues or expert analysis was based on expert analysis. But bureaucratic rule-making—even under the APA—seldom discloses adequate information to confirm that.

> Bureaucracy is the ultimate black box of government—the place where exercises of coercive power are most unfathomable and thus most threatening. To a great extent, this always will be so; the bureaucratic form—in its proportions, its reach, and its distance—is impervious to full public understanding, much less control.

Kagan, *supra*, at 2332.

The "black box" of regulatory decision making seldom lays bare the identity of the "experts" conducting the analysis, their qualifications, knowledge, biases, or methodologies. While some of

the methodologies may have been presented as part of the rulemaking procedure, those behind the scenes remain anonymous and cloaked in obscurity. Yet *Chevron* gives these unseen, unknown bureaucrats deference. That is inconsistent with all other expert witness jurisprudence.

> Under informal rulemaking procedures, agencies typically do not develop a controlled administrative record equivalent to the record that would be produced in a trial court. . . . Agencies . . . may or may not disclose in a complete or timely manner the scientific and technical materials upon which they rely or the analytical process they follow. Moreover, the Administrative Procedure Act permits public participation in the rulemaking process without regard to the quality of public submissions. Thus, the agency record may provide little useful guidance on the scientific and technical materials or conclusions relied upon by the agency to reach the rulemaking conclusions.

Paul S. Miller, & Bert W. Rein, "*Gatekeeping" Agency Reliance on Scientific and Technical Materials After* Daubert*: Ensuring Relevance and Reliability in the Administrative Process*, 17 Touro L. Rev. 297, 312–314 (2000). Accordingly, Miller and Rein properly reject the application of *Chevron* deference to agency

rulemaking based on scientific and technical expertise.

CONCLUSION

For the foregoing reasons, this Court should abandon the *Chevron* doctrine, and the decision of the First Circuit should be REVERSED.

Respectfully submitted,

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