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* THE OHIO CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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QUESTION 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]

Founded in 1893, the Ohio Chamber of Commerce (the "Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization, representing businesses ranging from small sole proprietorships to some of the nation's largest companies. The Ohio Chamber works to promote and protect the interests of its more than 8,000 business members, while building a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance.

The Ohio Chamber promotes a pro-growth agenda with policymakers and in courts across Ohio. It seeks a stable and predictable legal system which fosters a business climate where enterprise and Ohioans can prosper. The Ohio Chamber regularly files amicus briefs in cases that are important to its members' interests.

The Ohio Chamber supports a regulatory environment that is conducive to economic growth. As this Court has recognized, the administrative state "wields vast power and touches almost every aspect of daily life." *Free Enterprise Fund v. Public Company Accounting Oversight Bd.,* 561 U.S. 477, 499 (2010).

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

Amicus curiae therefore has a strong interest in ensuring that statutes and regulations are properly construed, and that administrative agency actions are not unnecessarily burdensome on businesses and other job creators.

SUMMARY OF ARGUMENT

Administrative agencies exercise a significant amount of authority when implementing and enforcing our nation's laws. This Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), augmented that authority by requiring courts to show deference to an agency's interpretation of an ambiguous statute so long as the agency's interpretation "is based on a permissible construction of the statute." *Id.* at 843. Despite this reasonable beginning, four decades later it has become clear that the *Chevron* doctrine must be reined in.

Amicus curiae the Ohio Chamber of Commerce agrees with Petitioners that the First Circuit erred in its application of *Chevron* deference. *See* Pet. at 20-24. The Magnuson-Stevens Act ("MSA"), 16 U.S.C. § 1801 *et seq.*, does not provide that "federal observers will be paid by the regulated vessels of New England's herring fishery." Pet. at 1; *see also Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 372 (D.C. Cir. 2022) (Walker, J., dissenting) (concluding that "Congress unambiguously did not" "authorize the National Marine Fisheries Service to make herring fishermen in the Atlantic pay the wages of federal

monitors who inspect them at sea"). The usual tools of statutory interpretation, including canons such as *expressio unius est exclusio alterius*, are sufficient to resolve this issue. "[I]f the law gives an answer" in its text, "then a court has no business deferring to any other reading." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

Amicus curiae writes separately to emphasize the constitutional problems posed by the First Circuit's decision, and to offer a potential solution. The strong form of deference applied below is inconsistent with the separation of powers. Respectfully, the First Circuit's decision is even more problematic than the D.C. Circuit's decision in *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359. In *Loper Bright Enterprises*, the court conceded that there is no clear statutory authority for the challenged rules, but nonetheless found that statutory "silence" left "room for agency discretion." *See* 45 F.4th at 368. Here, however, the First Circuit purports to find "clear textual support for the Agency's lawful authority to require the vessel owners to pay for at-sea monitors." Pet. App. 17a. The First Circuit also invents a novel canon of statutory construction, opining that "[w]hen Congress says that an agency may require a business to do 'X,' and is silent as to who pays for 'X,' one expects that the regulated parties will cover the cost of 'X.'" Pet. App. 13a.

The First Circuit's decision erroneously applies *Chevron* and should be reversed. However, it is also a stark reminder that the courts' use of

administrative deference must be reined in. The First Circuit's reasoning is not merely incorrect—it intrudes on the prerogatives of both the legislative and judicial branches. First, it allows executive agencies to engage in the legislative function of policymaking. Second, it cedes to those agencies the courts' responsibility "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The *Chevron* doctrine springs from the proposition that courts should afford consideration to executive interpretations of the law. *See Buffington v. McDonough*, 143 S. Ct. 14, 18 (2022) (Gorsuch, J., dissenting from denial of certiorari). Yet *Chevron* and subsequent decisions "require[] a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 843-44 & n.11). Unsurprisingly, in practice this has often led to agencies' interpretations trumping those of the courts. *See, e.g.*, *Serano Lab'ys v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998) (holding that a court must follow an agency's "reasonable" interpretation even if the court finds that there are other interpretations which are "more reasonable"). This intrudes on the proper role of the judiciary to interpret the law. This Court should no longer allow agencies to wrest that responsibility from the federal courts.

Several states have eliminated *Chevron*-style deference through court decisions, by statute, or even by constitutional amendment. For example, just last year the Ohio Supreme Court rejected *Chevron*-style deference for state agency interpretations of statutes. In *TWISM Enterprises LLC v. State Bd. of Registration for Professional Engineers & Surveyors*, the Ohio Supreme Court held that such deference violates separation of powers principles by "hand[ing] to the executive branch the judicial authority 'to say what the law is.'" *TWISM Enterprises*, 2022-Ohio-4677, ¶ 34 (Ohio 2022) (citation omitted).

The *TWISM* court struck a balance between protecting the judiciary's role and allowing courts to rely on agency expertise. It rejected mandatory deference, but held that Ohio courts may nonetheless consider agency interpretations of ambiguous statutes. *Id.* at ¶ 44. However, such consideration must be based on the "persuasive power of the agency's interpretation and not on the mere fact that it is being offered by an administrative agency." *Id.* at ¶ 45. This approach shows the proper respect to the executive branch while also protecting the role of the courts.

This Court should consider the well-founded reasoning of Ohio and other States that have rejected mandatory deference to agency interpretations. This Court should overrule *Chevron* or replace it with a new test that better respects the courts' primary role in interpreting the law.

ARGUMENT

I. The First Circuit's Holding Is Inconsistent With The Separation of Powers.

The *Chevron* doctrine, as applied by the First Circuit in its decision below, is inconsistent with the Constitution's separation of powers. Administrative agencies undoubtedly have some authority to shape how statutes are interpreted and implemented. In practice, however, the courts' reliance on *Chevron* has allowed agencies to promulgate regulations and requirements beyond those found in enabling statutes. Likewise, it has often substituted the will of agencies for the judgment of the courts.

Here, Respondents imposed a rule on a segment of the fishing industry—specifically, requiring "industry-funded monitoring" of herring fishing companies. Pet. App. 6a; *see also Loper Bright Enterprises, Inc.*, 45 F.4th at 372 (Walker, J., dissenting) (describing the rule as requiring companies to "pay the wages of federal monitors who inspect them at sea"). This rule will have significant financial and practical implications, harming small businesses and historic fishing communities. *See, e.g.*, Pet. App. 7a-8a ("The Agency further acknowledged that the Rule could reduce vessel returns-to-owner … *by around 20%*.") (emphasis added).

Although there is no explicit statutory authorization for the rule, the First Circuit had "no

trouble finding that the Agency's interpretation of its authority to require at-sea monitors who are paid for by owners of regulated vessels does not 'exceed[ ] the bounds of the permissible.'" Pet. App. 22a (quoting *Barnhart v. Walton*, 535 U.S. 212, 218 (2002) (alteration in original)). Because Congress authorized the agency "to require vessels to carry monitors," the court found that it is "reasonable for the Agency to conclude that its exercise of that authority is not contingent on its payment of the costs of compliance." *Id.*

The First Circuit's decision is inconsistent with the separation of powers. It allows agencies to usurp the policymaking authority of Congress by promulgating rules that are neither found in, nor authorized by, the underlying statute. It also cedes to those agencies the courts' responsibility "to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177.

The decision of the Court of Appeals should be reversed. If *Chevron* actually supports such an outcome, it should be overruled. In any event, however, the First Circuit's decision underscores the pressing need for this Court to rein in the lower courts' use of administrative deference.

A. The *Chevron* Doctrine Intrudes on the Courts' Responsibility to Interpret the Law.

The Constitution "divides all power conferred upon the Federal Government" between the

legislative, executive and judicial branches. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992); *see generally* The Federalist No. 51, at 317-322 (James Madison) (Clinton Rossiter ed., 2003). Each branch has a separate and distinct role. Article III vests "[t]he judicial Power of the United States" in the "[S]upreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST., art. III, § 1; *see also* The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("The interpretation of the laws is the proper and peculiar province of the courts."). The very purpose of the judiciary is to stand as a check on the legislative and executive branches. *See id.* (stating that it "cannot be the natural presumption" that the political branches should serve as "judges of their own powers").

Modern administrative law—particularly the federal courts' application of the *Chevron* decision—encroaches on the courts' responsibility. Strong forms of deference turn the constitutional structure on its head by giving executive agencies, rather than the courts, the primary responsibility to interpret the law. This Court made clear more than two centuries ago that "[i]t is emphatically the province and duty *of the judicial department* to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177 (emphasis added). Yet *Chevron* and its progeny relegate courts to the much more limited role of determining whether an agency's construction is "reasonable." *See Chevron*, 467 U.S. at 844-45; *Brand X*, 545 U.S. at 980. This

deference, or at least the strong version of it applied below, is inconsistent with the separation of powers.

The *Chevron* doctrine springs from the reasonable proposition that courts should afford consideration to executive interpretations of the law. *See Buffington*, 143 S. Ct. at 18 (Gorsuch, J., dissenting from denial of certiorari). *Chevron* sets forth a two-step process for reviewing agency interpretations. First, a court should use the "traditional tools of statutory construction" to determine if "Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. *Only if* the statute is silent or ambiguous does the court proceed to step two—determining whether the agency interpretation "is based on a permissible construction of the statute." *Id.* at 843.

These principles were in line with the Court's traditional pattern of affording consideration to executive interpretations without necessarily deferring to them. *See, e.g.*, *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932) ("The court is not bound by an administrative construction … [and] it will be taken into account only to the extent that it is supported by valid reasons."). There is little reason to believe that the Court intended, at the time that *Chevron* was decided, to make "fundamental changes in the law of judicial review." Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental*

Landmark, 66 ADMIN. L. REV. 253, 275 (2014). To the contrary, Professor Thomas W. Merrill recounts that Justice Stevens (who authored the opinion) regarded *Chevron* as merely a restatement of existing law. *See id.* at 275 & n.77.

Despite these seemingly innocuous beginnings, over time *Chevron*'s two-part test has often resulted in agency interpretations substituting for the judgment of courts. To be sure, whether interpreting statutes or regulations, the courts are supposed to "exhaust all the 'traditional tools' of construction" before finding ambiguity. *Kisor*, 139 S. Ct. at 2415 (quoting *Chevron*, 467 U.S. at 843 n.9). "[I]f the law gives an answer … then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Kisor*, 139 S. Ct. at 2415. Yet this is not what occurs in practice. It is relatively easy for agencies to claim "ambiguity," and relatively common for the courts to agree. In fact, a sample of more than 1,000 cases shows that courts applying *Chevron* find ambiguity 70% of the time. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 33-34 (2017).

The frequency with which courts find ambiguity is troubling. What was designed as a process for interpreting truly ambiguous statutes—the rare circumstance where the other tools of construction do not work—has instead become commonplace. What was essentially a last resort has instead become the go-to strategy for agencies and courts. Courts

deferring to federal agencies on matters of interpretation has become the norm, rather than the exception. As a practical matter, this trend has substantially altered our constitutional framework by "wrest[ing] from Courts the ultimate interpretative authority to 'say what the law is,' … and hand[ing] it over to the Executive." *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

The second part of the *Chevron* inquiry is equally problematic. *Chevron* instructs that where a statute "is silent or ambiguous" with respect to an issue, "the question for the court is whether the agency's answer is based on a *permissible* construction of the statute." *Chevron*, 467 U.S. at 843 (emphasis added). *Chevron* further explains that a court should show deference to a permissible agency interpretation even if the court itself would have interpreted the statute differently. *See id.* at 843 n.11.

This Court should reconsider these principles. Over time, their application has led courts—including this Court—to substitute agency interpretations for their own. Strict adherence to *Chevron* leads to courts applying agencies' "reasonable" interpretations even if the courts themselves believe there are better alternatives. *See, e.g.*, *Serano Lab'ys*, 158 F.3d at 1321 ("[U]nder *Chevron,* courts are bound to uphold an agency interpretation as long as it is reasonable—

regardless whether there may be other reasonable, *or even more reasonable*, views.") (emphasis added).[2]

A particularly stark example is *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967. In that case, this Court gave deference to a Federal Communications Commission (FCC) determination that cable broadband providers do not provide "telecommunications service" as defined by the Communications Act, 47 U.S.C. § 151 *et seq*. *See Brand X*, 545 U.S. at 973-74. The Court showed deference even though the FCC's interpretation was inconsistent with its own past practice. *See id.* at 981.[3] This Court also held that the Ninth Circuit had erred by applying *its own prior interpretation* of the statute, rather than the agency's new interpretation. The Court reasoned that "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute" would impermissibly "allow a court's interpretation to override an agency's." *Id.* at 982. Thus, this Court found that the Ninth Circuit had erred because under *Chevron* "it is for agencies, not courts, to fill statutory gaps." *Id.* (citing *Chevron*, 467 U.S. at 843-44 & n.11).

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[2] Such deference also allows executive agencies to intrude on the policymaking authority of Congress. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (describing *Chevron* as "a judicially orchestrated shift of power from Congress to the Executive Branch").

[3] This Court concluded that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *See Brand X*, 545 U.S. at 981.

Amicus curiae respectfully submits that such extraordinary levels of deference are incongruent with the separation of powers. "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez v. Mortgage Bankers Assn.*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring); *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (expressing the concern that *Chevron* is a "doctrine for the abdication of the judicial duty"). *Chevron* addresses a legitimate concern by guarding against the judiciary giving itself policymaking powers properly left to the executive branch. However, it "is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington, Texas v. F.C.C.*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

Significantly, showing strong deference to administrative agencies is also inconsistent with longstanding federal law. The Administrative Procedure Act ("APA") allows agencies to issue binding regulations and requires courts to defer to agency fact-finding. *See* 5 U.S.C. §§ 553, 556, 557, 706(2)(E); *see also Buffington*, 143 S. Ct. at 16 (Gorsuch, J., dissenting from denial of certiorari). By contrast, however, the APA specifically provides that courts "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 (emphasis added).

The APA also instructs courts to set aside agency actions, findings, or conclusions that are "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(C), or are "otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). "On its face [the APA] seems unequivocally to instruct courts to apply independent judgment on all questions of law." Thomas W. Merrill, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 47 (Harvard Univ. Press 2022).

Whether one looks to the Constitution or the APA, the outcome is the same. The separation of powers requires a careful balancing act between the three branches of government. Under *Chevron* and its progeny, however, the scales tip to the executive branch, to the detriment of the judiciary. This Court should restore the proper balance and make clear that it remains the job of the courts "to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177.

II. This Court Should Overrule *Chevron* Or Scale Back *Chevron*-style Deference To Respect The Courts' Primary Role In Interpreting Statutes.

This Court should overrule *Chevron* or, at the very least, scale back the level of consideration given by courts to agency interpretations of statutes. Numerous States have already done this with respect to state agency construction of statutes. These States have often adopted or returned to a form of deference similar to that set forth by this Court in *Skidmore v.*

Swift & Co., 323 U.S. 134 (1944). Under that standard, the weight of an agency's interpretation depends upon its thoroughness, the validity of its reasoning, and its consistency with prior and subsequent agency behavior. *See id.* at 140. This approach recognizes the executive branch's proper role while also respecting the separation of powers.

Amicus curiae respectfully submits that the Court should consider the approach of these States when determining whether to overrule *Chevron*. In particular, *amicus* points this Court to the Ohio Supreme Court's well-reasoned decision in *TWISM Enterprises LLC v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677.

A. The Ohio Supreme Court Has Adopted an Approach to Deference That Properly Respects the Separation of Powers.

Numerous States have already eliminated *Chevron*-style deference. *Amicus curiae* respectfully submits that these cases, and in particular the Ohio Supreme Court's decision in *TWISM*, should be given consideration by this Court as it determines the future of administrative deference.

In *TWISM*, the Ohio Supreme Court heard an appeal of a state agency adjudication regarding the requirements that a firm must meet in order to provide engineering services in Ohio. *See* 2022-Ohio-4677, at ¶ 1. The case turned on the construction of Ohio Rev. Code § 4733.16(D), which sets forth those

requirements. *Id.* The intermediate court of appeals looked to *Chevron* and applied its two-part test. *See id.* at ¶¶ 15-16. The appellate court concluded that the statute was ambiguous, and that the court therefore "must defer" to the agency's interpretation. *Id.* at ¶ 16 (quoting *TWISM Enterprises LLC v. State Bd. of Registration for Professional Engineers & Surveyors*, 2021-Ohio-3665, ¶ 29 (Ohio App. 1st Dist. 2021)).

With this backdrop, the Ohio Supreme Court determined to answer the "predicate question" of "[w]hat deference, if any, should a court give to an administrative agency's interpretation of a statute?" *TWISM*, 2022-Ohio-4677, at ¶ 2. The court discussed *Chevron* and related state court precedents at length. *See id.* at ¶¶ 18-28. It also took a "step back" in order to "examine the matter in light of first principles." *Id.* at ¶ 29. These included the separation of powers and, more specifically, protecting the courts' authority to render definitive interpretations of the law. *See id.* at ¶ 33.

The Ohio Supreme Court rejected all forms of mandatory deference. *Id.* at ¶ 42. It reasoned that when 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.* ¶ 34 (quotations omitted). The court held that such deference is "not appropriate" in light of the separation of powers. *Id.* at ¶ 42.

The Ohio Supreme Court also rejected *Chevron*-style deference for a separate reason: showing deference to an agency "would fly in the face of the foundational principle that no man ought to be a judge in his own cause." *Id.* at ¶ 35 (quotations omitted); *see also* The Federalist No. 10, at 74 (James Madison) (Clinton Rossiter ed., 2003) ("No man is allowed to be a judge in his own cause because his interest would certainly bias his judgment ….").[4] Over time, deference to agencies creates a systematic bias in cases where administrative agencies are also parties. *TWISM*, 2022-Ohio-4677, at ¶ 35 (citing Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1211 (2016)).

Significantly, the *TWISM* decision recognizes that agency interpretations can be helpful to the courts. The Ohio Supreme Court held that a court "*may*" consider an agency interpretation when the statute is truly ambiguous. *TWISM*, 2022-Ohio-4677, at ¶ 44 (emphasis in original). However, the weight a court assigns to an agency's interpretation must depend on the persuasiveness of its reasoning, and not merely the fact that it is offered by an administrative agency. *Id.* at ¶ 45. The weight of an agency's position may be judged by its thoroughness, the validity of its reasoning, and its consistency with earlier and later

[4] This Court has likewise long recognized the principle that "no man can be a judge in his own case." *In re Murchison*, 349 U.S. 133, 136 (1955); *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("[A] law that makes a man a Judge in his own cause … is against all reason and justice ….").

pronouncements. *Id.* at ¶ 46 (citing *Skidmore*, 323 U.S. at 140).

Amicus curiae respectfully submits that the Ohio Supreme Court's reasoning applies equally here. The court's approach respects the informed judgment of executive agencies, while protecting the proper role of the courts. This approach is consistent with the separation of powers and provides a workable alternative to *Chevron*. It allows the government, and regulated parties, to "benefit[] from expertise without being ruled by experts." *Free Enterprise Fund,* 561 U.S. at 499.

B. Numerous Other States Are Stepping Back From *Chevron*-style Deference.

Ohio is not alone in its approach. A number of other state supreme courts have adopted similar standards in recent years. In 2020, for example, the Arkansas Supreme Court addressed separation of powers concerns stemming from *Chevron*-style deference. *See Myers v. Yamato Kogyo Co., Ltd.*, 2020 Ark. 135, 5-6 (Ark. 2020). The court held that it "cannot" give "deference to agencies' interpretations of statutes" because doing so would "effectively transfer[] the job of interpreting the law from the judiciary to the executive." *Id.* at 5. Accordingly, Arkansas courts now review agency interpretations of statutes *de novo*. *Id.* Where a statute is ambiguous, those courts will consider an agency's interpretation as one of many available tools used to provide guidance. *Id.* at 6.

The Wisconsin Supreme Court has likewise "return[ed]" the "judicial power ceded by [its] deference doctrine" to the state's courts. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 84 (Wis. 2018). Wisconsin courts now review administrative agencies' conclusions of law *de novo*. A court may consider an agency's analysis, giving "respectful, appropriate consideration to the agency's views" while the court exercises its independent judgment. *Id.* ¶ 78 (discussing Wis. Stat. § 227.57(10), which requires that "due weight" be accorded to an agency's experience and specialized knowledge). Similarly, the Mississippi Supreme Court recently announced that it has "abandon[ed] the old standard of review giving deference to agency interpretations of statutes." *King v. Mississippi Mil. Dep't*, 245 So. 3d 404, 408 (Miss. 2018). The court based its decision on separation of powers concerns, and held that it was time for state courts to "step fully into the role" because the state constitution "provides for the courts and the courts alone, to interpret statutes." *Id.*

Numerous other States are in accord, and have either moved away from *Chevron*-style deference or declined to adopt it in the first instance.[5] Nor is this

[5] *See, e.g.*, *North Carolina Acupuncture Licensing Bd. v. North Carolina Bd. of Physical Therapy Examiners*, 371 N.C. 697, 700-01 (N.C. 2018) (holding that agency interpretations are not binding and should be given weight according to their persuasiveness); *Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 2016 UT 34, ¶ 27 (Utah 2016) (holding that "agency decisions premised on pure questions of law are subject to non-deferential review"); *Pickard v. Tennessee Water Quality Control Bd.*, 424 S.W.3d 511, 523 (Tenn. 2013) ("Notwithstanding the courts'

movement limited to the courts. The Arizona legislature has eliminated *Chevron*-style deference by statute. Under Ariz. Rev. Stat. § 12-910(F), in any proceedings brought by or against a regulated party, the courts must interpret statutory provisions or rules adopted by an agency "without deference" to agency determinations. *Id.* Likewise, under a Tennessee law enacted in 2022, state courts interpreting a state statute or rule "in a contested case shall not defer to a state agency's interpretation of the statute or rule and shall interpret the statute or rule *de novo*." Tenn. Code Ann. § 4-5-326. In 2018, Florida voters adopted a state constitutional amendment imposing a similar policy. *See* FLA. CONST. art. V, § 21 ("In interpreting a state statute or rule, a state court … may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule *de novo*.").

The broad deference used by the lower courts in this case is inconsistent with the separation of

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respect for administrative expertise, an agency's interpretation of its controlling statutes remains a question of law subject to *de novo* review."); *Cochran v. State, Dep't of Agr., Div. of Water Res.*, 291 Kan. 898, 904 (Kan. 2011) (holding that Kansas courts "no longer give[] deference to an agency's interpretation of a statute"); *In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 103, 754 N.W.2d 259, 267 (Mich. 2008) (declining to adopt *Chevron*-style deference and instead holding that an agency's interpretation may be used as "an aid for discerning the Legislature's intent" but "is not binding on the courts"); *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999) ("A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it.").

powers. It intrudes on the courts' responsibility as primary interpreters of statutory text. *Amicus curiae* respectfully requests that this Court join the Ohio Supreme Court, and the courts of numerous other States discussed *supra*, in rejecting mandatory deference to agency interpretations. These States have demonstrated that agency interpretations can be given respectful and appropriate consideration without yielding the courts' "ultimate interpretive authority" to the executive branch. *See Michigan*, 576 U.S. at 761 (Thomas, J., concurring).

CONCLUSION

For the reasons set forth above, the decision of the First Circuit should be reversed. Furthermore, this Court should overrule *Chevron* or replace it with a new test that better respects the courts' primary role in interpreting the law.

Respectfully submitted,

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