No. 22-1219

In the Supreme Court of the United States

RELENTLESS, INC., *et al.*,

Petitioners,

v.

DEPARTMENT OF COMMERCE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF PROFESSOR ADITYA BAMZAI AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

The question presented is whether this Court should overrule or clarify the *Chevron* doctrine.

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INTEREST OF *AMICUS CURIAE*[*]

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SUMMARY OF ARGUMENT

In *Loper Bright Enterprises v. Raimondo*, No. 22-451 (pending), this Court granted certiorari to consider whether to overrule the approach to judicial deference to agency interpretation associated with the decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Amicus* filed a brief in that case (hereinafter, "Bamzai *Loper Bright* Brief") and, as the Court is aware, the United States filed a brief setting forth its views (hereinafter, "U.S. *Loper Bright* Brief"). A portion of both briefs addressed the meaning of the Administrative Procedure Act ("APA"), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). Subsequently, the Court granted certiorari in this case.

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[*] No party or party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. The University of Virginia School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

In this brief, *amicus* sets forth at greater length the reasoning that supports his understanding of section 706 of the APA. Specifically, section 706 provides that "the reviewing court shall decide all relevant questions of law," "interpret constitutional and statutory provisions" and "hold unlawful and set aside agency action . . . not in accordance with law." 5 U.S.C. § 706. Many have said that the approach announced in *Chevron* conflicts with section 706. *Chevron* concluded that, if "Congress has not directly addressed the precise question at issue," "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." 467 U.S. at 843 (footnote omitted). Rather, the second step of *Chevron* asks "whether the agency's answer is based on a permissible construction of the statute," *id.*, even if that answer rejects the "best" interpretation.

At the same time, *Chevron* required courts to employ all the "traditional tools of statutory construction," *id.* at 843 n.9, to resolve ambiguities. *That* footnote is in some tension with other parts of *Chevron*, *see infra* Part II, but it is consistent with the APA. Section 706 of the APA is best understood to establish a de novo standard of review for legal questions in the sense that a reviewing court should give statutory text the "best" reading possible, assuming one exists, using the traditional tools of construction. The Court should read *Chevron* and related cases in a manner consistent with the APA to establish a principled, consistent, and fair set of criteria governing when courts place weight on administrative agencies' legal and policy determinations.

ARGUMENT

I. The APA requires a form of de novo review for questions of law.

Where statutory text has a "best" interpretation, section 706 of the APA requires a court to give it that interpretation, subject to canons of construction that required courts to give weight to agency interpretations that were contemporaneous or customary. That was the traditional approach prior to the passage of the APA. And although certain cases in the 1940s seemed to depart from the logic of that approach, the APA is best understood to repudiate those later cases and embrace the traditional framework.

A. Three themes in the judicial review of agency statutory interpretation.

Three separate strands of jurisprudence help frame the backdrop against which Congress enacted the Administrative Procedure Act in 1946: (1) the interpretive principle that courts respect customary and contemporaneous interpretations of law; (2) the differing standards of review for questions of law and questions of fact; and (3) judicial review via a writ of mandamus and its accompanying standard. Consider the three in turn.

1. Customary and contemporaneous interpretation.

a. Courts frequently respected executive branch interpretations of statutory text that were contemporaneous with the statute's enactment or articulated a customary practice that had developed under the statute. Even in the context of

constitutional interpretation, "de novo" judicial review gave (and continues to give) weight to certain persuasive contemporaneous and customary understandings of legal text. *See, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 525, 528–29 (2014) (relying on a set of United States Attorney General opinions to interpret the Constitution and noting that "this Court has treated practice as an important interpretive factor . . ."). Because the basic approach to interpreting the U.S. Constitution derived from preexisting theories of interpretation generally, it should be unsurprising to find that courts likewise long respected contemporaneous and customary understandings of *statutory* text. *See, e.g.*, *Edwards Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the *contemporaneous* construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.") (emphasis added); *United States v. Vowell*, 9 U.S. (5 Cranch) 368, 372 (1810) ("If the question had been doubtful, the court would have respected the *uniform* construction which it is understood has been given by the treasury department . . .") (emphasis added). These approaches to statutory interpretation reflected a broader set of commitments to weighing contemporaneous and customary practices in assessing the ordinary meaning of legal text. *Cf. Sackett v. EPA*, 143 S. Ct. 1322, 1365 (2023) (Kavanaugh, J., concurring in judgment) (reasoning that a "longstanding and consistent agency interpretation reflects and reinforces the ordinary meaning of the statute").

In the pre-APA era, courts followed this approach. For example, in a case relied on by *Chevron* itself (*see* 467 U.S. at 843 n.9), the Court, in an opinion by Chief Justice Hughes, addressed the question whether a foreign territory was a "foreign country" within the meaning of a federal revenue statute. *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 4–5 (1932). The Court explained that the "word 'country,' in the expression 'foreign country,' is ambiguous," because it could "be taken to mean foreign territory or a foreign government." *Id.* at 5. In its analysis, the Court alluded to the "familiar principle . . . that great weight is attached to the construction consistently given to a statute by the executive department charged with its administration." *Id.* at 16. But the Court identified a "qualification of that principle" that was "as well established as the principle itself"—namely, that the Court was "not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons." *Id.*

Chief Justice Hughes' approach was consistent with cases decided before and after 1932. Consider Justice Brandeis's statement in *Iselin v. United States*, 270 U.S. 245 (1926), that the agency's "construction was neither uniform, general, nor long-continued; neither is the statute ambiguous. Such departmental construction cannot be given the force and effect of law." *Id.* at 251. Or consider Justice Cardozo's reasoning the year after *Burnet* in *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933). In that case, Justice Cardozo explained the then-current state of the law as follows: "True indeed it is that administrative practice does not avail to overcome a statute so plain in its

commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion. . . ." *Id.* at 315 (citations omitted); *United States v. Moore*, 95 U.S. 760, 762–63 (1878) (noting a construction of a statute that had "always heretofore obtained in the" agency was "entitled to the most respectful consideration, and ought not to be overruled without cogent reasons"); *cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). Justice Cardozo's approach thus stressed that administrative practice ("consistent and generally unchallenged" custom) and "contemporaneous construction" are relevant to construing statutes.

Scholars took note of this approach. Then-Professor Griswold wrote an article in 1941 summarizing what he described as the "regulations problem." Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398 (1941). Griswold explained that then-current law depended on two factors that "can be compressed into two long words: contemporaneousness, and long-continuedness." *Id.* at 404. Although Griswold's article dealt specifically with the question of the effect to "be given to Treasury Regulations in the construction and application of the Federal Revenue Acts," *id.* at 398, he based his reasoning on the broader principle that "contemporaneousness is a significant factor in evaluating an administrative regulation [that] goes back to the earliest

considerations of the problem, *id.* at 405. As Griswold put it, reference to contemporaneous administrative interpretation was warranted, because "unless the language of the statute is very general, the primary problem is to ascertain the meaning of the statute as of the time it was enacted." *Id.* "Contemporaneous regulations may thus represent actual evidence of the elusive legislative intent." *Id.* at 405–06 (listing cases, as well as other reasons justifying the principle); *see id.* at 408–11 (discussing cases addressing long-continuedness); *see also White v. Winchester Country Club*, 315 U.S. 32, 41 & n.17 (1942) (relying on Griswold's article for the proposition that an agency's "substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times . . .").

Griswold's approach paralleled Sutherland's in his treatise on statutory interpretation. *See* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (1891). Sutherland devoted a section to "contemporaneous construction," claiming that "[t]he aid of contemporaneous construction is invoked where the language of a statute is of doubtful import and cannot be made plain by the help of any other part of the same statute . . . ." *Id.* § 307, at 391. Sutherland devoted several sections to "general usage," *see* §§ 308–12, at 392–97, most pertinently explaining that "[a] practical construction, of long standing, by those for whom the law was enacted, will not be lightly questioned . . .," *id.* § 309, at 392. Other treatise authors echoed these points. *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 962–65 (2017) [hereinafter, "*Origins of Judicial Deference*"].

To be sure, there were cases that seemed not to fit the pattern of contemporaneousness and long-continuedness. *See, e.g.*, *Bates & Guild Co. v. Payne*, 194 U.S. 106, 107–10 (1904). Notably, in *Bates*, Justice Harlan's dissent pointed out that the government's then-current position conflicted with its longstanding one and that the Court had "overthrown" the "settled" principle that "the established practice of an Executive Department charged with the execution of a statute will be respected and followed—especially if it has been long continued." *Id.* at 111 (Harlan, J., dissenting); *see also Origins of Judicial Deference* 966–68 & n.253 (discussing *Bates* and citing other similar cases). Out of the thousands upon thousands of statutory cases decided by the Supreme Court before the APA's passage, it is unsurprising to find some that break the mold or some that stretch the established principles. But the general pattern identified by Griswold and Sutherland reflects a pre-1940s framework—as Chief Justice Hughes' opinion in *Burnet* indicates.

b. In its brief in *Loper Bright*, the United States acknowledged that "[t]he Court emphasized" the customary and contemporaneousness "factors in some instances" in cases during the pre-APA era. U.S. *Loper Bright* Brief 23–24. But the United States claimed (a) the Court "did not frame its reasoning in terms of any canon as such"; and (b) "[i]t was the settled understandings *of the Executive*" that the Court respected in this line of cases. *Id.* at 24. *Amicus* has no quarrel with either point but does not believe that they cut against the approach set forth in this brief. For one thing, whether characterized as "factors" or as "canons," the critical point is that respect was *not* afforded under this interpretive

approach unless the relevant executive interpretations were contemporaneous or customary. That contrasts with the interpretive approach of *Chevron*. *See National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."). For another, it is true that it was "the settled understandings *of the Executive*" at issue in these cases. *Amicus* certainly does not mean to suggest that the contemporaneous views of a random, disinterested bystander would also qualify for "respect" in judicial proceedings. But again, that point does not contradict the position that it was the *contemporaneous* or *customary* "understanding of the Executive" that mattered. As Chief Justice Hughes explained, the Court was "not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons." *Burnet*, 285 U.S. at 16.

2. The law-fact distinction.

In addition, courts distinguished between questions of fact and questions of law in assessing the scope of review. Whereas the former could be deferentially reviewed—unless the Constitution required de novo review, *see Crowell v. Benson*, 285 U.S. 22 (1932)—the latter generally were not. *See, e.g.*, JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 50 (1927) (recognizing that, under prevailing case law, courts "review[ed] for error[s] of law, but not findings of fact, at least where, on the evidence, the findings are within the bounds of reason") (footnote omitted);

JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 144–45 (1938) (observing that the "scope of judicial review" over questions of fact and questions of law "is wholly different" and remarking that "[t]he interesting problem as to the future of judicial review over administrative action is the extent to which judges will withdraw, not from findings of fact, but conclusions upon law").

Indeed, in this era, some argued that the Constitution required de novo review and, thus, barred judicial deference to executive statutory legal interpretation. In a prominent concurrence, Justice Brandeis reasoned that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); *see id.* at 73–74 (Brandeis, J., concurring) (reasoning that due process requires that an administrative order "may be set aside for any error of law, substantive or procedural"); *see, e.g.*, LANDIS, *supra*, at 124 (interpreting Justice Brandeis as meaning that the "supremacy of law" requires the "right of a party to a judicial determination as to the appropriate rule of law applicable to his particular case . . ."); John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 516 (1947) (arguing that "[a] very broad statement of th[e] principle" that "questions of law are for the determination of the reviewing Court" is "contained in a classic passage of Mr. Justice Brandeis' concurring opinion in the *St. Joseph Stock Yards* case"). To the extent Justice Brandeis's concurrence implied that the Constitution requires de novo review of statutory questions in *all*

circumstances, *amicus* respectfully disagrees with it. *See* Bamzai *Loper Bright* Brief 15–18. But at a minimum, Justice Brandeis's concurrence reflects the prevalence of the notion, in the latter part of the 1930s, that courts reviewed questions of law de novo.

3. The mandamus standard.

For much of the nineteenth century, judicial review occurred in certain areas using a writ of mandamus, in which an Article III court would not resolve questions of law de novo. *See, e.g.*, *Origins of Judicial Deference* 947–58; *United States v. Mead Corp.*, 533 U.S. 218, 242–43 (2001) (Scalia, J., dissenting) (observing that under mandamus practice some "[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive"); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 514–15 (1840). But because no party argued that the APA incorporated the mandamus standard in *Loper Bright*, *amicus* does not discuss the issue further and believes that the Court need not address its intricacies in this case.

B. The judicial breakdown of the law-fact distinction.

In the era immediately surrounding the passage of the APA, several Supreme Court cases undercut a sharp distinction between "questions of law" and "questions of fact" for purposes of the standard of review. *Origins of Judicial Deference* 977–81. Three cases exemplified this trend.

In *Gray v. Powell*, 314 U.S. 402 (1941), the Court reasoned that Congress had "delegate[d] th[e] function" of interpreting the statutory term "producer" "to those whose experience in a particular field gave promise of a better informed, more

equitable" judgment. *Id.* at 412 & n.7. "To determine upon which side of the median line the particular instance falls," the Court reasoned, "calls for the expert, experienced judgment of those familiar with the industry." *Id.* at 413. Although this language might have suggested a broader approach to statutory interpretation, *Gray* could also have been understood as limited to the meaning of the term "producer." But to the extent that particularized understanding of *Gray* was possible in 1941, the two later cases of the trilogy rendered it untenable.

In *Dobson v. Commissioner*, 320 U.S. 489 (1943), the Court addressed the proper interpretation of statutory language in the Revenue Act authorizing review of Tax Court determinations "not in accordance with law." *See id.* at 494. The Court read into the statutory review provision a deferential standard, reasoning that "when the Court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand," and that "[i]n deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter." *Id.* at 502. In doing so, *Dobson* remarked that "[p]erhaps the chief difficulty in consistent and uniform compliance with the congressional limitation upon court review lies in the want of a certain standard for distinguishing 'questions of law' from 'questions of fact.'" *Id.* at 500–01; *see, e.g.*, *John Kelley Co. v. Commissioner*, 326 U.S. 521, 527 (1946) (relying on *Dobson* and remarking on the difficulty "in drawing a line between questions of fact and questions of law"). In this fashion, *Dobson* appeared to generalize the

approach that *Gray* might have been understood to have taken.

Finally, in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court reasoned that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." *Id.* at 131. The Court rejected the argument that it could "import wholesale the traditional common-law conceptions" into the statutory term "employee," instead reasoning that the agency construction "is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.* at 125, 130–31. (For a discussion of how *Hearst* seems out of step with the Court's ordinary treatment of a common-law term ("employee") incorporated into a statute, see CALEB NELSON, STATUTORY INTERPRETATION 621–22 (2011).)

These were not the only cases, and the Court was by no means consistent in its approach to statutory interpretation. *See Origins of Judicial Deference* 977–81. For example, the very same year *Hearst* was decided, the Court seemed to articulate a more forthrightly multifactor and contextual approach to judicial deference in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (reasoning that the "weight" given an agency legal interpretation "depend[ed] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"). And several cases appeared to ignore the approach of *Gray v. Powell*, *Dobson*, and *Hearst* altogether. *See, e.g.*, *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

Thus, writing in 1951, Professor Kenneth Culp Davis remarked that "[t]he one statement that can be made with confidence about applicability of the doctrine of *Gray v. Powell* is that sometimes the Supreme Court applies it and sometimes it does not." KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 248, at 893 (1951); *see also id.* § 247, at 887–93 (citing, as cases contrary to *Gray v. Powell*, *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944), *Otis Co. v. SEC*, 323 U.S. 624 (1944), and *SEC v. Central-Illinois Securities Corp.*, 338 U.S. 96 (1949)).

C. Section 706 and the concept of deference.

When Congress enacted the APA in 1946, it included a section entitled "Scope of review" setting forth a series of standards that courts should employ when reviewing agency action. 5 U.S.C. § 706. The best interpretation of section 706, read as a whole, is that it established a form of de novo review, tempered by the customary and contemporaneous approaches to interpretation. *See supra* Part I.A.1.

1. The text and structure of section 706.

As an initial matter, a prefatory clause to the section provides that the 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. To *amicus*' knowledge, Congress had not used these phrases—"shall decide all relevant questions of law" and "interpret constitutional and statutory provisions"—in statutory provisions prior to the APA.

As a textual matter, many have viewed this language as requiring some form of de novo review. For example, five years after the APA's passage in 1946, the Ninth Circuit reasoned that, "[i]n enacting the Administrative Procedure Act Congress did not merely express a mood that questions of law are for the courts rather than agencies to decide—it so enacted with explicit phraseology." *SEC v. Cogan*, 201 F.2d 78, 86–87 (9th Cir. 1951). *See, e.g.*, THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 47 (2022) (noting that the APA appears "unequivocally to instruct courts to apply independent judgment on all questions of law"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 194 & n.408 (1998); John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 516 (1947).

To the extent that legislative history might be relevant to understanding section 706, it tends to cut in favor of this approach. Before passage of the bill that became the APA, Representative Francis Walter, the chairman of the House Subcommittee on Administrative Law, described the scope-of-review provision as "requir[ing] courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions. . . ." 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter). Moreover, in the context of a discussion of why "interpretative rules" were exempted from the APA's notice-and-comment requirements, *see* 5 U.S.C. § 553(b)(3)(A), a Senate Judiciary Committee print indicated that agency statutory interpretations "are subject to plenary

judicial review." S. Doc. No. 248, 79th Cong., 2d Sess. 11, 18 (1946); *see generally Origins of Judicial Deference* 988–90 (summarizing other portions of the legislative history).

The listed standards of review contained in section 706 bolster this understanding of the prefatory language. Specifically, after the prefatory language, section 706 provides that the reviewing court "shall . . . compel agency action unlawfully withheld or unreasonably delayed; and . . . hold unlawful and set aside agency action, findings, and conclusions found to be" in violation of a series of listed standards. 5 U.S.C. §§ 706(1)–(2). The first subsection then provides that reviewing courts shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Moreover, a later subsection contemplates deferential "substantial evidence" review of factfinding in certain agency proceedings. *Id.* § 706(2)(E). These provisions establish a distinction between the standard of review for questions of "law" and "fact" that would have been familiar in the mid-1940s. *Origins of Judicial Deference* 959–62, 971–76.

In arguing to the contrary, the United States places substantial weight on an excerpt from a 1941 Attorney General study of administrative procedures, which provided that "where the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body." U.S. *Loper Bright* Brief 43 (quoting *Final Report of the Attorney General's Committee on Administrative Procedure* 90–91 (1941)). Notably, however, the Report was operating on a vision of the law-fact

distinction that, like *Gray v. Powell*, blurred the line between the two categories. *See id.* ("The question of statutory interpretation might be approached by the court de novo and given the answer which the court thinks to be the 'right interpretation.' Or the court might approach it, somewhat as a question of fact, to ascertain, not the 'right interpretation,' but only whether the administrative interpretation has substantial support."). If the APA sought to recrystallize a distinction between law and fact, then the Final Report's discussion on this point is not compelling evidence of the meaning of section 706.

The United States also cites a portion of section 706 that provides for review of agency decisions "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2)(F). The United States claims that the "presence of the 'de novo' modifier in that provision suggests that its absence from the portion of Section 706 on which petitioners rely was deliberate." U.S. *Loper Bright* Brief 44. But that claim does not follow from the structure of section 706, which provides as a default that review of factual issues in formal proceedings is deferential. *See* 5 U.S.C. § 706(2)(E) (substantial-evidence standard). To change that default, either because a statute or the Constitution might require "trial de novo," Congress inserted the phrase "de novo" in this provision. *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22 (1932).

2. Congressional repudiation of *Dobson* and *Hearst*.

In the era surrounding the passage of the APA, Congress repudiated two of the leading 1940s cases

addressing judicial deference—*Dobson* and *Hearst*. Congress's actions cast light on the APA.

a. When Congress repudiated *Dobson*, it did so by construing language—"not in accordance with law"—that it had used in the APA. Congress had previously used the phrase "not in accordance with law" in a statutory review provision in 1926 to describe the authority of federal courts over the newly constituted Board of Tax Appeals—an executive agency and the predecessor of the U.S. Tax Court. *See* Revenue Act of 1926, § 900, 44 Stat. 9, 105–06, 110; *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U.S. 716, 721 (1929) (tracing statutory history). The Revenue Act of 1926 authorized courts of appeals to exercise direct judicial review of the Board of Tax Appeals through "exclusive jurisdiction to review the decisions of the Board." § 1003(a), 44 Stat. at 110. In conducting such review, federal courts were given the "power to affirm or, *if the decision of the Board is not in accordance with law*, to modify or to reverse the decision of the Board." § 1003(b), 44 Stat. at 110, codified at 26 U.S.C. § 1226 (emphasis added). During the same congressional session that Congress enacted the Revenue Act of 1926, it used the same language to authorize federal courts to review orders issued under the Longshoremen's and Harbor Workers' Compensation Act, § 21(b), 44 Stat. 1424, 1436 (1927), codified as amended at 33 U.S.C. §§ 901–50.

The Supreme Court first addressed the meaning of this phrase in *Crowell v. Benson*, 285 U.S. 22 (1932). In *Crowell*, although Chief Justice Hughes' majority and Justice Brandeis' dissent disagreed on the scope of review of factual questions, they agreed on its

application to questions of law. Chief Justice Hughes reasoned that the question of scope of review at issue in the case "relate[d] only to determinations of fact," because authority over "legal questions" was reserved to federal courts. 285 U.S. at 49. As Chief Justice Hughes explained: "Rulings of the [agency official] upon questions of law are without finality. So far as the latter [*i.e.*, 'questions of law'] are concerned, full opportunity is afforded for their determination by the federal courts through proceedings to suspend or to set aside a compensation order." *Id.* at 45–46. "The Congress did not attempt to define questions of law," Chief Justice Hughes observed, but the statute left "no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category." *Id.* at 50.

In his dissent, Justice Brandeis observed that "[t]he initial question" that he would address was "one of construction of the Longshoremen's Act." 285 U.S. at 66 (Brandeis, J., dissenting). He noted that the Longshoremen's Act provided that "'if *not in accordance with law*, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings . . . instituted in the Federal district court.'" *Id.* at 67; *see also id.* (observing that "[t]he phrase in [the Longshoremen's Act] providing that the order may be set aside 'if not in accordance with law' was adopted from the statutory provision, enacted by the same Congress, for review by the Circuit Courts of Appeals of decisions of the Board of Tax Appeals"). Justice Brandeis agreed that, under the statute, the agency's "conclusions are, as a matter of right, open to re-examination in the courts on all questions of law." *Id.* at 88. And Justice Brandeis

described "the prevailing practice" under the review provisions of the Longshoremen's Act as "confin[ing]" judicial review "to questions of law." *Id.* at 93. Thus, as a statutory matter, Justice Brandeis frankly agreed that federal courts could freely reexamine "questions of law" under the "not in accordance with law" standard.

As previously discussed, in *Dobson*, the Court read into the same statutory language in the Revenue Act a seemingly deferential standard. *See* 320 U.S. at 502 (reasoning that the Court should not disturb a Tax Court decision "when the Court cannot separate the elements of a decision so as to identify a clear-cut mistake of law," and that "[i]n deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter").

But *Dobson* was not long for this world. Two years after enacting the APA (with the "not in accordance with law" language contained in section 706(2)(A)), Congress overturned *Dobson* by statute. Act of June 25, 1948, § 36, 62 Stat. 869, 991 (providing that the courts of appeals should review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury"), codified as amended at 26 U.S.C. § 7482(a)(1). Supporters of the bill, such as Representative Sam Hobbs (the author of the Administrative Orders Review Act, otherwise known as the Hobbs Act, 28 U.S.C. § 2342) contended that "[p]rior to the *Dobson* decision it was assumed by all the courts, including the Supreme Court, that on appeal from the Tax Court all questions of law were fully reviewable . . . ." 93 Cong. Rec. App. 3281 (1947);

see also 94 Cong. Rec. 8501 (1948) (statement of Rep. Reed) (similar).

Stepping back from the particulars, the critical point is this: Although the 1948 legislation amended solely the Revenue Act (and not the APA), it did so in a fashion that suggested Congress's understanding of the meaning of the statutory review phrase "not in accordance with law." According to Representative Hobbs, all had agreed that, prior to *Dobson*, such language rendered questions of law "fully reviewable." The most plausible interpretation is that the exact same language, when used in the APA, was intended to have the same effect. *Cf.* DAVIS, *supra*, § 244, at 868 n.1 ("Before its statutory abolition in 1948, the opinion was widespread that whether or when the *Dobson* doctrine would be applied was utterly unpredictable. What is not generally recognized is that outside the tax field the use or non-use of what is essentially the *Dobson* doctrine is equally difficult to predict.").

b. Congress also appeared to repudiate *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944), shortly after passage of the APA. Here, too, a brief overview of the steps leading to Congress's actions is revealing.

In the Wagner Act of 1935, Congress specified that "[t]he findings of the Board as to the facts, if supported by evidence, shall be conclusive." § 10(e), 49 Stat. 449, 454, codified as amended at 29 U.S.C. § 160(e). In the following years, the Court read the word "evidence" in the Wagner Act to mean "substantial evidence." *Washington, V. & M. Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)

(reasoning that "[s]ubstantial evidence is more than a mere scintilla," but rather "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *see also NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). As previously discussed, interpreting the "substantial evidence" test in *Hearst*, the Court reasoned that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." 322 U.S. at 131.

When Congress passed the Taft-Hartley Act in 1947, *see* Pub. L. No. 80-101, 61 Stat. 136, codified as amended at 29 U.S.C. § 141 *et seq.*, an accompanying House Report provided that "[i]t is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in" a variety of cases. H.R. Rep. No. 510, 80th Cong., 1st Sess. 56 (1947). Among the listed cases was *Hearst*. *See id.*

A few years later, the Court addressed the implications of the Taft-Hartley Act for the scope of review of *factual* issues in the landmark opinion of *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474 (1951). In doing so, the Court made two remarks relevant to the scope of review of legal questions. First, the Court noted that "[i]t would be mischievous wordplaying to find that the scope of review under the Taft-Hartley Act is any different from that under the [APA]." *Id.* at 487. Second, the Court recognized Congress's repudiation of *Hearst*, quoting the House Report language just mentioned. *See id.* at 485–86.

The relationship between section 706 and cases like *Hearst* is thus somewhat complex. But it cannot be disputed that many members of Congress were alert to cases like *Dobson* and *Hearst* and sought to repudiate them in the era surrounding the APA's passage. Returning to section 706's text, the most plausible interpretation is that, much like with its statutory repudiation of *Dobson*, Congress sought to establish the traditional scope-of-review for legal questions when it enacted the APA. In doing so, Congress sought to repudiate then-recent innovations regarding the standard of review.

3. Contemporaneous commentators.

In its brief in *Loper Bright*, the United States conceded that at least "one commentator" understood the APA to "require independent judicial resolution of all questions of law." U.S. *Loper Bright* Brief 43 (citing John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 516 (1947)). But the United States sought to characterize Dickinson's understanding of section 706 as "completely isolated" and "contradicted [by] the great weight of contemporary scholarship." *Id.* (quotation marks and citation omitted). With respect, *amicus* has both a methodological and factual disagreement with the United States's claim. As an initial matter, *amicus* is skeptical, to say the least, of the implicit premise in the claim—namely, that one might derive the appropriate understanding of section 706 by conducting a head count of academics writing contemporaneously with the APA's passage. But leaving to one side this methodological point, *amicus* believes that the claim is incorrect. Contrary

to the United States' brief, Dickinson's perspective was not "completely isolated."

Consider, for example, the views of Professor Louis Jaffe. In a 1951 article, Jaffe characterized the Court's opinions in *Gray v. Powell*, *Hearst Publications*, and *Dobson* as "rather unfortunate." Louis L. Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 Harv. L. Rev. 1233, 1258 (1951). Jaffe contended that—to the extent those precedents were understood to hold that "if the [agency's] judgment is reasonable the courts are powerless to interfere, though independently they would have arrived at a different conclusion"—such a holding was "in [his] opinion, [ ] heresy." *Id.* According to Jaffe, "[t]he question whether the action of the administrative body is within the limits of relevance is always a question for the courts, regardless of how reasonable the agency's conception of relevance may be." *Id.* at 1258–59.

No less importantly, Jaffe claimed that, as of the time he was writing, "[i]t [wa]s thought to be open for decision whether the so-called doctrine of *Gray v. Powell* has been repealed by the Administrative Procedure Act." *Id.* at 1260 (citing specifically the clause in section 706 providing "that the court shall decide 'all relevant questions of law,'" 5 U.S.C. § 706). Jaffe observed that "[i]n the view of some distinguished authorities this provision was intended to overcome the doctrine of *Gray v. Powell*." *Id.* (citing Dickinson). And he observed that "[i]t is significant, too, that the *Hearst* case was cited by the Taft-Hartley legislative committees with disapproval." *Id.* He concluded that "[t]his question"—namely, whether section 706 rejected *Gray*, *Hearst*, and other similar

cases—"must ultimately be faced" and "cannot be avoided by labeling these questions as questions of fact." *Id.* Were the Court to face the question, Jaffe said that he "would argue that insofar as these opinions suggest what I have called heresy (and one quite unnecessary to the decisions in those cases) they should be regarded as disapproved." *Id.*

To be sure, Jaffe sought at the same time to maintain "valid areas of administrative discretion" where agency judgment would "be set aside only if unreasonable or arbitrary." *Id.* But Jaffe's article contradicts the government's claim that Dickinson's understanding of section 706 was "completely isolated." U.S. *Loper Bright* Brief 43.

Consider, next, the views of Professor Bernard Schwartz, who wrote in 1955 that "it must be conceded that [the *Gray v. Powell* line of cases] has enabled the highest Court to all but nullify language in the Administrative Procedure Act of 1946" that otherwise could "be said to eliminate the *Gray v. Powell* doctrine." Bernard Schwartz, *Gray vs. Powell and the Scope of Review*, 54 Mich. L. Rev. 1, 67–68 (1955) (footnote omitted) (citing section 706's language that "the reviewing court shall decide all relevant questions of law" and "interpret . . . statutory provisions"). Schwartz contended that, although section 706 appeared to "eliminate[] the doctrine of narrow review in the *Gray v. Powell* situation," the Court had "avoided this result by its refusal to concede that an agency finding of the kind under discussion involves statutory interpretation." *Id.* at 68. "By its use of its power to classify challenged agency findings," Schwartz continued, "the Court has been able to maintain the *Gray v. Powell* doctrine

unaltered, despite the seemingly contrary language of the Administrative Procedure Act." *Id.* Schwartz said that he "doubt[ed] the soundness of the doctrine and hope[d] for its ultimate repudiation." *Id.* At the same time, he noted that he "still desire[d], so long as it is not overruled, to see it applied in a logically consistent fashion," which was why he was concerned by "the embarrassingly large number of Supreme Court decisions that do not adhere to the doctrine of *Gray v. Powell*." *Id.* In a nutshell, Schwartz's article reflected a disagreement with the approach of *Gray v. Powell*; a belief that section 706 repudiated *Gray*'s interpretive methodology; and a concern that the Court's precedents, circa 1955, were in disarray on this issue.

Others echoed the perspective expressed by Dickinson, Jaffe, and Schwartz. *See, e.g.*, Thayer D. Moss, *The Administrative Interpretation of Statutes*, 39 Georgetown L.J. 244, 259 (1951). To be sure, some commentators believed that section 706 did not establish a general standard of review for legal questions. *See, e.g.*, DAVIS, *supra*, § 244, at 871; *see also id.* § 245, at 877 (asking, rhetorically, whether it is "not high time, now that the APA has reasserted [the law-fact] distinction, that the courts should conform to the statutory formula"). And the perspectives of Professors Jaffe and Schwartz were nuanced and perhaps even changed subtly over time. But contrary to the United States's claim, the perspective that section 706 targeted the interpretive approach in the Court's then-recent cases (like *Gray v. Powell* and *Hearst*) was not at all isolated.

II. Stare decisis does not bar a proper interpretation of section 706.

A. Properly understood, stare decisis does not stand in the way of fitting the proper domain of judicial deference to the APA's text. As an initial matter, this Court has often said that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). In this case, the question of the meaning of section 706 was neither brought to the *Chevron* Court's attention nor ruled upon.

But leaving to one side this conceptual point about stare decisis, in the particular case of the "*Chevron* doctrine," the difficulty is that it is hard to point to a single doctrine, rather than shifting approaches changing over time. Before *Chevron* was decided, Judge Friendly observed that "there are two lines of Supreme Court decisions on th[e] subject [of judicial deference] which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand." *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976). Although *Chevron* appeared to distill the pre-*Chevron* approach to a two-step process, the Court likely did not intend to establish a significant precedent. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 Admin. L. Rev. 253, 275–76 (2014); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987) (describing the issue before it as "a pure question of statutory construction for the courts to decide").

Moreover, *Chevron* itself contained an internal tension between two of its footnotes, which has caused confusion to this day. In footnote 9, *Chevron* indicated that a court would approach interpretation "employing traditional tools of statutory construction." 467 U.S. at 843 n.9. But in footnote 11, the Court suggested that a reviewing court might abandon "the reading the court would have reached if the question initially had arisen in a judicial proceeding" in the face of an agency construction. *Id.* at 843 n.11; *see Brand X*, 545 U.S. at 980 ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires 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.") (citing *Chevron*, 467 U.S. at 843–44, 843 n.11). *Compare American Council on Education v. FCC*, 451 F.3d 226, 234 (D.C. Cir. 2006) (reasoning that the court could not "set aside the Commission's reasonable interpretation of the Act in favor of an alternatively plausible (or an even better) one"), *with* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017) (noting that he has "personally . . . never had occasion to reach *Chevron*'s step two in any of [his] cases").

Following *Chevron*, this Court effectively jettisoned the two-step process by introducing the notion that the measure of deference that a court gives to an agency interpretation depends in part on the formality of the agency's procedures. *See United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001). If *Chevron* ever was about a simplified two-step process, *Mead* unequivocally abandoned that approach.

Finally, some Justices adhered to a multi-factor understanding of *Chevron* throughout. *See, e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 308–09 (2013) (Breyer, J., concurring in part and concurring in the judgment) (reasoning that "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant").

As a result, the issue of stare decisis with respect to the "*Chevron* doctrine" requires the Court to answer an antecedent question: Stare decisis weight to what exactly? The "footnote 9" or the "footnote 11" approach to understanding *Chevron*? The abandonment of the two-step process in *Mead*? The multifactor approach embraced by some Justices in the post-*Chevron* era?

B. As *amicus* explained in his brief in *Loper Bright*, the Court should embrace the "footnote 9" approach. If the Court were to do so, it would effectively adopt the conception of ambiguity that requires courts to follow the best interpretation of a statute in the face of an alternative permissible interpretation embraced by an agency. Moreover, even in the case of legal interpretation, courts should respect contemporaneous and customary agency interpretations. *See supra* Part I.A.1.

As Justice Kavanaugh explained in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), "[i]f a reviewing court employs all of the traditional tools of construction"—as *Chevron*'s footnote 9 directs—then "the court will almost always reach a conclusion about the best interpretation of the [legal text] at issue." *Id.* at 2448

(Kavanaugh, J., concurring in the judgment) (citing *Chevron*, 467 U.S. at 843 n.9). At that point, a court "will have no need to adopt or defer to an agency's contrary interpretation." *Id.* At the same time, "some cases involve [legal text] that employ broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.'" *Id.* In general, absent contrary indications in the organic statute, "[t]hose kinds of terms afford agencies broad policy discretion," *id.*, subject to the APA's arbitrary-and-capricious standard, *see* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Under these circumstances, it would make sense to say that a legal text does not speak to an issue, which would imply that any questions left unresolved by the text were questions of policy, not legal interpretation. This approach to judicial deference makes the best sense of the APA, the pre-APA caselaw, and can even fit much of the post-*Chevron* caselaw.

CONCLUSION

Respectfully, the Court should decide this case consistent with the principles described in this *amicus* brief.

Respectfully submitted.

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