No. 22-1219

IN THE

Supreme Court of the United States

RELENTLESS, INC., ET AL.

Petitioners,

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

Respondents.

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

BRIEF OF THE EMORY INTELLECTUAL PROPERTY SOCIETY AND LAW AND ARTIFICIAL INTELLIGENCE SOCIETY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The Emory Intellectual Property Society and Law and Artificial Intelligence Society are student organizations at Emory University School of Law. *Amici*'s members are students at Emory Law School, who seek to deepen the understanding of laws surrounding intellectual property and artificial intelligence, respectively, within the Emory Law School community and beyond. This case will directly impact the way emerging technologies are regulated, a core interest of *amici*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For nearly four decades, *Chevron* deference has provided a "stable background rule against which Congress can legislate." *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013). Congress has used its power to delegate narrow or expansive authorities to executive agencies as it deems appropriate. Agencies have duly exercised such authority subject to judicial oversight under *Chevron* and Congressional review.

Petitioners have challenged *Chevron* by questioning the National Marine Fisheries Service's

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* affirm that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

interpretation of the Magnuson-Stevens Fishery Conservation and Management Act. However, reconsidering *Chevron* deference implicates all agency action regardless of industry or domain.

In support of Respondents, *amici* believe the need for *Chevron* is especially clear in the context of artificial intelligence ("AI"), a rapidly developing technology. AI is not only ripe with uncertainty and risk; it also holds promise for advancing most every human endeavor, from medicine to the arts. Regulation will therefore be critical both to protect the public and to support AI innovation such that it contributes to, rather than threatens, human welfare.

Part I of this brief surveys calls for AI regulation from industry and policy experts; discusses the challenges of regulating AI; and considers current and future legislation regarding AI. Part II examines five cases from this Court in which *Chevron* allowed agencies to effectively regulate new technology.

Because weakening or overturning *Chevron* will severely constrain agencies' capacity to regulate the novel challenges and opportunities of AI, *amici* urge the Court to affirm the judgment of the court of appeals.

ARGUMENT

I. THE IMPORTANCE OF DEFERENCE TO AGENCY INTERPRETATIONS

Emerging technologies are disruptive: the automobile, telephone, and internet have altered society in unpredictable ways. Americans rely on Congress to regulate our markets and protect our rights when tensions inevitably arise. Congress does so by promulgating both specific technical laws and broad statutory frameworks to be filled in by agencies and executive action. Today, corporations, non-profits, researchers, and everyday citizens are calling for Artificial Intelligence ("AI") to be regulated. Whether Congress immediately legislates regarding AI, courts should continue to honor Congress's delegations of authority to executive agencies by reaffirming *Chevron* deference.

A. Calls for the regulation of artificial intelligence

AI is developing quickly, posing a challenge for Congress, courts, and regulators alike.[2] Congress can pick up the pen and craft legislation tailored to the technology now or it can choose to let agencies apply existing statutory frameworks to this new technology.

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[2] Alicia Solow-Niederman, *Administering Artificial Intelligence*, 93 S. Cal. L. Rev. 633, 656 (2020) ("[T]he potential speed of algorithmic development leads to an especially stark instance of the classic 'pacing problem' in regulation.").

Whichever path the legislature chooses, overruling *Chevron* will have adverse effects. Agencies have begun responding to the need for rules governing AI, while AI developers themselves are some of the most ardent advocates of government regulation in the field.

The technology industry acknowledges the dangers of unregulated innovation. Calls for regulation come from private and public actors across the world, including those developing the technology. In March 2022, the United States Chamber of Commerce called for AI regulation "to ensure future economic growth, provide for a competitive workforce, maintain a competitive position in the global economy, and provide for our future national security needs,"[3] a notable departure from the group's usual anti-regulatory posture.[4] In July 2023, Google CEO Sundar Pichai said regulation is necessary to ensure AI will be developed to align with "human values."[5] The next

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[3] Chamber of Com. of the U.S., Commission on Artificial Intelligence Competitiveness, Inclusion, and Innovation (2023), https://www.uschamber.com/assets/documents/CTEC_AICommission2023_Exec-Summary.pdf.

[4] Suzanne Smalley, *U.S. Chamber of Commerce calls for AI Regulation*, Routers (Mar. 9, 2023), https://www.reuters.com/technology/us-chamber-commerce-calls-ai-regulation-2023-03-09/.

[5] Sundar Pichai, CEO, Google, Interview with CBS News's 60 Minutes: Is Artificial Intelligence Advancing too Quickly? What AI Leaders at Google Say (July 9, 2023), https://www.cbsnews.com/news/google-artificial-intelligence-future-60-minutes-transcript-2023-07-09/.

month brought a flurry of calls for regulation: OpenAI CEO Sam Altman explained to the Senate Judiciary Subcommittee on Privacy, Technology, and the Law that "regulatory intervention by governments will be critical to mitigate the risks of increasingly powerful [AI] models."[6] Microsoft President Brad Smith urged both congressional and executive action to regulate AI, highlighting that "the rule of law and a commitment to democracy has kept technology in its proper place."[7] At the same time, IBM emphasized the necessary role of executive agencies, which have expertise in the fields implementing AI: "AI for autonomous driving systems, for example, should be regulated by the National Highway Traffic Safety Administration, which already knows how to regulate cars on America's highways."[8]

In addition to support from the tech industry, the need for AI regulation is also recognized by a diverse array of think tanks and academics. While preferring

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[6] Max Zahn, *OpenAI CEO Warns Senate: If this Technology Goes Wrong, it can go Quite Wrong*, ABC News (May 16, 2023), https://abcnews.go.com/Business/openai-ceo-warns-senate-technology-wrong-wrong/story?id=99357748.

[7] Brian Fung, *Microsoft Leaps into the AI Regulation Debate, Calling for a New US Agency and Executive Order*, CNN (May 25, 2023), https://www.cnn.com/2023/05/25/tech/microsoft-ai-regulation-calls/index.html.

[8] Christina Montgomery, *Why a Single AI Regulator Just Won't Work*, The Hill (May 25, 2023), https://thehill.com/opinion/congress-blog/4020159-why-a-single-ai-regulator-just-wont-work/.

a "light touch approach," the CATO institute suggests that agencies consider whether AI concerns are "already covered by regulation" and that the federal government consider promulgating regulations that preempt potential state and local laws that may stifle innovation.[9] The Center for American Progress asserts that "direct governmental regulation will be needed to ensure the development and deployment of trustworthy AI."[10] Meanwhile, the Brookings Institute explains the foreign affairs dimension of domestic AI regulation: "U.S. regulation of the risks of harm from AI is clearly needed . . . . [M]aking progress in regulating AI will be key if the U.S. wants to lead on international cooperation in AI governance."[11]

Leading technology companies and policy experts alike are calling for immediate regulation to protect national security interests and to match the speed of

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[9] Jennifer Huddleston, *What Might Good AI Policy Look Like? Four Principles for Light Touch Approach to Artificial Intelligence*, CATO Institute (Nov. 9, 2023), https://www.cato.org/blog/what-might-good-ai-policy-look-four-principles-light-touch-approach-artificial-intelligence.

[10] Adam Conner & Megan Shahi, *Priorities for a National AI Strategy*, Center for American Progress (Aug. 10, 2023), https://www.americanprogress.org/article/priorities-for-a-national-ai-strategy/.

[11] Joshua Meltzer, *The US Government Should Regulate AI if it Wants to Lead on International AI Governance*, Brookings (May 22, 2023), https://www.brookings.edu/articles/the-us-government-should-regulate-ai/.

research and market demand.[12] The nation's economy is structured to progress as fast as research and production will let it; meanwhile, the regulatory process ensures the public's protection and provides a stable context for the efficient development of technology.[13]

B. The challenges of regulating artificial intelligence

AI presents a broad range of risks from privacy violations to securities fraud to biological attacks.[14] In

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[12] David McCabe, *Microsoft Calls for A.I. Rules to Minimize Technology's Risks*, N.Y. Times, May 26, 2023, at B3; Celia Kang, *OpenAI's Sam Alman Urges A.I Regulation in Senate Hearing*, N.Y. Times, May 17, 2023, at B1; *Oversight of A.I.: Rules for Artificial Intelligence*, *S. Judiciary Comm. Subcomm. on Privacy, Technology, and the Law*, 118th Cong. (May 16, 2023) (statement of Samuel Altman, CEO of OpenAI).

[13] Eric Schmidt, *Innovation Power: Why Technology Will Define the Future of Geopolitics*, 102 Foreign Aff. 38 (2023).

[14] Christopher A. Mouton et al., *The Operational Risks of AI in Large-Scale Biological Attacks: A Red-Team Approach*, RAND Corporation (2023) https://www.rand.org/pubs/research_reports/RRA2977-1.html (discussing how in the use of AI language models to assist in planning biological attacks, "the speed at which AI technologies are evolving often surpasses the capacity of government regulatory oversight, leading to a potential gap in existing policies and regulations"); John Bailey, *AI in Education: The Leap into a New Era of Machine Intelligence Carries Risks and Challenges, but also Plenty of Promise*, 23 Education Next 4, 28-35 (2023).

May 2022, AI experts and executives from leading AI companies (Microsoft, Google, OpenAI, DeepMind, and Anthropic) went so far as to warn of "the risk of [human] extinction from AI."[15] While it is impossible to know the precise contours of threats posed by AI, the risks far exceed those of any previous emerging technology aside from nuclear weapons. AI therefore demands broad, anticipatory, and consistent regulation rather than the disjointed, uncertain, and unpredictable regulation that may follow from overturning *Chevron*.[16]

Citizens have fallen prey to "deepfakes"[17] and misinformation created by AI may disrupt civic

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[15] *AI Extinction Statement Press Release*, Center for AI Safety (May 30, 2023), https://www.safe.ai/press-release.

[16] Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1126 (1987) (discussing the patchwork effect created by increased circuit splits); Andrew Tutt, *An FDA for Algorithms*, 69 Admin. L. Rev. 83, 119 (2017) ("[A]lgorithms are precisely the kind of technology that calls for federal regulation: opaque, complex, and occasionally dangerous . . . regulation in one form or another is inevitable, and the true choice is between regulation that is piecemeal, reactive, and slow or regulation that is comprehensive, anticipatory, and technically savvy.").

[17] Todd C. Helmus, *Artificial Intelligence, Deepfakes, and Disinformation: A Primer*, RAND Corporation, 4 (2022) (discussing the use of AI to create "Deepfake" videos of important public figures such as Barack Obama and Richard Nixon).

discourse.[18] By the time one data breaching technology regulation is found to be within agency power, there will likely already be new technological developments threatening citizens' private information.[19] Machine learning, for example, is becoming more powerful with every piece of data and information it receives, making predictable, secure regulation all the more essential.[20] Making someone whole after their data has been taken is no longer simply about returning the data—that data has already been compromised, and each successful breach further refines the algorithm.

Fortunately, the implementation of AI is not inevitably harmful. AI's grave risks may be matched or even outweighed by the technology's remarkable potential for good. Daron Acemoglu, MIT economist and professor, reminds us that the "objective [of AI development] is not to make machines intelligent in and of themselves, but more and more useful to humans."[21] AI has contributed to human health and

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[18] *Id*; Michael L. Littman et al., *Gathering Strength, Gathering Storms: The One Hundred Year Study on Artificial Intelligence* (AI100), 2021 Study Panel Report, Stanford University, Standing Question 10 (Sept. 2021).

[19] Bob Lambrechts, *May It Please the Algorithm*, 89 J. Kan. B. Assn. 36 (Jan. 2020).

[20] *Id*.

[21] Peter Dizikes, *Who will Benefit from AI?*, MIT News (Sept. 29, 2023), https://news.mit.edu/2023/who-will-benefit-ai-machine-usefulness-0929.

prosperity as a tool that augments our productivity and capabilities.[22] Of course, Professor Acemoglu also warns that the future of human prosperity is dependent on policy changes that direct AI toward safe and democratic implementation.[23]

A predictable regulatory framework is also critical for keeping innovators in the field and ensuring their innovations positively serve humanity. Unpredictable regulation may inhibit market participation. If companies cannot trust the regulations created by experts at executive agencies are an accurate representation of the government's will and authority, they may simply abandon the field. To both protect the public and foster new technology, companies must be able to trust agency regulations. That trust would be undermined with the elimination of *Chevron* deference. The expert agency deference under *Chevron* allows for consistency among courts throughout the country and lays the foundation for the stability and clarity necessary to regulate emerging technologies.

C. Legislative responses to artificial intelligence

Concerns about the use of AI ring around the world, and on December 9, 2023, the European Union ("EU") became the first governing body to attempt a

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[22] *Id.*
[23] *Id.*

comprehensive limit on the use of AI.[24] European lawmakers released their first draft of the AI Act in 2021.[25] At the time, AI had just begun to test better than humans in reading comprehension and language understanding.[26] The first draft of the AI Act focused heavily on applications of AI, like those for self-driving cars, application sifting, and facial recognition.[27]

But AI kept developing. It developed so rapidly that European lawmakers have been scrambling to keep up, reworking, renegotiating, and rebooting the AI Act for two years.[28] AI today is wholly distinguishable from the technology of 2021. Then, AI was digestive—it was fed information and asked to process it.[29] Now, AI is creative—it is able to generate text, images, and audio with just a fraction of the

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[24] Adam Satariano, *E.U. Agrees on Landmark Artificial Intelligence Rules*, N.Y. Times, Dec. 9, 2023, at A1.
[25] Adam Satariano, *Europe Proposes Strict Rules for Artificial Intelligence*, N.Y. Times, Apr. 22, 2021, at B1.
[26] Max Roser, *The Brief History of Artificial Intelligence: The World Has Changed Fast – What Might be Next?* (Dec. 6, 2022) https://ourworldindata.org/brief-history-of-ai.
[27] Adam Satariano, Europe Proposes Strict Rules for Artificial Intelligence, Apr. 22, 2021, at B1.
[28] Adam Satariano, E.U. Agrees on Landmark Artificial Intelligence Rules, N.Y. Times, Dec. 9, 2023, at A1.
[29] Max Roser, *The Brief History of Artificial Intelligence: The World Has Changed Fast – What Might be Next?*, Our World in Data (Dec. 6, 2022), https://ourworldindata.org/brief-history-of-ai.

training period[30] required two years prior.[31] With its rapid development, AI is expected to match the capabilities of the human brain by 2040.[32]

The latest draft of the EU's AI Act mirrors the changes in AI. It focuses on general-purpose AI models like ChatGPT,[33] released in 2022.[34] Once implemented, the AI Act is expected to protect consumers from AI exploitation with its requirement for transparency and levels of oversight based on the gauged "systemic risk" posed by the use of AI in a given field.[35] To ensure the Act's relevance as technology continues to advance unpredictably, the European Parliament wants to establish a "technology-neutral" definition for AI.[36]

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[30] "Training period" refers to the amount of training computation required to achieve a given performance. *Id.*
[31] *Id.*
[32] *Id.*
[33] Adam Satariano, E.U. Agrees on Landmark Artificial Intelligence Rules, N.Y. Times, Dec. 9, 2023, at A1.
[34] Will Heaven, *The Inside Story of How ChatGPT was Built from the People who Made it*, MIT Technology Review (Mar. 3, 2023), https://www.technologyreview.com/2023/03/03/1069311/inside-story-oral-history-how-chatgpt-built-openai/.
[35] EU AI Act: First Regulation on Artificial Intelligence, European Parliament (June 14, 2023), https://www.europarl.europa.eu/pdfs/news/expert/2023/6/story/20230601STO93804/20230601STO93804_en.pdf.
[36] *Id.*

The AI Act will pave the way for the regulation of AI in other countries, including the United States. As of now, regulation of AI in the United States is primarily governed by President Biden's executive order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (the "EO").[37] The EO's directives are to be pursued through broad delegations to the nation's federal agencies.[38] Notably, the EO authorized the creation of the AI Task Force within the Department of Health and Human Services (HHS).[39] The task force must develop a strategic plan that uses policies, frameworks, and regulatory action to promote safety, equity, privacy, and security in the implementation of predictive and generative AI in the health and human services

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[37] Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Nov. 1, 2023).
[38] Michael Peregrine and Alya Sulaiman, *The Governance Implications of Biden's AI Executive Order*, American Health Law Association (Nov. 3, 2023), https://www.americanhealthlaw.org/content-library/health-law-weekly/article/526c9b54-0923-443b-81e5-5401e5e5bebf/The-Governance-Implications-of-Biden-s-AI-Executiv. ("[T]he administration intends to pursue the EO's directives through policy guidance, federal rulemaking, and other actions initiated by federal agencies, such as the Department of Commerce, the Department of Homeland Security, the National Security Agency, the Department of Justice, the Department of Health and Human Services (HHS), and the Federal Trade Commission.").
[39] Exec. Order No. 14,110, 88 Fed. Reg. 75191, 75214 (Nov. 1, 2023).

sector.[40] This is not dissimilar to former President Trump's executive order regarding artificial intelligence in 2019, which issued instructions to the nation's federal agencies on the regulation of AI.[41] The 2019 order called for the National Institute of Standards and Technology "to lead the development of appropriate standards for reliable, robust, trustworthy, secure, portable, and interoperable AI systems."[42]

The resulting agency actions are certain to inspire litigation. Should *Chevron* deference become a thing of the past, the health care sector will face the confusion of different implementation standards across jurisdictions. Health inequities across the country will deepen as the use of AI as a diagnostic tool will vary. Health care providers will hesitate to use new technology for fear of the unpredictability of medical malpractice suits to follow—did the AI company appropriately comply with agency standards in my jurisdiction? How can we tell if it did, when each circuit requires different levels of compliance for a broadly used tool?

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[40] *Id.*

[41] Exec. Order No. 13,859, 84 Fed. Reg. 3967 (Feb. 11, 2019).

[42] Accelerating America's Leadership in Artificial Intelligence, Trump Whitehouse Archives (Feb. 11, 2019), https://trumpwhitehouse.archives.gov/articles/accelerating-americas-leadership-in-artificial-intelligence/.

What if Congress adopts the EU's AI Act for the United States? More likely than not, Congress would delegate authority to federal agencies with instruction to gauge levels of systemic risk, impose and enforce transparency requirements, and ensure the safe implementation of developing technology. Should deference not be afforded to agency experts in defining levels of systemic risk, outlining the transparency requirements necessary for each field implementing AI, and laying the foundation for the safe use of the technology? If it is not, Congress's already difficult task of drafting legislation will become substantially more complex. A Congress that cannot rely on judicial deference to reasonable agency interpretation is one that will be less able to effectively protect, support, and govern society.

II. *CHEVRON* HAS BEEN APPLIED TO ALLOW FOR HELPFUL REGULATIONS ON NEW TECHNOLOGIES

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) holds particular importance in the realm of emerging technologies.[43] In fact, *Chevron* has been applied by this Court to allow for several helpful, pro-consumer technological regulations. This section will briefly review five such instances: (A) telecommunications network

[43] Ryan Hagemann, *New Rules for New Frontiers: Regulating Emerging Technologies in an Era of Soft Law*, 57 Washburn L. Rev. 235, 244 (2018).

infrastructure, *AT&T Corporation v. Iowa Utilities Board*; (B) cable pole attachments, *National Cable & Telecommunications Association, Inc. v. Gulf Power Company*; (C) electricity transmission, *New York v. Federal Energy Regulatory Commission*; (D) high-speed internet service, *National Cable and Telecommunications Association v. Brand X Internet Services*; and (E) wireless telecommunications Infrastructure, *City of Arlington v. Federal Communications Commission*. In each of these cases, the Court recognized the importance of regulatory flexibility with regard to emerging technologies.

A. Telecommunications networks infrastructure

The Telecommunications Act of 1996 restructured local telephone markets, ending long-running state-granted monopolies for local exchange carriers (LECs). *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999). To facilitate market entry for other companies, the Act required LECs, among other things, to share their existing physical infrastructure network. *Id.* at 371-72. Dozens of state utility commissions and incumbent LECs brought suit after the FCC issued an order implementing the law. *Id.* at 373-74; *see Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753, 788-91 (8th Cir. 1997), *amended on reh'g* (Oct. 14, 1997). The challengers argued the agency exceeded its authority by assuming authority historically exercised by the states, *AT&T Corp.*, 525 U.S. at 374, and the

FCC went too far by allowing new carriers to provide service while simultaneously relying exclusively on existing elements of the LECs' networks, *id*. at 375-76.

But the law into which the Act was inserted provided that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." *Id*. at 377 (internal quotations omitted). And the Court explained the FCC did, in fact, have jurisdiction to engage in intrastate regulatory activity. *Id*. at 380. The Court also found all but one of the FCC's unbundling rules were reasonable. *Id*. at 387, 392-94, 396. After considering each of the rules individually, the Court explained that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Id*. at 397 (citing *Chevron*, 467 U.S. at 842-43). *Chevron* deference grants Congress a higher degree of legislative utility and, in this case, kept regulations serving important pro-competitive effects in place.

B. Cable pole attachments

In the early days of television, cable companies leased space for their "attachments" (wires) on existing telephone and electric utility poles. *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 330 (2002). To prevent the utility companies from charging monopolistic rates, the Pole Attachments Act of 1978 allowed the FCC to "regulate the rates, terms, and conditions" by which cable

companies could lease that space. *Id.* at 330-31. The Act originally defined "pole attachments" to include only those from cable television providers, but it was later amended to embrace telecommunications service attachments. *Id.* at 331. The FCC used the law to set rates for (1) commingled cable television and broadband internet service and (2) wireless telecommunications attachments, both of which had developed since Congress last addressed the issue. *Id.* at 331-32. The Court found the Act unambiguously supported both of these applications such that *Chevron* need not apply. *Id.* at 333.

But *Gulf Power* still demonstrates the importance of *Chevron*. In considering the agency's regulation of commingled television and internet service attachment rates, the Court explained that several different interpretations might have survived judicial review if the statute were ambiguous. *Id.* at 333. This was a "technical, complex, and dynamic" area that would "evolve in directions Congress knew it could not anticipate." *Id.* at 338-39. The Court came out similarly on the FCC's regulation of wireless telecommunication attachment rates, explaining that "if the text were ambiguous, we would defer to its judgment on this technical question." *Id.* at 341. So, *Gulf Power* can be read as a situation in which *Chevron* supported proliferation of helpful new technologies, again via pro-competition regulation. While the Court may not have found it necessary to

apply *Chevron*, the agency may not have acted as it did without it.

C. Electricity transmission

The Federal Energy Regulatory Commission (FERC) regulated the transmission of electricity under the Federal Power Act of 1935, the Public Utility Regulatory Policies Act of 1978, and the Energy Policy Act of 1992. *New York v. F.E.R.C.*, 535 U.S. 1, 4-9 (2002). In a 1996 order, FERC required utility companies to voluntarily separate the costs of transmission and energy when billing retail consumers to transmit competitors' electricity at those same rates. *Id*. at 4-5. This order aimed to promote competition by cutting down on discriminatory transmission pricing practices by older public utility companies. *Id*. at 5. Technological advances had allowed smaller power companies to enter the market, which the established companies resisted. *Id*. at 7-8. As it surveyed the landscape, FERC identified the industry's pricing practices as "a fundamental systemic problem." *Id*. at 14 (citation omitted). Petitioners argued the FERC had both overstepped and under-stepped the bounds of its authority. *Id*. at 16.

But the Court explained that "the landscape of the electric industry ha[d] changed" since the Federal Power Act. *Id*. And that "in 1935, there was neither state nor federal regulation of what did not exist." *Id*.

at 21. The evolution of the electric industry decreased the persuasive effect of the earlier Act's legislative history. *Id.* at 23. The Court also stated that several policy arguments raised by one petitioner were more "properly addressed to [FERC] or to the Congress, not to [the] Court." *Id.* at 24. In upholding FERC's decision not to apply its rule to utility companies that offered only bundled retail sales, the Court noted that the agency "had discretion to *decline* to assert . . . jurisdiction in this [situation] in part because of the complicated nature of the jurisdictional issues." *Id.* at 25-28. In this way, *New York* can be read as showing that *Chevron* can support an agency's decision to exercise restraint. That subtlety may be helpful in the context of AI (see *supra* section I).

D. High-speed internet service

The Communications Act of 1934 subjected "telecommunication servic[e]" providers to common-carrier regulation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 973 (2005). The FCC determined the law did not reach cable companies selling broadband internet. *Id.* at 974. Instead, cable companies were categorized as Information Service Providers ("ISPs"). *Id.* at 977-78. The FCC's order served to ease the transition from "dial-up" (or "basic") to higher-speed ("enhanced") internet. *Id.* at 974-76. At issue in *Brand X* was whether the FCC could treat these cable companies, which owned the lines used to connect consumers to

the internet, like "non-facilities-based" ISPs. *Id*. at 977-78. The Ninth Circuit rejected this argument, relying on an earlier case in which it ruled cable modem service was a "telecommunication service." *Id*. at 979-80.

But the Court explained that agencies are better equipped to make these sorts of policy choices. *Id*. at 980. As such, federal courts are required to accept reasonable agency constructions, "even if the agency's reading differs from what the court[s] believe[] is the best statutory interpretation." *Id*. Courts must do so even when those interpretations represent a change in the agency's position on a matter. *Id*. at 981-82. Here, the statute in question was ambiguous, so *Chevron* applied despite the fact the Ninth Circuit reached the question before the FCC. *Id*. at 982-86. Further, the Court found the Commission's definition was permissible. *Id*. at 986 (thinking "it improbable that the Communications Act unambiguously [froze] in time" an earlier treatment of facilities-based ISPs). Accordingly, *Brand X* demonstrates how *Chevron* supports agencies' ability to regulate new technologies consistently across the circuits and adaptively in response to emerging information.

E. Wireless telecommunications infrastructure

The Telecommunications Act of 1996 also (*see supra* subsection A) imposed limitations on the authority of state and local governments to regulate

the location, construction, and modification of wireless telecommunications facilities. *City of Arlington v. F.C.C.*, 569 U.S. 290, 293 (2013). One limitation required the government to act on applications from wireless companies "within a reasonable period of time." *Id*. at 294. Because the FCC found the delays in the application process to have obstructed the proliferation of wireless services, it determined that 90 and 150 days were reasonable periods for the governments to process collocation (i.e., updates to existing infrastructure) and other applications. *Id*. at 294-95. In this case, the FCC's rulemaking aimed to combat this inaction.

The Fifth Circuit upheld the rule, holding that *Chevron* extended to agency constructions concerning regulators' jurisdiction. *Id*. at 295. The Court agreed, explaining *Chevron* rested on a presumption that Congress "understood . . . ambiguity [left in a statute] would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id*. at 296 (citation omitted). "*Chevron* thus provides a stable background rule against which Congress can legislate[.]" *Id*. "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Id*. The Court ruled there was no dividing line between "big, important" and "humdrum, run-of-the-mill" interpretations and the FCC's interpretation was permissible. *Id*. at 296-305. Justice

Scalia, who dissented in *New York* and *Brand X*, wrote the majority opinion in *City of Arlington*. In closing, he observed that "[t]hirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy [*Chevron*'s] stabilizing purpose[.]" *Id.* at 307.

Together, these cases—*AT&T*, *Gulf Power*, *New York*, *Brand X*, and *City of Arlington*—demonstrate the importance of *Chevron* deference in regulating emerging technology. The flexibility *Chevron* provides has supported helpful, pro-consumer regulations that have shaped the current technological landscape.

CONCLUSION

For the reasons stated, *amici* respectfully request that the Court affirm the judgment of the court of appeals.

Respectfully submitted.

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