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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Article III vests federal courts with the power and duty to say what the law is. Even in hard cases, courts must exercise independent judgment and determine the original public meaning of federal statutes based on their best understanding of statutory text, structure, history, purpose, and precedent. *Chevron* flouts these principles by requiring courts to apply whatever inferior-but-tenable construction an agency has most recently selected on pure policy grounds. That violates Article III, the Administrative Procedure Act, and the Fifth Amendment.

The government barely grapples with these problems, and its various efforts to defend *Chevron*'s departure from ordinary interpretive principles are unpersuasive. The government's delegation theory conflates interpretation and policymaking and involves no actual (or permissible) delegation. Its historical theory fails because *Chevron* marks an abrupt departure from longstanding practice. Its misplaced policy arguments cannot overcome *Chevron*'s constitutional flaws. And its case for *stare decisis* ignores *Chevron*'s threat to the rule-of-law values that *stare decisis* aims to protect.

This Court should overturn *Chevron* and invalidate the Final Rule.

ARGUMENT

I. *CHEVRON* SHOULD BE OVERRULED

A. The Government Cannot Reconcile *Chevron* With Article III

Article III requires judges to exercise independent judgment when interpreting federal statutes. The

government does not directly challenge that proposition. Nonetheless, it insists that *Chevron* properly compels judicial deference to agency interpretations that—by the court's lights—do *not* best reflect the original public meaning of the law.

To defend that counterintuitive claim, the government asserts that: (1) resolution of statutory ambiguity requires policymaking; (2) *Chevron* squares with Article III because courts independently interpret the law even when deferring to agencies; (3) *Chevron* follows tradition; and (4) *Chevron* promotes agency expertise and uniformity. Each argument fails.

1. Interpretation Is Not Policymaking

Chevron rests on the view that determining the meaning of ambiguous federal statutes requires policymaking, not legal interpretation. From that premise, the government argues that *Chevron* does not encroach on Article III power because "policy choices" should be made by agencies accountable to an elected President, not unelected judges. OSG Br. 19.

The government's premise is wrong: Interpreting an ambiguous statute is *not* policymaking. Rather, it involves the kind of ordinary legal analysis that courts undertake every day. Beyond the *Chevron* context, courts regularly resolve ambiguity—not by imposing their policy preferences, but by applying traditional interpretive tools. *See* Pet. Br. 15-18, 35-38. In doing so, they rightly exercise "neither FORCE nor WILL, but merely judgment." The Federalist No. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

The government eventually concedes that resolving statutory ambiguity does not invariably

involve policymaking. Specifically, it acknowledges that "judges may be required to interpret ambiguous statutory language outside the *Chevron* context, and doing so is not illegitimate policymaking." OSG Br. 21. But the government offers no explanation for why "the *Chevron* context" transforms what would otherwise be a legal question into a policy question.

Nor could it. Resolving statutory ambiguity requires legal judgment squarely in the wheelhouse of Article III courts. It is not policymaking.

2. The Delegation Theory Is An Unconstitutional Fiction

The government further argues that judges applying *Chevron* fulfill their Article III duty to "'say what the law is'" because the law *itself* delegates to agencies the power to resolve statutory ambiguities. OSG Br. 37-38, 41. This delegation theory rests on a fictional account of congressional intent and an impermissible transfer of core Article III responsibility that is not Congress's to reassign.

a. The government continues to champion *Chevron*'s "inference of legislative intent"—the notion that by leaving ambiguities in statutes, Congress implicitly empowered agencies to resolve those ambiguities through binding interpretations, and to require courts to give effect to those interpretations. OSG Br. 12-13. The government says this inference—*Chevron*'s central premise—reflects the "'most faithful reading'" of ambiguous statutes. OSG Br. 37.

Everyone knows this is a complete fiction. Petitioners' opening brief cited Justices Scalia, Thomas, Breyer, Kagan, and Gorsuch all saying so, echoed by various other commentators. *See* Pet. Br. 34-35 & n.10. The government's only response is a

conclusory, single-sentence *ipse dixit* declaring the inference "entirely sensible." OSG Br. 13. The emptiness of that rejoinder speaks volumes.

Recognizing the intentional-delegation theory's implausibility "as an original matter," the government pivots to defending *Chevron*'s fictional presumption as a "'stable background rule against which Congress can legislate.'" *Id.* That rationale cannot apply to statutes enacted before *Chevron* was handed down in 1984. Pet. Br. 41-42. It's also disproven by the empirical evidence showing that in practice Congress does not intend all statutory ambiguities to be resolved by agencies. Pet. Br. 34. Not to mention that most ambiguities are themselves unintentional, which means Congress did not know they existed, let alone want them to be conclusively resolved by agencies. *Id.* The government has no response to these points.

Versions of the government's stable-background-rule argument have been made—and rejected—for other illegitimate approaches to statutory construction, including resort to legislative history as a definitive guide to meaning, and the creation of implied rights of action. *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 860, 871-74 (1992); *Alexander v. Sandoval*, 532 U.S. 275, 287-88 (2001); *id.* at 313-14 (Stevens, J., dissenting). There are especially good reasons to reject it as to *Chevron*, given the doctrine's extreme departure from the usual rule that courts resolve pure legal questions de novo. *See* Pet. Br. 35.

b. More fundamentally, the government is wrong to argue that Congress may vest agencies with ultimate interpretive authority over federal law, even

explicitly. OSG Br. 37-38, 41. Article III gives that power to the judiciary, and Congress cannot take it away.

This principle is why Congress cannot require courts to defer to the FBI Director's interpretations of criminal statutes, or to the Senate Finance Committee's interpretation of the Internal Revenue Code. The government's logic suggests such delegations would comply with Article III, because courts applying deference would be "properly recognizing … that Congress vested [the non-judicial interpreter] with the authority to resolve an ambiguity or fill a gap within reasonable boundaries." OSG Br. 37. That cannot be right. Article III bars Congress from shrinking the judiciary's constitutional role to an empty formality.

Chevron fails for these same reasons. By making the government the primary interpreter, *Chevron* turns judges into "'puppets of a ventriloquist [agency],'" forcing them to declare the agency's interpretation to be the law of the land. *Printz v. United States*, 521 U.S. 898, 928 (1997). That transformation vitiates the courts' constitutional role as an independent check on the political branches. The power to "say what the law is" means little if a court must say that the law is whatever the agency tells it to say.

3. Tradition Does Not Protect *Chevron*

The government next invokes a supposed "tradition of Judicial deference to Executive interpretations." OSG Br. 21-26. But it nowhere denies that courts from the Founding "did not apply anything resembling *Chevron* deference." *Baldwin v. United States*, 140 S. Ct. 690, 693 (2020) (Thomas, J.,

dissenting from denial of certiorari); *see* Pet. Br. 20-23.

a. This Court has recognized a crucial distinction between (1) an agency's "power to persuade" and (2) its "power to control" judicial resolutions of statutory ambiguities. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The government's authorities overwhelmingly fall into the former camp. *See, e.g.*, *Nat'l Lead Co. v. United States*, 252 U.S. 140, 145-46 (1920) (giving "great weight" to the government's "contemporaneous construction"); *United States v. Moore*, 95 U.S. 760, 763 (1877) (affording "the most respectful consideration" to the government's interpretation).

The government relies mainly on cases granting "respect" to *contemporaneous* and *continuous* agency interpretations of statutes—in other words, invoking "traditional tools of statutory interpretation." Thomas Merrill, The *Chevron* Doctrine 36-37, 51-52 (2022); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 930-47 (2017) (Bamzai); Pet. Br. 21-22. But *Chevron* breaks from that precedent by requiring deference to agency interpretations that are neither contemporaneous nor continuous. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

The government claims that "not all" of its cases emphasized the contemporaneous and continuous canons, pointing only to *LaRoque v. United States*, 239 U.S. 62, 64 (1915). OSG Br. 23. But *LaRoque* itself stated that the agency's construction was "not conclusive," and it cited *Hastings & D.R. Co. v. Whitney*, 132 U.S. 357, 366 (1889), which explained that an agency's decisions "on matters of law are not

binding upon this court, in any sense," but rather informative based on the agency's expertise and participation in drafting the relevant statute. *LaRoque*, 239 U.S. at 64 (also citing cases invoking contemporaneity and consistency canons).

b. The government does not deny that the Court's mandamus cases affirmatively *rejected* the notion that courts should defer to agencies when interpreting federal law outside the mandamus context. *See* Pet. Br. 22-23. That directly undermines the government's description of the mandamus precedent as a "forerunner" of *Chevron*. OSG Br. 24.

As petitioners explained, judicial deference in mandamus cases stems from the limited nature of the extraordinary writ, not from any duty to adopt an agency's statutory interpretation. Pet. Br. 22-23. The government does not disagree. And although the government correctly quotes this Court in *Decatur v. Paulding* that a judge should not "'revise [an officer's] judgment in any case where the law authorized him to exercise discretion, or judgment,'" that statement merely reflects the limited remedies available in mandamus review. OSG Br. 24 (quoting 39 U.S. (14 Pet.) 497, 515 (1840)). It does not require judges to adopt agency interpretations as authoritative statements of federal law, as *Chevron* commands.

c. The government fails to distinguish the cases where the Court reviewed statutory questions without deferring to agencies. *See* Pet. Br. 20-22. The government describes *United States v. Dickson*, 40 U.S. 141 (1841), as involving a clear-meaning ruling equivalent to *Chevron* Step One. OSG Br. 24. But that ignores Justice Story's admonition that, while an agency's view deserves "great respect," its interpretation "cannot be permitted to conclude the

judgment of a court of justice" if "not in conformity to the *true intendment* and provisions of the law." 40 U.S. at 161 (emphasis added). Justice Story further explained that "the judicial department" has the "solemn duty to interpret the laws, *in the last resort*; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it." *Id.* at 162 (emphasis added). *Dickson* is incompatible with mandatory deference to the Executive on difficult questions of statutory interpretation.

The government likewise dismisses *Johnson v. Towsley*, 80 U.S. (13 Wall.) 72, 82-92 (1871), because the Court resolved the statutory question against the agency without "address[ing] any question of deference." OSG Br. 24. But that's the point: The Court did not even consider deferring to the agency, but rather exercised its independent judgment on the law's meaning—exactly what petitioners urge here.

d. Finally, the government concedes that cases decided between passage of the APA and *Chevron* were inconsistent, with some decisions applying deference and others interpreting statutory provisions de novo. OSG Br. 25-26. Indeed, the government does not dispute that a similar inconsistency has continued even *after Chevron*, with the Court refusing to apply the doctrine in any case since 2016, despite many opportunities to do so. Pet. Br. 45. These inconsistencies undermine any alleged "tradition" of *Chevron*-style deference—and underscore the need to return to constitutional first principles.

4. The Government's Policy Arguments Lack Merit

The government also leans on policy arguments about agency expertise and centralization. These arguments are unpersuasive and cannot overcome *Chevron*'s constitutional deficiencies.

a. The government asserts that federal agencies enjoy "accumulated experience, expertise, and specialized knowledge that judges lack." OSG Br. 16. But agencies are run by "[p]olitical appointees," and their supposedly expert "policy" judgments "often reflect[] political, not simply 'scientific,' considerations." Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 Cardozo L. Rev. 2189, 2195 (2011).

Moreover, *Chevron* concerns the resolution of interpretative ambiguities in statutory text, and Article III courts—not agencies—have the most relevant expertise in the craft of legal interpretation. Pet. Br. 37. The government ignores this point. It likewise fails to explain why courts should defer to agencies on matters *outside* their policy expertise, asserting only that agencies can sometimes "yield interpretive insights even outside of technical or scientific areas." OSG Br. 17. That vague statement hardly defends *Chevron*'s indiscriminate rule of mandatory deference on all ambiguities, and it ignores petitioners' examples showing why expertise alone cannot justify taking away judicial power. Pet. Br. 38.

The government also overlooks that courts are fully capable of assimilating agency expertise when it properly bears on statutory interpretation. As petitioners noted, *Skidmore* and the traditional

canons giving weight to contemporaneous and consistent agency interpretations allow expertise to inform courts' best assessment of original meaning. Pet. Br. 21-22, 39-40. The government does not explain why these other doctrines are insufficient.

b. The government also implies that *Chevron* is necessary to let agencies develop and execute regulatory policies in the national interest. OSG Br. 16-17, 20, 38-39. But at least half the States do just fine without state-law *Chevron* analogs. *See* Luke Phillips, Chevron *in the States? Not So Much*, 89 Miss. L.J. 313, 315 (2020); West Virginia Br. 24-27; Former State Supreme Court Justices Br. 9; Am. Free Enterprise Chamber of Commerce *Loper* Br. 27-31.

Chevron makes a difference only when an agency departs from the best interpretation of ambiguous federal law. Petitioners assume—and surely the government agrees—that in the vast majority of instances, agencies correctly interpret the law. In such circumstances, *Chevron* adds nothing to agency discretion, and Article III independent judgment does not threaten legitimate agency functions at all.

The government wrongly suggests that rejecting *Chevron* would bar Congress from expressly delegating policymaking authority to federal agencies using capacious "terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.'" Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 (2016) (Kavanaugh); *see* OSG Br. 20. To the contrary: Such "broad and open-ended" language can properly "afford agencies broad policy discretion" to establish regulatory programs within the boundaries established "by the text of the [statute]." *Kisor v.*

Wilkie, 139 S. Ct. 2400, 2448-49 (2019) (Kavanaugh, J., concurring in the judgment).

A court's evaluation of such agency policies is "more *State Farm* than [*Chevron*]," *id.* at 2449 (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)), and is entirely compatible with "rigorous [judicial] scrutiny of an agency's statutory interpretation," Kavanaugh 2153-54 & n.178. In these circumstances—when Congress has *actually* vested agencies with policy discretion (not interpretive authority)—*Chevron* deference is neither applicable nor necessary, and courts can uphold lawful agency choices without abdicating their core Article III duty.

For the same reasons, Congress can expressly authorize agencies to promulgate definitions for specific statutory terms. *See* OSG Br. 36-37. Such delegations grant the agency policy discretion to fill in details expressly left open by Congress. They do not involve legal interpretation and pose no threat to Article III judicial duty.[1]

The statute at issue in this case—the Magnuson-Stevens Act (MSA)—includes many acceptable delegations. For example, it expressly gives the agency the power to "establish a reasonable schedule of fees" that observers should be paid by foreign fishing vessels. 16 U.S.C. § 1821(h)(6)(C). Such delegations do not implicate *Chevron*, and courts can review the agency's policy choices under *State Farm*.

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[1] Of course, any grant of policymaking authority would still need to satisfy Article I constraints on delegating legislative power.

Other statutes can likewise preserve a meaningful role for agency expertise and discretion.

c. Beyond expertise, the government argues that *Chevron* "promotes national uniformity in federal law," reduces "circuit conflicts," and minimizes ideological splits on appellate panels. OSG Br. 17, 20. But uniform and consensus-based application of *bad* law is hardly desirable; in fact, it makes *Chevron* all the more pernicious.

Article III requires courts to interpret statutes *correctly*. And decentralized consideration of challenging statutes drives better interpretive results. That's why there are multiple circuit courts and multi-judge panels, and why this Court often lets hard issues percolate before granting certiorari to resolve them. The government itself embraces this principle all the time. *See, e.g.*, BIO 14-15, *Missouri v. Yellen*, 143 S. Ct. 734 (2023) (No. 22-352); BIO 19, *Oakbrook Land Holdings, LLC v. Commissioner*, 143 S. Ct. 626 (2023) (No. 22-323). Uniformity and consensus are no reason to systematically tilt the interpretive scales in the government's favor.

d. Finally, the government warns that petitioners' Article III logic threatens "radical consequences" for other doctrines limiting judicial authority to impose remedies for legal error or unreasonable conduct. OSG Br. 38-39. Specifically, the government argues that overturning *Chevron* would undermine (1) the "plain error" test governing unpreserved errors in criminal appeals; (2) deferential habeas corpus review of state convictions under 28 U.S.C. § 2254(d)(1); (3) good-faith review of alleged attorney misconduct; and (4) mandamus. OSG Br. 24, 39.

The government is wrong again. Unlike *Chevron*, none of those doctrines forces a judge to say that federal law means X when the judge instead believes it means Y. Rather, they simply limit the remedies available to a court confronted with error or misconduct. *See infra* 14. Like the government's other arguments, these points provide no reason to shrink from enforcing Article III.

B. The Government's APA Arguments Fail

Five Justices have already recognized that the APA reinforces the judiciary's Article III duty to exercise independent judgment when determining the meaning of federal law. Pet. Br. 28. But *Chevron* ignored the APA, and the government's response disregards its plain meaning and history.

1. Section 706 instructs courts to "interpret constitutional and statutory provisions," "decide all relevant questions of law," and set aside agency action that is "contrary to constitutional right," "in excess of statutory [authority]," or "otherwise not in accordance with law." 5 U.S.C. § 706. The meaning of this language is straightforward: If the court believes that an agency action is unlawful, it must say so. Nonetheless, the government's interpretation requires courts to uphold agency conduct by embracing agency interpretations that they believe are wrong. That mandate defies the whole purpose of judicial review of agency action. The government's belabored arguments to the contrary fail for the reasons noted above. *Supra* 2-5; *see* OSG Br. 41-42.

The government elsewhere says that "when a court upholds an agency's interpretation at *Chevron* step two, *the court's holding is generally limited to reasonableness*." OSG Br. 32 (emphasis added). That

characterization of *Chevron* outright confesses the APA violation. Section 706 requires courts to themselves "*interpret* … statutory provisions," not merely check if agency interpretations are reasonable.

Indeed, the contrast between Section 706 and the one other statute the government cites as requiring *Chevron*-like deference is striking: 28 U.S.C. § 2254(d)(1) authorizes habeas relief only if the state court's decision violated "'*clearly established* Federal law.'" *See* OSG Br. 39 (emphasis added). Its other cited provisions likewise are explicit in mandating forms of reasonableness review. *See* Fed. R. Crim. P. 52(b) ("plain error"); Fed. R. Civ. P. 11(b)(2) ("nonfrivolous"); *see also* 28 U.S.C. § 2412(d)(1)(A) ("substantially justified"). Section 706's text is totally different from the government's own examples.

The government concedes that the APA imposes the same standard of judicial review for questions of constitutional and statutory interpretation. Pet. Br. 25; OSG Br. 42. Its only response is that "in neither instance does Section 706's text specify the applicable standard of review." OSG Br. 42. But that misses the point (perhaps deliberately). As the government well knows, courts interpret constitutional questions de novo, with no deference to agencies. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 923 (1995). The government has no answer for why the APA does not require the same approach to statutory questions.

Finally, the government argues that the APA's reference to judicial review of "facts … subject to trial *de novo* by the reviewing court," 5 U.S.C. § 706(2)(F), shows that when Congress wanted to mandate de novo review, it did so expressly. OSG Br. 42. But under Section 706(2)(E), the APA's baseline standard

of review for factual issues calls for deference under the substantial-evidence test. The "de novo" modifier in Section 706(2)(F) simply changes that default in a limited set of circumstances. It has no bearing on judicial review of *legal* issues (both constitutional and statutory), as to which the default has always been de novo review. *See* Bamzai 959-62, 971-76.

2. As to history, the government cites legislative sources describing the APA as a restatement of existing law as to judicial review. OSG Br. 42-43. But the established understanding had been that pure legal questions would be resolved by courts using independent judgment. Pet. Br. 26-28. Indeed, the government's own source unambiguously reflects that position, declaring that questions of statutory interpretation would be "subject to plenary judicial review" and invoking *ICC v. Illinois Central Railroad Co.*, 215 U.S. 452, 470 (1910), which understood such independent review as a constitutional requirement and the "essence of judicial authority" that "may not be curtailed … [or] avoided." S. Doc. No. 79-248, at 18, 39, 313 (2d Sess. 1946); *see* Pet. Br. 27. The government ignores these statements, just as it ignores the Court's contemporaneous *Skidmore* decision prescribing de novo review of agency legal interpretations.

The government misplaces reliance on *Gray v. Powell*, 314 U.S. 402 (1941), and other New Deal-era decisions granting agencies greater deference on mixed questions of law and fact. *See* OSG Br. 24-25. As petitioners explained, those decisions departed from traditional de novo review. In the 1940s, Congress enacted the APA, the Taft-Hartley Act, and a 1948 statute to repudiate these cases and reaffirm the judicial duty to interpret statutes using

independent judgment. *See* Pet. Br. 23-24, 26-28; Bamzai *Relentless* Br. 17-23; Thayer D. Moss, *The Administrative Interpretation of Statutes*, 39 Geo. L.J. 244, 244-59 (1951) (Moss). Congress thus consistently *opposed* deference to agencies on legal questions.

The government also deems ambiguous various statements by key APA legislators and committees emphasizing that "'questions of law are for courts rather than agencies to decide in the final analysis'" and requiring courts to "'determine independently all relevant questions of law.'" OSG Br. 44. But on any fair reading, those statements are clear: They require independent judicial determination of legal issues, just as the APA's text demands.

The government claims that only a single commentator—leading scholar John Dickinson—believed the APA compelled de novo review of legal questions, and that his view was an "'isolated' understanding" contradicted by the "great weight of 'contemporary scholarship.'" OSG Br. 44-45. That's simply incorrect, as Professor Bamzai has detailed: Scholars including Louis L. Jaffe, Bernard Schwartz, and Thayer Moss all echoed versions of Dickinson's view that Section 706 required independent judgment—not deference—as to the law. *See* Bamzai *Relentless* Br. 23-26 (discussing Jaffe and Schwartz at length); Aditya Bamzai, *On the Interpretive Foundations of the Administrative Procedure Act*, 31 Geo. Mason L. Rev. __, at 3, 24-26 & n.168 (forthcoming 2024) (available at SSRN) (same, and citing six other scholars and Ninth Circuit); Moss 259.

The government closes by noting that this Court has never held that the APA bars deference to agency statutory interpretations. OSG Br. 45. That's true, but only because the full Court has not yet seriously

grappled with the relevant APA text or history—not even in *Chevron*. Now is the time to start.

C. *Chevron* Violates Due Process

The government also fails to reconcile *Chevron* with the Fifth Amendment's guarantee of due process of law. OSG Br. 39-40. The government denies any due process problem because judges applying *Chevron* do not manifest *personal* bias. OSG Br. 39. But that merely addresses the due process test for "'judicial disqualification.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876-77 (2009). It says nothing about the broader due process guarantee of fundamentally fair proceedings. *See* Pet. Br. 30-33. *Chevron*'s bias is systemic, potentially affecting any case involving a federal agency. It is even *worse* than personal bias.

The government insists that *Chevron* does not make agencies the judges in their own cases, declaring that "[t]he judge remains the judge" when applying *Chevron*. OSG Br. 39. But if so, that's in name only: *Chevron* turns the judge into the agency's mouthpiece, forcing the judge to embrace whatever inferior-but-tenable interpretation the agency selects. *See supra* 5; Pet. Br. 15-20.

The government suggests that treating *Chevron*'s bias as improper would threaten doctrines like qualified immunity, the rule of lenity, and the pro-federalism canon. OSG Br. 40. That's wrong too. Qualified immunity is a substantive legal rule protecting government officials from certain types of civil liability. That rule itself reflects a pro-government bias (just like workplace-safety laws reflect a pro-worker bias), but courts applying immunity are not required to enforce the government's interpretation of its scope or otherwise

sacrifice their own independent judgment on disputed legal questions (such as whether the official violated the law).

As for the rule of lenity and pro-federalism canon: Those tools of construction reflect deeply rooted constitutional values and are legitimate tools to the extent they inform a statute's original public meaning. Unlike *Chevron*, they are not a license to set law aside and defer to one subset of litigants on policy grounds.

The government's assertion that *Chevron* reflects the democratic will of the American people, as expressed through the election of the President, exemplifies the very Executive Branch hubris that makes *Chevron* so problematic. *See* OSG Br. 40. Statutory interpretation is properly focused on discerning the true meaning of laws enacted by *Congress*, which *directly* represents the people and exercises the legislative power. Requiring courts to enforce inferior-but-tenable interpretations of Congress's work—merely on the Executive's say-so—directly subverts our Constitution's system of democratic lawmaking. Regardless, no amount of democratic legitimacy could justify systemic bias in litigation between citizens and their government.

Most telling of all is the government's failure to dispute Justice Kavanaugh's insight that *Chevron* can require courts to apply—as law—interpretations of federal statutes that *neither* the court *nor* the agency believes best reflect their true meaning. Pet. Br. 32-33. That point just confirms *Chevron*'s incompatibility with the rule of law. Due process protects citizens from being subjected to agency whims in this way.

D. *Chevron* Undermines *Stare Decisis* Values

The government's *stare decisis* case for *Chevron* is even weaker. *Chevron* undermines the essential rule-of-law values that justify *stare decisis* in the first place. *See* Pet. Br. 40-47.

1. The government errs at the threshold by demanding "the strongest form of stare decisis because Congress remains free to alter [*Chevron*] at any time but has declined to do so." OSG Br. 9-10. In fact, *Chevron* is an interpretive method entitled to *no* precedential effect. *See* Loper Br. 18-22, Loper Reply Br. 3-7 (No. 22-451). And *Chevron* is certainly not entitled to a "particularly" strong form of *stare decisis*, OSG Br. 28, given that the doctrine's core flaw is constitutional—its violations of Article III and due process. This Court should not wait for Congress to overturn *Chevron* deference, any more than it would wait for Congress to repeal an unconstitutional statute. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 362-65 (2010) (applying ordinary *stare decisis*).

Besides, it's hard to demand more clarity from Congress than Section 706 already provides, as the government's own virtually indistinguishable example makes clear. OSG Br. 30. Forcing Congress to re-enact APA-like language would be especially strange given that neither *Chevron* nor its progeny ever analyzed the original Section 706. And *Chevron*'s origins and impact likewise undercut waiting for Congress: *Chevron* is a judicially invented

doctrine that uniquely threatens the judiciary. It warrants a *judicial* response.[2]

2. Next, the government insists that formally repudiating *Chevron* would upset the expectations of private parties that have reasonably relied on judicial decisions upholding agency interpretations under *Chevron*. OSG Br. 31. This argument fails: Repudiating an interpretive method (like *Chevron*) does not require upending prior decisions applying that method. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008). And the sky has not fallen in the many States that have abolished *Chevron* analogs. Former State Supreme Court Justices Br. 7-16; Am. Free Enterprise Chamber of Commerce Br. 27-31.

More fundamentally, the only entities with any secure reliance interests in *Chevron* are the federal agencies directly benefiting from the doctrine's thumb on the scale in litigation. Meanwhile, ordinary citizens are left to guess at the meaning of Congress's enactments, which an agency may effectively alter at any time. *Chevron* "make[s] it impossible for Americans to be able to rely on any stable legal regime as the basis for their decisionmaking in many important contexts." Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 Duke L.J. Online 91, 92 (2021). Citizens have the right to rely on the Constitution's guarantees of due process and the independent judgment of Article III courts. Any *Chevron*-based reliance interests pale by comparison.

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[2] The government's argument that Congress has legislated against the backdrop of *Chevron* fails for the reasons already noted. *Supra* 4; *see* OSG Br. 29.

The government's vague references to private "investment" or "contract[ual]" reliance interests in *Chevron* are unfounded. Over 70 amicus briefs have been filed in this case and in *Loper*. Not one identifies any private investment or contract interest that would be harmed by *Chevron*'s demise. By contrast, numerous briefs from private-sector groups large and small—from the U.S. Chamber of Commerce and the American Farm Bureau Federation to the New England Fishermen's Stewardship Association—attest to the unpredictable and disruptive harms visited upon private interests by *Chevron*, which "fosters commercial instability," Am. Free Enterprise Chamber of Commerce *Loper* Br. 21, and lets the Executive Branch twist statutes so as to "disfavor[ ] unpopular … groups at every turn." Little Sisters of the Poor *Loper* Br. 16; *see also, e.g.*, U.S. Chamber of Commerce *Loper* Br. 14-17.

The government says petitioners have "fail[ed] to show that agencies change course with such frequency under *Chevron* as to make any private reliance on existing [regulation] unreasonable." OSG Br. 33. But in other *Chevron* cases, the government has successfully overridden massive reliance interests in existing regulations based on a purported "obligation" to reconsider "'the wisdom of [agency] policy *on a continuing basis*.'" Respondents Br. 88, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063) (emphasis added) (quoting *Brand X*, 545 U.S. at 981). Examples of such regulatory shifts—on questions of seismic importance—appear regularly on this Court's docket. *See, e.g.*, *Sackett v. EPA*, 598 U.S. 651, 666-69 (2023) (describing "flurry" of contradictory rulemaking proceedings to define "'waters of the United States'"); *West Virginia v. EPA*,

142 S. Ct. 2587, 2604-06 (2022) (describing ping-pong trajectory of EPA's Clean Power Plan). The instability abetted by *Chevron* in cases large and small is real. It weighs heavily against *Chevron*.

3. Finally, the government argues that *Chevron* sets forth an "administrable" rule. OSG Br. 34. But the government does not seriously dispute the insoluble ambiguity-about-ambiguity problem, Pet. Br. 44, and much of its response rests on the already-rebutted premise that resolving ambiguity by interpretation is akin to policymaking, *supra* 2-3. Nor does the government defend the lower courts' unpredictable and excessive reliance on *Chevron*—including in instances that the government barely defends (if at all) on appeal to this Court. *See Buffington v. McDonough*, 143 S. Ct. 14, 21 (2022) (Gorsuch, J., dissenting from denial of certiorari).

More importantly, mere administrability is not the lodestar. A rule that "the government always wins" would be quintessentially administrable, but would intolerably offend the guarantees inscribed above this Court's doors: "Equal Justice Under Law" and "Justice the Guardian of Liberty."

Chevron is not far removed from that rule. Even though the government does not always win under *Chevron*, the doctrine has fostered a legal culture in which agencies feel emboldened to stretch the bounds of their lawful authority—and then stretch even further. *Chevron* should be overruled.

II. THE FINAL RULE SHOULD BE SET ASIDE

Whatever this Court does with *Chevron*, it should vacate the Final Rule, which rests on an untenable reading of the MSA. The fishery observers at issue here are government agents in every relevant sense.

NMFS has no lawful basis to force commercial fishermen to pay those observers, especially given Congress's express authorization of cost-shifting in other specific circumstances. Pet. Br. 47-52.

The government argues that the observers are not formally NMFS employees, OSG Br. 46, but that's beside the point. The government does not dispute that—in NOAA's own words—the observers "'represent the Federal Government'" and serve as NMFS's "'eyes and ears on the water.'" Pet. Br. 6-7 (citing website and manual). And the government concedes that the observers are trained by NMFS, receive official government email addresses, are treated as federal "employees" for certain statutory purposes, and have the primary mission of collecting data for—and reporting to—NMFS. OSG Br. 46-47; Pet. Br. 6-7, 48.

Nothing about the MSA's definition of "observer" in 16 U.S.C. § 1802(31) changes the fact that the observers are federal agents working for NMFS. *See* OSG Br. 46. The government's attempt to analogize observers to private lawyers or accountants is misplaced: Among many other distinctions, privately hired lawyers and accountants are not subject to regular "debriefing" by government officials and do not perform their work using government email addresses. Nor is there any other basis to conclude that Congress wanted fishermen to pay observers' costs.

The government also discounts the significance of the MSA's *express* cost-shifting framework. It claims that the provisions specifically authorizing the government to impose observer fees on vessel owners are not "'apples-to-apples comparators'" because, unlike the Final Rule, they require fishermen to pay

fees to the government to cover observer costs, instead of requiring them to contract and pay for observers directly. OSG Br. 47-48 (quoting Pet.App.18a).

But the government completely ignores the MSA's creation of a "supplementary observer program" applicable to certain "foreign fishing vessels." 16 U.S.C. § 1821(h)(1), (6). That program—like the Final Rule—requires fishermen to contract directly with "certified observers," without any payment to the government. *Id.* § 1821(h)(6)(C); *see* Pet. Br. 49. It is the precise apples-to-apples analog the government claims is missing. The supplementary observer program confirms that when Congress wanted to force fishermen to directly fund observers, it did so expressly.

The program also disposes of the government's related point that the MSA's sanctions provision is not limited to (1) "arrangements in which owners pay fees to the government," but also contemplates (2) "a contractual relationship between the vessel owner and a third-party provider of observer services." OSG Br. 45-48 (citing 16 U.S.C. § 1858(g)(1)(D)). The supplementary observer program tracks the second category. Section 1858(g)(1)(D) does not implicitly authorize NMFS to require domestic fishermen to pay observers in other circumstances not set forth in the statute.

Finally, the government notes that shortly before Congress's 1990 authorization of observer fees on domestic fishing vessels in the North Pacific fisheries, NMFS had promulgated a rule "requiring vessel owners to pay for third-party monitoring" in those same fisheries. OSG Br. 48. To the extent the government implies that Congress implicitly ratified that rule, it is mistaken: As the government points

out, the specific scheme Congress created for North Pacific observers was a "fee-based program" that differed from the 1990 rule. *Id.* Moreover, as petitioners have argued, the government's current interpretation of 16 U.S.C. § 1853(b)(8) renders the 1990 law's specific authorization of the North Pacific program superfluous. Pet. Br. 50-51. The government has no persuasive response on this point.

The government's feeble efforts only underscore why courts should not defer to self-serving agency interpretations of federal law. This Court should overturn *Chevron* and vacate the Final Rule.

CONCLUSION

The First Circuit's judgment should be reversed.

Respectfully submitted,

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