No. 22-451

In The
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, et al.,

Petitioners,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR *AMICI CURIAE* PTAARMIGAN LLC AND US INVENTOR IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

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

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INTEREST OF THE *AMICI CURIAE*[1]

PTAAARMIGAN (Patent and Trademark Attorneys, Agents, and Applicants for Restoration and Maintenance of Integrity in Government) advocates on behalf of intellectual property attorneys, agents and owners, and on behalf of IP-owning clients. PTAAARMIGAN focuses on issues where the substantive or procedural law provides protections against agency overreach, and a federal agency acts in contravention of that law.

US Inventor is the largest inventor-led non-profit organization, with a membership of more than 87,000 individual and small business inventors. US Inventor favors restoring American innovation and inventor rights.

This case addresses an issue of great importance to the *amici*, whose members are harmed when the U.S. Patent and Trademark Office promulgates regulations without the public participation and vetting required by the Administrative Procedure Act, Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, and Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*. The USPTO is funded entirely by user fees, and has direct financial incentives to shortcut the transparency and procedure that governs agency rulemaking to capture

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[1] Pursuant to Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

additional fees. 35 U.S.C. § 42. When parties challenge lack of procedural formality, the USPTO claims that *Chevron* authorizes the USPTO to bypass the procedures that ensure that the agency considers the public interest. The USPTO's neglect of rulemaking procedure leads to regulatory costs that exceed $ 1 billion per year. *See* David E. Boundy, *Agency Bad Guidance Practices at the Patent and Trademark Office: a Billion Dollar Problem*, 2018 PATENTLY-O L.J. 20 (2018), *available at* https://ssrn.com/abstract=3258040. Clarifying *Chevron* deference is critically important to the members of the *amici* because proceedings within the USPTO are often conducted for the financial benefit of the USPTO itself, and without the procedures that ensure consideration of the public interest.

SUMMARY OF ARGUMENT

The Administrative Procedure Act, in 5 U.S.C. § 553, lays out two paths for agency rulemaking. Section 553(c) lays out a full-dress path by which an agency can make any rule authorized by the agency's organic statute. Another path is an "interpretative" rule that can be issued by simple publication, § 553(d)(2)/§ 552(a)(1), but that path is available only for rules that genuinely "interpret" genuine ambiguity. *Chevron* deference operates differently on those two paths. When an agency promulgates a rule using full-dress procedure, the result has "force and effect of law"—*Chevron* applies by operation of statute. 5 U.S.C. § 553; *Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 301

(1979).[2] In all other circumstances—*e.g.*, when an agency adopts a rule without notice-and-comment under the blanket authority to promulgate "interpretative" rules without notice-and-comment, § 553(b)(A) and (d)(2), or issues guidance with less than full-dress procedure—*Chevron* operates differently. For a subleg-islative rule, *Chevron* deference—and the force of law that comes as a corollary—requires, first, the statutory preconditions for a valid rule, and second, additional "reasonableness" criteria to ensure that the agency's deliberation is as solid as a legislative rule's. The two contexts arise under two different heads of authority, require different levels of rulemaking procedure, and different attendant conditions—when *Chevron* is so

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[2] The word "legislative rule" refers to a rule promulgated by notice-and-comment procedure, as opposed to an "interpretative" rule.

An "interpretative" rule is a rule promulgated by publication alone, §§ 553(d)(2), 552(a), by exercise of the opt-out from notice-and-comment permitted under § 553(b)(A).

This Court has occasionally referred to "full-dress" procedure. That may vary depending on the agency's rulemaking statute: "full-dress" may be notice-and-comment under 5 U.S.C. § 553(c), trial-type formal rulemaking under §§ 556 and 557, or whatever *sui generis* procedures Congress mandates in an agency's organic statute (in this case, 16 U.S.C. § 1852), plus the procedures mandated by the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, several executive orders, etc.

In older cases, the word "substantive" was used as both the inverse of "procedural" and the inverse of "interpretative," which created significant confusion. *E.g.*, *Azar v. Allina Health Services*, 139 S.Ct. 1804, 1811-14 (2019) (spending four pages disentangling multiple meanings of the word "substantive"). The "substantive" vs. "procedural" divide is not implicated in this case.

bifurcated, *Chevron* has statutory legitimacy, *Chevron* preserves separation of powers, and *Chevron* reinforces agencies' obligations to observe procedures for fair rulemaking.

Whether a "statutory silence . . . constitute[s] an ambiguity requiring deference to the agency" depends on the statute, the rulemaking authority Congress delegated to the agency, and the procedures the agency used to fill the statutory silence:

- When Congress couples a statutory silence or ambiguity with a delegation of rulemaking authority, then the agency has authority to gap-fill or resolve the ambiguity, so long as the agency uses full-dress procedure. A validly-promulgated full-dress rule has force of law to bind the public, the agency, and the courts. *Chrysler*, 441 U.S. at 301. When Congress delegates such authority and an agency exercises it, *Chevron* is a creature of statute, and separation of powers issues do not arise.

- When a statute has an ambiguity (not a silence, a "genuine *ambiguity*" in the sense of *Kisor v. Wilkie*, 588 U.S. ___, 139 S.Ct. 2400, 2410 (2019)), and the agency exercises § 553(b)(A) to opt-out of full-dress procedure, the default is an "interpretative" rule with no force of law. If the agency meets additional criteria analogous to those of *Kisor* (described below in § III), the rule may earn *Chevron* deference (which has the effect of conferring force of law), even though not demanded by statute.

- The only way an agency can fill a silence is a full-dress legislative rule. Silence does not

> support exercise of "interpretative" authority under § 553(b)(A) and (d)(2)—an agency's authority to "interpret" (without notice-and-comment) reaches only to ambiguity, not to silence. Anything less is "procedurally defective," and therefore simply invalid—an invalid rule cannot be eligible for deference.

This bifurcation of *Chevron* reflects the dichotomy between full-dress legislative rules of § 553(c) vs. publication-only "interpretative" rules in § 553(b)(A) and (d)(2). Criticism of *Chevron* has focused largely on application of deference to agency rules adopted without notice-and-comment procedure. However, when *Chevron* is separated into its two separate contexts, *Chevron* preserves separation of powers, and requires agencies to observe procedures for rulemaking that ensure public participation. The criticisms of *Chevron* find resolution in § 553.

Although *Christensen v. Harris County*, 529 U.S. 576 (2000) limited *Chevron* deference for sublegislative rules, lower courts have occasionally waived rulemaking procedure in the name of *Chevron*, *e.g.*, *SKF USA Inc. v. U.S.*, 254 F.3d 1022, 1030 (Fed. Cir. 2001) (relying on *Chevron* to give agencies a do-over); *Atrium Medical Center v. Dept. of HHS*, 768 F.3d 560, 573 (6th Cir. 2014) (affording *Chevron* deference to a sublegislative manual on a point that goes beyond interpreting a genuine ambiguity). Such excessive deference encourages agencies to skip the public vetting required by § 553(c). *E.g.*, *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1318-20 (Fed. Cir. 2017) (though agency

ultimately loses, a USPTO rule with no conceivable claim to procedural regularity survived a first appeal, and was only invalidated on *en banc* rehearing). To be sure, sublegislative guidance documents serve a variety of important functions: to announce tentative, non-binding preliminary views on novel questions, to announce general policies subject to refinement for specific facts, and the like. Admin. Conf. of the U.S., *Recommendation 2019-1, Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38927, 38928 (Aug. 8, 2019); Executive Office of the President, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432 (Jan. 25, 2007) ("*Good Guidance*"). But agencies should not be permitted to attach binding weight to sublegislative rules to "foreclose consideration . . . of positions advanced by affected private parties." *Good Guidance* at 3436. *Chevron* should be confined so that it only grants deference (and force of law) to rules that are valid either as "legislative" rules under § 553(c), or valid as "interpretative" rules under § 553(b)(A) with the additional safeguards of section III of this brief.

Confining *Chevron* in this way preserves its advantages: agencies can still provide early and national uniformity, and Article III courts benefit from agencies' informed judgments—agencies just have to follow statutory procedures to earn full deference. Also, *Chevron* is just the first layer of a three-layer standard of review, not a test for a lawful rule. If a rule is not *Chevron*-eligible, the agency can still invoke *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140

(1944). And a rule that fails *Skidmore* may be valid on *de novo* review.

Tying *Chevron* to rulemaking procedure will give agencies appropriate carrots and sticks to observe public participation and accountability. If *Chevron* deference is only available for full-dress rules and near-full-dress interpretations of genuine ambiguity, administration-to-administration whipsawing is minimized. With *Chevron* appropriately narrowed, agencies have a bright line: a rule issued without full-dress procedure may not be enforced as the last word—"when interested persons disagree with the views expressed in an [sublegislative] rule, the agency should allow [parties] a fair opportunity to try to persuade the agency to revise or reconsider its interpretation." ACUS *Recommendation 2019-1*, 84 Fed. Reg. at 38928.

ARGUMENT

I. An agency rule can only be *Chevron*-eligible if it is a statutorily valid rule, not "procedurally defective"

A rule must first be procedurally valid, either as a valid "legislative" rule, § 553(c), or as a valid "interpretative" rule. § 553(b)(A) and (d)(2), § 552(a)(1)(D). Expansion of *Chevron* in the 1990s erased a key distinction between the two: agencies were allowed to exercise the *breadth* of legislative rulemaking with the *low procedural* requirements of simple interpretative guidance documents such as agency manuals,

memoranda, and the like—these cases give agencies a pass to issue gap-fill rules where a statute is silent, without notice-and-comment procedure required by statute. *E.g.*, *Pharm. Research and Mfrs. Am. v. Thompson*, 362 F.3d 817, 822 (D.C. Cir. 2004). Expansive application of *Chevron* attached binding weight to rules that had not been through the public participation and vetting that Congress intended.

A valid "legislative" rule satisfies two criteria: (a) the agency is acting within rulemaking authority granted by the agency's organic statute (a test often expressed as "not plainly erroneous or inconsistent with"), and (b) the rule has been promulgated with full-dress procedure. A rule that satisfies these two criteria has "force and effect of law." *Chrysler*, 441 U.S. at 301.

Alternatively, a rule issued without notice-and-comment may be procedurally valid if it qualifies as an "interpretative" rule under § 553(b)(A). The exemption is narrow and requires a showing that the agency rule is *interpreting* an obligation already present in a statute (though perhaps subject to resolution of an ambiguity). The "convenience" for opting out of rulemaking procedure has two "prices," *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015):

- First, the opt-out is only available where a rule with force of law already exists, and all the agency is doing is *interpreting* ambiguity in that underlying rule. *Id*. A valid interpretative rule cannot "create new law, rights or duties," *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), or

"create *de facto* a new regulation," *Christensen*, 529 U.S. at 588. The "genuine ambiguity" test of *Kisor*, 139 S.Ct. at 2415, is a useful formulation of the test for availability of the "interpretative" exemption from notice-and-comment.

- Second, the default is that a sublegislative rule does not have force of law against any member of the public, *Perez*, 575 U.S. at 97—it is only "hortatory," only the agency's current best guess. *Drake v. Honeywell, Inc.*, 797 F.2d 603, 606-07 (8th Cir. 1986). The agency must entertain alternative positions advanced by affected private parties. ACUS, *Recommendation 2019-1*, 84 Fed. Reg. at 38928; *Good Guidance* at 3436. For sublegislative interpretations published without notice-and-comment, force of law under *Chevron* is the exception, not the rule.

Judge Posner, in *Hoctor v. U.S. Dep't. of Agriculture*, 82 F.3d 165, 169-70 (7th Cir. 1996) explained why "interpretative" rules without notice-and-comment must exist but must be closely cabined. Congress delegated blanket "interpretative" rulemaking as a concession to practical necessity—nearly every statute has some ambiguity, agencies have to interpret those ambiguities and do so in a timely way to ensure that parties receive timely decisions and should do so using procedures that ensure notice and that similarly-situated parties receive similar interpretations. *See id.*, 82 F.3d at 168. The "interpretative" exemption from notice-and-comment, § 553(b) and (d), recognizes this

practical necessity for the agency to conduct business—but doesn't grant *gap-filling* authority to go beyond interpretation of statutory or regulatory text. Agencies shouldn't make up the rules on the fly, and then point to *Chevron* to excuse the procedural shortcut.

In *Hoctor*, the USDA had issued a legislative regulation for zoo fences that required "such strength as appropriate . . . [and] to contain the animals." The USDA then issued subregulatory guidance that required certain fences to be eight feet tall. Judge Posner started by accepting that the agency's "eight foot" rule was "consistent with, even in some sense authorized by" statute. But, he explained, the "eight foot" rule was ***not*** exempt from notice-and-comment under the "interpretative" exemption. A rule can "only [be 'interpretative'] if it can be derived from the [statute or regulation] by a process reasonably described as interpretation." 82 F.3d at 169-70. "It is obvious that eight feet is not part of the meaning of secure containment." *Id.* at 170.

A few past cases (mostly in the 1990s and early 2000s) gave *Chevron* deference to sublegislative rules so long as the rule is "not contradicted by" or is "consistent with" statute. While the "[n]ot inconsistent with" is a valid test for *Chevron* deference for a *legislative* rule, it is not a valid test for a sublegislative rule issued without notice-and-comment.

II. For legislative rules, *Chevron* is superfluous

1. General principles

A solid majority of *Chevron* cases involve full-dress "legislative" rules. But for legislative rules, *Chevron* is superfluous, with no effect on the outcome. Legislative rules have binding force of law. *Chrysler*, 441 U.S. at 295-96, 301. Likewise, when an agency formulates legislative rules, it operates under a delegation from Congress, so separation of powers issues do not arise.

A legislative rule may either gap fill when a statute is silent, *e.g.*, *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 280 (2016) (on an issue where statute was silent, and the agency had a grant of rulemaking authority, the agency's gap-filling regulation issued via notice-and-comment earned *Chevron* deference), *E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 513-15 (2014) (where Congress gave the agency a set of aspirational goals and rulemaking authority to develop rules to implement those goals, afford *Chevron* deference to those gap-fill regulations), or may interpret existing but ambiguous statutory language. *E.g.*, *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 558 (2012) (giving *Chevron* deference to Social Security's regulation that defined the statutory term "child"); *Mayo Found. for Med. Ed. & Research v. U.S.*, 562 U.S. 44, 56-57 (2011) (giving *Chevron* deference to IRS' regulation that defined the terms "student" and "employee" for tax purposes). "Not plainly erroneous or inconsistent with statute" is a useful test for agency power to issue

a *legislative* rule, so long as the agency uses full-dress procedure that gives the public full rights to participate.

Kisor explained why deference is owed to agency interpretations of legislative rules, 139 S.Ct. at 2413:

> Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. And so too, when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar.

That same rationale applies to legislative rules themselves, whether those rules gap-fill or interpret ambiguity in statute.

Congress may vary the level of procedure necessary for a legislative rule, either up or down. In *Stinson v. United States*, 508 U.S. 36, 44-45 (1993), this Court granted *Chevron* deference to subregulatory "commentary" to the federal Sentencing Guidelines. But that exception was specifically created by statute, 18 U.S.C. § 3553(b), which directed courts to consider "official commentary." The "not inconsistent with" language of *Stinson* should not have been elevated to a general rule that qualifies sublegislative interpretations for *Chevron* deference.

Likewise, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999) is an exception that proves the rule: this Court gave *Chevron* deference to the INS'

sublegislative interpretation of the term "serious nonpolitical crime" arrived at by case-by-case adjudication. But the relevant statute granted *sui generis* authority to make rules without rulemaking procedure: "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." Because of that *sui generis* waiver of § 553 rulemaking, INS' rules promulgated without notice-and-comment could be *Chevron*-eligible.

In any event, both *Stinson* and *Aguirre-Aguirre* were decided before *U.S. v. Mead*, 533 U.S. 218, 227 (2001) stressed "procedurally defective" as a bar to *Chevron* deference.

Conversely, Congress may increase the level of procedure required, as it did for fisheries rules, as discussed next.

2. The observer rule in this case is a valid legislative rule

In this case, the Secretary points to three statutory grants of rulemaking authority.

First, 16 U.S.C. § 1853(a)(1)(A), *requires* the Secretary to promulgate regulations for:

> conservation and management measures . . . which are necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote

> the long-term health and stability of the fishery.

Second, § 1853(b)(14) says that the Secretary:

> may prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

Third, § 1853(b)(8) permits a Fishery Management Council or the Secretary to prepare fishery management plans that:

> require that one or more observers be carried on board a vessel . . . engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery.

These are broad grants of authority (but not extraordinarily so, *contrast*, *e.g.*, 26 U.S.C. § 7805(a) (IRS has authority to "prescribe all needful rules")). Neither the dissent below nor the *certiorari* petition nor Petitioners' blue brief identified any "genuine ambiguity" in the plain language of the statute, only a gap, a requirement to fill it by a "fisheries management plan," and a delegation of authority to do so. In fact, Petitioners' blue brief concedes that relevant statutory authority is "decades-old" and only needed to be "dusted off." Pet. Br. at 39. To be sure, § 1853(b)(8) does not apply here, because the observers in this case exceed the "purpose" of § 1853(b)(8). But § 1853(b)(8) does not forbid observers for other purposes, or state a carveout from the

general authority of § 1853(b)(14). The only express limit on the fishery Councils' or Secretary's choice of means for implementing those statutory grants is in § 1853(b)(8):

> except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized.

Petitioners' blue brief makes not a single argument to suggest that the observer rule is *not* authorized by § 1853(b)(14). Petitioners' blue brief observes that § 1862(a)(1) gives the Secretary additional authority for observers under a "fisheries *research* plan," but does not explain how that becomes a carve-out from a "fisheries *management* plan" authorized by §§ 1853(a)(1)(A) and 1853(b)(14). Cost allocation is neither included nor excluded as a factor to be considered—this is a silence that *requires* "necessary and appropriate" gap-filling, § 1853(a)(1)(A), and exercise of the rulemaking discretion of the Councils and Secretary.

To counterbalance the broad—but unambiguous—delegation of authority, Congress added unusually-high procedural checks and balances: the "Fishery Management Councils." 16 U.S.C. § 1852. Each Council must include voting members, "to the extent practicable, [that] ensure a fair and balanced apportionment . . . of the active participants . . . in the commercial and

recreational fisheries." § 1852(b)(2)(B). A fisheries management plan must go through additional layers of public comment, § 1853(c), § 1854(a)(1)(B), capped off by § 553(c) APA notice-and-comment. Congress recognized the interests of fishing operators like Loper, and provided multiple procedural checks and balances to ensure that their interests would be fairly represented. Congress provided procedures that would gather sufficient information to ensure balance of both Loper's immediate interest, and Loper's long-term interest—to "prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." § 1801(a)(6). Petitioners' blue brief does not contend that the agency's procedural compliance was less than adequate, or that the observer rule is anything other than "necessary and appropriate for the conservation and management of the fishery." § 1853(a)(1)(A).

If the rule is within the statutory grant of authority and issued with full-dress procedure, the observer rule is a valid legislative rule, and therefore entitled to "force of law."

This case is similar to *Cuozzo*: the USPTO was charged with creating a new tribunal and rules for that tribunal. On one specific issue of patentability, existing law presented two alternatives, and the statute was silent as between them. The USPTO chose one and promulgated a legislative rule. This Court wrote "we find an express delegation of rulemaking authority, a 'gap' that rules might fill, and 'ambiguity' in respect to the boundaries of that gap," and blessed the USPTO's

rule. *Cuozzo*, 579 U.S. at 280. Similarly, in this case, the statute grants authority to "require that one or more observers be carried on board a vessel." There are only two ways to fund those observers: either they are paid by the agency, or they have to be paid by the operator. The Fisheries Management Council and the agency went through the consultative process prescribed by Congress, and decided to have the operators pay.

Section 1801(a)(6) expressly states a goal of "prevent[ing] overfishing." To ensure costs and benefits would be fairly distributed, Congress provided additional procedural checks and balances. §§ 1852, 1853, 1854. Requiring regulated parties to pay for compliance contractors is hardly novel—safety regulations require employers to pay for on-site inspectors and engineers, 29 C.F.R. § 1926.1412, and securities regulations require companies to pay for their own accountants, auditors, and lawyers, *e.g.*, 17 C.F.R. Parts 240 and 270. When Congress has laid out standards for an agency's rulemaking, courts should require no more. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978).

III. Application of *Chevron* to sublegislative rules

For agency *interpretations* of ambiguous statutes via sublegislative rule, *Kisor*'s refinements of *Auer* interpretations of regulation are equally applicable to resolve many of the criticisms of *Chevron*. If the agency's

rulemaking procedure approximates notice-and-comment such that the agency has earned the right to deference, the advantages of *Chevron*—early and national uniformity of interpretation, reached by combining the agency's expertise with public vetting—is well justified, though not statutorily compelled.

Since 2001, this Court has rarely given *Chevron* deference to a rule that is neither legislative nor genuinely "interpretative" of genuine ambiguity (at least since *Christensen* in 2002). *E.g.*, *Judulang v. Holder*, 565 U.S. 42, 52 n. 7 (2011) (denying *Chevron* deference because the agency's rule has no statutory antecedent to support a claim for "interpretative" authority, and was not promulgated by legislative procedure).

1. Step zero: a statute whose interpretation is committed to the agency

A sublegislative interpretation can only be *Chevron*-eligible if it arises from valid exercise of agency rulemaking authority. For example, in *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 154 (1991), rulemaking and adjudicatory authority were bifurcated between two agencies; interpretations by the adjudication agency were not entitled to *Chevron* deference. Similarly, the IRS' view of the Affordable Care Act was not entitled to deference. *King v. Burwell*, 576 U.S. 473, 486 (2015). Similarly, at the USPTO, rulemaking and adjudication authority are bifurcated between two different parts of the agency. When the adjudication tribunal attempts to exercise

rulemaking authority, its rules are not *Chevron*-eligible. *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1352 (Fed. Cir. 2020) ("additional views" of a unanimous panel).

Agencies' interpretations of the scope of their own authority should be treated under the sublegislative branch of *Chevron*, not the near *per se* deference of *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 304-05 (2013).

2. Step one: a genuine ambiguity

The Constitution vests statutory interpretation in the judicial branch, not the executive branch. However, "[a]gencies (unlike courts) have 'unique expertise,' often of a scientific or technical nature" relevant to interpreting statutes and adapting them "to complex or changing circumstances." *See Kisor*, 139 S.Ct. at 2413.

To balance those considerations, *Chevron* deference should only be given to sublegislative interpretations when a statute has language (not silence) that is "genuinely ambiguous" that can be *interpreted* as the agency urges. If judicial tools cannot resolve the ambiguity, no separation of powers issues arise when a court defers the last fine points of interpretation to an agency. Examples of "genuine ambiguity" includes a direct conflict (typically because of two statutes that were enacted separately), careless drafting, an awkward or ambiguous term, a sentence with an ambiguous parse, an aspirational or general term, a term with no express definition or a definition that does not reach the specific question, a sentence with an opaque

construction, a sentence whose meaning is susceptible to more than one reading when applied to a fact pattern that Congress could not have reasonably foreseen, or a reflection of "the well-known limits of expression or knowledge." *Kisor*, 139 S.Ct. at 2410. *Kisor* cautions that ambiguity should be found only "after exhausting all the traditional tools of construction," including "careful consider[ation of] text, structure, history and purpose." 139 S.Ct. at 2415.

Silence is not ambiguity: silence is silence. Silence can invoke the principle of *expressio unius est exclusion alterius*; ambiguity generally does not. If a statute grants an agency rulemaking authority, the agency can gap-fill a silence by a legislative rule. If the statute speaks but speaks ambiguously, the agency can interpret—and that interpretation can be eligible for high *Chevron* deference, low *Skidmore* deference, or no deference at all, depending on the rest of the agency's procedures. If the statute is silent and the agency has no rulemaking authority or has not exercised it in a procedurally-valid way, the agency has authority to issue non-binding "general statements of policy." 5 U.S.C. § 553(b)(A). And in some cases, an agency may still have authority to act case-by-case by adjudication. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 772-73 (1969). Obviously, all parties benefit when the agency acts by full-dress rulemaking—one of the risks in this case is making rulemaking so hard that agencies are tempted to shortcut.

Kisor notes that "hard interpretive conundrums, even those related to complex rules, can often be

solved" and that a court's independent, careful consideration of the issue will make deference inappropriate for "many seeming ambiguities." 139 S.Ct. at 2415.

Step one sharply narrows the range of interpretations open to an agency, and directly resolves another common criticism of *Chevron*—judges should not defer to strained agency interpretations. Judges should keep hold of the interpretive steering wheel for as long as constitutionally required, and only hand it over to agencies when judicial tools are exhausted. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) is overly deferential to agencies and should be narrowly cabined.

Finally, agencies should not operate under the impression that "it's easier to get forgiveness than permission." As Judge Posner explained, the practical reality is that agencies must have authority to interpret ambiguity in real time with fairly low procedure. *Hoctor*, 82 F.3d at 169-70. But when a statute is silent, an agency must not be able to fill in the blank using binding, permanent ink without legislative procedure. When a rule is procedurally defective, an agency should not be able to claim *Chevron*'s force of law, simply because the agency's rule is "not inconsistent" with that silence. *E.g.*, Brief of USPTO at 43-48, *Hyatt v. USPTO*, No. 2017-1722 paper 16 (Fed. Cir. Jun. 12, 2017). Congress set out two separate sets of limits on agency rulemaking in § 553(c) and § 553(b)(A)/ § 552(a); agencies can't have the best of both at the same time.

3. Step two: is the agency's interpretation reasonable?

The interpretation offered by the agency must genuinely address the identified ambiguity and fall within the "zone of ambiguity" remaining after step one. In other words, step one not only determines whether a statute is ambiguous, but also bounds the range of reasonable interpretations.

An interpretation can only be *Chevron*-eligible if it "implicate[s] the agency's substantive expertise." *Kisor*, 139 S.Ct. at 2417. The Court explained that, "[g]enerally, agencies have a nuanced understanding of the regulations they administer," such as when a regulation is technical or implicates policy expertise. Deference is less likely warranted when an interpretive issue "fall[s] more naturally into the judge's bailiwick," such as a common law property term or the award of attorney's fees. When the agency has no comparative expertise in resolving an ambiguity, Congress presumably would not grant it that authority. *Kisor*, 139 S.Ct. at 2417.

Step two can only approve an agency interpretation supported by an explanation that survives arbitrary-and-capricious review under *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 48-49 (1983).

Has the agency been consistent—at least, if the agency has changed its mind, has it given a sound explanation? *Kisor*, 139 S.Ct. at 2414; *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-24 (2016) (no

deference because agency change of position not adequately explained). But unexplained change of course is arbitrary and capricious, *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)—an arbitrary and capricious rule is "procedurally defective," and ought not be rehabilitated by "deference."

4. Not "procedurally defective"—sufficient deliberative formalities to ensure that the interpretation is the agency's "authoritative or official position"

Chevron deference is not owed when agencies promulgate "procedurally defective" rules. *E.g.*, *Encino Motorcars*, 579 U.S. at 220. Of course that must be the case: a "procedurally defective" rule isn't valid at all, let alone entitled to deference. For a sublegislative rule to be procedurally valid, it must (i) fall within one of the exemptions of § 553(a), (b)(A), or (b)(B) (typically the "interpretative" exemption), and (ii) be published in the Federal Register. 5 U.S.C. §§ 552(a)(1) and (2).

An "interpretative" rule without notice-and-comment can only be valid if it genuinely interprets genuine ambiguity. *Kisor*, 139 S.Ct. at 2415 ("genuine ambiguity"); *Hoctor*, 82 F.3d at 170 ("can be derived . . . by a process reasonably described as interpretation").

The requirement for Federal Register publication ensures that the agency only enforces rules issued with the authority of the agency, not preferences of individual employees. Centralizing publication in the Federal

Register is crucial to the public: for example, the USPTO expects the public to keep up with a cacophony of staff manuals with language that purports to bind the public, web pages that are updated without notice, press releases, decisions of agency tribunals spread among a dozen different lists, sign-up email lists, memoranda (some labeled "Internal Use ONLY" so the public never has notice), "Standard Operating Procedures," and decades-old notices in the agency's *Official Gazette* (that is not indexed). The USPTO enforces unpublished secret rules for years. When the USPTO gets around to publication, it attaches retroactive effect, sometimes a year or more. Rules spring out of nowhere like boogie men. For example, after this Court's decision in *U.S. v. Arthrex*, 141 S.Ct. 1970 (2021), the PTO has never initiated rulemaking—instead, the PTO has a "Q&A" web page that changes every few months.[3] It is very difficult to conduct orderly business with an agency that has no rigor in its rulemaking process, and no gatekeeper to separate statements of individual employees from the agency's considered position.

To earn *Chevron* force of law for a sublegislative rule (rather than the hortatory default for "interpretative" rules under § 553(b)(A), *Drake*, 797 F.2d at 606-07), the agency must observe some process that

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[3] David Hoyle, *USPTO Implementation of Arthrex: Questions from Administrative Law*, *available at* https://ipwatchdog.com/2021/07/22/uspto-implementation-arthrex-questions-answers-administrative-law-part-dismissal-subregulatory-rulemaking/id=135896 and https://ipwatchdog.com/2021/07/26/uspto-implementation-arthrex-questions-administrative-law-part-ii-bigger-picture-reform/id=135965 (Jul. 22 and 28, 2021).

approximates the level of vetting, public participation, agency experience, and notice that could have been gained by notice-and-comment. *Mead*, 533 U.S. at 227; *Christensen*, 529 U.S. at 587. The interpretation "must at the least emanate from those actors, using those vehicles, understood to make authoritative policy." *Kisor*, 139 S.Ct. at 2416.

Some rulemaking laws do not provide separate private rights of action to challenge procedural defects; these laws should enter into the "procedurally defective" calculus. Examples include the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (before a 1996 amendment that added a judicial review provision), the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.* (though this Court has not ruled on the issue, several Courts of Appeals have held that § 3507(a) does not create a private right of action), Executive Order 12866 (the basic benefit-cost executive order), and several other executive orders that protect the public from agency overreach. Because these laws do not provide direct judicial review, some agencies skirt or ignore them. *See* Letter from Richard B. Belzer to USPTO, *Comments on Improving Regulation and Regulatory Review* (Apr. 14, 2011), *available at* https://www.uspto.gov/sites/default/files/patents/law/comments/belzer14apr2011.pdf The public should be able to point to the agency's neglect to conduct proper benefit-cost analyses under the "procedurally defective" or "fair and considered judgment" limit on *Chevron* (for either legislative or sublegislative rules). If Congress didn't make a rule's validity turn on agency

compliance with these rules, *Chevron* ought not either. But an agency ought not get deference for a rule that was issued with less-than-complete procedure.

5. An agency's "fair and considered judgment"

Kisor explains that an agency's interpretation is only deference-worthy if it reflects "fair and considered judgment." 139 S.Ct. at 2417. Counterexamples given in *Kisor* include agencies' "convenient litigating positions" or "*post hoc* rationalizatio[ns]" advanced to "defend past agency action against attack," or an interpretation that creates "unfair surprise" such as when a new interpretation conflicts with prior interpretation or imposes retroactive liability for long-standing conduct that the agency had never before addressed.

Another counterexample would be where the agency has a conflict. A few agencies have the authority to keep their fee collections in accounts segregated from the general treasury, *e.g.*, 35 U.S.C. § 42, and a few of those have authority to set fees by rulemaking that bypasses Congressional oversight. *E.g.*, America Invents Act, Pub.L. No. 112-29 § 10, 125 Stat. 316-17 (2011). At some of these agencies, senior staff have direct financial interests in the agency's rulemaking because Congress exempted agency personnel from the anticorruption statutes that govern the rest of the executive branch. *Contrast* 35 U.S.C. § 3(b)(2)(B) (50% bonuses for PTO senior career staff) *to* 5 U.S.C. § 4505a(a)(2) (capping most bonuses at 10%, with "exceptional" cases

at 20%). These agencies have an obvious conflict of interest, and regulations promulgated under this kind of conflict should essentially never be *Chevron*-eligible.

In this case, Congress obligated the Secretary to promulgate regulations for "conservation and management" of an increasingly-scarce resource. To all appearances, she did everything by the book. The agency and the public need certainty and repose: when an agency acts within the substantive and procedural limits set by Congress, the agency's rule carries force of law.

CONCLUSION

The Court should reaffirm *Chevron* deference, but confine it as required by 5 U.S.C. § 553.

Respectfully submitted,

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