No. 22-451

IN THE

Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL.,

Petitioners,

v.

GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL.,

Respondents.

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

BRIEF OF PROFESSOR THOMAS W. MERRILL AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

JAMES B. SPETA
6254 N. Glenwood Ave.
Chicago, Illinois 60660
(773) 965-1624

JOSEPH D. KEARNEY
Counsel of Record
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 313-0504
kearney89@gmail.com

Counsel for Amicus Curiae Professor Thomas W. Merrill

July 21, 2023

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, DC 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Court Should Not Repudiate the *Chevron* Doctrine.	4
A. There Is No Reason to Overrule the *Chevron* Decision.	4
B. There Is No Constitutional or Statutory Reason to Repudiate the *Chevron* Framework.	7
1. The *Chevron* Framework Does Not Violate Article III If the Doctrine Is Limited to Circumstances of Congress's Actual Delegation to Administrative Agencies.	8
2. The *Chevron* Framework Does Not Violate Article I If It Is Limited to Instances Where the Agency Acts Pursuant to Its Delegated Authority.	14
3. The *Chevron* Framework Does Not Violate the APA but Respects Congress's Delegations in Agencies' Organic Statutes.	18

TABLE OF CONTENTS—Continued

Page

II. Other Objections to the *Chevron* Framework Can Be Addressed Without Overturning It. 20

A. Legal Instability Can Be Addressed, at "Step Two," by Considering Reliance Interests. 20

B. Bias Toward Agencies Can Be Limited, at "Step Two," by Considering Agency Interpretation Processes. 24

III. A Decision Repudiating the *Chevron* Framework Would Be Destabilizing. 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page(s)

American Hosp. Ass'n v. Becerra,
142 S. Ct. 1896 (2022) 27

Auer v. Robins,
519 U.S. 452 (1997) 7

Batterton v. Francis,
432 U.S. 416 (1977) 9, 10

Becerra v. Empire Health Foundation,
142 S. Ct. 2354 (2022) 26-27

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 14

Buffington v. McDonough,
143 S. Ct. 14 (2022) 11, 24

Burnet v. Coronado Oil & Gas Co.,
285 U.S. 393 (1932) 24

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 2-6, 8-30

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 14

City of Arlington v. FCC,
568 U.S. 936 (2012) 17

City of Arlington v. FCC,
569 U.S. 290 (2013) 9, 14, 16, 17, 29

Entergy Corp. v. Riverkeeper, Inc.,
556 U.S. 208 (2009) 12, 22

TABLE OF AUTHORITIES—Continued

Page(s)

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 7, 18, 19

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 13

General Elec. Co. v. Gilbert,
429 U.S. 125 (1976) 21

General Motors Corp. v. Ruckelshaus,
742 F.2d 1561 (D.C. Cir. 1984) (en banc) .. 5

Gonzales v. Oregon,
546 U.S. 243 (2006) 13

ICC v. Cincinnati, N.O. & Tex. Pac. R. Co.,
167 U.S. 479 (1897) 13

King v. Burwell,
576 U.S. 473 (2015) 13

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 7

La. Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986) 14

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803).....8, 10, 26

Michigan v. EPA,
576 U.S. 743 (2015) 8

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.,
142 S. Ct. 661 (2022) 14

Sackett v. EPA,
143 S. Ct. 1322 (2023) 23

Shreveport Rate Cases,
234 U.S. 342 (1914) 13

Skidmore v. Swift & Co.,
323 U.S. 123 (1944) 16, 18, 27

Smiley v. Citibank, N.A. (South Dakota),
517 U.S. 735 (1996) 2, 11

Swift v. Tyson,
41 U.S. (16 Pet.) 1 (1842).....7, 18, 19

Udall v. Tallman,
380 U.S. 1 (1965) 21

United States v. Mead Corp.,
533 U.S. 218 (2001) 3, 15-17

Verizon Communications, Inc. v. FCC,
535 U.S. 467 (2002) 12

West Virginia v. EPA,
142 S. Ct. 2587 (2022).....15, 21, 23

Young v. Community Nutrition Institute,
476 U.S. 974 (1986) 5

TABLE OF AUTHORITIES—Continued

CONSTITUTION Page(s)

U.S. Const. art. I 14, 17, 18

U.S. Const. art. III.....8, 14, 18, 19, 24

STATUTES

5 U.S.C. § 706 19

15 U.S.C. § 78j(b)..... 9

Hepburn Act, 34 Stat. 584 (1906)..... 13

OTHER AUTHORITIES

Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017)..... 22

Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts,* 116 Mich. L. Rev. 1 (2017)..... 27

Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 Notre Dame L. Rev. 1441 (2018) 25

Nicholas R. Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 Geo. Wash. L. Rev. 1392 (2017) 27

Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016)..... 24

Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235 (2007) 27-28

TABLE OF AUTHORITIES—Continued

Page(s)

Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron's *Domain*, 70 Duke L.J. 931 (2021) 6, 25

Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 Fordham L. Rev. 1823 (2015) 22

Gary Lawson, *The Ghosts of* Chevron *Present and Future*, B.U. School of Law Research Paper Series No. 23-11 (Feb. 22, 2023) (forthcoming 103 B.U. L. Rev. (2023)), https://ssrn.com/abstract=4367469/ 27

THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (Harv. Univ. Press 2022) 1, 4-6, 8-11, 14, 18, 21, 22

Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992) 1

Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807 (2002) 1

Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727 (2008) 1

Thomas W. Merrill, *Re-Reading* Chevron, 70 Duke L.J. 1153 (2021) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753 (2014) 1, 15-16

Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833 (2001)..... 1, 15

Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002)..... 1, 13

Henry P. Monaghan, Marbury *and the Administrative State,* 83 Colum. L. Rev. 1 (1983)..... 9

RESTATEMENT (THIRD) OF AGENCY (ALI 2006)..... 10

Peter 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 (1987)..... 28

Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, Yale J. Reg. Notice & Comment (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/ 29

INTEREST OF *AMICUS CURIAE*

Thomas W. Merrill is the Charles Evans Hughes Professor at Columbia Law School.[1] For more than forty years, much of his professional life has involved practicing, teaching, and writing in the field of administrative law. This work has focused on how much weight courts should give administrative interpretations of law in different contexts.[2] He has filed or written several previous *amicus* briefs in the Court on this topic.[3]

---

[1] No party or party's counsel authored this brief in whole or in part, and no one other than *amicus curiae* or his counsel made a monetary contribution intended to fund the preparation or submission of the brief.

[2] *See, e.g.*, THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (Harv. Univ. Press 2022); Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753 (2014); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727 (2008); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002); Thomas W. Merrill, *The* Mead *Doctrine*: *Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807 (2002); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833 (2001); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992).

[3] Br. for Prof. Thomas Merrill as Amicus Curiae, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15); Br. for the Nat'l Governors Ass'n et al. as Amici Curiae, *City of Arlington v. FCC*, 569 U.S. 290 (2013) (Nos. 11-1545 & 11-1547); Br. for the Nat'l Governors Ass'n et al. as Amici Curiae, *Cuomo v. Clearing House Assn., L.L.C.*, 557 U.S. 519 (2009) (No. 08-453); Br. for Ctr. for State Enforcement of Antitrust & Consumer Protection Laws, Inc., as Amicus Curiae, *Wyeth v. Levine*, 555 U.S. 555 (2009) (No. 06-1249); Br. for Ctr. for State Enforcement of Antitrust and Consumer Protection Laws, Inc., as Amicus Curiae, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (No. 05-1342); Br. for Prof. Thomas W. Merrill as Amicus

SUMMARY OF ARGUMENT

Petitioner has asked the Court to "overrule *Chevron*." Pet. i–ii.[4] In evaluating this request, it is necessary to determine what is meant by "*Chevron*." Most commonly, *Chevron* refers to a framework for reviewing interpretations by agencies of the statutes that they administer: first, a court exercises independent judgment to ascertain whether Congress has answered the question; if not, the court considers whether the agency's interpretation is a reasonable one. On a few occasions, however, this Court has suggested that *Chevron* stands for a much more far-reaching idea: namely, a fixed presumption that agencies have primary authority to resolve any and all ambiguities in the statutes they administer. *See, e.g., Smiley v. Citibank, N.A.* (*South Dakota*), 517 U.S. 735, 740–41 (1996).

If *Chevron* is understood in this latter way, as a fixed presumption of agency primacy in matters of statutory interpretation, it raises serious questions about its compatibility with the duty and role of courts. This maximalist view of *Chevron* is also open to the objections that it promotes legal instability and introduces a bias in favor of agencies at the expense of those that they regulate. Such a conception of *Chevron* is indeed problematic.

Curiae, *United States v. Mead Corp.*, 533 U.S. 218 (2001) (No. 99-1434).

[4] The Court granted the petition as to Question 2: "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."

When properly understood in the former and more common way, as a framework for reviewing interpretations by agencies of the statutes they administer, the objections that have been directed at *Chevron* largely disappear. The constitutional and statutory objections are answered by clarifying that the *Chevron* framework requires a judicial determination that Congress has actually delegated authority to the agency to regulate with respect to the matter at hand, as the Court held in *United States v. Mead Corp*., 533 U.S. 218 (2001). And even when the agency has authority to regulate, other contextual variables may indicate that it was not given authority to interpret the precise question at issue. Other concerns recede as well. The objection based on legal instability can be ameliorated by emphasizing that a reasonable agency interpretation is one that considers reliance interests created by past agency decisions. And the objection based on agency bias can be addressed by making clear that a reasonable agency interpretation must be the result of an appropriate interpretive *process* by the agency.

The *Chevron* framework has been applied in thousands of cases and has proved to be a useful and appropriate way for agencies, parties, and judges to organize their consideration of relevant variables. Like other doctrines for determining the respective roles of different institutions in determining the meaning of the law, the framework has undergone a process of refinement and clarification over time. The *Chevron* framework, as appropriately refined or clarified, should be reaffirmed.

ARGUMENT

I. The Court Should Not Repudiate the *Chevron* Doctrine.

The *Chevron* doctrine derives in part from two paragraphs in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which have become canonical. The decision itself did not proceed by mechanically applying these paragraphs, yet their language has sometimes been invoked to support an unfortunate "maximalist" version of *Chevron*. In fact, properly understood, both the case generally and the much-cited paragraphs were not a fundamental break with the past and are traceable to important rule-of-law values. *See* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE ch. 1 (Harv. Univ. Press 2022) (setting out general interpretive values); *id.* ch. 2 & at 53–54 (summarizing *Chevron*'s relationship to pre-*Chevron* decisions). There is no reason for overruling: The *Chevron* doctrine is, in fact, an appropriate framework for judicial decisionmaking, even as it may need some clarification. *See id.* at 230–42 (describing appropriately clarified *Chevron* structure).

A. There Is No Reason to Overrule the *Chevron* Decision.

In asking the Court to "overrule *Chevron*," petitioners should not be taken to mean that the Court should overrule the *Chevron* decision. There is no reason to overrule that decision unless the Court believes that it was wrong to interpret "stationary source" for purposes of the nonattainment provisions of the Clean Air Act as meaning the entire plant as opposed to individual apertures within a plant. The

precise holding of the *Chevron* decision has been settled for nearly forty years and has no bearing on the controversy in the present case.

There is a second reason why it would be inappropriate to "overrule" the *Chevron* decision. Although the canonical statement of the "two questions" or two-step approach to judicial review of agency determinations of law is found in early paragraphs in the *Chevron* opinion, 467 U.S. at 842–43, a close reading of the case makes plain that the two-step framework was not used by the Court there.[5] Instead, the opinion by Justice Stevens carefully examined the relevant text of the Clean Air Act, related statutory provisions, potentially relevant canons of interpretation, legislative history, the EPA's efforts to resolve the issue, and competing arguments based on policy—concluding that none of these conventional tools of statutory interpretation precluded the agency's definition. The two-step idea was not employed in the case. It is not the Court's practice to overrule past decisions in order to disclaim particular dicta.

To be sure, the two-step idea that appears as dictum in *Chevron* eventually became a settled mode of analysis for reviewing agency interpretations of law. What came to be called "the *Chevron* doctrine" was first deployed by the D.C. Circuit. *See General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1566–67 (D.C. Cir. 1984) (en banc). This Court initially applied it in 1986. *See Young v. Community Nutrition Institute*, 476 U.S. 974, 980 (1986). Its use as a framing device gradually

---

[5] For a detailed explication, see Thomas W. Merrill, *Re-Reading* Chevron, 70 Duke L.J. 1153 (2021); MERRILL, THE *CHEVRON* DOCTRINE ch. 3.

spread, in fits and starts, as Members of the Court found it useful in one or more cases presenting issues of judicial review of agency interpretations of law. *See* MERRILL, THE *CHEVRON* DOCTRINE, at 80–97. The *Chevron* doctrine became an accepted mode of analysis, spreading throughout the federal judicial branch. Eventually, *Chevron* became one of the most-cited opinions in American public law. And not just cited: its two-step mode of analysis has been used by this Court in more than 100 decisions. *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron's *Domain*, 70 Duke L.J. 931, 1000–13 (2021).

Given its origins and its gradual acceptance by different Members of the Court, the *Chevron* doctrine has been refined over time in a series of decisions, many of which clarify and in some cases limit the doctrine. "*Chevron*," then, is not so much a case as a framing device that courts have used in reviewing agency interpretations of law. So the precise formulation of the question before the Court is whether it should repudiate this established framework for judicial review.

Because the *Chevron* framework has been regarded, at least until recently, as a settled aspect of federal law, the factors relevant to whether it should be disapproved or repudiated are similar but not identical to those that have been applied in determining whether to overrule precedent established in a single particular case. It is relevant that hundreds of federal judges in thousands of cases have relied upon it as a useful framing device. At the same time, the Court's multiple refinements of the doctrine, and the disagreements among Members of the Court about the proper formulation and legal status of the doctrine, indicate that the legal

community should have no strong expectation that the Court will not make further refinements in this framing device. *Compare Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019) (reaffirming the doctrine of "*Auer* deference" but setting forth "various circumstances in which such deference is 'unwarranted'" and "taking the opportunity to restate, and somewhat expand on, [its] principles").

B. There Is No Constitutional or Statutory Reason to Repudiate the *Chevron* Framework.

The Court has rarely seen fit to repudiate a longstanding framing device for determining the appropriate source of a rule of law. *Kisor*, which considered whether to disclaim the doctrine of *Auer v. Robins*, 519 U.S. 452 (1997), is one example of the Court's considering whether to do so. Another is *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), disapproving the practice, beginning with *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), of applying general common law in diversity cases. *Erie* is particularly instructive since it considered whether it was appropriate to "disapprove" a "doctrine" for determining the content of law that had been followed for 96 years and that federal courts had applied in countless decisions. *See* 304 U.S. at 69 ("The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.") (footnote omitted). The Court in *Erie* offered two justifications for deciding to reject the longstanding *Swift* doctrine: "the unconstitutionality of the course pursued has now been made clear, and compels us to do so," and the doctrine was inconsistent with the original meaning of a foundational federal statute, the Rules of Decision Act. *Id.* at 71–73, 77–78.

Both types of arguments—constitutional and statutory—have been advanced against *Chevron*. These arguments rest on a maximalist conception of the *Chevron* doctrine—one that requires reviewing courts to accept any reasonable interpretation by an agency of the statute it administers whenever that statute requires interpretation. With the understanding or clarification that this is not what the *Chevron* framework means, neither type of argument provides a basis for repudiating *Chevron*. *See generally* MERRILL, THE *CHEVRON* DOCTRINE.

1. The *Chevron* Framework Does Not Violate Article III If the Doctrine Is Limited to Circumstances of Congress's Actual Delegation to Administrative Agencies.

One assertion has been that *Chevron* violates a basic precept of Article III of the Constitution, namely, that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). In other words, the argument goes, *Chevron* deference derogates the unfailing duty of federal courts to exercise independent judgment in resolving issues of law in cases that come before them. *See, e.g., Michigan v. EPA,* 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring).

But the judicial duty to exercise independent judgment in declaring the law is not violated if a court concludes, in the exercise of independent judgment, that Congress has instructed the court to defer to the understanding of the law as determined by an administrative agency. As the Chief Justice has explained: "We do not ignore [*Marbury's*] command when we afford an agency's statutory interpretation

Chevron deference; we respect it. We give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law.'" *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (dissenting opinion). *See also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 27–28 (1983) ("the court is not abdicating its constitutional duty to 'say what the law is' by deferring to agency interpretations of law: it is simply applying the law as 'made' by the authorized law-making entity").

The paragraphs in *Chevron* that became the source of the *Chevron* doctrine acknowledged the point. Sometimes, the Court noted, Congress enacts "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." 467 U.S. at 843–44. That is most obvious in a provision, such as section 10(b) of the Securities Exchange Act of 1934, that instructs an agency to give meaning to a general statutory term through rules and regulations. *See* 15 U.S.C. § 78j(b) (outlawing "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe . . . for the protection of investors"); MERRILL, THE *CHEVRON* DOCTRINE, at 49–51 (noting this principle in pre-*Chevron* law); *id.* at 233 (identifying post-*Chevron* cases and summarizing how the principle applies in an appropriate *Chevron* framework). Legislative regulations adopted pursuant to such delegations, the *Chevron* Court correctly observed, "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844 (citing, *inter alia*, *Batterton v. Francis,* 432 U.S. 416, 424–26 (1977), which upheld a regulation adopted pursuant to an

express delegation to define "unemployment"). The Court went on to suggest that a "delegation [that] is implicit rather than explicit" should be given a similar degree of deference. *Id.*

The Court in *Chevron* did not spell out what it meant by an "implicit" delegation of power to interpret. Respect for implicit delegations can be squared with the duty of federal courts to exercise independent judgment about the meaning of the law, provided that an implicit delegation is understood always to mean an *actual delegation*, as determined by a careful examination by the reviewing court of the statute in question. In other words, if the reviewing court determines that Congress actually—if implicitly—intended that the agency exercise primary authority to interpret a statutory provision, subject to review for the agency's reaching "a reasonable interpretation," *id.*, then there is no violation of the judicial duty to "say what the law is." Indeed, this is supported by *Marbury* itself, which states immediately following the "duty" sentence: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." 5 U.S. (1 Cranch) at 177. *See* MERRILL, THE *CHEVRON* DOCTRINE, at 196. Where Congress has delegated rule application to an agency, the agency necessarily is an "expound[er] and interpret[er]." *See id.* ch. 10 ("The Principle of Legislative Supremacy").[6]

[6] The common law of agency similarly has long recognized that an agent's "actual" authority includes both the authority expressly granted and that implicit in the express grant. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 2.02(1) (ALI 2006) ("An agent has actual authority to take action designated or implied in the principal's manifestations to the agent").

The need to ground deference to the agency in a finding of actual delegation of interpretive authority has been unhelpfully obscured by a handful of post-*Chevron* decisions appearing to assume that such a delegation will be presumed whenever the reviewing court finds an "ambiguity" in a statute that generally delegates regulatory authority to an agency. *See, e.g.*, *Smiley*, 517 U.S. at 740–41 ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity 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."); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to fill the statutory gap in reasonable fashion."); *see also Buffington v. McDonough*, 143 S. Ct. 14, 18 (2022) (Gorsuch, J., dissenting from denial of certiorari) (discussing the rise of this broader interpretation).[7] Unfortunately, the term "ambiguous" is itself ambiguous. It could mean that a word or phrase can be reasonably interpreted in more than one way. Or, more expansively, it could mean that a statutory provision requires interpretation for any reason—including that it fails to address the question altogether. With the expansive meaning, the approach

[7] For a more in-depth discussion of *Smiley* and related cases, see MERRILL, THE *CHEVRON* DOCTRINE, at 184–89. For the better path forward than *Smiley*'s maximalist approach, see *id*. at 230–42.

of treating any ambiguity as an implicit delegation to the agency would in effect transfer primary interpretive authority to a qualifying agency whenever a statute requires interpretation. Such an understanding would indeed be in tension with the idea that federal courts have a duty to "say what the law is" in all cases that come before them.

Happily, the Court, applying the *Chevron* framework, usually has not understood agencies to exercise delegated authority whenever the statute they administer requires interpretation. Instead, in order to confirm that Congress has actually if implicitly delegated interpretive authority to an agency, the Court has engaged in statutory analysis, considering the nature of the agency, the history of the regulation in question, and the importance of the question in the context of the statutory scheme. This is the way the *Chevron* decision itself proceeded. 467 U.S. at 845–66; *see supra* p. 5. Such a careful analysis is similarly characteristic of numerous post-*Chevron* decisions. Sometimes the Court has concluded that Congress's use of a general term in a statute constitutes an implicit delegation of interpretive authority to the agency administering those provisions. *See, e.g., Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002) (concluding that a directive to the FCC to determine the "cost" of providing elements of telephone service includes the authority to interpret the term to mean forward-looking cost); *Entergy Corp. v. Riverkeeper, Inc*., 556 U.S. 208 (2009) (concluding that a directive to establish emissions controls based on "best technology," when considered in context with more-limiting statutory terms, permits the agency to consider the costs of different standards). In other instances, Congress has created penalties for violation of agency rules and orders or otherwise given

legal effect to specific agency action, and each of these, too, indicates a delegation to the agency to interpret the statute. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 576–90 (2002). At other times, by contrast, the Court has concluded that a consideration of the context of a statutory term reveals that no implicit delegation was intended. *See, e.g.*, *King v. Burwell*, 576 U.S. 473, 486 (2015) (concluding that Congress had not delegated authority under the Affordable Care Act "to the *IRS*"); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (refusing to interpret the Controlled Substances Act to give the Attorney General authority to make "quintessentially medical judgments"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143–56 (2000) (to find authority in the FDA to regulate tobacco products would be inconsistent with legislation subsequent to the original FDCA). And the basic principles of how to interpret implicit delegations of authority well antedate *Chevron*.[8]

[8] For example, compare two landmark cases decided under the 1887 Interstate Commerce Act: *ICC v. Cincinnati, N.O. & Tex. Pac. R. Co.*, 167 U.S. 479 (1897), which held that the act, creating the ICC, requiring all carrier-proposed rates to be "reasonable and just," and authorizing the agency "to execute and enforce the provisions of this act," did not implicitly delegate authority to the agency "to *prescribe* rates which should control in the future," *id.* at 500, 505–06 (emphasis added) (eventually leading in 1906 to the Hepburn Act, 34 Stat. 584), and the *Shreveport Rate Cases*, 234 U.S. 342 (1914), where the Court held that the 1887 act's grant of authority to the ICC to regulate interstate rates and to guard against unreasonable discrimination *did* implicitly delegate authority to the agency to regulate *intrastate* rates affecting interstate rates.

In short, the Article III objection to the *Chevron* framework can be answered by clarifying that it is not enough that a statute administered by an agency requires interpretation. The *Chevron* framework applies only if Congress has either expressly or implicitly (but actually) delegated interpretive authority to an agency to resolve the issue presented. *See generally* MERRILL, THE *CHEVRON* DOCTRINE ch. 11 ("Discerning the Boundaries of Agency Authority to Interpret").

2. The *Chevron* Framework Does Not Violate Article I If It Is Limited to Instances Where the Agency Acts Pursuant to Its Delegated Authority.

A second constitutional objection to the *Chevron* framework is that it undermines the grant of "[a]ll legislative powers" to Congress in Article I of the Constitution. *See, e.g., City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting). This Court has repeatedly recognized that "[a]dministrative agencies are creatures of statute" and "accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 665 (2022) (per curiam); *accord Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). The *Chevron* framework has been characterized as providing an inadequate basis for enforcing this important separation-of-powers principle. If reviewing courts must accept all reasonable administrative interpretations that implicate the scope of an agency's authority, the argument runs, then an agency can exploit this interpretive discretion to expand or contract the scope of its authority without a meaningful judicial check.

The Court recently answered this objection in part by recognizing what it has called the major questions doctrine: novel agency interpretations that address highly consequential economic and political questions require clear congressional authorization; statutory ambiguity is not enough. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). But only a small percentage of agency initiatives involve major questions; certainly, the decision of the National Marine Fisheries Service at issue here cannot be thus characterized. And the principle that agencies must abide by limitations on their authority applies to all forms of agency action, major and minor alike. So if the *Chevron* framework provides an inadequate basis to ensure that agencies act within the scope of their delegated authority, then this is a serious deficiency, affecting all but the small minority of agency initiatives that can be characterized as major questions.

Fortunately, the Court has already provided the appropriate qualification of the *Chevron* framework, designed to ensure that the heightened deference associated with that framework applies only when the agency acts within the scope of its delegated authority to regulate. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court held (8–1) that *Chevron* deference is appropriate only where an agency has been delegated authority to act with the force of law and the interpretation in question has been rendered in the exercise of such authority. *Id.* at 226–27. These preconditions to applying the *Chevron* framework, the Court made clear, must be resolved by the reviewing court as a matter of independent judgment. *See id.* at 229–31. That is, they must be considered at what "might be called step zero." Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 836 (2001); *see also* Thomas W. Merrill, *Step Zero*

After City of Arlington, 83 Fordham L. Rev. 753 (2014). If the preconditions are not met, then the agency interpretation is entitled, at most, to the type of deference associated with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Mead* has thus already established that, as a precondition to applying the *Chevron* framework, the reviewing court must determine, as a matter of independent judgment, that the agency is acting within the scope of its delegated authority to regulate.

The Court did not call this understanding into question in its subsequent decision in *City of Arlington v. FCC*, 569 U.S. 290 (2013). The decision rejected the proposition that there is a separate exception to the *Chevron* framework for "jurisdictional" questions. The Court explained that there is no separate category of jurisdictional questions in the administrative law context, because all limits on agency authority are effectively jurisdictional, in the sense that the violation by an agency of any limitation on its authority renders its action ultra vires. *Id.* at 297–98. In reaching this decision, the Court did not question the holding of *Mead*, which limited *Chevron* deference to agency interpretations that have the force of law. Indeed, it held that the *Mead* precondition was satisfied in that case. *Id.* at 306.[9]

---

[9] The Court's opinion in *Arlington* (by Justice Scalia) and the dissenting opinion (by the Chief Justice) disagreed about the specificity with which a reviewing court must determine that an agency has been delegated authority to act with the force of law. But all agreed that *Mead* requires that such a delegation be identified before the *Chevron* framework applies. *Compare* 569 U.S. at 306 (majority) *with id.* at 308–10 (Breyer, J., concurring) *and id.* at 322–24 (dissent). And no one disagreed with this proposition of the Chief Justice: "Courts defer to an agency's interpretation of law when and because Congress has conferred

Moreover, *Arlington* declined to review whether the FCC had actual authority to regulate the matter at issue, which concerned whether local government agencies must process applications to construct wireless transmission towers within a reasonable period of time. *Id.* at 294–95. The Court agreed to hear only the relatively abstract question whether *Chevron* should apply to an agency's determination of its own "jurisdiction."[10] *Arlington* thus cannot stand for the proposition that courts should not exercise independent judgment in determining whether an agency is acting within the scope of its authority to regulate. *Mead* establishes that *Chevron* applies only when an agency has authority to regulate. *Arlington* merely holds that when an agency is properly regulating, there is no additional limitation on *Chevron* for agency interpretations that can be said to be "jurisdictional."

The Article I objection to the *Chevron* framework—that it provides an inadequate basis to ensure that agencies act within the scope of their delegated authority—can therefore be answered by a simple reaffirmation of *Mead*, with the clarification (really the

---

on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency." *Id.* at 312 (dissent).

[10] The Court granted the petitions "limited to" the question whether *Chevron* should apply to an agency's determination of its own "jurisdiction" and denied review of the additional questions about whether the FCC could limit local authority over wireless transmission towers. 568 U.S. 936 (2012) (order on certiorari in two underlying cases); *see* Pet., *City of Arlington v. FCC*, 569 U.S. 290 (2013) (No. 11-1545); Pet., *City of Arlington v. FCC*, 569 U.S. 290 (No. 11-1547).

observation) that an agency can act with the force of law only if it has been delegated authority to regulate with respect to the question presented. *See* MERRILL, THE *CHEVRON* DOCTRINE, at 266.

The answer to the Article I objection is thus similar to the answer to the Article III objection: *Chevron* deference should be limited to actual (whether express or implicit) delegations of authority from Congress. This is so even though the objections are distinct. The Article I objection turns on whether Congress has actually delegated authority to the agency *to regulate* with the force of law in the area in which the precise question arises. A negative answer to that question will necessarily resolve the Article III objection: an agency's interpretation offered with respect to an issue as to which it has no delegated authority to regulate will be entitled at most to *Skidmore* treatment, but not *Chevron* deference. A positive answer to the question will not, however, necessarily satisfy the Article III objection. It is possible that even when an agency offers an interpretation with respect to an issue as to which it has authority to regulate, context-specific factors will reveal that Congress had no actual intent to delegate to the agency authority *to interpret* with respect to that issue. *See supra* pp. 13 (citing cases), 8–14 (answering Article III objection).

3. The *Chevron* Framework Does Not Violate the APA but Respects Congress's Delegations in Agencies' Organic Statutes.

The Court in *Erie* also cited a statutory reason for disapproving the doctrine of *Swift v. Tyson*. This was based on "the more recent research of a competent scholar" suggesting that the Rules of Decision Act, adopted as part of the Judiciary Act of 1789, was

intended to encompass state common law as well as statutory rules of decision. 304 U.S. at 72–73. Similarly, it has been argued that the Administrative Procedure Act, enacted in 1946, establishes a standard of review precluding *Chevron*-style deference to agency interpretations of law.

The APA, in Section 706, includes a number of provisions relevant to the "[s]cope of review" a court is to apply in reviewing agency action. The introductory statement says that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law." 5 U.S.C. § 706. Subsections go on to provide that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2). On any fair reading, these provisions direct courts to exercise independent judgment in determining whether the agency has complied with all relevant provisions of law.

If the *Chevron* framework were interpreted as requiring reviewing courts to accept any agency interpretation that is reasonable, it would be inconsistent with the APA's directive to exercise independent judgment in resolving "all relevant questions of law." But as noted above in connection with the Article III objection, the *Chevron* framework does not violate this injunction if the court concludes, as a matter of independent judgment, that Congress has actually (even if implicitly) delegated authority to an agency to exercise primary authority in interpreting the law. Nor does a reviewing court violate the injunction to determine whether the

agency has acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" if it concludes, as a matter of independent judgment, that Congress has expressly or implicitly (but always actually) delegated authority to the agency to act with the force of law to regulate in the matter in which the contested issue of law arises.

So the APA objection—like the constitutional objections—fails, provided that the *Chevron* framework is understood to be limited to circumstances in which Congress has actually delegated authority to the agency to interpret.

II. Other Objections to the *Chevron* Framework Can Be Addressed Without Overturning It.

The *Chevron* framework has elicited other objections, principally (1) that it promotes instability in the law by allowing successive administrations to adopt conflicting interpretations of the law's requirements and (2) that the framework creates a systematic bias in favor of agencies at the expense of persons affected by their directives. These objections are serious, but they are best addressed, as with the constitutional and APA objections, by reaffirming or clarifying important limitations on the *Chevron* framework.

A. Legal Instability Can Be Addressed, at "Step Two," by Considering Reliance Interests.

A prominent objection to the *Chevron* framework is that, by allowing successive administrations to adopt different but "reasonable" interpretations of statutory terms (even wholly opposite interpretations), it generates instability in the law. When this happens,

persons subject to agency regulation can fairly claim that they are being whipsawed by ever-changing legal requirements, creating great uncertainty about their legal obligations and making long-term planning difficult. The proper interpretation of the Clean Air Act, insofar as it applies to climate change, provides a prime illustration. The Bush II Administration interpreted the act narrowly, the Obama Administration broadly, the Trump Administration reverted to narrow interpretation, and the Biden Administration wants to go broad again. This was effectively the source of the dispute in *West Virginia*.[11]

In the era before *Chevron*, this kind of regulatory flip-flopping would have been met with judicial skepticism. The courts frequently said that they would give "weight" (sometimes "great deference" or "controlling weight") to interpretations contemporaneous with enactment of a statute or consistently maintained over a significant period of time. *See, e.g., Udall v. Tallman*, 380 U.S. 1, 16–18 (1965) (and cases cited). Agency interpretations inconsistent with past readings, in contrast, were viewed skeptically and given little or no "weight." *See, e.g., General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) ("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency."). This privileging of agency consistency created an incentive for agencies to adhere to settled understandings, which promoted the ability of regulated entities to rely

[11] Other examples of by-administration flip-flopping are discussed in MERRILL, THE *CHEVRON* DOCTRINE, at 163–64, 207–14, 317 n.28.

on administrative interpretations laid down in the past.

In *Chevron* itself, respondents argued that the EPA's interpretation of "stationary source" was entitled to no weight because the agency had changed its mind about whether this referred to an entire plant or to any emission source within the plant. 467 U.S. at 863. The Court rejected this argument in the particular case, commenting that "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863–64. Yet the canons giving an interpretation extra "weight" if it is contemporaneous with enactment of a statute or if it is maintained in a consistent and longstanding fashion date to the early decades of our Republic, and they keep popping up, even in decisions applying the *Chevron* framework. *See, e.g., Entergy Corp.*, 556 U.S. at 224 ("While not conclusive, it surely tends to show that the EPA's current practice is . . . reasonable . . . that the agency has been proceeding in essentially this fashion for over 30 years.").[12]

The concern about sudden changes in agency interpretation also appears in the Court's recent major question decisions, given the characterization of the

---

[12] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 942 (2017); Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 Fordham L. Rev. 1823 (2015). MERRILL, THE *CHEVRON* DOCTRINE, at 66–67, explains that in *Chevron* it was not the case that the agency had been unable to make up its mind about the best definition of "stationary source"; rather, the Court rejected the argument based on flip-flopping because the agency's oscillating interpretations had been dictated by the D.C. Circuit.

agency actions under consideration as entailing "novel," "unheralded," and "unprecedented" interpretations. *See West Virginia,* 142 S. Ct. at 2605, 2608; *see also Sackett v. EPA*, 143 S. Ct. 1322, 1365 (2023) (Kavanaugh, J., concurring in judgment) (a "longstanding and consistent agency interpretation reflects and reinforces the ordinary meaning of the statute").

To discourage agencies from using the *Chevron* framework to implement repeated changes in the law, the Court should reaffirm the "contemporaneous" and "longstanding" canons by affording more or less weight to agency interpretations, according to whether they conform to settled expectations about the law. The appropriate way to do so would be to incorporate these canons into *Chevron*'s step two, which asks whether the agency's interpretation is "reasonable." Favoring settled expectations and preserving reliance interests should not be absolute. If an agency in the exercise of delegated authority can assemble the data and arguments in support of a course correction, the reviewing court should give the agency's position respectful consideration. But if the reviewing court perceives that the agency is simply oscillating between one administration's political platform and another's, the appropriate response is for the court to announce its own best interpretation of the statute, putting an end to the gyrations. *Cf. Sackett*, 143 S. Ct. at 1332–35 (adopting an interpretation of the phrase "waters of the United States" against the backdrop of a history of fluctuating agency interpretations). This would require the contesting factions to direct their energies to Congress. In the meantime, a measure of stability in the law would have been restored, whether or not observers regarded the settlement as optimal. The insight that "in most matters it is more important that

the applicable rule of law be settled than that it be settled right," *Burnet v. Coronado Oil & Gas Co*., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), is relevant here.

B. Bias Toward Agencies Can Be Limited, at "Step Two," by Considering Agency Interpretation Processes.

The *Chevron* framework has also been criticized for creating systematic bias in favor of agency views about the law. If contested terms in the statute must be resolved in favor of the agency's interpretation, the argument runs, this stacks the deck in favor of the agency. By contrast, if disputes about statutory meaning must be resolved by an Article III court, the interpretation is more likely to be decided in a fair and impartial fashion, favoring neither agency nor those it seeks to regulate. *See Buffington*, 143 S. Ct. at 18–19 (Gorsuch, J., dissenting from denial of certiorari); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1211–12 (2016).

A preliminary and important point is that, insofar as the question involves the formulation of policy, a decision by Congress to delegate responsibility to an agency reflects a deliberate choice to give this responsibility to the agency, rather than a reviewing court. This is not an example of "bias" in favor of the agency, but rather a judgment by the people's representatives to charge the agency with particularizing the goals set forth in the enabling legislation.

The charge of bias makes more sense where the interpretation in question emerges from an enforcement action brought by an agency. Here, the agency can be said to be functioning as both prosecutor

and adjudicator, and deferring to its interpretation creates a nontrivial risk of bias in favor of the agency. Yet the vast majority of this Court's *Chevron* decisions have involved judicial review of agency regulations, and commentators have suggested that it would be appropriate to confine the *Chevron* framework to such proceedings. *See, e.g.,* Hickman & Nielson, 70 Duke L.J., at 964–82, 1000–13. That, of course, is the very setting in which the *Chevron* framework got its start.

An important theme in the lower courts in applying step two of the *Chevron* doctrine is that reasonableness should be assessed in terms of the process followed by the agency. *See* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 Notre Dame L. Rev. 1441, 1462–68 (2018). If the agency has adopted its interpretation in a process that affords an opportunity for public participation and the agency has provided a reasoned response to material criticisms advanced in that process, this should weigh in favor of determining that its interpretation is reasonable. This is another valuable clarification that the Court should provide, in an appropriate case, in spelling out what is "reasonable" under step two of the *Chevron* framework. Such a clarification would help to limit the potential for bias toward the agency.

III. A Decision Repudiating the *Chevron* Framework Would Be Destabilizing.

This Court has frequently reaffirmed the importance of *stare decisis*. The reasons for standing by what has been decided apply not just to previously decided cases but also to established "doctrines" and decisional frameworks. For the ultimate rationale for *stare decisis* is the promotion of stability and predictability in the law. *Stare decisis* is critical to the Court's legitimacy. If the Court does not stand by its

precedents and decisional frameworks, it cannot expect lower courts and other actors to do so either.

There can be no doubt that the *Chevron* doctrine has been regarded, at least until recently, as a settled decisional framework. *Chevron* is one of the most cited decisions in American public law, far surpassing *Marbury* among others.[13] It has been cited in some 244 decisions of this Court. Indeed, the two-step *Chevron* framework has been applied by this Court in more than 100 decisions reviewing an agency interpretation of law. Given this history, it would be difficult to explain why the *Chevron* framework has been discovered to be egregiously wrong, unworkable, in conflict with more recent developments in the law, or impervious to correction by Congress.[14]

An important factor in this connection is the differential capacity of this Court and the lower federal courts to engage in *de novo* review of all questions of statutory interpretation arising on judicial review. This Court decides approximately seventy cases per Term, of which only a handful involve the interpretation by an agency of the statute it administers. This caseload makes it possible for the Court to resolve questions of interpretation, arising under highly complex statutes, in what amounts to *de novo* interpretation of the statutes. *See, e.g., Becerra v.*

---

[13] Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, Yale J. Reg. Notice & Comment (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/.

[14] The question thus is less whether overruling the *Chevron* framework would endanger "reliance interests," Pet. Br. 21–22, 40–42, and more whether the legal community will retain confidence that legal methods long endorsed by this Court will not be lightly cast aside.

Empire Health Foundation, 142 S. Ct. 2354 (2022) (not relying on deference or referring to *Chevron* framework, in upholding agency construction of complex statute); *American Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (same analytical approach, in rejecting agency construction of complex statute). Lower federal courts have caseloads many times greater than this Court. As several commentators have pointed out, the lower courts do not have the decisional capacity to engage in an exhaustive review of every statutory interpretation question arising on judicial review. They need some means of cutting to the heart of the dispute, "out of a sheer instinct for self-preservation." Gary Lawson, *The Ghosts of* Chevron *Present and Future*, B.U. School of Law Research Paper Series No. 23-11, at 86 (Feb. 22, 2023) (forthcoming 103 B.U. L. Rev. (2023)), https://ssrn.com/abstract=4367469/; *see also* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 71 (2017); Nicholas R. Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 Geo. Wash. L. Rev. 1392, 1398 (2017). The *Chevron* framework has served as a method allowing the lower courts to engage in meaningful review of agency interpretations without having to resolve every such issue from scratch.

Presumably, some other deference doctrine, such as the one associated with *Skidmore*, could also function as a device for reducing the burden of judicial review on the lower courts relative to *de novo* interpretation. But the *Skidmore* doctrine has more moving parts than the *Chevron* framework, and it would take considerable effort by the lower courts, and by this Court on further review, to develop a uniform conception of how *Skidmore* deference should proceed. *See* Kristin E. Hickman & Matthew D. Krueger, *In*

Search of the Modern Skidmore *Standard*, 107 Colum. L. Rev. 1235 (2007). It is doubtful that the benefits of transitioning to a different standard of review would justify the uncertainty and other costs this would entail, relative to refining or reaffirming certain clarifications of the *Chevron* framework.

* * * *

In assessing the advantages and disadvantages of any decisional framework, it is important to ask: compared to what? It is probably impossible to devise a system of judicial review that satisfies all desired criteria. Any framework for assessing agency interpretations of law will inevitably be subject to a variety of tradeoffs.

If the alternative to the *Chevron* framework is *de novo* consideration by federal courts of all questions of law that arise in the course of judicial review, the result might be a reduction of bias toward agencies. But any such reduction in bias would be achieved at the expense of significant costs. One cost would be reduced uniformity in federal law, as different courts in different circuits adopted different interpretations of law that this Court does not have the institutional capacity to sort out. *See* Peter 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, 1121–22 (1987). Another cost might be more decisions that are not well informed about highly technical or specialized areas of the law. A third cost might be more decisions that do not cohere well with complicated statutory schemes that are difficult for generalist judges to easily comprehend.

A final cost might be, in some contexts, the replacement of bias in favor of agencies with an inappropriate elevation of the judiciary's role. As Justice Scalia, the foremost proponent of the *Chevron* framework, understood, the basic purpose of the *Chevron* doctrine is to prevent the transfer of "any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts." *Arlington*, 569 U.S. at 304. This understanding was shared by Justice Stevens when he authored the *Chevron* decision. He wrote: "[F]ederal judges—who have no constituency—have a duty to respect the legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" 467 U.S. at 866.[15]

This fundamental insight behind the *Chevron* framework for reviewing interpretations by agencies of the statutes they administer should be preserved.

---

[15] The suggestion, Pet. Br. 36–38, that requiring federal courts in administrative-review cases to decide all questions of law *de novo* would induce Congress to reach compromises about disputed issues of policy, is unrealistic. The more likely effect would be to make judicial confirmation hearings even more contentious.

CONCLUSION

The *Chevron* framework warrants appropriate clarification on several points but should be reaffirmed.

Respectfully submitted,

JAMES B. SPETA
6254 N. Glenwood Ave.
Chicago, Illinois 60660
(773) 965-1624

JOSEPH D. KEARNEY
Counsel of Record
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 313-0504
kearney89@gmail.com

Counsel for Amicus Curiae Professor Thomas W. Merrill

July 21, 2023