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 D.C. Circuit*

## BRIEF OF THE CATO INSTITUTE AND COMMITTEE FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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## QUESTION PRESENTED

Whether the Court should overrule *Chevron*.

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

**Regulations**

## INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs, conducts conferences, and produces the annual *Cato Supreme Court Review*.

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This case interests *amici* because *Chevron* deference undermines the separation of powers, and the separation of powers is one of the fundamental constitutional protections against government overreach.

## SUMMARY OF ARGUMENT

On June 26, 1984, the New York Times ran a story on page A8 about an administrative law opinion

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[1] Rule 37 statement: No party's counsel authored this brief in any part and *amici* alone funded its preparation and submission.

issued by this Court the previous day. The ninth paragraph of that article noted that the opinion "contained broad language on the need for courts to defer to agency interpretations of ambiguous statutes, language that is likely to find its way into future administrative law rulings on subjects far removed from the Clean Air Act."[2] Fifteen thousand citations later, this prediction can now safely be characterized as an understatement.

The *Chevron* doctrine had ostensibly innocent beginnings. This Court's opinion framed *Chevron* deference not as a watershed, but instead as merely the natural extension of preexisting statutory canons of construction. *See Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984); *Buffington v. McDonough*, 143 S. Ct. 14, 17–18 (2022) (Gorsuch, J., dissenting from denial of cert.). It is now clear, however, that *Chevron* deference is fundamentally unlike anything that came before. It is unconstitutional and ahistorical. And not only was *Chevron* unconstitutional when it was penned, over the past forty years its constitutional problems have only grown—now it is a doctrine of reactionary deference, rather than the last-resort interpretive method the Court originally envisioned. Over these years, *Chevron* has wreaked havoc in the lower courts upon people and businesses.

One such business is Loper Bright Enterprises. Loper Bright and the other petitioners in this case are herring fishers who face significant financial hardships under new regulations issued under the supposed authority of the Magnuson-Stevens Act ("MSA"). Pet. at 7. The MSA divided the nation's fisheries into

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[2] Linda Greenhouse, *Court Upholds Reagan on Air Standard*, N.Y. TIMES, June 26, 1984, at A8.

several regions, each with a "fishery management council" tasked with creating a "fishery management plan" for that region. *Id.* at 3–4. Per the MSA, these "fishery management plans 'may require that one or more observers be carried on board a [fishing] vessel.'" *Id.* at 4; 16 U.S.C. § 1853(b)(8) (1996).

In 2020, the National Marine Fisheries Service ("NMFS") invoked this authority to require "industry funded monitoring" of catch amounts for vessels fishing in New England waters. Pet. at 8–9; 85 Fed. Reg. 7,414 (Feb. 7, 2020). This regulation financially harms commercial fishers in multiple ways. For example, they must make room on a crowded vessel to carry a monitor, which takes up valuable working space and adds costly weight. Pet. at 24. Even more onerously, they must pay the monitor's wages. *Id.* at 10. This can cost up to $710 a day and is expected to reduce their profits by 20%. *Id.* Those who refuse to pay for monitors are prohibited from fishing for herring. *Id.*

The petitioners sued, but the district court upheld the agency's regulation as within NMFS's authority to "require that one or more observers be carried on board." *Id.* at 10–11. Although the court of appeals affirmed, it relied on a different rationale. The panel held that the MSA was ambiguous as to whether fishing operations could be forced to pay the cost of their own monitoring. But the panel concluded that NMFS's interpretation of the statute was a reasonable one. The court therefore held for the government at "Step Two" of the *Chevron* Doctrine. *Id.* at 12–13.

It is time for this Court to overrule *Chevron*, and this is the case to do it. The judicial deference that *Chevron* mandates is incompatible with the Constitution's design for at least three reasons.

First, *Chevron* deference violates the separation of powers by depriving the judiciary of its Article III judicial power. *See Michigan v. E.P.A.*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("*Chevron* deference precludes judges from exercising [independent] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction.") (citation omitted); *see also* Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 506–07 (2016).

Second, *Chevron* deference rests on the premise that Congress can delegate Article III power to a federal agency. *See* Charles J. Cooper, *The Flaws of* Chevron *Deference*, 21 TEX. REV. L. & POL. 307, 310–11 (2016). But Congress does not have any Article III power, and it cannot delegate a power that it does not have to begin with. *Id.*

And third, *Chevron* violates due process. Under *Chevron*, courts favor the agency's interpretation merely *because* it is the agency's interpretation. And when courts put a thumb on the scale to give an agency's interpretation *more* weight, courts necessarily give a challenger's opposing interpretation *less* weight. For that reason, the challenger is denied an impartial adjudication, which is the core of due process. Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1211–13 (2016).

When it comes to *Chevron*, the Court should not take half measures, as some suggest. *See* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE 261–68 (2022); Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 MO. L. REV. 983, 987–94 (2016); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference*, GEO.

L.J. 1083, 1179–96 (2008). History shows that any new version of *Chevron* deference would still be unworkable.

*Chevron* has evolved continuously over the past 39 years: The *Chevron* test of 1984 is not the same test that has been applied across the decades since. *Chevron* has become a Leviathan that the *Chevron* Court never dreamed of. Rather than applying interpretive tools to find the meaning of statutory text, as *Chevron* itself instructed, courts use *Chevron* as an excuse to quickly defer. And courts have struggled to apply *Chevron* consistently. Even as this Court has narrowed the circumstances in which deference applies, the test has remained too underdetermined to be applied consistently. History has shown that no matter how *Chevron* is adjusted, it will remain too unworkable to be salvaged. The Court should end the failed four-decade *Chevron* experiment.

## ARGUMENT

### I. *Chevron* Deference Was Unprecedented

#### A. The Pre-*Chevron* Cases

Defenders of *Chevron* often claim that courts have deferred to agencies going as far back as the nineteenth century. *See, e.g.*, Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 679–80 (2020). But that is misleading. Nineteenth-century courts referenced the executive's legal interpretations as *persuasive* authority in certain situations, but that was a far cry from *Chevron* deference. Through the early twentieth century, courts looked to agency interpretations when applying two canons called the "contemporaneous" and "customary" canons of

construction.[3] Neither of these two canons were comparable to *Chevron* deference, and neither provides a historical precedent for *Chevron* deference. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 933–38 (2017); MERRILL, *CHEVRON* DOCTRINE, *supra*, at 34.

First, the "contemporaneous" canon held that ambiguous statutes should be interpreted as they were interpreted contemporaneously with the statute's enactment. This canon traces its roots as far back as the fifteenth century, when one treatise held that the most persuasive authorities were those written nearest in time to a statute's enactment. *See* A DISCOURSE UPON THE EXPOSICION AND UNDERSTANDINGE OF STATUTES WITH SIR THOMAS EGERTON'S ADDITIONS 151 (Samuel E. Thorne ed., 1942).

Second, the "customary" canon held that ambiguous texts should be interpreted as they have been over a long course of time. This canon can be traced back to third-century Roman law. Bamzai, *Origins*, *supra*, at 937 n.113. And this canon also was applied in the English common law. *See, e.g.*, *Stevens v. Duckworth*, 145 Engl. Rep. 486, 487 (1664) ("[T]he reason of a law, and the design, of the law-makers, must be judged of by what has been the constant practice ever since . . . .").

Together, these two canons looked to prior interpretation and past usage to determine the meaning of statutes. Several American Founders, including Hamilton and Madison, acknowledged and applied these canons when interpreting statutes. *See, e.g.*, 2 Annals

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[3] *See* Brief for Cato Institute and Liberty Justice Center as *Amici Curiae* Supporting Petition for Writ of Certiorari at 5–16, *Loper Bright Enterprises v. Raimondo*, (No. 22-451) (filed Dec. 9, 2022).

of Cong. 1945–46 (1791); Bamzai, *Origins*, *supra*, at 938–41.

This Court also frequently applied these canons in the nineteenth century. For example, in *Edwards' Lessee v. Darby*, the Court explained that in "the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." 25 U.S. (12 Wheat.) 206, 210 (1827). The Court gave substantial weight to the agency's contemporaneous interpretation of the statute, especially since the legislature had affirmed that interpretation shortly thereafter. *Id.* at 209–10. Crucially, the Court gave credence to the agency's interpretation *because* it was contemporaneous and consistently held, not simply because it was the agency's. *See id.* at 210.

This Court further emphasized the distinction between consistent and inconsistent agency interpretations in another nineteenth century case, *Merritt v. Cameron*, 137 U.S. 542 (1890). In *Merritt*, the Court declined to give any special recognition or deference to an executive department's legal interpretation. The interpretation had not been adopted until twelve years after the statute was enacted, and it had been abandoned by the executive five years prior to the case. *Id.* at 552. As the Court explained, an executive interpretation only deserved "conclusive and binding" status if it was "the contemporaneous construction" and had been "continuously in force for a long time." *Id.*

Courts regularly applied these canons during the late nineteenth century. *See, e.g.*, *The "City of Panama*," 101 U.S. 453, 461 (1879) (concluding that the "rule is universal that the contemporaneous

construction of such a statute is entitled to great respect," especially when that interpretation "has prevailed for a long period"); *Schell v. Fauché*, 138 U.S. 562, 572 (1891) (emphasizing that the contemporaneous construction of "the officials whose duty it is to carry the law into effect, is universally held to be controlling"). But courts also recognized the limits of these canons. In *United States v. Haley*, the Court rejected the Department of the Interior's interpretation because the Department's view had been inconsistent. 160 U.S. 136 (1895). It was therefore the Court's "duty to determine the true interpretation of the [statute], without reference to the practice in the department." *Id.* at 145.

In none of these cases did the Court "defer" to the executive branch because of the executive's expertise or because of its mere status as the executive. Rather, the Court respected the consistently held, contemporaneous interpretations of the executive branch. If the executive branch's interpretation was neither long held nor contemporaneous, the Court applied its own judgment. Courts thus required that the executive's interpretation be much more than just "reasonable" to merit deference. *See* Bamzai, *Origins*, *supra*, at 930–65.

With some exceptions, courts generally applied these two canons into the early twentieth century. *Id.* at 968–69. One of these exceptions was in the mandamus cases, where courts applied a more deferential form of review due to the unusual cause of action of a writ of mandamus. Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 209 (1991). Between 1805 and 1875 there was no general federal jurisdiction to review agency actions. Plaintiffs' main recourse against

unlawful executive action was to file a writ of mandamus requesting that the executive either perform a required act or stop performing an offending act. *See* Bamzai, *Origins*, *supra*, at 950–51; *see also* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the* Appellate *Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 947 (2011).

Starting in 1840 with *Decatur v. Paulding*, writs of mandamus were reviewed deferentially, and courts could not second-guess executive actions when the executive was given discretion by law. 39 U.S. (14 Pet.) 497, 515 (1840). But this deferential review was limited to mandamus actions; deference was only given because of the unusual nature of that cause of action. *See* Bamzai, *Origins*, *supra*, at 958. Other actions were still reviewed *de novo*. *See United States ex rel. Dunlap v. Black*, 128 U.S. 40, 48 (1888). Once general federal jurisdiction was instituted under the Jurisdiction and Removal Act of 1875, mandamus actions mostly ceased. *See* Ch. 137, § 1, 18 Stat. 470, 470 (1875) (codified as amended at 28 U.S.C. § 1331). Courts then returned to reviewing executive interpretations *de novo* and applying the contemporaneous and customary canons. Bamzai, *Origins*, *supra*, at 955; Woolhandler, *supra*, at 239.

But in the early-to-mid-twentieth century, this Court moved away from applying these canons and instead began giving deferential weight to agency interpretations even when they were not contemporaneous or long held. This period was defined by three cases: *Gray v. Powell*, 314 U.S. 402 (1941), *NLRB v. Hearst Publ'ns*, 322 U.S. 111 (1944), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

First, in 1941, the Court upheld an agency's interpretation of coal "producer" because Congress had delegated that authority to experts. *Gray*, 314 U.S. at 411–12. The Court refused to "substitute its judgment for that of the [agency]." *Id.* The dissent, however, argued that it was the role of the Court to review the agency's statutory interpretation and that the Court was abdicating its duty by accepting the agency's interpretation. *Id.* at 420 (Roberts, J., dissenting).

The Court's deferential approach continued in 1944 in *National Labor Relations Board v. Hearst Publications*, where the Court explained that the specific application of statutory terms was left to agencies, not courts. 322 U.S. at 131. Emphasizing the agency's expertise, the Court held that the agency's definition was "to be accepted if it ha[d] 'warrant in the record' and a reasonable basis in law." *Id.* at 131.

Also in 1944, the Court deferred, or in its words gave "respect," to an agency's statutory interpretation after finding that it was reasonable. *Skidmore*, 323 U.S. at 140. *Skidmore* deference is often considered "persuasive deference" because its balancing test is not binding—courts may defer but are not required to. *See* MERRILL, *CHEVRON* DOCTRINE, *supra*, at 44.

Ultimately, the new type of deference exemplified in these three cases would culminate decades later in *Chevron v. Natural Resources Defence Council*.

This overview of nineteenth and early twentieth-century cases shows that *Chevron* deference is not a creature of history. It was not until the mid-twentieth century and the rise of the administrative state that courts truly deferred on legal interpretations. Prior to the mid-twentieth century, courts simply applied canons of construction that gave weight to the customary

and contemporaneous interpretation of the executive branch. *Chevron* is ahistorical and should be overruled.[4]

### B. *Chevron* Itself

In 1984, Justice Stevens authored this Court's opinion in *Chevron*, which was an accidentally revolutionary decision. *See* John Paul Stevens & Linda Greenhouse, *A Conversation with Justice Stevens*, 30 YALE L. & POL. REV. 303, 315 (2012).

*Chevron* involved the Environmental Protection Agency's ("EPA's") interpretation of the Clean Air Act ("CAA"). *Chevron*, 467 U.S. at 840. The CAA required permits for "new or modified major stationary sources" of air pollutants. *Id.* The EPA issued a regulation that treated each plant as a single "stationary source." This allowed owners to construct or modify buildings *within* a plant without a permit, so long as the total pollution emitted by the whole plant did not increase. *Id.* This was referred to as the "bubble" concept. *Id.*

The EPA's regulation was challenged in the D.C. Circuit, which set aside the regulation as "inappropriate" and contrary to the statute's purpose. *See id.* at 841; MERRILL, *CHEVRON* DOCTRINE, *supra*, at 59. The Supreme Court reversed, holding that the agency's "bubble" interpretation was permissible under the statute. *Chevron*, 467 U.S. at 866.

The Court's statutory interpretation began with the most famous part of the opinion—the two-step

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[4] Once overruled, there are multiple interpretive rules that could replace *Chevron*. One such option would be to apply the contemporaneous and customary canons once again, especially to agencies' legal interpretations. *See* Aditya Bamzai, *Judicial Deference and Doctrinal Clarity*, 82 OHIO ST. L.J. 585, 594–98 (2021).

standard of review for agencies' legal interpretations. Under this standard, a court must first consider "the question whether Congress has directly spoken to the precise question at issue." *Id.* at 842. This first question should be "the end of the matter" if "the intent of Congress is clear," because courts "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. At this stage, courts must employ "the traditional tools of construction" to ascertain whether "Congress had an intention on the precise question at issue." *Id.* at 843 n.9.

It was the second step, however, that would make *Chevron* a landmark case. If a court finds that "Congress has not directly addressed the precise question at issue," then the agency's interpretation can become determinative. *Id.* at 843. In this situation, *Chevron* instructed that a court should "not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Id.* Instead, courts should ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* If the answer is yes, the court must defer.

But after laying out this seemingly revolutionary test, the Court proceeded with a statutory analysis that was surprisingly typical of its time. The Court first examined the statutory text, but it concluded that "the language of [the statute] simply" did not "compel any given interpretation of the term 'source.'" *Id.* at 859–60. The Court then turned to the definition of "stationary source" as used in a different statutory provision, because that usage shed "as much light on the meaning . . . as anything in the statute." *Id.* at 860. But even this evidence was unhelpful, because the "meaning of a word must be ascertained in the context of achieving particular objectives." *Id.* at 861. The

Court next turned to the legislative history, but that was also "unilluminating." *Id.* at 862–63.

The Court finally concluded that the "language may be reasonably interpreted" the way the agency had interpreted the statute. The Court found that this interpretation accorded with Congress's discernible intent. *Id.* at 861–62.

The challengers had argued that the agency's interpretation should not receive any deference because the agency had been inconsistent. *Id.* at 863. This argument was understandable, since consistency had previously been necessary for agencies to benefit from the "customary" canon. But the Court held that consistency was no longer necessary for agencies to receive deference. Interpretations are "not instantly carved in stone," the Court maintained, and agencies should be allowed the flexibility to pivot in "technical and complex area[s]." *Id.* at 863–64. Even though the agency had flipped its interpretation when the White House had flipped parties, the Court dismissed the agency's initial Carter-era interpretation as merely acquiescence to the D.C. Circuit, which had read the statute inflexibly in a prior case. *Id.* at 853–58, 864. The Court concluded that the agency had not truly changed its own *independent* interpretation of the statute. *Id.* at 865.

The Court ended its opinion with a rhetorical defense of judicial deference to the executive: Since Congress did not address the specific question at issue, that statutory gap should be filled by the branch with the next most political accountability. The executive branch had more political accountability and more expertise than the judiciary, which doubly justified deference in the eyes of the Court. *Id.* at 865.

*Chevron* was an accidental revolution, because the approach that the Court actually applied did not match the radical language of the test *Chevron* laid out. This is the irony of *Chevron*: it is famous for its two-step test, but the opinion itself did not follow this new test. Instead, the Court applied deference that looked very similar to other then-recent cases. For example, *Chevron* quoted from *United States v. Shimer*, 367 U.S. 374, 383 (1961), which stated that courts "should not disturb [the agency's choice] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." The *Chevron* Court similarly analyzed the text and legislative history *before* turning to the agency's interpretation and finding it to be reasonable. *Chevron*, 467 U.S. at 859–63. *See* MERRILL, *CHEVRON* DOCTRINE, *supra*, at 55–56, 71–72, 79.

Although *Chevron* did not immediately break new ground in its interpretive approach, its language would nonetheless revolutionize administrative law and make *Chevron* this Court's most cited administrative law decision. *See* Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 1–5 (2013); Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014). In hindsight, *Chevron* was unlike the other deferential cases of the early-to-mid-twentieth century because the Court's language created a *binding* rule for analyzing agency interpretations. MERRILL, *CHEVRON* DOCTRINE, *supra*, at 72–73. *Chevron* was not the first time the Court had given weight to an agency's interpretation because it was reasonable and permissible under the statute. *See Shimer*, 37 U.S. at 883; MERRILL, *CHEVRON* DOCTRINE,

*supra*, at 72–73. But *Chevron* transformed this principle into a mandatory rule, instructing lower courts that they *must* defer if an agency's interpretation lies anywhere within reasonable bounds.

The second part of the *Chevron* two-step test was unconstitutional, but its damage would have been limited if courts had faithfully applied the tools of construction before reaching that step, as instructed and demonstrated in the opinion itself. *Chevron*, 467 U.S. at 843 n.9. But as subsequent history shows, that did not happen.

## II. How Does a Court Determine Ambiguity? That is Ambiguous.

In the decades following *Chevron*, this Court has struggled to consistently determine when a statute is ambiguous and when to instead apply the traditional tools of construction and reach an independent judgment. This history shows that no matter what test the Court has attempted to formulate, the definition of an "ambiguous" statute has itself remained hopelessly ambiguous.

### A. Early Post-*Chevron* Cases Took an Inconsistent Approach to "Ambiguity."

One of the first major cases applying *Chevron* was *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The question was whether the "well-founded fear" and "clear probability" standards were the same under the Immigration and Nationality Act. *Id.* at 445–46. Justice Stevens again wrote the Court's opinion, but this time the Court did not defer. Quoting *Chevron*'s reference to the "traditional tools of statutory construction," the Court

employed those traditional tools to determine Congress's intent. *Id.* at 448.

Looking at the "plain language" of the statute, parallels with other statutes, and the legislative history, the Court determined that the statute was unambiguous and that the standards were not the same. *Id.* at 449–50. Even though the term "well-founded fear" may have been ambiguous, the Court was not tasked with defining that term; the Court only had to decide whether the two standards were identical. *Id.* at 448. The Court thus declined to defer under *Chevron* because applying the canons of construction answered the "precise question at issue." *See Chevron*, 467 U.S. at 843 n.9.

Justice Scalia, concurring in the judgment, critiqued the majority's discussion of *Chevron*, arguing that since the statute was unambiguous, the discussion of *Chevron* was superfluous. *Cardoza-Fonseca*, 480 U.S. at 452–54 (Scalia, J., concurring in the judgment). Justice Scalia further claimed that Justice Stevens, writing for the majority, had misinterpreted his own majority opinion in *Chevron*. *Id.* at 453–54.

Justice Scalia interpreted *Chevron* to require "that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent." *Id.* at 454. Justice Scalia thought language in the *Cardoza-Fonseca* majority opinion was "flatly inconsistent with this well-established interpretation." *Id.* In Justice Scalia's view, the majority had wrongly implied "that courts may substitute their interpretation of a statute for that of an agency whenever, employing traditional tools of statutory construction, they are able to reach a conclusion as to the proper

interpretation of the statute." *Id.* (quotation marks and brackets omitted). Justice Scalia found this characterization of the scope of *Chevron* deference to be too narrow, "authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue." *Id.*

What is the difference between Justice Scalia's view of *Chevron* and the *Cardoza-Fonseca* majority's view? It is the difference between a statute that has an "unambiguously expressed intent" and a statute that falls short of this standard but that nonetheless gives a court enough clues "to reach a conclusion as to the proper interpretation." *Id.* at 454. In Justice Scalia's view, deference was required for all interpretations of statutes except those which fell in the former category. Justice Scalia believed that declining to defer to interpretations in the latter category would "eviscerat[e]" *Chevron* and "make deference a doctrine of desperation." *Id.*

Three years later in *Dole v. United Steelworkers*, the Court again refused to defer and instead applied the tools of construction. 494 U.S. 26, 34–35 (1990). Applying the textual canons, the Court narrowed down the possible interpretations to only two, one of which was the agency's. But the Court concluded that the agency's interpretation was "counterintuitive and contrary to clear legislative history," and the Court thus chose the other interpretation. *Id.* at 40.

Justice White dissented, arguing that the text of the statute could not have been so clear as to foreclose deference because the Court needed ten pages to explain why the text was unambiguous. *Id.* at 43 (White, J., dissenting). Justice White further highlighted the Court's apparent acknowledgement that the agency's

interpretation was a reasonable one. The majority had called the agency's interpretation "not the most natural reading of this language," but a reading that is "not the most natural" can still fall within the bounds of permissibly reasonable interpretations. *Id.* at 44–45 (White, J., dissenting).

Once again, a dissent made a compelling argument that *Chevron* deference would have been appropriate if *Chevron*'s broadest language were read literally. But once again, a majority of the Court declined to defer and instead applied the tools of statutory construction to decide the case.

That same term, in *Sullivan v. Everhart*, the Court again addressed how courts should define ambiguity. 494 U.S. 83 (1990). Justice Scalia, writing for the majority, determined that the agency's interpretation was not "an inevitable interpretation of the statute," but it was "assuredly a permissible one," and for that reason the Court deferred. *Id.* at 93.

Justice Stevens dissented, explaining that the Court needed to apply the canons of construction more rigorously prior to deferring under *Chevron*. *Id.* at 103 (Stevens, J., dissenting). Justice Stevens insisted that it was unnecessary for Congress to "express its intent as precisely as would be possible" in order for the statute to be unambiguous. *Id.* at 106. Justice Stevens suggested that the text of the statute at issue may have not explicitly precluded the agency's interpretation because Congress simply never envisioned the agency making such an interpretation. *Id.* at 104–06.

However, the Court's approach to *Chevron* swung back again that same term in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990). In that case, the majority explained that *Chevron* deference is not warranted just

because a statute fails to speak to every potential issue or address all possible interpretations. *Id.* at 649. The tension between this approach and the approach in *Sullivan* was notable. While *Sullivan* had held a statute to be ambiguous because it did not *preclude* the government's interpretation, *Adams Fruit* held a statute to be *un*ambiguous even though it did not explicitly address every potential interpretation.

In one term alone, the Court wavered in its approach to "ambiguity" across three cases. This inconsistency in defining ambiguity demonstrates how hard it is for judges to firmly define ambiguity and how individual judges themselves can fluctuate in their own analysis. *See* Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2134–44 (2016).

### B. *Chevron* Deference Expands to New Circumstances and New Justifications.

The next several years would see the Court expand *Chevron* deference to situations that were likely unforeseen in 1984. In *Pauley v. Bethenergy Mines*, 501 U.S. 680 (1991), the Court again deferred under *Chevron*. But remarkably, the Court's opinion did not find that the statute could be read multiple ways or that the statute was "ambiguous." Instead, the Court held that the statute had implicitly *mandated* interpretive deference for the agency.

The statute at issue required that new agency regulations "not be more restrictive than" certain interim regulations that had already been promulgated by another agency. *Id.* at 697–98. The Court held that this provision implicitly delegated authority to the agency to interpret those interim regulations and determine just how restrictive they were.

This was necessary, the Court held, for the agency to determine the scope of its own authority. *Id.* at 698. Instead of deferring because the statute was ambiguous, the Court thus deferred because it saw an express Congressional mandate to defer. This not only gave the agency authority to gap fill, but also to determine how large those gaps were.

In *Holly Farms Corp. v. National Labor Relations Board*, the Court determined that the petitioner's interpretation was "a plausible, but not an inevitable, construction" of the statute. 517 U.S. 392, 401 (1996). The Court only spent three sentences analyzing the statute and Holly Farms' interpretation before turning to the agency's interpretation and applying Step Two.[5] *Id.* at 401. Like in *Sullivan*, the Court broadly applied *Chevron* deference and ignored *Chevron*'s own command to apply all the tools of construction first. Justice O'Connor dissented and critiqued the majority for spending "the bulk of its opinion" analyzing reasonableness but giving "remarkably short shrift to the statute itself." *Id.* at 410 (O'Connor, J., dissenting).

The Court offered a similarly sparse analysis in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996). The Court held that a statute was ambiguous because two state supreme courts had interpreted the statute differently. Because of these two courts' different interpretations, the Court opined that "it would be difficult indeed to contend that the word" in the statute was "unambiguous with regard to the point at issue here." *Id.* at 739. The Court did not apply the tools of construction to find the statute's meaning, but

[5] It was four sentences if a footnote responding to the dissent is included. *Id.* at 399 n.6.

instead only relied on this split decision as nearly conclusive evidence of ambiguity.

The Court returned to the canons of construction, however, in *General Dynamics Land Systems, Inc., v. Cline*, 540 U.S. 581 (2004). The Court explained that under *Chevron* and *Cardoza-Fonseca*, "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Id.* at 600. The Court declined to defer because the agency's interpretation was "clearly wrong." *Id.* at 600. The Court found that "regular interpretive method leaves no serious question, not even about purely textual ambiguity in the [statute]." *Id.* Like in *Cardoza-Fonseca*, and unlike in *Holly Farms* and *Smiley*, the Court applied the traditional interpretive tools and did not defer. The Court continued shifting from case to case on whether and when to apply the tools of construction.

In *Smith v. City of Jackson*, the Court did not even cite *Chevron*. 544 U.S. 228 (2005). The majority applied the canons of construction—including the customary canon—and looked at the text, precedent, and the regulations at issue. *Id.* at 233–40. Justice Scalia concurred in part and concurred in the judgment, calling *Smith* a "classic case for deference," because the agency promulgated the rule at issue under explicit Congressional authority, and the agency's rule was "reasonable." *Id.* at 243–44 (Scalia, J., concurring in the judgment). Justice Scalia cited the long-held nature of the agency's interpretation as evidence of the interpretation's reasonableness. *Id.* at 244.

Two years later, *Zuni Public School v. Department of Education* raised a novel question concerning

the order in which to apply the *Chevron* steps. 550 U.S. 81 (2007). Justice Breyer's opinion for the Court essentially reversed the order of the *Chevron* steps, holding that the agency's interpretation was reasonable *before* turning to whether the statute was ambiguous. *Id.* at 90. The Court held that the "background and basic purposes" of the statute gave "unusually strong indications that Congress intended to leave the Secretary free" to interpret the statute as the agency had. *Id.* at 90. These background principles, like the statute's history, also showed that the agency's interpretation was "reasonable." *Id.* at 93. Then, the Court turned to the language of the statute to confirm that the statute was ambiguous and was indeed "broad enough to permit the Secretary's reading." *Id.* at 93–100.

Even though the Court had originally justified *Chevron* deference as a solution to ambiguous statutory *language*, *Zuni* looked to "considerations other than language" to defer to the agency. *Id.* at 90–91. Specifically, the Court relied on the complexity of the regulatory regime and the history of the statute and regulations that enforced it to reach its initial conclusion that deference was justified. *Id.* at 90.

Effectively, the Court treated the tools of statutory interpretation as only a last hurdle for the agency's interpretation to pass. In a concurrence, Justice Kennedy wrote that if this approach became systemic, "it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes." *Id.* at 107 (Kennedy, J., concurring).

In *Negusie v. Holder*, the majority and dissent again disagreed on the use of the tools of construction. 555 U.S. 511 (2009). Justice Kennedy, writing for the

majority, found the statute ambiguous and remanded "to the agency for its initial determination of the statutory interpretation question." *Id.* at 524.

Justice Stevens dissented. He urged that the Court's application of *Chevron* was too broad and that the Court should not have deferred on a purely statutory question. Justice Stevens believed that under *Cardoza-Fonseca*, that was a question for the Court to decide, not the agency. *Id.* at 533–35 (Stevens, J., dissenting). Twenty-five years after *Chevron*, that opinion's author now had one of the narrowest views of *Chevron* deference on the Court.

In *Holder v. Gutierrez*, the Court again declined to fully analyze the statutory text at Step One. 566 U.S. 583 (2012). The unanimous Court determined that the agency's interpretation of the statute read "like a multitude of agency interpretations—not the best example, but far from the worst—to which we and other courts have routinely deferred." *Id.* at 597–98. Even though the agency's explanation may have read *like* other interpretations that the Court had deferred to, the Court did not explain how the statute at issue authorized the agency's reading.

*Cuozzo Speed Technologies, LLC v. Lee* was the last time this Court has deferred under *Chevron*, finding ambiguity because the statute allowed the application of two different standards. 579 U.S. 261 (2016). Justice Thomas concurred, noting skepticism of "*Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law." *Id.* at 286 (Thomas, J., concurring). Justice Thomas urged the Court to reconsider the "fiction of *Chevron* and its progeny." *Id.*

### C. This Court Has Not Deferred Under *Chevron* in the Past Seven Years.

In the past seven years, the Court has settled into a pattern of declining to defer under *Chevron* in cases where deference could have been invoked. In *SAS Institution v. IANCU*, the Court did not apply *Chevron* but rather employed the "traditional tools of interpretation." 138 U.S. 1348, 1358 (2018). Justice Breyer dissented, explaining his view that those interpretive tools showed that the statute was ambiguous. *Id.* at 1360. For that reason, Justice Breyer would have deferred under *Chevron*.

In *BNSF v. Loos*, the Court applied the tools of construction, including the customary canon, giving weight to "the IRS's long held construction . . . ." 139 U.S. 893, 899 (2019). In *American Hospital Association v. Becerra*, the unanimous Court declined to defer and employed the traditional tools of interpretation. 142 S. Ct. 1896 (2022). And in *Becerra v. Empire Health Foundation*, the Court applied the canons of construction and upheld the agency's reading. 142 S. Ct. 2354 (2022).

Both of the *Becerra* cases were viewed as potential vehicles to address the constitutionality of *Chevron*,[6] and *Chevron* was referenced 51 and 17 times in

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[6] *See* Eli Nachmany, *SCOTUS Faces a* Chevron *Decision Tree in* American Hospital Association v. Becerra, YALE J. ON REG. NOTICE & COMMENT (Aug. 9, 2021), https://bit.ly/3hbbIcM; Brian R. Stimson, et al., *Pending Supreme Court Decision in* AHA v. Becerra *May be Felt Well Beyond the Healthcare Industry*, 12 NAT. L. REV. 46 (Feb. 15, 2022), https://bit.ly/3FcIDFY; Katie Keith & Joseph Wardenski, *Supreme Court Hears Two Medicare Disputes*, GEO. O'NEIL INST. (Dec. 9, 2021), https://bit.ly/3Pd2jOD.

the respective oral arguments.[7] But instead of applying or even discussing *Chevron*, the Court simply applied the canons of construction.

And this past term, the Court again could have addressed *Chevron* in *Pugin v. Garland*, No. 22-23, slip op. (June 22, 2023). The government asked for *Chevron* deference, but the Court held that the statute was unambiguous and declined to defer. *Id.*, slip op. at 10.

Looking at these recent cases collectively, there have been ten cases applying (or deciding whether to apply) *Chevron* in the past eight terms,[8] and agencies have lost 70% of them. *See* Isaiah McKinney, *The* Chevron *Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, YALE J. ON REG. NOTICE & COMMENT (Dec. 18, 2022).[9] Eight of these cases were decided at one of the *Chevron* steps (rather than an exception), and the agency won only one case at Step Two and two cases at Step One. Agencies lost the remaining five cases at Step One. This demonstrates that recently, this Court has decided cases via the traditional tools of construction rather than deference.

This historical overview of cases addressing ambiguity shows that the Court has gone back and forth on how to determine when a statute is ambiguous and when or whether to employ the tools of construction. On the one hand, there are cases like *Cardoza-Fonseca*, *Dole*, *Adams Fruit*, *General Dynamics*, *City of*

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[7] Transcript of Oral Argument, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022), https://tinyurl.com/bdawj8jr; Transcript of Oral Argument, *Becerra v. Empire Health Found.*, 142 S. Ct. 2354 (2022), https://tinyurl.com/3nm4be5z.

[8] This includes the 2015–16 term in which *Cuozzo Speed Technologies, LLC v. Lee* was decided.

[9] Available at https://tinyurl.com/ye25f352.

*Jackson*, *SAS Institution*, *BNSF*, *American Hospital*, *Empire Health*, and *Pugin*, where the Court engaged in a rigorous statutory interpretation, applied the "traditional tools of statutory construction," and did not defer. On the other hand, there are cases like *Sullivan*, *Pauley*, *Holly Farms*, *Smiley*, *Zuni Public School*, *Negusie*, and *Holder*, where the Court either did not apply the canons of construction, swapped the order of *Chevron*'s two steps, or reflexively deferred without thoroughly analyzing the statutes.

Sometimes, the Court has continued in one jurisprudential vein for a while, like the Court's recent anti-deference trend. At other times however, the Court has vacillated quickly between the two, like in *Dole*, *Sullivan*, and *Adams Fruit*. This uncertainty gives litigants little confidence in how *Chevron* will be applied in their own case.

Just as importantly, this inconsistency in applying the canons of construction and deciding what constitutes ambiguity undermines the workability and longevity of *Chevron* deference. When a case's standard is not "manageable" and "is incapable of principled application," it is no longer a workable precedent. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004). And when "governing decisions are unworkable," the Court is not constrained to follow those precedents. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). In the context of *Chevron*, litigants cannot rely upon an evenhanded application, and this Court's jurisprudence is ambiguous at best, contradictory at worst. The Court has had forty years to settle on a consistent approach but has been unable to find one. For that reason, *Chevron* should be overruled.

## III. Failure to Overrule *Chevron* Would Prolong Inconsistent Applications in the Circuits

But even as *Chevron*'s viability at the Supreme Court wanes, lower courts continue to regularly apply *Chevron*.

In a study looking at cases from 2003 through 2013, Professors Kent H. Barnett and Christopher J. Walker analyzed 1,327 circuit opinions that applied the *Chevron* doctrine. Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 5 (2017).[10] Out of all the cases in their study, Barnett and Walker found that agencies won 71.4% of the time. *Id.* at 28. *Chevron* was applied 74.8% of the time, while courts used the *Skidmore* test 10.8% of the time. *Id.* at 29. *De novo* review was granted 7.5% of the time. *Id.* The remaining 6.9% of the time, the court did not specify what standard of review it applied. *Id.* When *Chevron* was applied, agencies won at Step One 11.7% of the time and at Step Two 65.7%. *Id.* at 33. Agencies lost at Step One 18.3% of the time and at Step Two 4.4%. *Id.* Of the cases that made it to Step Two, 93.8% favored the agency. *Id.*

Because the Barnett and Walker study ended before the last case in which this Court deferred—*Cuozzo*—the Cato Institute did its own empirical study of the circuits. Our survey covered two calendar years,

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[10] The Barnett & Walker study used slightly different search criteria than this brief did. *See* Barnett & Walker, *supra*, at 22. One significant difference between our study and the Barnett & Walker study is that Barnett & Walker treated each instance of statutory interpretation, including multiple interpretations in one case, as separate counts, while we only counted each opinion once, giving controlling weight to the interpretation that deferred. *See id.* at 23.

from January 1, 2020 through December 31, 2021.[11] We found 142 cases analyzing *Chevron*.[12] The results were less deferential overall than the Barnett & Walker study, which is unsurprising considering the direction of deference jurisprudence. But unfortunately, the circuits are still much more deferential than this Court.

We looked at cases either applying *Chevron* or deciding whether to apply it. In our study, circuit courts applied the *Chevron* steps 84.5% of the time, 7.0% of cases were decided via *Skidmore* deference or persuasion, 7.0% received *de novo* review, and 1.4% were decided on other exceptions. Of all cases studied, the agency won 57.0% of the time, and 50% of all cases were decided at Step Two. Of the cases applying *Chevron*, 59.2% held that the statute was ambiguous and thus proceeded to Step Two, while 40.8% held that the statute was unambiguous. Among cases that reached Step Two, the agency's interpretation was held to be permissible 77.5% of the time. Among cases decided at Step One, by contrast, the agency's interpretation prevailed only 32.7% of the time.

Looking at all cases decided under *Chevron*, 13.3% were agency wins at Step One, 45.8% were agency wins at Step Two, 27.5% were agency losses at

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[11] Empirical data used in this brief was collected from a Lexis search. Cases were limited to those that mentioned *Chevron* at least four times, discussed it in the majority, and analyzed whether to apply *Chevron*. The data excludes cases that applied *Auer*/*Kisor* deference rather than *Chevron* and cases that were decided without determining whether *Chevron* applied. The data is also limited to reported cases.

[12] A complete list of the cases in our study is available at *Circuit Court of Appeals Opinions Analyzing and Applying* Chevron, CATO INST., https://tinyurl.com/yrvy4m9m.

Step One, and 13.3% were agency losses at Step Two. The 45.8% of cases with Step Two agency wins is less than the 65.7% in the Barnett & Walker study, but it is still significantly higher than the 10% at the Supreme Court in the past eight years. *See* Barnett & Walker, *supra*, at 33.

A comparison of the recent Supreme Court cases, the Barnett & Walker study, and our very recent study of the circuits shows that the circuits apply *Chevron* less than they used to, but not nearly as seldom as this Court. Among cases applying *Chevron*, only one Supreme Court case (12.5%) in the last eight terms was decided at Step Two, but the 2003–2013 circuit analysis showed that 70.0% of cases made it to Step Two, and our 2020–2021 study shows that 59.2% of circuit cases were decided at Step Two. These comparisons show that unfortunately, Justice Gorsuch may have understated the situation in his *Buffington* dissent when he said "courts . . . rarely rely upon [*Chevron*]." *Buffington*, 143 S. Ct. at 22. Circuit courts still find ambiguity 59.2% of the time when *Chevron* is invoked. Too many courts continue to look for ambiguity rather than "find[ing] the best reading of the statute." Kavanaugh, *supra*, at 2144.

Another difference between the lower courts and this Court is that the lower courts have struggled to apply pre-deference tests, like *Mead* and the Major Questions Doctrine. Although this Court has narrowed *Chevron* for decades through tools like the *Mead* "force of law" test and the Major Questions Doctrine,[13] the lower courts have only employed such tests in 4.9% of

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[13] *See United States v. Mead*, 533 U.S. 218, 229–34 (2001); *King v. Burwell*, 576 U.S. 473, 485–86 (2015); *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–09 (2022).

*Chevron* cases. *See* Isaiah McKinney, *At the Supreme Court,* Chevron *Deference Has Morphed into the Application of the Tools of Construction*, YALE J. ON REG. NOTICE & COMMENT (Jan. 9, 2023).[14] If this Court retains *Chevron* but creates another narrowing pre-deference test, history suggests that lower courts will struggle to apply that test as well.

*Chevron* continues to boldly wreak havoc among the lower courts. Leading by example has proven to be insufficient, but this Court has an opportunity to finally put *Chevron* to rest and overrule it. Only overruling *Chevron* in its entirety will give lower courts the clarity they need. This Court should end *Chevron* deference once and for all and give *Chevron* a "tombstone no one can miss." *Buffington*, 143 S. Ct. at 22.

## CONCLUSION

*Chevron* should be overruled.

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[14] Available at https://tinyurl.com/2p8jhk9y.