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 LAW PROFESSORS KENT BARNETT AND CHRISTOPHER J. WALKER AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Kent Barnett is the Associate Dean for Academic Affairs and J. Alton Hosch Professor of Law at the University of Georgia School of Law. Christopher J. Walker is a Professor of Law at the University of Michigan Law School. They both teach and write about administrative law and regulation. As most relevant here, they have conducted the most comprehensive empirical study to date on *Chevron*'s application in the federal courts of appeals. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1 (2017); Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 Vand. L. Rev. 1463 (2018); Kent Barnett, Christina L. Boyd & Christopher J. Walker, *The Politics of Selecting* Chevron *Deference*, 15 J. Empirical Legal Stud. 597 (2018).

SUMMARY OF ARGUMENT

In 1984, the Court clarified a core principle of administrative law: a reviewing court must defer to a

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. *Amici*'s employing law schools provide financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing and submitting this brief. (The law schools are not signatories to the brief, and the views expressed here are those of *amici*.) Otherwise, no person or entity other than *amici* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

federal agency's reasonable interpretation of an ambiguous statute that the agency administers. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984). Petitioners ask the Court to overrule *Chevron*. *Amici* urge the Court to decline this invitation for the following reasons.[2]

I. As to *Chevron*, the pull of statutory *stare decisis*—which this Court has applied when asked to overrule its deference jurisprudence—is too strong to overcome. Over the last four decades, this Court has repeatedly reaffirmed *Chevron*, and the federal courts have relied on it in thousands of cases. *Chevron* has come to be understood as a judicial interpretation of the Administrative Procedure Act (APA). Congress has legislated against that *Chevron* backdrop and refused to enact numerous bills that sought to abrogate it. Indeed, Congress, federal agencies, the lower federal courts, and the public have all relied on *Chevron*. Moreover, the original understanding of the scope of judicial deference under the APA is at best muddled, and the constitutional arguments against *Chevron* are unpersuasive.

II. *Chevron* advances rule-of-law values in the modern administrative state. Aside from the conventional values of agency expertise, enhanced deliberative process, and more politically accountable

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[2] *Amici* take no position on the second part of the question presented—i.e., whether the Court should "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." *See* Pet'rs Br. 43–46.

policymaking, *amici*'s empirical scholarship sheds light on two less-appreciated values.

First, *Chevron* encourages stability in federal law. Because this Court reviews only a fraction of the hundreds of judgments concerning administrative interpretations of law each year, judicial review of agency statutory interpretations rests mostly with the courts of appeals. *Chevron* reduces disagreements among federal courts over policy-laden judgments and thus promotes national uniformity. *Amici*'s review of more than a decade of published court-of-appeals decisions mentioning *Chevron* demonstrates a nearly twenty-five percent-point difference as to the prevailing rate of agency statutory interpretations, depending on whether a circuit court does or does not apply the *Chevron* framework. Under *Chevron*, an agency's nationwide policy implementation of a statute it administers is more likely to govern, as opposed to a patchwork scheme of potentially conflicting judicial interpretations across the federal courts of appeals with ideologically disparate panels providing their "best readings" of the statute.

Second, the findings from *amici*'s study underscore another significant and largely overlooked cost of eliminating *Chevron*: judges' policy preferences would play a larger role in review of agency statutory interpretations. *Amici*'s empirical work demonstrates that *Chevron* has, to a substantial degree, succeeded in removing judges from policy decisions that Congress has delegated to agencies. By doing so, it has promoted stability in judicial decisionmaking across ideologically

varied courts of appeals, increasing national uniformity and predictability in federal law.

In other words, *amici*'s findings demonstrate that, in a world without *Chevron*, the federal courts will be applying a far less workable standard when interpreting statutes that federal agencies implement.

III. In recent years, this Court's approach to *Chevron* has already addressed the concerns Petitioners and others raise. The Court has instructed lower courts to take *Chevron* step one seriously, precluding deference when the statute is "clear enough." It has suggested that *Chevron* step two should be a meaningful check on unreasonableness, including whether the agency's interpretation is impermissibly arbitrary and capricious. And, of course, the major questions doctrine precludes *Chevron* deference—or regulatory activity at all—when an agency seeks to regulate certain major policy questions without clear congressional authorization.

As such, the meager benefits of overruling *Chevron* now do not outweigh the substantial costs.

ARGUMENT

I. *Chevron* Is a Bedrock Precedent, and the Pull of Statutory *Stare Decisis* Is Strong.

Chevron has been settled law for nearly four decades. Westlaw reports that it has been cited in almost 100,000 documents in its databases, including in more

than 17,000 federal court decisions. It no doubt remains the most cited administrative law decision of all time. *See*, *e.g.*, Peter M. Shane & Christopher J. Walker, Foreword, Chevron *at 30: Looking Back and Looking Forward*, 83 Fordham L. Rev. 475, 475 (2014) (so finding).

Chevron provides a framework for judicial review of agency interpretations of statutes that Congress has empowered those agencies to administer. Although the *Chevron* decision itself famously does not refer to the APA, it has long since been understood as a judicially created doctrine designed to implement Section 706 of the APA. *See*, *e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 227, 229 (2001) (referring to APA § 706, 5 U.S.C. § 706, in describing agencies' interpretive primacy when Congress has delegated such interpretive authority to agencies). Indeed, *Chevron* is grounded on a theory of congressional delegation whereby courts defer to reasonable agency statutory interpretations to realize Congress's explicit or implicit delegation when empowering an agency to administer a statutory scheme. *See Chevron*, 467 U.S. at 843–44, 865–66.

As to judicial precedents interpreting statutes, this Court has made clear that "*stare decisis* carries enhanced force" because those who think the judiciary wrongly decided the issue "can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). In this "superpowered form of *stare decisis*," the Court has required "a superspecial justification to warrant reversing" the statutory precedent. *Id.*

at 458. Moreover, the necessity for that justification "is even more than usually so" when, as here, (1) Petitioners ask "the Court to overrule not a single case, but a 'long line of precedents'—each one reaffirming the rest"; (2) that line of precedents "pervades the whole corpus of administrative law"; and (3) overruling *Chevron* "would allow relitigation of any decision based on" its framework. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2023) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). Notably, contrary to Petitioners' suggestion, *see* Pet'rs Br. 18–22, this Court in *Kisor* applied the "even more than usually so" enhanced force of *stare decisis*—as opposed to some abnormally weaker version—when declining to overturn its deference jurisprudence.

Unlike constitutional *stare decisis*, statutory *stare decisis* is grounded in legislative supremacy. As then-Professor Amy Coney Barrett explained, this legislative supremacy rationale comprises two distinct strands: congressional acquiescence and separation of powers. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 322–27 (2005). When considering longstanding statutory precedents, "congressional inaction following the Supreme Court's interpretation of a statute reflects congressional acquiescence in it." *Id.* at 322; *see also id.* at 322 n.23 (collecting cases). The separation-of-powers strand addresses the concern that the legislature—not the judiciary—has greater institutional competence to revisit statutory precedents. *Id.* at 323; *see also id.* at 323 nn.28–31 (collecting cases).

As to the APA, the congressional acquiescence justification for statutory *stare decisis* is arguably stronger than for most statutes. The APA established the default rules for agency procedure and judicial review of agency actions. Many of the key judicial precedents interpreting the APA—including *Chevron*—go back decades. *See*, *e.g.*, Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 Notre Dame L. Rev. 1963, 1966–89 (2023) (surveying statutory precedents). During this time, Congress has legislated against the backdrop of APA statutory precedents when it authorizes—and reauthorizes—the hundreds of statutes that govern federal agencies today, including when it has departed from that backdrop in countless statutes governing numerous federal agencies. *See* Part I.A *infra* (discussing examples in the *Chevron* context). In a very real sense, Congress is reenacting the statutory scheme that this Court considered. *Cf. Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 201 (2017) ("Principles of *stare decisis* compel our adherence to those [statutory] precedents in this context. And principles of statutory interpretation require us to respect Congress' decision to ratify those precedents when it reenacted the relevant statutory text.").

The separation-of-powers concerns here are also pronounced. As then-Professor Antonin Scalia observed, this Court has long respected "the APA as a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished." Antonin

Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 363. In enacting the APA, Congress established the ground rules for the relationships between the three branches of the federal government surrounding federal agency actions. Settled statutory precedents interpreting that separation-of-powers framework statute should be upset only in extraordinary situations.

For *Chevron* and the APA, the pull of statutory *stare decisis* is too strong to overcome. Congress understands that *Chevron* is part of the APA and has legislated against and refused to abrogate this *Chevron* backdrop. Indeed, for decades, Congress, federal agencies, the lower courts, and the public have all relied on *Chevron* when interpreting, implementing, and interacting with statutes governing administrative action. Neither the original understanding of the scope of judicial deference under the APA—which is, at best, muddled—nor the constitutional arguments against *Chevron*—which are underwhelming—provide a reason to turn from *stare decisis*. *Amici* address each point in turn.

A. Congress Legislates Against the Backdrop of *Chevron* and Has Rebuffed Efforts To Abrogate It.

Congress has strongly relied on *Chevron* as a background principle in drafting legislation and, at times, signaled its application or rejection. Although Congress rarely refers to *Chevron* by name, on occasion it

has altered the standards of review for agency interpretations, including in some of its most monumental legislation. *See generally* Kent Barnett, *Codifying* Chevmore, 90 N.Y.U. L. Rev. 1 (2015) (discussing how Congress has codified *Chevron* and *Skidmore* ("*Chevmore*") and its meaning for *Chevron*'s delegation theory).

For instance, Congress modified *Chevron*'s application in the Dodd–Frank Wall Street Reform and Consumer Protection Act, enacted in response to the 2008 financial crisis. *See id.* at 22–33 (further detailing). In that legislation, Congress rendered judicial review of certain preemption decisions of the Office of the Comptroller of the Currency (OCC) more searching by codifying the factors from *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), when *Chevron* otherwise would have applied. Congress required courts to "assess the validity of such [preemption] determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision." 12 U.S.C. § 25b(b)(5)(A). Congress included a savings clause to clarify that the more searching review of the OCC's preemption ruling does not "affect the deference that a court may afford" other OCC interpretations. *Id.* § 25b(b)(5)(B).

An accompanying Senate Report indicates that the Senators understood that *Chevron* deference might apply to other OCC interpretations. S. Rep. No.

111–176, at 176 (2010) ("Section 1044 clarifies that nothing affects the deference that a court may afford to the OCC under the *Chevron* doctrine when interpreting Federal laws administered by [the OCC], except for preemption determinations."). The few remarks in the House on this topic indicate that members of the House shared the Senate's understanding of *Chevron* as a background drafting principle. *See* Barnett, *Codifying* Chevmore, *supra*, at 28–29 (discussing legislative history). In other words, Congress indicated that it understood *Chevron* to be the background deference regime and signaled when it wanted, and did not want, *Chevron* to apply.

Indeed, Congress went even further in Dodd–Frank when it created the Consumer Financial Protection Bureau (CFPB) and reallocated authority over consumer protection statutes among federal agencies. Congress gave various agencies concurrent jurisdiction to enforce these statutes. In doing so, Congress appeared aware of a longstanding debate as to whether *Chevron* deference is available when more than one agency is charged with administering a statutory scheme. *See id.* at 32–33.

For some of the statutory schemes, Congress provided that "the deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." 12

U.S.C. § 5512(b)(4)(B); *see also* 15 U.S.C. § 1604(h) (similar provision in the Truth in Lending Act). This provision's apparent purpose is to ensure that the CFPB receives *Chevron* deference for relevant interpretations, even if courts would normally presume that Congress would not delegate interpretive primacy to an agency when other agencies also administer those statutes. In other instances, Congress instructed courts to treat each administering agency as if it were the only administering agency, presumably to render *Chevron* deference available for each agency's interpretations. 15 U.S.C. § 1681s(e)(2) (Fair Credit Reporting Act); *id.* § 1691b(g) (Equal Credit Opportunity Act).

Congress has also signaled in at least two other instances when it does not want courts to defer to agency statutory interpretations. Congress, again in Dodd–Frank, instructed the D.C. Circuit not to defer to the Commodities Futures Trading Commission and the Securities and Exchange Commission on certain rules and orders. 15 U.S.C. § 8302(c)(3)(A) (instructing the D.C. Circuit to "give deference to the views of neither Commission"). Likewise, in a provision concerning federal preemption of insurance regulation, Congress has instructed that courts review "the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law, *without unequal deference*." *Id.* § 6714(e) (emphasis added).

In addition, Congress has refused over approximately forty years to enact numerous bills that sought

to abrogate *Chevron*. *See*, *e.g.*, Regulatory Accountability Act, H.R. 5, § 202, 115th Cong. (2017); Separation of Powers Restoration Act, S. 909, § 2, 116th Cong. (2019); Separation of Powers Restoration Act, H.R. 288, § 2, 118th Cong. (2023); Elizabeth Garrett, *Legislating* Chevron, 101 Mich. L. Rev. 2637, 2661–62 (2003) (discussing the "Bumpers Amendment," which failed to pass in the 1970s and early 1980s). Indeed, when recent bipartisan support in the Senate for modernizing the APA arose, the sponsoring Senators left *Chevron* deference undisturbed, while replacing *Auer* deference for agency regulatory interpretations with the less-deferential *Skidmore* standard. *See* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 Admin. L. Rev. 629, 667–69 (2017) (discussing the Portman–Heitkamp Regulatory Accountability Act, S. 951, § 4, 115th Cong. (2017)).

When rejecting a call to overrule *Auer* deference, this Court found it relevant that—as here, with *Chevron*—Congress refused to act despite the Court's "deference decisions reflect[ing] a presumption about congressional intent" and despite "[m]embers of this Court . . . rais[ing] questions about the doctrine." *Kisor*, 139 S. Ct. at 2423. As this Court recently reiterated, Congress's refusal to abrogate the Court's statutory decisions is a powerful reason not to overrule a statutory precedent. *See Allen v. Milligan*, 143 S. Ct. 1487, 1515 (2023) ("Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it

does, statutory *stare decisis* counsels our staying the course.").

Contrary to concerns from past and current members of the Court, congressional understandings, practice, and knowing acceptance of *Chevron* demonstrate that *Chevron*'s undergirding theory—that Congress seeks to delegate interpretive primacy to agencies over statutory ambiguities in statutes that agencies administer—is not "fictional," regardless of whether *Chevron* correctly inferred congressional intent when it was decided. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212 ("Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court's view of how best to allocate interpretive authority."); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) (referring to *Chevron*'s delegation theory as a "legal fiction"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 ("[A]ny rule adopted in this field [such as *Chevron*] represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.").

B. Congress, Federal Agencies, Courts, and the Public Have Relied on *Chevron* When Interpreting Statutes.

Beyond codifying *Chevron* or *Skidmore* with respect to specific regulatory schemes and refusing to abrogate *Chevron* by statute, Congress and its legislative drafters rely heavily on *Chevron* as a background statutory drafting and interpretive rule. The same is true for federal agencies when interpreting statutes and drafting regulations, and for federal courts and the public when interpreting and interacting with statutes that federal agencies administer.

With respect to congressional drafters' reliance on *Chevron*, Professors Abbe Gluck and Lisa Bressman have conducted the most extensive empirical study. In 2011–2012, they interviewed 137 congressional drafters, asking them 171 questions about the canons of statutory interpretation, legislative history, and administrative law doctrines. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 905–06 (2013).

Notably, *Chevron* was the most known—by name (82%) and by concept (91%)—of any interpretive tool in the study. *Id.* at 927–28 figs.1–2. Nine in ten (91%) congressional drafters stated that one reason for allowing statutory ambiguity is to delegate decisionmaking to agencies, with lack of time (92%), complexity of issue

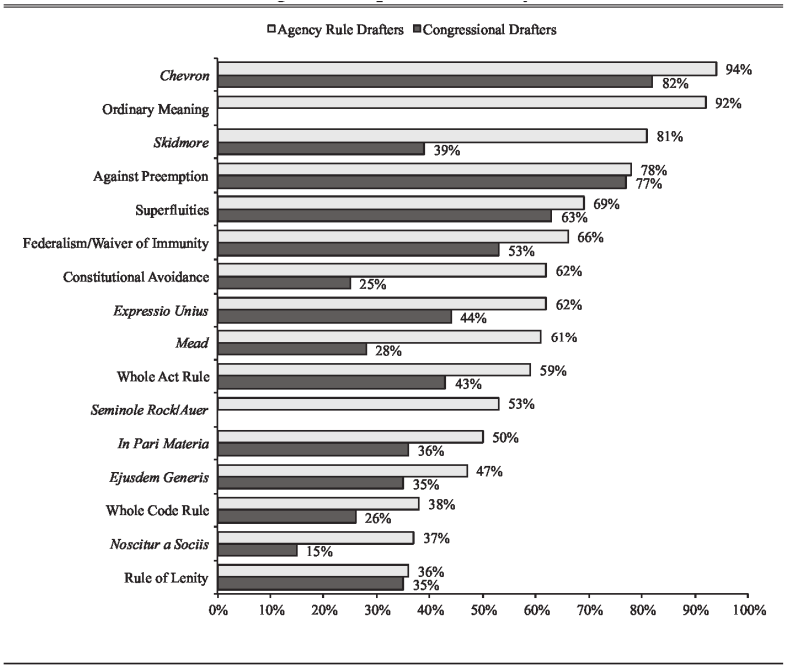
(93%), and need for consensus (99%) being other predominant reasons. *Id.* at 997.

The central importance and settled nature of *Chevron* as an interpretive tool is also borne out within federal agencies. One of *amici* conducted a parallel study of agency rule drafters, asking 128 agency rule drafters at seven executive departments and two independent agencies 195 questions about how they interpret statutes and draft regulations. *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1013 (2015).

Among all the interpretive tools in the survey, *Chevron* was most known by name (94%) and most used in statutory interpretation (90%) by the agency respondents. *Id.* at 1019–20 figs.1–2. More than nine in ten agency rule drafters believed that statutory ambiguities related to implementation details (99%) or within the agency's areas of expertise (92%) are ones Congress intended for the agency to fill, with far fewer respondents believing the same about major policy questions (56%), major economic questions (49%), major political questions (32%), or serious constitutional questions (24%). *Id.* at 1053 fig.10; *see also* Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703, 721–25 (2014) (further exploring how the agency rule drafters surveyed perceived differences in agency regulatory activity based on whether the agency thinks it will receive *Chevron* deference).

Figure 1 from that study, which depicts the high-level findings from both the Bressman–Gluck and Walker studies, is reproduced below:

Knowledge of Interpretive Tools by Name



Finally, the settled nature of *Chevron* is reflected in how the federal courts of appeals have applied the doctrine, to which *amici* return in Part II.A. And the same is no doubt true in how the regulated public has structured its operations and affairs in light of judicial decisions relying on *Chevron*. This settled understanding is of utmost importance when the Court weighs whether to reconsider a precedent like *Chevron*. As this Court has explained, "*[s]tare decisis* has added force when the legislature, in the public sphere, and

citizens, in the private realm, have acted in reliance on a previous decision . . . ." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). That is because "overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Id.*

When *Chevron* is properly appreciated as an interpretation of the APA and a backdrop principle against which Congress legislates, the flaws in Petitioners' argument that *Chevron* is at most a methodological or procedural precedent become plain. *See* Pet'rs Br. 18–22. For example, Petitioners try to analogize *Chevron* to the now-overturned order-of-battle decisional rule in qualified immunity, which instructed courts to first decide whether the alleged conduct violates a constitutional right before determining whether that constitutional right was clearly established. *See id.* at 21 (citing *Pearson v. Callahan*, 555 U.S. 223 (2009)).

But Congress never legislated against the backdrop of that order-of-battle rule. No outcome in any case hinged on whether a court followed the procedural rule. The precedent merely "involv[ed] internal Judicial Branch operations." *Pearson*, 555 U.S. at 233–34. Neither governments and their officials nor members of the public "order[ed] their affairs" around the procedural rule. *Id.* at 233. For these reasons, Justice Alito, writing for the unanimous Court in *Pearson*, correctly concluded that, in that procedural context, "[a]ny change should come from this Court, not Congress." *Id.* at 234.

Here, the better analogy is this Court's recognition of a qualified immunity defense in 42 U.S.C. § 1983. With both *Chevron* and qualified immunity, the Court interprets federal statutes to incorporate background legal principles. Both affect outcomes when raised in litigation. Congress has legislated against the backdrop of both precedents in other statutes. And it has considered, though not passed, legislation to abolish both. *See* Aaron Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1856–63 (2018) (defending qualified immunity on *stare decisis* grounds). Finally, similar to how federal agencies and the regulated public have ordered their affairs around *Chevron*, state and local governments and their officials have structured their affairs around qualified immunity, including in terms of officer indemnification laws and contractual arrangements. *See generally* Aaron Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 Geo. L.J. 229 (2020).

Amici take no position here on the continuing viability of qualified immunity under Section 1983. We merely suggest that Petitioners' analogy to a procedural rule of qualified immunity is misplaced. The more apt comparison for *Chevron* as precedent is the Court's precedent interpreting Section 1983 to include qualified immunity as a defense.

C. The Original Understanding of Judicial Deference in APA § 706 Is Contested.

To be sure, statutory *stare decisis* is not insurmountable. A critical inquiry concerns how erroneous the statutory precedent is as a matter of original meaning. As to *Chevron* deference and the original understanding of Section 706 of the APA, the answer is far from clear.

In recent years, Professor Aditya Bamzai has advanced an originalist argument against *Chevron*. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017). In concluding that *Chevron* is nonoriginalist, Professor Bamzai looks to the theory and practice of interpretation before the APA. He argues that judicial deference to executive interpretation began only after the APA, and to the extent courts deferred to agencies beforehand, the APA was enacted "to stop this deviation." *Id.* at 916–18.

Under this approach, the "most natural reading" is that "section 706 established deferential standards of review for issues other than 'relevant questions of law,' thereby indicating that Congress knew how to write a deferential standard into statute when it wanted to do so." *Id.* at 987, 985 (footnote omitted) (quoting 5 U.S.C. § 706); *see also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 193–99 (1998) (arguing that *Chevron* cannot be squared with the text of APA § 706).

Professors Ron Levin and Cass Sunstein have both written thoughtful responses. Professor Levin concludes that "the text of § 706, related APA provisions, legislative history, caselaw background, and contemporaneous understanding all fail to support the no-deference interpretation of § 706." Ronald M. Levin, *The APA and the Assault on Deference*, 106 Minn. L. Rev. 125, 130 (2021). He argues that Professor Bamzai understates the extent to which pre-APA caselaw relied on deference principles. *Id.* at 167–70. In Professor Levin's view, the drafters of the APA wrote broad language into the APA because they were not particularly concerned about the issue of judicial deference on legal questions. *See id.* at 170–74. Indeed, he contends, almost all contemporaneous courts and commentators understood the APA as having made no change in the law on this subject. *See id.* at 175–83.

Professor Sunstein similarly concludes that, "in the 1940s, the contextual evidence on behalf of Bamzai's claim is not strong. Actually, it is difficult to find, and that difficulty can be seen as a dog who did not bark in the night—a probative silence." Cass R. Sunstein, Chevron *as Law*, 107 Geo. L.J. 1613, 1650 (2019). Despite this Court noting shortly after the APA's enactment that the APA changed how courts were thought to review factual findings and how agencies separated functions internally, the Court never indicated that the APA altered deference to agency legal interpretations. *See id.* at 1653–54. Instead, the Court continued to apply deference to agency legal interpretations in terms strikingly similar to *Chevron*'s

formulation without any meaningful pushback—both shortly after the APA's enactment and in the decades leading up to *Chevron* itself. *See id.* at 1654–56.

The APA originalism debate over *Chevron* deference continues.[3] A careful review of the scholarship published to date does not provide a clear answer, and certainly does not support the conclusion that "*Chevron* is egregiously wrong." Pet'rs Br. 23. The dispute surrounding cryptic phrases, unclear historical accounts, and judicial practice immediately after the APA's enactment in 1946 provides no basis for ignoring the strong pull of statutory *stare decisis* for *Chevron*.

D. The Constitutional Arguments Against *Chevron* Are Unpersuasive.

If *Chevron* were clearly unconstitutional, *stare decisis* would pose little barrier to overruling the precedent. But the constitutional arguments to date fall far short. Those arguments can be separated into two camps: Article I concerns and Article III concerns. *See* Christopher J. Walker, *Attacking* Auer *and* Chevron

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[3] *Compare* Aditya Bamzai, *Judicial Deference and Doctrinal Clarity*, 82 Ohio St. L.J. 585 (2021), *with* Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 Ohio St. L.J. 565 (2021); *see also* Kristin E. Hickman & R. David Hahn, *Categorizing* Chevron, 81 Ohio St. L.J. 611, 650–70 (2020) (concluding that *Chevron* is a standard of review, which is consistent with pre-APA practice, interprets APA § 706, and implicates *stare decisis* concerns); Michael B. Rappaport, Chevron *and Originalism: Why* Chevron *Deference Cannot Be Grounded in the Original Meaning of the Administrative Procedure Act*, 57 Wake Forest L. Rev. 1283, 1308–10, 1314–23 (2022) (responding to Levin and Sunstein).

Deference: A Literature Review, 16 Geo. J.L. & Pub. Pol'y 103, 110–15 (2018).

The first argument is that Article I of the U.S. Constitution vests Congress with "[a]ll legislative Powers," yet *Chevron* encourages members of Congress to delegate broad lawmaking power to federal agencies. In doing so, Congress frustrates the values of the nondelegation doctrine. The problem with this argument is that *Chevron* itself does not cause the constitutional violation. *Chevron* explicitly instructs reviewing courts to say what the law is, "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Instead, the argument rests with Congress's decision to delegate too broadly; the nondelegation doctrine is the constitutional tool to address that. *See* Part III *infra* (returning to these Article I concerns in light of the major questions doctrine). Even under a strict version of the nondelegation doctrine, Congress may allow those charged under "general provisions to fill up the details." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). *Chevron* simply permits Congress to delegate to agencies to decide those details as long as Congress has provided sufficient direction with its general provision.

The second argument is that deference to agencies' reasonable statutory interpretations violates Article III because courts are no longer able to "say what the law is," á la *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *See Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from the denial of certiorari); *Gutierrez-Brizuela v. Lynch*, 834

F.3d 1142, 1151–52, 1156 (10th Cir. 2016) (Gorsuch, J., concurring). Yet, this Court has established a much more nuanced Article III jurisprudence that does not require courts to answer legal questions *de novo* or provide a remedy in all instances. *See generally* Kent Barnett, *How* Chevron *Deference Fits Into Article III*, 89 Geo. Wash. L. Rev. 1143 (2021).

Although the Court on occasion has expressed hesitation if certain agency actions are unreviewable, it has never suggested any categorical concern over no-review clauses, which have existed since at least the 1930s. *See* 5 U.S.C. § 701(a)(1) (stating that the APA's judicial review provisions do not apply when "statutes preclude judicial review"); Laura Dolbow, *Barring Judicial Review*, Vand. L. Rev. pt.II & app.B (forthcoming) (identifying nearly 200 judicial review bars in the U.S. Code), https://ssrn.com/abstract=4368442; *cf. United States v. Erika*, 456 U.S. 201, 206 (1982) (holding that Congress deprived federal courts of jurisdiction to review certain Medicare benefits adjudications); *Johnson v. Robison*, 415 U.S. 361, 367 (1974) (noting that Congress's intent to preclude review of certain veterans' benefits decisions did not extend to constitutional challenges). Because Congress can preclude judicial review altogether of some or all claims under Article III, it is difficult to see how reasonableness review offends Article III, especially when this Court and its members have relied on greater-includes-the-lesser-power reasoning in its Article III jurisprudence[4] and when

[4] For instance, the plurality relied on this reasoning when explaining why Congress has more room under Article III to

Chevron concerns the interpretation of statutes Congress itself enacted.

Indeed, Congress has limited plenary judicial review in other contexts, such as the limited federal judicial review of state-court judgments under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254(d)(1); *see*, *e.g.*, *White v. Woodall*, 572 U.S. 415, 419–20 (2014). In rejecting an Article III challenge to § 2254(d), Judge Easterbrook for the Seventh Circuit noted that as goes § 2254(d) so goes *Chevron*:

> If . . . federal courts must give judgment without regard to the legal views of other public actors, and without regard to the resolution of contested issues in state litigation, then [the] argument reaches far beyond § 2254(d). It would mean that deference in administrative law under *Chevron* is unconstitutional. . . .

Lindh v. Murphy, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); *see also Bowling v. Parker*, 882 F. Supp. 2d 891, 897–900 (E.D. Ky. 2012) (Thapar, J.) (rejecting Article III challenge to § 2254(d)).

Additionally, courts cannot refuse to confirm an arbitration award based on disagreements with an

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decide how private rights that it creates, as opposed to those created by the States, may be litigated. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80–81 (1982) (plurality opinion). The Court applied similar reasoning when explaining why Congress could under Article III limit courts' equitable remedies. *See Lockerty v. Phillips*, 319 U.S. 182, 187–88 (1943).

arbitrator's legal interpretations. *See* 9 U.S.C. §§ 10–11; *see also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592–93 (1985) (rejecting Article III challenge to the extremely limited judicial review of statutorily required arbitration scheme).[5]

These are just two of many examples where Congress has imposed limits on judicial review. The Court need not agree with each of these or agree that any one case implicitly blesses *Chevron* deference. Perhaps *Chevron* offends Article III in certain contexts, such as when private rights are at issue or agency interpretations lead to criminal liability. *See* Barnett, *How* Chevron *Deference Fits Into Article III*, *supra*, at 1193–97. But for the Court to suggest or hold that *Chevron*'s reasonableness review offends Article III in all or some cases, it must do much more than simply invoke *Marbury v. Madison*, announce victory, and move on.[6]

In sum, the concern that *Chevron* encourages Congress to delegate broadly or that it limits courts from reviewing agency statutory interpretations *de novo* may well implicate important policy judgments. But there can be no serious dispute that the Constitution

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[5] At best, courts may decline to confirm an award when the arbitrator demonstrated a "manifest disregard for the law," but even this extremely limited ground for refusing enforcement of the award is questionable under this Court's precedent. *See Paul Green Sch. of Rock Music Franchising v. Smith*, 389 F. App'x 172, 176 & n.6 (3d Cir. 2010).

[6] For similar reasons, Professor Philip Hamburger's arguments about due process and pro-government institutional bias fail as a constitutional matter. *See* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1189 (2016).

allows for *Chevron* as a general rule. Because *Chevron* has been the law for nearly four decades (and strikingly similar to other of the Court's decisions going back approximately four decades before *Chevron* itself), the pull of statutory *stare decisis* is strong. Accordingly, *Chevron* reformers should "take their objections across the street, and Congress can correct any mistake it sees." *Kimble*, 576 U.S. at 456; *see also Bay Mills Indian Cmty.*, 572 U.S. at 800–01 ("Congress, we said . . . has the greater capacity 'to weigh and accommodate the competing policy concerns and reliance interests' involved in the issue." (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998))).

II. *Chevron* Advances Important Rule-of-Law Values in Administrative Law.

Overturning *Chevron* is not only inconsistent with statutory *stare decisis*, but it would also frustrate the rule-of-law values that *Chevron* advances. The conventional values in the caselaw and literature on *Chevron* include respect for congressional delegation, comparative agency expertise, deliberative process in policymaking, and political accountability in law implementation. Based on their empirical study of *Chevron* in the federal courts of appeals, *amici* focus on two less-studied values of *Chevron*: greater national uniformity in federal law, and less politics in judicial decisionmaking.

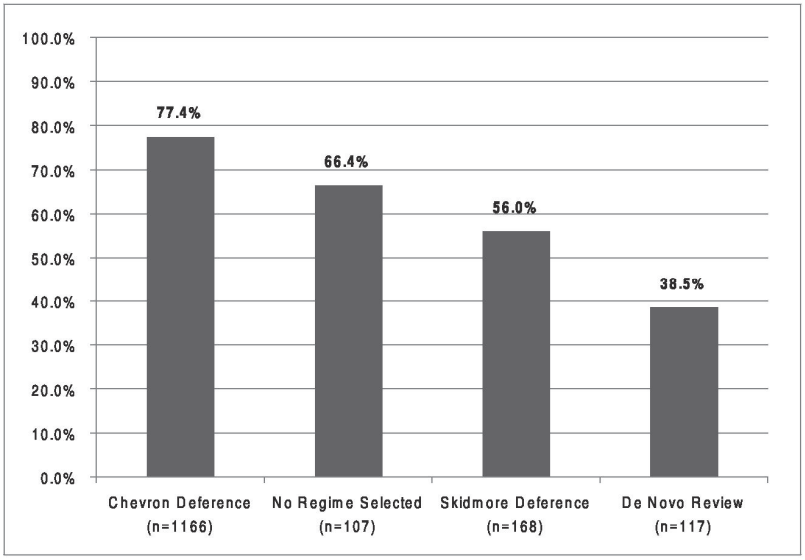
A. *Chevron* Increases National Uniformity in Federal Law.

Chevron deference promotes national uniformity in federal law by limiting courts' responsibility for determining the best reading of a statute. Instead, courts need assess only the reasonableness of an agency's interpretation, rendering it more likely that lower federal courts across the country will agree in accepting or rejecting the agency's interpretation. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1121–22 (1987). Moreover, by providing agencies space to interpret statutory ambiguities, *Chevron* provides a disincentive for judicial challenges and thereby allows the agency to provide a national standard even absent judicial review. The Court has called this *Chevron*'s "stabilizing purpose." *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).

Amici's empirical research on *Chevron* provides support for this stabilizing purpose. *Amici* compiled the largest dataset to date on *Chevron* and *Skidmore* deference in the circuit courts. *Amici*'s dataset was comprised of all published three-judge-panel, court-of-appeals decisions that referred to *Chevron* or *Skidmore* over eleven years (from 2003 to 2013) and provided judicial review of agency statutory interpretation, whatever the standard of review. (*Amici*'s research design leaves open the unavoidable possibility that additional relevant published circuit court opinions exist that cite neither *Chevron* nor *Skidmore*.) The final version of

this dataset includes 1,613 agency statutory interpretations in 1,382 decisions (meaning that a decision may concern more than one agency statutory interpretation). *Amici* coded the decisions for some forty variables. *See* Barnett & Walker, Chevron *in the Circuit Courts*, *supra*, at 21–27 (detailing methodology and its limitations). Figure 1 from Chevron *in the Circuit Courts*, reproduced below, breaks down how often agency interpretations prevail under different standards of review:

Prevailing Rate of Agency Statutory Interpretations by Deference Standard



The bottom-line takeaway, descriptively speaking, is that there is a difference of nearly twenty-five percentage points in the prevailing rate of agency statutory interpretations when judges decide to apply the *Chevron* deference framework, as compared to when

they apply any other standard of review, in the decisions reviewed. *Id.* at 6.

Of course, one should be careful not to read too much into these descriptive findings, as there are also great differences in prevailing rates by agency, circuit court, and subject matter. Similarly, methodological limitations inherent in this study, as is typical with any coding project, should counsel caution. A more sophisticated statistical analysis of these findings is discussed in Part II.B. That said, even these raw-number findings make it hard to argue that *Chevron* does not matter in the circuit courts in terms of encouraging national uniformity in federal law. Under *Chevron*, an agency's nationwide policy implementation of a statute it administers is more likely to govern, as opposed to a patchwork scheme of potentially conflicting judicial interpretations as different courts provide their own best readings of the statutes.

B. *Chevron* Limits Politics in Judicial Decisionmaking.

Another critical rule-of-law value of *Chevron* is that it limits judges from deciding cases based on their personal policy preferences. *Chevron* itself noted that deference to agencies' interpretations of ambiguous statutory provisions leaves the resolution of competing policy determinations to the political branches. *See Chevron*, 467 U.S. at 865–66.

Amici found in their empirical research that *Chevron* is largely meeting this goal of removing judges from deciding policy—that is, political—matters. Along

with their co-author, political scientist Dr. Christina Boyd, *amici* leveraged their dataset to explore the political dynamics of judicial decisionmaking. *See* Barnett, Boyd & Walker, *Administrative Law's Political Dynamics*, *supra*. *Amici*'s findings, by comparing how judges review interpretations under *Chevron* or other standards of review, demonstrated that *Chevron* deference muted ideological decisionmaking on the federal courts of appeals, even if it did not fully constrain it. The most liberal panels agreed with conservative agency statutory interpretations only 24% of the time when they did not use *Chevron* deference but 51% when they did. Likewise, the most conservative panels agreed with liberal agency interpretations only 18% of the time without *Chevron* deference but 66% with it. *Id.* at 1499–1501.

Nonetheless, political judicial decisionmaking still likely exists, even with *Chevron* deference's ameliorating effects. *Amici* found that conservative panels were up to 23% more likely than liberal panels to agree with conservative agency interpretations under *Chevron* deference, as compared to up to 36% more likely than liberal panels under a lesser form of deference. Likewise, *amici* found a 25% difference for review of liberal agency interpretations under *Chevron* (with liberal panels being more likely than conservative ones to agree) and a sizable 63% difference without *Chevron* deference. *Id.* at 1502.

Ultimately, *amici*'s findings provide compelling evidence that *Chevron* has, to a substantial degree, succeeded in removing judges from policy decisions that Congress has delegated to agencies. By doing so, it has

promoted stability in judicial decisionmaking across ideologically varied courts of appeals and panels, increasing national uniformity and predictability in federal law. Eliminating *Chevron* would also eliminate these benefits for the administrative state and for the federal judiciary.

These findings, moreover, demonstrate the errors in Petitioners' claim that *Chevron* is an unworkable standard. *See* Pet'rs Br. 32–36. Petitioners are quite careful not to remind the Court of what they really request: *de novo* review or at most a squishier *Skidmore* review standard. There can be no serious argument that either of these alternative standards of review would be more workable than *Chevron*—i.e., would better promote rule-of-law values of predictability and uniformity in federal law. Justice Scalia was correct to observe for the Court that "[t]hirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*." *City of Arlington*, 569 U.S. at 307.

III. The Court's Recent Approach to *Chevron* Addresses the Concerns Petitioners and Others Raise.

Chevron as articulated by this Court is constitutional, and when properly applied, it advances rule-of-law values in administrative law. As Petitioners' counsel have previously observed: "At its inception, [*Chevron*] was conceptualized as an effort to foster respect

for the Constitution's separation of powers, ensuring that policy decisions are left to the politically accountable branches and leaving Congress with room to draw on the comparative advantages and expertise of the executive branch." Brief for U.S. Chamber of Commerce as *Amicus Curiae*, at 2, *in Am. Hosp. Ass'n v. Becerra*, No. 20–1114, 142 S. Ct. 1896 (2022) [hereinafter U.S. Chamber Am. Br.].

The concerns that Petitioners and others raise are not really about *Chevron* as properly applied. Instead, they concern when *Chevron* is misapplied—when it becomes merely a "reflexive deference," as Justice Kennedy aptly called it. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). When courts fail to patrol the bounds of statutory ambiguity, they allow federal agencies to exceed the policymaking authority Congress granted to the agencies by statute.

In recent years, the Court has taken a number of measures to address the concerns that Petitioners and others raise about *Chevron*'s application.

First, this Court has instructed reviewing courts to take *Chevron* footnote nine seriously. At *Chevron* step one, courts must determine whether the statutory provision at issue is ambiguous, "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Justice Gorsuch, writing for the Court, has reiterated that if the statute is "clear enough," then the agency gets no deference at step one. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

Second, the Court has instructed reviewing courts to take *Chevron* footnote eleven seriously. At *Chevron* step two, courts must ensure that an agency's interpretation is "permissible" or "reasonable." *Chevron*, 467 U.S. at 843–44 & n.11. Justice Kagan, writing for the Court, has stressed that to be reasonable, an agency's interpretation "must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Kisor*, 139 S. Ct. at 2416 (concerning agency interpretations of their own regulations). She continued: "And let there be no mistake: That is a requirement an agency can fail." *Id.* Elsewhere, Justice Kagan, again writing for the Court, has compared *Chevron* step two to APA arbitrary-and-capricious review. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) ("Were we to [use *Chevron* step two], our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance." (internal quotation marks omitted)).[7]

Amici are not the first to make these observations. Petitioners' counsel, for instance, articulated this position in greater detail in 2021. *See* U.S. Chamber Am. Br. 4–17. *Amici* agree that "[e]ach of *Chevron*'s two steps includes significant limitations and requirements that play a critical part in safeguarding the

[7] *Amici* have explored how *Chevron* step two has been applied in the federal courts of appeals and encouraged this Court to provide further guidance on step two's application. *See* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 Notre Dame L. Rev. 1441 (2018).

separation of powers, and that reflect the doctrine's foundational rationales of agency expertise, political accountability, and congressional delegation." *Id.* at 16–17. *Amici* further agree that it could be productive—perhaps in this case—for "the Court to reinforce limits on *Chevron* deference that are akin to the limits articulated in *Kisor*." *Id.* at 17.

Finally, over the last two years, the Court has further developed the major questions doctrine as a threshold check on administrative action and congressional delegation. In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Court explained that when agencies claim authority to regulate certain major policy questions, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims." *Id.* at 2609 (internal quotation marks omitted); *accord Biden v. Nebraska*, No. 22–506, 2023 WL 4277210, at *13 (U.S. June 30, 2023); *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665–66 (2022); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489–90 (2021).

Amici take no position here on the wisdom of this invigorated major questions doctrine. But any discussion about the future of *Chevron* must consider the major questions doctrine's impact. It eviscerates the Article I concerns discussed in Part I.D about Congress abdicating its duty—either as a constitutional matter on nondelegation doctrine grounds or as a normative separation-of-powers concern—to make the major value judgments in federal lawmaking.

If reviewing courts take *Chevron* footnotes nine and eleven seriously and apply the major questions doctrine, *Chevron* would apply only when Congress has delegated via ambiguity comparatively minor policymaking authority and the agency has reasonably exercised that authority. An agency would retain policymaking discretion—in Chief Justice Marshall's words—to "fill up the details" of a statutory scheme, *Wayman*, 23 U.S. (10 Wheat.) at 43, where the agency has comparative expertise and accountability over courts and where national uniformity in law is paramount for the regulated and the public more generally.

* * *

Ultimately, when considering whether to abandon *Chevron*, this Court finds itself in the following place:

- the enhanced force of statutory *stare decisis* applies;
- Congress and agencies have relied on *Chevron* as a background drafting and interpretive principle;
- Congress has indicated in specific situations when it seeks to extend or limit *Chevron*;
- Congress has repeatedly rejected legislation to abrogate *Chevron*, even after members of this Court have questioned the doctrine;
- it is, at most, contested whether *Chevron* is inconsistent with the original understanding of APA § 706;
- constitutional arguments against *Chevron* are unpersuasive;

- *Chevron* has the under-appreciated benefits of promoting national uniformity and limiting politics in judicial decisionmaking; and
- this Court's recent *Chevron* jurisprudence mitigates concerns over agencies acting beyond their statutory authority.

With these points in mind, the appropriate answer to the question presented is self-evident—the force of *stare decisis* strongly supports this Court's reaffirmation of *Chevron*.

CONCLUSION

For the foregoing reasons, this Court should not overrule *Chevron*.

Respectfully submitted,

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