No. 22-451

In the
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL.,
Petitioners,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce, ET AL.,
Respondents.

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

BRIEF *AMICI CURIAE* OF THE BUCKEYE INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Magnuson-Stevens Act (MSA) governs fishery management in federal waters and provides that the National Marine Fisheries Service (NMFS) may require vessels to "carry" federal observers onboard to enforce the agency's myriad regulations. Given that space onboard a fishing vessel is limited and valuable, that alone is an extraordinary imposition. But in three narrow circumstances not applicable here, the MSA goes further and requires vessels to pay the salaries of the federal observers who oversee their operations—although, with the exception of foreign vessels that enjoy the privilege of fishing in our waters, the MSA caps the costs of those salaries at 2–3% of the value of the vessel's haul. The statutory question underlying this petition is whether the agency can also force a wide variety of domestic vessels to foot the bill—up to 20% of the vessel's revenue—for the salaries of the monitors they must carry. Under well-established principles of statutory construction, the better answer is no, as the express grant of such a controversial power in limited circumstances forecloses a broader implied grant that would render the express grant superfluous. But a divided panel of the D.C. Circuit answered yes under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the theory that statutory silence produced an ambiguity justifying deference.

The question presented is:

1. Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning

powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

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INTEREST OF *AMICI CURIAE*

This *amicus* brief is submitted by The Buckeye Institute and the National Federation of Independent Business Small Business Legal Center, Inc.[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

Through its Legal Center, the Buckeye Institute works to restrain governmental overreach at all levels of government. More and more often, that government overreach comes in the form of agency rules and regulations imposed by unelected bureaucrats. The result is not just government overreach but the insulation of important public policy decisions from political or judicial accountability. This

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[1] *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

rule by regulatory agencies—particularly when those agencies' statutory interpretations are granted judicial deference on questions of legal interpretation—is incompatible with representative democracy and the Constitution's system of checks and balances. Forty years of experience with *Chevron* has revealed its flaws, and Buckeye will show how jettisoning that doctrine will return the judiciary to its proper role in our governmental scheme.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The NFIB Legal Center joins as an amicus in this case for two primary reasons: 1) to speak on behalf of the thousands of small businesses concerned with agency aggrandizement of power through *Chevron* deference, and because 2) the Rule will have detrimental effects and impose severe financial burdens on small and independent fisheries.

SUMMARY OF ARGUMENT

The Court should formally abandon *Chevron*.

Regulatory burdens harm the business community, especially small businesses. While eliminating *Chevron* deference alone will not reduce the regulatory burden, it will force Congress to consider the regulatory impact of its laws more carefully before enacting them.

Initially *Chevron* deference seemed to promise both administrative expertise and political accountability. Experience has taught otherwise. Given 40 years of its checkered history, the Court should revisit *Chevron* without the constraints of a mechanical application of stare decisis. Repetition of a mistake on the sole rationale of "precedent" is a betrayal of judicial responsibility.

Indeed, many states have now rejected *Chevron*. Most recently, the Ohio Supreme Court rejected *Chevron*, explaining that "the judicial branch is *never* required to defer to an agency's interpretation of the law." *TWISM Enterprises, L.L.C. v. State Bd. of Registration for Pro. Engineers & Surveyor*s, 2022-Ohio-4677, ¶ 3 (emphasis in original). Ohio is far from alone in this reexamination of a stale doctrine.

Importantly, legislators and regulators have incorporated *Chevron* into their decision making. They recognize that when courts utilize *Chevron,* the courts rule in favor of agencies 93.8% of the time. This contaminates and undermines the legislative and rulemaking process. Moreover, judicial deference to the sovereign's viewpoint over the governed is counter

to separation of powers and threatens to destroy the independent judiciary.

So, what is the solution? Judges are directed to and are well suited to evaluate regulations de novo after considering the expertise presented by both the sovereign and experts of the regulated parties. See *id.* at ¶ 48. This Court has directed judges to do so with Fed. R. Evid. 702 (Testimony by Expert Witness). While this approach is not exactly *Skidmore* deference, it is consistent with the idea that the agencies' interpretation of a statute is "entitled to respect" only to the extent it has the "power to persuade." *Gonzales v. Oregon,* 546 U.S. 243, 256 (2006).

ARGUMENT

I. Introduction

"When you find yourself in a hole, stop digging."

- Will Rogers

For nearly 40 years, courts have been digging the *Chevron* hole deeper and deeper. "Along the way, [it] has become pitted with exceptions and caveats . . . ." *Buffington v. McDonough*, 143 S. Ct. 14, 20 (2022) (Gorsuch, J., dissenting from denial of cert.). As we look up from the depths of the *Chevron* hole manifested by the NMFS regulation, the light of congressional authority is barely a glimmer. It is time to stop digging and climb out.

NMFS[2] is asserting *Chevron* deference to claim the power to not only require herring fishing boats in the Atlantic Ocean to carry NMFS monitors as authorized by the MSA but also to force the boat captains to berth *and pay* those monitors. Without any statutory support, the agency demands *Chevron* deference to its creative statutory reading.

II. The burden from unchecked and unexamined regulation crushes small businesses.

"I'm just a bill. Yes I'm only a bill. And I'm sitting here on Capitol Hill. Well, it's a long, long journey to the Capitol City."[3]

And it should be a long journey. It requires—at least theoretically—extensive discussion, committee hearings, debates, analyses, and evaluation of pros and cons and impacts on all aspects of American life. But the introduction of agency rulemaking, followed by agency deference doctrines such as *Chevron*, undermines the congressionally-felt need for a complete analysis of the lowly bill before it becomes a mighty law. Regulations have a much shorter road, and their anticipated *Chevron* deference bypasses

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[2] The NMFS is part of the National Oceanic and Atmospheric Administration ("NOAA") and has an Office of Law Enforcement ("OLE"), which "conducts enforcement activities through patrols both on and off the water [and] criminal and civil investigations." Office of Law Enforcement, Nat'l Oceanic & Atmospheric Admin., *About Us*, NOAA Fisheries, https://tinyurl.com/NOAAabout (last visited Dec. 13, 2022).

[3] *Schoolhouse Rock!: I'm Just a Bill* (ABC television broadcast Mar. 27, 1976).

much of the accountability imposed upon the law-making process.

As a result, the number of "laws" through regulatory rulemaking has increased exponentially. The sheer amount of federal regulation is impossible to follow. By one account, the Code of Federal Regulations now spans more than 180,000 pages. *Buffington*, 143 S. Ct. at 20 (Gorsuch, J., dissenting from denial of cert.). Each year, the agencies add between "three thousand to five thousand final rules." *West Virginia v. E.P.A.*, 142 S. Ct. 2587, 2619 n. 2 (2022) (Gorsuch, J., concurring) (quoting Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 Geo. Mason L. Rev. 683, 694 (2021)).

Historically, overregulation has imposed significant costs on the business community, with small businesses disproportionately bearing the brunt of these costs. A 1995 report found that businesses with over 500 employees spent $2,979 per employee on regulatory costs in 1992, while businesses with fewer than 20 employees spent $5,532 per employee on regulatory costs in the same year. Thomas D. Hopkins, *Profiles of Regulatory Costs* 20 (1995), https://bit.ly/3URWXsY. Recently, this number exploded. As of 2014, businesses with fewer than 50 employees spent $11,724 in regulatory costs per employee per year. W. Mark Crain & Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* 1 (2014), https://bit.ly/2uJZgUz. Meanwhile, medium-sized firms spend only $10,664 per employee per year, and large firms spend less than $10,000 per employee per

year. *Id*. And the regulatory costs keep adding up. The current administration has "been adding regulatory costs at a rate of $617 billion per year of rulemaking, not counting regulatory costs created by statutes and other non-rule regulatory actions." Casey B. Mulligan, *Burden is Back: Comparing Regulatory Costs between Biden, Trump, and Obama*, Committee to Unleash Prosperity 18 (2023), https://tinyurl.com/Burden-is-Back.

Overregulation itself is a significant obstacle to the success of small businesses. Every four years, the NFIB Research Center surveys small businesses to determine their most important concerns. In 2020, small businesses ranked "Unreasonable Government Regulations" as their 6th biggest problem, with 19% labeling it "critical." NFIB Research Center, *Small Business Problems and Priorities* 9 (2020), https://bit.ly/3uJQE04. For context, small business ranked this concern ahead of operational issues like sales, employee turnover, and marketing.

Abandoning *Chevron* will not eliminate the regulatory crush, but it will force Congress to take greater care in lawmaking and more carefully consider the impact of its actions on those it seeks to govern. At least that is a worthy goal of our representative democracy.

III. Stare decisis should not deter the Court from abandoning *Chevron*.

There are those that would keep *Chevron* purely based on stare decisis. After all, it has been in place for nearly 40 years. But doing something simply because we have done it for decades is a poor reason to continue doing the same thing. Indeed, experience has taught that *Chevron* is wrong, and the life of the law is experience. O. Holmes, *The Common Law* 1 (1881). The Court has recognized that "precedents are not sacrosanct . . . ." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). There are hundreds of examples where the Court has "overruled prior decisions where the necessity and propriety of doing so has been established." *Id*. Accordingly, "when this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, [it] ha[s] chosen not to compound the original error, but to overrule the precedent." *Payne v. Tennessee*, 501 U.S. 808, 842–43 (1991).

Every member of the current Court has recognized that "*stare decisis* is not an inexorable command." *Person v. Callahan*, 555 U.S. 223, 233 (2009) (citation omitted); see also *Groff v. DeJoy*, No. 22-174, 2023 WL 4239256 (June 29, 2023) (Barrett and Jackson, JJ., joining unanimous opinion) (recognizing that *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407 (2022) abrogated *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (Alito, Gorsuch, and Kavanaugh, JJ., joining majority) (overruling then 34-year-old precedent); *Hurst v. Florida*, 577 U.S. 92 (2016) (Sotomayor, J., for the Court with Roberts, C.J., and

Thomas, Kagan, JJ., joining) (overruling two prior precedents—one 27 years old at the time of overruling and the other 32 years old and decided the same term as *Chevron*). Thus, the question is not if a Court should abide by stare decisis but when it precludes prudent changes.

And the *Chevron* doctrine is not an interpretation of a statute, which would suggest it merits a measure of respect for stare decisis. Rather, it is a judicially created interpretive rule that Congress does not modify by rewriting a statute or clarifying a regulation. The Court should not "place on the shoulders of Congress the burden of the Court's own error." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 695 (1978) (citing *Girouard v. United States,* 328 U.S. 61, 70 (1946)). And the Court has long recognized that "stare decisis is a principle of policy and not a mechanical formula of adherence," especially in the face of experience showing the need for a change. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). And the experience of this Court, a multitude of other federal courts, and that of state courts, "justifies reconsideration," *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977), rather than a mechanical adherence to the overused—and sometimes abused—judicially created doctrine.

When *Chevron* was decided, it seemed to promise the best of both worlds—administrative expertise along with political accountability. See Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83 Fordham L. Rev. 555, 556 (2014). Indeed, the case was decided unanimously, albeit with three Justices not participating. But time

and experience have exposed its flaws and placed *Chevron*'s continued salience in doubt. See, *e.g.*, Michael Hertz, Chevron *is Dead; Long Live* Chevron, 115 Colum. L. Rev. 1867 (2015) ("This decision, though seen as transformatively important, is honored in the breach, in constant danger of being abandoned, and the subject of perpetual confusion and uncertainty."); see also Catherine M. Sharkey, *Cutting In On the* Chevron *Two-Step*, 86 Fordham L. Rev. 2359, 2448 n. 2 (2018) ("Today, there are calls to abandon *Chevron*, originating not only in academia but from the halls of Congress and chambers of judges as well. Recent U.S. Supreme Court opinions, eliding *Chevron* altogether or declining to defer for one reason or another, have led some scholars to proclaim the 'terminal' state of the venerable doctrine of agency deference in statutory interpretation."). Justice Alito has aptly described *Chevron* as "an important, frequently invoked, once celebrated, and now increasingly maligned precedent . . . ." *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting).

In *City of Arlington Tex. v. F.C.C.*, Chief Justice Roberts observed that the "Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." 569 U.S. 290, 320 (2013) (Roberts, C.J., dissenting). Although "[i]t would be a bit much to describe the result as 'the very definition of tyranny'"—as James Madison, the Father of the Constitution, famously did—"the danger posed by the growing power of the administrative state cannot be

dismissed." *Id.* In that same vein, Justice Gorsuch, while serving on the United States Court of Appeals for the Tenth Circuit, described the *Chevron* doctrine as "no less than a judge-made doctrine for the abdication of the judicial duty." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151–52 (10th Cir. 2016). Other circuit court judges have opined as well, with Judge Carlos Bea of the United States Court of Appeals for the Ninth Circuit plainly stating that "[w]e should reconsider all the assumptions underlying *Chevron* deference and consider *Chevron*'s abandonment altogether. In other words, let's junk *Chevron*." Carlos T. Bea, *Who Should Interpret Our Statutes and How It Affects Our Separation of Powers*, Heritage Foundation (Feb. 1, 2016), https://tinyurl.com/bddvsm9a.

By all appearances, the Court has abandoned *Chevron*; now, it should do so formally. "*Chevron* has more or less fallen into desuetude—the government rarely invokes it, and courts even more rarely rely upon it." *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of cert.); see generally Nathan Richardson, *Deference Is Dead, Long Live* Chevron, 73 Rutgers U.L. Rev. 441 (2021). But clarity will remove the doctrine from the federal jurisprudential lexicon and eliminate the illusion that it still has life. Narrowing or "clarifying" *Chevron* without explicit abandonment would leave "a mere facade to give the illusion of reality." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 954 (1992) (Scalia, J., dissenting), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). *Chevron*

has become an "old rule no more than a remnant of abandoned doctrine . . . ." *Id.* at 855.

> Lest there be any confusion,
>
> > overruling *Chevron* would not merely be the result of changed views, but rather would be informed by experience that could not have been available at the time *Chevron* was decided. These factors confirm that overruling *Chevron* would be consistent with the principles that govern whether it is permissible for a court to overrule its precedent.

Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 785 (2010).

IV. States have led the charge in abandoning *Chevron* deference by demonstrating a more constitutionally appropriate path forward.

One of the "happy incidents" of our constitutional system is the ability of States to serve as "laborator[ies]" having the "right to experiment" by charting new paths. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandies, J., dissenting). Under our Constitution, States retain an "extensive portion of active sovereignty." The Federalist No. 45, at 308 (James Madison) (Easton Press ed., 1979).

To their credit, the States have admitted fault, and many have begun to dig out of the *Chevron* hole. See *TWISM*, 2022-Ohio-4677 at ¶ 48 ("Roughly half

the states in the Union review agency interpretations of the law de novo." (citation omitted)); Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines* 71–73 (2020), bit.ly/3qQU3eK (noting that 12 States have deference equivalent to that of the federal courts while approximately 32 have expressly rejected *Chevron*, give a lesser form of deference, or have expressed skepticism toward deference doctrines recently). States usually follow this Court's lead, but here, the Court should follow theirs.

More to the point, when States declare that de novo review applies to agency interpretations of the law, they are only doing what Congress told this Court to do years ago. In the Administrative Procedure Act, Congress tasked the courts with the responsibility to "decide all relevant questions of law [and] interpret constitutional or statutory provisions. . .." 5 U.S.C. § 706. If the Court follows the States, as it should, it will also give effect to the will of Congress, something that has been frequently overlooked in the application of *Chevron*.

Ohio is the most recent State to reject *Chevron* deference. In *TWISM*, the Ohio Supreme Court considered "[w]hat deference, if any, should a court give to an administrative agency's interpretation of a statute . . . ." 2022-Ohio-4677 at ¶ 2. The court was clear—"the judicial branch is *never* required to defer to an agency's interpretation of the law." *Id.* at ¶ 3 (emphasis in original).

Ohio's Supreme Court found it "difficult" to "reconcile" *Chevron*-style deference with the Ohio Constitution's separation of powers due to the abdication of the judicial duty to "say what the law is" to the executive branch. *Id.* at ¶ 34 (citation omitted). Given the striking similarity between the separation of powers provisions in the Ohio and United States Constitutions, this Court should consider the Ohio Supreme Court's rationale persuasive.[4] Further, *Chevron* raises due process and judicial independence concerns because it "turns over to one party" in the case, that is, the executive branch and agency being sued, "the authority to say what the law means." *Id.* at ¶ 35; see also The Federalist No. 10, at 57 (James Madison) (Easton Press ed., 1979) ("No man is allowed to be a judge in his own cause."); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1211 (2016) ("One of the costs of deference . . . is that it systematizes biased judgment in violation of the Fifth Amendment's guarantee of due process.").

Ohio did not just reject *Chevron*; it laid the groundwork for a judicial review scheme in a post-*Chevron* world. First, courts should use the traditional tools of statutory interpretation to determine the

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[4] Compare Ohio Const. art. II, § 1 ("*The legislative power* of the state shall be vested in a General Assembly."), Ohio Const. art. III, § 5 ("*The supreme executive power* of this state shall be vested in the governor."), and Ohio Const. art. IV, § 1 ("*The judicial power* of the state is vested in a supreme court" and lower courts), with U.S. Const. art. I, § 1 ("*All legislative Powers* herein granted shall be vested in a Congress."), U.S. Const. art. II, § 1 ("*The executive Power* shall be vested in a President."), and U.S. Const. art. III, § 1 ("*The judicial Power* of the United States, shall be vested in one supreme Court," and other inferior courts).

meaning of a text. At this point, the inquiry ends "[i]f the text is unambiguous . . . ." *TWISM*, 2022-Ohio-4677 at ¶ 44. Where ambiguity remains, "a court may consider an administrative agency's construction," assigning it weight solely based "on the persuasive power" of the interpretation and "not on the mere fact that it is being offered by the administrative agency." *Id.* at ¶¶ 44–45. In other words, in Ohio, *Skidmore* reigns supreme in a post-*Chevron* world. *Id.* at ¶ 46 (analogizing Ohio's future of deference to *Skidmore*); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("[T]he rulings, interpretations and opinions of the Administrator under this Act, while *not controlling upon the courts by reason of their authority*, do constitute a body of experience and informed judgement to which courts and litigants *may* properly resort for guidance. The *weight of such judgment* in a particular case will *depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade*, if lacking power to control." (emphasis added)).

Wisconsin has recently held that its practice of deferring to administrative agencies on questions of law violated the separation of powers. See *Tetra Tech EC, Inc. v. Wisc. Dep't. of Rev.*, 914 N.W.2d 21 (Wis. 2018); *Myers v. Wisconsin Dep't. of Nat. Resources*, 922 N.W.2d 47 (Wis. 2019) ("We have ended our practice of deferring to administrative agencies' conclusions of law." (citing *Tetra Tech EC, Inc.,* 914 N.W.2d 21)). Wisconsin's deference was not an exact replica of *Chevron*. Courts gave agency interpretations "great

weight" deference—adopting agency interpretations so long as they were *reasonable*—or "due weight" deference—a "tie goes to the agency" approach when there are multiple equally reasonable interpretations. *Tetra Tech EC, Inc.*, 914 N.W.2d at 31–32. According to the Wisconsin Supreme Court, both types of deference were "unacceptably problematic" and "unsound in principle" because they do "not respect the separation of powers" and "give[] insufficient consideration to the parties' due process interest in a neutral and independent judiciary . . . ." *Id.* at 48, 54.

Wisconsin established a way forward similar to that chosen by Ohio after rejecting deference on questions of law. Demonstrating an exemplary functioning of the tripartite system of government responding to one another on an issue, the Wisconsin Legislature passed 2017 Wis. Act 369. Section 35 of the Act enshrined into law that "[n]o agency may seek deference in any proceeding based on the agency's interpretation of any law," and section 80 amended a current statutory provision to read "[u]pon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law." 2017 Wis. Act 369 §§ 35, 80 (codified at Wis. Stat. §§ 227.10(2g) and 257.57(11)). Wisconsin courts now review questions of law de novo, while giving agency interpretations "due weight" based on their persuasive value and not deferential right. *Tetra Tech EC, Inc.*, 914 N.W.2d at 53.

Michigan rejected *Chevron* deference even though its "Constitution specifically recognizes administrative agencies." *In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259, 265 (Mich.

2008). Recognizing that agencies have "quasi-judicial" powers to conduct contested cases and fact-finding proceedings, the Court distinguished this "limited" power from the "defining aspect[] of judicial power" to say what the law is. *Id.* When courts give deference to agencies on questions of law, "they threaten the separation of powers . . . by allowing the agency to usurp the judiciary's constitutional authority to construe the law . . . ." *Id.* at 267. The Michigan Supreme Court also recognized what others have when considering the subject—deferring to executive agencies on questions of law produces the anomalous result that courts place *more weight* on a different branch's interpretation of the law than a lower court's interpretation in its own branch. *Id.* at 270.

The Michigan Supreme Court explicitly declined to "import the federal [*Chevron*] regime into Michigan's jurisprudence." *Id.* at 272. This was so because *Chevron* has proven "very difficult to apply" and the "unyielding deference . . . required by *Chevron* conflicts with . . . the separation of powers . . . by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government." *Id.* at 271–272.

Like its midwestern counterparts, Michigan's Supreme Court clarified judicial review post-*Chevron*. Michigan courts review statutory interpretation de novo. *Id.* at 266–67. Courts give "respectful consideration" to agency interpretations of statutes, but these interpretations are "not binding on the courts . . . ." *Id.* at 267 (citation omitted). Instead, courts "take[] note" of agency constructions of "doubtful or obscure laws," meaning they serve as an

"aid for discerning the Legislature's intent" as "expressed in the language of the state . . . ." *Id.*

Ohio, Wisconsin, and Michigan are not alone. Indeed, the growing trend among the States is to reject *Chevron*-type judicial deference, and this Court should follow suit. *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of cert.) ("[N]otable voices have also spoken. Several state courts have refused to import a broad understanding of *Chevron* in their own administrative law jurisprudence."). What follows are additional examples of the State rejection of broad *Chevron*-style deference.[5]

Arizona: In 2018, the Arizona Legislature and Governor amended its statutes to curtail agency deference on questions of law. Arizona now requires that "[i]n a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency." Ariz. Rev. Stat. § 12-910(F).

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[5] It is worth mentioning that federal judges have likewise become increasingly skeptical of *Chevron*'s fit within our constitutional structure. See A. Gluck & R. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1313, 1319–20, 1348–50 (2018) (noting that with the exception of D.C. Circuit judges, many federal judges "seriously questioned the wisdom and even legality of *Chevron*", "had little faith in the concept of agency deference", "do not favor the *Chevron* rule", were "decidedly anti-*Chevron*", and that "[t]he judges expressing skepticism regarding *Chevron* divide equally among liberals and conservatives").

Arkansas: In 2020, the Arkansas Supreme Court held that "agency interpretations of statutes will be reviewed de novo" because "giving deference to agencies' interpretations of statutes . . . transfers the job of interpreting the law from the judiciary to the executive" which the court "cannot do." *Myers v. Yamato Kogyo Co.*, 597 S.W.3d 613, 617 (Ark. 2020). Now, an agency's interpretation of an ambiguous statute is one of many tools in the toolbox to provide Arkansas courts with guidance.

Colorado: Colorado's Supreme Court has been "unwilling to adopt a rigid approach to agency deference that would *require* courts to defer to a reasonable agency interpretation of an ambiguous statute even if a better interpretation is available" but consider the agency interpretation "further persuasive evidence" along with statutory purpose, language, structure, and legislative history. *Nieto v. Clark's Market, Inc.*, 488 P.3d 1140, 1149 (Co. 2021). *But see Destination Maternity v. Burren*, 463 P.3d 266, 275 (Co. 2020) (deferring to an agency's "reasonable statutory interpretation[]").

Delaware: Delaware has long-rejected *Chevron*-type deference. Expressly declining to adopt *Chevron* deference, the Delaware Supreme Court concluded that deference to agency interpretations of statutes was wrong and that "[s]tatutory interpretation is ultimately the responsibility of the courts." Courts "will not defer to [agency] interpretation[s] as correct merely because it is rational" but may accord it "due weight" based on the agency's technical expertise or longstanding interpretation. *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382–83 (Del. 1999).

Florida: In 2018, Florida voters passed Amendment 6, amending the Florida Constitution to read, "[i]n interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo." Fl. Const. art. 5, § 21.

Kansas: Kansas rejects deference to agency interpretations of statutes. "[T]o the extent any statutory interpretation is required," Kansas' courts' review is "unlimited, with deference no longer being given to the agency's interpretation." *Kansas Dep't. of Rev. v. Powell*, 232 P.3d 856, 859 (Kan. 2010) (citation omitted).

Mississippi: "[A]bandon[ing] [its] old standard of review giving deference to agency interpretations of statutes," the Mississippi Supreme Court clarified that it is the role of "the courts and the courts alone, to interpret statutes." The court explained that its previous practice of showing "great deference" to agency interpretations was problematic under the State Constitution's separation of powers. *King v. Mississippi Military Dep't.*, 245 So.3d 404, 407–408 (Miss. 2018).

Tennessee: In 2022, Tennessee eliminated *Chevron*-type deference by statute. Now, "[i]n interpreting a state statute or rule, a court . . . shall not defer to a state agency's interpretation of the statute or rule and shall interpret the statute or rule de novo." The legislature went further, mandating that "[a]fter applying all customary tools of

interpretation, the court shall resolve any remaining ambiguity against increased agency authority." Tenn. Code § 4-5-326 (2022).

Utah: Utah gives no deference to agency interpretations on questions of law, but instead, uses a "non-deferential" standard that reviews agency conclusions of law "for correctness." In fact, the Utah Supreme Court has "openly repudiated" *Chevron* deference. Recognizing that the executive and legislative branches do interpret the law, the court distinguished legal interpretations "in the process of fulfilling constitutionally assigned powers" from "exercising authoritative power to say what the law is." In the former, the branches and agencies are "subject to judicial review without deference," preserving the separation of powers; in the latter, where *Chevron*-type deference lives, the courts transgress the separation of powers by abdicating their judicial role as final arbiter of the law. *Ellis-Hall Consultants v. Pub. Serv. Comm.*, 379 P.3d 1270, 1273–75 n. 4 (Utah 2016) (citations omitted).

Just last year, fifteen States urged this Court to take significant action on *Chevron*, including nine States other than those mentioned above. See Brief for Indiana et al. as *Amici Curiae* in Support of Pet'r, *Buffington*, 143 S. Ct. 14. "[T]he Court should either return to a judicially robust version of *Chevron* or overturn it altogether." *Id.* at 13. While an increasing number of States have moved away from *Chevron* or deference altogether, it is telling that "no states [] have gotten appreciably more deferential in the past 20 years." Ortner, *supra*, at 3 n. 3, 68.

V. *Chevron* has led to agency self-aggrandizement, legislative indifference, and judicial passivity.

1. Under *Chevron* agencies almost always win—but not necessarily because they are right.

"For justice is blind, and knows not of the existence of the sovereign, or of his rights, until made manifest by its own record." *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 300 (1822). But in the case of agencies, justice seems to be peeking underneath her blindfold and noting well which party is the sovereign. It is hard to reach any other conclusion upon examination of the judiciary's record of applying *Chevron*.

Indeed, *Chevron* deference introduces a "systemic judicial bias" in favor of the government. Hamburger, *supra*, at 1188. As Hamburger notes, "[T]he bias arises from institutional precedent rather than individual prejudice, but this makes the bias systematic and the Fifth Amendment due process problem especially serious." *Id.* He explains, "Under Article III, judges have a duty to exercise independent and unbiased judgment, and under the Fifth Amendment's guarantee of due process, they are barred at the very least from engaging in systematic bias." *Id.* at 1212. *Chevron* represents a "judicially manufactured" "heavyweight thumb on the scales" in favor of administrative agencies during litigation. Cf. *Biden v. Nebraska*, No. 22-506, 2023 WL 4277210, at *31, 33 (June 30, 2023) (Kagan, J., dissenting)

(decrying what was perceived as judicial creations that disadvantage administrative agencies).

In a review of "every published circuit court decision that cite[d] *Chevron* deference from 2003 to 2013," the author of a study found that agencies were somehow "right" in almost every case when interpreting ambiguous statutes. Christopher J. Walker, *Lawmaking Within Federal Agencies and Without Judicial Review*, 32 J. Land Use & Env't L. 551, 554 (2017). Walker found that when courts consider *Chevron* deference in the context of an ambiguous statute, the agencies won 93.8% of the time. *Id*. Is this really blind justice? It seems unlikely that the sovereign can be right 93.8% of the time in interpreting ambiguous laws. After all, "ambiguous" means "capable of being understood in two or more possible senses or ways." *Ambiguous*, Merriam-Webster, https://tinyurl.com/Webster-Ambiguous (last accessed Jul. 11, 2023).

Even a half-blind observer would see what is going on here. And those observers that are part of the process are just as likely to act upon this observation in a way that benefits them. That is true of legislators, regulators, and courts. Indeed, procedural rules, no matter how inconsequential or consequential, always affect the conduct of those who live by or with them. And this Court has long recognized that, in the context of jurors, both "conscious bias [and] unconscious bias" "can affect how we evaluate information and make decisions." *United States v. Diaz*, 854 F. App'x 386, 388 (2d Cir.), *cert. denied sub nom. Felton v. United States*, 142 S. Ct. 473 (2021). But, of course, what is true for jurors, is undoubtedly true for all humans,

even—or perhaps especially—those who govern us. And in the *Chevron* context, it has certainly affected all three branches of the federal government. See generally E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 Vill. Envtl. L.J. 1 (2005).

2. Agencies sometimes push the envelope expecting *Chevron* deference to protect them.

Knowing they will go into any legal challenges with such strong odds in their favor is bound to affect how agencies exercise their delegated powers. Consciously or subconsciously, it stands to reason that with only a minimal check on rulemaking authority, regulators will likely push the boundaries more and more. Indeed, this case illustrates just how serious a factor *Chevron* can be when it comes to upholding overly intrusive regulations.

But this observation and expectation are not hypothetical. Professor Walker confirmed this expectation with scientific precision in surveys of regulators and legislators. He found that

> agency rule drafters surveyed [] seemed to suggest that federal agencies act differently when they believe they are entitled to *Chevron* space. Nearly nine in ten rule drafters surveyed strongly agreed (46%) or agreed (41%)—and another 11% somewhat agreed—that "[w]hen drafting rules and interpreting

> statutes, agency drafters such as yourself think about subsequent judicial review."

Walker, *supra*, at 556.

Those surveyed further understood "that '[i]f *Chevron* deference (as opposed to *Skidmore* deference or no deference) applies to an agency's interpretation of an ambiguous statute it administers, the agency is more likely to prevail in court.'" *Id*. Indeed, they recognized "that a federal agency is more aggressive in its interpretive efforts if it is confident that *Chevron* deference applies—as opposed to *Skidmore* deference or de novo review." *Id*. at 556–57.

It turns out that the *Chevron* effect goes even further with the regulators. Knowing that they are judicially endowed with power to interpret statutes, "federal agencies play a substantial role in drafting statutes that they subsequently administer." *Id.* at 557. This Court has previously recognized that, at least some "federal legislation" "has usually not only been sponsored but actually drafted by the appropriate executive agency." *Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 177 (1942) (Stone, C.J., dissenting).

Professor Walker later concluded that "when rule drafters indicate that they 'use' administrative law doctrines when interpreting statutes, it could mean that they are more or less aggressive in their interpretive efforts, depending on which deference standard applies." Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1063 (2015).

Indeed, "[t]o require the various agencies of the government who are the effective authors of legislation . . . to express clearly and explicitly their purpose . . . makes for care in draftsmanship and for responsibility in legislation." *Cloverleaf Butter Co.*, 315 U.S. at 178 (Frankfurter, J., dissenting). And conversely, allowing vagueness "is to encourage slipshodness in draftsmanship and irresponsibility in legislation." *Id*. (Frankfurter, J., dissenting).

3. Legislators sometimes utilize *Chevron* to avoid accountability.

Then House Speaker Nancy Pelosi famously proclaimed Congress "[has] to pass the bill so you can find out what's in it . . . ." Peter Roff, *Pelosi: Pass Health Reform So You Can Find Out What's In It,* U.S.News (Mar. 9, 2010), https://tinyurl.com/Pelosi-Pass-the-Bill. While not intending to, her statement suggests an important truth about legislation—congressional staffers draft legislation. And those staffers understand the process, including the subsequent agency interpretation process and the impact of *Chevron*.

In 2013, Professors Gluck and Bressman conducted a study interviewing 137 congressional staffers involved in statutory drafting. "82% [of the respondents] were familiar with *Chevron*." 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, 995 (2013). And *Chevron* was the administrative doctrine that they "most use when drafting . . . ." *Id.* at 994. While it is unclear

exactly what consideration they gave the *Chevron* doctrine and how it affected the amount of ambiguity versus precision they allowed into the legislation, it did have an impact. Some—but certainly not all—admitted that "*Chevron* sometimes gives us comfort when things are ambiguous because we can't get more clarity." *Id.* at 1025 n. 345.

And courts have recognized these incentives—or biases—as Congress delegates more and more power to agencies. "*Chevron* deference 'tempts Congress to let the hardest work of legislating bleed out of Congress and into the Executive Branch, since Congress knows judges will defer to agency interpretations of ambiguities and gaps in statutes Congress did not truly finish.'" *Egan v. Delaware River Port Auth.,* 851 F.3d 263, 279 n. 3 (3d Cir. 2017) (quoting *The* Chevron *Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing before the H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary*, 114th Cong. (March 15, 2016) (Prepared Statement of the Honorable Bob Goodlatte)). Indeed, "[t]he consequent aggrandizement of federal executive power at the expense of the legislature leads to perverse incentives, as Congress is encouraged to pass vague laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues." *Id.*

4. Courts evade their constitutional duty to judge through agency deference.

In the Administrative Procedure Act, Congress tasked the courts with the responsibility to "decide all relevant questions of law [and] interpret constitutional or statutory provisions . . . ." 5 U.S.C. § 706. Creating ambiguity to give agencies such power effectively gives the agencies a lawmaking function reserved to Congress. For the courts, "[t]here is nothing so liberating . . . as the discovery of an ambiguity." Raymond Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 316 (2017).

But the liberation from the text when the court detects ambiguity brings with it responsibility—the responsibility to interpret the laws. As "Hamilton said in Federalist No. 78 that '[t]he interpretation of the laws is the proper and peculiar province of the courts.'" *Id*. at 323. At the same time, it is sometimes easier for courts to abdicate their role to others.

First, judges have limited time, and relying on the judgment of the agency—the sovereign—is easier and faster than puzzling out the answer de novo. Indubitably, "[w]ork takes time and energy." Brian Sheppard, *Judging Under Pressure: A Behavioral Examination of the Relationship Between Legal Decisionmaking and Time*, 39 Fla. St. U. L. Rev. 931, 959 (2012). Reliance on another requires little of either.

Second, "[a]n obvious concern of judges is that they avoid becoming overburdened. . . . This does not imply that judges are lazy, just that they are human

and have goals in life other than spending all their time deciding cases." Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 Nw. U. L. Rev. 1437, 1481 (2001).

Third, judges may feel that the agency has more expertise and can better decifer the statutory intent than the judges. Indeed, that is one of the supposed reasons behind *Chevron* deference. "[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference." *Cardiosom, L.L.C. v. United States,* 115 Fed. Cl. 761, 769 (2014) (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990)). But "[t]he type of reflexive deference exhibited in some of these cases is troubling." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

Despite any judicial excuse to rely on the judgment of others, judging is their duty and their oath. It is non-delegable. "It is emphatically the province and duty of the judicial department to say what the law is." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 316 (2013) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Court must throw away the *Chevron* crutch and let the lower courts—once again—walk on their own.

VI. Courts already have the skills and interpretive rules in place of *Chevron*.

First, it should be obvious that courts have the tools to interpret statutes. It is their place and their duty. *Marbury*, 5 U.S. (1 Cranch) at 177. Second, even when the agencies have the supposed expertise in a

technical area, that is not the basis for the court to peek beneath the blindfold of justice to favor the sovereign. Instead, they need to give both sides a fair shake and follow the rules of evidence established by the Supreme Court.

Congress directs courts to review agency action in 5 U.S.C. § 706. The review should first start with a determination of whether Congress has delegated authority to the agency to issue the regulation or other agency action, sometimes known as *Chevron* step zero. See generally Jeremy D. Rozansky, *Waiving* Chevron, 85 U. Chi. L. Rev. 1927 (2018). Once the agency establishes its regulatory authority, the court needs to review the submissions from the party challenging the regulation and the agency that issued the regulation, treating both parties equally. Some have suggested giving the agency *Skidmore* deference in such litigation. But there is "a substantial amount of disagreement about the *Skidmore* doctrine. At one end of the spectrum are those who believe that *Skidmore* deference is no deference at all—what could be called 'zero deference.'" Bradley Lipton, *Accountability, Deference, and the* Skidmore *Doctrine*, 119 Yale L.J. 2096, 2125 (2010). The Court has sometimes explained that the agency's "interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales v. Oregon,* 546 U.S. 243, 256 (2006). It has also been described as a "sliding scale of optional deference, where the deference the court accords to an agency's interpretation depends on the extent to which the court is persuaded by such interpretation." Islame Hosny, *Interpretations by Treasury and the IRS: Authoritative Weight, Judicial Deference, and the*

Separation of Powers, 72 Rutgers U.L. Rev. 281, 294 (2020).

But how much deference should the court give to the challenging party's expert? The Court answered this when it issued the Federal Rules of Evidence. The Federal Rules of Evidence "apply to proceedings in United States courts." Fed. R. Evid. 101(a). And when questions of expertise arise before the court, Rule 702 directs the courts to provide a fair hearing of experts on both sides accompanied by judicial review under *Daubert*. Specifically, the court may allow experts to give expert testimony if qualified as an expert by that rule. This Court recognized the effectiveness of this rule but charged trial judges to act as "gatekeepers" to exclude unreliable expert testimony, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993), and further explained that this applies to all expert testimony, not just testimony based in science, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

The Federal Rules of Evidence do not direct—or allow—the court to give one side a preference. *Chevron* deference is simply inconsistent with Rule 702. However, Rule 702 is not inconsistent with *Skidmore* deference—at least as some have understood it. "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citing *Skidmore*, 323 U.S. at 140). Justice Scalia summarized the majority's

view of *Skidmore* as follows: "A judge should take into account the well-considered views of expert observers." *Mead*, 533 U.S. at 250 (Scalia, J., dissenting). Justice Scalia called this a "truism" and "obvious." *Id.* (Scalia, J., dissenting). It is also consistent with Rule 702. Justice Scalia was right; it is obvious, and there is no need to make it any more complicated.

The way forward, then, is to jettison *Chevron*. It should be replaced with (1) a recognition of the role that 5 U.S.C. § 706 gives the courts; (2) a consideration of whether Congress, in fact, authorized the agency to act, and; (3) consistent with the *Skidmore* approach of giving the agency interpretation the respect it is entitled to as an "expert"—where appropriate—apply Federal Rule of Evidence 702 to the agency's and challengers' expert presentations.

CONCLUSION

This Court should abandon the *Chevron* doctrine and reverse the decision below.

Respectfully submitted,

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