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 D.C. Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

September 2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. As originally formulated, the *Chevron* doctrine is firmly grounded in the APA and gives effect to the legitimate authority of Congress, the executive branch, and the courts..... 3

II. Properly understood, *Chevron* does not call for unfettered deference to agencies' implementation of statutory terms. 8

III. *Chevron* confines each of the three branches to its proper role. 16

CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases **Pages**

Aid Ass'n for Lutherans v. U.S. Postal Serv.,
321 F.3d 1166 (D.C. Cir. 2003) 14

Am. Bus Ass'n v. Slater,
231 F.3d 1 (D.C. Cir. 2000) 12

Arizona v. Thompson,
281 F.3d 248 (D.C. Cir. 2002) 11

Barnhart v. Thomas,
540 U.S. 20 (2003) 17

Central United Life Ins. Co. v. Burwell,
827 F.3d 70 (D.C. Cir. 2016) 14

Chevron, U.S.A., Inc. v. NRDC,
467 U.S. 837 (1984) 1–20

Christensen v. Harris Cty.,
529 U.S. 576 (2000) 9

Citizens Coal Council v. Norton,
330 F.3d 478 (D.C. Cir. 2003) 18

City of Arlington v. FCC,
569 U.S. 290 (2013) 3, 4, 5, 9, 14, 15, 20

Coeur Alaska, Inc. v. S.E. Alaska Conservation Council,
557 U.S. 261 (2009) 16

Consumer Fed'n of Am. v. U.S. Dep't of Health & Human Servs.,
83 F.3d 1497 (D.C. Cir. 1996) 18

Cuozzo Speed Techs., LLC v. Lee,
579 U.S. 261 (2016) 17

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 9

Encino Motorcars, LLC v. Navarro,
138 S. Ct. 1134 (2018) 19

Encino Motorcars, LLC v. Navarro,
579 U.S. 211 (2016) 7, 13, 15

Entergy Corp. v. Riverkeeper, Inc.,
556 U.S. 208 (2009) 12, 17

Facebook, Inc. v. Duguid,
141 S. Ct. 1163 (2021) 19

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 15, 16

Freeman v. Quicken Loans, Inc.,
566 U.S. 624 (2012) 14

Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.,
550 U.S. 45 (2007) 17

Holder v. Martinez Gutierrez,
566 U.S. 583 (2012) 11, 17

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 5, 10

Judulang v. Holder,
565 U.S. 42 (2011) 7

King v. Burwell,
576 U.S. 473 (2015) 10, 19

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 11

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 13, 17

Mayo Fdn. for Med. Educ. & Research v. United States,
562 U.S. 44 (2011) 17

Mont. Consumer Counsel v. FERC,
659 F.3d 910 (9th Cir. 2011) 18

MCI Telecomms. Corp. v. AT&T Co.,
512 U.S. 218 (1994) 14

Moore v. Hannon Food Serv., Inc.,
317 F.3d 489 (5th Cir. 2003) 12

Motion Picture Ass'n of Am. v. FCC,
309 F.3d 796 (D.C. Cir. 2002) 12

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,
463 U.S. 29 (1983) 7, 15, 17

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 6, 7, 15

Pereira v. Sessions,
138 S. Ct. 2105 (2018) 19

PDK Labs. v. DEA,
362 F.3d 786 (D.C. Cir. 2004) 11

Perez v. Mortgage Bankers Ass'n,
575 U.S. 92 (2015) 4

Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.,
471 F.3d 1350 (D.C. Cir. 2006) 11

Ruderman v. Whitaker,
914 F.3d 567 (7th Cir. 2019) 18

Ry. Labor Executives Ass'n v. Nat'l Mediation Bd.,
29 F.3d 655 (D.C. Cir. 1994) 12

Sackett v. EPA,
143 S. Ct. 1322 (2023) 19

SAS Inst., Inc. v. Iancu,
138 S. Ct. 1348 (2018) 11

Scialabba v. Cuellar de Ororio,
573 U.S. 41 (2014) 14, 19

SEC v. Chenery Corp.,
318 U.S. 80 (1943) 11

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 10

Smiley v. Citibank (S. Dak.), N.A.,
517 U.S. 735 (1996) 4, 15

United States v. Eurodif S.A.,
555 U.S. 305 (2009) 17, 19

United States v. Home Concrete & Supply, LLC,
566 U.S. 478 (2012) 10, 14

United States v. Mead Corp.,
533 U.S. 218 (2001) 5, 6, 9, 15

Util. Air Regulatory Grp. v. EPA,
573 U.S. 302 (2014) 10

West Virginia v. EPA,
142 S. Ct. 2587 (2022) 10

Statutes

5 U.S.C. § 706..... 7

5 U.S.C. § 706(2)(A) 2, 7, 8, 13

5 U.S.C. § 706(2)(D) 13

Other

Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010) 6

Br. for Pet., *Kisor v. Wilkie*, No. 18-15 (filed Jan. 24, 2019) 5

Michael Herz, Chevron *is Dead: Long Live* Chevron, 115 Colum. L. Rev. 1867 (2015) 8

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016) ... 17

INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization that appears before Congress, administrative agencies, and the courts on behalf of its nationwide members and supporters. Much of Public Citizen's research and policy work focuses on regulatory matters, and Public Citizen is often involved in litigation both challenging and defending agency action. Frequently, that litigation involves application of this Court's major doctrines concerning deference to agencies, including the doctrine articulated in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), which provides for deference when agencies exercise rulemaking authority delegated by Congress to flesh out statutory terms that allow the agency a range of reasonable choices. The government often invokes the *Chevron* doctrine in defense of agency actions challenged by Public Citizen, as well as in defense of agency actions that Public Citizen supports. Public Citizen's view of the doctrine therefore does not reflect a perception that it systematically favors or disfavors outcomes supported by Public Citizen. The role the doctrine plays in cases of significance to Public Citizen's mission gives Public Citizen a strong interest in its proper application and in the more fundamental question whether the Court should continue to adhere to it.

SUMMARY OF ARGUMENT

The *Chevron* doctrine, at its core, reflects the principle that the law commands courts to uphold the reasonable exercise of authority delegated by Congress to

---

[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief.

an administrative agency. *Chevron* deference to the lawful exercise of agency authority to fill gaps in regulatory schemes created by statute, properly understood and applied, is fully consistent with the requirement that courts interpret statutes. *Chevron* commands deference only when a court has determined that what a statute *means* is that an agency has discretion to resolve a particular matter through regulations or other actions with the force of law. Thus, where *Chevron* is triggered, its deferential standard implements—indeed, is commanded by—the standard of review for discretionary agency action set forth in the Administrative Procedure Act (APA). *See* 5 U.S.C. § 706(2)(A). That is, when an agency takes an action premised on a lawful construction of a statute whose plain terms do not resolve the issue, the APA's deferential standard of review applies, and a court may set aside the agency's action only if it is arbitrary, capricious, or an abuse of discretion. *Id.*

Chevron has become controversial in large part because, over its 40-year history, agencies have claimed deference, and courts have sometimes afforded it, in situations outside its proper scope. But as the best reasoned decisions applying *Chevron* have emphasized, *Chevron* does not command unqualified deference to an agency's construction of a statute. Rather, *Chevron* applies only when a court concludes that Congress has delegated authority to the agency and that a statute genuinely allows the agency to select among a range of reasonable choices in implementing a regulatory scheme created by Congress. Moreover, not every opinion that an agency or its personnel express about the meaning of a statute, or every form in which such an opinion is expressed, reflects an agency action to which the APA standard of review applies—

and thus to which *Chevron* should apply. And even when a statute could reasonably be read in more than one way, an agency is not free to choose a reading that the statute's terms foreclose. Finally, like other actions subject to APA review, an agency's choice of how to implement an "ambiguous" statutory command must be set aside if lacks a reasoned basis.

A doctrine that circumscribes agency authority so carefully is unlikely to subvert our constitutional order, and *Chevron* has not done so in practice. Rather, as recent unanimous decisions of this Court applying *Chevron* to uphold reasonable exercises of agency authority illustrate, *Chevron* allows agencies to do their jobs within the scope of their statutory mandates, while preserving the roles of Congress and the courts in enacting and interpreting the law. To be sure, courts may sometimes err in applying *Chevron*, typically when they fail to respect its limits. But such errors, inherent in the application of legal doctrines, do not demonstrate that *Chevron* is unworkable or an infringement of the respective roles of the three branches of the federal government.

ARGUMENT

I. As originally formulated, the *Chevron* doctrine is firmly grounded in the APA and gives effect to the legitimate authority of Congress, the executive branch, and the courts.

In *City of Arlington v. FCC*, 569 U.S. 290 (2013). Justice Scalia explained on behalf of a majority of the Court that "*Chevron* is rooted in a background presumption of congressional intent." *Id.* at 296. Specifically, *Chevron* commands deference to an agency's construction of a statute if a court determines that,

when Congress " 'left ambiguity in a statute' administered by an agency, [it] 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.' " *Id.* (quoting *Smiley v. Citibank (S. Dak.), N.A.*, 517 U.S. 735, 740–41 (1996)).

Chief Justice Roberts's dissent in *City of Arlington*, while disagreeing with the majority opinion on the resolution of the particular question posed in that case, agreed that "[c]ourts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretative authority over the question at issue." *Id.* at 312 (Roberts, C.J., dissenting). Despite their differences, the *Arlington* majority and dissent were united in recognizing that *Chevron* properly applies when a court determines that a statute's *meaning* is that an agency possesses discretionary authority and that the agency has acted within the scope of that discretion. *See id.* at 306–07 (majority opinion).

Petitioner Loper Bright Enterprises urges the Court to abandon its longstanding deference to agency exercise of discretion conferred by Congress, in favor of suggestions that *Chevron* was "[h]eedless of the original design of the APA" because it transferred from the courts to agencies the power to "interpret … statutory provisions." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment). *Chevron*, on that view, represents a "judge-made doctrine[ ] of deference" that is inconsistent with "the responsibility of the court to decide whether the law means what the agency says it means." *Id.*

However, as Justice Scalia himself had previously explained—and as a host of this Court's decisions have recognized—where *Chevron* properly applies, it is fully consistent with both objectively manifested congressional intent and judicial responsibility to determine the meaning of statutes. *See Arlington*, 569 U.S. at 296. Indeed, even critics of the Court's deference doctrines have acknowledged that "[w]hen the APA's procedural safeguards are respected, judicial deference to agency interpretations of ambiguous statutory text is consistent with the APA's structure and purpose." Br. for Pet. 46, *Kisor v. Wilkie*, No. 18-15 (filed Jan. 24, 2019).

In a *Chevron* case, a reviewing court does not abdicate its responsibility to interpret the relevant statute. Rather, the court defers only after it determines that the *meaning* of the statute is that Congress has delegated authority to the agency to resolve a particular issue concerning the statute's scope or application. Deference under *Chevron* is triggered when a court finds a statutory "gap" or "ambiguity" with respect to a matter as to which Congress has conferred rulemaking authority to an agency—a gap that ordinary principles of statutory construction, beginning with the primacy of unambiguous statutory text, cannot resolve. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 446–49 (1987). Such a gap exists when the court determines that the statutory language can *reasonably* be read to have a range of permissible meanings as applied to specific circumstances that the agency may face in applying it, and that the statutory text, structure, and context do not reflect a specific congressional directive concerning how the agency should resolve that matter. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

That form of "ambiguity" in a statute "is essentially a delegation of policymaking authority to the governmental actor charged with interpreting a statute." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 123 (2010) (citing *Chevron*, 467 U.S. at 843–44). Thus, when an agency has been delegated regulatory authority under a statute to take actions with the force of law, the best reading of an ambiguity in the statute is often that it represents a delegation of authority to the *agency* to resolve the matter, within the bounds set by the statute and the agency's obligation to engage in rational decisionmaking in conformity with applicable procedures. *See Mead*, 533 U.S. at 229.; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

Chevron is a case in point. The statute at issue there required the agency to regulate air emissions from "stationary sources," but the statute did not express a discernible intent as to how that term should be applied to a single facility with multiple smokestacks. 467 U.S. at 845. In light of the statute's delegation of regulatory power to the agency, the Court held that what the statute meant was that the agency had discretion to determine the bounds of a stationary source, just as it had discretion under the statute with respect to certain other matters, such as determining the emissions limits necessary to protect public health. *See id.* at 843–45, 865–66.

Where Congress has lawfully delegated such authority, and the agency has exercised it in an action taken through the procedures required by Congress—typically, through rulemaking, *see Mead Corp.*, 533 U.S. at 230—the APA provides for deferential review: The agency action is to be set aside only if it is

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Chevron*, 467 U.S. at 843. The standard is equally applicable whether the matter delegated to the agency is filling a gap in the statute by explicating ambiguous statutory terms (*Chevron*'s domain) or exercising some other form of delegated discretion, such as determining whether a motor vehicle safety standard is "reasonable, practicable, and appropriate." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 33 (1983). Thus, the "reasonableness" review that a court exercises at "*Chevron* step two" is, properly understood, an application of APA review of the exercise of agency discretion. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–24 (2016) (applying *State Farm* standard to an agency's construction of a statute); *Brand X*, 545 U.S. at 981 (explaining that interpretations entitled to *Chevron* deference are subject to review to determine whether they are "arbitrary and capricious … under the Administrative Procedure Act").

Accordingly, a reviewing court applying the *Chevron* framework fully complies with its obligation to "decide all relevant questions of law [and] interpret constitutional and statutory provisions." 5 U.S.C. § 706. It does so, first, by interpreting the statute and deferring only upon a determination that what the statute *means* is that Congress delegated authority to the agency on the point at issue. *Chevron* thus explicitly honors the principle that "[t]he judiciary is the final authority on issues of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Second, at *Chevron* step two, the court enforces the requirements of the APA, as well as the constraints that the authorizing statute

places on the agency's exercise of its discretionary authority, by considering whether the agency's construction must be set aside as "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

This understanding of *Chevron*, which hews closely to the *Chevron* decision itself, avoids "an abandonment of the judicial role, while still granting due weight to agency interpretation and, within the congressionally established and judicially policed *Chevron* space, respecting agency construction." Michael Herz, Chevron *is Dead: Long Live* Chevron, 115 Colum. L. Rev. 1867, 1909 (2015).

> So understood, *Chevron* is not a revolutionary shift of authority from the judiciary to the executive. That *Chevron* is dead. Rather, *Chevron* is an appropriate allocation of decisionmaking responsibility among the three branches, relying on the judiciary to enforce congressional decisions, but protecting agency authority and discretion where Congress has left the decision to the executive. Long may it reign.

Id. at 1867.

II. Properly understood, *Chevron* does not call for unfettered deference to agencies' implementation of statutory terms.

Criticism of *Chevron* has grown as, at times, the scope of deference afforded agency actions has gone beyond the bounds of the *Chevron* doctrine. Properly understood, *Chevron* does not stand for blanket deference to agencies' views of statutory meaning. Rather, *Chevron*, as elaborated by decisions that are faithful to its underlying premises, imposes substantial constraints on agencies to ensure that they have stayed within their assigned role of carrying out authority

delegated by statute—and to preserve the proper role of the courts when agencies engage in action that is subject to judicial review under the APA. *Chevron* is decidedly not a doctrine under which anything goes if an agency can identify some arguable ambiguity in the terms of a statute.

To begin, *Chevron* is limited to instances where a statute confers on an agency the authority to take actions with the force of law to implement the statute—typically through "rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Mead*, 533 U.S. at 229; *see Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). When the text, structure, and context of the statutory scheme show that Congress did not "delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable.' " *Mead*, 533 U.S. at 229 (quoting *Christensen*, 529 U.S. at 597 (Breyer, J., dissenting)). Put another way, "[a]n agency interpretation warrants *Chevron* deference only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner." *Arlington*, 569 U.S. at 321–22 (Roberts, C.J., dissenting).

Second, even if an agency has some interpretive authority under a statute, the text, structure, and context of a particular statutory provision may show that the provision must prescribe a singular answer to the question it addresses, rather than allowing for a range of choices from which an agency may choose. That is, where a statute means either A or B, and the Court concludes that the statutory scheme does not delegate the choice to an agency, *Chevron* does not apply. In such an instance, although the statute may be ambiguous as to which meaning Congress intended,

Congress did not confer discretion on the agency to resolve the ambiguity. *See*, *e.g.*, *King v. Burwell*, 576 U.S. 473, 485–86 (2015); *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488–89 (2012) (plurality); *INS v. Cardoza-Fonseca*, 480 U.S. at 446–48. Rather, in a case properly before it, a court would determine the best reading of the statute (informed by the agency's views only to the extent that they have power to persuade, *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), just as the court is informed by persuasive arguments from other sources). The principle that reasonable exercises of agency *discretion* are lawful would not come into play.[2]

Third, *Chevron* deference is by definition inapplicable if an agency does not *purport* to be exercising interpretive discretion conferred by statute. If an agency's action is premised on its view that Congress has compelled a specific interpretation or application of the statute, that action cannot be upheld as a reasonable exercise of discretion that the agency did not believe it possessed and hence did not exercise, let

---

[2] Among the circumstances in which the Court has held it improper to find the requisite delegation are those presented by "certain extraordinary cases" where "both separation of powers principles and a practical understanding of legislative intent make [the Court] 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Although petitioners suggest that the same approach should apply to "less major" questions, Pet. Br. 35, that suggestion disregards both the principles underlying the *Chevron* doctrine and the reasons articulated by the Court for declining to afford agencies "power beyond what Congress could reasonably be understood to have granted" over what the Court has described in shorthand as "major questions." *West Virginia*, 142 S. Ct. at 2609.

alone provide rational reasons for exercising in a particular manner. *See*, *e.g.*, *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006); *PDK Labs. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004); *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002). Deferring in such circumstances to a discretionary determination that the agency never made would violate the longstanding principle that a court may not uphold an agency ruling based on a rationale the agency did not adopt. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943); *see also Holder v. Martinez Gutierrez*, 566 U.S. 583, 597 (2012) (deferring to Board of Immigration Appeals' statutory construction only after concluding that there was "nothing in [its] decision to suggest that the Board thought its hands tied" by the statute).

Fourth, when an agency seeks to invoke its gap-filling authority under *Chevron*, it must identify a genuine ambiguity—one that allows for multiple reasonable applications of a statutory term that cannot be ruled out through the use of "traditional tools of statutory construction." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9). "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer" should a court conclude that the best reading of the statute is that the agency has discretion to select one of the possible reasonable answers. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

Critically, a statute is not "ambiguous" within the meaning of *Chevron* just because it does not *explicitly* rule out a particular agency construction. "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of

keeping with *Chevron* and quite likely with the Constitution as well." *Ry. Labor Executives Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc); *accord Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002); *see also Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003) (stating that a regulation is not " 'ambiguous' merely because its authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope").

However, where, as in this case, a grant of authority can otherwise be reasonably read to confer discretion to take a particular approach, the absence of an explicit reference to that approach, in context, may well represent an ambiguity implying permission to adopt the approach—especially when the statutory "silence" concerns some matter that the agency will necessarily have to resolve one way or another in exercising its statutory authority. *See*, *e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222–23 (2009) (finding that statutory silence concerning agency's consideration of costs did not preclude agency from considering them). Thus, in *Chevron* analysis, "sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." *Id*. In other circumstances, "silence cannot bear that interpretation" and instead supports agency authority. *Id*. For this reason, the Court's *Chevron* precedents have, from the beginning, referred to statutory "silence" together with "ambiguity" as potentially implying agency authority to fill a "gap" in a statutory scheme. *see Chevron*, 467 U.S. at 837. But the Court has never read *Chevron* to mean that anything "that … is not forbidden is permitted." *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, J., concurring).

Fifth, where a statutory scheme contains an ambiguity that is properly understood as a delegation of gap-filling authority to an agency, an agency's attempted exercise of that authority is entitled to deference only when the agency has complied with the procedures prescribed by Congress for the lawful exercise of authority. The APA explicitly requires courts to set aside agency actions taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). When, as is typically the case, Congress has delegated an agency authority to construe a statute through rulemaking or adjudication, a construction arrived at through procedures that do not conform with applicable statutory or constitutional requirements is not entitled to *Chevron* deference. *See*, *e.g.*, *Encino Motorcars*, 579 U.S. at 220; *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174–76 (2007) (unanimously granting *Chevron* deference to a properly promulgated Labor Department regulation implementing the Fair Labor Standards Act's companion-worker exception).

Sixth, even where a statute contains a gap or ambiguity providing the agency a range of discretion and the agency has followed the correct procedures in seeking to exercise that authority, the statute may still unambiguously *rule out* some purported exercises of that discretion, rendering them "not in accordance with law," in the terms of section 706(2)(A) of the APA. For example, although the statute at issue in *Chevron* was ambiguous with respect to the scope of a "stationary source," and the rule at issue reflected a reasonable resolution of that ambiguity, the statute would have unambiguously ruled out a regulation that, say, purported to define a facility located in New York as being within the same "stationary source" as a facility

in Los Angeles. Whether such a regulation would be viewed as failing at *Chevron* step one or step two, it would doubtless be held unlawful because the delegation of authority implicit in statutory ambiguity cannot extend to an "agency interpretation [that] is clearly beyond the scope of any conceivable ambiguity." *Home Concrete*, 566 U.S. at 493 n.1 (Scalia, J., concurring in part and in the judgment). As Justice Scalia colorfully observed in *Home Concrete*, "It does not matter whether the word 'yellow' is ambiguous when an agency has interpreted it to mean 'purple.' " *Id*. Rather, even "where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *Arlington*, 569 U.S. at 307. *See also Scialabba v. Cuellar de Ororio*, 573 U.S. 41, 80 (2014) (Alito, J., dissenting) (observing that a statute "may well contain a great deal of ambiguity, which the [agency] in its expertise is free to resolve, so long as its resolution is a 'permissible construction of the statute' ").

This principle has been repeatedly applied by this Court and lower federal courts to ensure that agencies do not stray beyond the limits of their authority as defined by Congress. *See*, *e.g.*, *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) ("[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."); *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 631 (2012) (same); *Central United Life Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016) ("[I]f Congress grants an agency flexibility to flesh out a particular policy, the regulation will be upheld 'as long as the agency stays within that delegation.' ") (citation omitted); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1178–79 (D.C. Cir. 2003) (finding that "the

Postal Service transgressed the bounds of any delegation to fill alleged gaps in the statute, because the statute simply cannot bear the meaning that the Postal Service seeks to give it"). When this constraint is applied, *Chevron* fully vindicates judicial authority to police the bounds of agency authority by "taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority." *Arlington*, 569 U.S. at 307.

Finally, even if an agency regulation does not on its face exceed the bounds of discretion conferred by statute, it should be upheld under *Chevron* only if it reflects a *reasonable* exercise of that authority—one that can be sustained in light of the APA's condemnation of agency action that is "arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars*, 579 U.S. at 221. Accordingly, when an agency adopts a construction of its authority under the statute, it "must give adequate reasons for its decisions," and " 'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.' " *Id.* (quoting *State Farm*, 463 U.S. at 43). And when the agency's action reflects a change in the agency's view of its authority, the agency must "display awareness that it is changing position," *id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)), and articulate reasons for doing so that consider such factors as reliance interests, *id.* at 222 (quoting *Smiley*, 517 U.S. at 742). Failure to provide such an explanation for a change in the agency's view is sufficient "reason for holding an interpretation to be … arbitrary and capricious," *id.* (quoting *Brand X*, 545 U.S. at 981), and hence beyond the bounds of *Chevron* deference, *id.* (citing *Mead*, 533 U.S. at 227).

III. *Chevron* confines each of the three branches to its proper role.

A. The significant limits on *Chevron* deference described above operate to prevent it from becoming a source of constitutional imbalance. It allows agencies to claim deference only when they exercise power legitimately conferred by Congress within the limits imposed by statutes conferring authority and the overarching constraints of the APA. And it recognizes the reality that in conferring regulatory authority on administrative agencies, Congress cannot anticipate and unambiguously address every issue that may arise in implementing a statute. Congress may legitimately grant agencies discretion to address statutory gaps and to implement broadly worded statutory mandates, consistently with statutory language and structure and the policies they reflect. And "[i]t is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions." *Coeur Alaska, Inc. v. S.E. Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring in part and in the judgment).

At its heart, *Chevron* sensibly addresses this reality, as even its skeptics have acknowledged:

> *Chevron* makes a lot of sense in certain circumstances. It affords agencies discretion over how to exercise authority delegated to them by Congress. For example, Congress might assign an agency to issue rules to prevent companies from dumping "unreasonable" levels of certain

> pollutants. In such a case, what rises to the level of "unreasonable" is a policy decision. So courts should be leery of second-guessing that decision. The theory is that Congress delegates the decision to an executive branch agency that makes the policy decision, and that the courts should stay out of it for the most part. That all makes a great deal of sense and, in some ways, represents the proper conjunction of the *Chevron* and *State Farm* doctrines.

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016).

Indeed, even as criticism of *Chevron* has mounted, this Court has continued to uphold, often unanimously or by substantial majorities, reasonable agency efforts to flesh out details of complex regulatory schemes that are not clearly resolved by underlying statutory provisions and that delegate gap-filling authority to agencies. *See*, *e.g.*, *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 276–83 (2016) (Patent and Trademark Act); *Holder v. Martinez Gutierrez*, 566 U.S. at 591 (Immigration and Nationality Act); *Mayo Fdn. for Med. Educ. & Research v. United States*, 562 U.S. 44, 54–58 (2011) (Internal Revenue Code); *Entergy*, 556 U.S. at 224 (Clean Water Act); *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (antidumping provisions of Tariff Act); *Long Island Care*, 551 U.S. at 165 (Fair Labor Standards Act); *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 55 (2007) (Communications Act); *Barnhart v. Thomas*, 540 U.S. 20, 26–30 (2003) (Social Security Act).[3] As these decisions reflect, when

[3] *See also Ruderman v. Whitaker*, 914 F.3d 567–73 (7th Cir. 2019) (Barrett, J.) (Immigration and Nationality Act).

Congress has properly delegated details of statutory administration to an agency, deference to reasonable exercises of agency discretion is consistent with congressional intent, the rule of law, and the proper role of the courts.

B. To be sure, courts have sometimes misfired in their application of *Chevron* and too readily sustained an agency action that falls outside the scope of discretion conferred by a statute. In most such instances, the error lies in a court's failure to adhere to the limits on *Chevron* deference discussed above. *See*, *e.g.*, *Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 915–23 (9th Cir. 2011) (erroneously finding FERC's rule permitting market-based rates for wholesale electricity to be within the scope of discretion granted FERC by the Federal Power Act's requirements that rates be filed and subject to review for reasonableness before they go into effect); *Consumer Fed'n of Am. v. U.S. Dep't of Health & Human Servs.*, 83 F.3d 1497, 1503–05 (D.C. Cir. 1996) (mistakenly holding that HHS's discretion to establish qualifications for persons who administer medical tests that are "appropriate" in light of the risks and consequences of erroneous results allowed the agency to establish qualifications it deemed appropriate based on another factor, without considering those risks and consequences); *Citizens Coal Council v. Norton*, 330 F.3d 478, 481–86 (D.C. Cir. 2003) (mistakenly concluding that a Surface Mining Control and Reclamation Act provision requiring regulation of surface impacts of underground mines granted discretion to the Department of Interior not to regulate such impacts).

That courts may sometimes misapply a standard, or disagree about its application to a particular case, is not a reason for discarding it. Of course, judges,

including Justices of this Court, will not always agree on the existence or scope of a statutory ambiguity on which an agency grounds an action for which it claims deference. But this Court also often concludes that lower court judges have erred in supplying their own constructions of what this Court sees as *unambiguous* statutory language. *See*, *e.g.*, *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021). And Justices of this Court themselves often disagree about the plain meaning of statutory language, as well as over the best reading of complex statutory schemes that contain ambiguities. *See*, *e.g.*, *Sackett v. EPA*, 143 S. Ct. 1322 (2023); *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018); *Pereira v. Sessions*, 138 S. Ct. 2105 (2018); *King v. Burwell*, 576 U.S. 473; *Scialabba*, 573 U.S. 41. No one would suggest, however, that the Court should abandon its insistence on adherence to a statute's plain meaning as an unworkable standard, or that it should not, when necessary, attempt to determine a statute's best reading.

Moreover, the difficulties in determining a statute's best reading in some cases suggest that it is not obviously more workable for judges to resolve ambiguities than to apply *Chevron* where the conditions for applying it are present. Agreement among judges that the best reading of a statute is that it leaves a particular issue to an agency's discretion may, indeed, be more likely than agreement about how that issue is best resolved as a de novo matter, particularly where the issue falls within an area of agency expertise. *See*, *e.g.*, *Eurodif*, 555 U.S. at 886 (unanimously concluding that Tariff Act delegated determination of the "better view" of its application to the Department of Commerce). Moreover, arriving at a "best interpretation" of a regulatory statute that lacks a plain meaning

necessarily involves considerations of statutory policies with which judges may lack expertise and familiarity. *See Arlington*, 569 U.S. at 303. Accordingly, leaving the determination of such details of administration, in the first instance, to the agency charged by Congress with carrying out the statute is not only more workable than letting judges fill in regulatory gaps, but also more consistent with the statutory scheme enacted by Congress. Abandoning *Chevron* would both fail to yield better results in the run of cases and disregard Congress's choices to delegate authority to agencies to implement regulatory statutes.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

September 2023