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 THE MANHATTAN INSTITUTE AND PROFESSORS RICHARD EPSTEIN, TODD ZYWICKI, GUS HURWITZ, AND GEOFFREY MANNE AS *AMICI CURIAE* SUPPORTING PETITIONERS

Ilya Shapiro
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

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QUESTION PRESENTED

Whether the court should overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

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INTEREST OF *AMICI CURIAE*[1]

The **Manhattan Institute for Policy Research** ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has historically worked sponsored scholarship and filed briefs supporting economic freedom against government overreach.

Richard Epstein is the Laurence A. Tisch Professor of Law at New York University. He also serves as the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution and the James Parker Hall Distinguished Service Professor of Law emeritus and a senior lecturer at the University of Chicago.

Todd Zywicki is George Mason University Foundation Professor of Law at George Mason University Antonin Scalia School of Law and a research fellow of the GMU Law and Economics Center.

Justin "Gus" Hurwitz is a senior fellow and academic director of the Center for Technology, Innovation, and Competition at the University of Pennsylvania Carey Law School.

Geoffrey Manne is the president and founder of the International Center for Law and Economics and a distinguished fellow at Northwestern University's Center on Law, Business, and Economics.

This case interests *amici* because it involves an agency regulation that was not explicitly authorized by statute. Indeed, it gives the Court a chance to

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

revisit *Chevron*—either overruling it or clarifying that statutory silence does not require judicial deference.

SUMMARY OF ARGUMENT

Family-run fishing businesses face a fraught and competitive environment even before the intrusion of burdensome regulations. Here, the National Marine Fisheries Service ("NMFS") promulgated a rule for certain classes of herring boats that sweeps in most such businesses, as portrayed in the Oscar-winning movie *CODA*. If a vessel needs a monitor and has not already been assigned one under a federally funded program, it must pay for one itself. The cost for most herring boats exceeds $710 per sea day.

Petitioners, four family-owned and -operated fishing companies, contend that the industry-funding requirement—which is not explicitly authorized by statute—will have a devastating economic impact on the herring fleet and will disproportionately impact small businesses, destroying historic communities.

The district court ruled for the government, finding that various provisions of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") together conferred broad authority on the NMFS to implement regulations to carry out fishery management plan's measures. Without any analysis, the court also found that, even if the statute were ambiguous, the government's reading would be reasonable under *Chevron* Step Two and thus worthy of judicial deference. A divided panel of the D.C. Circuit affirmed, reasoning that the MSA's authorization for the placement of monitors, through silence on funding, left room for agency discretion. This Court granted *certiorari* to determine whether the Court should overrule

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984), or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

The Court should now take this opportunity to overhaul the *Chevron*-deference regime, because this experiment in rebalancing the relationship between administration and judicial review has failed. It has led to agency overreach, haphazard practical results, and the diminution of Congress. Although intended to empower Congress by limiting the role of courts, *Chevron* has instead empowered agencies to aggrandize their own powers to the greatest extent plausible under their operative statutes, and often beyond. Congress has proved unequal to the task of responding to this pervasive agency overreach and now has less of a role in policymaking than in the pre-*Chevron* era. Courts, in turn, have become sloppy and lazy in interpreting statutes. It's a vicious cycle of legislative buck-passing and judicial deference to executive overreach.

Chevron deference rests on the presumption that Congress won't over-delegate and that agencies will be loyal agents. But the past 40 years have shown that Congress loves passing the buck and agencies are actually principals who pursue their own interests. The time has more than come for the Court to revisit *Chevron*, whether it chooses to overrule it explicitly or keep it nominally under a newly restricted standard. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (preserving *Auer* deference but reworking it so completely that both Chief Justice Roberts, who joined Justice Kagan's majority opinion, and Justice Kavanaugh, who joined

Justice Gorsuch's effective dissent, noted that there wasn't much difference between the two).

ARGUMENT

I. *CHEVRON* DEFERENCE ENCOURAGES AGENCY TAKEOVER OF GOVERNMENT AND A DIMINUTION OF CONGRESS

In *Chevron*, courts were told "to treat statutory silence or ambiguity as an implicit delegation of authority from Congress to the agency." Thomas Griffith and Haley Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine,* Yale L. J. Forum 693, 695 (Nov. 21, 2022) (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984)). Such presumption of agency power was based on good intentions: a desire to provide ease and flexibility, with agency action seen as less permanent than judicial rulings. *See, e.g.*, Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753, 753 (2014) ("*Chevron*'s appeal for the courts rests in significant part on its ease of application as a decisional device"). In practice, however, there has been little ease or flexibility.

Indeed, the degree of deference that courts owe to agency interpretations is one of the "the most crucial and contested legal issue[s] respecting agency decision making." Maxwell L. Stearns, Todd J. Zywicki & Thomas Miceli, *Law and Economics: Private and Public* 767 (2018). Courts' interpretation of *Chevron* deference has produced "haphazard results." *Id.* at 774 (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 983 (2005)). *See, e.g., MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218 (1994) (holding that statutory authority to modify did not

extend to setting aside tariffs entirely); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (finding FDA regulations invalid because Congress had not intended to give the agency the power to regulate tobacco); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that the Clean Air Act gave the EPA the power to regulate tailpipe emissions); *King v. Burwell,* 576 U.S. 473 (2015) (applying the major questions doctrine instead of *Chevron* deference). *See also* Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 Notre Dame L. Rev. 727 (2014) (postulating that the Court's unique position and competencies necessitate that it give agencies less deference than do lower courts).

Chevron deference also encouraged agency overreach. *Chevron* and its progeny shifted "interpretive authority from courts to agencies—it was a 'counter-Marbury for the administrative state.'" Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. Online 174, 176 (2022) (quoting Cass R. Sunstein, *Law and Administration after* Chevron, 90 Colum. L. Rev. 2071, 2075 (1990)). *See also,* Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 Rutgers U. L. Rev. 441 (2021). In her concurrence in *Biden v. Nebraska*, Justice Barrett likens an agency overstepping its power to a person, who when told to "pick up dessert," orders a four-tiered wedding cake. 600 U.S. __, __ (2023) (Barrett, J., concurring). In his concurrence in *Michigan v. EPA*, 576 U.S. 743 (2015), Justice Thomas lamented that *Chevron* deference had devolved into an agency power grab. "These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference. What EPA claims for itself

here is not the power to make political judgments in implementing Congress' policies . . . . It is the power to decide—without any particular fidelity to the text—which policy goals EPA wishes to pursue." *Id*. at 763 (Thomas, J., concurring).

Along with enabling agencies to go overboard and to take over the government, *Chevron* deference has also resulted in a diminution of Congress's role. *See, e.g.*, Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015). Judge Rao explored examples from economics and political science to show how individual Congress members derive "myriad benefits" from delegation. *Id*. at 1468. In effect, delegation "unravel[s] the institutional interests of Congress." *Id*. at 1466. As her colleague Judge Griffith pointed out, "the Court is of many minds about what Congress does when it gives discretion to agencies." Griffith and Proctor, *Deference, Delegation, and Divination,* Yale L. J. Forum at 693.

Being cognizant of the diminution of Congress's role and the tendency toward agency self-aggrandizement coming from *Chevron,* the Court should curb agency overreach by curbing *Chevron.*

II. *CHEVRON* PRESUPPOSES THAT CONGRESS WON'T OVER-DELEGATE AND THAT AGENCIES WILL BE LOYAL AGENTS; IN PRACTICE, NEITHER IS TRUE

Chevron rests on a separation-of-powers presumption that Congress won't over-delegate and that an agency will be a loyal agent of Congress. As the past 40 years have shown, however, Congress does over-delegate and agencies pursue their own agendas.

In retrospect, congressional over-delegation appears inevitable. Congress will over-delegate because individual members can more easily achieve their goals by shaping administration than by marshalling the collective to pass legislation. As Judge Rao has described, delegation "undermines separation of powers . . . [and] unravel[s] the institutional interests of Congress." Rao, *Administrative* Collusion, 90 N.Y.U. L. Rev. at 1466. Among other effects, "*Chevron* effectively allows, and indeed encourages, Congress to abdicate its role as the most politically-accountable branch by deferring politically-difficult questions to agencies in ambiguous terms." Justin (Gus) Hurwitz, *Chevron's Political Domain: W(h)ither Step Three*, 68 DePaul L. Rev. 615, 618 (2019). This dynamic is an affront to the separation of powers: the most politically difficult questions are precisely the ones that most need to be answered by the most politically accountable branch. *Id*. at 630. *See also* Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, not Powers*, 119 Harv. L. Rev. 2311 (2006) (contending that Congress allows executive overreach during times of unified government).

In addition to the problem of congressional over-delegation, there is the problem of agencies who behave not as loyal agents but as principals. Too often, agencies attempt to piggyback their sweeping policy agendas onto narrow statutes unrelated to their powers. To take three recent examples where the Court had to step in to stop blatant overreach: in *Alabama Assn. of Realtors v. HHS*, 594 U. S. __ (2021), the CDC tried to issue a nationwide eviction moratorium; in *NFIB v. OSHA*, 595 U. S. __ (2022), OSHA tried to mandate employee vaccinations; and in *West Virginia v. EPA*, 597 U.S. __ (2022), the EPA tried to use the Clean Air Act to restructure electricity generation.

More than half a century ago, the economist William Niskanen identified that bureaucratic management is subject to "survivor" bias; "only those bureaucrats willing to compete for larger budgets and power will survive." Stearns et al., *Law and Economics*, at 786 (citing Niskanen, *Bureaucracy and Representative Government* 38 (1971)). One should be "'[s]keptical of mismatches' between broad 'invocations of power by agencies' and relatively narrow 'statutes that purport to delegate that power.'" *Biden v. Nebraska,* 600 U.S. at __ (2023) (Barrett, J., concurring).

Beyond the disloyal-agent problem, there is a lack judicial neutrality, in that judges don't apply *Chevron* deference in a neutral manner. *See, e.g.,* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997) (exploring how ideology influences judicial review of administrative decision making); Frank B. Cross and Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L.J. 2155 (1998) (enumerating further evidence that D.C. Circuit judges vote ideologically when reviewing agency decision making).

But courts do not always swallow *Chevron* hook, line, and sinker. Indeed, they have recently tried to sidestep *Chevron* by refraining from applying a deference analysis or citing *Chevron* even when the facts of a case might implicate it. *See, e.g.*, Michael Coenen and Seth Davis, *Minor Courts, Major Questions*, 70 Vand. L. Rev. 777, 796 n.92 (2017) (enumerating several lower court cases where the influence of *King v. Burwell* "disallow[s] *Chevron* deference in cases that would otherwise fall firmly within *Chevron*'s domain."); Gary Lawson, *The Ghosts of Chevron Present*

and Future, 103 B.U. L. Rev. (forthcoming 2023) (exploring six 2021 cases where courts failed to cite *Chevron*); Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262 (2022) (claiming that four of the Court's 2021 cases adopt a "different and more potent" version of the major question exception); *Am. Hospital Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (discussing HHS discretion in interpretating statutory language without mentioning *Chevron*); Gregory Curfman, Jason Gardiner & Justin Cole*, The 340B Drug Discount Program Preserved After US Supreme Court Review—But Chevron Remains Vulnerable,* 3 JAMA Health F. (2022) (discussing *AMA v. Becerra*).

III. *STARE DECISIS* SHOULD NOT STOP THE COURT FROM OVERRULING OR CABINING *CHEVRON*

A. The strength of *stare decisis* is proportionate to how easily Congress could remedy the underlying error.

Stare decisis helps promote "consistency and uniformity," but it is not "an inexorable command." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting). *Stare decisis* should not "compel unending adherence to . . . abuse of judicial authority." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022).

Applied in the most generous light, the doctrine of *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). It may even serve judicial economy by reducing "incentives for

challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble v. Marvel Entm't*, 576 U. S. 446, 455 (2015). But at its worst, *stare decisis* may allow "judges to abdicate their job of interpreting the Law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring).

The weight of *stare decisis* depends on the type of interpretive task before the court. *See* Brian C. Kalt, *Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases*, 8 Tex. Rev. L. & Pol. 279 (2004). This weight is determined by the ease with which the legislature can override incorrect interpretations of the law. *Stare decisis* holds the least weight when courts review cases that implicate constitutional rights. *See* Ilya Shapiro and Nicholas M. Mosvick, *Stare Decisis after Citizens United: When Should Courts Overturn Precedent,* 16 Nexus J. L. & Pub. Policy 121, 124 (2011). In contrast, it typically holds the greatest weight when courts revisit statutory interpretations. Kalt, *Three Levels of Stare Decisis*, at 279. One member of this Court has described this weight as a "special force" and "super-strong," one that seeks to honor legislative supremacy. Amy C. Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317 (2005). That's because the constitutional amendment process is a high hurdle to pass compared to legislative action. *See e.g.*, *Burnet*, 285 U.S. at 407. (Brandeis, J., dissenting) (describing amending the Constitution as "practically impossible."). Moreover, when Congress fails to respond to a judicial ruling, its silence can be taken as approval of that interpretation. *See e.g.*, *Kisor*, 139 S. Ct. at 2406 ("For approaching a century, Congress has let this deference regime work side-by-side with both

the Administrative Procedure Act (APA) and the many statutes delegating rulemaking power to agencies.")

But there are compelling explanations as to why congressional silence may not represent approval of a court's interpretation. One is that Congress's composition may have changed such that the new Congress is unable or unwilling to defend the original intended meaning of the statute. Other reasons may include simple apathy, a misunderstanding of the judicial interpretation, or practical political realities. Kalt, *Three Levels of Stare Decisis*, at 280.

B. *Chevron* is an interpretive instruction, not statutory interpretation itself, and thus hard for Congress to remedy.

Chevron's rule is not an interpretation of any particular statute, but an interpretive instruction on how to approach a wide range of statutes. *See e.g., Kisor*, 139 S. Ct. at 2445 (Gorsuch, describing the similar *Auer* doctrine as "an abstract default rule of interpretive methodology that settles nothing of its own force."). In this way, *Chevron* deference may be analogous to a development of common law, which generally receives a lower form of *stare decisis*. *See* Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of* Stare Decisis, 97 Tex. L. Rev. 1125 (2019). In a typical case involving statutory interpretation, Congress can amend the underlying statute to override the judicial interpretation of a particular word or phrase. But it is less clear how Congress can go about addressing interpretive canons such as the *Chevron* doctrine.

Congress may, on one hand, attempt to write statutes with such specificity and clarity that it forces every Step One *Chevron* analysis to find that there is no ambiguity, preventing any *Chevron* deference from applying. But overeager agencies, like Ishmael in *Moby Dick*, will always purport to find statutory ambiguities in an effort to expand their authority. ("I try all things, I achieve what I can.") On the other hand, Congress may attempt to legislate away *Chevron* deference more generally, but this type of legislation is likely to instigate a larger constitutional issue about Congress's ability to dictate judicial interpretation of future laws. *See*, *e.g.*, *Kisor,* 139 S. Ct. at 2445 ("We should not be in the business of tossing "'balls . . . into Congress's court . . . that would explode with constitutional questions if Congress tried to pick them up.")

Finally, although *Chevron* does not strictly implicate constitutional interpretation, it raises similar considerations because courts have used it to shift power from the legislature to the executive.

C. *Chevron* should receive a weak form of *stare decisis*, largely because it involves no reliance interests.

The Court considers several *stare decisis* factors, including the reasoning of the original opinion, the workability of the ruling, the factual and legal developments that have taken place since the ruling, and any applicable reliance interests. *Janus v. AFSCME,* 138 S. Ct. 2448, 2479 (2018). We addressed post-*Chevron* factual and legal developments in Parts I and II above, but the reliance point is really the central concern of *stare decisis*, with the other factors often serving as further proxies for reliance interests. Randy J.

Kozel, Stare Decisis *as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 449 (2010).

Chevron should not receive reliance-interest consideration because it doesn't create any rights or obligations. The only parties that could rely on *Chevron* doctrine are administrative agencies, and the Court has "never suggested that the convenience of government officials should count in the balance of stare decisis, especially when weighed against the interests of citizens in a fair hearing before an independent judge and a stable and knowable set of laws." *Kisor*, 139 S. Ct. at 2445 (Gorsuch, J., concurring).

Overturning *Chevron* wouldn't upset any previous statutory interpretations; it would only change the methodology that courts use to review agency action going forward. It would also re-empower Congress to curtail the excesses of unaccountable agencies.

CONCLUSION

The 40-year-old *Chevron* experiment has not worked. Agencies have gone overboard and Congress hasn't responded, leading to haphazard results and agency overreach. *Chevron* deference results in agencies' taking over government and a diminution of Congress, while courts have become lazy in interpreting statutes. The time has come to overhaul *Chevron*.

Respectfully submitted,

Ilya Shapiro
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

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