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 OF TECHFREEDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Table of Contents

Page

Table of Authorities

Page(s)

Cases

Constitution and Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[*]

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom takes a balanced stance on the administrative state. We oppose regulators who attempt to exercise raw political power. We support regulators who apply special knowledge to difficult technical problems. When expert agencies issue shrewd regulations, they can foster technological dynamism. Much of our work seeks to promote this vision of a smart, disciplined administrative state. See, e.g., James Dunstan, *The FCC, USF, and USAC: An Alphabet Soup of Due Process Violations*, Center for Growth and Opportunity, https://tinyurl.com/2nbrtvj3 (Apr. 23, 2023); Corbin K. Barthold, *Sludge Kills*, City Journal, https://tinyurl.com/yk368b65 (Sept. 12, 2022); Corbin K. Barthold, *West Virginia v. EPA: Sound and Fury, Signifying What?*, WLF Legal Pulse, https://tinyurl.com/ynj76vyf (July 5, 2022); Berin Szóka & Corbin Barthold, *The Constitutional Revolution That Wasn't: Why the FTC Isn't a Second National Legislature*, TechFreedom, https://tinyurl.com/3wnxzk4y (June 2022); TechFreedom, *SCOTUS Should Uphold FCC Reforms of Obsolete Media-*

[*] No party's counsel authored any part of this brief. No person or entity, other than TechFreedom and its counsel, helped pay for the brief's preparation or submission.

Ownership Rules, https://tinyurl.com/442pu326 (Nov. 23, 2020).

Properly construed, *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), gels with TechFreedom's broader understanding of how the administrative state should work. The *Chevron* "doctrine" has gone too far. Agencies should not be allowed to use any silence, "gap," or ambiguity in a statute to construe the law in a manner that binds the courts. But *Chevron*'s core insight—that policymaking is a task not for the courts, but for the political branches—is correct. By deliberately placing a broad term, such as "reasonable" or "feasible," in a statute, Congress may grant an agency discretion to apply its expert judgment in limited circumstances. The Court should ditch the *Chevron* doctrine, but keep the *Chevron* decision.

Chevron is dead, long live *Chevron*.

SUMMARY OF ARGUMENT

"Textualism triumphant," a prominent legal scholar once remarked, "would lead to a permanent subordination of the *Chevron* doctrine." Thomas W. Merrill, *Textualism and the Future of* Chevron *Deference*, 72 Wash. U. L.Q. 354, 371-72 (1994). We write to hail the arrival of that moment.

Throughout this brief, we will differentiate between *Chevron* the *doctrine* and *Chevron* the *decision*. *Chevron* the doctrine "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch,

J., concurring). It has rightfully come in for extensive criticism, and should be discarded. *Chevron* the decision, however, is sound. At its core, *Chevron* says (1) that Congress and the administrative agencies (not the courts) are the policymaking experts, and (2) that Congress may, by statute, call on an agency to wield its policymaking expertise, but (3) that, before assuming that Congress has passed a policy matter to an agency, a court must deploy every pertinent tool of statutory interpretation, in an effort to nail down the law's meaning for itself. *Chevron* the *decision* strikes the right balance between respect for agency expertise, respect for congressional judgment, and respect for the judiciary's role as final arbiter of the law's meaning. Accordingly, there is no need to overturn *Chevron*.

Our argument proceeds as follows:

I. Judges are not policy experts. They are (by and large) not trained in technical subjects. The judicial process, meanwhile, is geared toward resolving narrow disputes. It is not designed to collect the broad public input needed to answer general policy questions. Contrast these traits with the workings of administrative agencies, which are staffed with experts, and which use the notice-and-comment process to collect large amounts of information. Agencies are well-equipped to craft policy. They play an important role in our system of government.

II. Some claim that in the past, courts broadly deferred to the Executive Branch's reading of the law. Others respond that, whatever may have happened in the past (and it's not so clear), the Administrative

Procedure Act codified *de novo* judicial review of all questions of law pertaining to agency action. Each side has a point. Courts should defer to agencies—but only when it is clear that Congress intended for them to do so.

This Court has gone astray, in certain post-*Chevron* decisions, by instructing the Judiciary to defer to agencies even when Congress has *not* clearly told the Judiciary to do so. Under the proper rule—under *Chevron*, properly construed—courts should defer to agencies only when Congress has *triggered* such deference. Congress must do this deliberately and expressly, by using open-ended terms, such as "reasonable" or "feasible," that unmistakably grant agencies policymaking discretion.

III. A court can (a) grant an agency the flexibility to regulate within the scope of an open-ended term, and still (b) provide the last word on "what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This is no paradox. There is nothing illegitimate, from a judicial standpoint, about acknowledging that a term such as "reasonable" can have a range of meanings. On the contrary, a court that imposes its singular reading of a word like "reasonable" moves *beyond* conventional legal reasoning and *usurps* the policymaking authority of the political branches. Judges fulfill their duty when they follow an explicit and otherwise proper *direction* from Congress to defer to an agency.

IV. Although it need not overrule *Chevron*, the Court should "restate, and somewhat expand on," the decision's limits, in order "to clear up some mixed

messages [it] ha[s] sent." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). Specifically, the Court should:

- Reiterate that, under *Chevron*, deference is never "reflexive." Judges are the experts—both in fact and by constitutional directive—when it comes to statutory interpretation, and they should wield their expertise with vigor.
- Clarify that statutory "silence" never triggers deference. The dicta, in *Chevron*, that has caused confusion in this regard should be renounced.
- Remind judges never to defer to an agency before rigorously deploying the tools of statutory interpretation. Because courts must adhere to *Chevron*'s "statutory tools" proviso, they should almost never find themselves deferring to an agency at *Chevron* "step two."
- Note that the Constitution vests all legislative power in Congress. Although it may instruct agencies to fill in statutes' technical details, Congress must make the fundamental policy decisions itself.
- Announce that *Chevron* the "doctrine" is dead. No more finding "signals" of "ambiguity" in statutory language. No more letting agencies fill in every perceived "gap" in an enabling statute. If it wants to invoke an agency's policymaking expertise, Congress must do so expressly, using broad terms such as "reasonable" or "feasible."

"The loss of forests necessary to make the paper to print all of the articles written" on *Chevron* "might well have justified requiring the Supreme Court to issue an environmental impact statement along with the opinion." Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 Law & Contemp. Probs. 185, 229 n.116 (1994). It is long past time for the Court to clear up the confusion that sustains this professorial cottage industry. The Court can do so by imposing a straightforward rule, under which only a handful of broad terms, used in a small set of circumstances, trigger *Chevron* deference.

ARGUMENT

I. AGENCIES POSSESS UNIQUE EXPERTISE.

At the root of *Chevron* lies an impeccably correct premise: courts lack the expertise possessed by agencies.

As *Chevron* correctly noted, courts are not legitimate or capable policymakers. They "are not part of either political branch of the Government." 467 U.S. at 865. Nor are they equipped to "assess[] the wisdom of … policy choices" or "resolv[e] … competing views of the public interest." *Id.* at 866; see also *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004) (observing that courts "lack both expertise and information" to navigate "policy disagreements").

Justices of all jurisprudential stripes have acknowledged the Court's lack of technical expertise. In a case about gene patenting, Justice Scalia declined

to join the parts of the majority opinion "going into fine details of molecular biology." *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 596 (2013). "I am unable to affirm those details on my own knowledge or even my own belief," he explained. *Id*. At an oral argument a few years ago, Justice Breyer noted that the FDA must decide when a "previously approved moiety," a "non-ester covalent bond," and a "lysine group" constitute "a single new active moiety." *Kisor v. Wilkie*, No. 18-15, OA Tr. 10 (Mar. 27, 2019). "Do you know how much I know about that?" he asked. *Id*. ("Right, exactly," he added, after the gallery laughed. *Id*.) Last term, the Court wisely—and unanimously—declined to fiddle with Section 230's liability protections for interactive computer services. "You know," Justice Kagan quipped at argument, "these are not like the nine greatest experts on the Internet." *Gonzalez v. Google*, No. 21-1333, OA Tr. 45 (Feb. 21, 2023).

Unlike courts, agencies can obtain and wield "unique" and "significant" expertise. *Kisor*, 139 S. Ct. at 2413; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Consider what's known as the knowledge problem—the fact that useful information is dispersed throughout society. See F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945). Agencies are structured to deal with this problem: they can gather and consider a wide array of perspectives through the notice-and-comment process. See 5 U.S.C. § 553. "The goal of notice-and-comment rulemaking" is to enable agencies "to fill gaps in knowledge and to see what might have been overlooked." Cass R. Sunstein, *The Cost-Benefit*

Revolution 88 (2018). "If the agency has inaccurately assessed the costs and benefits [of a proposed rule], public participation can and often will supply a corrective." *Id*. Agencies, in short, can "collect dispersed knowledge" and "bring it to bear on official choices." *Id*.

When they stick to doing their jobs, expert administrators spend a lot of their time grappling with difficult questions of math, science, engineering, and technology. "Far more than courts, agencies have the expertise and experience necessary to design regulatory processes suited to 'a technical and complex arena." *Michigan v. EPA*, 576 U.S. 743, 771 (2015) (Kagan, J., dissenting) (quoting *Chevron*, 467 U.S. at 863).

II. CONGRESS MAY—CAREFULLY—INVOKE AGENCY EXPERTISE.

Chevron's effect on judicial review of agency action has been the subject of extensive debate. Ultimately, that debate is best viewed as a sort of Hegelian dialectic. The two extremes merge into a valuable synthesis. A third way, under which, in certain discrete instances, a court can defer to an agency's expertise while still having the final say over the meaning of the law.

"*Chevron*," Justice Scalia believed, "was in accord with the origins of federal-court judicial review." *United States v. Mead Corp.*, 533 U.S. 218, 241-42 (2001) (dissenting opinion). Before the Administrative Procedure Act, he contended, "[j]udicial control of federal executive officers was principally exercised" on

"writ of mandamus"—a writ that "generally would not issue unless the executive officer was acting plainly beyond the scope of his authority." *Id*. at 242. This meant, Scalia explained, that "statutory ambiguities … were left to reasonable resolution by the Executive." *Id*. at 243. But cf. Pet. Br. 29-30.

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), a plurality of the Court concluded that the APA affirmed the hands-off pre-APA approach described by Justice Scalia. "Section 706" of the APA "was understood when enacted," the plurality maintained, "to 'restate the present law as to the scope of judicial review'" of agency action. *Id*. at 2419 (quoting Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1948)). According to the plurality, the APA "did not proscribe [the] deferential standard" of judicial review "then known and in use." *Id*. at 2420.

But that position is contested. "In truth," Justice Gorsuch wrote, concurring in *Kisor*, "when Congress passed the APA the law of judicial review of agency action was in a confused state." 139 S. Ct. at 2436. "[M]any members of Congress," in this telling, "thought the APA would clarify, if not expand, the scope of judicial review" and "'cut down the 'cult of discretion' so far as federal law is concerned.'" *Id*. (quoting Patrick A. McCarran, *Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review*, 32 A. B. A. J. 827, 893 (1946)). This attitude finds strong support in the APA's text, which states that "the reviewing court shall decide all relevant questions of law" and "interpret … statutory provisions." 5 U.S.C. § 706. "There is some question," even Justice Scalia had to concede, "whether *Chevron*

was faithful to the text of the Administrative Procedure Act." *Mead*, 533 U.S. at 241 (dissenting opinion).

There are times, insists one side, when courts should defer to agencies' well-informed policy judgments. In our system of government, responds the other, courts, not agencies, say what the law is. Each side makes an important point. One might even say that each side is right. This circle can be squared.

Courts "give binding deference to permissible agency interpretations of statutory ambiguities," observed Chief Justice Roberts, dissenting in *City of Arlington v. FCC*, 569 U.S. 290 (2013), "*because* Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law,'" *id.* at 317 (quoting *Mead*, 533 U.S. at 229). "But before a court may grant such deference," he continued, "it must on its own decide whether Congress … has in fact delegated to the agency lawmaking power over the ambiguity at issue." *Id.* This passage correctly describes how judicial review of agency action should work. Moreover, this passage is perfectly consistent with the *Chevron* decision—as opposed to the doctrine that grew up around it.

What went wrong, in certain decisions interpreting *Chevron*, is that the Court set too low a bar for determining when Congress has "in fact" given an agency the power to interpret "the ambiguity at issue." *Id.* *Mead*, 533 U.S. 218, concluded that *Chevron* should apply whenever "Congress has given *some signal* that the agency, rather than the court, is to be the primary interpreter of statutory ambiguity."

Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 833 (2002) (emphasis added). The "relevant signal," *Mead* tried to clarify, is "a delegation of power to act with the force of law." *Id*. But *Mead* treated "'force of law' as (at most) a standard to be applied by looking to a variety of factors." *Id*. In truth, therefore, *Mead* supplied no clarity at all.

So it was only to be expected that, following *Mead*, *Chevron* continued to stir up controversy—including, most notably, in *City of Arlington*, in which the "disagreement" among the justices over *Chevron*'s meaning was "fundamental." 569 U.S. at 312 (Roberts, C.J., dissenting). And *City of Arlington* itself only made matters worse. Under its sweeping rule, a court must defer to how an agency reads *any* ambiguity in a statute the agency administers. 569 U.S. at 296. The need for a "signal" from Congress—the impetus of the *Mead* rule—all but evaporated. *City of Arlington* doubled down on *Chevron* the *doctrine*.

City of Arlington went in exactly the wrong direction. What the Court should have done is make the *Mead* standard stricter. It should have narrowed the domain of statutory ambiguities that signal Congress's intent to convey interpretative authority to an agency. Then-Judge Kavanaugh got it right a few years later when he wrote that, even if the *Chevron* "doctrine" is abolished, "courts should still defer to agencies in cases involving statutes using broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.'" Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 (2016).

These are explicit keywords. You could say, without contradicting yourself, that they are *clear* terms of *ambiguity*. They display Congress's *intent* to place a gap in a statute for the agency to fill. On this view, Congress must use a word like "reasonable" as a means of bluntly announcing, *Here is a gap*. On this view, it remains for the courts to resolve any *true* ambiguity in the statute, via conventional statutory interpretation. The *Chevron* "rule," properly construed, is this:

> A court defers to an agency's permissible reading of a statute only after determining, for itself, that Congress has, through *a clear signal* (a term such as "reasonable," "appropriate," etc.), granted the agency the power to construe the statutory term at issue.

This is the middle path. A balanced approach to judicial review of agency action. An approach that carefully "confines" itself to the "boundaries" of the "historical justification for deferring to federal agencies." *Michigan v. EPA*, 576 U.S. at 763 (Thomas, J., concurring). An approach that preserves *Chevron*, but that understands how the *Chevron* "doctrine" "badly stretch[ed] the terms of the original decision." *Buffington v. McDonough*, No. 21-972 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from the denial of certiorari) (slip. op. 8).

This approach stops agencies from "discovering" new powers hidden in every statutory provision that is less than crystal clear. But this approach embraces the fact that the U.S. Code often instructs agencies to exercise discretion in deciding on a "feasible,"

"appropriate," etc., course of action. (Indeed, terms such as "reasonable" are at the center of several landmark laws. See, e.g., 47 U.S.C. §§ 201(b), 202(a).)

"This very important principle sometimes gets lost: a judge can engage in appropriately rigorous scrutiny of an agency's statutory interpretation and simultaneously be very deferential to an agency's policy choices within the discretion granted to it by the statute." Kavanaugh, *supra*, 129 Harv. L. Rev. at 2154.

III. A COURT CAN BOTH DEFER TO AN AGENCY AND DECIDE ALL QUESTIONS OF LAW.

When a word such as "reasonable" has several possible meanings, and a court defers to an agency's selection of one of them, the court, one might object, has not "appl[ied] independent judgment on all questions of law." *Buffington*, No. 21-972 (Gorsuch, J., dissenting from the denial of certiorari) (slip. op. 5) (quoting Thomas W. Merrill, *The* Chevron *Doctrine: Its Rise and Fall* 47 (2022)). But a court can in fact (1) meaningfully defer to agency expertise while (2) remaining in each case the final arbiter of the law's meaning.

Actually, when an agency stays within the bounds of an open-ended statutory term, it is far from clear that there is a true "question of law" for a court to resolve. "[W]hen one does not have a solid textual anchor or an established norm from which to derive [a] general rule, its pronouncement appears uncomfortably like legislation." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1185 (1989).

When it comes to terms like "reasonable" or "appropriate," courts quickly "reach[] the point where [they] can do no more than consult the totality of the circumstances," *id.* at 1187, and when that occurs, they are "acting more as fact-finders than as expositors of the law," *id.* A court is still "apply[ing] independent judgment," Merrill, Chevron *Doctrine*, *supra*, at 47, and "decid[ing] all relevant questions of law," 5 U.S.C. § 706, therefore, when it *acknowledges* that a broad statutory term has a *range* of permissible meanings.

"Without strict judicial oversight," we're told, "the agencies of the administrative state pose a continual challenge to the rule of law." Peter Wallison, *Judicial Fortitude: The Last Chance to Rein in the Administrative State* 19 (2018). Judicial oversight of those agencies is indeed necessary. But the "challenge to the rule of law" can come from the other direction, too. A court that attempts to divine the One True Meaning of an open-ended term can go *beyond* deciding a question of law. "Judicial action must be governed by *standard*, by *rule*, and [it] must be principled, rational, and based upon reasoned distinctions found in the Constitution or laws." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). A court that imposes its preferred notion of "reasonableness" or "appropriateness" on a statute risks "[p]revent[ing] agencies from doing important work, even though that is what Congress directed." *West Virginia v. EPA*, No. 20-1530 (U.S. June 30, 2022) (Kagan, J., dissenting) (slip. op. 29). It risks "depart[ing] from the demands of judicial restraint" and "overrid[ing] the combined judgment of the

Legislative and Executive Branches." *Biden v. Nebraska*, No. 22-506 (U.S. June 30, 2023) (Kagan, J., dissenting) (slip. op. 29-30). "[T]hat is not how … the Constitution thinks our Government should work." *Sackett v. EPA*, No. 21-454 (U.S. May 25, 2023) (Kagan, J., concurring in judgment) (slip. op. 6).

"*Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning" in justiciable controversies. *Buffington*, No. 21-972 (Gorsuch, J., dissenting from the denial of certiorari) (slip. op. 16). At the same time, "*Chevron* makes a lot of sense in certain circumstances." Kavanaugh, *supra*, 129 Harv. L. Rev. at 2152. Yet the tension here is minimal, the solution simple. "Where an agency is … interpreting a specific statutory term or phrase, courts should determine whether the agency's interpretation is the best reading of the statutory text." *Id*. at 2154. And where an agency is interpreting "broad and open-ended terms"—"feasible," "appropriate," and the like—"courts should say that the agency may choose among reasonable options allowed by the text of the statute." *Id*. at 2153-54.

IV. KEEP THE *CHEVRON* DECISION; DITCH THE *CHEVRON* "DOCTRINE."

Cass Sunstein once proposed that "*Chevron* is properly understood as a kind of counter-*Marbury* [*v. Madison*] for the administrative state"—as a declaration, in other words, that "it is emphatically the province of the executive department to say what the law is." Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 Yale

L.J. 2580, 2589 (2006). As should by now be clear, this claim perfectly encapsulates what the *Chevron* decision is *not*.

The "revolutionary effect" of *Chevron* suggested by Sunstein (among many others) "is not apparent" from "the opinion itself," which "signals no break with the past," and which "does not explicitly overrule or disapprove of a single case." Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 Yale J. on Reg. 283, 284 (1986). Indeed, the justices who heard and resolved *Chevron* do not appear to have "appreciate[ed]" that their "decision would effect[]" a "major change in administrative law." Robert Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 Envtl. L. Rep. 10606, 10613 (1993).

This Court should (a) keep the *Chevron* decision, which was never supposed to be anything but a conventional application of administrative law, but (b) roll back the *Chevron* doctrine, which improperly took on a life of its own. Let's explore some of the key ramifications of such a ruling.

A. Under *Chevron*, Deference Is Not "Reflexive."

Chevron says that, when a statute is ambiguous, a "court does not simply impose its own construction on the statute." 467 U.S. at 843. This is an inelegant statement. Courts should *always* "impose [their] own construction on the statute." *Id*. It's just that sometimes the construction will incorporate the policymaking wiggle room that Congress, by using certain open-ended terms, has explicitly conferred.

Under the *Chevron* "doctrine," "the federal courts have become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first." *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting); see Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 33–34 (2017) (concluding, based on a review of more than a thousand decisions, that federal courts of appeals find ambiguity at *Chevron* step one around 70% of the time).

In "many cases," courts defer to agencies "almost reflexively, as if doing so were somehow a virtue[.]" 918 F.3d at 525 (Kethledge, J., dissenting). The driving attitude seems to be that "modern society is too complex to be run by legislators," and that it is therefore "better to leave it to the agency bureaucrats." *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring).

"Agencies are experts at policy, but not necessarily at statutory interpretation." 918 F.3d at 525 (Kethledge, J., dissenting). *Even if* agencies are experts as to their *own* enabling acts, their readings of those acts are not owed any deference. Because courts have "the constitutional duty … to say what the law is," "relative competence" is not grounds for judicial abdication "when agency action is at issue." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514.

Deference is warranted only when the agency, acting on Congress's explicit directive, is determining

what is "reasonable," "appropriate," etc., within the domain of its policymaking expertise. A court properly affords this deference because a statute—as *the court* constructs it—tells the court to do so. Cf. *NFIB v. Dep't of Labor*, 21A244 (U.S. Jan. 13, 2022) (Gorsuch, J., concurring) (slip op. 1) ("This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.").

"In short," *Chevron* "is not a free pass." *Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018). It does not allow courts to grant "reflexive deference" to agencies. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). Courts must always engage in a close and careful construction of the statute. They sometimes afford an agency deference as a *byproduct* of that process.

B. Under *Chevron*, Statutory Silence Does Not Trigger Deference.

The *Chevron* decision says that a court may have to defer to an agency when a "statute is silent … with respect to [a] specific issue." 467 U.S. at 843. That line of dicta is wrong, and the Court should repudiate it.

The logic of "silence equals ambiguity" is boundless. If deference is triggered "any time a statute does not expressly negate the existence of a claimed administrative power (i.e., when the statute is not written in 'thou shalt not' terms)," then "agencies would enjoy virtually limitless hegemony." *Ry. Labor Exec. Ass'n v. Nat. Mediation Bd.*, 29 F.3d 655, 671

(D.C. Cir. 1994). Indeed, this case is a good illustration. Pet. Br. 43-46.

"Congressional silence usually means … not that Congress intended the agency to decide a question of law, but that Congress never thought about the question." Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 376 (1986). Yet "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). It is thus "unfaithful to the principles of administrative law," and "quite likely [to] the Constitution as well," *Nat. Mediation Bd.*, 29 F.3d at 671, to treat statutory silence as *Chevron*-triggering ambiguity.

C. *Chevron*'s Two-Step Framework Is Less Important Than *Chevron*'s "Statutory Tools" Proviso.

Chevron famously set forth a two-step framework. At step one, a court determines whether a statute is ambiguous. If the statute *is* ambiguous, then, at step two, the court accepts any "reasonable interpretation" of the statute offered by the agency. 467 U.S. at 844. That *Chevron* seemed to create a special "test" is perhaps the biggest reason why many assumed the existence of a new *Chevron* "doctrine."

Frankly, *Chevron*'s two-part test doesn't make much sense. "If the court resolves the question at step one, then it exercises purely independent judgment and gives no consideration to the executive view." Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 977 (1992). "If it resolves

the question at step two, then it applies a standard of maximum deference." *Id*. "[T]he two-step structure" thus "makes deference an all-or-nothing matter." *Id*. The stakes at step one—whether a statute is deemed "ambiguous"—are extraordinarily high. "And yet there is no particularly principled guide for making that clarity versus ambiguity decision." Kavanaugh, *supra*, 129 Harv. L. Rev. at 2153.

What's worse, by announcing a formal two-part test, *Chevron* wrongly gave the impression that statutes are full of ambiguities that trigger deference. Why have a two-part test, after all, unless each part will play an important role in many cases? In reality, however, few cases should move beyond step one. And step one is easy to apply. A court need do little more than look for clear terms of ambiguity—"reasonable," "appropriate," and the like. Absent such terms, a court should almost never find itself proceeding to *Chevron* step two. Cf. Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017) ("I personally have never had occasion to reach *Chevron*'s step two in any of my cases[.]").

Chevron states: "If a court, employing traditional tools of statutory construction, ascertains that Congress has an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843 n.9. In hindsight, it was a mistake to relegate this by now well-known "statutory tools" proviso to a footnote. It is a crucial principle. "*Chevron* itself reminds courts that they must do their job before applying deference: they must first exhaust the 'traditional tools' of statutory interpretation and

'reject administrative constructions' that are contrary to the clear meaning of the statute." *Arangure*, 911 F.3d at 336 (quoting *Chevron*, 467 U.S. at 843 n.9).

Treating *Chevron*'s "statutory tools" proviso as more important than *Chevron*'s (rather illusory) two-part test is in no way revolutionary. As *Chevron* itself acknowledges, "the judiciary is the final authority on issues of statutory construction." 467 U.S. at 843 n.9. It's worth remembering, moreover, that "the very same statutory instructions, yielding the very same level of ambiguity" that would, in the context of the *Chevron* "doctrine," be treated "as a delegation," will, "outside the administrative context," be treated "as ordinary legislation subject to ordinary judicial interpretation." Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 Stan. L. Rev. 1, 79 (2000). Judges are no strangers to statutory ambiguity. Resolving such ambiguity is an activity at which *they* are the experts.

Eliminating the overbroad *Chevron* "doctrine" simply ensures that courts do what they have always done: parse statutes and then declare, with finality, what they mean.

D. An Indeterminate Statute Raises Not A *Chevron* Question, But A Nondelegation Problem.

Many defenders of a broad reading of *Chevron* argue that the decision created a "background rule of law" for when "Congress … didn't think about [a] matter at all." Scalia, *supra*, 1989 Duke L. Rev. at 517.

In such cases, proponents of the *Chevron* "doctrine" claim, an agency can fill in statutory "gaps," thinking through policy on matters Congress didn't even consider.

That can't be right. *Chevron* makes sense only when Congress clearly and deliberately passes a policy question to an agency. When Congress hasn't "th[ought] about [a] matter at all," by contrast, it is doubtful that *either* an agency *or* a court may take the reins in Congress's stead. Not, at least, in cases of any consequence.

"[I]f we give the 'force of law' to agency pronouncements on matters of private conduct as to which 'Congress did not actually have an intent,' we permit a body other than Congress to perform a function that requires an exercise of the legislative power." *Michigan v. EPA*, 576 U.S. at 762 (Thomas, J., concurring) (quoting *Mead*, 533 U.S. at 229). Under the Constitution, however, all legislative power is vested in Congress. Const. Art. I, § 1. "That Congress chose, intentionally or unintentionally, to pass [a] difficult choice" to an agency is not, therefore, a reason to defer to that agency. *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring). It is, rather, a reason to suspect that "Congress … has improperly delegated that [difficult] choice" to another branch of government. *Id*. at 672.

Congress may "expressly and specifically"—via broad words such as "reasonable"—"delegate to agencies the authority" to make "fill-up-the-details decisions." *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of

certiorari). And Congress may assume that some interstitial lawmaking will occur, both at the agencies and in the courts, as an inevitable byproduct of construing statutory language that (language being what it is) can never be *perfectly* clear. See, e.g., *Boyle v. Utd. Tech. Corp.*, 487 U.S. 500, 531-32 (1988) (Stevens, J., dissenting). But when Congress fails to decide—or even to notice—some important policy question, it has not thereby left a "gap" for an agency or a court to rush in and "fill." *Id.* ("There are instances of so-called interstitial lawmaking that inevitably become part of the judicial process. But when we are asked … to answer questions of policy on which Congress has not spoken, … we have a special duty to identify the proper decisionmaker before trying to make the proper decision.") (cleaned up).

Under *Chevron* (properly understood), Congress may not blindly pass the buck to agencies. And under the nondelegation rule, Congress may not blindly pass the buck either to agencies or to courts. Congress's options are constrained. By that, though, we mean only that Congress must do its job. It may assign certain difficult technical matters to agencies (if it does so explicitly), but the tough political decisions are for it, and it alone, to resolve. We "expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch." *Biden v. Nebraska*, No. 22-506 (U.S. June 30, 2023) (Barrett, J., concurring) (slip. op. 9). "[T]he hard choices … must be made by the elected representatives of the people." *Indus. Union Dep't*, 448 U.S. at 687 (Rehnquist, J., concurring).

E. Although *Chevron*'s Core Holding Is Sound, Certain Applications Of *Chevron* Are Not.

Perhaps the most jarring consequence of ditching the *Chevron* "doctrine" is that *Chevron* itself winds up outside the realm of *Chevron*. The dispute in that case was over what qualifies as a "major stationary source" of air pollution under the Clean Air Act Amendments of 1977. Maybe (as the EPA argued) a "source" is an entire power plant. Or maybe (as the environmental groups argued) it is each discrete pollution-emitting device. Either way, the Court should have construed the term for itself, using the conventional tools of statutory construction and without putting a thumb on the scale for the Reagan EPA. (*Chevron* states that this approach would have consigned its analysis to a "sterile textual vacuum." 467 U.S. at 863. Well, yes, in a sense. Congress legislates entirely in words.)

Narrowing *Chevron* will not leave the jurisprudential landscape unscathed. We have discussed why *Mead* and *City of Arlington* should go. No doubt other decisions will be open to challenge as well.

As this Court's recent aversion to the *Chevron* "doctrine" confirms, however, the status quo is unacceptable. It is time to give "the whole [*Chevron* 'doctrine'] project … a tombstone no one can miss," *Buffington*, No. 21-972 (Gorsuch, J., dissenting from the denial of certiorari) (slip. op. 16), and start afresh. Once the work of burying the old rule is complete, parties and judges can get on with applying a narrower and better rule. A rule under which Congress may trigger agency discretion only with

explicit terms such as "reasonable" or "feasible." A rule that will be clearer, easier to apply, and, above all, more faithful to the Constitution than the *Chevron* "doctrine" ever was.

CONCLUSION

The judgment should be reversed.

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Respectfully submitted,

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