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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS*

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have frequently appeared before this Court as counsel either for a party, *e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Biden v. Nebraska*, No. 22-506, 2023 U.S. Lexis 2793 (U.S. June 30, 2023). The proper resolution of this case is a matter of utmost concern to the ACLJ and more than 4500 supporters of its sister organization, ACLJ Action, Inc. because of their commitment to separation of powers and the stable rule of law.

SUMMARY OF THE ARGUMENT

With Congress increasingly supine, and the executive branch asserting ever more brazen claims of power to set national policy, the federal judiciary is all that stands between the American people and the growing threat of tyranny from the administrative behemoth. Eliminating *Chevron* deference is essential to reducing the threat.

Few precedents have done more than *Chevron* to distort the proper functioning of the three co-equal branches of government. *Chevron* effectuated a

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* No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

seismic shift in power to the executive branch from the legislative and judicial branches of government. *Chevron* runs afoul of both Congress's Article I power to set national policy and the federal judiciary's Article III power of judicial review.

Chevron's core premise —that Congress intended administrative agencies to provide determinative interpretations of ambiguous statutory provisions —is devoid of support in the Administrative Procedure Act. To the contrary, Congress clearly stated that the courts retained sole authority over questions of law arising under the APA, including interpretation of federal statutes.

More significantly, *Chevron's* core premise gives Congress carte blanche to enact ambiguous legislation, and implicitly condones expansive delegations of authority to fill in gaps. *Chevron* effectively rewards Congressional abdication of responsibility and has accordingly proven to be a significant threat to the nondelegation doctrine. Since *Chevron,* the executive branch has become bolder in fabricating specious claims of Congressional authorization to set national policy. Publicly stated support by Members of Congress for executive trespass on Article I powers makes a mockery of the Founders' intention that each branch of government would jealously guard its own powers from encroachment by the other branches. The extraordinary increase in "major questions doctrine" cases over the past three years attests to the damage *Chevron* has wreaked on Congress's Article I power to establish national policy in the manner provided in the Constitution.

Chevron also divests the authority of the judiciary to interpret federal law. Interpreting ambiguous federal statutes that are administered by an agency requires the courts to exercise independent judgment. *Chevron* hamstrings judges from exercising that judgment by allowing administrative agencies to adopt any interpretation that is marginally reasonable —even if it does not reflect the best view of the statute.

Added to *Chevron*'s intrusions on the powers of co-equal branches is its offense against due process principles. Only in administrative law is there baked-in-the-cake systematic bias in favor of the government.

Last but certainly not least, *Chevron* promotes agency flip-flopping by requiring the same deference to diametrically opposed agency interpretations of the same statutory provision. The resulting instability in the law comes with an enormous price tag in judicial and litigant resources. Title X litigation is a particularly notable example. Over a half century, agency vacillation on the interpretation of a single provision has resulted in eleven lawsuits, ten appeals and two cert grants. Yet the meaning of the provision could change again after the next election, undoubtedly triggering another flurry of litigation. Such instability is more characteristic of a banana republic than a constitutional republic committed to the rule of law. Flawed from its inception, *Chevron v. U.S.A., Inc. v. Nat. Res. Def. Council, Inc*. should be repudiated or overruled.

ARGUMENT

For almost four decades, the judiciary has been required to defer to agency interpretations of ambiguous federal statutes. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* confers on agencies the power to "speak with the force of law when [they] address ambiguity in the statute or [fill] a space in the enacted law." *United States v. Mead*, 533 U.S. 218, 229 (2001).

Barrels of ink have been spilt detailing *Chevron*'s manifold faults, both by legal scholars and Members of this Court.[1] Among the most compelling reasons to

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[1] *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); Brett M. Kavanaugh, *Fixing Statutory Interpretation, Judging Statutes*, 129 Harv. L. Rev. 2118, 2150-51 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)); *Michigan v. EPA*, 576 U.S. 743, 760 (2015) (Thomas, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109-10 (2015) (Scalia, J., concurring in the judgment); *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 380 (1986) (acknowledging that *Chevron* rests on a "legal fiction"); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 Ala. L. Rev. 1 (2017); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016); Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1 (2013); Patrick J. Smith, Chevron*'s Conflict with the Administrative Procedure Act*, 32 Va. Tax Rev. 813, 814 (2013); Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779 (2010); Robert A. Anthony,

repudiate *Chevron* are: 1) its blatant conflicts with the APA, the separation of powers, and due process principles, and 2) the enormous havoc it has wreaked on stability in the law and the attendant waste of litigant and judicial resources. The toxic combination of an increasingly emboldened administrative state with a stultified Congress, including members who applaud Executive Branch trespass on Congress's Article I powers, renders *Chevron's* interment imperative.

I. *Chevron* Violates the APA.

Chevron is premised on the textually indefensible notion that Congress intended agencies to resolve any ambiguity Congress left in a statute to be implemented by an agency. *Chevron*, 467 U.S. at 843-44. This premise is manifestly false. Congress expressly stated that the judiciary retains sole authority to "interpret ... statutory provisions." 5 U.S.C. § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."). Members of this Court have joined numerous scholars [2] recognizing the conflict between judicial

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Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. on Reg. 1, 57 (1990).

[2] *See, e.g.,* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation,* 126 Yale L.J. 908, 976-77 (2017) ("Section 706 is best interpreted as an attempt to ... instruct courts to review legal questions using independent judgment and

deference to agency interpretations and § 706. *See, e.g., Kisor v. Wilkie,* 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., joined by Thomas, Alito, and Kavanaugh, JJ, concurring) (in deferring to administrative agency interpretation, "the court is abdicating the duty Congress assigned to it in the APA"); David Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212 (2001) ("*Chevron* doctrine at most can rely on a fictionalized statement of legislative desire."); *see also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 380 (1986) (acknowledging that *Chevron* rests on a "legal fiction").

Chevron's textual incompatibility with the APA is just one of its many faults. *Chevron* also violates the separation of powers.

II. *Chevron* Violates the Separation of Powers.

Separation of powers is an essential safeguard against the threat to individual liberty that results from the concentration of power in the hands of a single branch. As James Madison wrote,

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the canons of construction."); Patrick J. Smith, Chevron's *Conflict with the Administrative Procedure Act*, 32 Va. Tax Rev. 813, 814 (2013) ("It is impossible to reconcile the requirement in section 706 of the APA that 'the reviewing court shall . . . interpret . . . statutory provisions' with *Chevron's* holding that, under step two, a reviewing court must accept an agency's 'permissible construction of the statute' even if the agency interpretation is not 'the reading the court would have reached if the question initially had arisen in a judicial proceeding.'"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 193-99 (1998).

> [no] political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than [the separation of powers]. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, …may justly be pronounced the very definition of tyranny.

The Federalist No. 47, at 301, 303 (James Madison) (Clinton Rossiter ed., 1961). *Chevron* trenches upon the Constitution's separation of powers because it divests the authority of the judiciary to interpret federal law, and it has facilitated the exponential growth of a politically unaccountable administrative behemoth "alien to our system" of government. *See Crowell v. Benson*, 285 U.S. 22, 57 (1932) (warning against the constitutional violation that would result from divesting the judiciary of its power to review questions of law and conferring such power on an administrative agency).

A. *Chevron* Shifts Power from the Legislative Branch to the Executive Branch and thereby Threatens the Nondelegation Doctrine.

Chevron facilitates the unconstitutional delegation of Congress's powers. Article I of the Constitution vests federal legislative power in Congress. U.S. Const. art. I, § 1. Protecting legislative power is "vital to the integrity and maintenance of the system of

government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). The nondelegation doctrine seeks to ensure that binding legislative commands are the product of the legislative process mandated by Article I. *See Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 672-73 (1980) (Rehnquist, C.J. concurring). The doctrine protects one of the Constitution's most foundational precepts: the sovereignty of the American people and the political accountability of those who govern. "The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those entrusted with it should be kept in dependence on the people." *The Federalist No. 37*, at 4 (James Madison) (J. & A. McLean eds., 1788) (quotations omitted); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

The *Chevron* Court conceded that when agencies construe ambiguous statutes, they often are engaged in "formulation of policy." *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). According the force of law to agency pronouncements on matters of private conduct about which Congress did not actually have an intent, shifts legislative power to the agency. *See Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring). "Statutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate

legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress." *Id*. *See also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, *Judging Statutes*, 129 Harv. L. Rev. 2118, 2150-51 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)) (*Chevron* is "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.").

Chevron gives Congress carte blanche to enact ambiguous legislation, and implicitly condones expansive delegations of authority to fill in gaps. *Chevron* has played a key role in the modern administrative state in which the laws governing Americans are increasingly "nothing more than the will of the current President." Stephen Breyer, *Making Our Democracy Work: A Judge's View* 110 (2010).

Members of Congress from the President's party are sometimes only too happy for the Executive branch to implement major policy, no matter how severe the trespass on Congress's Article I powers. Recently, no fewer than eleven Members supported the President's proposal to fabricate authorization under the Fourteenth Amendment to avoid default on the national debt. *See* Jonathan Turley, *Congressional Democrats Beg Biden to Nullify their Existence*, The Hill, (May 23, 2023) https://thehill.com/opinion/white-house/4012134-congressional-democrats-beg-biden-to-nullify-their-existence.

Some Members of Congress even publicly excoriate this Court for defending the separation of powers, and Congress's Article I powers. Senate Majority Leader, Charles Schumer, called the Court's decision in *Biden*

v. Nebraska a "disappointing and cruel" display of "the callousness of the MAGA Republican-controlled Supreme Court."[3] So much for the Founders' intention that each branch of government would zealously guard its own power. *See Federalist No. 51*, at 4 (James Madison) (J. & A. McLean eds., 1788) ("Ambition must be made to counteract ambition.").

In the country the Framers envisioned, Congress would jealously protect its power to set national policy. *Chevron* facilitates Congress's abdication of its responsibility because it incentivizes Congress to pass the buck to administrative agencies through ambiguous statutes. Administrative agencies increasingly seize the opportunity to "be extremely aggressive in seeking to squeeze [their] policy goals into ill-fitting statutory authorizations and restraints." Kavanaugh, *supra*, at 2150; *see also Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring) ("[W]e should be alarmed that [the agency] felt sufficiently emboldened by those precedents to make the bid for deference that it did here."); *cf. Texas v. Becerra*, 623 F. Supp. 3d 696, 713 (N.D. Tex. 2022) (rejecting HHS's novel claim that the Emergency Medical Treatment and Labor Acted preempted Texas's post-*Dobbs* law prohibiting certain abortions).

The significant rise in the Court's "major questions" cases is proof of agency abuse of *Chevron* deference and the growing threat to the nondelegation doctrine. *See Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (noting that

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[3] Chuck Schumer (@SenSchumer), Twitter (June 30, 2023, 10:59 AM), https://twitter.com/SenSchumer/status/1674794719048781825.

although the major questions doctrine "is nominally a canon of statutory construction, we apply it in service of the [nondelegation principle]"); *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring) (lamenting the "potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference").

Within the past three terms, this Court has invalidated as many administrative agency mandates under the "major questions doctrine" as it did in the previous two decades.[4] While not the sole cause, *Chevron* enabled the recent spate of agency claims of implicit "delegation running riot." *See Gundy*, 139 S. Ct. at 2138 (Gorsuch, J., dissenting) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495,

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[4] *See Biden v. Nebraska*, No. 22-506, 2023 U.S. Lexis 2793 (U.S. June 30, 2023) (rejecting the Secretary of Education's claim of authority to forgive federal student loan debt); *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022) (rejecting EPA's claim of authority to restructure America's energy market); *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam) (rejecting OSHA's claim of authority to issue a nationwide vaccine mandate); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (rejecting the CDC's claim of authority to issue a nation-wide eviction moratorium); *King v. Burwell*, 576 U. S. 473, 485-86 (2015) (rejecting IRS's claim of authority to rewrite rules for billions of dollars in healthcare tax credits); *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2014) (rejecting EPA's claim of authority over millions of small greenhouse gas sources); *Gonzales v. Oregon,* 546 U.S. 243, 275 (2006) (rejecting Attorney General's claim of authority over controlled substances used for assisted suicide); *FDA v. Brown & Williamson Tobacco Corp.,* 529 U. S. 120, 159-60 (2000) (rejecting FDA's claim of authority over tobacco products).

551 (1935) (Cardozo, J., concurring)). *Chevron* must be repudiated.

B. *Chevron* Strips Power from the Judiciary "to Say what the Law Is."

Article III vests "[t]he judicial power of the United States" —and with it, the duty "to say what the law is" —in the independent federal courts. *Marbury v. Madison*, 5 U.S.(1 Cranch) 137, 177-78 (1803). "[O]ur Constitution unambiguously … commands that the independence of the Judiciary be jealously guarded." *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) (plurality op.). *Chevron* was a judicial forfeiture of Article III power.

Judicial determinations under *Chevron* usually begin with a hunt for the elusive quality of ambiguity in the relevant statutory language. "[N]o definitive guide exists for determining whether statutory language is clear or ambiguous" and "judges "have wildly different conceptions of whether a particular statute is clear or ambiguous." Kavanaugh, *supra*, at 2138, 2152; Christine Kexel Chabot, *Selling* Chevron, 67 Admin. L. Rev. 481, 483 (2015) (noting that the ambiguity requirement "confounds courts"). Most of the time, the hunt is successful. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 33-34 (2017) (sampling over 1,000 cases and concluding that courts of appeals find ambiguity at *Chevron* step one 70% of the time).

Once a statutory provision is declared ambiguous, judicial acceptance of the agency's interpretation "endow[s]" the agency's views "with force of law where

Congress did not intend them to have such force." Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 57 (1990).

Interpreting federal statutes, including ambiguous ones administered by an agency, "calls for an exercise of independent judgment." *Michigan*, 576 U.S. at 761 (Thomas, J., concurring) (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 122 (2015). *Chevron* hamstrings judges from exercising that judgment by allowing administrative agencies to adopt any interpretation that is marginally reasonable—even if it does not reflect the best view of the statute.

Chevron thus wrests from Courts the ultimate interpretative authority to 'say what the law is' and hands it over to the executive." *Michigan*, 576 U.S. at 761 (Thomas, J., concurring) (quoting *Marbury*, 5 U.S.(1 Cranch) at 177-78); *see also* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 Yale L.J. 2580, 2589 (2006) (describing *Chevron* as "counter-*Marbury* for the administrative state"). This massive shift in power is "alien to our system" of government, *Benson*, 285 U.S. at 57, and tilts the playing field in favor of the government.

III. *Chevron* Raises Due Process Concerns.

Chevron requires federal judges to place their thumbs on the scales of justice in favor of the executive branch. *See* Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1189 (2016); *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives,* 140 S. Ct. 789, 790 (2020) (Gorsuch, J., concurring in the denial

of cert.). *Chevron* therefore offends due process principles because it creates a "systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else." *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring) (citation omitted). Restoring *de novo* review of all statutory interpretation issues, as the Constitution requires and Congress reinforced in the APA, would ensure to private parties the "neutral forum for their disputes that they rightly expect and deserve." *Id.* at 2448.

IV. *Chevron* Promotes Agency Flip-Flopping and Instability in the Law.

Under *Chevron*, instability in the law is viewed as a standard feature rather than a corrosive bug. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) ("[C]hange is not invalidating, since *the whole point of Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.") (emphasis added). Because *Chevron* precludes courts from issuing definitive interpretations of ambiguous statutory provisions, the law remains subject to the changing whims of agency reinterpretations. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-85 (2005). *Brand X* requires courts "to overrule their own declarations about the meaning of existing law in favor of interpretations dictated by executive agencies." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring).

Chevron encourages agency flip-flopping by irrationally according equal deference to diametrically opposed agency interpretations. *See Rust v. Sullivan*, 500 U.S. 173, 186 (1991) ("[We have] rejected the argument that an agency's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the statute in question" (quoting *Chevron*, 467 U.S. at 862)). As one court recently said, "the agency . . . must consider varying interpretations and the wisdom of its policy *on a continuing basis*." *Int'l Brotherhood of Teamsters, Loc. 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841, 850 (9th Cir. 2021), *cert. denied sub nom. Trescott v. Fed. Motor Carrier Safety Admin.*, 142 S. Ct. 93 (2021) (cleaned up) (emphasis added).

Examples of agency flip-flopping abound and result in enormous squandering of litigant and judicial resources. *See, e.g.*, *Mozilla Corp. v. FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019) (describing FCC's 15-year vacillation on whether internet service providers are "common carriers," under the Communications Act of 1934.). *See also generally* Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 Duke L.J. Online 91, 92 (2021) (describing administrative agency flip-flops on major national policies).

The tale of Title X litigation illustrates forcefully how *Chevron* causes long-term instability in the law at an enormous toll in litigant and judicial resources. Enacted in 1970, Title X is a Spending Clause program dedicated to funding family planning

services.[5] The Department of Health and Human Services (HHS) see-sawed on its interpretation of a single statutory provision, §300a-6, for over a half century.

Section §300a-6 provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." Congress did not specify whether §300a-6 applied to abortion counseling, referral, and advocacy, or how to ensure that funds are not used "in programs where abortion is a method of family planning." *Rust*, 500 U.S. at 184.

HHS therefore implemented regulations interpreting §300a-6, alternating between pro-abortion and pro-life interpretations over the course of a half dozen presidential administrations. For the first 18 years, HHS interpreted §300a-6 to prohibit only the actual performing of abortion, but to otherwise permit pro-abortion counseling and referrals.[6]

In 1988, HHS changed its policy and issued regulations that barred funding recipients from providing abortion-related information or abortion referrals.[7] The 1988 Rule further required physical and financial separation between Title X-funded

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[5] Public Health Service Act of 1970, Pub. L. No. 91-572, 84 Stat. 1506 (codified as amended 42 U.S.C. §§ 300-300(a)(6)).

[6] Project Grants for Family Planning Services, 36 Fed. Reg. 18,465, 18,466 (Sept. 15, 1971).

[7] Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects, 53 Fed. Reg. 2,922, 2,927 (Feb. 2, 1988).

services and any abortion-related services.[8] The regulations were challenged in three separate lawsuits with the circuits splitting on whether the regulations were a permissible interpretation of §300a-6.[9] This Court granted review to resolve the split in *Rust v. Sullivan*.[10] Holding that §300a-6 is ambiguous, and applying *Chevron*, this Court upheld the 1988 regulations. 500 U.S. at 186-87.

Shortly after *Rust,* President George H. W. Bush, apparently disagreeing with the Court's decision in *Rust,* issued a directive to the HHS Secretary, directing adherence to four principles "compatible with free speech and the highest standards of medical care." *Nat'l Fam. Plan. & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 230 (D.C. Cir. 1992). HHS therefore issued interim regulations,[11] reverting back

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[8] *Id*. at 2,939.

[9] *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), *aff'd, New York v. Sullivan*, 889 F.2d 401 (1989) (upholding the 1988 regulations as a permissible interpretation of §300a-6.); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *aff'd*, *Massachusetts v. Sec'y of Health & Hum. Servs.*, 899 F.2d 53 (1st Cir. 1990) (enjoining the 1988 regulations); *Planned Parenthood Fed'n of Am. v. Bowen*, 687 F. Supp. 540 (D. Colo. 1988), *aff'd*, *Planned Parenthood Federation of America v. Sullivan*, 913 F.2d 1492 (10th Cir. 1990) (enjoining 1988 regulations on constitutional grounds).

[10] 493 U.S. 956 (1990).

[11] Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7,462 (Feb. 5, 1993). The final rules were not adopted until 2000. 65 Fed. Reg. 41,270 (July 3, 2000).

to the more pro-abortion interpretation of §300a-6. This rule change was also challenged in court.[12]

In 2019, HHS reversed course again, promulgating regulations virtually identical to the 1988 regulations upheld in *Rust*. A deluge of litigation followed, including challenges from nearly half the states. The lower courts split on the legality of the new regulations,[13] notwithstanding *Rust's* holding that 1988 regulations were a reasonable (and constitutional) interpretation of §300a-6.

This Court granted review once again, *Oregon v. Cochran*, 141 S. Ct. 1369 (2021), only to have HHS and the challenging parties agree to dismiss the case early in President Biden's term. *See Becerra v. Mayor of*

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[12] *Nat'l Fam. Plan. & Reprod. Health Ass'n v. Sullivan,* No. 92-935(CRR), 1992 U.S. Dist. LEXIS 9421 (D.D.C. July 1, 1992) (enjoining interim rules until HHS complied with APA notice and comment requirements), *aff'd, Nat'l Fam. Plan. & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992).

[13] *See Fam. Plan. Ass'n of Me. v. United States HHS*, 404 F. Supp. 3d 286 (D. Me. 2019) (upholding the 2019 regulations under *Chevron*); *Mayor & City Council of Balt. v. Azar*, 392 F. Supp. 3d 602 (D. Md. 2019) (enjoining the 2019 regulations); *Washington v. Azar*, 376 F. Supp. 3d 1119 (E.D. Wash. 2019) (same); *Oregon v. Azar*, 389 F. Supp. 3d 898 (D. Or. 2019); *California v. Azar*, 385 F. Supp. 3d 960 (N.D. Cal. 2019).

The Court of Appeals for the Ninth Circuit reversed the preliminary injunctions against the regulations granted in the California, Oregon, and Washington lawsuits. *California by & through Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020) (rejecting arguments that *Rust* was superseded by provisions in the ACA and the annual HHS appropriations riders). The Court of Appeals for the Fourth Circuit affirmed the injunction against the regulations. *Mayor of Baltimore v. Azar*, 973 F.3d 258 (4th Cir. 2020) (holding that the 2019 regulations were arbitrary and capricious).

Baltimore, 141 S. Ct. 2618 (2021) (dismissing *Oregon v. Cochran* and two other consolidated cases). Predictably, HHS flip-flopped again, re-adopting the 2000 regulations.[14] And yet again, litigation ensued, involving challenges from twelve states. *Ohio v. Becerra*, 577 F. Supp. 3d 678 (S.D. Ohio 2021), *aff'd,* 2022 U.S. App. LEXIS 3435 (6th Cir. Feb. 8, 2022). Again, HHS's policy reversal was upheld under *Chevron*. *Becerra*, 557 F. Supp. at 688-90.

The law didn't change, only HHS's interpretation of it. Content with HHS's flip-flopping, Congress abdicated its responsibility to clarify the statute. Eleven lawsuits, ten appeals and two cert grants later, the meaning of §300a-6 remains subject to change, perhaps ad infinitum, as long the political parties remain divided on the use of taxpayer funds to facilitate abortion. The resulting staggering cost in litigant and judicial resources alone counsels jettisoning *Chevron*. *See* Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 850-51 (2010) (stating that *Chevron* has "spawned an incredibly complicated regime that serves only to waste litigant and judicial resources").

Restoring the judiciary's power to determine the best meaning of an ambiguous statute would curtail the ability of agencies do about-faces on how ambiguous statutory provisions must be interpreted. It would further enable "citizens to organize their affairs with some assurance that the rug will not be

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[14] Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144, 56144 (Oct. 7, 2021) (to be codified at 42 C.F.R. pt. 59).

pulled from under them tomorrow, the next day, or after the next election." *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring); *see also Guedes*, 140 S. Ct. at 791 (Gorsuch, J., statement respecting denial of cert.) ("And why should courts, charged with the independent and neutral interpretation of the laws Congress has enacted, defer to such bureaucratic pirouetting?").

Ten years ago, Chief Justice Roberts thought it might "be a bit much" to describe the "growing power of the administrative state" as "'the very definition of tyranny.'" *See City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (citations omitted). Respectfully, not anymore. With Congress increasingly supine, and the executive branch asserting ever bolder claims of the power to set national policy, the specter of tyranny looms larger. The federal judiciary is all that stands in the breach. Eliminating the "powerful weapon," *id.* at 314, of *Chevron* deference is essential to ensuring that the threat remains inchoate.

CONCLUSION

Amicus respectfully requests this Court to reverse the D.C. Circuit and repudiate or overrule *Chevron*.

Respectfully submitted,

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