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

AMICUS CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Court should overrule Chevron 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 THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

To advance these goals, the Liberty Justice Center regularly litigates cases challenging overbroad assertions of regulatory discretion. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, No. 22-10387, 2022 U.S. App. LEXIS 31958 (5th Cir. Nov. 18, 2022) (striking down Congress's delegation of regulatory authority to a private industry group); *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 609 (5th Cir. 2021) (enjoining the Occupational Safety and Health Administrations' vaccination mandate). This case presents an important opportunity for this Court to limit executive authority to its proper scope under the Constitution.

This case interests *amicus* because the *Chevron* doctrine is a violation of the separation of powers, and the separation of powers is fundamental to the preservation of liberty.

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

SUMMARY OF ARGUMENT

Chevron is an abdication of this Court's responsibility to say what the law is. The entire premise—that courts owe deference in matters of legal interpretation because agencies are better suited to define their own limitations—is simply wrong. The separation of powers prevents this Court from delegating interpretive authority to the executive branch: just as Congress holds the responsibility to make the laws, and the executive holds the duty to follow those commands, this Court—and those inferior courts Congress has felt it wise to empower—hold the duty to interpret those laws and articulate what those commands are. *Chevron* delegates this inherent Article III power to executive agencies, allowing them to interpret laws consistent with their own policy preferences. This is a misinterpretation of the judicial role, and a misunderstanding of the expertise of agencies, which is in the technical details of the policy area—they have no greater, and probably far less, expertise in the interpretation of legal texts than courts do.

Nor is *Chevron* a regrettable necessity in the face of ambiguity. Longstanding canons of construction provide better and more consistent results where Congress has declined to be specific. English and American courts have long employed traditional canons of interpretation, grounded in contemporaneous understanding and longstanding custom, which better resolve uncertainty using criteria less prone to gamesmanship and caprice.

Chevron was wrong then, it's wrong now, and *amicus* submits it is long past time to correct this mistake.

ARGUMENT

I. *Chevron* represents an improper delegation of federal courts' authority in violation of the separation of powers.

This Court should overrule *Chevron* because it improperly delegates the federal courts' power to interpret the law to the executive branch.

"The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.'" *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring). Rather, each branch is granted its own sphere of authority, such that "'[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' Art. I, §1, '[t]he executive Power shall be vested in a President of the United States,' Art. II, §1, cl. 1, and '[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,' Art. III, §1." *Ass'n of Am. R.R.*, 575 U.S. at 67 (Thomas, J., concurring).

This structure is not simply technical or formalistic, but is an essential safeguard of Americans' liberty. James Madison warned that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison). "The Framers were concerned not just with the starting allocation, but with the 'gradual concentration of the several powers

in the same department.'" *Ass'n of Am. R.R.*, 575 U.S. at 74 (Thomas, J., concurring) (citing The Federalist No. 51 (Madison)). "[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist No. 51 (Madison).

The principle of nondelegation is essential to preserve this separation of powers. The "Vesting Clauses, and indeed the entire structure of the Constitution, make no sense [if there is no limit on delegations]." Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002); *see also Mistretta v. United States*, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.").

Most often the doctrine is invoked to prevent the Legislature from delegating powers to the Executive. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("Congress cannot, under the Constitution, delegate its legislative power to the President."); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935) ("Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is [constitutionally] vested.").

But just as Congress cannot abdicate its responsibility to make the laws, "the judicial department" cannot shirk its "province and duty" "to say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). It is incumbent on this Court, and those inferior courts established by Congress, to "exercise [their]

independent judgment in interpreting and expounding upon the laws." *Perez v. Mortgage Bankers Assn.*, 575 U.S 92, 119 (2015) (Alito, J. concurring). Courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

Chevron represents an abdication of that responsibility. *Chevron* is premised on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 734, 750-51 (1996). That premise is simply wrong—this Court made it up and should now renounce it.

Under *Chevron,* agencies have an open-ended license to invent their own "reasonable interpretation" of a statute. *Utility Air Regulatory Group v. EPA,* 573 U.S. 302, 332 (2014). To receive deference from the courts, agencies need not adhere to originalist, textualist, structuralist, or any other legitimate method of legal interpretation—so they can and do interpret statutes to mean whatever suits their fancy. Once a statute is declared "ambiguous," agency interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). But interpretation is what *courts* do—it is their role in the constitutional structure to say what the law Congress passed commands, and the Executive's role to carry out Congress's command.

Chevron abridged this structure based on two rationales, each flawed.

"The first was sound policy in the allocation of responsibilities among the branches of government." Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 921 (2017). Specifically, the Court noted that Article III judges do not have a constituency, are not experts in the field, are not part of either political branch, and are not competent to "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Chevron,* 467 U.S. at 865-66.

"Second, *Chevron* sought to ground the rule that it announced in precedent." Bamzai, *Origins of Judicial Deference* at 921. Specifically, it grounded its rule in the (mistaken) premise that this Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 866.

"[T]he Court cited, though it did not analyze, several dozen cases dating back to the Court's 1827 opinion in *Edward's Lessee v. Darby*." Bamzai, *Origins of Judicial Deference* at 921 (footnotes omitted). The earliest case relied on by the *Chevron* Court, 467 U.S. at 844 & n.14, was *Edward's Lessee v. Darby*, where the Court held that "[i]n the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Edwards' Lessee v. Darby*,

12 Wheat. 206, 210 (1827). The Court also observed that the North Carolina statute "was not only thus construed by the commissioners, but that construction seems to have received, very shortly after, the sanction of the legislature" in a later enactment that "must be construed as recognising the validity of, and as ratifying the surveys which had been made by the commissioners." *Id.* at 210-11. The Court granted deference to an executive interpretation because the interpretation was contemporaneous to enactment, not because of some special power, role, or expertise of the executive. The *Chevron* Court's reliance on the phrase "great respect" without acknowledging the importance of the contemporaneousness is cherry-picked phrasing without engaging with the substance of the holding.

Chevron's other citations fare no better: "of the several dozen cases that the Court cited to support Chevron's two-part test, seven were decided before 1940," and "[e]ach of those cases is consistent with the model of the traditional canons of statutory construction." Bamzai, *Origins of Judicial Deference*, at 998 (citing *Chevron,* 467 U.S. 842-44 & nn. 9, 11-14; *id.* at 865-66 & nn.39-41).

II. Traditional canons of construction can resolve any statutory ambiguity without undue deference to the executive branch.

Edwards' Lessee not only shows how *Chevron* went wrong, but also provides a good starting point for a proper understanding of how courts *should* resolve statutory ambiguity when determining the lawfulness of regulations: through traditional canons of construction. Specifically, *Edwards' Lessee* relied on a combination of contemporaneous and customary evidence,

each of which has its own Latin maxim: *consuetudo est optimus interpres legum,* "Custom is the best interpreter of law," and *contemporanea expositio est optima et fortissima in lege*," "Contemporaneous exposition is the best and strongest in law."

"Interpretive theorists of the seventeenth and eighteenth centuries routinely applied two interpretive canons to eliminate the problem of ambiguity: a reliance on the contemporaneous understanding of a text (what was called the '*contemporanea expositio*') and a reliance on the customary understanding of that text (the '*interpres consuetudo*')." Bamzai, *Origins of Judicial Deference* at 930.

"[T]he maxims are better translated as 'a very good interpreter of laws is custom' and 'contemporaneous exposition is very strong in law.'" Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1279 (2007) (citation omitted). "[U]sage under the statute that began contemporaneously with its enactment [i]s persuasive. *Id.* at 1279-1280 (citation omitted). "In other words, the intended application of a statute is divined from its historic and contemporary use, and practice developed under a statute is indicative of the meaning credited to its words." David R. Allman, *Scalpel or Sledgehammer? Blocking Predatory Foreign Investment with CFIUS or IEEPA*, 10 AM. U. NAT'L SEC. L. BRIEF 267, 303 (2020). "[B]oth Madison and Hamilton adopted the proposed solutions to the problem of legal ambiguity advocated by seventeenth- and eighteenth-century legal theorists." Bamzai, *Origins of Judicial Deference* at 940.

"A look into early American practice demonstrates courts' use of the canons in both constitutional and statutory interpretation, and their willingness to invalidate executive action on the basis of the canons." *Id.* at 941-42. In *Stuart v. Laird*, decided the same year as *Marbury*, the Court considered the question whether Supreme Court justices could sit as circuit judges without having a separate commission to sit on the circuit court. 5 U.S. (1 Cranch) 299 (1803). The Court reasoned that the "contemporary interpretation," which commenced at the time the judiciary was created, was a "practical exposition [] too strong and obstinate to be shaken or controlled." *Id.* at 308. Then in *McCulloch v. Maryland*, Chief Justice Marshall reasoned that "[a]n exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded." 17 U.S. 316, 401 (1819). In *Cohens v. Virginia*, Chief Justice Marshall again noted that "[g]reat weight has always been attached, and very rightly attached, to contemporaneous exposition." 19 U.S. 264, 418 (1821).

In *Boyd v. United States*, the Court expressly relied on both "*consuetudo est optimus interpres legum*" and "*contemporanea expositio est optima et fortissima in lege*," finding that "long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for [an interpretation] in the law." 116 U.S. 616, 622 (1886). "The principle of contemporaneous and practical construction is expressed in some of the oldest maxims of the law: '*Contemporanea expositio est fortissima in lege*;' '*Optima est legis interpres consuetudo*;' '*A communi observantia*

non est recedendum.' This court has frequently recognized and applied the doctrine in construing the Federal Constitution and the laws of Congress." *Univ. v. People*, 99 U.S. 309, 318 (1878) (italics added) (citations omitted); *see also Union Ins. Co. v. Hoge*, 62 U.S. 35, 60 (1859) (relying on "*contemporanea exposition*). "The doctrine of contemporaneous exposition is of considerable antiquity and encapsulates the idea that the best construction of an instrument is that placed upon it in contemporaneous sources." Diggory Bailey, *Settled Practice in Statutory Interpretation*, THE CAMBRIDGE LAW JOURNAL, 81, pp 28-49 (2022) (citing 2 Co. Inst. 11).

At first glance the early decisions might appear to have an air of deference, but in fact the courts were applying the traditional canons. The early courts afforded "great weight" to interpretations that were contemporaneous to the legislative enactment—*not* blanketly to just any executive-branch interpretations of the law. Early jurisprudence relied on the writ system.[2] Aaron Belzer, *From Writs to Remedies: A Historical Explanation for Multiple Remedies at Common Law*, 93 Denv. L. Rev. Online 1, 3 (2016). Reliance on

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[2] The writ system was used before the enactment of federal question jurisdiction in 1875. "[B]ecause federal courts lacked general federal-question jurisdiction before 1875, many statutory questions could be resolved only in the context of a mandamus action brought against an executive official." Bamzai, *Origins of Judicial Deference*, 958. "But application of the mandamus standard was a consequence solely of the form of relief requested, not the consequence of the interpretive theory used." *Id*. "Thus, when the general federal-question-jurisdiction statute in 1875 gradually eliminated the need to rely on mandamus jurisdiction to challenge executive action, the mandamus standard and Decatur line of cases became less relevant." *Id.*

the writ of mandamus case law for the premise that the executive branch is entitled to deference is misplaced. Review of a writ of mandamus was limited to whether the executive's action was discretionary or ministerial. *Marbury*, 5 U.S. (1 Cranch) at 170-71. "Judicial control of federal executive officers was principally exercised through the prerogative writ of mandamus." *United States v. Mead Corp.*, 533 U.S. 218, 242 (2001) (Scalia, J., dissenting) (citing L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 166, 176-177 (1965)). The Court "generally would not issue [a writ of mandamus] unless the executive officer was acting plainly beyond the scope of his authority." *Id.* at 242 (Scalia, J., dissenting). If the action was discretionary, then the court would generally defer to the discretion of the executive branch. *See Decatur v. Paulding*, 39 U.S. 497, 515 (1840). But if the action was ministerial and not entitled to discretion, then the action was not entitled to any deference. *See id.*

Decatur made clear that "[i]f a suit should come before this Court, which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department." 39 U.S. at 515. The Court made clear that "judgment upon the construction of a law must be given in a case in which [a court] ha[s] jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them." *Id.*

Thus, our Founding Fathers, scholars, commentators, and even our first Congress relied on custom and contemporaneity in ascertaining the intent and mean-

ing of the Constitution. *See* Bamzai, *Origins of Judicial Deference*, 940-41. These two maxims, when combined, come to a better approximation of meaning or intent than *Chevron*'s bias for whatever policy the current administration prefers. Although the writ system essentially ended with the nineteenth century, elements alluding to executive deference persisted into the twentieth century.

Many twentieth-century cases still applied the traditional canons of custom and contemporaneity, but those cases often didn't acknowledge the principles formally, and so the contemporaneity and custom canons became diluted, distorted, and devolved into other principles over time. "[T]he passage of time obscured the intellectual roots of the Court's nineteenth-century precedents privileging the executive's customary and contemporary interpretations of statutory text, those cases would be reimagined and recycled as precedents privileging the interpretation advanced by executive actors." *Id.* at 965.

Chevron was therefore in error to ground its delegation of legal interpretation to the executive in some supposed tradition of deference to the executive—there was no such tradition. What *Chevron* and its progeny treat as deference was rather the traditional application by courts of longstanding cannons—within which established practice and contemporary understandings could serve as guides to meaning. At no point does that tradition require courts to declare *new* and *novel* interpretations, ungrounded in text or tradition, "close enough for Government work."

CONCLUSION

For the foregoing reasons, and those stated by petitioner, the decision below should be reversed.

Respectfully submitted,

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