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 AMICUS CURIAE THE AMERICAN CORNERSTONE INSTITUTE IN SUPPORT OF PETITIONERS

Edward M. Wenger
Counsel of Record
Andrew Pardue
Kenneth C. Daines
Mateo Forero-Norena
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
emwenger@holtzmanvogel.com
Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The American Cornerstone Institute is a non-partisan, not-for-profit organization founded by world-renowned pediatric neurosurgeon and 17th Secretary of the Department of Housing and Urban Development Dr. Benjamin S. Carson. The Institute's mission is to educate the public on the importance of Faith, Liberty, Community, and Life to the continued success of the United States of America. Defending the Framers' constitutional design and the liberty it was designed to protect is one of the Institute's primary objectives.

In furtherance of this mission, the American Cornerstone Institute submits this brief in support of the Petitioners.

---

[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part. No person or entity other than Amicus and the counsel below contributed the costs associated with the preparation and submission of this brief.

INTRODUCTION & SUMMARY OF THE ARGUMENT

In this case, the Court must determine whether congressional silence—construed broadly as "statutory ambiguity"—means that the Secretary of Commerce has the power, under the Magnuson-Stevens Fishery Conservation and Management Act of 1976, to force the Petitioners to house *and pay* the federal employees regulating their trade. See *Loper Bright Enters.* v. *Raimondo*, 45 F.4th 359, 363 (D.C. Cir. 2022). Whether to grant an agency that power is a question that lies at the heart of domestic policymaking, and it is precisely the sort of inquiry that should be, and once was, deliberated by Congress: the entity most responsive to the regulated community and, indeed, to all Americans. But forty years ago, when this Court decreed that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, *implicitly or explicitly*, by Congress," *Chevron, U.S.A., Inc.* v. *NRDC, Inc.*, 467 U. S. 837, 843 (1984) (emphasis added), it ossified a twentieth century lurch toward policy-by-bureaucracy instead of policy by the representatives of the People.

The Framers saw this coming. They warned of the hazards associated with consolidation of power and the illegitimacy of lawmaking by the unaccountable. And they structured the Constitution to guard against that precise danger. See Federalist Nos. 47–48, 52, 77.

By its very terms, *Chevron* deference distorts the system created by the Founding generation. It permits the administrative state to issue binding

proclamations backed by the power of sanction (*i.e.*, law, the Article I power) on the premise that statutory ambiguity (or, here, silence) is tantamount to legislative delegation. That model transmogrifies the world's greatest deliberative body into little more than a collective of ombudsmen between the people and the bureaucrats. Meanwhile, *Chevron* deference defangs the federal courts, preventing them from performing their core function under Article III: interpreting law and ascertaining the actual will of Congress.

And in addition to these structural concerns, this case—as well as the decision-making of the administrative state during the COVID-19 pandemic—demonstrates that policies developed by unaccountable bureaucrats are often risible at best or catastrophically ill-informed at worst. As it turns out, deliberation matters.

Our republican form requires that our policymakers remain accountable to the people. Our liberty depends on the willingness of all three federal branches to check each other, rather than acquiescing to "reasonable" statutory interpretations arrived at by individuals operating outside of the Constitution's finely calibrated balance of authority. And, at bottom, the complexity of the problems facing our Nation today necessitates the sort of open dialogue, negotiation, trade-offs, and consideration that Congress can (and should be incentivized to) provide—but that the regulatory state never will.

Scuttling *Chevron* deference is a critical step towards a return to reasoned decision-making in public policy. Indeed, this Court recently made clear

that continued dereliction of both the Article I and Article III responsibilities cannot be tolerated. See, *e.g.*, *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2614 (2022) (holding that "such a vague statutory grant is not close to the sort of clear authorization required by our precedents" to sustain an environmental regulation). But until *Chevron* is expressly overruled, it will still cause mischief among the subordinate federal courts. The Court should overrule it now.

ARGUMENT

I. The Constitution was calibrated to ensure that the most deliberative and accountable branch would establish American public policy.

When the Framers convened the 1787 Constitutional Convention in Philadelphia, their task was informed by an attitude anathema to any notions of monarchical tyranny, as well as an acute cognizance of the havoc wrought by the impotent National government instituted under the Articles of Confederation. On one hand, concentration of sovereign power resulted in the despotism that triggered the American Revolution. But on the other, the Founding Generation recognized that the tendency of the Articles to over-democratize our fledging Country resulted in near calamity as state "legislatures too often passed foolish and short-sighted measures" driven by "'the restlessness of the people'" who elected them. J. Bessette, The Mild Voice of Reason: Deliberative Democracy & American National Government 9 (1994).

In other words, the Framers knew they had to prevent the over-accumulation of government power in the hands of any one person (or any small group of persons), lest autocracy or oligarchy take hold. They therefore remained committed to governmental legitimacy, which meant that sovereignty must trace back, and give its account to, the people of the United States. And, ultimately, they needed to do whatever they could to make sure that the policy emanating from the people's representatives was not so foolish, hasty, reactionary, or short-sighted to elicit catastrophe. Balancing these goals took four months of private deliberation followed by two years of selling the system to the American people. Ultimately, though, our system of checks and balances emerged.

A. To preserve liberty, the Framers separated the Nation's sovereign power into three coequal branches.

Influenced as they were by (among others) Locke and Montesquieu, the Framers justified declaring independence from the British Monarchy on the notion that legitimate government exists only to "secure the[] rights" of the people, and thus may only derive its "just powers from the consent of the governed." The Declaration of Independence para. 2 (U.S. 1776). The notion that first come rights, and only then comes government, coincides with Thomas Paine's reminder that "[a] constitution is a thing *antecedent* to a Government, and a government is only the creature of a constitution." T. Paine, Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution 56 (J. S. Jordan ed. 1791). In other words, "[t]he constitution of a country is not the act of

its government, but of the people constituting a government." *Id*.

The concept of government by the people was innovative in the late eighteenth century. Monarchical rule, perpetuated throughout generations by hereditary succession (interrupted only by occasional usurpations, civil war, and violence), was the prevailing norm. Indeed, self-government had a poor track record: Athens and Rome had each experimented with democracy and republicanism (respectively) millennia before, and both regimes devolved into tyranny within a few generations, primarily due to aggrandizement of power within the hands of one (or a few). The Framers studied this history and were all too aware that "the accumulation of all powers, legislative, executive, and judicial, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (C. Rossiter ed. 1961) (J. Madison).

The Framers' preventative innovation? Use human nature—particularly the less noble side of it. In their view, if "each department" has "the necessary constitutional means . . . to resist encroachments of the others," it will do so as long as statesmen are equipped with the appropriate "personal motives." The Federalist No. 51, at 321–22 (C. Rossiter ed., 1961) (J. Madison). If "[a]mbition . . . [is] made to counteract ambition," then the government will be "first enable[d] . . . to control the governed; and in the next place oblige[d] . . . to control itself." *Id*. This "regular distribution of power into distinct departments," according to Hamilton, is a "powerful means, by which the excellences of republican

government may be retained, and its imperfections lessened." The Federalist No. 9, at 72–73 (C. Rossiter ed., 1961) (A. Hamilton). Thus, the separation of powers achieves the advantages of a republic while diminishing its weaknesses.

As they divided the powers of the government, the Framers took pains to ensure that the branch responsible for establishing public policy would be the one closest to those who would labor under the laws adopted. This is why Article I of the Constitution tasks Congress with creating the Nation's laws and (originally) guaranteed that the representatives serving in one chamber of the Nation's legislature would be chosen through direct popular election.[2] In Federalist No. 52, Madison stated his belief that the House should have "an immediate dependence on, and intimate sympathy with, the people" because it is essential to liberty for the government to have "a common interest with the people." The Federalist, No. 52, p. 327 (C. Rossiter ed. 1961) (J. Madison). Alexander Hamilton further explained the importance of an accountable legislature, saying that

---

[2] By virtue of the Seventeenth Amendment, the individual members of both congressional chambers are now elected by direct popular vote. See U.S. Const., Amdt. 17. Even as initially contemplated, the people remained closely connected to their respective Senators, each of whom were chosen by the legislatures of their respective States. And during the Founding Era, no governmental bodies remained as closely connected to the will of the people as the State legislatures.

"[d]ue dependence on the people" is "the requisites to safety, in a republican sense." Federalist No. 77, p. 520 (J. Cooke ed. 1961) (A. Hamilton). Indeed, many of the fiercest debates during the Constitutional Convention turned on the extent to which both chambers of Congress would be connected to their members' respective constituents.

B. To promote the wise and responsible exercise of the nation's sovereign power, the Framers incentivized deliberation.

As much as the Founders knew their ancient history and political philosophy, they remained painfully aware of the danger inherent in shoddy policymaking. During the time of the Articles of Confederation, James Madison lamented to Thomas Jefferson about "the mutability of the laws of the States," which he found "to be a serious evil." Bessette, at 8. In his view, "[t]he injustice of them has been so frequent and so flagrant as to alarm the most stedfast [sic] friends of Republicanism." *Id*. In writing to John Jay, George Washington commented that "[w]e have probably had too good an opinion of human nature in forming our confederation." D. Ramsay, The Life of George Washington, Commander In Chief of The United States of America, Throughout the War Which Established Their Independence, and First President of The United States 161 (Balt., Joseph Jewett, and Cushing & Sons 1832). Echoing then-General Washington's sentiment, James Madison, in his 1787 essay *Vices of the Political System of the United States*, wondered with respect to republican government: "[W]hat is to restrain [the people] from unjust violations of the rights and interests of the minority,

or of individuals," whenever there exists "an apparent interest or common passion" that "unites a majority?"[3]

To the Founders, the answer (at least in part) was to "design a governmental system that would promote informed, reasoned, and responsible policy-making while also 'preserv[ing] the spirit and form of popular government'"—in other words, "a system . . . that would combine deliberation and democracy." Bessette, at 13. Deliberation, defined most commonsensically, is a "reasoning process in which the participants seriously consider substantive information and arguments and seek to decide individually and persuade each other as to what constitutes good public policy." *Id*., at 46. Innovations like creating large congressional districts, establishing the indirect election of Senators, and lengthy terms of office were all intended to allow lawmakers in a truly deliberative body to arrive at "the cool and deliberate sense of the community," rather than acquiescing without deliberation to public sentiment during those "particular moments in public affairs, when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn." Federalist 63, p. 384 (C. Rossiter ed., 1961) (J. Madison).

---

[3] Available at https://founders.archives.gov/documents/Madison/01-09-02-0187#:~:text=Among%20the%20vices%20of%20the,over%20commerce%3B%20and%20in%20general.

Even aside from the moments when the people require "a safeguard against the tyranny of their own passions," *id*., the Framers believed that deliberative democracy serves a critical purpose. They "very much sought to create legislative institutions that would not be mere collections and advocates of narrow interests." Bessette, at 27. "It was the framers' hope and expectation (1) that their electoral mechanisms would bring into government men of broad experience and outlook who were not unduly tied to local or partial interests and (2) that their institutional design would foster a growing knowledge of and attachments to national concerns." *Id*. Broad, differing experience means that persuasion—*i.e.*, "when information and arguments on the merits of an issue lead a participant in the policymaking process to take a substantive position that he or she had not taken prior to engaging in the process"—can occur. *Id*., at 53. Persuasion, in turn, means that policymakers can engage in prudential exercises like cost-benefit analyses and the consideration of trade-offs. And those exercises provide the necessary ingredients for good government.

This, then, is why James Madison famously observed that legislatures "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." Federalist No. 10, p. 50 (C. Rossiter ed., 1961) (J. Madison). Within that model, he argued, "the public voice, pronounced by the representatives of the people, will be more consonant to the public good than

if pronounced by the people themselves, convened for the purpose." *Id*. Over time, political scientists have confirmed the wisdom of Madison's perspective. See, *e.g.*, R. Dahl, Who Governs? Democracy and Power in an American City 223–56 (2d ed. 2005) (describing pluralism as an ordering theory of political science); T. Lowi, The End of Liberalism: The Second Republic of the United States 22–66 (40th anniversary ed. 2009).

II. Twentieth century developments—including *Chevron* deference—warped our deliberative Republic into a government of bureaucrat-driven policymaking.

The first century of American constitutional practice confirmed that the Founders' system of checks and balances accomplished limited, but effective, government by tapping into "the cool and deliberate sense of the community." Federalist 63, p. 384 (C. Rossiter ed., 1961) (J. Madison). The separation of powers prevented a tyrannical national government from forming in the years after ratification, even as America grew from thirteen to thirty-three States by 1860 and survived the crucible of the Civil War. J. Postell, Bureaucracy in America: The Administrative State's Challenge to the Constitutional Government 102 (2017); Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L.J. 453, 512 (1989). It was under that patchwork of polities, rather than the yoke of the federal government, that most aspects of American life and society were regulated during the nineteenth century. See Candeub, Preference and Administrative Law, 72 Admin. L. Rev. 607, 624 (2020). This regime, however,

would not remain stable as the Constitution entered its second century.

A. The Progressive Era laid the foundation for the modern administrative state and government via bureaucracy.

In the aftermath of Reconstruction, a national industrial economy emerged in the United States, marked by the regional division of labor and the rise of large, integrated corporations. Sanders, Rediscovering the Progressive Era, 72 Ohio St. L.J. 1281, 1284 (2011). At the same time, an intellectual revolution was occurring in the Academy, which found its roots primarily in the European political regimes from which the American Founders had parted ways. Rather than appreciate the deliberative—if sometimes messy—way in which the Founders structured American policymaking, the German theorist Max Weber famously emphasized that "the purely bureaucratic type of administrative organization . . . is, from a purely mechanical point of view, capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of carrying out imperative control over human beings." M. Weber, The Theory of Social and Economic Organization 337 (A.M. Henderson and Talcott Parsons trans. 1947).

Around this time, then-Professor Woodrow Wilson echoed the same sentiment by positing that "the object of administrative study" is "to discover, first, what government can properly and successfully do, and, secondly, how it can do those proper things with the utmost possible efficiency and at the least possible cost either of money or of energy." Wilson, The Study

of Administration, 2 Pol. Sci. Q. 197, 231 (1887) (hereinafter Administration). Wilson, one of the principal intellectual architects of the American Progressive movement and later U.S. President, believed that dividing powers between the branches of the federal government made officials within each branch less responsible and more susceptible to corruption. For government to work well, Wilson believed, its officers must be imbued with "[a] sense of highest responsibility, a dignifying and elevating sense of being trusted, together with a consciousness of being in an official station so conspicuous that no faithful discharge of duty can go unacknowledged and unrewarded, and no breach of trust undiscovered and unpunished." W. Wilson, Congressional Government: A Study in American Politics 284 (1885). In other words, government officials needed the authority to act, as well as a feeling of accountability to the public.

That said, Wilson also abhorred the inefficiency inherent in the Founders' conception of deliberative democracy. In *The Study of Administration*, he characterized the eighteenth-century debate between democracy and monarchy as "high warfare of principles," as contrasted with the apolitical "science of administration"—the question of "how law should be administered with enlightenment, with equity, with speed, and without friction." Administration, at 198, 200. In Wilson's view, "[i]t [wa]s getting to be harder to *run* a constitution than to frame one," due to the increasing complexity of national economies and innovations in the corporate form. *Id.*, at 200. He also dispensed with any concern over the autocratic temptation inherent in concentrating power, believing instead that "[o]ur peculiar American difficulty . . . is

not the danger of losing liberty, but the danger of not being able or willing to separate its essentials from its accidents. Our success is made doubtful by that besetting error of ours, *the error of trying to do too much by vote*." *Id.*, at 214 (emphasis added). Stated bluntly, Wilson viewed deliberative democracy as an impediment to the development of enlightened policymaking.

The Progressive intellectual revolution soon metastasized to the political arena, and a cadre of politicians rose to power in the early 1900s promising to enact sweeping reforms to counter the perceived excesses of the Gilded Age. These initiatives took root at the local level, "where labor and farm organizations, and elected and appointed officials in the states and cities can be said to have 'la[id] an urban seedbed for the modern administrative welfare state.'" Sanders, *supra*, at 1284 (quoting M. Willrich, City of Courts: Socializing Justice in Progressive Era Chicago, at xxi (2003)). Quickly, however, the Progressives set their sights on the national stage—spurred by the judicial invalidation of State laws on the basis that they violated the Commerce Clause, or because they encroached on individual rights of economic due process. R. McCloskey, The American Supreme Court 67–119 (Sanford Levinson ed., 5th ed. 2010).

Opposition to aggressive judicial review reached a fever pitch during the administration of Theodore Roosevelt. In his final State of the Union address, Roosevelt criticized federal and state courts for thwarting legislative and executive actions to regulate commerce and protect the weak against "the wrongdoing of very rich men under modern industrial

conditions." Theodore Roosevelt, Eighth Annual Message to the Senate and House of Representatives (Dec. 8, 1908).[4] He insisted that:

> "There are . . . some members of the judicial body who have lagged behind in their understanding of these great and vital changes in the body politic, whose minds have never been opened to the new applications of the old principles made necessary by the new conditions. Judges of this stamp . . . convince poor men in need of protection that the courts of the land are profoundly ignorant of and out of sympathy with their needs . . . To such men it seems a cruel mockery to have any court decide against them on the ground that it desires to preserve 'liberty' in a purely technical form, by withholding liberty in any real and constructive sense." *Id.*

This populist sentiment ruled the 1912 Presidential election, where both leading candidates, Roosevelt and Wilson, agreed that social and economic reform trumped adherence to the constitutional regime of separated powers. See G. Mowry, Theodore Roosevelt and the Progressive Movement 249–55 (1954); A. Link, Woodrow Wilson and the Progressive Era 1–2, 16–24 (1954).

---

[4] Available at http://www.presidency.ucsb.edu/ws/index.php?pid=29549#ixzz1TiFYxXAY.

After winning the presidency, Wilson embarked on a campaign to establish the administrative state for which he had long advocated. In the span of a few years, he instituted "banking reform, labor protection, environmental conservation, tariff reduction, antitrust law, farm subsidies, and the broadening of national regulatory power over the economy." Katz, The Lost Promise of Progressive Formalism, 99 Tex. L. Rev. 679, 691 (2021). The success of Wilson's presidency seemed to legitimate his theory of the Constitution as a "vehicle of life" able to evolve and fit "the spirit of the age." See W. Wilson, Constitutional Government in the United States 60 (1908). The Progressive thesis that "hard wired" structures could be altered by a President capable of molding popular opinion seemed vindicated. E. Sanders, Roots of Reform: Farmers, Workers, and the National State, 1877–1917, at 370 (1st ed. 1999).

"[T]he Progressives' theory of administration served as the ideological ferment" that, two decades later, produced the New Deal. Emerson, Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation, 102 Minn. L. Rev. 2019, 2069 (2019). In 1927, then-Professor Felix Frankfurter relied on the "pioneer scholarship" of Frank Goodnow (a contemporary of President Wilson) to argue that administrative law was of crucial importance to democratic governance. Frankfurter, The Task of Administrative Law, 75 U. Pa. L. Rev. 614, 616 (1927). Recognizing that broad statutory delegations left important details to the policy judgment of agencies, Frankfurter emphasized that these "'details' are of the essence; they give meaning and content to vague

contours." *Id.* Frankfurter thus argued that Congress should not retain detailed legislative control, but instead should govern through a professional civil service, a "spirited bar," and "easy access to public scrutiny." *Id.*, at 618.

Frankfurter believed that—although "the final determinations of large policy must be made by the direct representatives of the public, and not by the experts"—important value judgments should be made by the bureaucracy, independent of legislative enactments. F. Frankfurter, The Public and Its Government 160 (1930). He thus insisted that bureaucratic "expertise is indispensable" for the "task of adjusting the conflicting interests of diverse groups in the community, and bending the hostility and suspicion and ignorance engendered by group interests toward a comprehension of mutual understanding"—*i.e.*, the kind of compromise between competing interests once understood as a core *legislative* responsibility. *Id.*, at 161. Frankfurter thus concluded that administrative agencies would need to answer questions of economic and political significance, and would do so "through a combination of bureaucratic professionalism, adversarial legalism, and public input." Emerson, *supra*, at 270 n.279. Given Frankfurter's role as confidant to President Franklin Roosevelt, it is unsurprising that the vast expansion of administrative capacities during the New Deal continued the Progressive tradition.

***

In *The Study of Administration*, Wilson offered a tidy analogy that encapsulated his view of the administrative state: "Self-government does not

consist in having a hand in everything, any more than housekeeping consists necessarily in cooking dinner with one's own hands." Administration, at 214. In his view, "the cook must be trusted with a large discretion as to the management of the fires and the ovens." *Id*. This delegation—this *deference*—to the bureaucratic machine appeared to have successfully effected a fundamental change in the American regime.

B. *Chevron* deference emerged as an ill-founded response to fights surrounding the authority to set public policy.

Following the New Deal, "[t]he fight over the legitimacy of the administrative state subsided . . . , but it did not vanish." Postell, at 247. As it continued, however, the Framers' regime became even further distorted. Instead of debating whether public policy should be established by administrative agencies or by Congress, the biggest question became the extent to which the *courts* should second-guess administrative-agency policymaking. Indeed, "administration was [then] viewed as 'the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision,'" instead of a "technical process of devising the objectively best means to reach the ends set forth by Congress." *Id*., at 251.

Simply put, politics happened; as Republicans ascended to National leadership positions in the years following the New Deal, "the Progressives' consensus on the enlightened character and knowledge of the bureaucrats faded" because the identity of the decisionmakers themselves changed. *Id.,* at 268. So,

progressives turned to lawyers as the solution, and "courts became more involved in the administrative process." *Id*. And "[o]ne area where this took place was in statutory interpretation, where courts interpreted congressional enabling statutes." *Id*. At the time, the primary concern was with so-called "activist" or "liberal" judges undermining the will of administrative agencies by "interpret[ing] congressional enabling statutes de novo rather than deferring to the agencies' interpretations." *Id*. *Chevron*, which mandated judicial deference to agency interpretations, was viewed (at the time) as a judicial fix to this problem.

The core problem with *Chevron*, however, was the substantive premise underlying the methodological debate. In the view of the Court in 1984, "[t]he power of an administrative agency to administer a congressionally created . . . program *necessarily requires the formulation of policy* and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron, U.S.A., Inc.* v. *NRDC, Inc.*, 467 U. S. 837, 843 (1984) (emphasis added). In other words, the Court took as a given that administrative agencies are the primary decisionmakers for purposes of American public policy. And as set out above, that presumption could not be farther from the Founders' conception of ordered, deliberative, legitimate republicanism.

III. Recent history proves that the Founders had it right, the Progressives got it wrong, and *Chevron* deference needs to go.

In light of the historical backdrop discussed above, it stands to reason that "the proper standard for

evaluating" a regime "is how well the institutions of government foster the rule of informed and reasoning majorities." Bessette, at 35. In other words, does policy that emerges from a deliberative and iterative process—even if sometimes messy and inefficient—serve the common good? Or is a system in which policy is decreed by a bureaucracy "too efficient to be dispensed with, too smoothly operative to be noticed, too enlightened to be inconsiderately questioned, too benevolent to be suspected, too powerful to be coped with," better for the Nation? Administration, at 203.

The results appear unassailable. Even if arguments for agency deference were persuasive in theory, the facts of this case, as set out by the Petitioners, plainly show that bad decisions emanate from non-deliberative bureaucratic policymaking. So too, does the Nation's recent experience with the COVID-19 pandemic. Indeed, "[s]ince March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country." *Arizona* v. *Mayorkas*, 143 S. Ct. 1312, 1314 (2023) (statement of Gorsuch, J.).

As noted above, establishing and policing the Constitution's separation of powers serves two interests that were of critical importance to the Founding generation. First, it prevents the accumulation of power, which history shows inexorably leads to tyrannical trammeling of individual rights. And second, it promotes deliberation, which acts as a counterweight to policy that is inevitably and irresponsibly driven by majoritarian (or elite) passions, prejudices, and reactions.

Our Nation's expert-driven COVID-19 response whiffed on both points.

A. First, the bureaucratic hinderance of constitutional rights was unprecedented in both breadth and depth. As then-Judge Gorsuch noted in 2016, the nature of "our modern administrative state" allows it to exercise powers that regulate and "penalize persons in ways that can destroy their livelihoods and intrude on their liberty." *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) (citation omitted). COVID-19 unfortunately proved him quite prescient:

> "Executive officials across the country issued emergency decrees on a breathtaking scale. Governors and local leaders imposed lockdown orders forcing people to remain in their homes. They shuttered businesses and schools, public and private. They closed churches even as they allowed casinos and other favored businesses to carry on. They threatened violators not just with civil penalties but with criminal sanctions too. They surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct. They divided cities and neighborhoods into color-coded zones, forced individuals to fight for their freedoms in court on emergency timetables, and then changed their color-

> coded schemes when defeat in court seemed imminent." *Mayorkas,* 143 S. Ct., at 1314–15 (citations omitted).

And that wasn't all. In February 2021, for example, the Centers for Disease Control and Prevention published a new rule—"without allowing public participation through the APA's notice and comment procedures"—requiring persons to wear a mask while traveling on "any conveyance into or within the United States," including airplanes, trains, and ride-sharing services. *Health Freedom Def. Fund* v. *Biden*, 599 F. Supp. 3d 1144, 1154 (M.D. Fla. 2022), vacated as moot by 2023 U.S. App. LEXIS 15719 (11th Cir. June 22, 2023). The CDC justified its unilateral action by explaining that "'it would be impracticable and contrary to the public's health' to delay the Mandate to seek public comment." *Id.* (quoting Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025 (Feb. 3, 2021)). Fourteen months after it was issued, the CDC mask mandate was vacated by a federal district court because it "exceed[ed] the CDC's statutory authority and violate[d] the APA." *Id.*, at 1176.

Likewise, the Department of Labor's Occupational Safety and Health Administration ("OSHA") enacted a COVID-19 vaccine mandate "for much of the Nation's work force" in November 2021. *Nat'l Fed'n of Indep. Bus.* v. *Dep't of Lab.*, 142 S. Ct. 661, 662 (2022) (*per curiam*). "[C]overing virtually all employers with at least 100 employees" and containing few exceptions, the mandate required 84 million workers to either get vaccinated or be "removed from the workplace." *Id.*, at 662, 664 (citing 86 Fed. Reg. 61402, 61532 (Nov. 5, 2021)). OSHA eventually withdrew the

mandate, but not before the Court made it clear that the mandate was "untethered" from the agency's lawful authority and at odds with the "democratic processes" that govern the country. *Id.*, at 666.

These examples of judicial checks on administrative overreach, however, proved to be the exception instead of the rule throughout the pandemic. See *Arizona*, 143 S. Ct., at 1315–16. Judicial review was often limited by the government's use of *Chevron* as a shield—sometimes successfully, sometimes not. See, *e.g.*, *Corbett* v. *TSA*, 19 F.4th 478, 484–85 (D.C. Cir. 2021) (holding under *Chevron* that "it is not the court's role to second-guess TSA's judgments in carrying out its statutory mandate"); *Carmen's Corner Store* v. *SBA*, 520 F. Supp. 3d 726 (D. Md. 2021) (holding that "the Court need not go beyond *Chevron*'s first step" to affirm the agency's action); *Nat'l Fed'n of Indep. Bus.*, 142 S. at 672 (Breyer, J., dissenting) (arguing "[j]udicial review" to "OSHA's determinations . . . is deferential, as it should be"); *but see Health Freedom Def. Fund*, 599 F. Supp. 3d at 1164 (rejecting the government's *Chevron* defense because "the statute is not ambiguous. . . . [n]or is the government's interpretation a reasonable one").

Underscoring the degree to which individual rights fall when power consolidates in those who are not accountable to the electorate, Justice Gorsuch observed that "[w]hile executive officials issued new emergency decrees at a furious pace, state legislatures and Congress—the bodies normally responsible for adopting our laws—too often fell silent." *Id.* Instead, executive officials across the country were left largely unchecked as they imposed "no exceptions" mask

mandates that extended to solo outdoor walks (Massachusetts), banned citizens from interacting with their neighbors (Vermont), prohibited "non-essential" "travel on foot, bicycle, scooter, motorcycle, [or] automobile" (Los Angeles), and even banned the use of leaf-blowers (Sleepy Hollow and Croton-on-Hudson, New York). See G. Roper, A Look Back at the Most Ridiculous and Arbitrary COVID Restrictions, Pac. Legal Found. (Mar. 15, 2021).[5] And despite increasing public dissatisfaction with the policy response to COVID-19, federal courts continued to exhibit the "deference to experts" demanded by *Chevron*, notwithstanding the body-blows inflicted on Americans' fundamental rights.[6]

B. Above and beyond the notion that our Nation's bureaucrat-driven COVID-19 response largely

---

[5] Available at: https://pacificlegal.org/most-ridiculous-arbitrary-covid-restrictions/.

[6] See*, e.g.*, K. Mahr, 'It's a Tsunami': Legal Challenges Threatening Public Health Policy, Politico (May 10, 2022), https://www.politico.com/news/2022/05/10/legal-challenges-cdc-public-health-policy-00031253 (quoting a public health professor bemoaning the decline of "deference to experts who are using their legal authority to save lives"); I. Saric, Fauci: Republican Detractors are "Criticizing Science", Axios (Nov. 28, 2021), https://www.axios.com/2021/11/28/fauci-republican-critics (quoting Dr. Anthony Fauci's statement that lawmakers who criticize him are "criticizing science, because I represent science").

dispensed with numerous constitutionally enumerated rights, time has shown that many of the policies implemented by the administrative state either did no good whatsoever, affirmatively caused greater harm, or imposed costs wildly out of proportion with the benefits they bestowed. In Massachusetts, for example, the Governor issued an order requiring all persons older than five to wear masks, both indoors and outdoors. Off. of the Governor, Commonwealth of Mass., COVID-19 Order No. 55 (Nov. 2, 2020).[7] The Governor of Vermont issued executive orders "banning multi-household gatherings of any size," suspending "all recreational sports except 'school-sponsored sports activities,'" and requiring college students returning home to "quarantine for a minimum of seven days." T. Andersen, 'We're Going to Tighten the Screws': Citing COVID Spike, Vermont Governor Closes Bars, Bans Multi-Household Gatherings, Boston Globe (Nov. 13, 2020).[8] In both instances, the orders were based on incorrect data and later-rescinded official guidance.[9]

---

[7] Available at: https://www.mass.gov/doc/covid-19-order-55/download.

[8] Available at: https://www.bostonglobe.com/2020/11/13/metro/were-going-tighten-screws-citing-covid-19-spike-vermont-governor-closes-bars-bans-multi-household-gatherings/.

[9] The CDC and World Health Organization ("WHO") now say masks are largely unnecessary for children in most settings and unnecessary for all

And in other jurisdictions, public officials were candid enough to admit at the outset that their decrees were *not* based on science. See Explanation of Ban on Leaf Blower Use, Vill. of Croton-on-Hudson (Apr. 7, 2020) (noting "concern that the use of leaf blowers may be contributing to the spread of the virus although there is no scientific proof of this").[10]

The costs, in turn, were tremendous. By May 2020, the U.S. unemployment rate neared 15 percent—"the highest since the Great Depression." CDC Museum COVID-19 Timeline, Ctrs. for Disease

---

individuals when outdoors, and the CDC in December 2021 shortened the quarantine period for COVID-19 exposure to five days after reviewing transmission data. See Coronavirus Disease (COVID-19): Children and Masks, World Health Org. (Mar. 7, 2022), https://www.who.int/news-room/questions-and-answers/item/q-a-children-and-masks-related-to-covid-19; CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population, Ctrs. for Disease Control & Prevention (Dec. 27, 2021), https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html#:~:text=Everyone%2C%20regardless%20of%20vaccination%20status,others%20for%205%20additional%20days.

[10] Available at: https://www.crotononhudson-ny.gov/home/news/explanation-ban-leaf-blower-use.

Control & Prevention.[11] Approximately 20.5 million Americans were forced out of work because of shutdown policies—and those with lower incomes were hit hardest. *Id.*

Meanwhile, predictions that shutdown policies would "cause devastating non-economic consequences . . . total[ing] millions of accumulated years of life lost in the United States, far beyond what the virus itself has caused" quickly came to fruition. S. Atlas et al., The COVID-19 Shutdown Will Cost Americans Millions of Years of Life, The Hill (May 25, 2020).[12] Indeed, CDC data indicates that almost half of U.S. adults "delayed or avoided seeking medical care, including urgent or emergency care," between March and September 2020. CDC Museum COVID-19 Timeline, *supra*. Essential medical services like stroke evaluations, chemotherapy treatments, and organ transplants each declined by 40 to 85 percent, and drug overdose deaths increased 31.5 percent year-over-year in the twelve months ending in March 2021. Atlas et al., *supra*; Ctrs. for Disease Control &

---

[11] Available at: https://www.cdc.gov/museum/timeline/covid19.html.

[12] Available at: https://thehill.com/opinion/healthcare/499394-the-covid-19-shutdown-will-cost-americans-millions-of-years-of-life./

Prevention, Provisional Drug Overdose Death Counts, (Feb. 15, 2023).[13]

Moreover, studies show that COVID-era policies exacerbated an already devastating youth mental health crisis. See*, e.g.*, D. Ordway, Research Shows Spike in Youth Suicide Attempts, Depression After the COVID-19 Pandemic Began, Journalist's Res. (May 5, 2023).[14] The rate of suicide attempts among minors increased 27 percent nationwide between January 2020 and May 2022, and more children engaged in self-harm and suicidal ideation than ever before. See *id.*; S. Madigan et al., Comparison of Paediatric Emergency Department Visits for Attempted Suicide, Self-Harm, and Suicidal Ideation Before and During the COVID-19 Pandemic: A Systematic Review and Meta-analysis, 10 Lancet Psych. 342 (2023). These trends were in no small part due to the "[d]epression, anxiety, isolation, and decreased social support associated with the [COVID-19] pandemic and related lockdowns." J. Bridge et al., Youth Suicide During the First Year of the COVID-19 Pandemic, 151 Pediatrics, no. 3, Mar. 2023, at 2; see also L. Sher, The Impact of the COVID-19 Pandemic on Suicide Rates, 113 QJM 707, 707 (2020).

---

[13] Available at: https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm.

[14] Available at: https://journalistsresource.org/health/research-shows-spike-in-youth-suicide-attempts-depression-after-the-covid-19-pandemic-began/.

The problem with all these approaches can, in large part, be distilled to the tendency of administrative agencies to "ignor[e] . . . trade-offs." T. Sowell, The Vision of the Anointed 71 (1st ed. 1995). Indeed, "[a] moment's reflection on the implications of trade-offs makes it clear that *inevitably*, beyond some point, safety will be sacrificed . . . in the sense that unlimited sacrifices of other" values "for the sake of safety [will] of course" make society safer. *Id*. The question, however, is how much sacrifice makes sense when weighed against a potentially quite marginal benefit; answering that question requires attention to a broader range of interests than are represented within the walls of a federal agency.

The reason why we accept some risks is obvious—it would be irrational to impose astronomical costs to reduce the probability of a remote harm. And that's the point. The sacrifice of one important value for another—say, liberty for safety—is a decision that should "be justified on its merits in each specific case." *Id*. For example, even accounting for the novelty of the COVID-19 challenge in early 2020, the decision, *e.g.*, to shutter schools for *years* (especially given the known developmental calamity that ensues when children of elementary-school age experience isolation and the extraordinarily low mortality rate among elementary-age children) falls into the same category as, *e.g.*, manufacturing cars to be "tank-like structures at a sufficiently high price" to account for traffic fatalities when doing so would "mak[e] them unaffordable to many or most people." *Id*.

The problem with policy-by-bureaucrats is that the administrative state is not well suited for the sort of deliberative weighing of costs against benefits that

policy-setting necessitates. Experts like those at the CDC typically know the tools that are necessary to accomplish a particular agency goal, such as how to minimize the spread of communicable disease. As night follows day, then, it follows that when the government bestows nearly unlimited rulemaking power on experts at the CDC, those experts are going to fixate on the limited set of goals they have been trained to pursue: minimizing the spread of communicable disease *at all costs*, *no matter* the irrationality of the exorbitant sacrifices demanded by their policies. Not all tradeoffs are captured by an exponential growth formula.

The Framers' Congress, in contrast, was explicitly crafted to employ policymaking by deliberation. "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Immigr. & Naturalization Serv.* v. *Chadha*, 462 U. S. 919, 944 (1983). Instead, "[t]he declared purpose of separating and dividing the powers of government, of course, was to '[diffuse] power the better to secure liberty.'" *Bowsher* v. *Synar*, 478 U. S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring)). That was the point from the outset.

While it is impossible to retroactively assess whether outcomes would have been better if the COVID-19 response had been managed by the legislative branch rather than the executive, it is indisputable that a broader range of interests would have been taken into account. The reconciling of competing interests is, after all, the point of having a legislative branch, and it is an aspect that the

executive branch—despite its appropriation of many of the accoutrements of legislative power over the last century—can never successfully mimic.

***

When the Framers established the legislative branch, they expressly created a body capable of, and incentivized to, deliberate over costs and benefits in a way that would allow their republican experiment to *prudently* meet the exigencies of a changing world. However, the Progressive vision of policy-by-bureaucrat excises that most critical ingredient from good and sound policymaking. Because *Chevron* deference has, for the past four decades, presumed and protected policy-by-bureaucracy, its existence has prevented that wound from healing. Fundamentally, the doctrine has resulted in agency excoriation of our fundamental rights and has—to put it bluntly—generated some colossally ill-advised public policy. "[T]his wolf comes as a wolf," and it is this Court's duty to dispense with it forthwith. *Morrison* v. *Olson*, 487 U. S. 654, 699 (1988) (Scalia, J., dissenting).

CONCLUSION

Hindsight is 20/20, but it should not have taken three years for policymakers to recognize what the Framers knew two and a half centuries ago:

> "However wise one person or his advisors may be, that is no substitute for the wisdom of the whole of the American people that can be tapped in the legislative process. Decisions produced by those who indulge no criticism are rarely as good as those produced after robust and uncensored debate. Decisions announced on the fly are rarely as wise as those that come after careful deliberation. Decisions made by a few often yield unintended consequences that may be avoided when more are consulted." *Arizona*, 143 S. Ct., at 1316.

This is precisely why the Constitution demands that the preferences of *the people*—as reflected in the statutory text enacted by their elected representatives—be given effect, as opposed to the arbitrary (and often incorrect) dictates of executive officials. See *id.*

"Maybe, hopefully, we have relearned these lessons" since the pandemic's conclusion. *Id.* Nevertheless, history will always have an opportunity to repeat itself so long as *Chevron* "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers'

design." *Gutierrez-Brizuela*, 834 F.3d, at 1149 (Gorsuch, J., concurring).

The hour of decision has now arrived, as courts like the D.C. Circuit below interpret statutory silence to grant administrators an unlimited license to enact their own policy preferences. Policymaking within the context of a democratic government has never been particularly convenient or efficient, but our constitutional system was not designed for the ease of administrators. "To be sure, the demands of bicameralism and presentment are real and the process can be protracted. But the difficulty of making new laws isn't some bug in the constitutional design: it's the point of the design, the better to preserve liberty". *Perry* v. *Merit Sys. Prot. Bd.*, 582 U. S. 420, 441 (2017). The Constitution was designed first and foremost to "secur[e] . . . the rights of the people," Federalist No. 51, p. 323 (C. Rossiter ed. 1961), and none of the Framers' myriad successors have yet to devise an alternative system that better accomplishes that end.

The Court should reverse the opinion of the D.C. Circuit and explicitly overrule *Chevron*.

July 24, 2023 Respectfully submitted,

Edward M. Wenger
Counsel of Record
Andrew Pardue
Kenneth C. Daines
Mateo Forero-Norena
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
emwenger@holtzmanvogel.com

Counsel for Amicus Curiae