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 Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CATO INSTITUTE AND LIBERTY JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether *Chevron v. NRDC*, 467 U.S. 837 (1984), should be overruled.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs, conducts conferences, and produces the annual *Cato Supreme Court Review*.

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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 further

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party's counsel authored this brief in any part and *amici* alone funded its preparation and submission.

limit agency regulatory authority to its proper scope under the Constitution.

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

SUMMARY OF ARGUMENT

The *Chevron* doctrine originated from ostensibly innocent beginnings, purportedly as an extension of statutory canons of construction. *See Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984); *Buffington v. McDonough*, No. 21–972, slip op. at 8 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from denial of cert). But it is now clear that *Chevron* deference is unconstitutional and ahistorical. Over the past forty years and counting, it has wreaked havoc in the lower courts upon people and businesses.

One such business is Loper Bright Enterprises. Loper Bright and the other petitioners in this case are herring fishermen who face significant financial hardships under new regulations issued under the supposed authority of the Magnuson-Stevens Act ("MSA"). Pet. at 7. The MSA divided the nation's fisheries into regions, each with a "fishery management council" tasked with creating a "fishery management plan" for that region. *Id.* at 3–4. The MSA stated that these "fishery management plans '*may* require that one or more observers be carried on board a [fishing] vessel.'" *Id.* at 4; 16 U.S.C. § 1853(b)(8) (1996) (emphasis added). In 2020, the National Marine Fisheries Service ("NMFS") invoked this authority to promulgate a regulation requiring "industry funded monitoring" of catch amounts for vessels fishing in New England waters. Pet. at 8–9; 85 Fed. Reg. 7,414 (Feb. 7, 2020).

This regulation financially harms commercial fishers in multiple ways. First, they must make room on a crowded vessel to carry a monitor, which takes up valuable working space and adds costly weight. Pet. at 24. Even more onerously, they must pay the monitor's wages. *Id.* at 10. This can cost up to $710 a day, and paying for monitors is expected to reduce their profits by 20%. *Id.* Those who refuse to pay for monitors are prohibited from fishing for herring. *Id.*

The petitioners sued, and the district court upheld the agency's regulation as a proper interpretation of MSA's "may require" language. *Id.* at 10–11. The court of appeals upheld that decision, but on a different rationale. The panel concluded that the statute was ambiguous as to whether fishing operations could be forced to pay the cost of their own monitoring. But it concluded that NMFS's interpretation of the statute was a reasonable one, and therefore held for the government at "Step Two" of the *Chevron* Doctrine. *Id.* at 12–13.

This case offers a clean vehicle to reconsider the validity of the *Chevron* doctrine. *Chevron* has long been persuasively criticized as unconstitutional, both for violating Article III's vesting of all judicial powers in the judiciary and for violating due process. *See Michigan v. E.P.A.*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring); Charles J. Cooper, *The Flaws of* Chevron *Deference*, 21 Tex. Rev. L. & Pol'y 307, 310–11 (2016); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 NYU J.L. & Liberty 475, 507 (2016); Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1211 (2016).

This brief focuses on two particular problems with *Chevron*. First, *Chevron* deference is ahistorical. It was

not until the mid-twentieth century that courts ever gave substantial deference to an agency's interpretation simply *because* it was the agency's interpretation. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 913–14 (2017). And up until the New Deal and passage of the Administrative Procedure Act ("APA"), such deference was rare. *See* Thomas W. Merrill, *The* Chevron *Doctrine* 47–49 (2022). In fact, the APA drafters' major concern in codifying judicial review was deference to *factual* findings, not legal conclusions. *See id.* at 46.

Second, there is an increasing disconnect between what *Chevron* looks like in this Court and what *Chevron* looks like in the lower courts. This Court has rarely applied *Chevron* in the past seven years, while the circuits have largely deferred to agency interpretations with impunity. During this timeframe, this Court resolved 70% of *Chevron* cases at "Step One," with only 13% of cases going to Step Two. But at the circuit level, half of cases invoking *Chevron* were decided at Step Two. Among those cases where *Chevron* was invoked and the court found that no exception to *Chevron* applied, 59% made it to Step Two. And among cases decided at Step Two, agencies won 77% of the time.

Chevron has no basis in the original meaning of the Constitution. It instead arose out of the growth of administrative power during the New Deal. Further, the lower courts have not kept up with this Court's de-emphasis of *Chevron*. Only officially overruling *Chevron* can provide much-needed clarity to lower courts. And this case presents the *Chevron* question squarely, offering an excellent vehicle to reconsider that decision. This Court should grant certiorari and overrule *Chevron*.

ARGUMENT

I. *CHEVRON* IS AHISTORICAL AND SHOULD BE OVERRULED

Defenders of *Chevron* often claim that courts deferred to agencies as far back as the nineteenth century. *See, e.g.*, Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 Geo. Wash. L. Rev. 654, 679–80 (2020). But that is misleading. Courts referenced the executive's legal interpretation in certain situations as only *persuasive* authority, but that was a far cry from even *Skidmore* deference, let alone *Chevron*. The history of deference doctrines leading up to the passage of the APA and *Skidmore* shows that *Chevron* is not grounded in history.

A. Contemporaneous and Customary Canons of Interpretation

Prior to the American founding, and continuing through it, two types of statutory interpretative canons were applied to ambiguous texts. *See* Bamzai, *supra*, at 933–38; Merrill, Chevron *Doctrine*, *supra*, at 34. The first was *contemporanea expositio*—contemporaneous interpretation—which examined legal interpretations contemporaneous with the creation of a text. The second was *interpres consuetudo*—customary interpretation—which gave credence to the long-held usage and interpretation of a text. *See* Bamzai, *supra*, at 933–38.

Contemporanea expositio comes from a longer Latin phrase that means "a contemporaneous exposition is the best and most powerful in law." *Id.* at 933. This canon holds that ambiguous statutes should be interpreted as they were interpreted contemporaneously

with the statute's enactment. This canon traces its roots as far back as the fifteenth century, when one treatise held that the most persuasive authorities were those nearest to a statute. *See A Discourse Upon the Exposicion and Understandinge of Statutes with Sir Thomas Egerton's Additions* 151 (Samuel E. Thorne ed., 1942). For example, when examining statutory ambiguity, Lord Edward Coke reviewed the texts and works of authors writing at the time the law was passed. 2 Fortunatus Dwarris, *A General Treatise on Statutes* 562 (2d ed. 1848).

Another early interpretive canon, *interpres consuetudo*, came from a Latin phrase meaning "usage is the best interpreter of laws." Bamzai, *supra*, at 937. This canon stemmed from Roman law in the third century and holds that ambiguous texts should be interpreted as they have been over a long course of time. *Id.* at 937 n.113. This canon also had support in the English common law. *See Stevens v. Duckworth*, 145 Engl. Rep. 486, 487 (1664) ("[T]he reason of a law, and the design, of the law-makers, must be judged of by what has been the constant practice ever since . . . ."). *Duckworth* upheld a statutory interpretation allowing the sale of wine at a tavern because that was the long-held practice since the passage of the statute. *Id.*

Together, these two canons look at prior interpretation and past usage to determine the meaning of a statute. Historically, the American Founders also recognized these canons and applied them to ambiguous statutes. But this was not the same as deferring to the executive solely *because* it was the executive. Alexander Hamilton and James Madison believed that courts should review statutes *de novo*, just like they did constitutional provisions, applying the same canons of "[c]contemporary and concurrent expositions" to

ambiguous statutory provisions. 2 Annals of Cong. 1945–46 (1791); Bamzai, *supra*, at 938–41.

The Supreme Court also applied these canons in several cases in early American history. These cases have been cited by some as precedent for deference to the executive branch. *See* Green, *supra*, at 734–40. But the key to understanding these cases is that the Court was not deferring to the agency just *because* it was an agency. Rather, the Court was respecting the agency's long-held contemporaneous interpretation of a statute because it was long-held and consistent.

First, in *Edwards' Lessee v. Darby*, the Court opined that in "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." 25 U.S. (12 Wheat.) 206, 210 (1827) (emphasis added). At issue was whether commissioners appointed by the state had authority under the statute to survey certain lands. *Id.* at 207–09. The Court gave substantial weight to the commissioners' contemporaneous interpretation of the statute, especially since the legislature affirmed that interpretation shortly thereafter. *Id.* at 209–10. Crucially, although the Court emphasized that the executive's interpretation was given great weight, that was only because it was contemporaneous and consistently held. *See id.* at 210.

Another nineteenth century case, *Merritt v. Cameron*, rejected giving any special recognition to an executive department's interpretation. 137 U.S. 542 (1890). That was because the interpretation was first adopted twelve years *after* the statute was enacted and was abandoned by the executive five years prior to the

case. *Id.* at 552. As the Court explained, an executive interpretation only deserved "conclusive and binding" status if it was "the contemporaneous construction" and had been "continuously in force for a long time." *Id.*

Courts regularly applied these canons during the late nineteenth century. *See, e.g.*, *The "City of Panama*," 101 U.S. 453, 461 (1879) (concluding that the "rule is universal that the contemporaneous construction of such a statute is entitled to great respect," especially when that interpretation "has prevailed for a long period"); *Schell v. Fauché*, 138 U.S. 562, 572 (1891) (emphasizing that the contemporaneous construction of "the officials whose duty it is to carry the law into effect, is universally held to be controlling"). But courts also recognized the limits of these canons. In *United States v. Haley*, the Court rejected the Department of the Interior's interpretation because it had been inconsistent over the years. 160 U.S. 136 (1895). It was therefore the Court's "duty to determine the true interpretation of the [statute], without reference to the practice in the department." *Id.* at 145.

In none of these cases did the Court "defer" to the executive branch because of its expertise or because it was the executive branch. Rather, in each of these cases the Court respected the consistently held, contemporaneous interpretation of the executive branch. If the executive branch's interpretation was not long-held or contemporaneous—regardless of whether it was reasonable—the Court applied its own judgment.

Some of the main motivations behind applying these canons were reliance interests. *See* Merrill, Chevron *Doctrine*, *supra*, at 35–36. The contemporaneous canon provides stability, since the earliest

interpretation is often the first one looked to when interpreting texts. *Id.* at 35. The "contemporaneous and continuous construction of the statute" could create "a right to rely on that interpretation," and it "put[s] faith in the action of [the] constituted authorities, judicial, executive, and administrative." *United States v. Hill*, 120 U.S. 169, 182 (1887). The long-held interpretation canon recognizes that with the passage of time there is even more of a reliance interest. Merrill, Chevron *Doctrine*, *supra*, at 36. "Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice." *United States v. Midwest Oil Co.*, 236 U.S. 459, 472–73 (1915). Unlike *Chevron* deference, where the agency receives deference for its interpretation no matter how novel or inconsistent with past interpretations, these canons provide stable interpretations of the law.

B. The Mandamus Cases

Other supposed precedents for *Chevron* deference are the mandamus cases, which are often referred to as nineteenth century "deference" cases.[2] While executive actions were generally reviewed *de novo* at this time, courts began to apply a more deferential form of review to applications of relief from agency action—

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[2] *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 241–42 (2001) (Scalia, J., dissenting) (arguing that *Chevron* deference stemmed from the mandamus standard); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 18 n.69 (2006) ("[T]here are ample nineteenth-century examples of such deference to executive officials within their areas of administration and expertise."); Green, *supra*, at 734–40 (discussing deference in the nineteenth century).

writs of mandamus. Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 Admin. L. Rev. 197, 209 (1991).

Between 1805 and 1875 there was no general federal jurisdiction, and the main avenue for plaintiffs to seek recourse from executive action was via a writ, usually a writ of mandamus. *See* Bamzai, *supra*, at 950–51; *see also* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 947 (2011). A writ of mandamus is a request that an official perform a legally required act. 52 Am. Jur. 2d Mandamus § 403. Other than common law contract or tort claims, these writs were the only available remedy against executive or administrative action in violation of a statute. *See* Merrill, *Article III*, *supra*, at 947; Bamzai, *supra*, at 948. But a mandamus had its own standard of review: Mandamus was only available if the plaintiff could show that the executive had breached a ministerial, nondiscretionary duty that violated a vested right belonging to the plaintiff. Bamzai, *supra*, at 949. *See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170–71 (1803).

Writs of mandamus were originally reviewed under a standard that was functionally *de novo*, and agency action was routinely found reviewable as ministerial. *See*, *e.g.*, *Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 610 (1838). But in 1840, the Supreme Court changed the standard of review that it applied to mandamus requests in *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840). The Court denied a writ of mandamus because the act of interpreting the statute and initiating executive action in accordance with that interpretation was an act of discretion requiring decision-making, not a routine ministerial act. The

Court therefore held that the action was not subject to review. *Id.* at 513–15; *see* Bamzai, *supra*, at 949. The Court explained that in a normal suit, "the Court certainly would not be bound to adopt the construction given by the head of a department." *Decatur*, 39 U.S. at 515. But the Court found that it could not second-guess the interpretation and acts of the executive where the executive had been given discretion. *Id.*; *see also United States ex rel. Carrick v. Lamar*, 116 U.S. 423, 426 (1886). *Decatur* began a four-decade period where the Court generally refused to grant mandamuses, determining each time that the agency's action was discretionary. In each of these cases the Court would thus uphold the agency's interpretation. *See* Bamzai, *supra*, at 953.

But this deferential review was limited to mandamus actions and was entirely due to the unusual nature of that cause of action. *See id.* at 958. In *United States ex rel. Dunlap v. Black*, the Court explained that it could "not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties." 128 U.S. 40, 48 (1888). But the Court made clear that it could interpret the law itself if a suit were brought under a different cause of action or if a ministerial, rather than a discretionary act, were at issue. *Id.*; *see also Decatur*, 39 U.S. at 515. Thus, what is often hailed as the birth of deference was just "deference" in one very specific context, and the Court retained its role as the last word in all other interpretive matters. *See Decatur*, 39 U.S. at 515; *Dunlap*, 128 U.S. at 48. Mandamus review was not in the same family as modern *Chevron* deference.

After 1875, when mandamus actions were less prevalent due to the general federal jurisdiction provisions of the Jurisdiction and Removal Act of 1875,

mandamus deference became largely extinct, while *de novo* review continued. *See* Ch. 137, § 1, 18 Stat. 470, 470 (1875) (codified as amended at 28 U.S.C. § 1331); Bamzai, *supra*, at 955; Woolhandler, *supra*, at 239. This demonstrates that such deference was limited to the unique nature of mandamus petitions; if deference had been a general interpretive rule regarding executive action, it would have remained through the late nineteenth century and into the early twentieth.

C. Factual Deference

Another area where courts appeared to defer to agencies was in factual findings. Agencies were given fact-finding authority, and courts deferred to those findings. For example, in *Johnson v. Towley*, the Court emphasized that the executive's factual findings were generally final, but the Court could review "misconstruction of the law." 80 U.S. (13 Wall.) 72, 82–86 (1871). *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855); The Interstate Commerce Act, Ch. 104, § 14, 24 Stat. 384, 384 (1887) ("[S]uch findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."). But this is no different than what appellate courts do with trial records—defer to the trial court's factual findings.

Deferring to factual determinations but not legal interpretations created a line drawing problem, and thus deference did not always stop at merely factual decisions. In *Bates & Guild Co. v. Payne*, the Court embraced a more deferential standard of review for questions of law. 194 U.S. 106 (1904). In reviewing the Postmaster General's new mail classification, the Court concluded that on mixed questions of law and fact, or even on purely legal questions, "the exercise of

[agency] discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong." *Id.* at 107–10.

Importantly, the Postmaster General admitted that its classification conflicted with the interpretation of the mail class statute that the Post Office Department had held for over sixteen years. *Id.* at 111 (Harlan, J., dissenting). Deference here was antithetical to the long-held custom canon of construction.

While a progressive opinion, *Bates* was later constrained to questions of fact and mixed questions of law and fact, rather than pure legal questions. *See Silberschein v. United States*, 266 U.S. 221, 225 (1924). The Court continued to provide *de novo* judicial review of agency decisions that were "wholly dependent upon a question of law." *Id. Bates* alone thus hardly establishes a more widespread tradition of deference. The courts generally treated *Bates* as an outlier, instead following *Silberschein* and applying the traditional interpretive rules until the New Deal. *See* Bamzai, *supra*, at 968–69.

D. The New Deal Era of Deference

During the New Deal, the role of administrative agencies ballooned, and the standards of judicial review shifted along with them. *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 Mich. L. Rev. 399, 403–04 (2007). Three cases defined the New Deal era and changed the landscape of judicial review: *Gray v. Powell*, 314 U.S. 402 (1941), *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

First, in 1941, the Court upheld the agency's interpretation of coal "producer" because Congress had delegated that authority to experts. *Gray*, 314 U.S. at 411–12. Although there was "no dispute as to the evidentiary facts," the Court refused to "substitute its judgment for that of the [agency]." *Id.* This hearkened back to *Bates* and the acceptance of deference to purely legal conclusions. Justice Owen Roberts vigorously dissented, arguing it was the role of the Court to review the agency's statutory interpretation. *Id.* at 420 (Roberts, J., dissenting). Roberts accused the majority of "fail[ing] in performing its duty" and "abdicat[ing] its function as a court of review" by merely accepting the agency's statutory interpretation. *Id.*

This deferential reasoning continued in 1944 in *NLRB v. Hearst Publications*, where the Court explained that the specific application of statutory terms was left to agencies, not courts. 322 U.S. at 131. At issue was the definition of "employee" under the National Labor Relations Act. *Id.* at 113. Emphasizing the agency's expertise, the Court held the agency's definition was "to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.* at 131. Although acknowledging that issues of statutory interpretation first arising in judicial proceedings are decided by the judiciary, the Court reasoned that when "the question is one of specific application of a broad statutory term" and "the agency administering the statute must determine it initially, the reviewing court's function is limited." *Id.* at 130–31. While scholars disagree on the exact amount of deference *Hearst*

stood for[3]—one thing was clear: Deference was increasingly in vogue.

Also in 1944, the Supreme Court took a different approach and opted for a multi-factor balancing test rather than a bright-line rule. Federal courts were permitted to defer, or "respect" the agency's interpretation, when the agency's statutory interpretation was reasonable. *Skidmore*, 323 U.S. at 140. *Skidmore* deference is often considered "persuasive deference" because the balancing test is not binding—courts may defer but are not required to. *See* Merrill, Chevron *Doctrine*, *supra*, at 44.

Gray, *Hearst*, *Skidmore*, and, to a certain extent, *Bates* are all incarnations of a modern deference to an agency's interpretation of the law merely *because* the interpretation came from the agency. Rather than applying contemporaneous and long-held canons of construction to the agency's interpretation, courts deferred to agencies because they were agencies and had special expertise. Although true *Chevron* deference was not yet on the horizon, the Court had fully broken from historical precedent and was bowing to the agencies' interpretation.

Chevron deference is not a creature of history. It was not until the mid-twentieth century and the rise of the administrative state that courts seriously deferred on legal interpretations. Rather, prior to the New Deal, courts simply applied canons of construction that gave weight to the customary and contemporaneous interpretation of the executive branch. For these reasons, the Court should take this opportunity

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[3] *See* Bamzai, *supra*, at 981; Merrill, Chevron *Doctrine*, *supra*, at 38–42.

to overrule *Chevron* and return to the more limited and historically grounded canons of construction.

II. THE CIRCUIT COURTS HAVE NOT FOLLOWED THIS COURT'S TRAJECTORY IN ABANDONING *CHEVRON*

A. This Court Has Not Deferred Under *Chevron* in Six Years

Although this Court has not overruled *Chevron*, it has not deferred under the doctrine at Step Two in six years. The Court also did not cite *Chevron* in a majority opinion in the 2021 term, and cited it only three times in 2020.[4] Since *Michigan v. EPA*, and *King v. Burwell*, this Court has analyzed ten cases under *Chevron*.[5] In only one of those did the Court continue to Step Two. *See Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261 (2016). All the other cases were decided under Step One or under an exception, such as *Mead*. Out of the nine cases decided before reaching Step Two, the agency only won twice, both at Step One. *See HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021). Since the close of the 2015 term, the agency has lost 70% of Supreme Court

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[4] The first statistic is derived from a Lexis search for "467 U.S. 837" from July 1, 2021 to the present. The second is from a Lexis search for "467 U.S. 837" from July 1, 2020 to June 30, 2021, and excludes *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020), since it was decided as part of the 2019 term.

[5] Empirical data used in this brief was collected from a Lexis search. Cases were limited to those that mentioned *Chevron* at least four times, discussed it in the majority, and analyzed whether to apply *Chevron*. The data excludes cases that applied *Auer*/*Kisor* deference rather than *Chevron* and cases that were decided without determining whether *Chevron* applied. The data is also limited to reported cases.

cases that addressed *Chevron*. If considering only the eight cases that were decided at one of the *Chevron* steps (rather than an exception), the agency won only one case at Step Two and two cases at Step One. Agencies lost the remaining five cases at Step One. This Court thus rarely finds statutes ambiguous at Step One, and it does not even implicitly defer to the government when interpreting statutes at Step One.

Rather than resorting to *Chevron*, this Court has been applying the rules of statutory interpretation even more closely. *See Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896, 1906 (2022) ("In sum, after employing the traditional tools of statutory interpretation, we do not agree with HHS's interpretation of the statute."). The two *Becerra* cases from last term exemplify this Court's current statutory interpretation jurisprudence when it comes to agencies. Many thought that either case, especially *American Hospitals*, would be an opportunity for the Court to overrule *Chevron*. *See* Eli Nachmany, *SCOTUS Faces a* Chevron *Decision Tree in* American Hospital Association v. Becerra, Yale J. Reg. (Aug. 9, 2021);[6] Brian R. Stimson, et al., *Pending Supreme Court Decision in* AHA v. Becerra *May be Felt Well Beyond the Healthcare Industry*, 12 Nat. L. Rev. 46 (Feb. 15, 2022);[7] Katie Keith & Joseph Wardenski, *Supreme Court Hears Two Medicare Disputes*, Geo. O'Neil Inst. (Dec. 9, 2021).[8]

But instead, the word *Chevron* does not appear in either decision. In *American Hospitals*, this Court applied the "traditional tools of statutory interpretation," determining that "under the text and structure of the

[6] Available at https://bit.ly/3hbbIcM.
[7] Available at https://bit.ly/3FcIDFY.
[8] Available at https://bit.ly/3Pd2jOD.

statute, this case is therefore straightforward." *Am. Hosp.*, 142 S. Ct. at 1904, 1906. Even though "*Chevron*" was mentioned 51 times during oral argument, the case was decided purely on statutory interpretation grounds. Transcript of Oral Argument, *Am. Hosp. Assoc. v. Becerra*, 142 U.S. 1896 (2022).

Similarly, in *Becerra v. Empire Health Foundation*, this Court favored the agency's interpretation because it found that "text, context, and structure all support" HHS's interpretation. 142 S. Ct. 2354, 2368 (2022). Throughout the opinion, the Court emphasized the plain meaning of the text. *See id.* at 2367 ("[T]he usual meaning . . . should govern."); *id.* at 2362 ("But when read in that suitable way, the fraction descriptions disclose a surprisingly clear meaning—the one chosen by HHS."). "*Chevron*" was mentioned 17 times in oral argument, but not once in the opinion. Rather than deferring under *Chevron*, the Court analyzed the text and structure of the statute, and those are what decided the case.

Instead of focusing on whether there is ambiguity that would trigger *Chevron*, the *Becerra* cases are examples of this Court applying the canons "to find the best reading of the statute." *See* Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2135, 2144 (2016) ("[W]hen the text of the statute is clear, a court should not turn to other principles of statutory interpretation such as . . . *Chevron* deference.").

And though this Court emphatically moved away from relying on *Chevron* in the last term, this development is not novel. This Court has been steadily applying *Chevron* less frequently for years. *See* Nathan D. Richardson, *Deference is Dead, Long Live* Chevron, 73

Rutgers U.L. Rev. 441, 475–503 (2021). More and more exceptions have cropped up to the doctrine over time. *See, e.g.*, *Mead*, 533 U.S. at 226–27 (interpretation must have force of law); *Burwell*, 576 U.S. at 485–86 (interpretation must not be in an area of "deep political and economic significance") (internal quotations omitted); *Michigan*, 576 U.S. at 752–54 (interpretation must be permissible in light of statutory context as well as text).

Further, multiple recent and current justices have critiqued the doctrine. *See Buffington*, slip op. at 14 (Gorsuch, J., dissenting from denial of cert) (describing the individual critiques of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Gorsuch, and Kavanaugh).

In sum, this Court has gradually moved away from *Chevron* to the point of no longer addressing it even when it is seemingly applicable and instead applying the canons of construction. *Chevron* appears to be "effectively buried" at this Court, though yet without "a tombstone" acknowledging its death. *See id.* at 15–16.

B. The Lower Courts Still Apply *Chevron* Regularly

But if *Chevron* is at least partially interred at the Supreme Court, it is surely out of its grave and roaming like a zombie at the circuit courts. In Justice Gorsuch's *Buffington* dissent, he suggests that "courts . . . rarely rely upon [*Chevron*]," and he calls the Federal Circuit's decision to defer "something of an outlier." *Id.* at 15–16. But this is not the whole picture. The circuits still apply *Chevron* regularly, albeit not as consistently as they used to. Because the circuits still actively defer under *Chevron*, this Court should grant certiorari to correct the lower courts.

In a study looking at cases from 2003 through 2013, Professors Kent H. Barnett and Christopher J. Walker analyzed 1,327 circuit opinions that applied the *Chevron* doctrine. Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 5 (2017).[9] Out of all the cases in their study, Barnett and Walker found that agencies won 71.4% of the time. *Id.* at 28. *Chevron* was applied 74.8% of the time, while courts used the *Skidmore* test 10.8% of the time. *Id.* at 29. *De novo* review was granted 7.5% of the time. *Id.* The remaining 6.9% of the time, the court did not specify what standard of review it applied. *Id.* When *Chevron* was applied, agencies won at Step One 11.7% of the time and at Step Two 65.7%. *Id.* at 33. Agencies lost at Step One 18.3% of the time and at Step Two 4.4%. *Id.* Of the cases that made it to Step Two, 93.8% favored the agency. *Id.*

Because the Barnett and Walker study ended nearly a year and a half before *King v. Burwell*, before *Michigan v. EPA*, and before the Supreme Court cases discussed above, the Cato Institute did its own empirical study of the circuits for this brief. Our survey covered the last two calendar years, from January 1, 2020 through December 31, 2021.[10] We found 142 cases

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[9] The Barnett and Walker study used slightly different search criteria than this brief did. *See* Barnett & Walker, *supra*, at 22. One significant difference between our study and the Barnett & Walker study is that Barnett & Walker treated each instance of statutory interpretation, including multiple interpretations in one case, as separate counts, while we only counted each opinion once, giving controlling weight to the interpretation that deferred. *See id.* at 23.

[10] *See* note 5 for search criteria. Cases that involved multiple agency interpretations were only counted as one case.

analyzing *Chevron*.[11] The results were less deferential overall than the Barnett & Walker study, which is unsurprising considering the direction of deference jurisprudence. But unfortunately, the circuits are still much more deferential than the Supreme Court.

We looked at cases either applying *Chevron* or deciding whether to apply it.[12] In our study, circuit courts applied the *Chevron* steps 84.5% of the time, 7.0% of cases were decided via *Skidmore* deference or persuasion, 7.0% received *de novo* review, and 1.4% were decided on other exceptions. Of all cases studied, the agency won 57.0% of the time, and 50% of all cases were decided at Step Two.

Of the cases applying *Chevron*, 59.2% held that the statute was ambiguous and thus proceeded to Step Two, while 40.8% held that the statute was unambiguous. Among cases that reached Step Two, the agency's interpretation was held to be permissible 77.5% of the time. Among cases decided at Step One, by contrast, the agency's interpretation prevailed only 32.7% of the time.

Looking at all cases decided under *Chevron*, 13.3% were agency wins at Step One, 45.8% were agency wins at Step Two, 27.5% were agency losses at Step One, and 13.3% were agency losses at Step Two. The 45.8% of cases with Step Two agency wins is less than the 65.7% in the Barnett & Walker study, but it is still significantly higher than the 10% at the Supreme Court in the past six years. *See* Barnett & Walker, *supra*, at 33.

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[11] A complete list of the cases in our study is available at https://www.cato.org/sites/cato.org/files/2022-12/Loper-App.pdf.

[12] *See* Lexis search discussed in note 5.

A comparison of the recent Supreme Court cases, the Barnett & Walker study, and our very recent study of the circuits shows that the circuits apply *Chevron* less than they used to, but not nearly as seldom as the Supreme Court. Among cases applying *Chevron*, only one Supreme Court case (12.5%) in the last seven terms was decided at Step Two, but the 2003–2013 circuit analysis showed that 70.0% of cases made it to Step Two,[13] and our 2020–2021 study shows that 59.2% of cases were decided at Step Two.

These comparisons show that unfortunately, Justice Gorsuch may have understated the situation when he said "courts . . . rarely rely upon [*Chevron*]." Circuit courts still find ambiguity 59.2% of the time when *Chevron* is invoked. Too many courts continue to look for ambiguity rather than "find[ing] the best reading of the statute." Kavanaugh, *supra*, at 2144. *Chevron* continues to boldly wreak havoc among the lower courts. Leading by example has proven to be insufficient, but this Court has an opportunity to finally put *Chevron* to rest and overrule it, thereby providing much-needed clarity to the circuits.

[13] Barnett & Walker, *supra*, at 33.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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