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* Advance Colorado Institute in Support of Petitioners

KRISTINE L. BROWN
Counsel of Record
8700 E. Jefferson Ave. #370953
Denver, CO 80237
(720) 285-9552
kristiburtonbrown@gmail.com

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Advance Colorado Institute (Advance) is a nonprofit organization founded in 2021 whose members include business owners, entrepreneurs, elected officials, and citizen activists. Advance has over 3,000 members, and thousands of additional advocates and allies. Advance's mission is to educate on the benefit of strong, sustainable solutions in the areas of fiscal responsibility, transparency, limited and accountable government, free enterprise, lower taxes, strong public safety, and an accountable education system. Advance promotes principles and ideas that provide greater opportunity for all people. In order to foster the growth of a freer and more prosperous society, Advance educates on the need for government de-regulation and the rights of the people. Advance members own small and large businesses and have experienced the detrimental effects and confusion caused by government overregulation through the unchecked administrative state.

Amicus believes the *Chevron* doctrine has allowed an unconstitutional overreach by the executive branch and prevents adequate judicial review of agency-created law while ignoring the duty of the legislative branch to actually make the law. *Chevron U.S.A. Inc., v. Natural Resources Defense*

---

[1] Rule 37 Statement: No attorney for any party authored any part of this brief, and no one apart from *Amicus* and its counsel made any financial contribution toward the preparation or submission of this brief.

Council, Inc., 467 U.S. 837 (1984). As the size of the administrative state has risen dramatically in the United States, businesses have greater obstacles placed in their path as confusion, inconsistent requirements, and ever-changing direction from federal agencies cause many to shutter their doors.

Amicus' members, like business owners across the United States, would thrive in the constitutionally designed system where three co-equal branches govern together, not usurping each other. Due to the long-term destructive effect of the administrative state on its members' lives and businesses, *Amicus* has a direct interest in the outcome of this case.

SUMMARY OF ARGUMENT

Justice Thomas is correct: "We have come to a strange place in our separation-of-powers jurisprudence." *Department of Transportation v. Ass'n of American Railroads*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring). The power held by the current administrative state and granted by *Chevron* was never envisioned by America's founders. They believed in a strong separation of powers and enshrined checks and balances into the Constitution to ensure a transparent system that would be accountable to "We the People." This system has been severely undermined by the *Chevron* doctrine. For, "What [is] the administrative state in practical terms? Put most simply, it [is] the vast enlargement of the government." Jonah Goldberg, *Suicide of the West* 184 (2018).

President Woodrow Wilson, one of the chief architects of the administrative state, revealed what the purpose behind the ultimate executive power grab was: "Give us administrative elasticity and discretion, free us from the idea that checks and balances are to be carried down through all stages of organization." Quoted in Charles Murray, *By the People: Rebuilding Liberty Without Permission* 73 (2017). Reaching for a way out of the original Constitutional system, Wilson stated, "We have reached a new territory in which we need new guides, the vast territory of *administration*." Ronald J. Pestritto, *The Birth of the Administrative State: Where It Came From and What It Means for Limited Government*, Heritage Foundation, (Nov. 20, 2007).

From Wilson's time until now, "the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). It is the administrative state "on whose discretion it depends whether and how I am to be allowed to live or to work." F.A. Hayek, *The Road to Serfdom* 108 (1944). Its expansive power crushes innovation, penalizes citizens and business owners who intend to follow the law (but cannot track the confusing litany of rules invented by the administrative state), and stunts economic opportunity – all on top of threatening the foundations of our democratic republic as it pushes aside the legislative and judicial branches in a headlong and ill-fated race to be the one master of the ship.

Amicus contends that while *Chevron* may be drowning it out, legislative silence must be allowed to speak loudly Where a statute is silent on the rule-making authority of an agency, that silence ought to be honored. It is the duty of Congress – not of the administrative state – to clarify or amend a silent, vague, or unclear statute where necessary. Therefore, the "reflexive deference exhibited" due to *Chevron* "is troubling." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

Moreover, the lack of a serious application of the nondelegation doctrine has resulted in an excessive and sometimes abusive executive branch, unhinged by *Chevron*. The legislative branch ought not to divert its duty to make the law any more than the executive branch should be permitted to snatch this duty that does not belong to it.

Amicus argues that, in order to restore constitutional order, not only should *Chevron* be overruled, but a nondelegation doctrine should also be adopted as a serious check and balance on the branches of government.

ARGUMENT

I. It is the Duty of Congress Alone to Clarify or Amend Statutory Silence When Necessary.

"*Chevron* deference raises serious separation-of-powers questions." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). This is

true whether a statute is ambiguous, vague, or silent. Indeed, *Chevron* permits "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 v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

While silence, vagueness, and ambiguity regretfully exist in many statutes (despite their gargantuan page numbers), a lack of clarity or express direction should not result in reflexive deference to an executive agency. Nor should the judiciary have complete deference to unilaterally resolve silence or vague words. Congressional silence or vagueness is not a grant of rule-making authority to another branch.

A. The Separation of Powers Holds Each Branch Accountable.

For too long, both the executive and judicial branches have taken on a task that does not constitutionally belong to them: the task of creating law. This has exacerbated and perpetuated the gaping error that exists in the legislative branch: its propensity to craft statutes that are unclear, silent on details, and yet still spread across hundreds of pages that few read and even fewer understand. The ability of Congress to vaguely delegate and shove off their law-writing responsibility to the administrative state "runs the risk of compromising

our constitutional structure." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring).

When the legislative branch "delegates to executive-branch bureaucrats the power to make legally binding rules or 'regulations,' which will themselves determine the law's real-world impact," politicians are imbued with "all the credit for the popular goal and none of the blame for the controversial particulars of regulation." Mike Lee, *Our Lost Constitution: The Willful Subversion of America's Founding* Document 7 (2016).

Accountability matters, and the separation of powers is rooted in accountability. Judicial review keeps the executive branch accountable, and the constitutional separation of powers is honored when the judiciary seeks out the legislative voice instead of sweeping Congressional silence under the proverbial rug. In *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Evntl. Prot*, 903 F.3d 65, 72 (3rd Cir. 2018) the Court deferred to Congress and looked to "whether Congress has made the results of that [administrative] process reviewable under the Natural Gas Act." This is an example of the three branches holding each other accountable.

Where no best interpretation – taken from the clear words or expressed directive of the statute (rather than an implied meaning) – can be understood, a statute should properly be returned to Congress to resolve either by continuing its intentional silence or by amending with clarity. The

legislative branch must be held accountable to write this nation's laws. Because "[t]he founders considered the separation of powers a vital guard against governmental encroachment on the people's liberties," the judiciary must hold the legislative and executive branches accountable when they fail to uphold their respective ends of the national agreement. *Gutierrez-Brizuela* at 1149. Accountability does not include stepping in to do another's job.

Agencies have loved stretching their authority so far that they now find themselves like a child with an overused rubber band. The rubber band's outcome is predictable: it will snap. *Chevron* deference has been overused, and the separation of powers is at risk of snapping. *Chevron* – and with it the unconstitutional administrative state – should be the thing to break instead.

B. Clear Direction Must Come From Congress.

> In a typical year, Congress passes roughly 800 pages of law—that's about a seven-inch stack of paper. But in the same year, federal administrative agencies promulgate 80,000 pages of regulations—which makes an eleven-foot paper pillar. … Rather than elected representatives, unelected bureaucrats increasingly make the vast majority of the

> nation's laws—a trend facilitated by the Supreme Court's decisions…

Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 Indiana L.J. 923 (2020). "When agencies outflank the legislative process…they threaten liberty and risk promulgating regulations that have not yet attained the 'broad support' required by bicameralism and presentment. And when courts abandon their 'critical role' in protecting the 'separation of powers,' they threaten liberty as well." *Id. at 948.*

Chevron has allowed the executive branch to take on the power of the pen and the sword – the ability to write law and to enforce it. But statutory silence ought not to result in a 'duty swap' where a different branch is unaccountably in control of creating the law. The executive branch is not tasked with writing law, and the rise of the administrative state stunts the power granted in the U.S. Constitution only to the legislative branch, undermining our entire system of government as a democratic republic.

Federal agencies "exceed their enumerated powers by purporting to give meaning to gibberish just as surely as they would exceed their enumerated powers by directly inserting their own text into the Statutes at Large." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 339-40 (2002). Overturning the *Chevron* doctrine and returning silent and vague laws back

to Congress will force the legislative hand to craft law more clearly and with greater intentionality. The separation of powers holds each branch accountable to the others rather than covering over one branch's failings.

Agencies ought not to be the utensils used by the executive branch to consume more power than it was allotted. When the executive branch, through its administrative state, writes details into a law – claiming the right to do so because of statutory silence – the free, just, and transparent government envisioned by the constitutional separation of powers suffers death by a thousand strokes of the pen. Further, that the "administrative *state*" exists highlights the depth of the predicament *Chevron* has plunged us into: no government branch ought to be a "state" unto itself. There is one state, with three co-equal branches and markedly different duties.

In his *Telecom* dissent, then-Judge Kavanaugh wrote (and we agree): "an ambiguous grant of statutory authority is not enough." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 421 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc). Instead, as asserted in the same dissent, Congress must be explicitly clear in its authorization of an agency or federal agent to create any major regulation. *See id*. This is the only way to downsize the unconstitutional and over-large administrative state.

Instead of relying on the administrative state to police itself, declare what the law means, and write

rules ad nauseam, agencies ought to be required to refrain from incessant rule-making absent a clear statutory statement from Congress authorizing the agency to promulgate the specific rules. Requiring a clear direction from Congress (and not merely ambiguous or general assignment of rulemaking to an agency) would rightfully "preclude federal bureaucrats and federal judges from green-lighting regulation that the people's representatives lack the political support to clearly enact through bicameralism and presentment." Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 Indiana L.J. 923, 962 (2020).

Clear, explicit direction should include Justice Gorsuch's requirements: "(1) Congress must set forth a clear and generally applicable rule . . . that (2) hinges on a factual determination by the Executive . . . and (3) the statute provides criteria the Executive must employ when making its finding." *United States v. Nichols*, 784 F.3d 666, 673 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

In *Salcedo v. Hanna*, the 11th Circuit found that a law passed by Congress was "completely silent" on a particular matter – both in the statute's original language and in amendments recently passed. The harm at issue was only raised by the Petitioner because of the rulemaking authority of a federal agency that went beyond actual statutory language. The Court reasoned that, "At most, we could take

Congress's silence as tacit approval of that agency action," but continued: "[C]ongressional silence is a poor basis for extending federal jurisdiction to new types of harm. We take seriously the silence of that political branch best positioned to assess and articulate new harms…" *Salcedo,* 936 F.3d 1162, 1169 (11th Cir. 2019).

Throughout the decision, the Court evaluated the "history and judgement of Congress" to reach its conclusion that the administrative state did not have equal authority with Congress in creating a new harm. Similarly, *Amicus* takes the position that, where Congress is silent, federal agencies do not have the equal authority to create law – which *Chevron* has been applied to allow them to do.

In enforcement against businesses and citizens, there has been no difference in statutes crafted by Congress and rules created by the administrative state. But the executive branch has no more power to create law than the judiciary, whose power is "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). In addition to usurping the duties of the legislative branch, *Chevron* has unconstitutionally "wrest[ed] from Courts the ultimate interpretative authority to 'say what the law is,' and hand[ed] it over to the Executive." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Where Congress is silent – and where the legislative branch has neither spoken directly to a

statutory detail or application and where it has not plainly and expressly delegated the ability to make a particular rule to a federal agency, the "silence of that political branch" ought to be taken seriously, as the 11th Circuit affirmed in *Salcedo*.

C. Where There is Clear Statutory Direction, the Best Interpretation Test Should Be Followed.

The reasonable interpretation test adopted by *Chevron* – along with the statutory ambiguity allowed – has led to mass confusion for businesses like the ones *Amicus'* members own and operate. Completely opposite interpretations of law can be equally 'reasonable,' and allowances for ambiguity avoid accountability.

When there is statutory direction, *Amicus* agrees with Justice Kavanaugh's solution: that the judiciary "seek the best reading of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2121 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)). *Amicus* believes this solution should be reached only when Congress has expressly granted rule-making authority to the agency – not merely when an ambiguity in the statute might be reasonably interpreted to grant such authority.

The legislative branch must be plain and express in its delegation, providing clarity to the executive

branch, and freeing the judiciary to fairly apply the best interpretation test as necessary instead of weighing the ever-changing standard of "reasonableness" that forces economic interests of business owners, innovators, and entrepreneurs to hang in the balance.

II. A Strong Non-Delegation Doctrine Should Be Adopted.

Chevron deference has led to "potentially unconstitutional delegations we have come to countenance." *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring) (quoting U.S. Const. art. 1, §1). Delegation has been implied where Congress is silent, and Congress has been allowed to delegate major decisions to the administrative state – neither of which is constitutional. The rise of the administrative state has diverted the power granted in the Constitution to the legislative branch, undermining our entire system of government as the executive branch writes law while not being constitutionally tasked with it.

Often, not even the statute at issue in a particular case has given the administrative state the power it so boldly wields.

> [*Chevron*] suggests we should infer an intent to delegate not because Congress has anywhere expressed any such wish, not because anyone anywhere in any legislative history even hinted at that possibility, but because the legislation in question is silent (ambiguous) on the subject. Usually we're told

> that 'an agency literally has no power to act . . . unless and until Congress confers power upon it.' Yet *Chevron* seems to stand this ancient and venerable principle nearly on its head.

Gutierrez- Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

The fact that the executive has so long escaped with this behavior indicates that "Congress, as an institution, abdicated its sole responsibility to legislate…For the most part, Congress no longer makes laws the way the Founders intended. They outsource the heavy lifting to the bureaucracy." Jonah Goldberg, *Suicide of the West* 188-189 (2018). "[A] close reading of the Constitution reveals that 'the SEC' is not a nickname for Congress," and neither are the letters assigned to the multitude of other federal agencies. *Id.* at 190. American philosopher James Burnham accurately described that "[l]aws today in the United States, in fact most laws, are not being made any longer by Congress, but by the NLRB, SEC, ICC, AAA, TVA, FTC, FCC, the Office of Production Management (what a revealing title!), and the other leading 'executive agencies.'" Quoted in Matthew Continetti, *The Managers vs. the Managed*, Weekly Standard, (Sept. 21, 2015).

Administrative power is both outside and above the law as it is neither constitutional nor

accountable to anything but itself. *Chevron* continues to enable this extralegal system as "[t]he administrative regime consolidates in one branch of government the powers that the Constitution allocates to different branches." Philip Hamburger, *Is Administrative Law Unlawful*? 6 (2014). Over 230 years ago, James Madison warned: "The accumulation of all powers legislative, executive and judiciary in the same hands…may justly be pronounced the very definition of tyranny." James Madison, *Federalist No. 47*, (J. & A. McLean eds., 1788). Quoting Montesquieu, he wrote: "[t]here can be no liberty where the legislative and executive powers are united in the same person." *Id.*

No one questions whether the government has the authority to pass laws that put some restraints and rules on the marketplace. Rather, the question centers around who, exactly, has the right to create the restraints and rules. Our original constitutional system is clear: Congress has the foundational right.

"Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints." *Department of Transportation v. Ass'n of American Railroads*, 135 S. Ct. 1225, 1237 (citing *INS v. Chadha*, 462 U.S. 919, 959 (1983)) (Alito, J., concurring).

> When it comes to laws that deprive individuals of liberty and property, judges,

> presidents, and executive agencies have a say. But so must Congress—the branch most directly accountable to the voters. A robust nondelegation doctrine would prohibit Congress from abdicating its constitutionally prescribed place in the answer to the question, 'Who decides?'

Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 Indiana L. J. 923, 962.

> The framers understood, too, that it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals. Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement.

Gundy v. United States, 139 S. Ct. 2116, 2133 (2019), (Gorsuch, J., dissenting) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 697 (1891)).

A nondelegation doctrine should be adopted as *Chevron* is overruled so that the duty to write the law is placed squarely back on Congress.

CONCLUSION

Amicus asks this Court to safeguard the constitutional separation of powers, by ensuring vague and silent statutes are returned to Congress for clarity, rather than turned over to an agency whose interpretations and rules are given reflexive deference. Under *Chevron*, "the liberty protected by the separation of powers in the Constitution is primarily freedom from government oppression…" Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1909 (2014). In order to promote transparency, accountability, and freedom for "We the People," *Chevron* should be overruled, and a nondelegation doctrine adopted.

Respectfully submitted,

KRISTINE L. BROWN
Counsel of Record
8700 E. JEFFERSON AVE. #370953
DENVER, CO 80237
(720) 285-9552
KRISTIBURTONBROWN@GMAIL.COM

July 24, 2023