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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The government's submission underscores why *Chevron* has become "the-case-which-must-not-be-named." *Aposhian v. Wilkinson*, 989 F.3d 890, 896 (10th Cir. 2021) (Tymkovich, J., dissenting). The government's effort to demonstrate *Chevron*'s ubiquity and importance only highlights that this Court last used *Chevron* to decide a case in 2016. That is not for lack of opportunities. Yet for nearly a decade, this Court has instead done what Article III and APA §706 command, and simply interpreted the disputed statute. Thus, the question is less whether this Court should overrule *Chevron*, and more whether it should let lower courts and citizens in on the news. The reality is that *Chevron* has already proven itself unworkable, and its corrosive effects on our separation of powers have lingered long enough. The government's pleas to retain this misguided and reliance-destroying doctrine fall far short of the mark.

The government stumbles out of the gate, claiming that *Chevron* enjoys statutory *stare decisis*. That claim is puzzling given that the government itself recognizes that *Chevron*'s "interpretative methodology," U.S.Br.36, not its Clean-Air-Act holding, is at issue, and *Chevron* never mentioned the one statute that matters here—the APA. In reality, *Chevron*'s interpretive methodology has little (if any) precedential force, and the government fails to demonstrate otherwise.

Even if more traditional *stare decisis* factors were at play, the case for overruling *Chevron* would be overwhelming. The government barely defends *Chevron* as a constitutional and statutory matter and

insists that *Chevron* is rooted in historical tradition only by distorting history and ignoring what *Chevron* actually requires. It is one thing to give weight to a contemporaneous or consistent view of a coordinate branch (or to faithfully apply the mandamus standard), but it is quite another to defer to an agency when it abandons longstanding views and shifts the law 180 degrees within some ill-defined zone of reasonableness. There is no historical pedigree for the latter, but *Chevron* requires it. That reality eviscerates the government's emphasis on reliance interests. To the extent the courts have decided cases under step one, overruling *Chevron* will change nothing. And in step-two cases, regulated parties never had any justifiable reliance interests because the whole point of *Chevron* and *Brand X* is that the executive can always reverse field upon further reflection (or further election). That risk is hardly theoretical; on the consequential statutory issue in *Brand X*, the executive is on its fourth about-face. So much for the finality and stability interests *Chevron* defenders trumpet. Finally, the government barely mentions the damage *Chevron* has wrought on the political process and the citizenry—other than to implausibly insist that the governed sometimes *benefit* from the tie going to the government.

All roads thus lead to the conclusion that the Court should overrule *Chevron*. But if nothing else, the Court should clarify that statutory silence does not trigger *Chevron*. Either way, this Court should reverse the decision below and make clear that a statute silent on the power to make fishermen pay for government-trained and government-mandated monitors confers no such extraordinary power.

ARGUMENT

I. The Court Should Overrule *Chevron*.

A. *Chevron* Is Entitled to Little, If Any, *Stare Decisis* Effect.

The government insists that *Chevron* enjoys "the strongest form of *stare decisis*": statutory *stare decisis*. U.S.Br.10. That makes no sense. When it comes to its interpretative methodology, rather than its Clean-Air-Act holding, *Chevron* ignored the relevant statute altogether. *Chevron* announced a "framework for judicial review of an agency's interpretation of a statute." U.S.Br.7. There is a statute for that: §706 of the APA. *See* 5 U.S.C. §706. But as the government cannot dispute, *Chevron* "did not even bother to cite" the APA, let alone authoritatively interpret it. *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). It beggars belief that a decision could enjoy statutory *stare decisis* when it is entirely "heedless of" the relevant statute. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment).

The government's claims for statutory *stare decisis* thus rest on the bare fact that Congress "could alter" *Chevron* "at any time," but has "declined" to do so. U.S.Br.8. That argument is doubly problematic. First, the most straightforward way for Congress to countermand *Chevron* would be to simply re-enact §706 of the APA, which already specifies "that the reviewing court shall decide all relevant questions of law," "constitutional and statutory" alike. Indeed, the legislative proposal the government highlights, *see* U.S.Br.30, bears a striking resemblance to APA §706. Second, the government's effort to claim heightened

statutory *stare decisis* for any decision that Congress could redress via statute would (ironically enough) require the overruling of all this Court's decisions giving reduced *stare decisis* effect to precedents involving procedural or methodological questions. After all, the two-step approach of *Saucier v. Katz*, 533 U.S. 194 (2001), was a gloss on 42 U.S.C. §1983 that Congress could have countermanded by statute. But the Court instead held that "this Court, not Congress," should make that "change" because the Court itself initiated *Saucier*'s "puzzling misadventure." *Pearson v. Callahan*, 555 U.S. 223, 234 (2009). The same is true of procedural decisions that Congress has the power to superintend, but this Court nonetheless gives them "reduced" *stare decisis* effect. *United States v. Gaudin*, 515 U.S. 506, 521 (1995). That distinct treatment makes eminent sense, as it ill-serves the separation of powers to insist that Congress intervene on matters as central to Article III as how to interpret statutes or approach qualified-immunity defenses, when this Court recognizes its own misstep.

Far from implicating statutory *stare decisis*, *Chevron* instead possesses the *stare decisis* effect of an interpretive methodology—which is to say: none. The government declares that "untenable" because otherwise "lower courts would not have been obligated to adhere to the *Chevron* framework." U.S.Br.10, 31. But whether an interpretive methodology is "mandatory" for lower courts does not dictate its *stare decisis* effect in this Court. *Pearson*, 555 U.S. at 227, 233-36. In the bad old days when this Court routinely inferred private causes of action, the lower courts were not free to refuse to play along, but that did not mean this Court had to run through the *stare decisis* factors

or eliminate 10b-5 actions to restore a mode of statutory interpretation more consistent with the separation of powers, which also became "mandatory" for lower courts.

The government ultimately agrees *Chevron* is, in fact, an "interpretive methodology." U.S.Br.36. That makes the threshold issue here easy. After all, "[u]nlike ordinary statutory precedents, the 'Court's precedents … pronouncing the Court's own interpretive methods and principles typically do not fall within that category of stringent statutory *stare decisis*.'" *Allen v. Milligan*, 599 U.S. 1, 43 n.1 (2023) (Kavanaugh, J., concurring).

The government is really arguing that *Chevron* is somehow an *exception* to that rule. But nothing supports that view. While the government emphasizes prior cases authored by a variety of Justices in which the Court applied *Chevron*, it concedes that the Court has since decided numerous cases where it "could have applied *Chevron* but did not," U.S.Br.31—consistent with how courts treat disfavored interpretive methodologies, *see* Kristin E. Hickman & R. David Hahn, *Categorizing* Chevron, 81 Ohio St. L.J. 611, 653 (2020). In fact, by the government's own tally, this Court has not applied *Chevron* since 2016—almost 20% of *Chevron*'s lifespan. *See* U.S.Br.App.B. Thus, while some may have (erroneously) "once regarded" *Chevron* "as the exception to the rule that there is no methodological *stare decisis*," that theory is not even arguably viable now given that *Chevron* has "expired at the Court." Richard M. Re, *Personal Precedent at the Supreme Court*, 136 Harv. L. Rev. 824, 847-48 (2023); *see Hohn*

v. United States, 524 U.S. 236, 252 (1998) (jettisoning a rule that "has often been disregarded in our own practice.").

At most, *Chevron* enjoys only the "reduced" force attendant to procedural rules. *Gaudin*, 515 U.S. at 521. The government disagrees because *Chevron* has substantive "impacts," including on "ordinary citizens." U.S.Br.32. To the extent the government means that *Chevron* is outcome-determinative in cases citizens would otherwise win, that is hardly a reason to keep it. Moreover, *Saucier* likewise had substantive impacts, including depriving citizens of a clear demarcation as to where government power left off and individual liberty began. *See Pearson*, 555 U.S. at 234 (referencing *Saucier*'s "substantive" problems); *Bunting v. Mellen*, 541 U.S. 1019, 1022-25 (2004) (Scalia, J., dissenting from denial of certiorari) (documenting same). The same is true of *Chevron*.

The government is left relying on *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019). *See* U.S.Br.8, 10, 30-31. But despite the government's efforts to equate the briefing here and in *Kisor*, Kisor addressed different questions and gave some *stare-decisis* considerations short (or no) shrift. *See, e.g.*, 139 S.Ct. at 2421 (referencing Kisor's "fleeting[]" separation-of-powers argument); *id.* at 2423 ("Kisor does not claim that *Auer* deference is 'unworkable'"). The *Kisor* opinion itself never mentioned *Pearson* or *Gaudin* and secured a majority only on the understanding that statements made there "do not … touch upon" *Chevron*. *Id.* at 2425 (Roberts, C.J., concurring in part). Moreover, the separation of powers threat of *Chevron* is far greater, and the retention of *Auer* deference only heightens the

need to get the statutory questions correct and avoid layering deference on top of deference. *See* Pet'rs.Br.42-43.[1]

B. In All Events, Every *Stare Decisis* Consideration Militates in Favor of Overruling *Chevron*.

Even if *Chevron* receives a strong form of *stare decisis*, every relevant factor supports its overruling. *See* Pet'rs.Br.22-43.

1. *Chevron* is egregiously wrong.

1. *Chevron* is inconsistent with Article III, Article I, and the Due Process Clause, and the government's back-of-the-brief arguments do not change the calculus. The government downplays the Article III problem, claiming that courts "retain a firm grip on the interpretive function" by deciding whether to "defer[]" to agencies. U.S.Br.38-39. But the judicial power is the power to definitively interpret the meaning of applicable statutes while determining a citizen's entitlement to judicial relief. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222-23 (1995). Declining to perform that function because the executive's position is not unreasonable or obviously incorrect is an abdication of the Article III duty.

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[1] Borrowing a page from *Kisor*, the government suggests that *Chevron*'s baleful consequences are ameliorated by various prerequisites and carve-outs, like the major questions doctrine. U.S.Br.14-16. While those factors exacerbate *Chevron*'s workability problems, *see infra* at pp.13-14, they also undermine the government's plea for heightened statutory *stare decisis*. Whatever the ultimate scope of the major questions doctrine, this Court treated it as the refinement of an interpretative methodology and did not cycle through the *stare decisis* factors.

The government emphasizes Congress' purportedly "recognized" power to give an agency "express[]" authority to "define a statutory term" without violating Article III and suggests the same is true for the implied delegations posited by *Chevron*. U.S.Br.38. But even setting aside that *Chevron*'s conception of implied delegations is "fictionalized," David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212 (2001) (Barron & Kagan), there is a vast difference between respecting Congress' express commands and "[a] rule requiring [courts] to suppose that statutory silences and ambiguities are both always intentional and always created by Congress to favor the government over its citizens," *Buffington v. McDonough*, 143 S.Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of certiorari). With an express command, "judges" must actually "ascertain" the "meaning" of the command and can judge it for conformity with non-delegation principles and other constitutional limits. The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003). To the extent such delegations are permissible, it is explained by the difficulties of policing the limits of permissible delegation. But a judicial doctrine that infers broad delegations of substantial policy-making authority out of ambiguity or silence has nothing to recommend it.

The government suggests that crediting the Article III argument would have "radical consequences," because courts "routinely defer when a constitutional or statutory provision vests responsibility or discretion in another Branch" and "regularly evaluate whether a given interpretation or

understanding of federal law is unreasonable," as in "habeas corpus." U.S.Br.39-40. As to the former, the government confuses giving due consideration of the views of a coordinate branch (which can account for the pedigree and consistency of those views) and the strong form of deference that *Chevron* and *Brand X* demand. As to the latter, the government ignores the difference between limiting a remedy and abdicating the responsibility to fix the meaning of a statute by which the government purports to limit the liberty of its citizens in the first instance. Whatever limits can be permissibly imposed on habeas relief, the sensible and venerable rule in the first instance is that when it comes to ambiguous statutes, the tie goes to the citizenry. *See United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

The government's half-hearted effort to square *Chevron* with Article I is equally unavailing. In its zeal to minimize the Article III problem by describing gap-filling as "policymaking," rather than statutory interpretation, the government only highlights the Article I problem. It claims Congress is free to "authorize an agency to fill in the details of the statutory scheme" if Congress supplies an "intelligible principle." U.S.Br.40. But even putting the problems with the intelligible-principle concept to one side, *cf. Gundy v. United States*, 139 S.Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting), it hardly promotes application of that doctrine (or broader concerns with impermissible delegation) to incentivize Congress to delegate via ambiguity or silence, which are pretty much the opposite of intelligible principles. And while agencies certainly may "fill up the details" of statutory schemes, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1,

43 (1825), *Chevron* treats *everything* short of a major question like a "detail," as confirmed by the "thousands of pages of regulations" that allow "hundreds of federal agencies" to "pok[e] into every nook and cranny of daily life," *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). *Chevron* thus remains "a judicially orchestrated shift of power from Congress to the Executive Branch." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) (Kavanaugh).

The government's fleeting attempt to paper over the due-process problems fare no better. The government contends the Due Process Clause protects only against "personal bias," and "judges applying *Chevron*" are not "demonstrating any personal desire to see a favored team win." U.S.Br.40-41. In reality, the Due Process Clause broadly ensures that litigants receive "[a] fair trial in a fair tribunal," *In re Murchison*, 349 U.S. 133, 136 (1955), which plainly precludes "systematic bias" against disfavored litigants, Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1212 (2016). Moreover, the government simply cannot appreciate—because it is the government—that when a citizen sees federal judges rule in favor of federal agencies even when the statute does not clearly support the government, the citizen perceives (correctly) unfairness and bias. However the government prefers to describe this bias—*e.g.*, bias toward "the President," U.S.Br.41—the salient point is that *Chevron* forces judges to prefer the government over the citizenry, which offends basic fairness, *cf. Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 49 (Wis. 2018) ("The injury

arises … from the fact that the court has a favorite at all.").

2. The government promises that "*Chevron* is consistent with the APA," U.S.Br.41, but it does not deliver. The government insists that 5 U.S.C. §706 does not require courts to apply "*de novo*" review. U.S.Br.42. But five sitting members of the Court have either authored or joined opinions concluding the opposite. *See Kisor*, 139 S.Ct. at 2433 (Gorsuch, J., concurring in the judgment); *United States v. Texas*, 143 S.Ct. 1964, 1982 (2023) (Gorsuch, J., concurring in the judgment). Past members of the Court were in accord, as it is obvious that judicial review of questions of law is presumptively *de novo*. *See Perez*, 575 U.S. at 109 (Scalia, J., concurring in the judgment). If Congress wanted to deviate from the clear default rule that questions of law—both constitutional and statutory—are reviewed *de novo*, it would need to specify as much. That principle disposes of the government's only real counterargument, its emphasis that 5 U.S.C. §706(2)(F) specifies narrow circumstances in which factual findings are subject to *de novo* review. But the default standard of review for findings of fact is the opposite of the standard of review for questions of law. *See* Bamzai.Amicus.Br.20. Thus, all §706(2)(F) demonstrates is that when Congress wants to adjust the default standard of review, it does so explicitly.

Lacking plausible textual arguments, the government invokes the APA's "history," U.S.Br.42, and asserts that only "one" person "before or immediately after" the APA's enactment understood it "to require de novo review," U.S.Br.43-44. That

assertion contradicts the historical record, which demonstrates that Professor Dickinson had ample company in recognizing what the APA's text makes clear—*viz.*, it "requires courts to determine independently all relevant questions of law." 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter); *see* S. Doc. No. 248, 79th Cong., 2d Sess. 11, 18 (1946); H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945); *SEC v. Cogan*, 201 F.2d 78, 86-87 (9th Cir. 1951).

3. The government's effort to align *Chevron* with the historical record more broadly distorts history and ignores what *Chevron* actually entails. Simply put, there is no historical pedigree for the strong medicine of *Chevron/Brand X*-style deference. For example, the government invokes cases explaining that courts afforded "respect" to the "cotemporaneous," *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827), and "uniform" construction of statutes, *United States v. Vowell*, 9 U.S. (5 Cranch) 368, 372 (1810).[2] But *Chevron* is not "rooted" in this tradition. U.S.Br.8. *Chevron* demands deference to agency interpretations that are neither contemporaneous nor consistent. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005). And *Chevron* affords the executive far more than respectful consideration. The consistent understanding of state officials and the regulated industry are all entitled to respectful consideration. *See Christopher v.*

[2] The government also references 1940s cases, such as *Gray v. Powell*, 314 U.S. 402 (1941), *see* U.S.Br.25, but those "heralded a new era." Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 977 (2017) (Bamzai).

SmithKline Beecham Corp., 567 U.S. 142, 157 (2012). Only the executive demands more and demands it even when its interpretation is novel or as oscillating as a sine wave.

The government lastly suggests that mandamus practice is a "forerunner of *Chevron*." U.S.Br.24. But the "deferential standard in mandamus did not reflect judicial deference to the official's interpretation"—"it was a limitation on the court's ability to provide the *remedy* of mandamus." F. Andrew Hessick, *Remedial* Chevron, 97 N.C. L. Rev. 1, 21 & n.110 (2018). Because *Chevron* "is not a remedial doctrine," *id.* at 16, mandamus history cannot rescue the government. That history just underscores that *Chevron* is egregiously wrong across the board.

2. *Chevron* has caused significant negative jurisprudential and real-world consequences.

Chevron has also produced negative consequences for the judiciary, political process, and citizenry. The government's responses are strikingly brief and uniformly meritless.

1. *Chevron* is hopelessly unworkable to the point that this Court no longer works with it. The government offers the lukewarm counter that *Chevron* is workable "[i]n the mine run of cases." U.S.Br.35-36. But *Chevron* is either workable or not, and it plainly is not. The government itself has previously admitted that *Chevron*'s trigger question—"how much ambiguity is enough?"—is unanswerable. Tr. of Oral Arg. at 72, *Am. Hosp. Ass'n v. Becerra*, No. 20-1114 (U.S. Nov. 30, 2021). Thus, it is insufficient to tell judges to "not wave the ambiguity flag" too soon,

U.S.Br.14-15, when no one can agree how soon is too soon with "different judges hav[ing] wildly different conceptions" of ambiguity, Kavanaugh 2152.

And *Chevron* has grown only more unworkable over time as the Court has "pitted" it "with exceptions and caveats." *Buffington*, 143 S.Ct. at 20 (Gorsuch, J., dissenting from denial of certiorari). While the government now applauds that list of exceptions, *see* U.S.Br.14-16, 36-37, it previously blamed them for creating "difficulties" and "complications," Br. in Opp. at 25, *Buffington*, No. 21-972 (Apr. 8, 2022). Furthermore, the government does not deny that the Court will have to make *Chevron* even *more* elaborate if it does not make a clean break now, as many vexing questions lurk just around the corner. Pet'rs.Br.35.

Despite its obvious negatives, the government insists that *Chevron* has "many [offsetting] benefits." U.S.Br.37. The government claims "*Chevron* respects the unique expertise, often of a scientific or technical nature, that federal agencies can bring to bear." U.S.Br.17 (quotation marks omitted). But once again, the government ignores what *Chevron* actually entails. *Chevron* is not limited to thorny technical and scientific questions, as this case well illustrates. No scientific or technical expertise is needed to determine whether a cash-strapped agency has legal authority to expand its enforcement regime by forcing the governed to foot the bill. Even if agencies bring such expertise to bear, *but see* Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 Cardozo L. Rev. 2189, 2195 (2011) ("Political appointees, often not experts, are normally responsible for managing agencies and

determining policy. And policy often reflects political, not simply 'scientific,' considerations."); *cf.* Little.Sisters.Amicus.Br.20-21, *Skidmore* is well-equipped to account for it, *see Kisor*, 139 S.Ct. at 2442-43 (Gorsuch, J., concurring in the judgment).

The government claims *Chevron* "reduces" circuit splits and "promotes national uniformity in federal law." U.S.Br.18. But circuit splits are no burden; it "is why we have a Supreme Court." *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 527 (6th Cir. 2019) (Kethledge, J., dissenting). And the national uniformity *Chevron* produces is both overstated (since courts disagree on when to wave the ambiguity flag) and a form of uniformity only the government could love. *Chevron* does not promote national uniformity as to what statutes actually mean; it simply imposes the current administration's view of a disputable statute on the whole country without a definitive judicial reckoning.

Finally, the government revealingly warns that overruling *Chevron* would "shift policymaking power" to courts. U.S.Br.21. But that adopts a view of statutory construction fundamentally at odds with the Framers' design. If the Framers viewed statutory interpretation as "policymaking," they would have assigned that role to somebody other than life-tenured, unelected judges. And yet the framing generation was essentially unanimous that when government power is brought to bear against an individual under a statute, it is emphatically the province of the judiciary to definitively resolve the meaning of the statute. *See* Pet'rs.Br.24-25. A regime in which the judiciary stops short at some ill-defined

point and gives the tie to the government can be described as "policymaking," but it would be anathema to the Framers.

2. The government's effort to belittle the damage that *Chevron* has inflicted on the legislative process is also ineffective. The government's primary response is to demand "empirical evidence" for the debilitating effect that *Chevron* has had on Congress. U.S.Br.44. But even a quick look at this Court's docket over the past few years provides evidence in spades. The Court has not reviewed new legislation on contentious issues like vaccine mandates, student loan reform, border policy, or climate change. Instead, on all those issues, this Court has reviewed agency rules purporting to accomplish via executive fiat what Congress would not authorize via legislation. In some cases, the President could not get support even from his own party for some important initiative due to the perception he could invoke some ambiguous existing statute. Michael D. Shear et al., *As Democrats Seethed, White House Struggled to Contain Eviction Fallout*, N.Y. Times (Aug. 7, 2021), https://nyti.ms/45N9sff.

The government can pretend this is novel, but petitioners are hardly breaking any news. Members of Congress have explained how *Chevron* encourages "Congress to let the hardest work of legislating bleed out of Congress and into the Executive Branch." *The* Chevron *Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies* at 4, Hearing Before the H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, 114th Cong. (March 15, 2016) (Hon. Bob Goodlatte). Members of this Court

have described the phenomenon, too. *See, e.g.*, Kavanaugh 2150. While the government claims Congress "is in a far better position than this Court" to address this problem, U.S.Br.45, it does not explain why Congress would act when the status quo allows members to evade "responsibility" and avoid the kind of compromises that forge enduring legislative solutions at the expense of primary challengers. *Overruling* Chevron *Could Make Congress Great Again*, The Reg. Rev. (Sept. 12, 2018), https://bit.ly/48XvaQb.

3. The government has even less to say about *Chevron*'s baleful consequences for the citizenry. Without embarrassment, the government claims that "individuals … *benefit* from having *Chevron*[]." U.S.Br.45 (emphasis added). If the government actually believes that, it is an additional reason to overrule *Chevron*. To be sure, in some regulatory contexts, a subset of regulated parties will support the current administration's approach and may even lob in a brief supporting the agency while citing *Chevron*. But when the administration or context changes, they will be on the no-deference team. The only constants are that a rule giving the tie to the government always favors the government and incentivizes the regulated to direct their efforts at agency capture, rather than filing briefs focused on the best reading of the statute or lobbying for legislation that clearly resolves the matter. That system works a particular hardship on individual citizens and small businesses that lack the resources to cozy up to the regulators who are the only consistent beneficiaries of *Chevron*. *See* 27.States.Amicus.Br.17-18.

The government asserts that "[r]egulated parties and members of the public … benefit from the centralized procedures that agencies … can use to interpret federal law," such as the notice-and-comment process. U.S.Br.18. Talk about a lack of empirical evidence. The government cites no opinion surveys documenting a consumer preference for submitting comments to Washington, as opposed to litigating in their local district court. Moreover, litigation in a post-*Chevron* world would at least definitively fix the meaning of the statute, rather than just limit the boundaries of executive flexibility to engage in a new round of notice-and-comment rulemaking every four years.

3. Overruling *Chevron* would not upset reliance interests.

The government's principal defense of *Chevron* is not that it was correctly decided or consistent with the separation of powers or due process, but that overruling it would be "convulsive." U.S.Br.10. That paean to stability and reliance interests is remarkable because *Chevron* is a reliance-destroying doctrine that empowers the executive to change the law and defy expectations as long as it acts within some ill-defined zone of reasonableness.

To be concrete, there are only two types of cases that invoke *Chevron*: step-one cases and step-two cases. Everyone agrees that overruling *Chevron* will have zero impact on any step-one case. And as to step-two cases, no private party has any justifiable reliance interests, because the whole point of *Chevron*, as supplemented by *Brand X*, is to allow the government to reverse course even after a court blesses its first

interpretation of the statute as reasonable. *See Brand X*, 545 U.S. at 982-86.

And that is no mere theoretical possibility. On the highly consequential and contentious issue of how to regulate broadband, which was litigated all the way to this Court in *Brand X*, the government recently announced its intention to flip-flop for the fourth time, with the Biden Administration revisiting the Trump rule, which revisited the Obama rule, which rescinded the rule approved in *Brand X*, which overturned the agency's first crack at the statutory interpretation question. FCC, *Chairwoman Rosenworcel Proposes to Restore Net Neutrality Rules*, (Sept. 26, 2023), https://bit.ly/46ToZen; *see also Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (documenting FCC's repeated flip-flops on net neutrality); *cf.* U.S.Chamber.Amicus.Br.14-17. Under these circumstances, what is convulsive and a threat to stability is maintaining the status quo.

Finally, even assuming that some regulated parties are bravely relying on *Chevron* step-two decisions—despite the possibility of *Brand X*-style switcheroos and *Chevron*'s own "uncertain status," *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, 2485 (2018); *see* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 476 (2021) ("[N]o one would be shocked" if *Chevron* is "overruled.")[3]—overruling *Chevron* hardly means

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[3] The government claims that relying on this Court's precedent "is *always* justifiable reliance." U.S.Br.34. That statement defies not only *Janus* but observed reality. Some precedents linger for decades even though they are "obvious[ly]" not good law. *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018).

eviscerating those decisions if the agency retains an interpretation upheld in a precedential opinion. As the government does not deny, "[p]rinciples of *stare decisis* … demand respect for precedent whether judicial methods of interpretation change or stay the same." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008). This Court swore off the habit of inferring unwritten causes of action without revisiting decisions under the discarded interpretive methodology. *Id.* The only argument for not doing the same here is that *Brand X* eliminates the possibility for the kind of reliance interests occasioned by inferred causes of action. Either way, the government cannot seriously contend that regulated parties have justifiably arranged their affairs around *Chevron*, or cases decided using it, when "*Chevron*'s very point is to permit agencies to upset the settled expectations of the people by changing policy direction depending on the agency's mood at the moment." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

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Although the Court need not apply statutory *stare decisis* to *Chevron*, those factors make the path forward clear beyond peradventure: After 40 years of confusing experimentation and disastrous consequences, it is time to give the profoundly wrong *Chevron* doctrine "a tombstone no one can miss." *Buffington*, 143 S.Ct. at 22 (Gorsuch, J., dissenting from denial of certiorari).

II. At A Bare Minimum, The Court Should Clarify That *Chevron* Is Not Triggered By Statutory Silence.

At the least, the Court should narrow *Chevron* and clarify it does not apply merely because the statute is silent on an issue, especially when the purported silence involves an extraordinary power that Congress expressly conveyed elsewhere in the statute subject to equally express limits. *See* Pet'rs.Br.43-46. The government protests that this clarification "would contravene *Chevron*'s holding that an agency's interpretation should be reviewed for reasonableness 'if the statute is *silent or ambiguous* with respect to the specific issue.'" U.S.Br.45. But the government elsewhere encourages the Court to "circumscribe *Chevron*'s domain … if necessary," and it does not argue that doing so would offend *stare decisis* principles. U.S.Br.36.

There is every reason to circumscribe *Chevron* when it comes to statutory silence if the Court does not overrule it entirely. At the outset, while *Chevron*'s "fictionalized" concept of implicit delegation, Barron & Kagan 212, may be a tolerable fiction when it comes to ambiguity, conjuring delegation from silence is wholly inconsistent with the "ancient and venerable principle" that agencies may not act unless they have express authority, *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring).

The government contends there is no meaningful distinction between silence and ambiguity, and, as if to prove the point, claims that the statute here—the Magnuson-Stevens Act (MSA)—is "*not* silent" regarding industry-funded monitoring. But every

panel member below begged to differ. *See* Pet.App.16, 27. And the silence on the agency's ability to force the herring fleet in this fishery to foot the bill for government-trained and government-mandated monitors is underscored by the fact that, where the statute was not silent on this issue and expressly granted this authority, it equally expressly limited the burdens. Thus, the government's inability to perceive statutory silence produces a regime where the largest and most commercially successful fleets in the Pacific Northwest have a congressional guarantee that monitoring costs will consume no more than 2% of their take, while petitioners face a burden that the government itself estimated at 20% of their net operating revenues. *See* Pet'rs.Br.49-50.

The government's efforts to minimize that burden only underscore the fundamental problems with its position here. The government trumpets the fact that, "[a]lthough not required to do so," U.S.Br.5, it created a refund program where companies subjected to an unauthorized demand to pay for government-mandated monitors could apply to obtain an equally unauthorized refund (while presumably thanking their overlords for this act of grace). But surely even the government must concede that the reason this refund was not "required" was because the statute was utterly silent on the matter. A system where an agency can conjure a regime of impositions and refunds reminiscent of the Tax Code out of such silence would be wholly unrecognizable to the Framers. *Cf.* U.S. Const., Art. I §7, cl. 1 (measures "for raising revenue shall originate in the House"); House.Amicus.Br.28 (referencing the "end-run of Congress's power of the purse" here).

The government alternatively tries to lessen the burden here by analogizing it to the need for regulated parties to pay for "third parties" (like "lawyers") when they need "to comply with federal law." U.S.Br.47. But there is a wide gulf between paying a personal lawyer and paying a government-mandated monitor: The former is a hand-picked agent of the individual; the latter is a government-trained agent that the National Marine Fisheries Service (NMFS) itself describes as its "eyes and ears on the water." NOAA Fisheries, Fishery Observers, https://bit.ly/3XYDI2K (last visited Oct. 15, 2023). Petitioners can hardly claim attorney-client privilege over statements to monitors. That underscores who the monitors work for and explains why NMFS itself previously conceded that its rule is "controversial," CADC.App.411—and why Congress limited its approval of industry-funded monitoring to only three contexts subject to strict limits.

In short, while there are numerous excellent reasons why the Court should discard *Chevron in toto*, it should at least make clear that not even *Chevron* allows the government to leverage statutory silence to impose extraordinary rules that involve powers that Congress carefully cabined in the same statute.

III. In Either Event, The Court Should Reverse Rather Than Remand.

This Court should reverse the decision below rather than remand regardless of whether it overrules or narrows *Chevron*. Unlike other contexts where overruling a precedent raises difficult questions about what should replace the discarded test, here the answer is obvious: good, old-fashioned statutory

interpretation. And using those ordinary tools, this is a straightforward case, as the MSA's explicit authorization for both the permissive and mandatory use of industry-funded monitors elsewhere, subject to express limits in the case of all but foreign vessels, preclude divining an uncapped authority elsewhere.[4] Making that point clear would not only provide concrete relief to petitioners, but underscore how far astray *Chevron* can take a court trying to apply it faithfully. *See* Pet'rs.Br.47-52.

The government nonetheless requests a remand if the Court adopts a "new approach." U.S.Br.48. The government does not argue that the Court is required to remand, and the prudent course is to definitively resolve this case now, as other courts have realized. *Cf. TWISM Enters., L.L.C. v. State Bd. of Registration for Pro. Engineers & Surveyors*, 2022 WL 17981386 (Ohio 2022) (rejecting deference in Ohio and resolving statutory question); *King v. Miss. Mil. Dep't*, 245 So.3d 404, 410 (Miss. 2018) (similar in Mississippi).

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[4] The government's principal response is to invoke §1858(g)(1)(D), which "empowers the agency to impose sanctions on vessel owners that fail to timely pay for third-party observer services." U.S.Br.46. But contrary to the government's belief that this was Congress' sly mechanism to empower NMFS to require herring fishermen to cede 20% of their returns to third-party monitors, this provision merely provides a sanction to ensure payment of the monitoring obligations expressly authorized in the statute.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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