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Brief of Amici Curiae Administrative and Federal Regulatory Law Professors in Support of Respondents

Andrew F. Popper

No. 22-451

IN THE

Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, *et al.*,

Petitioners,

v.

GINA RAIMONDO, 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 *AMICI CURIAE* ADMINISTRATIVE AND FEDERAL REGULATORY LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person other than Amici's counsel made a monetary contribution to fund the preparation or submission of this brief.

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SUMMARY OF THE ARGUMENT

Amici write to address the first question presented: whether *Chevron* should be overruled. Properly understood, it should not.

Chevron has been much discussed but not always understood. On the one hand, courts have sometimes misapplied the doctrine or failed to understand its legal foundations. On the other, courts and commentators alike have criticized *Chevron*, often as a result of such aggressive applications. This case provides an opportunity for the Court to clarify what *Chevron* does and does not entail, while reaffirming the essential role that judicial recognition of constitutionally delegated policymaking authority plays in federal statutory programs.

Many of the criticisms leveled at *Chevron* are based on the premise that it empowers agencies to usurp the authority of the courts to interpret statutes. So framed—and some courts have indeed seemed to understand it this way—*Chevron* looks like a supercanon of construction, one that requires courts to reflexively defer to what an agency claims a statute means whenever there is some statutory ambiguity.

But the premise is wrong. *Chevron* is not a doctrine for resolving statutory ambiguities as such, but rather for identifying and policing the boundaries of Congressional delegations. It provides a rubric to recognize when (and to what extent) Congress has granted an agency authority to decide a matter left unresolved by the statute, usually because the way in

which the statute applies to concrete situations requires elaboration through agency experience or some aspect of the statute requires "the formulation of subsidiary administrative policy within the prescribed statutory framework." *Yakus* v. *United States*, 321 U.S. 414, 425 (1944). *Chevron* thus requires far more than mere ambiguity—it requires statutory indeterminacy, a gap "left . . . unresolved" even after a court has applied all its "traditional tools of statutory construction." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018). In other words, *Chevron* addresses, not instances where statutory text might be judicially construed to have this meaning or that, but where, using these "traditional tools," the court cannot confidently arrive at a judicial construction at all, either because competing interpretations are equally plausible or because identifying a governing interpretation requires policy assessments that courts ought not to make.

When Congress leaves such a gap—while constitutionally delegating to the agency the primary responsibility to implement the statute—Congress signals its intent to "entrust[] to the [agency], rather than to the courts, the primary responsibility for interpreting the statutory term" within the limits of the authorizing statute. See *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). By Congress's command, the agency should exercise its discretion to fill that gap, and the courts independently determine and police the boundaries of the agency's delegated authority and ensure it has exercised it reasonably. See Peter L. Strauss,

"Deference" Is Too Confusing – Let's Call Them "Chevron Space" and "Skidmore Weight", 112 Colum. L. Rev. 1143, 1145 (2012).

So understood, *Chevron* need not and should not be overruled. Since early in the history of the Republic, Congress has seen fit to entrust executive agencies to "fill up the details" of the more "general provisions" that it enacts. See *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 20 (1825). *Chevron*, properly understood, merely assists in identifying the boundaries of statutory delegations; it does not pose the problems Petitioner identifies with the more extravagant conceptions of the doctrine (however justified those concerns may be). Nor does it violate the Administrative Procedure Act—on contrary, *Chevron* mirrors that statute by requiring courts to independently determine the scope of agency authority and then review actions within that scope for reasonableness. Finally, *Chevron* promotes, rather than threatens, the separation of powers by giving effect to duly enacted laws.

Requiring that Congress do its job is one thing. It is quite another to refuse Congress's choice to delegate certain issues—issues it could not reasonably attend to itself—to the Executive. *Chevron* respects those choices and should be reaffirmed.

ARGUMENT

I. *Chevron* Enforces Delegations Grounded in Statutory Structure and Context Rather Than Resolving Mere Statutory Ambiguities.

A. *Chevron* centers on delegations of discretion within statutory limits.

Chevron rests on a longstanding inference: that when Congress entrusts an agency to implement a statute yet leaves in that statute an unresolvable ambiguity or room for policy discretion, the agency may make policy within that space, subject to judicial policing of the boundaries. More precisely, *Chevron* recognizes that when a statute authorizes an agency to implement a statutory program by promulgating governing regulations, and when the agency addresses an issue that the statute left open, the statutory context and structure signal that the agency's authority extends to addressing that particular issue. *Chevron* somewhat imprecisely labelled such delegations as "implicit." 467 U.S. 837, 843. They are more accurately described as "structural" or "contextual," since they are grounded in an inference from the statute's structure and context that Congress authorized the

agency to exercise policymaking discretion within a specific area. See Strauss, *supra*, at 1163.[2]

This form of delegation is nothing new. Since the founding, Congress has promulgated certain statutes in "general provisions" and entrusted executive agencies to "fill up the details" as they carry out the statutory commands. *Wayman*, 23 U.S. at 43. For instance, the Postal Act of 1792 gave the Postmaster General broad discretion to determine "where to set up post offices," and "full authority to contract for the carriage of mail by whatever devices he thought 'most expedient.'" Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations*, 1787–1801, 115 Yale L.J. 1256, 1294 (2006); *id.* at 1295 ("Congress made broad delegations of authority in a host of other statutes."); see also, e.g., Act of Aug. 5, 1789 ch. 35, § 1, 1 Stat. 49 (authorizing a board of commissioners "to carry into effect the said ordinance and resolutions of Congress, for the settlement of accounts between the United States and individual states"); Act of Mar. 26, 1804, ch. 35, § 1, 2 Stat. 277, 277 (delegating authority to the surveyor-general to dispose of public lands in the Indiana Territory according to regulations the surveyor promulgated).

As the number of statutes and administrative agencies has grown, this Court continued to recognize that certain statutes delegate authority to agencies to formulate "subsidiary administrative policy within

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[2] We refer generically to "the agency" for convenience, but we note that the delegations referred to in this brief can be either to executive departments or so-called independent agencies.

the prescribed statutory framework." *Yakus*, 321 U.S. at 425. In the labor context, for instance, the Court recognized in the broad terms of the National Labor Relations Act that Congress "left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798 (1945) (sustaining agency interpretation of clause banning employer "interfere[nce]" with employee concerted activity to protect the right of employees to talk to each other in the workplace on union issues under certain circumstances). Yet that delegation did not preclude the Court from rejecting NLRB interpretations that "rest[ed] on erroneous legal foundations" as opposed to the exercise of policymaking discretion. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112-13 (1956) (holding *Republic Aviation* did not apply to nonemployee union organizers).

Congressional delegations of policymaking discretion are often unavoidable; "in our increasing complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad directives." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). Although members of this Court differ over the specificity with which Congress must legislate to exercise its Article I legislative power, *compare Gundy* v. *United States*, 139 S. Ct. 2116, 2129 (2019) (plurality) (discussing case law and application of nondelegation doctrine) with *id.* at 2135-42 (Gorsuch, J., dissenting) (same), no one disputes the role of agencies subject to

presidential and judicial supervision in "the steady administration of the laws," *Seila Law LLC* v. *Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2203 (2020) (quoting The Federalist No. 70, at 471 (A. Hamilton)).

Put in terms of congressional intent, Congress understands that by entrusting an agency to carry out a statute, and by leaving that statute indeterminate in certain respects, it is calling on the agency to fill in the details with policy choices consistent with the statute as a whole (and other applicable law). In some cases, Congress does this expressly, specifically directing an agency to set standards to define a statutorily undefined term. *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977) (welfare statute delegating to agency authority to set standards defining term "unemployment"). Yet Congress may also signal its intent through statutory structure and context, which is what *Chevron* appreciated and what is generally understood in other areas of statutory construction. For instance, Congress may direct an agency to provide that rates for utility pole attachments are "just and reasonable." See *National Cable & Telecomms. Ass'n, Inc.* v. *Gulf Power Co.*, 534 U.S. 327, 338-339 (2002). Or it might direct an agency to regulate certain "stationary sources" to control pollution, without explaining (beyond the phrase itself and the surrounding context) what "stationary sources" are. *Chevron*, 467 U.S. at 846.

In such cases, one can infer that Congress intended, as surely as when it says so expressly, to grant the agency limited authority to "formulat[e] . . . policy"

to fill the open space left in the statute as the agency enforces it. *Chevron*, 467 U.S. at 843 (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). After all, if Congress had wanted to issue the agency a precise directive, or a strict prohibition, Congress would have said so itself. See *City of Arlington* v. *FCC*, 569 U.S. 290, 296 (2013) ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.").[3] Rather than do so, Congress used statutory language that, at least as applied to the matter at issue, resists judicial construction, thus creating a defined zone for agency policymaking discretion.

B. In practice, this Court's *Chevron* jurisprudence enforces structural delegations rather than resolving ordinary ambiguities.

Some courts and commentators—referring to arguably confusing language in opinions, including some from this Court—have described or treated *Chevron* as a doctrine for resolving ordinary statutory ambiguities, governing whenever statutory text bears more than one interpretation.[4] That is wrong. The Court's

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[3] This does not mean that the courts are excluded from determining the scope of the agency's delegated authority de novo, as we explain below. Indeed, neither the majority opinion nor the dissent in *City of Arlington* disagreed that it is for the court to determine the boundaries of agency authority. *Compare* 569 U.S. at 297, 301 (majority) *with id.* at 317 (Roberts, C.J., dissenting).

[4] See, e.g., *Michigan* v. *EPA*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) (criticizing agencies' use of "statutory ambiguity" "not to find the best meaning of the text, but to formulate legally

actual application of *Chevron* in the vast majority of its decisions reflects the understanding of the doctrine as grounded in enforcing Congressional delegations. And those delegations are based on the facts that the statutory question at issue is *not* susceptible of judicial resolution and that the agency charged with implementing the statute has promulgated a resolution of the question in the manner Congress has granted the agency to act.

Thus, certain principles govern *Chevron* cases. A court should not uphold an agency interpretation when the particular issue can be resolved using ordinary tools of judicial construction. If it can, there is no space for the agency to fill. Cf. *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("Congress . . . [does] not delegate authority to the Commissioner to develop new guidelines or to assign liability in a manner inconsistent with the statute."). Nor should a court uphold an agency interpretation unless the agency exercised delegated interpretative authority in the manner Congress authorized. And, just as crucial, the agency's particular exercise of its interpretative authority must fall within the scope of the delegation.

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binding rules to fill in gaps based on policy judgments"); Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2151 (criticizing this approach, and explaining, "when the Executive Branch chooses a weak (but defensible) interpretation of a statute, and when the courts defer, we have a situation where every relevant actor may agree that the agency's legal interpretation is not the best, yet that interpretation carries the force of law. Amazing.").

Each of these inquiries boils down to the same "question in every case," namely, "whether the statutory text forecloses the agency's assertion of authority, or not." *City of Arlington*, 569 U.S. at 301.[5]

1. Chevron *applies only where the statute's meaning on the question presented cannot be resolved with traditional tools of judicial construction.*

a. If a court can resolve the statutory interpretation question at hand, it should. There is neither need nor warrant for *Chevron* deference in such cases. That is, if a court concludes that it *can* construe the statute on the question addressed by the agency, then Congress left no space for the agency to fill with its policy-making discretion.

The Court described the doctrine along such lines from the beginning: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9; *City of Arlington*, 569 U.S. at 296 ("[A]pplying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question

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[5] The principles listed bear some resemblance to the famous multi-step framework typically associated with *Chevron* doctrine as it has developed. We do not suggest that judicial review of agency statutory interpretation involves a specific number of steps, however, because the Court has not in fact treated *Chevron*'s "steps" as a rigid order of operations and because the evidence and inquiry at each "step" is often relevant to others.

at issue.") (quotation marks omitted). Thus, "deference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Systems*, 138 S. Ct at 1630.

b. The Court's holdings bear out this description. Consider *Chevron* itself. There, Congress had empowered the EPA to enforce the Clean Air Act by limiting modifications to "stationary sources" that increased emissions. *Chevron*, 467 U.S. at 840. The EPA issued regulations that allowed states to use a "plantwide definition of the term 'stationary source,'" which in effect permitted power plants to install new equipment (like smokestacks) as long as the plant's total emissions did not increase. *Ibid.* Environmental groups challenged that interpretation as ultra vires on the ground that "stationary source" meant individual smokestacks, which would prohibit installation of any new equipment that increased emissions even if that increase were offset by other emission reductions achieved through other plant changes.

The *Chevron* court scrutinized the statute to determine whether Congress had "explicitly" or "implicitly" "left a gap" for the EPA to supply its own definition of "stationary source." The Court turned to each of its usual tools of statutory construction, from text to canons to legislative history and purpose (the latter two being less controversial then than they are now). See *id.* at 842 n.7, 859-866 (invoking "statutory language," "context"-based canons like *noscitur a sociis*, "legislative history," and purpose). Exhausting all of those tools, the Court concluded that Congress "did not have

a specific intention" on the meaning of "stationary source." In familiar terms, this meant that Congress had made a "legislative delegation" to the EPA to interpret the statute based on its own "policy choice." *Id.* at 844, 845.

This approach mirrored what the Court had long done in administrative law cases. Take as an example *NLRB* v. *Hearst Publ'ns*, in which the Court addressed whether news vendors, called "newsboys," were "employees" under the National Labor Relations Act. 322 U.S. 111 (1944). The Court deferred to the agency's construction only after (i) rejecting the construction proffered by the employer that the statutory term should be construed by reference to the state common law; (ii) finding that there was no uniform meaning in a range of federal statutes containing the same term; and (iii) concluding that newsboys were not easily categorizable as either classic employees or classic independent contractors. See *id.* at 120-29.

On the other side of the ledger, the Court has often been able to resolve statutory ambiguities using its own independent judgment and "traditional tools" of construction. In *Dole* v. *United Steelworkers*, for instance, the Court employed the linguistic canon *noscitur a sociis* and the statute's "structure . . . as a whole" to resolve the statutory question and therefore "decline[d] to defer to the OMB's interpretation." 494 U.S. 26, 36, 42 (1990). The Court has relied, too, on a preponderance of dictionary definitions, together with evidence from statutory context, to resolve statutory ambiguity. See *MCI Telecomms. Corp.* v. *AT & T Co.*, 512

U.S. 218, 225-229 (1994) (holding that removal of regulatory filing requirements in their entirety exceeded agency's authority to "modify" the requirements). The Court has also invoked substantive canons to construe a statute and thus preclude resort to *Chevron* deference. See, e.g., *Morrison* v. *Nat. Australia Bank, Ltd.*, 561 U.S. 247, 272-73 (2010) (presumption against extraterritoriality); *Epic Systems*, 138 S. Ct. at 1630 ("canon against reading conflicts into statutes"); *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (canon against retroactive application absent a clear statement); *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (cannon of constitutional avoidance).

When a court does this, it essentially declares that Congress enacted a statute with a definite meaning on the question presented, even if that meaning requires some judicial spadework to unearth.

To be sure, courts—including this one—have been less than precise about how much ambiguity is needed to trigger *Chevron*. In certain instances, the Court has suggested that an agency construction is entitled to deference so long as it is "reasonable . . .—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); but see *id.* at 218 n.4.

This case presents the opportunity for the Court to clarify that *Chevron* requires more than bare ambiguity—it requires an ambiguity "*unresolved*" by tradi-

tional methods of statutory construction. *Epic Systems*, 138 S. Ct. at 1630 (emphasis added). Indeed, that was the approach "the *Chevron* Court itself intended," Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 n.175 (2016), and that the Court's *Chevron* holdings reflect.

2. Chevron *requires that Congress have delegated to the agency authority to decide the matter following appropriate procedures.*

If the court cannot construe the statute using ordinary tools of construction, then it becomes plausible that Congress made a structural delegation to the agency by leaving a statutory gap—what has been termed "*Chevron* Space" (see *Strauss*, supra at 1145)—that can be filled only by a policy choice. The other half of the equation, then, is whether Congress provided an affirmative indication that it desired the agency to decide the issue at hand in the way that the agency did. This Court has therefore recognized certain "preconditions" (*Adams Fruit Co., Inc.* v. *Barrett*, 494 U.S. 638, 649 (1990)) before a court may conclude that a statute delegates interpretive or policymaking discretion to the agency on a given question, no matter how ambiguous that statute may be.

a. First, *Chevron* deference can be triggered only when Congress has given the agency the power to enforce and apply the statute at issue. See *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). *Chevron* thus requires that the agency possess "congressional authority to determine the particular matter at issue in

the particular manner adopted," by which is meant (in part) "a general conferral of rulemaking or adjudicative authority." *City of Arlington*, 569 U.S. at 306 (discussing *Mead*).

b. Another "essential premise[]" of *Chevron* is that the agency interpretation to which deference would apply be an interpretation of "'a statute which [the agency] administers.'" *Epic Sys. Corp*, 138 S. Ct. at 1629. In *Epic Systems*, for instance, the NLRB in effect asserted it was entitled to deference not only for its interpretation of the NLRA, 29 U.S.C. § 151 et seq.—which it administers—but also for its interpretation of the Federal Arbitration Act, 9 U.S.C. § 1 et seq., which it does not. *Ibid.* The Court readily rejected that argument: Congress would not "implicitly delegate[] to an agency authority to address the meaning of a second statute it does not administer." *Ibid.*

Likewise in *Adams Fruit*, the Court declined to defer to an agency interpretation of a statute enforced through private, civil litigation. By creating a private right of action, "Congress has expressly established the Judiciary and not the department of labor as the adjudicator of private rights under the statute." 494 U.S. at 649.

c. Another *Chevron* precondition, as *Mead* itself illustrates, is that the agency issue its interpretation in the *manner* Congress authorized it to do. See 533 U.S. at 231-32 ("the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law"). Similarly, even if Congress

grants an agency the power to interpret statutes through formal acts of policymaking, arguments the agency's lawyer first made during the litigation do not receive deference because "Congress has delegated to the administrative official and *not to [its] counsel* the responsibility for elaborating and enforcing statutory commands." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (emphasis added). And, of course, the strictures of the APA generally govern the manner of administrative rulemaking and adjudication. See generally 5 U.S.C. §§ 551-559.

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Only if such preconditions exist can a court conclude that Congress intended a structural delegation to the agency to exercise discretion to fill a space left in a statute's terms. This approach makes sense of *Chevron* as a delegation doctrine. For a court to sensibly ensure the agency is exercising a power it was given and no more, the court must ensure that the agency was delegated authority to administer the very statute in question, with the force of law, and in the manner employed by the agency.

3. Assessing whether the agency acted within the scope of the structural delegation.

Once a court has found a valid delegation to the agency, what remains to decide is whether the agency stayed respected the terms of that delegation (as well as other applicable strictures including those found in

the APA). That inquiry demands that the agency's action "operate within the bounds of reasonable interpretation." *Utility Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 321 (2014) (quotation marks omitted). And, the Court has advised, "reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole." *Ibid.* (quotation marks and alteration omitted). Indeed, the Court employs all its usual tools of interpretation. See *ibid.* Ultimately, the Court analyzes whether the agency has confined itself to filling the policy space Congress left in the statute, or whether it has gone beyond the limits of the delegation. See *City of Arlington*, 569 U.S. at 307. And in this area, as throughout *Chevron*'s domain, "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington*, 569 U.S. at 297. There are a variety of ways an agency can step beyond the pale.

a. First, an agency does so when it gives an indeterminate statutory term a meaning it cannot possibly bear or contradicts some other term in the statute. Even "somewhat elastic phrase[s]," after all, are "not infinitely so." *MCI Telecomms. Corp.*, 512 U.S. at 232; see also *Utility Air*, 573 U.S. at 328 ("[T]he need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn.").

MCI can be read as an example of this principle. There, the Court held that the Federal Communications Commission's authority to "modify" a common carrier's obligation to post its rates did not allow the FCC to allow certain carriers representing a significant share of the market *not* to post their rates at all. See 512 U.S. at 234. The Court held that the FCC's rule was "much too extensive" to qualify as a "modification" and violated a separate requirement that general rules like the one the FCC promulgated be limited to "'special circumstances or conditions.'" *Id.* at 231, 232 (quoting 47 U.S.C. §203(b)(2)).[6]

b. Second, and similarly, the agency's interpretation may not be "inconsistent with the design and structure of the statute as a whole." *Utility Air*, 573 U.S. at 321 (quotations marks and alterations omitted).

Utility Air offers an example of an agency running afoul of this principle. The case dealt (in part) with a portion of the Clean Air Act called the "Prevention of Significant Deterioration" (PSD) program. The PSD provisions required that certain stationary sources—those emitting more than 250 tons of "any air pollutant" per year—be equipped with advanced emission control technologies. *Id.* at 309. The EPA claimed that greenhouse gases fell within the statutory term "air

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[6] To be sure, the *MCI* Court initially construed the statutory term "modify" as a judicial matter (see 512 U.S. at 225-229), but it went on to assess whether the agency's interpretation could reasonably fit within the meaning of the term so construed.

pollutant" and therefore were subject to the PSD program. *Id.* at 312.

In an exercise of boundary enforcement, the Court rejected that interpretation. It first acknowledged that Congress had given the EPA some discretion to select which substances to regulate as "air pollutants." *Utility Air*, 573 U.S. at 319 (explaining that "air pollutant" described "the universe of substances the EPA may *consider* regulating under the Act[]"). Yet the EPA had gone beyond "the bounds of reasonable interpretation" in applying the PSD program to greenhouse gases. *Id.* at 321. Stationary sources emit greenhouse gases at far greater levels than other pollutants. If every source emitting more than 250 tons of greenhouse gases were subject to PSD protocols, it would have "calamitous consequences"; the number of regulated sources would jump from 15,000 to 6.1 *million*, and annual compliance costs would "balloon" from $62 million to $21 *billion*. *Id.* at 321-22. Rather than regulating factories, the EPA would end up with authority to regulate "smaller industrial sources" like "large office and residential buildings" and "hotels." *Id.* at 310.

To take the same principle from the affirmative side, the Court has taken care to assess whether the agency's interpretation recognizes the goals of the statute and makes a reasonable attempt to further them. *Chevron* itself reflects such an inquiry. After an exhaustive review of the bases for the agency's position, the Court concluded that it was consistent with the statute's language, see 467 U.S. at 861 (noting

that related language "itself implies a 'bubble concept' of sorts"), and the concerns motivating the statutory scheme, see *id.* at 863 (observing that the EPA's interpretation arguably furthered statute's goals). *Utility Air*, addressing a different aspect of the rule challenged there, undertook a similar analysis. See 573 U.S. at 332 (holding that the challengers failed to demonstrate that the rule's demands would "be of a significantly different character from those traditionally associated with PSD review").

c. A third, overarching, ground for rejecting an agency's interpretation is the so-called major questions doctrine. As Justice Barrett recently explained, this doctrine is best understood as rooted in the common-sense insight that, depending on the statutory context, "a reasonable interpreter [of the statute] would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring); see also *id.* at 2379 ("[C]ontext is also relevant to interpreting the scope of a delegation.").

The Court has applied the doctrine that way in *Chevron* cases, assessing whether, in context, the agency's assertion of authority is plausible. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (rejecting EPA program premised on a "rarely . . . used" and "ancillary" statutory provision where program would "substantially restructure the American energy market" and "Congress had conspicuously and repeatedly declined to enact" similar proposals); see also *FDA* v.

Brown & Williamson Tobacco Corp., 529 U.S. 120, 158-60 (2000). As an inference based on statutory text and context, the doctrine fits comfortably within the *Chevron* question "whether the agency has stayed within the bounds of its statutory authority." *City of Arlington*, 569 U.S. at 297; see also Brian Chen & Samuel Estreicher, *The New Nondelegation Regime*, 102 Tex. L. Rev. (forthcoming).[7]

d. Finally, the agency must comply with the APA and any other procedural requirements. This includes the use of notice-and-comment rulemaking where appropriate, arbitrary-and-capricious review, and the like. See generally 5 U.S.C. §§ 553, 556, 557. Indeed, while *Chevron* unfortunately did not cite the APA, its analysis of the "reasonableness" of the agency's interpretation is best understood by reference to APA § 706. *Chevron* assesses both the legal nature of the agency's authority and whether its exercise was an abuse of discretion in various ways, which mirrors what the APA commands. See generally 5 U.S.C. § 706(2).

* * * *

If a court ultimately concludes that deference to the agency is warranted, that is not because the judicial role has been abdicated, or merely because a statute appears "ambiguous." It is instead because the court is satisfied that Congress delegated to the agency limited discretion to fill a gap in the statute,

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[7] Available at SSRN: https://ssrn.com/abstract=4376257.

and that the agency limited itself to doing so consistent with the statute and in the manner prescribed by Congress.

II. So understood, *Chevron* need not be and should not be overruled.

A. *Chevron* does not pose the sort of concerns that Petitioner raises.

Properly understood, *Chevron* does not pose the sort of separation of powers concerns that Petitioner raises. Rather, it performs an essential office.

a. For one, because courts say "what the law is" when applying *Chevron*, there is no "executive branch[] aggrandizement." Contra Pet. 30-31; Pet. Br. 24-25. When *Chevron* applies, it means Congress has delegated to an agency, by statute, the authority to fill a gap with a policy choice. Assuming that delegation is constitutionally permissible, courts fulfill their judicial duty when they police the statutory limits on that authority and verify that the agency acts reasonably and within the scope of its delegation. This sort of deference—respect for the statute as Congress wrote it rather than abdication to the agency to rewrite the statute—in no way offends the separation of powers. As Professor Henry P. Monaghan's famous pre-*Chevron* article put it, "[j]udicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of lawmaking authority to an agency." Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983).

For the same reasons, Petitioner's APA arguments miss the mark. See Pet Br. 28-29 (arguing that Section 706 of the APA forecloses *Chevron*). "There is no conflict between Section 706 and a decision to defer to an agency interpretation if the court concludes, as a matter of independent judgment, that Congress *intended* to defer to the agency's interpretation." Thomas W. Merrill, *The* Chevron *Doctrine: It's Rise and Fall, and the Future of the Administrative State* 48 (2022). Indeed, as noted above, *Chevron*'s approach mirrors the APA's strictures.

b. Nor does the faithful interpretation of statutory delegations threaten injury to "the citizenry." Contra Pet. 31; Pet. Br. 38. Under *Chevron*, agencies exercise only the interpretive authority given to them *by Congress*. It is Congress, not agencies, that decides how much authority agencies receive; it is the courts that enforce that decision consistent with the Constitution; and it is Congress again that can decide whether the delegation and what the agency did with it were wise policy. And there is some empirical evidence that Congress does, in fact, evaluate and re-evaluate its delegation choices. See David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach To Policy Making Under Separate Powers 237 (1999) (summarizing findings that "[l]egislators carefully adjust and readjust discretion over time and across issue areas so as to balance the marginal costs and benefits of legislative action against those of delegation."). Of course, the proper route for the citizenry to challenge permissible but unwise delegations is through the political process.

c. Finally, while *amici* concur that this case presents an opportunity for the Court to clarify when a court should find a delegation to the agency, Petitioner's arguments that *Chevron* is unworkable are misguided. Contra Pet. Br. 33-35. Petitioner's chief complaint is that "there is no good answer to how much ambiguity is enough to get from step one to step two." Pet. Br. 33. That critique proves too much. As stressed above, *Chevron* deference should apply only if the statute leaves open a policy space—that is, the court cannot answer the particular question as a matter of judicial construction. The Court has applied similar standards before, for example in applying the rule of lenity. See *Ocasio* v. *United States*, 578 U.S. 282, 295 n.8 (2016) ("That rule applies only when a criminal statute contains a 'grievous ambiguity or uncertainty,' and 'only if, after seizing everything from which aid can be derived,' the Court 'can make no more than a guess as to what Congress intended.'") (internal quotation omitted); *Wooden* v. *United States*, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring). If this standard is up to the task of protecting individual rights in criminal cases, Pet. Br. 38 ("breaking . . . ties"), then so too can it be trusted to assess legislative delegations.

B. *Chevron* Should Not Be Abandoned Because It Plays An Important Role In How Courts Apply Indeterminate Statutes

Not only is there no need to overrule *Chevron,* properly construed, there is need *not* to do so. Policy-

making discretion in the execution of laws is a necessary aspect of the constitutional scheme and an inevitable incident of legislation on complex subjects. *Utility Air*, 573 U.S. at 327 ("The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration.").

The implications of an over-scrupulous insistence that the executive undertake no statutory interpretation whatsoever would be troubling. To take one example, Congress would have to determine in advance the rates that would apply to utility pole attachments, or perhaps courts would have to decide whether specific rates count as "just and reasonable." Cf. *Nat'l Cable & Telecomms. Ass'n, Inc.* v. *Gulf Power Co.*, 534 U.S. 327 (2002). Neither is feasible. In short, although there are surely examples of courts deferring too readily to executive interpretations, there are also numerous areas where appropriate deference, as set forth above, is essential.

And this is not only because agencies have illuminating expertise in the relevant area, although in many cases they do. It is also because Congress, on the one hand, cannot determine ex ante every particular issue that might arise under statutory program. And courts, on the other, cannot construe ex post, as a matter of judicial construction, the sometimes necessarily indeterminate terms Congress must use. To ask courts to do so would be to force the judiciary to divine interpretations of statutes based on something other than the usual tools of statutory construction. The

temptation to rest decisions on policy concerns—and thereby transgress the limits of the judicial role and harm the public impression of the judiciary—would be great.

Moreover, the abandonment of *Chevron* would require courts to substitute their judgments for judgments Congress constitutionally delegated to the agency. For that reason, "The court is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano* v. *Sanders*, 430 U.S. 99 (1977). Just as judicial oversight ensures that agencies do not exceed their lawful boundaries, *Chevron*, properly understood helps courts avoid exceeding theirs.

CONCLUSION

For the foregoing reasons, the Court should reaffirm *Chevron*.

Respectfully submitted,

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