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* STATE OF WEST VIRGINIA AND 26 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Should the Court overrule *Chevron*—or at least clarify that statutory silence on controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency on the scope of those powers?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

In a quiet footnote some 40 years ago, the Court unanimously reminded everyone that courts are "the final authority on issues of statutory construction." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). And it instructed judges to "discern" Congress's "intention" when reviewing an agency's interpretation by "employing traditional tools of statutory construction." *Id.* Many might be surprised to learn that statements like these come from *Chevron*. The language sounds too much like the "claim to judicial supremacy over agency interpretations of the law" that "pre-*Chevron* courts" had asserted for decades before. Brian V. Payne, *Wading Through the Murky Waters of Chevron and Agency Jurisdiction*, 53 WASHBURN L.J. 583, 587 (2014). Yet Justice Stevens—who wrote *Chevron*—regarded the decision as "nothing more or less" than "simply a restatement of existing law." Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275 & n.77 (2014); see also, *e.g.*, *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 596 (2000) (Breyer, J., dissenting) ("*Chevron* made no relevant change.").

If only. Rather than continuing to offer their "best independent judgment of [each] law's meaning," courts began using *Chevron* as an "excuse[] … to abdicate their job of interpreting the law." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment). Courts and scholars alike came to believe that *Chevron* had "effected a fundamental transformation in the relationship between courts and agencies." Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 834 (2001). By giving "more policy

discretion and law-making authority to administrative agencies," the decision changed "the nature of American government without the benefit of a constitutional amendment." E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENV'T. L.J. 1, 5 (2005). Whatever limited reach the Court might have originally intended for it, *Chevron* quickly stretched to its furthest bounds.

That's not overstatement. In ignoring *Chevron*'s words of caution about the judicial role, courts have done more than dent a little constitutional doctrine. Even before *Chevron* hit the books, federal agencies had formed "a veritable fourth branch of the Government." *Fed. Trade Comm'n* v. *Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). "[M]ore values" were "affected by their decisions than by those of all the courts." *Id.* And that shift generated more "important consequences on personal rights" than most could have predicted. *Id.* *Chevron* made things worse—exchanging meaningful judicial review for reflexive agency deference. It also gave this growing "fourth branch" an incentive to grow bigger and quicker than before. And sure enough, agencies expanded fast. They abused their power, and real people suffered real harm.

Petitioners' case puts these realities front and center. A cash-strapped federal agency, relying on statutory silence, asserted power to force the family-owned and -operated fisheries it regulates to fund the agency's invasive inspection program or else stop fishing. Seeing nothing like this tax-and-spend scheme in the statute the agency said it was enforcing, the families sought relief in federal court. Yet leaning on *Chevron*, two courts sided with the agency. Only one judge out of four recognized

that "[a]n agency may not reorder federal statutory rights without congressional authorization." *POM Wonderful LLC* v. *Coca-Cola Co.*, 573 U.S. 102, 120 (2014); see Pet.App.21-37 (Walker, J., dissenting). The fishers were out of luck.

This sort of regulatory abuse happens too often, so the *Amici* States implore the Court to set things right. The only way to recover from *Chevron* is to scrap *Chevron*—all of it. Until that's done, "the danger posed by the growing power of the administrative state," *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting), will loom larger, and *Chevron*'s failure to provide the "stability [and] predictability" needed to save it will grow starker, *Vasquez* v. *Hillery*, 474 U.S. 254, 265-66 (1986). These dangers "cannot be dismissed" because it is easier for courts to punt if a law "is ambiguous and an administrative official is involved." *Gonzales* v. *Oregon*, 546 U.S. 243, 258 (2006) (cleaned up); see also Gary Lawson, *The Ghosts of* Chevron *Present and Future*, 103 BOSTON UNIV. L. REV. (forthcoming 2023) (explaining that *Chevron*'s expanded scope came from lower courts who "thought it would make their lives easier"). Whatever the motive, a "judicially orchestrated shift of power from Congress to the Executive Branch" only "invites" more agency "aggressi[on]." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150-51 (2016).

Our constitutional structure is durable enough to move forward without *Chevron*. And the States have been using workable approaches to de novo agency review for decades, to great effect. It's time for the Court to pull at *Chevron*'s quiet footnote again—and leave the rest behind.

SUMMARY OF ARGUMENT

I. *Chevron* has inflicted real and lasting damage on the States, on our citizens and businesses, on our "separation of powers," and, ultimately, on "our Constitution and the individual liberty it protects." *Dep't of Transp.* v. *Ass'n of Am. R.R.s*, 575 U.S. 43, 91 (2015) (Thomas, J., concurring in the judgment). An accurate accounting of this harm leads to only one conclusion: *Chevron* must go.

II. If it does, the sky will not fall. Courts can reassume their place as experts and "the final authority on issues of statutory construction." *Chevron*, 467 U.S. at 843 n.9. And the other branches will have reset incentives to better work to solve our most pressing problems. This return to the way it should have been can be done. It already has been—by this Court effectively in the past few years and in many States in the few decades before.

The harms from keeping *Chevron* are far worse than any risk we assume abandoning it. The Court should act.

ARGUMENT

I. *Chevron* Causes Real Damage.

Chevron has spelled trouble from the moment it hit the U.S. Reports. Climbing administrative costs, warped regulatory incentives, a power asymmetry between regulated citizens and their regulators—these features have defined the four decades we've spent with "the most cited administrative law case in history." Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us about the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 612 (2014). The citations need to stop. *Chevron*'s harms are as real as they are widespread. This case presents an

opportunity to stop them from spilling forward, and the Court should take it.

A. *Chevron* Makes Rulemaking Boundless And Unaccountable.

1. Federal regulations' numbers are at an all-time high. In *Chevron*'s forty years, federal agencies have promulgated over 156,000 final rules spanning 2.5 million pages in the Federal Register. CLYDE WAYNE CREWS, JR., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE, 2022 ED., COMPETITIVE ENTERPRISE INSTITUTE 92-93 (2022), https://bit.ly/43WCKaS. The rules agencies published over the last decade—40,000—have outpaced the laws that Congress enacted at a rate of 26-to-1. *Id.* at 7, 45. And about 10% of those regulations were "significant rules." *Id.* at 45. That designation means they substantially affected the economy or key government programs, interfered with another agency's ambit, or "raise[d] novel legal or policy issues." Executive Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

This flurry of activity—even where well-intentioned—imposes some serious costs. Agencies spent an estimated $78 billion to administer rules in 2020. Crews, *supra*, at 7. And that figure is a sliver of the $1.9 trillion in overall costs that some estimate run with federal regulations each year. *Id.* at 6, 33 ("recogniz[ing] that significant figures in mathematical terms are indeterminate," this estimate is an "amalgam of GDP losses and compliance costs derived from available official data and other accessible sources," including congressional cost analyses, cost-benefit reports, and social expense estimates). In perspective: that number "rivals individual corporate federal income

tax receipts," tops the GDP of all but the seven biggest economies in the world, *id.* at 6, 37, and matches the size of the massive American Rescue Plan Act of 2021 *each year*.

This state of play was unimaginable to the Framers. They "could hardly have envisioned today's vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities." *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting) (cleaned up). Perhaps for that reason, the Constitution says nothing about the existence of administrative agencies. See also Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523, 1555 (2013) ("While the Framers were familiar with British ministries' and colonies' charter governments, the writings on government that Framers like Madison were familiar with did not discuss anything that even approximates the administrative state we have today.").

Unlike today's freewheeling administrative state, the first of our "nation's regulatory statutes … contain[ed] detailed and *limited* grants of authority to administrative bodies." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255 (2001) (emphasis added). Early Congresses also "fought regularly with departments on domestic and international matters" that involved the President's policy directives "being carried out by his immediate cabinet subordinates." Turley, *supra*, at 1556. But over time, "the rise of the regulatory state and the need for administrative discretion" undermined the "strict limits on congressional delegation of power" the Framers had contemplated. Erwin Chemerinsky, *A Paradox Without A Principle: A Comment on the Burger Court's*

Jurisprudence in Separation of Powers Cases, 60 S. CAL. L. REV. 1083, 1107 (1987).

Today, "the administrative state has … grow[n] out of control." PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE 134 (1st ed. 2018). The Framers may have "considered Congress the most dangerous branch," but modern agencies "answerable to the President" now make the Executive "the constitutional institution to reckon with." Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 528-29 (2015). In truth, neither the President nor Congress can "truly monitor the millions of agency decisions made each year." Turley, *supra*, at 1556-57. And the functional agency autonomy that results "creates questions of accountability in a system of checks and balances." *Id.*; see *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting) ("[T]he danger posed by the growing power of the administrative state cannot be dismissed.").

2. Let's be clear: The States are not asking the Court to fix where we've ended up by doing away with regulations or agencies. An unfounded ban like that would be neither practical nor rational. We do, though, question the oft-unstated notion that more regulation is necessarily better. The space between these poles is important; it's the ground on which courts should referee regulatory disputes. But *Chevron* feeds regulatory growth because it all-but leave agencies to their own devices to decide how far they can go—in other words, the courts have left the field.

The judiciary's role in this space should have always stayed the same: Having the final say on what the law is, even when an agency is involved. It has always been true that "interpreting statutes and determining agency

jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary." *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring); see also generally Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016) (explaining how constitutional requirements of due process and independent judgment conflict with *Chevron*); cf. *Kisor*, 139 S. Ct. at 2423 ("[A]dministrative law doctrines must take account of the far-reaching influence of agencies and the opportunities such power carries for abuse."). Those principles and function contemplate *active* courts. For decades, "determining the limits of statutory grants of authority" to agencies has remained "a judicial function." *Stark* v. *Wickard*, 321 U.S. 288, 310 (1944). And courts have a responsibility, too, to make sure that agencies "not only [respect] the ultimate purposes Congress has selected, but … the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp.* v. *Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994).

Of course, Congress might leave "gap[s] for the agency to fill," *Chevron*, 467 U.S. at 843, with rules that track Congress's "policy decision[s]," *Statutory Interpretation*, *supra*, at 2152. When Congress "assign[s] an agency" policy choices in this way, then "courts should be hesitant to second-guess." Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge As Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1912-13 (2017). But it's a risky proposition to assume an actionable gap whenever an agency spots a possible statutory ambiguity. *Chevron*, 467 U.S. 843-44 (noting the distinction between express and implied agency delegations); see also *Keynote Address*, *supra*, at 1912 (because of "the limits of language,"

eliminating ambiguity altogether "is an impossible goal to achieve").

Chevron's footnote nine says little more than all that. So reading this footnote robustly—and applying the principles it espouses—might have kept our separation of powers on an even keel. Instead, four decades on we have a collective misapprehension of *Chevron*'s "restatement of existing law" to deal with. *Accidental Landmark*, *supra*, at 275 & n.77.

Although courts started by deferring "to the agency's reasonable gap-filling decisions," many have ended up "ceas[ing] to mark the bounds of delegated agency choice." *Negusie* v. *Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part). Now courts approach agency-interpreted statutes "backwards." *Bais Yaakov of Spring Valley* v. *FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017). How? By largely forgetting that "Congress does not delegate authority merely by not withholding it." *Gulf Fishermens Assoc.* v. *Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 456 (5th Cir. 2020). And by treating agency choices as de facto "good policy," courts move from "interpreting" statutes to "creating federal common law." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 422 (1989). After all, discerning "what is reasonable or appropriate" is "less a matter of pure interpretation than of common law-like judging." *Statutory Interpretation*, *supra*, at 2120 n.12.

All told, *Chevron* has changed the way courts work. Courts now "rush[] to find statutes ambiguous" instead of performing the heavy lift of "a full interpretive analysis" with its large suite of canons, tools, and presumptions. *Arangure* v. *Whitaker*, 911 F.3d 333, 336, 339 (6th Cir. 2018). And they find statutes ambiguous in the "vast

majority" of cases—about 7 of every 10—and then uphold the agency's view 93% of the time. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 33 (2017). Even when matched against co-equal sovereign States, *Chevron* delivers wins for the federal government most of the time. See Stephen M. Johnson, *The* Brand X *Effect: Declining* Chevron *Deference for EPA and Increased Success for Environmental Groups in the 21st Century*, 69 CASE W. RES. L. REV. 65, 116 n.42 (2018) (analyzing challenges to EPA actions over a 16-year period and finding that EPA prevailed 66% of the time when States sued alone).

With the deck stacked this way, a long-term shift of interpretive power from courts to the Executive is no surprise. See *Michigan* v. *EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring). Literally: *Chevron*'s supporters welcomed the decision as a "dramatic improvement" because it "transformed" the way courts approach "agency interpretations of statutory provisions." Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302 (1988). Critics too (admittedly even less surprisingly) called it a "siren's song" that "fundamental[ly] alter[ed]" "our constitutional conception of the administrative state." Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989). Skeptics also worried that it could create a "seriously overbroad, counterproductive and sometimes senseless" "blanket rule." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986).

Forty years later, it turns out all of them were right. *Chevron* has "morph[ed] into something truly

revolutionary." *Buffington* v. *McDonough*, 143 S. Ct. 14, 16-18 (2022) (Gorsuch, J., dissenting from denial of certiorari). But unfortunately, it's the critics and skeptics who predicted better what consequences that change would bring. Even some of the "strongest supporters of *Chevron* deference" in the early years have come to recognize that it is "a source of extreme instability in our legal system." Richard J. Pierce, Jr., *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 92 (2021). And for "a pillar in administrative law" as strong as *Chevron*, Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990), "extreme" may be an understatement.

B. *Chevron* Makes Rulemaking Too Damaging.

The consequences from this judicial swing and government-always-wins arrangement are serious.

1. For starters, by making agencies near-invincible, broad deference motivates them to wield vast "power to make" and "enforce" laws. *Ass'n of Am. R.R.s*, 575 U.S. at 91 (Thomas, J., concurring in the judgment). They push expansive constructions of their governing statutes that bind our citizens with "crushing" "criminal penalties and steep civil fines" for even inadvertent regulatory violations. *Cty. of Maui* v. *Haw. Wildlife Fund*, 140 S. Ct. 1462, 1489 (2020) (Alito, J., dissenting). Indeed, *Chevron* "invites an extremely aggressive executive branch philosophy of pushing the legal envelope" by "seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints." *Statutory Interpretation*, *supra*, at 2150-51. And it encourages agencies to try power grabs that affect larger classes of people or greater segments of an industry, not just "a few discrete players."

Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1559-60 (2009).

Chevron encourages aggressive agency policymaking like this more than on the front end. Agencies also count on its judicial shield on the back end. Petitioners' case illustrates this concept in neon lights: An agency arrogated power to itself by imposing levies on the entities it regulates in contravention of its authorizing statute and, at least arguably, the Constitution. See U.S. CONST. art. I, § 9, cl. 7 (Appropriations Clause). Yet the lower courts found not one but two ways to approve that power play under *Chevron*. See Pet.App.61-62 (district court siding with the agency at Step One), 13-16 (divided D.C. Circuit panel siding with the agency at Step Two). Rulings like these speak loud. Federal agency "[f]oxes" can build and then "guard henhouses" they forced the hens to buy, *Interpreting Statutes in the Regulatory State*, *supra*, at 446—no "straightforward and explicit command" from Congress needed, *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990). By condoning these tactics, *Chevron* has become "a powerful weapon in an agency's regulatory arsenal." *City of Arlington*, 569 U.S. at 314 (Roberts, C.J., dissenting).

Beyond all this, the Executive Branch's policy goals change every four to eight years, compounding the effects of agency overreach. A new administration's changes are rarely fractional. They often reflect "not merely differences of visions," but "*conflicts* of visions." THOMAS SOWELL, A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES 35 (2007) (emphasis added). Each new guard sees the world differently and thus reaches "sharply divergent, often diametrically opposed,

conclusions" on a wide range of issues. *Id.* Straight away, it seems, they start to "undo the ambitious work of their predecessors" by "proceed[ing] in the opposite direction with equal zeal." *Buffington*, 143 S. Ct. at 20 (Gorsuch, J., dissenting from denial of certiorari).

In just the past 15 years, for example, EPA and the Army Corps of Engineers have redrawn the boundary lines for the "waters of the United States" that are subject to Clean Water Act regulation at least four times. The latest iteration is set to change again considering this Court's recent ruling in *Sackett* v. *EPA*, 143 S. Ct. 1322 (2023). By creating a judicial ecosystem that could plausibly defer to all these iterations, *Chevron* "encourage[s] executive agents not to aspire to fidelity to the statutes Congress has adopted, but to do what they might while they can." *Buffington*, 143 S. Ct. at 20 (Gorsuch, J., dissenting from denial of certiorari).

In other words, each wave of bureaucrats sprints to the fringe of what they think the courts will allow—making new law instead of implementing different policies within an agreed-upon statutory range. Resetting that power balance requires a judiciary that can step in. And that's how the Framers designed the separation of powers to work: to prevent "abuses of government" by ensuring that one branch's "[a]mbition" is "made to counteract" the others'. THE FEDERALIST NO. 51 (J. Madison). Yet *Chevron* practically guarantees that ever-more-ambitious agency ploys—and the whipsaw effect that comes with them—will continue and probably get worse.

2. Our States' residents pay the price for this dysfunction. A multi-trillion-dollar annual regulatory burden might be of less concern if regulation had only upside. But "[p]oorly designed regulations may cause more harm than good; stifle innovation, growth, and job

creation; waste limited resources; undermine sustainable development; and erode the public's confidence in our government." Paul R. Noe, *Smarter Regulation for the American Manufacturing Economy*, in IND. UNIV. SCH. OF POL'Y AND ENV'T. AFFS., WHAT THE NEXT PRESIDENT SHOULD DO ABOUT U.S. MANUFACTURING: AN AGENDA FOR THE FIRST 100 DAYS 29, 29 (2016), https://bit.ly/3JC756n. By "distort[ing] the marketplace or pick[ing] winners and losers among companies or technologies," even "well-intended" rulemaking "invariably cause[s] unintended harms." *Id.*

More specifically, the annual per-household cost of federal regulation exceeds everything but housing in the average American budget. Crews, *supra*, at 6, 37. On average, consumers face nearly 1% price increases for every 10% increase in overall federal regulation. D. Chambers, C.A. Collins, A. Krause, *How Do Federal Regulations Affect Consumer Prices? Analysis of the Regressive Effects of Regulation*, 180 PUB. CHOICE 57, 59 (2019), https://bit.ly/3rxlH0Q. These "costs tend to be hidden from view," Robert W. Hahn, *Achieving Real Regulatory Reform*, 1997 U. CHI. LEGAL F. 143 (1997)—making it harder for the public to respond.

Property values often take a particular hit when federal regulation touches land or buildings in even small ways. Here again the Clean Water Act provides a good example, as wetlands regulation can substantially devalue bare land and improved properties alike. See Randall S. Guttery, et al., *Federal Wetlands Regulation: Restrictions on the Nationwide Permit Program and the Implications for Residential Property Owners*, 37 AM. BUS. L.J. 299, 325 (2000); see also Chris Bennett, *Chevron deference: Strangling farmers one regulation at a time?*, FENCE POST (Oct. 24, 2017), https://bit.ly/3NIcDhg (citing

Chevron's "tremendous influence on producer activity and private land ownership"). And landowners must either mount expensive—and usually losing, see above—legal challenges, or pony up for pricey water permits or penalties. See, *e.g.*, Dan Bosch, *The Biden WOTUS: Breadth and Uncertainty,* AMERICAN ACTION FORUM: INSIGHT (Nov. 19, 2021), https://bit.ly/3E4RgkT (describing how proposed rule would "cost between $113 and $276 million for increased permit and mitigation costs on an annualized basis"); Bennett, *supra* (describing enormous fines and penalties resulting from permitless farming in an area with a small, temporary vernal pool). Multiply these harms across the thousands of statutes that agencies administer, and the full sense of the problem comes into sharper focus.

3. The States' businesses pay, too. For them, the specter of regulatory swings can loom over investment decisions until the whipsaw puts them in outright jeopardy. A risk-heavy status quo scares investors away with the possibility of "reduce[d] or eliminate[d] … return[s]" due to "[r]adical and vacillating changes in [the] law." *Awful Effects*, *supra*, at 92, 99; see also Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1041 (2007) ("[P]re-existing programs become unworkable and new projects become necessary."). Then, when someone challenges those regulations, businesses must guess whether the agency's action will be upheld. And at all times, they must "remain alert to the possibility that the agency will reverse its current view 180 degrees" and "*still* prevail." *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

At best, the continuous state of flux means that short- and long-term plans, projects, and investments are put on

hold until a seemingly stable framework emerges. At worst, businesses are not able to "steer between" changing definitions of what is "lawful and unlawful conduct." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972). So they risk ending up on the receiving end of future penalties for actions that were once fine under a prior administration's interpretation of the same law. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (explaining that it is too much "to require regulated parties to divine the agency's interpretations in advance or else be held liable").

High volatility like this puts businesses in an almost impossible situation—even more because "[m]uch of what an agency does … occurs in the twilight of discretion." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 198 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). Agencies "determin[e] … when, how, and against whom to bring enforcement actions to enforce" their rules. *Id.* And with all the uncertainty businesses already face today, "an unpredictable regulatory framework is an unnecessary, additional burden." Jason Bailey, *Clean Water Act, Section 404 Applicants: May the Odds Be Ever in Your Favor*, 3 AM. U. BUS. L. REV. 457, 477 (2014). Yet this is the playing field *Chevron* built. So to assuage investor fears and avoid future setbacks, businesses often plan for the harshest potential regulatory environment as a matter of prudence. See, *e.g.*, Kate Sheppard, *EPA Chief Says She's Not Worried About Supreme Court Mercury Ruling*, HUFFINGTON POST (July 7, 2015), https://bit.ly/3IRFtqY (EPA head dismissing a decision from this Court as irrelevant because most of the regulated parties had "already invested in technology" to comply with the unlawful rule).

Especially for small, family-owned and -operated outfits like Petitioners', the burdens of shifting, expanding regulations are crushing. One analysis found that small businesses pay on average $11,700 in regulatory costs per employee, per year—totaling "more than $40 billion" in direct spending before adding additional costs for "lost productivity" and "higher prices." U.S. CHAMBER OF COM. FOUND., THE REGULATORY IMPACT ON SMALL BUSINESS: COMPLEX. CUMBERSOME. COSTLY. 4, 6, 8 (Mar. 2017), https://bit.ly/2MaFaOC. Here, the agency estimated that compliance would cost herring fishers $710 a day, "which in the aggregate could reduce annual returns by approximately 20 percent." Pet.App.4 (cleaned up). Other analyses have documented even higher figures for some sectors. See, *e.g.*, W. MARK CRAIN & NICOLE V. CRAIN, THE COST OF FEDERAL REGULATION TO THE U.S. ECONOMY, MANUFACTURING, AND SMALL BUSINESS 2 (2014), https://bit.ly/3pFeGdS (finding federal regulations saddled small manufacturers with about $35,000 in costs per employee in 2012).

Challenging regulations in court imposes even more expenses that many small businesses cannot afford. "Most farmers," for example, "don't have the money to go through an administrative process that is already tilted against their favor, just to get to a court of law" where they'll face *Chevron*'s tough standard. Bennett, *supra*. High margins and deep pockets help companies get through extended legal fights. Business owners without either are the ones who feel most acutely the denied freedom to "function[] without being ruled by functionaries." *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010).

And the regulatory problem for small businesses isn't just the price tag, but the disproportionate burden they

shoulder. The situation is ripe for rent-seeking. "[C]ompliance, reporting, and record keeping" costs burden smaller companies 36% more than larger outfits due to "smaller staffs and more limited access" to "specialized legal knowledge" and expensive consulting services. REGULATORY IMPACT ON SMALL BUSINESS, *supra*, at 5. Some rules, for example, would hit smaller companies 65 times harder "than their largest competitors." *Id.* at 6 (EPA's 2013 greenhouse gas regulations). The reason is that regulatory compliance "involves economies of scale." James L. Huffman, *The Impact of Regulation on Small and Emerging Businesses*, 4 J. SMALL & EMERGING BUS. L. 307, 313-15 (2000). Larger competitors are better able to fund initiatives to advance their bottom lines while also "cop[ing] with the costs and delays associated with the existing [regulatory] system." *Id.* at 314. So they often need only wait and watch as compliance costs "discourage the startup of new businesses," run down competition from existing competitors, and put pressure on smaller outfits to merge with them "before an economic downturn or a significant regulatory violation leads to failure." *Id.* A brawny *Chevron* doctrine bears much of the blame for these anticompetitive results.

4. Finally, the States themselves feel *Chevron*'s sting. As things stand right now, "unelected officials in federal agencies have the significant power to encroach on state autonomy." Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 94 (2008). Yet they wield that power having "no special expertise" in "the proper balance between state and federal power." Damien J. Marshall, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 280 (1998). When agencies lack institutional

incentives to protect federalism and courts let them erode the States' spheres through uncertain text, it's no surprise that States become *Chevron*'s victims, too.

Consider how agencies treat States in the regulatory process. Unfortunately, "[f]ederalism criteria ... do not have a natural home in [federal] agencies." Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 571 (2012). Agencies often miss or discount "federalism values" because "they are unlikely to confront them routinely." Kent Barnett, *Improving Agencies' Preemption Expertise with Chevmore Codification*, 83 FORDHAM L. REV. 587, 594 (2014). Agencies' "institutional focus" makes them "particularly ill-suited to consider state autonomy to regulate"—much less "federalism concerns" more generally. Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 699 (2008). So each time agency power ratchets up, the agency's "stake in validating [its] own policy decisions" grows at the same rate its "willing[ness] to consider the validity of a different balance struck by state regulators" shrinks. *Id.*

Chevron makes the courts accomplices to these blind spots. As Justice Breyer put it, "the true test of federalist principle may lie … in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 160-61 (2001) (Breyer, J., dissenting) (cleaned up). But *Chevron* let agencies downgrade the States' interests in exactly those cases; it says that when an agency enforces the statute, courts should assume Congress passed off a much wider array of these details than in an ordinary "statutory case[]." Put differently, when courts see the "absence of adequate guidance from Congress" in a statute (not unusual; again, see above), *Chevron* treats

that ambiguity as a green light to "excessive[ly] interfere[] with state regulatory autonomy." Mendelson, *supra*, at 699.

And agency preferences triumph over federalist values in all sorts of contexts. Federal agencies lean on *Chevron* to ignore state interests and preempt state law. See, *e.g.*, *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996) (applying *Chevron* to find a regulation preempted state law despite an argument that the presumption against preemption should have controlled). Knowing *Chevron* will shepherd them through the courts, regulators heighten the conditions States must satisfy to participate in federal funding programs. See, *e.g.*, *Pa. Dep't of Pub. Welfare* v. *United States*, 781 F.2d 334, 340 (3d Cir. 1986) (upholding an agency-imposed spending condition as sufficiently clear because "[S]tates are familiar with the broad discretion" agencies get). And agencies wield growing power to probe the States' own conduct and even pursue direct adverse actions against them. See, *e.g.*, Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 117 (2012) ("[F]ederal agencies have increasingly exercised [administrative] subpoena power to demand confidential information from state governments."). In all these ways, *Chevron* feeds the drive for vertical control over the States.

Another troubling—and recurring—example is federal agencies' habit of pushing States out of cooperative federalism schemes. In *Chevron*'s early days, some courts thought the doctrine made it "particularly important" for agencies to "follow the correct statutory procedures" when attempting to "mak[e] state regulation stricter." *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984) (addressing the Clean Air Act). But it didn't

take long for the same courts to use *Chevron* in blessing broad claims of agency authority that cast cooperative federalism aside. *E.g.*, *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 191 F.3d 845, 851 (7th Cir. 1999) (relying on *Chevron* to allow expansive new assertion of power under the Clean Water Act), *rev'd*, 531 U.S. 159 (2001). *Chevron*'s "mechanical application to [a] system of 'cooperative federalism'" ensures that "federal agencies will retain almost absolute discretion to [decide] whether to 'cooperate' with state and local governments or not." Sierra B. Weaver, *Local Management of Natural Resources: Should Local Governments Be Able to Keep Oil Out?*, 26 HARV. ENV'T. L. REV. 231, 242 (2002).

This shift from congressionally intended state input to agency-directed control highlights how *Chevron* cannot "adjust to situations in which the federal agency is not the only 'expert agency' involved"—even when Congress chose a "system of 'cooperative federalism'" precisely to reap those multiple-regulator benefits. Weaver, *supra*, at 242. So, worse than the usual problem of asking courts to read too much into congressional silence, applying *Chevron* in these cases also runs into the teeth of Congress's decision to rely on "cooperative federalism['s] … experimental benefits." Ben Raker, *Decentralization and Deference: How Different Conceptions of Federalism Matter for Deference and Why That Matters for Renewable Energy*, 47 ENV'T. L. REP. NEWS & ANALYSIS 10,963, 10,975 (2017). *Chevron*, that is, is indiscriminately pro-agency. Even where the best reading of a statute would favor the States' involvement and voice, a merely permissible reading need not.

It was never supposed to be this way. The country started from a premise that States "would have primary responsibility for matters of greatest concern to citizens."

Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 340 (2003). The Constitution enshrined that "distinction between what is truly national and what is truly local," *United States* v. *Morrison*, 529 U.S. 598, 617-18 (2000), including that regulating "health and safety matters"—much of federal agencies' current beat—"is primarily, and historically, a matter of local concern," *Hillsborough Cnty.* v. *Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985). So the Framers would be surprised to find their prediction flipped: The "greatest risk" now is not "that the states would encroach upon matters best left to the federal government," but that "the federal government would intrude upon matters best left to the states." Pettys, *supra*, at 340. And moving regulatory power from the States to less connected and representative agencies means that rules are less able "to respond to the divisive needs of a diverse citizenry." Keller, *supra*, at 94. Other harms aside, even *Chevron*'s author saw that "a healthy respect for state sovereignty calls for something less than *Chevron* deference" when the federal-state balance is at stake. *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting, joined by Roberts, C.J., and Scalia, J.).

Yet here we are. A doctrine that says agencies virtually always win siphons the States' constitutional powers in areas of particular concern and local expertise. And it erases structural federalism defenses to do it.

The power *Chevron* gives the federal government to "displace[] state law without adhering to the constitutionally prescribed lawmaking procedures" makes the whole gambit "suspect." Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1433 (2001). "Separation-of-powers

principles" include protections from laws "enacted in contravention of constitutional principles of federalism." *Bond* v. *United States*, 564 U.S. 211, 222-24 (2011). Applied here, that means within (important) subject-matter limits, *Congress* can preempt traditional state powers under the Supremacy Clause. But it must do so with "unmistakably" and "exceedingly clear language." *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989); *U.S. Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020). The idea that agencies can get to the same place through ambiguous—by definition, *not* clear—text gets this presumption backward. It sidelines Congress's role setting the "boundary between state and national spheres" through the "limits of the regulatory schemes" it puts into law. Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 874 (2008).

The upshot is that the States are losing not only our authority to regulate in ways that matter most, but also our right to have the people we send to Congress make those calls if the federal government tries to take on these issues instead. At least in Congress, members have front of mind that voters can fire them for snubbing concerns contrary to the "will of the people." *United States* v. *Lee Yen Tai*, 185 U.S. 213, 222 (1902). Agencies are inherently "less accountable." Clark, *supra*, at 1438. And though the Administrative Procedure Act is meant to counteract that reality by making them more "accountable to the public," *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020), *Chevron* "is in serious tension with" that goal. *Baldwin* v. *United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from the denial of certiorari). *Chevron*'s damage to federalism is another reason it has to go.

* * * *

The lower courts' "wildly different approaches" to *Chevron* and its many "exceptions and caveats" leave the doctrine beyond restoration to anything resembling a "clear and stable rule." *Buffington*, 143 S. Ct. at 20 (Gorsuch, J., dissenting from denial of certiorari). And after wreaking this much damage, it deserves a rebuke of equal measure. The Court should overrule it now. Anything less will deny the people of our States the relief they need and that our separation of powers promises.

II. Experience Shows That The Sky Will Not Fall Without *Chevron*.

For all the reasons to leave *Chevron* behind, the question still remains: "What's next?" The States have an answer: "We've already shown you." Many of our legislatures and courts have blazed a trail without *Chevron*-like deference. The "trains [are still] run[ning] on time" in the many States that have opted out—and our constitutional integrity and "individual libert[ies]" are better for it. *Ass'n of Am. R.R.s*, 575 U.S. at 91 (Thomas, J., concurring in the judgment). Our residents are reaping the gains from better accountability and responsible regulation. These real-world experiences provide reason for confidence that with *Chevron* out of the picture, the same will be true on the federal side.

A. This Court does not have to guess what would follow a reversal. One of the benefits of our co-sovereign, laboratory-of-democracy system is that we have some examples to go on. In this case, many.

Lots of States have been ahead of the curve by skipping the *Chevron* experiment entirely. See Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83

FORDHAM L. REV. 555, 557 (2014) (collecting "high-quality and recent surveys" that show a "mixed reception" for the doctrine). Florida, for instance, put anti-*Chevron* right into its constitution: "In interpreting a state statute or rule, a state court … may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret [it] de novo." FLA. CONST. art. V, § 21. Recent statutes mark an emerging trend to codify similar principles, too. Wisconsin does not allow any agency to "seek deference in any proceeding based on the agency's interpretation of any law." WIS. STAT. § 227.10(2g). Arizona emphasizes that courts "shall decide all questions of law" *and* "all questions of fact" without deference to an agency, "including the interpretation of a constitutional or statutory provision or a rule adopted by an agency." ARIZ. REV. STAT. § 12-910(F). And Tennessee not only bars courts in contested cases from "defer[ring] to a state agency's interpretation of [a state] statute or rule," but it also provides that de novo review in this context requires resolving any ambiguity left after "applying all customary tools of interpretation … *against* increased agency authority." TENN. CODE § 4-5-326 (emphasis added).

State courts have also not been shy about rejecting *Chevron*'s reasoning since almost as soon as the decision came down. Three years after *Chevron*, the South Dakota Supreme Court found "no reason to give deference to agency conclusions of law." *Permann* v. *S.D. Dep't of Lab., Unemployment Ins. Div.*, 411 N.W.2d 113, 117 (S.D. 1987). A decade later, Delaware's high court "expressly decline[d] to adopt [*Chevron*'s] standard" because "[s]tatutory interpretation is ultimately the responsibility of the courts." *Pub. Water Supply Co.* v. *DiPasquale*, 735 A.2d 378, 382-83 (Del. 1999). A decade after that, Michigan's supreme court concluded that *Chevron*'s "vagaries" "d[id] not provide a clear road map" to justify

"import[ing]" it to the Great Lakes State. *In re Compl. of Rovas Against SBC Mich.*, 754 N.W.2d 259, 271-72 (Mich. 2008). Another five years on, the Utah Supreme Court held deference is inappropriate when interpreting statutes. *Murray* v. *Utah Lab. Comm'n*, 308 P.3d 461, 472 (Utah 2013). Then, a few years ago, the Supreme Court of Mississippi scrapped deference altogether, calling it "confusing and vague" to defer to an agency "while simultaneously claiming that the Court bears the ultimate responsibility to interpret statutes." *King* v. *Miss. Mil. Dep't*, 245 So. 3d 404, 407 (Miss. 2018). And this progression is still continuing. Late last year, Ohio's high court held that "separation of powers" principles forbid courts from giving their "interpretative authority to administrative agencies." *TWISM Enters., LLC* v. *State Bd. of Registration for Pro. Eng'rs & Surveyors*, No. 21-1440, 2022 WL 17981386, at *7 (Ohio Dec. 29, 2022).

These examples—spanning several decades of practice—are not aberrations. "[M]ost" of the state courts, it turns out, "have not embraced the *Chevron* approach." Cass R. Sunstein, *On Overruling* Chevron 9 n.50 (Nov. 2020), *available at* https://bit.ly/46FKKPg. By one count as of 2020, "pure *Chevron*-style review" States were "outnumbered by states that apply less deferential standards by more than a 2-to-1 ratio." Luke Phillips, Chevron *in the States? Not So Much*, 89 MISS. L.J. 313, 315 (2020); see also Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977, 984-87 (2008) (finding comparable results).

True, the same survey found fourteen States deployed *Chevron*-style deference. Phillips, *supra*, at 315-16. But twenty-one had courts that review de novo. *Id.* at 315.

Another eleven applied less deferential "hybrids" that exempt certain agency decisions from deference, consider unique factors when assessing the appropriate type of review, or mix *Chevron* with a bit of *Skidmore* for a custom deference blend. *Id.* at 316. And four States apply something akin to *Skidmore* alone. *Id.* at 315; see also Daniel Ortner, *The End of Deference: The States Have Rejected Deference*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 24, 2020), https://bit.ly/3JRvsNQ (providing a map showing the diverse deference approaches among the States). In short, "it's the state court judges" that "by and large did not fall under *Chevron*'s spell"—and that makes them the ones "doing the leading" now. Jeffrey S. Sutton & John L. Rockenbach, *Respect and Deference in American Administrative Law*, 102 B.U. L. REV. 1937, 1944-45 (2022).

Lastly, the "no deference" and "deference lite" States are doing just fine. Those hoping to save *Chevron* based on fears of life without it ought to be able to point to fallout in States like these. They cannot. As far as *amici* are aware, no State that rejected *Chevron*-style deference has reverted back. In fact, the States cannot find even one decision or the like questioning the choice to abandon a more deferential approach. State agencies themselves—who would no doubt be quick to blame institutional failings on a lack of deference if they could—are also not citing absence of deference as a genuine policy constraint. In the end, the *Chevron*-less States seem able to efficiently and effectively tackle questions that are just as technically complex as those the mix of federal agencies see.

B. So life without *Chevron* can move on easily. The States' experience also shows that it can do so without missing out on agency expertise—long cited as the reason

Chevron deference should stay. That subject-matter mastery would just operate in a narrower and more accountable zone.

Most obviously, like the state legislatures, Congress would still have power to delegate many issues to agencies. It would simply have to use more "specific words in the statute" and provide more clarity through statutory context to articulate its intent. *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring). It might have to work a little harder on occasion. But there's no reason it could not accept the task again. After all, without the dodge *Chevron* gives our representatives to pin policy change (or lack of it) on the Executive, the incentives get reset for Congress to step up and reflect the "will of the people of the United States." *Lee Yen Tai*, 185 U.S. at 222.

Congress is also unlikely to make too many major policy swings like those agencies have become known for with each incoming administration. Institutional roadblocks are *features* in the Legislature's architecture, designed to make sure that big changes come with deliberation and input from all regions of the country. So more congressional attention post-*Chevron* means narrower net zones of change and reduced intensity for the whipsaw. But at the same time, if Congress doesn't act to address critical issues, then the responsibility that axing *Chevron* will help restore means that voters will know who to blame.

The federal courts, too, will likely have no trouble following so many of their state counterparts into a deference-free world. Many are already halfway there.

Chevron's prominence has been "fading" for a while, Linda Jellum, Chevron*'s Demise: A Survey of* Chevron

from Infancy to Senescence, 59 ADMIN. L. REV. 725, 727 (2007), as the Court has declined to apply it "in nearly three-quarters of the cases where it would appear applicable," William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1125 (2008). Just two Terms back, two of the Court's decisions confirmed that "[t]he famous footnote nine … is alive and well." Richard J. Pierce, Jr., *Is* Chevron *Deference Still Alive?*, REGUL. REV. (July 14, 2022), https://bit.ly/3XrHoex. It seems, then, that "*Chevron* maximalism has died of its own weight and is already effectively buried." *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of certiorari).

No wonder that many judges in the lower courts seem prepared to write the doctrine's eulogy. They are eager to stop aiding and abetting an "erode[d]" "role of the judiciary" and "diminishe[d]" "role of Congress." *Egan* v. *Del. River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in the judgment). They are ready for the "Article III renaissance [that] is emerging against the judicial abdication performed in *Chevron*'s name." *Waterkeeper All.* v. *EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring). And along with so many state courts, they are tired of seeing "our constitutional separation of powers" "disordered." *Valent* v. *Comm'r of Soc. Sec.*, 205 L. Ed. 2d 417, 524 (6th Cir. 2019) (Kethledge, J., dissenting); see also, *e.g.*, *Voices for Int'l Bus. & Educ., Inc.* v. *NLRB*, 905 F.3d 770, 781 (5th Cir. 2018) (Ho, J., concurring) ("Misuse of the *Chevron* doctrine means collapsing the[] three separated government functions into a single entity."); *Aqua Prod., Inc.* v. *Matal*, 872 F.3d 1290, 1334 (Fed. Cir. 2017) (Moore, J.) ("*Chevron* has effected a broad transfer of legislative and judicial function to the executive.").

So freeing federal courts from *Chevron* would let these and other judges again "fulfill their duty to exercise their independent judgment about what the law *is*." *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring) (emphasis in original). That's the kind of work they do every day. And like in the majority of the States, making that true again for agency review would let us keep the "benefits from expertise without being ruled by experts." *Free Enter. Fund*, 561 U.S. at 499.

* * * *

At bottom, this case confronts the question: "Who decides?" *NFIB* v. *OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring). The *Amici* States do not think all agencies should be eliminated or ignored; agency insight has a role to play. But for far too long, agencies have enjoyed more influence than our constitutional system should tolerate. Congress should call the shots, and courts should hold agencies to those calls. Even forty years ago, *Chevron* offered few good reasons to reshuffle the nature of decisionmaking as it did. See Cass R. Sunstein, Chevron *As Law*, 107 GEO. L.J. 1613, 1669 (2019) ("[T]he quality of the reasoning in *Chevron* was not high."). It has aged even worse—and our residents and businesses, along with our sovereign interests, feel the sting. The Court should end it.

CONCLUSION

The Court should reverse the decision below and, in doing so, overturn *Chevron*.

Respectfully submitted.

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