No. 22-451

# In the Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, *et al.*,

*Petitioners*,

v.

GINA RAIMONDO, in Her Official Capacity as Secretary of Commerce, *et al.*,

*Respondents*.

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

**BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**


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## QUESTION PRESENTED

Whether the Court should overrule *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

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## INTEREST OF AMICUS CURIAE[1]

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization devoted to defending civil liberties. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more people. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by how the regime of "*Chevron* deference"—like other government agency-deference doctrines—requires federal judges to *defer* to another non-judicial entity's interpretation of *the law*. By mandating systematic pro-agency bias, the *Chevron* doctrine requires judges to abdicate their duty of independent judgment and even to deny litigants

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[1] Pursuant to Rule 37.6, no party's counsel authored any part of this brief. No person or entity, other than *Amicus Curiae* and its counsel, paid for the brief's preparation or submission.

before them the due process of law. This case presents an opportunity for the Court to overturn the doctrine of "*Chevron* deference" and confess its constitutional error.

A popular film has dramatized the unfairness of the controversial regulation at issue here. In *CODA*, which won Best Picture at the 2022 Academy Awards, the struggling Rossi family of deaf fishermen protests the high cost of the National Oceanic and Atmospheric Administration's (NOAA) regulation that forces the fishermen to pay for at-sea monitors[2]:

> John Kaufman [of NOAA]: "We understand that the observers are a financial hardship, but it's critical to protect the fishery." . . . .
>
> Gio Salgado [Fisheries Council head]:
>
> "It's John's job to look out for the fish, and as head of the council, it's my job to look out for you!"
>
> The fishermen react—calling bullshit.
>
> . . . . Frank [deaf patriarch of the Rossi fishing family, daughter Ruby translating]: "We're tired of this shit, Gio! You don't care if these guys regulate us to death. … No one's getting paid what their catch is worth!"

Indeed, to comply with this same regulation, one member of the crew filming *CODA* had to be removed from the boat to make way for a government monitor.[3]

[2] Screenplay for *CODA*, written by Siân Heder, p. 41, available at: https://deadline.com/wp-content/uploads/2022/01/CODA-Read-The-Screenplay-1.pdf

[3] *See CODA* Trivia: 30 facts about the Oscar-nominated movie, available at https://www.uselessdaily.com/movies/coda-

*CODA* does not illustrate *Chevron*'s central role in this saga. But from representing fishermen in the same position as petitioners (and as the Rossis in *CODA*), NCLA knows firsthand this regulation would not survive without *Chevron*'s forcing judicial deference to NOAA's regulation. NCLA shares our clients' frustration with NOAA's making fishermen pay for monitors without statutory authority to do so.

## SUMMARY OF THE ARGUMENT

Little is more foundational than that federal judges must exercise independent judgment and act impartially. The Constitution's tenure and salary protections for judges are only the outward bulwark of judicial independence. Under Article III, the office of a judge includes, at its core, an individual duty of independent judgment, untainted by any personal or institutional precommitment. The Fifth Amendment, moreover, guarantees the due process of law, which at the very least includes a prohibition against biased judgment. These requirements of judicial duty and due process are so axiomatic they seldom merit mention. Ordinarily, judges assiduously protect their independent judgment and avoid even the appearance of bias for or against a party appearing in their courtrooms.

The judiciary, however, routinely flouts these basic principles of justice and constitutional law by "deferring" to agencies' interpretations of federal statutes under *Chevron, U.S.A. Inc. v. Natural Resources Defense*

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trivia-30-facts-about-the-oscar-nominatied-movie/ [*sic*] (Fact 24. "One day they actually had to bring an observer with them (life imitating art from the movie) and they had to [re]move one of the crew members from the boat set since they could only have a maximum of 10 people on the boat."

*Council, Inc.*, 467 U.S. 837 (1984). The judges defer under *Chevron* "even in cases where the court concludes another interpretation is more reasonable." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). Although *Chevron* is "now [an] increasingly maligned precedent," which the Court deigns to "simply ignore[]," *BNSF Ry. Co. v. Loos*, 139 S.Ct. 893, 908 (2019) (Gorsuch, J., dissenting), lower courts still follow this precedent, to the injury of innocent parties. *Buffington v. McDonough*, 598 U.S. ___, 143 S.Ct. 14, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari). So, this Court must overrule *Chevron* altogether, not just further narrow or cabin it.

*Stare decisis* cannot save *Chevron*. The justices have a duty to say what the law is, and no precedent can rise above the Constitution, especially not when the precedent perverts judicial proceedings by preventing independent judgment and requiring judicial bias. *Chevron* instantiates a continuing injustice in the courts themselves—an unjust bias that no amount of time can cure. Nearly 40 years of experience, moreover, have shown the *Chevron*-deference regime to be unworkable and arbitrary. Further, no American citizen has relied upon *Chevron*. If anything, only bureaucrats have done so, and theirs is not a reliance interest this Court has ever recognized.

Moreover, *Chevron* destabilizes the law. It expands the scope of regulatory whiplash, leaving Americans and their businesses in persistent uncertainty. In this very case, no fisherman reading the statute could have ascertained he would have to pay for monitors. This regulatory power was asserted nearly 20 years after Congress passed that provision.

This example demonstrates starkly how *Chevron* deference excludes citizens from lawmaking, even through their elected representatives. By expanding the realm of administrative power within presidential control, deference enables extreme policies and even invites destabilizing political conflict. A precedent that is not merely in error, but so profoundly unjust and dangerous, must be cast aside.

Rather than just discard *Chevron*, this Court should candidly confess its *Chevron* error. The Court has for so long refused to repudiate *Chevron* that its glaring injustices have come to seem an almost ineradicable stain on the reputation and legitimacy of the judiciary. Therefore, if this Court were to be less than candid about its error in *Chevron*, it would seem brittle. It would appear to be hiding from the reality that the Court itself has imposed an injustice and needs to be held to account. Although this Court exercises legal judgment over Americans, it ultimately is subject to the reputational judgment of the people. So, only by candidly admitting its own culpability in *Chevron*'s perversion of justice can this Court restore the confidence of Americans that the Court understands what it has done. Only such candor can show that this Court is committed to restoring the judges' duty of independent judgment under Article III and the Fifth Amendment's due process of law.

## ARGUMENT

Although *Chevron* is erroneous for many reasons,[4]

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[4] *See, e.g., Pereira v. Sessions*, 138 S.Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring) (noting *Chevron* deference fails to "accord with constitutional separation-of-powers principles and the function and province of the Judiciary"); *Michigan v. EPA*, 576

what most clearly necessitates overturning this flawed precedent is that it requires the judges themselves to violate the Constitution. It presses judges to abandon their duty of independent judgment under Article III and to deny litigants due process of law protected by the Fifth Amendment. *See* Philip Hamburger, *Chevron* Bias, 84 GEO. WASH. L. REV. 1187 (2016).

## I. *CHEVRON* DEFERENCE VIOLATES ARTICLE III BY REQUIRING JUDGES TO ABANDON THEIR DUTY OF INDEPENDENT JUDGMENT

*Chevron* compels judges to abandon their duty of independent judgment. Article III vests "[t]he judicial power of the United States" in the federal courts, and judges holding office under this power were understood to have an office of judging—at its core, a duty of independent judgment in accord with the law of the land. That is why it is "emphatically the province and duty of the Judicial Department to say what the law is," and why determining the constitutionality of a statute "is of the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

This duty of independent judgment was, and still is, inherent in the office of a judge. It was to preserve this

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U.S. 743, 760 (2015) (Thomas, J., concurring) (explaining *Chevron* deference "wrests from Courts the ultimate interpretative authority to 'say what the law is,'" and "is in tension with Article III's Vesting Clause, …"); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (noting *Chevron* deference "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.").

independent judgment that Article III guarantees judges' appointment for life, with undiminished salaries and other protections. U.S. Const., Art. III. The combination of judicial power in the courts and judicial duty in each of the judges is profoundly important, even if often forgotten. The breadth of the institutional power is tempered by the narrow duty of the individuals who oversee it, centrally the duty of independent judgment. The tight personal duty limits the danger from the breadth of institutional power.[5]

Yet *Chevron* directs Article III judges to abandon even the pretense of independent judgment by giving automatic and often dispositive weight to an agency's interpretation of federal legislation. It forces federal judges to acquiesce in the executive branch's view of the law—even when the courts themselves disagree with the agency's view. That is nothing less than a massive "judicially orchestrated shift of power," Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016), which conflicts with Article III's vesting of judicial power exclusively in the courts. *See Michigan*, 576 U.S. at 762 (Thomas, J., concurring). "When judges defer to agency judgments about … interpretation, the judges abandon their very office or duty as judges." Hamburger, *Chevron* Bias, 84 GEO. WASH. L. REV. at 1249-50.

This is a gross dereliction of duty and a violation of Article III. That article makes no allowance for judges to abandon their duty of independent judgment, let alone to defer to decisions of persons

[5] For a more elaborate discussion of the duty of independent judgment in American law, *see* Philip Hamburger, *Law and Judicial Duty*, 507-35 (Harvard 2008).

who are not independent judges and do not enjoy life tenure, salary security, and other protections.

The constitutional offense is especially serious because this Court imposes deference on lower court judges, not only the justices. Lower court judges are thus invidiously compelled to depart from their independent judgment. And "when judges acquiesce in *Chevron* deference, they unconstitutionally abandon their very office as judges." Hamburger, *Chevron* Bias, 84 GEO. WASH. L. REV. at 1286. Neither Congress nor the Supreme Court has authority to transfer judicial power to the Executive. Indeed, how could Congress presume to transfer (or delegate) judicial power, something which it never possessed in the first instance? That approach is unjustified by the Constitution's text and structure, and unsupported by history. From the earliest days of our Republic, the Court recognized this reality, agreeing that "the legislative power is confined to *making* the law, and cannot interfere in the *interpretation*; which is the natural and exclusive province of the judicial branch of government." *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 329 (1788) (emphasis added). Since then, and through "every term through 1983, the Supreme Court relied on its own analysis and judgment regarding statutory meaning without regard for the administering agency." Kristin Hickman & Richard Pierce, Jr., *Administrative Law Treatise* § 3.1 (6th ed., updated Nov. 1, 2021).

Courts would not tolerate *Chevron*'s abandonment of independent judgment in any other context—even if it were commanded by statute and even if Congress commanded deference to a truly expert body. Imagine that a statute established a committee of expert law

professors and instructed the federal judiciary to "defer" to that committee's announced interpretations of a category of federal statutes so long as they were "reasonable." Or imagine the statute directed the courts to interpret legislation by bowing to the legal interpretations of *The New York Times*'s editorial board. Such statutes would be laughed out of court, summarily declared as gross violations of Article III and a perversion of the independent judgment the Constitution requires of the judiciary.[6]

Yet *Chevron* operates precisely the same way. At its essence *Chevron* compels judges to abandon their Article III duty of independent judgment and defer to a non-judicial entity's view of a statute's meaning.

To be clear, there is nothing improper or constitutionally problematic about a court considering an agency's interpretation of a statute and affording it weight according to its persuasiveness. *In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259, 270 (Mich. 2008) ("'Respectful consideration' is not equivalent to any normative understanding of 'deference' as the latter term is commonly used in appellate decisions."); *Tetra Tech EC Inc v. WI Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. Sup. Ct. 2018); *see also id.* ("'[D]ue weight' means giving 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law.

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[6] *United States v. Havis*, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring), vacated on reh'g *en banc*, 927 F.3d 382 (6th Cir. 2019) ) ("The fact that the Sentencing Commission includes thoughtful and respected lawyers, scholars, and judges does not change the court's obligation to exercise its independent judgment when determining what a law (or regulation) means.").

'Due weight' is a matter of persuasion, not deference."). A court should hear and consider an agency's views, just as it would any other litigant or *amicus curiae*.

None of this respectful consideration compromises a judge's duty of independent judgment. But *Chevron* requires far more. It requires courts to favor the legal position of one party—the government—over the legal position of another party, and it instructs courts to subordinate their own judgments to those of the agency.

So, while the duty of independent judgment allows courts to consider an agency's views and to adopt them *when persuasive*, it absolutely forbids a regime in which courts begin with a predisposition to "defer" to, or favor, one party's statutory interpretation over the interpretations of other parties. As Nathaniel Gorham put it at the 1787 Constitutional Convention, "[T]he Judges ought to carry into the exposition of the laws no prepossessions with regard to them." The Records of the Federal Convention of 1787 79 (Max Farrand ed., rev. ed. 1937).

Ironically, while federal judges, who enjoy lifetime appointment and salary protection, created *Chevron*'s unconstitutional regime, state court judges who lack equivalent constitutional protections have nonetheless concluded that their deference to an administrative agency would be an unconstitutional abdication of their duty to exercise independent judgment.

For instance, in Mississippi, where judges and justices are elected for limited terms of service, the state Supreme Court in *King v. Mississippi Military Dep't*, 245 So. 3d 404 (Miss. 2018), "abandon[ed] the

old standard of review giving deference to agency interpretations of statutes." Such deference, the court explained, prevents judges from "fulfilling their duty to exercise their independent judgment about what the law *is*." *Id.* at 408 (quoting *Gutierrez–Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring)). "In deciding no longer to give deference to agency interpretations," the *King* Court explained, "we step fully into the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes." *Id.* at 408.[7]

No dire consequences have followed the reclamation of independent judgment by state courts. The parade of horribles marched before the courts by agency litigants in defense of *Chevron* deference is as fictional as the doctrine itself. *See infra* at 15 n.12. If state courts can return to independent judgment, so should the highest federal court.[8]

## II. *CHEVRON* DEFERENCE DENIES DUE PROCESS OF LAW BY REQUIRING JUDICIAL BIAS IN FAVOR OF ONE PARTY AND AGAINST THE OTHER PARTY

The due process of law, including its basic requirement of unbiased judging, is an ancient and

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[7] *See also Tetra Tech*, 914 N.W.2d at 50, in which the Wisconsin Supreme Court, although elected for a limited term, prohibited *Chevron*-style deference in Wisconsin courts because its "systematic favor deprives the non-governmental party of an independent and impartial tribunal."

[8] If states are "laboratories of democracy," the abandonment of *Chevron* deference has proved a successful experiment demonstrating no harm would ensue from its abandonment by this court. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting).

profound principle of justice. It therefore is sobering that this Court in *Chevron* systematically requires judges in their cases to favor the legal position of one of the parties—always the government party. Such deference is "systematic judicial bias in favor of the most powerful of parties and against other parties." Hamburger, *Chevron* Bias, 84 GEO. WASH. L. REV. at 1189. To be sure, "the bias arises from institutional precedent rather than individual prejudice, but this makes the bias especially systematic and the Fifth Amendment due process problem especially serious." *Id.*

This Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Judges are ordinarily very scrupulous about adjudicating cases without "passion or prejudice" and without "favor or fear," avoiding even the mere appearance of bias. And all federal judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon me."[9] Yet *Chevron* institutionalizes a regime of systematic judicial bias, forcing judges to favor government parties over all others.

By favoring the government's statutory interpretation based solely on its being proffered by

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[9] 28 U.S.C. § 453 (2012) ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.' ").

an agency, *Chevron* deference violates the due process rights of litigants proposing an alternative reading of the legislation. Nongovernmental litigants are forced to establish that the agency's proffered interpretation is unreasonable, not just inferior. This is bias against nongovernmental parties. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1729, 1732 (2018) (holding that agency and judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from hostility or bias); *id.* at 1734 (Kagan, J., concurring) (agreeing that the Constitution forbids agency or judicial proceedings that are "infected by … bias"). *Chevron* thus denies the due process of law to Americans who litigate in opposition to agencies. *See Tetra Tech*, 914 N.W.2d at 50 (recognizing Wisconsin's deference doctrine "deprive[d] the non-governmental party of an independent and impartial tribunal," while granting the "rule of decision" to an "administrative agency [that] has an obvious interest in the outcome of a case to which it is a party."); *see also id.* at 50 ("deference threatens the most elemental aspect of a fair trial … '—a fair and impartial decisionmaker' ").

Judicial precommitment to accept one party's interpretation of a statute so long as it is reasonable and an express unwillingness to impartially consider the opposing party's position—even where its proposed statutory interpretation is *more* reasonable—would be utterly disqualifying in any other circumstance. Indeed, 28 U.S.C. § 455 requires any justice or judge of the United States to disqualify him or herself "in any proceeding in which his [or her] impartiality might reasonably be questioned," and further mandates disqualification in cases where the

justice or judge holds "a personal bias or prejudice concerning a party, ..." 28 U.S.C. § 455(a), (b)(1). Canon 3 of the Code of Conduct for United States Judges mirrors this statutory language. What holds for "personal bias" applies equally to the "institutional bias" *Chevron* compels.

Moreover, Canon 1 of the ethical rules governing federal judges stresses that "an independent and honorable judiciary is indispensable to justice in our society," with the commentary noting that society's "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges." Code of Conduct for United States Judges, Commentary to Canon 1. *Chevron* deference is incompatible with justice and destroys public confidence in the independence of the judiciary. Hamburger, *Chevron* Bias, 84 GEO. WASH. L. REV. at 1248.

The unbiased judgment between the parties that is at the core of due process gets thrown out the window by *Chevron*. It is astonishing that in bowing to agencies, this Court has for nearly 40 years disregarded so cherished a principle of justice. That is four decades too long. It is time to restore judicial impartiality and uphold the due process of law.[10]

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[10] *See, e.g.*, Hamburger, *Chevron* Bias, 84 GEO. WASH. L. REV. 1187; *Havis*, 907 F.3d at 451 n.1 (6th Cir. 2018) (Thapar, J., concurring), (NB: the *en banc* court in this case was responding to the panel's call for *en banc* so as to be relieved of applying an erroneous but binding circuit precedent).

## III. *CHEVRON* BIAS CANNOT BE EXCUSED BY RECASTING INTERPRETATION AS LAWMAKING OR BY THE EXISTENCE OF OTHER "DEFERENCE"

It is difficult to defend *Chevron*'s requirement of judicial bias—so, unsurprisingly, there have been few attempts at outright justification. Indeed, one common approach to the bias problem has been simply not to mention it, as if a dignified silence could make it go away.[11] Two defenses of *Chevron*, however, are superficially plausible and thus deserve attention.

First, it is urged that the "interpretation" in that case can be reconceptualized as mere policymaking—that is, lawmaking. From this perspective, a defense of *Chevron* merely "require[s] a conceptual shift in the understanding of the *kind* of discretion conferred on an administrative agency by an ambiguous statute." Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 942 (2018). By this means, judicial bias in deferring to one party's interpretation becomes merely judicial recognition of a congressional grant of authority to agencies to make policy or law. But this reconceptualization of interpretation as lawmaking runs into difficulty.

One problem is that statutory ambiguity does not show congressional intent to delegate legislative power.[12] On the contrary, any assumption that there

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[11] Thomas W. Merrill, The *Chevron* Doctrine: Its Rise and Fall, and the Future of the Administrative State, Harvard University Press (2022).

[12] "This is a caricature of *Chevron*. … [O]bviously, the FLSA cannot serve as a source of authority to prohibit activities it does

is such congressional intent is merely a fiction.[13] Even if one were to indulge the fiction that Congress had delegated its legislative power to agencies, *Chevron* would then just run into another constitutional obstacle—that this would be an unconstitutional delegation. Article I mandates that legislative power "shall be vested" in Congress. U.S. Const., Art. I, § 1. That location is mandatory. Philip Hamburger, Nondelegation Blues, 92 GEO. WASH. L. REV. ___ (forthcoming).[14] So, a congressional grant of

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not cover, just as a statute reading 'No dogs in the park' cannot be said to authorize a Parks Department to ban birds as well. The reason is basic but fundamental, and it has nothing to do with any sort of free-floating nondelegation presumption. Rather, the point is that a statute's deliberate non-interference with a class of activity is not a 'gap' in the statute at all; it simply marks the point where Congress decided to stop authorization to regulate." *Oregon Restaurant and Lodging Ass'n, et al. v. Perez*, 843 F.3d 355, 356 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of reh'g *en banc* alongside JJ. Kozinksi, Gould, Tallman, Bybee, Callahan, Bea, M.Smith, Ikuta, and N.Smith).

[13] *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring) ("*Chevron*'s claim about legislative intentions is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that"); David Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212 (2001) ("*Chevron* doctrine at most can rely on a fictionalized statement of legislative desire"); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 380 (1986) (acknowledging that *Chevron* rests on a "legal fiction"); Abbe Gluck & Lisa Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 996 (2013) (noting that majority of congressional staffers surveyed indicated "that their knowledge of *Chevron*[] does not mean that they intend to delegate whenever ambiguity remains in finalized statutory language").

[14] Available at: https://papers.ssrn.com/sol3/papers.cfm?

lawmaking discretion to agencies would cause Congress to "run[] headlong into the teeth of Article I," which vests "[a]ll legislative Powers" in Congress. *See Michigan*, 576 U.S. at 762 (Thomas, J., concurring) (quoting U.S. Const., Art. 1, § 1).

The most basic obstacle to reconceptualizing *Chevron* as a non-interpretive doctrine—and thus without its concomitant unconstitutional bias—is that the decision's language and logic clearly involve interpretation. To be sure, agencies often make policy under *Chevron*. That case, however, notoriously took a dual vision of the matter, in which agencies simultaneously interpret and make policy.

*Chevron* recognized the reality that in the absence of express authorization for rulemaking, agencies would be making law in the gaps left by ambiguities. But the ostensible justification for this unauthorized agency rulemaking was precisely that an agency would be interpreting the statute. The interpretation theory was a necessary prerequisite for the *Chevron* decision.[15] So, the claim that *Chevron* involves only policymaking, not interpretation, cannot be squared with this Court's holding.

A second surface-plausible defense of *Chevron* deference says that judges supposedly defer, in other matters, to other branches of government. Under the Constitution's guarantee of a republican form of government, they defer to the judgment of Congress. *Luther v. Borden*, 48 U.S. (§ How.) 1, 42 (1849). In

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[15] Philip Hamburger, Chevron *on Stilts: A Response to Jonathan Siegel*, 72 VAND. L. REV. EN BANC 77, 81 (2018).

foreign and military policy, it often is claimed that judges defer to the judgment of the Executive. *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). Why, then, should they not defer to the judgment of executive and other administrative agencies in their interpretation of statutes?

In fact, most of the alleged "deference" that might seem to justify *Chevron* deference is not really deference to the other branches of government. The office and duty of judges require them to defer only to the law, and although they sometimes say they are deferring to the other branches, they usually are merely recognizing that the Constitution allocates power over some matters to another branch, whether Congress or the Executive. In other words, judges in these instances tend to be merely exercising judgment about the law—specifically the Constitution and its allocation of authority. This account explains decisions about the republican form of government and foreign and military matters. Most of this alleged deference to other branches is thus not really deference, and it is doubtful whether judges could further defer to other branches without giving up their independent judgment.

Conversely, *Pullman* abstention, in which courts abstain "from deciding an unclear area of state law that raises constitutional issues because state court clarification might serve to avoid a federal constitutional ruling," really is deference. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). But it is deference to other judges, who also hold the office of independent judgment, not to a party in a case, and it is a deference commanded by the comity inherent in the Constitution's structure. Some

presumptions, especially those that distinguish among different types of parties, could be imagined to justify *Chevron* deference. Presumptions, however, favor only classes of persons (for example, defendants), not a specified party (government). And they generally do not require the judges to defer to the judgment of a particular party about the law. The rule of lenity, for example, protects all criminal defendants and thus is available for the benefit of all Americans whenever they find themselves facing criminal charges—as one might expect given its constitutional foundation in the due process of law. Presumptions that do not favor any particular party and do not require deference to the judgment of a particular party cannot lend legitimacy to *Chevron*-style deference.

Other interpretative canons likewise "operate in congruence with the Constitution rather than test its bounds." *Biden v. Nebraska*, ___ S.Ct. ___, 2023 WL 4277210 (June 30, 2023) (Barrett, J., concurring). Further, even if a handful of canons of construction may test the bounds of our constitutional structure, *see,* A. Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. REV. 109, 169 (2010), that is no reason to break the limits of Article III's judicial office with *Chevron* deference—let alone, to tolerate judicial bias in violation of due process.[16] This Court's justices

[16] Scholarly modesty cautions against drawing strong conclusions from scholarly conclusions about such canons. For example, contrary to current scholarly assumptions, the old avoidance doctrine, which let a court avoid an unconstitutional interpretation of a statute, traditionally applied on the theory that a legislature should not be presumed to have intended an unjust or unconstitutional meaning and that, when a statute was ambiguous, a court should follow the statute's intent, not its

must "act as faithful agents of the Constitution." *Id.*

For all these reasons, *Chevron* adherents can take little comfort in attempts to reconceptualize away its foundation in interpretation. Nor can they find solace in other deference—especially as much of the other alleged deference is not really deference, let alone deference to a particular party in a case.

## IV. *STARE DECISIS* CANNOT JUSTIFY RETAINING THIS UNCONSTITUTIONAL PRECEDENT

It may be wondered whether *Chevron* can be salvaged by invoking *stare decisis*, as if that doctrine obligates or at least permits this Court to adhere to blatantly unconstitutional precedent.[17] *Stare decisis*, however, cannot save *Chevron*—most fundamentally because a judge's ultimate duty is to follow the law—in this case, the Constitution—even at the expense of a judicial precedent. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

Notwithstanding *Aaron v. Cooper*, 358 U.S. 1 (1958), precedent is not the supreme law of the land. It therefore is not as binding as law. Instead,

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literal meaning. It thus was a doctrine about intent, not deference, let alone deference to a party's judgment.

[17] *Chevron*'s status as a rule of interpretation suggests *stare decisis* should play no part in the Court's analysis in the first place. *See, e.g., Kisor v. Wilkie*, 139 S.Ct. 2400, 2443-44 (2019) (Gorsuch, J., concurring in the judgment); *Baldwin v. United States*, 140 S.Ct. 690, 691 n.1 (2020) (Thomas, J., dissenting from denial of certiorari); Kristin Hickman & Aaron Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 991 (2021).

traditionally, it was merely authoritative evidence of law where the law was so uncertain as to be in *equilibrio*. *See* Hamburger, *Law and Judicial Duty*, 231. So, although lower court judges must exercise their judgment about the law only within the confines of higher court precedents, this Court should not feel constrained by *Chevron* because there is no doubt, let alone a doubt in *equilibrio*, that the Constitution's requirements of independent judgment and due process bar judicial bias in favor of one party and against the other party in a case.

Nor are there countervailing special reasons, such as reliance in conveyances of property, of sufficient weight to justify retaining *Chevron*'s judicial bias.[18] *See supra* at 11–14. In fact, in this case the citizen fishermen relied on the language of 18 U.S.C. § 1853(b)(8) that observers might be required but not that they would have to pay for them. *Buffington*, 143 S.Ct. at 21 (Gorsuch, J., dissenting from denial of *certiorari*.) ("[O]ften it is ordinary individuals who are unexpectedly caught in the whipsaw of all the rule changes a broad reading of *Chevron* invites.").

Second, regardless of one's views on precedent, *Chevron* is not an ordinary precedent because this Court did not simply make an error in that case about an unconstitutional act by another branch of government.

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[18] Any possible reliance interests in *Chevron* are much undermined by the flip-flopping of agency interpretations promoted by that case. If anything, overruling *Chevron* would restore the possibility of reliance the statutory text and agency rules. *See, e.g., Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2178 (2019); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S.Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari).

Rather, *Chevron* compels the Court to persistently violate its own constitutional obligations under Article III and the Fifth Amendment.

If this Court in *Chevron* had mistakenly upheld an unconstitutional statute, then this Court would not have acted unconstitutionally, but simply would have erred. In *Chevron*, however, the justices abandoned their Article III duty of independent judgment. Further, they acted with a pro-agency bias in violation of the Fifth Amendment's due process of law. Most appallingly, this Court's *Chevron* doctrine continually requires lower courts—often unwillingly—to abandon their own independent judgment and impartial decision making. *Chevron* thereby infects the entire adjudicative regime with recurring violations of judicial office and due process.

Third, the cost of retaining the unconstitutional *Chevron* methodology is enormous because of the doctrine's broad, cross-cutting reach. While *stare decisis* may justify retaining a misinterpretation of a single statutory provision, *Chevron* deference constantly threatens to generate new erroneous interpretations of any statute connected to an administrative agency—and not just once, but over and over again. This pronounced tendency to generate error across virtually all regulatory regimes weighs heavily in favor of overturning *Chevron* completely. *See Citizens United v. FEC*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring) ("[A]llow[ing] the Court's past missteps to spawn future mistakes[] undercut[s] the very rule-of-law values that *stare decisis* is designed to protect.").

Fourth, *Chevron* deference undermines the

"evenhanded, predictable, and consistent development of legal principles." *Payne v. Tennessee*, 501 U.S. 808, 824 (1991). *Chevron* does this in several ways—for instance, by directing courts, upon a finding of ambiguity, to *avoid* definitively declaring what a law means. *Chevron* thus ensures the law remains ill-defined and subject to politically expedient agency reversals and reinterpretations.

Other times, *Chevron* renders the law unpredictable by requiring courts "to overrule their own declarations about the meaning of existing law in favor of interpretations dictated by executive agencies." *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring) (citing *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967 (2005).

Fifth, *Chevron* has proven unworkable in practice. For starters, *Chevron*'s ambiguity trigger is woefully indeterminate. "[N]o definitive guide exists for determining whether statutory language is clear or ambiguous." Kavanaugh, *supra*, at 2138. Not even the Government—*Chevron*'s biggest defender—can offer a coherent explanation for when a statute is sufficiently ambiguous to invoke *Chevron* deference. *See* Tr. of Oral Arg. at 71-72, *Am. Hosp. Ass'n v. Becerra*, No. 20-20-1114 (U.S. Nov. 30, 2021) (When asked "[h]ow much ambiguity is enough," the Assistant to the Solicitor General, responded, "I don't think I can give you an answer to th[e] question.").

Thanks to this ambiguity over ambiguity, judges "have wildly different conceptions of whether a particular statute is clear or ambiguous." Kavanaugh, *supra*, at 2152. *Chevron*'s inherent

indeterminacy thus inevitably produces arbitrary and inconsistent results that are "antithetical to the neutral, impartial rule of law." *Id.* at 2154.

The unworkability of *Chevron* is further seen from the many caveats to that doctrine this Court has adopted—for instance, the Court's holding that *Chevron* does not apply to interpretive "question[s] of deep 'economic and political significance.'" *King v. Burwell*, 576 U.S. 473, 486 (2015).

Finally, this Court's own "frequent disregard" of *Chevron*—likely due to its unworkability—supports overruling that precedent. *Hohn v. United States*, 524 U.S. 236, 252 (1998). As a leading treatise observes, the Court sometimes "gives *Chevron* powerful effect," sometimes "ignores *Chevron,*" and sometimes "characterizes the *Chevron* test in strange and inconsistent ways."[19] The Court's unwillingness to apply *Chevron* consistently speaks volumes, as does its refusal to even speak its name, as seen in the Court's recent decision in *Biden v. Nebraska*, No. 22-506 (June 30, 2023). When the Court in *Biden* refused to defer to the Secretary of Education's interpretation of statutory provisions on financial aid, including student loans, it made no mention of *Chevron*, instead citing the separation of powers concerns addressed by *Burwell*, 576 U.S. 473, and relying on the major questions doctrine to deny deference to the agency. Indeed, lower courts have remarked on this Court's

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[19] Hickman & Pierce, *supra*, § 3.5.6; *id.* § 3.6.10 (surveying how the Court has treated *Chevron* in seemingly eligible cases over the last decade); *see also Pereira*, 138 S.Ct. at 2121 (Alito, J., dissenting) ("I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.").

reticence to speak *Chevron*'s name in other recent cases, which has led to calling it the "Lord Voldemort" of Supreme Court precedents—a moniker that also bespeaks more than a little antipathy.[20] Nonetheless, these lower courts still remain bound to "name *Chevron*, and apply its precedent—until and unless it is overruled[.]"[21]

In sum, *stare decisis* does not justify retaining *Chevron*. Following precedent here would not "promote[] the evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, [or] contribute[] to the actual and perceived integrity of the judicial process." *Payne*, 501 U.S. at 827. On the contrary, preserving *Chevron* comes with many costs, for Americans and for this Court. Every day that *Chevron* remains unrepudiated, this Court deprives Americans of their constitutional right to independent judgment by an unbiased judge. Every day, therefore, that this Court refuses to correct its own grievous constitutional error, *Chevron* erodes this Court's legitimacy.

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[20] *See Mexican Gulf Fishing Co. v. U.S. Dep't of Commerce*, 60 F.4th 956, 963 n.3 (5th Cir. 2023) ("To be sure, *Chevron* has become something of the-precedent-who-must-not-be-named—left unmentioned by the Supreme Court in two recent decisions addressing the reasonableness of agency action."); *see also Aposhian v. Wilkinson*, 989 F.3d 890, 896 (10th Cir. 2021) (Tymkovich, C.J., dissenting, joined by JJ. Hartz, Holmes, Eid, and Carson, first invoking *Chevron* as "the Lord Voldemort of administrative law, 'the-case-which-must-not-be-named.'").

[21] *Id.*

## V. *CHEVRON* MUST BE REPUDIATED BECAUSE IT IS POLITICALLY DESTABILIZING

Accentuating the need to reject *Chevron* is its tendency to enlarge the sphere of administrative regulation. That unrepublican form of government threatens not only our constitutional freedoms but also the stability of our laws and government. So, *Chevron*'s expansion of administrative regulation further accelerates its destabilizing effects.

For businesses and individuals, administrative power under presidential oversight comes with increased regulatory yo-yoing—the tendency of regulatory policies to fluctuate with each new administration. Regulatory stability is essential for business investment and perhaps especially for the mundane life decisions of individuals—for example, in deciding whether to purchase a gas stove.[22] So, when *Chevron* expands the range of regulation and regulatory instability, business and life become more difficult.[23]

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[22] *See* John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, CSAS Working Paper 21-42, at 4, 18-20 (Oct. 1, 2021) (detailing the cycle of newly empowered agency heads changing administrative rules "180 degrees" between the Obama and Trump administrations and accurately predicting a dizzying regulatory reversal by the Biden Administration).

[23] Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. Online 91, 101-03 (2021) (discussing agency flip-flops on DACA, the Clean Power Plan, and net neutrality, among others, and concluding, "[t]he combination of *Chevron* and political polarity makes it certain that government policies in many important contexts will change dramatically every four to eight years. That effect is intolerable. It makes it impossible for individuals, corporations,

The shift from congressional lawmaking to agency regulation also pushes national policy toward extremes. With administrative power, as shown by John McGinnis and Michael Rappaport, "Presidents and their party in Congress have little incentive to reach compromises in the broad swaths of the policy space where they can act unilaterally and therefore achieve their preferred policy outcomes."[24] Although this would be worrisome enough without *Chevron*, that case greatly broadens the opportunity for regulation to be made without the moderating effect of being expressly authorized by Congress.[25]

*Chevron* also has dubious administrative consequences for state law. Contemporary preemption doctrine is already troubling in permitting state law to be trumped by mere agency regulation, which is not part of the supreme law of the land. U.S. Const., Art. VI. *Chevron* makes this problem worse because it increases the range of agency regulation—rules not intended by Congress—that defeats state law. It even encourages lower-court

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and prospective investors to make wise decisions.").

[24] John O. McGinnis & Michael B. Rappaport, Presidential Polarization, at 28 SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788215. Indeed, "*Chevron* encourages the Executive Branch … to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints." Kavanaugh, *supra*, at 2150.

[25] Pierce, *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. Online at 92 ("the increasing political polarity in America makes *Chevron*, … a source of extreme instability in our legal system").

judges to invent new theories of deference to agencies to avoid deciding questions of law.[26]

Worst of all, *Chevron* expands the destabilizing effects of administrative power into national politics. The Supreme Court has greatly enlarged federal legislative power, and *Chevron* allows that power to be exercised by unelected bureaucrats, who can be unleashed—or at least restrained—by the president. So, presidential elections largely determine the control of an almost general legislative agency power.

Such elections therefore elicit an intensity of feeling that strains lawful, let alone civilized, conduct. With so much policy direction riding on a single election, the stakes become *too* high. Hence, presidential elections have become do-or-die battles for control of massive amounts of regulatory power. And by expanding the scope of agency power that is up for grabs, *Chevron* substantially contributes to this destabilizing tendency toward political conflict.[27]

The nation therefore can ill afford administrative

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[26] *See Voigt v. Coyote Creek Mining Co., LLC*, 980 F.3d 1191 (8th Cir. 2020) (trying to invent federal court deference to a state agency's interpretation of federal law, before withdrawing the opinion and replacing it with one according no such deference).

[27] Philip Hamburger, *How the Supreme Court Set the Stage for the Jan. 6 Riot*, The Wall Street Journal (Jan. 5, 2023); *see also*, McGinnis & Rappaport, *supra*, at 4-5 ("The imperial administrative presidency also raises the stakes of any presidential election, making each side fear that the other will enjoy largely unchecked and substantial power in many areas of policy. … The result is both a more acrimonious presidential contest and a perpetual campaign, as the losing side gears up immediately to win the all-important contest next time.").

power; at the very least, it cannot afford the hydra-headed deference *Chevron* spawns.[28]

## VI. THIS COURT MUST RECLAIM ITS REPUTATION BY CONFESSING ITS ERROR RATHER THAN SIDESTEP *CHEVRON*'S UNCONSTITUTIONALITY

The damage to this Court's reputation from its abandonment of its institutional judicial office for nearly four decades deserves special attention. The reputation of this Court rests on more than simply the correction of its past error—though that is important. At least in this case, its reputation also rests on its courage in candidly facing up to the more serious problem: that it itself has violated the Constitution.

There is no appeal from the erroneous doctrines of the Supreme Court, except to the Court itself at a later day. It therefore is imperative this Court correct its own constitutional errors and not just those of lower courts. Any decision that avoids frankly acknowledging *Chevron*'s patent constitutional defects would leave Americans without an adequate judicial remedy. Indeed, being committed by their oath to support and defend the Constitution of the United States, *see* 5 U.S.C. § 3331, the members of this Court are bound by law, to God and the American people, to repudiate *Chevron*'s grotesque requirement of servile deference and bias.

The people need to have confidence that this Court will not hide from its own errors, let alone its own departures from law. Far from preserving this Court's

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[28] Pierce, *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. Online at 103 ("I have reached the conclusion that we can no longer afford *Chevron* with regret.").

reputation, any decision that "avoids" recognizing the unconstitutionality of *Chevron* deference would leave Americans with the impression the Court lacks the self-confidence to confront its own past mistakes.

Of course, if this case concerned an unconstitutional federal statute that also was vulnerable for non-constitutional reasons, this Court would ordinarily have no need to reach the constitutional question. But, here, this Court faces a challenge to the constitutionality of a doctrine of its own making. So, there is no justification to avoid the constitutional question. On the contrary, there is special reason to confront it.

This Court is not accountable to previous litigants whom *Chevron* deference has harmed. But it is intellectually and morally accountable, and it should embrace this opportunity to recognize the full extent of the problems with *Chevron* deference. This doctrine's shortcomings implicate the most fundamental attributes of the federal judiciary—independent judgment and avoiding bias—so, this Court must set the record straight on these matters as forthrightly as possible by confessing error. If not to atone for the damage its prior decision has done, then it must at least act to preserve its reputation for integrity.

Justice Story predicted: "[I]f any changes shall hereafter be proposed, which shall diminish the just authority of this, as an independent department, they will only be matters of regret, so far as they may take away any checks to the exercise of arbitrary power by either of the other Departments of the Government."[29]

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[29] Joseph Story, *A Familiar Exposition of the Constitution of the United States*, ch. 30, § 305, p. 185 (The Classics of Liberty Library 1994).

Story wrote in the context of threats to judicial tenure, but *Chevron* deference has similarly diminished the just authority of the judiciary as "an independent department." *Chevron* deference has surely become a "matter of regret." *Id.* By admitting as much, this Court can reclaim its moral authority.

## CONCLUSION

The judgment of the court of appeals should be reversed, and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* should be overruled.

Respectfully submitted,

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