No. 22-1219

IN THE
Supreme Court of the United States

RELENTLESS, INC., et al.,
Petitioners,

v.

U.S. DEPARTMENT OF COMMERCE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE FORMER STATE SUPREME COURT JUSTICES ANDREW W. GOULD, MARK D. MARTIN, BURLEY B. MITCHELL, WILLIAM L. WALLER, JR., KURTIS T. WILDER; FORMER ARIZONA COURT OF APPEALS JUDGE PHILIP L. HALL; AND AMERICAN COMMITMENT FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Court should overrule *Chevron* 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.

2. Whether the phrase "necessary and appropriate" in the MSA augments agency power to force domestic fishing vessels to contract with and pay the salaries of federal observers they must carry.

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Former Arizona Supreme Court Justice Andrew W. Gould, former Chief Justices of the North Carolina Supreme Court Mark D. Martin and Burley B. Mitchell, former Chief Justice of the Mississippi Supreme Court William L. Waller, Jr., former Michigan Supreme Court Justice Kurtis T. Wilder, former Arizona Court of Appeals Judge Philip L. Hall, and American Commitment Foundation respectfully submit this brief as amici curiae in support of the Petitioner.

Amici include former state supreme court justices and a former state court of appeals judge. Amici each have experience in their respective states of applying standards of non-deferential review of agency interpretations of state statutory law. As this Court considers overturning *Chevron* at the federal level, Amici offer their unique perspective on how such an approach is both workable and preferable as evidenced by their experience as justices and judges in their respective state courts, bolstering the case for adopting the same approach at the federal level. In this capacity, Amici have witnessed the traditional role and function of the judiciary upheld, and in some cases restored, in the administrative law arena, with statutory law faithfully interpreted in accordance with its terms.

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[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part. No person or entity other than Amici and the counsel below contributed the costs associated with the preparation and submission of this brief.

Amici also include a non-profit organization, American Commitment Foundation ("American Commitment"), whose stated mission is to help restore and protect the American commitment to free markets, economic growth, constitutionally limited government, property rights and individual freedom. Consequently, American Commitment has a significant interest in preserving the federal separation of powers and preventing overreach by federal agencies.

Because *Chevron* deference directly undermines the Constitution's structure and scheme that the Framers put in place to preserve liberty and guard against federal abuse of power, and is frequently used to expand agencies' regulatory authority beyond what the text of statutes fairly authorizes, American Commitment has a particular interest in whether *Chevron* is overruled.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The core issue presented here is one that state court judges have considered extensively over the last decade. Many States that previously recognized state-law analogs to *Chevron* deference have abolished those counterparts, either by statute or judicial decisions. Indeed, the clear trend in the States towards *Chevron*-like deference is one of elimination rather than entrenchment.

Amici here had front-row seats to these changes: they include former state justices and judges that served during those abolitions. Amici submit this brief to provide their unique experiences from these important legal innovations. Amici offer two overarching points. *First*, overruling *Chevron* will not produce the significant disruptions that the United States and its alarmist amici postulate. No such disruptions occurred in Amici's states. *Second*, overruling *Chevron* will restore the federal judiciary to its proper role of resolving what federal statutes mean. After all, "[i]t is emphatically the *province and duty* of the judicial department to *say what the law is*." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

Among the myriad benefits of our federal system of dual sovereigns is the opportunity for States to serve as the "'laboratories for devising solutions to difficult legal problems.'" *Arizona State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (citation omitted). A corresponding benefit is that the federal government (including the judiciary)

can benefit from the lessons and experiences of the States' experimentation.[2]

So it is here. Many prognosticators have liberally predicted grave—even cataclysmic[3]—consequences if this Court were to overrule *Chevron*. In their view, having federal courts determine what federal

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[2] As Sixth Circuit Judge Jeffrey Sutton put it, "state and federal courts may borrow historical, practical, and other useful insights from each other," including "how best to construe generally phrased, sometimes implied, limitations on the powers of each branch." J. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 184 (2021). In the context of administrative law then, state courts operate as "laboratories of administration" throughout the nation for this Court's observation and learning. *See* A. White, *Learning from Laboratories of Liberty*, 46 Harvard J. Law & Public Policy 303 (2023).

[3] *See, e.g.*, Brief of American Cancer Society, et al., *Loper Bright Enterp. v. Raimondo*, No. 22-451, at 6 (contending that overruling *Chevron* would cause "disruption to the health care system… [that] *would be enormous*" (emphasis added)); C. Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 Boston Univ. L. Rev. 619, 703 (2021) (warning that efforts to overturn *Chevron* could culminate in the "*decimat[ion of] federal institutions and displace[ment of] American democracy*, while also undermining the credibility of constitutional decision-making itself" (emphasis added)); J. Turrentine, *What Happens if the Supreme Court Ends "*Chevron *Deference"*? NRDC (June 21, 2023) ("[T]he Supreme Court could reopen the door for federal judges to decide how executive-branch agencies should go about their daily business" including deciding "rules about equipment usage" or "the need for periodic employee rest breaks"); I. Millhiser, *A new Supreme Court case seeks to make the nine justices even more powerful*, Vox (May 2, 2023) (warning that overruling *Chevron* could "introduce chaos into the entire federal government" where "[n]o one will know what the rules are until judges with no expertise on the relevant subject matter weigh in").

statutes mean without agencies' thumbs (and frequently anvils) on the scales would "usher in a new era marked by legal and administrative chaos." J. Turrentine, *What Happens if the Supreme Court Ends "Chevron Deference"?* NRDC (June 21, 2023), https://www.nrdc.org/stories/what-happens-if-supreme-court-ends-chevron-deference. The United States is only modestly more restrained, warning that an "abuse of judicial power" may result from courts resolving statutory ambiguities based on "'the judges' personal policy preferences'" without the opportunity for democratic accountability. Brief for Respondents, *Loper Bright Enterp. v. Raimondo,* No. 22-451, at 19.

The experiences of the States that have abolished *Chevron*-like deference refute these doom-and-gloom predictions. These States have not encountered such conjectured catastrophes. Indeed, the putative disruptions are so minor and insignificant that they are often even difficult to detect. For example, after Arizona abolished *Chevron*-like deference in 2018, the Arizona Supreme Court has only even *mentioned* that elimination three times.

While disruptions of any magnitude were hard to discern, the resulting benefits were readily perceptible to Amici. Abolishing *Chevron* analogs has spurred something of a judicial renaissance, with state courts reclaiming their proper role of "say[ing] what the law is." *Marbury*, 5 U.S. at 177. In Amici's experience, the results have been overwhelmingly positive.

That is particularly so because *Chevron* and *Chevron*-like deference rests on a deep anomaly that

upends separate-of-powers principles. The *core competency*—and *principal duty*—of the federal Judiciary is to decide what the proper interpretation of federal law is. Indeed, the Founders specifically created an independent judiciary with life tenure precisely so that legal disputes could be resolved by impartial, non-elected officials. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring) (Article III "requires a court to exercise its independent judgment in interpreting and expounding upon the laws.").

Chevron, however, erroneously abdicated the Judiciary's constitutional responsibility by outsourcing it to the elected Executive and deferring to its interpretations of ambiguous statutes. In so doing, it empowers the Executive to usurp the powers of Congress too. This case provides a powerful example of just that: unwilling to ask Congress to exercise the legislative power of the purse to impose user fees and spend the resulting funds, Respondents arrogated that power to themselves without any "authorization" beyond mere Congressional silence. And hamstrung by *Chevron*, the First and D.C. Circuits have upheld that usurpation.

None of this would fly in the States that have abolished *Chevron* deference. There, legislative silence is not carte blanche for agencies to impose their will upon—or stick their fingers into the pockets of—regulated parties. The courts of all of these States would review the lawfulness of the mandates like those presented here *de novo*, and would have had little difficulty finding them wanting. But *Chevron* has enfeebled federal courts'

role of checking extravagant assertions of agency authority, and permitted agencies to run roughshod over limitations on their powers. Based on their experience in their respective States, Amici are confident that overruling *Chevron* will restore the federal courts to their proper role of exercising the "judicial Power of the United States," U.S. Const. Art. III § 1, rather than delegating that power to the elected Executive.

Given *Chevron*'s dubious foundations, it is unsurprising that "this Court has not invoked the broad reading of *Chevron* in many years." *Buffington v. McDonough*, 143 S. Ct. 14, 21 (2022) (Gorsuch, J., dissenting from denial of certiorari). And just as many States have relegated *Chevron*-like deference to the ash heap of history, this Court should now give Chevron a proper burial with a "tombstone no one can miss." *Id.* at 22.

ARGUMENT

I. The Recent Trend in State Courts Away from Broad Agency Deference Demonstrates That Alternatives Are Both Workable and Preferable.

Both the United States and its amici have advanced overwrought predictions of a "convulsive shock to the legal system" that will result from overruling *Chevron*. *See*, *e.g.*, *Loper Bright*, Resp. Br. at 10. This includes their contention that "if *Chevron* were overruled, the federal courts would inevitably be required to resolve policy questions properly left to the 'political branch[es],'" *id.* at 10 (citation omitted), which would in turn "erode [the]

distinction" between the judicial process and politics, *id.* at 37. "[R]eplacing *Chevron* with a regime of de novo review," they insist, would also "exacerbate the potential for inconsistent results," *id.* at 8, and "'render the binding effect of agency rules unpredictable,'" *id.* at 18 (quoting *City of Arlington*, 569 U.S. at 307). They even go so far as to warn of the "abuse of judicial power" that may result from courts resolving statutory ambiguities based on "'the judges' personal policy preferences'" without the opportunity for democratic accountability. *Id.* at 19.

Contrary to these forebodings, the experience of States—including the states where Amici have served as state supreme court justices and as a court of appeals judge—refutes these predictions. Requiring *de novo* consideration of delegated authority has caused not any "convulsive shock to the legal system." *Loper Bright*, Resp. Br. at 10. Nor has it resulted in any kind of excessive or unwarranted disruption that the United States is so confidently predicting. Instead, each of these States has experienced the opposite: abolishing deference has simply put the ball of statutory interpretation back in the "court" where it belongs.

Evidence is abundant and ever-growing that ending *Chevron*-like deference is eminently workable in practice. In fact, a recent survey of States demonstrates that "not only have a large number of states abandoned deference but that a significant number of states have also moved away from deference in less dramatic respects." D. Ortner, *The End of Deference: How States Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines*, at 4 (March 11,

2020), https://ssrn.com/abstract=3552321 (hereinafter "The End of Deference").

Indeed, ten states have abolished such deference either by judicial decision (Arkansas, Colorado, Delaware, Kansas, Michigan, Mississippi, Utah, and Wisconsin) or by statute or constitutional amendment (Arizona, Florida, and Wisconsin). *Id.* at 9–23. Only *Skidmore*-type deference persists in three additional states (North Carolina, Virginia, and West Virginia), while in five other states there is only *Auer*-type deference for regulations, but no *Chevron*-like deference for statutory interpretations (California, Louisiana, Minnesota, Nebraska, and Tennessee). *Id.* at 72.

Meanwhile, "no states … have gotten appreciably more deferential in the past 20 years." *Id.* at 3 n.4, 68–69. By another recent survey's count, the number of States applying either no deference at all, or a lesser form of deference, numbers 36 in all—outnumbering States with the *Chevron*-type deference standards by more than two-to-one. L. Phillips, Chevron *in the States? Not So Much*, 89 Miss. L. J. 313, 364 (2020). This "quiet revolution" was "well underway in courts throughout the nation" three years ago, which underscores how minimally disruptive overruling *Chevron* would be. *See* The End of Deference at 69. And the fact that the trend is overwhelmingly against *Chevron*-like deference strongly suggests federal courts could follow the lead of the States without dire consequences that the United States predicts.

Arizona, for example, abolished deference to agency legal interpretations in 2018. *See* Ariz. Rev.

Stat. Ann. § 12-910(F) ("In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency.") (enacted by 2018 Ariz. Legis. Serv. ch. 180 (H.B. 2238)).

No discernible negative consequences have yet arisen. Indeed, in the ensuing half decade after the legislature abolished agency deference, the Arizona Supreme Court has only even mentioned the abolition of deference a grand total of three times. *Roberts v. State*, 512 P.3d 1007, 1018 (Ariz. 2022); *Saguaro Healing LLC v. State*, 470 P.3d 636, 638 (Ariz. 2020); *Silver v. Pueblo Del Sol Water Co.*, 423 P.3d 348, 356 (Ariz. 2018).

The *Silver* case demonstrates one reason why disruptions likely will be minor: legislative ratification of long-standing agency interpretations will frequently render the issue of deference irrelevant. *See Silver*, 423 P.3d at 356 ("[T]he dissents' argument conflates judicial deference (also known as '*Chevron* deference') with legislative adoption. The amendment prohibits courts from deferring to agencies' interpretations of law. The amendment does not, however, prohibit the *legislature* from adopting an agency's interpretation of a term of art. The latter is what we have here." (citation omitted)).

Arizona is hardly alone in abolishing or limiting *Chevron*-like deference. While Michigan has "never adopted *Chevron* for review of state administrative

agencies' statutory interpretations," it has expressly rejected agency deference under a standard first enunciated as far back as 1935. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 111, 754 N.W.2d 259, 272 (2008) (citing *Boyer–Campbell Co. v. Fry,* 271 Mich. 282, 296-97, 260 N.W. 165 (1935)).

In refusing to import the federal *Chevron* regime into Michigan's jurisprudence in a 2008 decision, the Michigan Supreme Court explained that "the unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence" and "separation of powers principles ... by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government." *Id.* A key reason Michigan has never adopted *Chevron* is that its vagaries offer no "clear road map" when reviewing administrative decisions, making it "very difficult to apply". *Id.*

Instead, Michigan has long accorded "respectful consideration" to agencies' statutory construction, meaning that such constructions can be overruled if there are "cogent reasons" for doing so. *Id.* at 103 (quoting *Boyer–Campbell Co.,* 271 Mich. at 296-97). Consequently, agencies' interpretations "are not binding on [Michigan] courts"; rather, they are simply to be "taken note of by the courts as an aiding element to be given weight in construing such laws." *Id.*

Expounding on this standard in a subsequent decision, Justice Wilder (then as Judge Wilder of the Michigan Court of Appeals) explained that "'[r]espectful consideration" "is not akin to

'deference.'" *Grass Lake Imp. Bd. v. Department of Environmental Quality*, 316 Mich. App. 356, 363, 891 N.W. 2d. 884, 888 (2016) (quoting *Rovas*, 482 Mich at 108.). While an agency's position can be a "helpful aid in construing a statutory provision with a 'doubtful or obscure' meaning," at the end of the day it is Michigan courts that bear responsibility "for finally deciding whether an agency's interpretation is erroneous under traditional rules of statutory construction." *Id.* (quoting *Rovas*, 482 Mich. at 103, 108).

In other words, although Michigan courts accord respect and due consideration to agencies' positions on the meaning of statutes, and find such constructions to be helpful criteria when construing vague statutes, they are by no means the predominant or prevailing criteria; in the end, responsibility for interpreting the law rests with the courts. As it should. *Marbury*, 5 U.S. at 177. This "respectful consideration" standard has now proven effective and workable in Michigan for nearly a century, with no signs that the state supreme court has any inclination to revisit that long-standing precedent.

Mississippi has been even more explicit in its rejection of *Chevron* deference. In 2018, the Mississippi Supreme Court expressly "abandon[ed] the old standard of review giving deference to agency interpretations of statutes." *King v. Miss. Military Dep't*, 245 So. 3d 404, 408 (¶12) (Miss. 2018). In reversing its past *Chevron*-equivalent precedent, the court continued its trend in recent years of backing away from showing "great deference" to agency interpretations because "'the ultimate authority and

responsibility to interpret the law'" rests with the judiciary. *Id.* at 407 (¶9) (quoting *Miss. State and School Emp. Life and Health Plan v. KCC, Inc.*, 108 So. 3d 932, 939 (¶20) (Miss. 2013)).

Notably, the Mississippi Supreme Court also held that agency deference itself contravenes the Mississippi Constitution's strict separation of powers. That constitution provides that no branch of government "shall exercise any power properly belonging to either of the others." Miss. Const. art. 1, § 2. Accordingly, the court held that "when deference is given to an agency interpretation, we share the exercise of the power of statutory interpretation with another branch in violation of Article 1, Section 2." *King*, 245 So. 3d at 408 (¶11); *see also id.* (¶12) (indicating that by eliminating deference the court was "stepp[ing] fully into the role" that the state constitution provides "for the courts and the courts alone, to interpret statutes").

In so holding, it found persuasive the reasoning of then-Judge Gorsuch, who had written in an opinion concurring with his own majority in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016), that, "absent judicial deference to administrative agencies' interpretation of statutes, '[c]ourts would then fulfill their duty to exercise their independent judgment about what the law *is*.'" *King*, 245 So. 3d at 408 (¶12) (quoting *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring)); *see also id.* at 407 (¶9) (identifying the contradiction inherent in "claiming to give deference while simultaneously claiming that the Court bears the ultimate responsibility to interpret statutes").

Mississippi did not stop there. In response to the legislature's imposition of a deferential standard on Mississippi courts, the state supreme court went a step further in a 2020 decision holding that even legislative-prescribed deference was unconstitutional because it violated the state constitution's separation of powers doctrine. *HWCC-Tunica, Inc. v. Miss. Dep't of Revenue*, 296 So. 3d 668, 677 (¶34) (Miss. 2020) ("Interpreting statutes is reserved *exclusively* for courts." (emphasis added)).[4] In so holding, the court noted that Mississippi courts nonetheless retained the flexibility to look to regulations for information and guidance in interpreting vague statutes under a *Skidmore*-like analysis while still preserving the core judicial function of independently determining the law. *See HWCC-Tunica*, 296 So. 3d at 677 (¶36).

Similarly, North Carolina has long declined to accord significant deference to agency interpretations of statutes, applying instead a *Skidmore*-like standard where the weight that courts will accord to agency interpretations depends upon the thoroughness of the agency's consideration in a particular case, the validity of its reasoning, and its

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[4] Continuing its movement away from deference, in June 2020 the Mississippi Supreme Court again overruled past precedent and ruled that deference to agency interpretations of rules or regulations (*Auer*-like deference) also violated the Mississippi Constitution. *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 319 So. 3d 1049, 1055 (¶18) (Miss. 2021). In adopting a new *de novo* standard, the court held that the same reasoning for ending deference to agencies' statutory constructions applied to agency regulations: "when the interpretation of a regulation comes into a third-branch courtroom," such deference constitutes "the ceding of judicial authority to the executive branch." *Id.* at 1054 (¶17).

persuasive power. *In re Appeal of North Carolina Sav. & Loan League*, 302 N.C. 458, 466 (1981). Because agency interpretations of statutes are "not binding," a North Carolina court "may freely substitute its judgment for that of the agency and employ *de novo* review." *Id.* at 465-66. Indeed, many States that have overturned *Chevron*-like deference similarly apply a similar type of *Skidmore*-like deference where their courts evaluate the persuasiveness of the agency's analysis in determining how much weight to give its interpretation. *See* The End of Deference at 24 n.85.

Amici have served in the judiciaries of Arizona, Michigan, Mississippi, and North Carolina and have been directly involved in applying these standards in administrative law cases. For Michigan and North Carolina's jurisprudence, *Chevron* deference is not the standard for reviewing administrative interpretations, and has not been for decades. In Arizona and Mississippi, earlier *Chevron*-like deference has been more recently overturned by superseding statute or state constitutional interpretation. In each of these four states, regardless of the circumstance and timing of when *Chevron*-like deference was rejected, the sky has not fallen—the courts by and large respect the boundary between judicial review and politics, notwithstanding any alarmist predictions to the contrary.

Contrary to Respondents' and their Amici's dire predictions of seismic disruptions, the reality on the ground is that courts remain capable of using ordinary tools of statutory construction to fulfill their judicial duty to faithfully interpret the law

even when agencies are involved. Judiciaries exercising judicial power independent from the Executive is simply not the calamity that the Executive believes it to be. That much is made plain by the rapidly growing "quiet revolution" away from *Chevron*-like deference, where today most States have adopted either a standard of no deference or a weakened form of deference. *See Chevron* in the States at 364. There is every reason to believe that any revolution in the federal system occasioned by overruling *Chevron* would be equally quiet.

II. Consistent with Amici's Experience in Their Respective State Courts, Overruling *Chevron* Will Help Restore the Judiciary's Proper Constitutional Role.

In this Court's most formative decision, Chief Justice Marshall pronounced that "[i]t is emphatically the province and duty of the Judicial Department to say what the law is." *Marbury*, 5 U.S. at 177. Ensuring that this responsibility continues to lie with the Judiciary is critical to preserving the carefully crafted and delicate scheme of separation of powers under the Constitution. Until *Chevron*, this Court had recognized no major carveout to Article III's investment of judicial power in the Judiciary when it came to reviewing executive branch agencies' interpretations of law. In the wake of *Chevron*, however, this Court's administrative law jurisprudence has lost its way, outsourcing the judiciary's core responsibility to a political branch of government.

When crafting the government's separation of powers structure, the Framers sought to protect

against usurpation and aggregation of power in a single branch. *See* The Federalist No. 47 (C. Rossiter ed. 1961) (J. Madison) ("[T]he accumulation of all powers, legislative, executive, and judicial, in the same hands ... may justly be pronounced the very definition of tyranny."). Accordingly, the Framers intentionally ensured that the Judiciary would be able to exercise meaningful judicial review of the lawfulness of the Executive's actions, rather than being bound by the latter's self-serving assertions that its actions were legal.

That (proper) understanding of the Constitution was preserved for nearly 200 years until *Chevron*. As Hamilton explained, "[s]o long as the judiciary remains truly distinct from both the legislature and the Executive" "the general liberty of the people can never be endangered from that quarter." The Federalist No. 78 (C. Rossiter ed. 1961) (A. Hamilton). To accomplish this distinctness, the judicial branch was given a discrete task: "The interpretation of the laws is the proper and peculiar province of the courts.... It, therefore, *belongs to them* to ascertain ... the meaning of any particular act proceeding from the legislative body." *Id.* (emphasis added). By creating a neutral and independent Judiciary, the Constitution thus insulates the courts from the political considerations that pervade the political branches, making the courts instead answerable to the strictures and demands of the law.

Chevron's original sin was to turn these fundamental principles on their head and abdicate the Judiciary's responsibility to "say what the law is." *Marbury*, 5 U.S. at 177. As Justice Gorsuch recently admonished, under a broad reading of

Chevron, "[r]ather than provide individuals with the best understanding of their rights and duties under the law a neutral magistrate can muster, [the federal courts] outsource our interpretive responsibilities. Rather than say what the law is, we tell those who come before us to go ask a bureaucrat." *Buffington*, 143 S. Ct. at 18-19 (Gorsuch, J., dissenting from the denial of certiorari).

And by effectively delegating the judicial power to executive branch officials whenever a statute is ambiguous or silent, those officials are permitted "to judge the scope of their own powers and duties," *id.*, effectively entrusting an agency to be judge of its own case and offending basic requirements of due process as a result, *see id.* The Framers were acutely aware of the tendency of individuals—and institutions—to favor their own interests. *See* The Federalist No. 10 (C. Rossiter ed. 1961) (J. Madison) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."); The Federalist No. 80 (C. Rossiter ed. 1961) (A. Hamilton) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."). And while they designed a system with separation of powers specifically to check such impulses, *Chevron* vitiates those protections.

In particular, a robust independent federal Judiciary is a critical means of thwarting excessive self-interest and of maintaining self-government. Accordingly, the principle that "foxes should not guard henhouses" is fundamental to judicial review

of agency action. *See* Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869, 889 (2008); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 446 (1989) ("The basic case for judicial review depends on the proposition that foxes should not guard hen-houses.").

The good news is that it is not too late for this Court to correct course. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee* v. *Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). And as Amici's experience as judges and justices in their respective state courts demonstrates, such an amply warranted course correction will produce substantial benefits and minimal disruptions. In each of these states (and for many others identified above), avoiding, narrowing, or in recent cases even overturning longstanding *Chevron*-type deference has been effective at restoring the judiciary to its proper role and function under the state constitutions. See *supra* § I. This Court should follow this collective wisdom.

In contrast, the Executive's grave, self-interested prediction that overruling *Chevron* will result in "abuse of the judicial power" where statutory ambiguities will be resolved based on personal policy preferences rather than sound principles and canons of statutory construction, *see Loper Bright*, Resp. Br. at 19, is unfounded. As an initial matter, the United States' warning seems more of an apt description of the mischief that the Executive is currently engaged in, rather than a convincing prediction of the results that overruling *Chevron* would produce.

In any event, Amici's experiences bely the United States' prediction. Amici respectfully submit that impartial judges are better equipped than agency personnel to faithfully ascertain the meaning of laws passed by the legislature. This accords with the Framers' intuition that interpreting law is "the proper and peculiar province of the courts." The Federalist No. 78 (C. Rossiter ed. 1961) (A. Hamilton).

When the Judiciary interprets the meaning of statutes in accordance with the statutory meaning as enacted by the legislature, responsibility for changing or clarifying the law falls more effectively to the truly accountable branch rather than an unaccountable bureaucracy. Such legislative accountability in turn protects liberty, ensuring that the people remain sovereign over those who govern them. And it mitigates the perverse incentive for legislators to enact intentionally vague laws and thereby evade their legislative responsibility by outsourcing policymaking authority to the bureaucracy.[5] Instead, in a post-*Chevron* world, Congress's incentive will be to adopt statutes that are sufficiently clear and specific that the Courts can then interpret as intended.

This case now affords an important opportunity to correct these errors by ensuring that doctrines of agency deference properly preserve the judicial role and the separation of powers. Amici respectfully

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[5] This is an important reason that *Chevron*-like deference to executive agencies similarly undermines Article I's vesting of "[a]ll legislative Powers" in Congress, enabling Congress to abdicate its constitutional duties. U.S. Const. art I. §1.

urge this Court to either overturn *Chevron* entirely, or at a minimum scale it back closer to *de novo* consideration, to help restore the Framers' vision of America's constitutional framework.

CONCLUSION

As Justice Kennedy explained, "[t]he proper rules for 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). Because *Chevron* deference contravenes these principles, Amici agree that it is "necessary and appropriate to reconsider ... the premises that underlie *Chevron* and how courts have implemented that decision." *Id.*

As clear trends in the "laboratories of administration" throughout the nation are demonstrating, overturning *Chevron* is not only feasible, but desirable. In States that have altogether eliminated *Chevron*-like deference (or declined to adopt it in the first place), none of the cynics' catastrophic predictions have transpired. Instead, application of traditional tools of construction upholds and, if necessary, restores the judicial role in administrative law adjudication. Doing so at the federal level will do the same, helping to protect liberty by adhering more carefully to the Framers' intended separation-of-powers framework.

The Court should reverse the judgment of the First Circuit below and explicitly overrule *Chevron*.

Dated: November 27, 2023

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