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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 28, 2024]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Since our decision in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we have sometimes required courts to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. In these cases we consider whether that doctrine should be overruled.

I

Our *Chevron* doctrine requires courts to use a two-step

framework to interpret statutes administered by federal agencies. After determining that a case satisfies the various preconditions we have set for *Chevron* to apply, a reviewing court must first assess "whether Congress has directly spoken to the precise question at issue." *Id.*, at 842. If, and only if, congressional intent is "clear," that is the end of the inquiry. *Ibid.* But if the court determines that "the statute is silent or ambiguous with respect to the specific issue" at hand, the court must, at *Chevron*'s second step, defer to the agency's interpretation if it "is based on a permissible construction of the statute." *Id.*, at 843. The reviewing courts in each of the cases before us applied *Chevron*'s framework to resolve in favor of the Government challenges to the same agency rule.

A

Before 1976, unregulated foreign vessels dominated fishing in the international waters off the U. S. coast, which began just 12 nautical miles offshore. See, *e.g.*, S. Rep. No. 94–459, pp. 2–3 (1975). Recognizing the resultant overfishing and the need for sound management of fishery resources, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (MSA). See 90 Stat. 331 (codified as amended at 16 U. S. C. §1801 *et seq*.). The MSA and subsequent amendments extended the jurisdiction of the United States to 200 nautical miles beyond the U. S. territorial sea and claimed "exclusive fishery management authority over all fish" within that area, known as the "exclusive economic zone." §1811(a); see Presidential Proclamation No. 5030, 3 CFR 22 (1983 Comp.); §§101, 102, 90 Stat. 336. The National Marine Fisheries Service (NMFS) administers the MSA under a delegation from the Secretary of Commerce.

The MSA established eight regional fishery management councils composed of representatives from the coastal States, fishery stakeholders, and NMFS. See 16 U. S. C.

§§1852(a), (b). The councils develop fishery management plans, which NMFS approves and promulgates as final regulations. See §§1852(h), 1854(a). In service of the statute's fishery conservation and management goals, see §1851(a), the MSA requires that certain provisions—such as "a mechanism for specifying annual catch limits . . . at a level such that overfishing does not occur," §1853(a)(15)—be included in these plans, see §1853(a). The plans may also include additional discretionary provisions. See §1853(b). For example, plans may "prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment," §1853(b)(4); "reserve a portion of the allowable biological catch of the fishery for use in scientific research," §1853(b)(11); and "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery," §1853(b)(14).

Relevant here, a plan may also require that "one or more observers be carried on board" domestic vessels "for the purpose of collecting data necessary for the conservation and management of the fishery." §1853(b)(8). The MSA specifies three groups that must cover costs associated with observers: (1) foreign fishing vessels operating within the exclusive economic zone (which *must* carry observers), see §§1821(h)(1)(A), (h)(4), (h)(6); (2) vessels participating in certain limited access privilege programs, which impose quotas permitting fishermen to harvest only specific quantities of a fishery's total allowable catch, see §§1802(26), 1853a(c)(1)(H), (e)(2), 1854(d)(2); and (3) vessels within the jurisdiction of the North Pacific Council, where many of the largest and most successful commercial fishing enterprises in the Nation operate, see §1862(a). In the latter two cases, the MSA expressly caps the relevant fees at two or three percent of the value of fish harvested on the vessels. See §§1854(d)(2)(B), 1862(b)(2)(E). And in general, it author-

izes the Secretary to impose "sanctions" when "any payment required for observer services provided to or contracted by an owner or operator . . . has not been paid." §1858(g)(1)(D).

The MSA does not contain similar terms addressing whether Atlantic herring fishermen may be required to bear costs associated with any observers a plan may mandate. And at one point, NMFS fully funded the observer coverage the New England Fishery Management Council required in its plan for the Atlantic herring fishery. See 79 Fed. Reg. 8792 (2014). In 2013, however, the council proposed amending its fishery management plans to empower it to require fishermen to pay for observers if federal funding became unavailable. Several years later, NMFS promulgated a rule approving the amendment. See 85 Fed. Reg. 7414 (2020).

With respect to the Atlantic herring fishery, the Rule created an industry funded program that aims to ensure observer coverage on 50 percent of trips undertaken by vessels with certain types of permits. Under that program, vessel representatives must "declare into" a fishery before beginning a trip by notifying NMFS of the trip and announcing the species the vessel intends to harvest. If NMFS determines that an observer is required, but declines to assign a Government-paid one, the vessel must contract with and pay for a Government-certified third-party observer. NMFS estimated that the cost of such an observer would be up to $710 per day, reducing annual returns to the vessel owner by up to 20 percent. See *id.*, at 7417–7418.

B

Petitioners Loper Bright Enterprises, Inc., H&L Axelsson, Inc., Lund Marr Trawlers LLC, and Scombrus One LLC are family businesses that operate in the Atlantic herring fishery. In February 2020, they challenged the Rule under the MSA, 16 U. S. C. §1855(f), which incorporates

the Administrative Procedure Act (APA), 5 U. S. C. §551 *et seq*. In relevant part, they argued that the MSA does not authorize NMFS to mandate that they pay for observers required by a fishery management plan. The District Court granted summary judgment to the Government. It concluded that the MSA authorized the Rule, but noted that even if these petitioners' "arguments were enough to raise an ambiguity in the statutory text," deference to the agency's interpretation would be warranted under *Chevron*. 544 F. Supp. 3d 82, 107 (DC 2021); see *id.*, at 103–107.

A divided panel of the D. C. Circuit affirmed. See 45 F. 4th 359 (2022). The majority addressed various provisions of the MSA and concluded that it was not "wholly unambiguous" whether NMFS may require Atlantic herring fishermen to pay for observers. *Id.*, at 366. Because there remained "some question" as to Congress's intent, *id.*, at 369, the court proceeded to *Chevron*'s second step and deferred to the agency's interpretation as a "reasonable" construction of the MSA, 45 F. 4th, at 370. In dissent, Judge Walker concluded that Congress's silence on industry funded observers for the Atlantic herring fishery—coupled with the express provision for such observers in other fisheries and on foreign vessels—unambiguously indicated that NMFS lacked the authority to "require [Atlantic herring] fishermen to pay the wages of at-sea monitors." *Id.*, at 375.

C

Petitioners Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC own two vessels that operate in the Atlantic herring fishery: the F/V *Relentless* and the F/V *Persistence*.[1] These vessels use small-mesh bottom-trawl gear and can freeze fish at sea, so they can catch more species of fish and take longer trips than other vessels (about 10 to 14 days, as

[1] For any landlubbers, "F/V" is simply the designation for a fishing vessel.

opposed to the more typical 2 to 4). As a result, they generally declare into multiple fisheries per trip so they can catch whatever the ocean offers up. If the vessels declare into the Atlantic herring fishery for a particular trip, they must carry an observer for that trip if NMFS selects the trip for coverage, even if they end up harvesting fewer herring than other vessels—or no herring at all.

This set of petitioners, like those in the D. C. Circuit case, filed a suit challenging the Rule as unauthorized by the MSA. The District Court, like the D. C. Circuit, deferred to NMFS's contrary interpretation under *Chevron* and thus granted summary judgment to the Government. See 561 F. Supp. 3d 226, 234–238 (RI 2021).

The First Circuit affirmed. See 62 F. 4th 621 (2023). It relied on a "default norm" that regulated entities must bear compliance costs, as well as the MSA's sanctions provision, Section 1858(g)(1)(D). See *id.*, at 629–631. And it rejected petitioners' argument that the express statutory authorization of three industry funding programs demonstrated that NMFS lacked the broad implicit authority it asserted to impose such a program for the Atlantic herring fishery. See *id.*, at 631–633. The court ultimately concluded that the "[a]gency's interpretation of its authority to require at-sea monitors who are paid for by owners of regulated vessels does not 'exceed[] the bounds of the permissible.'" *Id.*, at 633–634 (quoting *Barnhart* v. *Walton*, 535 U. S. 212, 218 (2002); alteration in original). In reaching that conclusion, the First Circuit stated that it was applying *Chevron*'s two-step framework. 62 F. 4th, at 628. But it did not explain which aspects of its analysis were relevant to which of *Chevron*'s two steps. Similarly, it declined to decide whether the result was "a product of *Chevron* step one or step two." *Id.*, at 634.

We granted certiorari in both cases, limited to the question whether *Chevron* should be overruled or clarified. See

601 U. S. ___ (2023); 598 U. S. ___ (2023).[2]

II

A

Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved. The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear. Cognizant of the limits of human language and foresight, they anticipated that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation," would be "more or less obscure and equivocal, until their meaning" was settled "by a series of particular discussions and adjudications." The Federalist No. 37, p. 236 (J. Cooke ed. 1961) (J. Madison).

The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." *Id.*, No. 78, at 525 (A. Hamilton). Unlike the political branches, the courts would by design exercise "neither Force nor Will, but merely judgment." *Id.*, at 523. To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches. *Id.*, at 522; see *id.*, at 522–524; *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011).

This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury* v. *Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137,

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[2] Both petitions also presented questions regarding the consistency of the Rule with the MSA. See Pet. for Cert. in No. 22–451, p. i; Pet. for Cert. in No. 22–1219, p. ii. We did not grant certiorari with respect to those questions and thus do not reach them.

177 (1803). And in the following decades, the Court understood "interpret[ing] the laws, in the last resort," to be a "solemn duty" of the Judiciary. *United States* v. *Dickson*, 15 Pet. 141, 162 (1841) (Story, J., for the Court). When the meaning of a statute was at issue, the judicial role was to "interpret the act of Congress, in order to ascertain the rights of the parties." *Decatur* v. *Paulding*, 14 Pet. 497, 515 (1840).

The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. For example, in *Edwards' Lessee* v. *Darby*, 12 Wheat. 206 (1827), the Court explained that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Id.*, at 210; see also *United States* v. *Vowell*, 5 Cranch 368, 372 (1809) (Marshall, C. J., for the Court).

Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. See *Dickson*, 15 Pet., at 161; *United States* v. *Alabama Great Southern R. Co.*, 142 U. S. 615, 621 (1892); *National Lead Co.* v. *United States*, 252 U. S. 140, 145–146 (1920). That is because "the longstanding 'practice of the government'"—like any other interpretive aid—"can inform [a court's] determination of 'what the law is.'" *NLRB* v. *Noel Canning*, 573 U. S. 513, 525 (2014) (first quoting *McCulloch* v. *Maryland*, 4 Wheat. 316, 401 (1819); then quoting *Marbury*, 1 Cranch, at 177). The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who were "[n]ot unfrequently . . . the draftsmen of the laws they [were] afterwards called upon to interpret." *United*

States v. *Moore*, 95 U. S. 760, 763 (1878); see also *Jacobs* v. *Prichard*, 223 U. S. 200, 214 (1912).

"Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge "certainly would not be bound to adopt the construction given by the head of a department." *Decatur*, 14 Pet., at 515; see also *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16 (1932). Otherwise, judicial judgment would not be independent at all. As Justice Story put it, "in cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it." *Dickson*, 15 Pet., at 162.

B

The New Deal ushered in a "rapid expansion of the administrative process." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 644 (1950). But as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment.

During this period, the Court often treated agency determinations of *fact* as binding on the courts, provided that there was "evidence to support the findings." *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51 (1936). "When the legislature itself acts within the broad field of legislative discretion," the Court reasoned, "its determinations are conclusive." *Ibid.* Congress could therefore "appoint[] an agent to act within that sphere of legislative authority" and "endow the agent with power to make *findings of fact* which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily." *Ibid.* (emphasis added).

But the Court did not extend similar deference to agency

resolutions of questions of *law*. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function." *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 544 (1940); see also *Social Security Bd.* v. *Nierotko*, 327 U. S. 358, 369 (1946); *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678, 681–682, n. 1 (1944). The Court understood, in the words of Justice Brandeis, that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." *St. Joseph Stock Yards*, 298 U. S., at 84 (concurring opinion). It also continued to note, as it long had, that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to "great weight." *American Trucking Assns.*, 310 U. S., at 549.

Perhaps most notably along those lines, in *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944), the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon . . . specialized experience," "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions. *Id.*, at 139–140. "The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*, at 140.

On occasion, to be sure, the Court applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency. For example, in *Gray* v. *Powell*, 314 U. S. 402 (1941), the Court deferred to an administrative conclusion that a coal-burning railroad that

had arrangements with several coal mines was not a coal "producer" under the Bituminous Coal Act of 1937. Congress had "specifically" granted the agency the authority to make that determination. *Id.*, at 411. The Court thus reasoned that "[w]here, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched" so long as the agency's decision constituted "a sensible exercise of judgment." *Id.*, at 412–413. Similarly, in *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944), the Court deferred to the determination of the National Labor Relations Board that newsboys were "employee[s]" within the meaning of the National Labor Relations Act. The Act had, in the Court's judgment, "assigned primarily" to the Board the task of marking a "definitive limitation around the term 'employee.'" *Id.*, at 130. The Court accordingly viewed its own role as "limited" to assessing whether the Board's determination had a "'warrant in the record' and a reasonable basis in law." *Id.*, at 131.

Such deferential review, though, was cabined to fact-bound determinations like those at issue in *Gray* and *Hearst*. Neither *Gray* nor *Hearst* purported to refashion the longstanding judicial approach to questions of law. In *Gray*, after deferring to the agency's determination that a particular entity was not a "producer" of coal, the Court went on to discern, based on its own reading of the text, whether another statutory term—"other disposal" of coal—encompassed a transaction lacking a transfer of title. See 314 U. S., at 416–417. The Court evidently perceived no basis for deference to the agency with respect to that pure legal question. And in *Hearst*, the Court proclaimed that "[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." 322 U. S., at 130–131. At least with

respect to questions it regarded as involving "statutory interpretation," the Court thus did not disturb the traditional rule. It merely thought that a different approach should apply where application of a statutory term was sufficiently intertwined with the agency's factfinding.

In any event, the Court was far from consistent in reviewing deferentially even such factbound statutory determinations. Often the Court simply interpreted and applied the statute before it. See K. Davis, Administrative Law §248, p. 893 (1951) ("The one statement that can be made with confidence about applicability of the doctrine of Gray v. Powell is that sometimes the Supreme Court applies it and sometimes it does not."); B. Schwartz, Gray vs. Powell and the Scope of Review, 54 Mich. L. Rev. 1, 68 (1955) (noting an "embarrassingly large number of Supreme Court decisions that do not adhere to the doctrine of *Gray v. Powell*"). In one illustrative example, the Court rejected the U. S. Price Administrator's determination that a particular warehouse was a "public utility" entitled to an exemption from the Administrator's General Maximum Price Regulation. Despite the striking resemblance of that administrative determination to those that triggered deference in *Gray* and *Hearst*, the Court declined to "accept the Administrator's view in deference to administrative construction." *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 156 (1944). The Administrator's view, the Court explained, had "hardly seasoned or broadened into a settled administrative practice," and thus did not "overweigh the considerations" the Court had "set forth as to the proper construction of the statute." *Ibid.*

Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes. Instead, just five years after *Gray* and two after *Hearst*, Congress codified the opposite rule: the traditional understanding that *courts* must "decide all relevant questions of

law." 5 U. S. C. §706.[3]

C

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Morton Salt*, 338 U. S., at 644. It was the culmination of a "comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers." *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670–671 (1986).

In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o

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[3]The dissent plucks out *Gray*, *Hearst*, and—to "gild the lily," in its telling—three more 1940s decisions, claiming they reflect the relevant historical tradition of judicial review. *Post*, at 21–22, and n. 6 (opinion of KAGAN, J.). But it has no substantial response to the fact that *Gray* and *Hearst* themselves endorsed, implicitly in one case and explicitly in the next, the traditional rule that "questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight"—not outright deference—"to the judgment of those whose special duty is to administer the questioned statute." *Hearst*, 322 U. S., at 130–131. And it fails to recognize the deep roots that this rule has in our Nation's judicial tradition, to the limited extent it engages with that tradition at all. See *post*, at 20–21, n. 5. Instead, like the Government, it strains to equate the "respect" or "weight" traditionally afforded to Executive Branch interpretations with binding deference. See *ibid.*; Brief for Respondents in No. 22–1219, pp. 21–24. That supposed equivalence is a fiction. The dissent's cases establish that a "*contemporaneous* construction" shared by "not *only* . . . the courts" but also "the departments" could be "controlling," *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572 (1891) (emphasis added), and that courts might "lean in favor" of a "contemporaneous" and "continued" construction of the Executive Branch as strong evidence of a statute's meaning, *United States* v. *Alabama Great Southern R. Co.*, 142 U. S. 615, 621 (1892). They do not establish that Executive Branch interpretations of ambiguous statutes—no matter how inconsistent, late breaking, or flawed—always *bound* the courts. In reality, a judge was never "bound to adopt the construction given by the head of a department." *Decatur* v. *Paulding*, 14 Pet. 497, 515 (1840).

the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U. S. C. §706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." §706(2)(A).

The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, §706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential. See §706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); §706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

In a statute designed to "serve as the fundamental charter of the administrative state," *Kisor* v. *Wilkie*, 588 U. S. 558, 580 (2019) (plurality opinion) (internal quotation marks omitted), Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was "exclusively a judicial function," *American Trucking Assns.*, 310 U. S., at 544. But nothing in the APA hints at such a dramatic departure. On the contrary, by directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, Section 706 makes clear that

agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus "remains the responsibility of the court to decide whether the law means what the agency says." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 109 (2015) (Scalia, J., concurring in judgment).[4]

The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning. According to both the House and Senate Reports on the legislation, Section 706 "provide[d] that questions of law are for courts *rather than agencies* to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946) (emphasis added); accord, S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945). Some of the legislation's most prominent supporters articulated the same view. See 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter); P. McCarran, Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review, 32 A. B. A. J. 827, 831 (1946). Even the Department of Justice—an agency with every incentive to endorse a view of the APA favorable to the Executive Branch—opined after its enactment that Section 706 merely "restate[d] the present law as to the scope of judicial review." Dept. of Justice, Attorney General's Manual on the

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[4]The dissent observes that Section 706 does not say expressly that courts are to decide legal questions using "a *de novo* standard of review." *Post*, at 16. That much is true. But statutes can be sensibly understood only "by reviewing text in context." *Pulsifer* v. *United States*, 601 U. S. 124, 133 (2024). Since the start of our Republic, courts have "decide[d] . . . questions of law" and "interpret[ed] constitutional and statutory provisions" by applying their own legal judgment. §706. Setting aside its misplaced reliance on *Gray* and *Hearst*, the dissent does not and could not deny that tradition. But it nonetheless insists that to codify that tradition, Congress needed to expressly reject a sort of deference the courts had never before applied—and would not apply for several decades to come. It did not. "The notion that some things 'go without saying' applies to legislation just as it does to everyday life." *Bond* v. *United States*, 572 U. S. 844, 857 (2014).

Administrative Procedure Act 108 (1947); see also *Kisor*, 588 U. S., at 582 (plurality opinion) (same). That "present law," as we have described, adhered to the traditional conception of the judicial function. See *supra*, at 9–13.

Various respected commentators contemporaneously maintained that the APA required reviewing courts to exercise independent judgment on questions of law. Professor John Dickinson, for example, read the APA to "impose a clear mandate that all [questions of law] shall be decided by the reviewing Court itself, and in the exercise of its own independent judgment." Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A. B. A. J. 434, 516 (1947). Professor Bernard Schwartz noted that §706 "would seem . . . to be merely a legislative restatement of the familiar review principle that questions of law are for the reviewing court, at the same time leaving to the courts the task of determining in each case what are questions of law." Mixed Questions of Law and Fact and the Administrative Procedure Act, 19 Ford. L. Rev. 73, 84–85 (1950). And Professor Louis Jaffe, who had served in several agencies at the advent of the New Deal, thought that §706 leaves it up to the reviewing "court" to "decide as a 'question of law' whether there is 'discretion' in the premises"—that is, whether the statute at issue delegates particular discretionary authority to an agency. Judicial Control of Administrative Action 570 (1965).

The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. *Skidmore*, 323 U. S., at 140. And

interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning. See *ibid.*; *American Trucking Assns.*, 310 U. S., at 549.

In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. *Batterton* v. *Francis*, 432 U. S. 416, 425 (1977) (emphasis deleted).[5] Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825), or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan* v. *EPA*, 576 U. S. 743, 752 (2015), such as "appropriate" or "reasonable."[6]

When the best reading of a statute is that it delegates

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[5] See, *e.g.*, 29 U. S. C. §213(a)(15) (exempting from provisions of the Fair Labor Standards Act "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*)" (emphasis added)); 42 U. S. C. §5846(a)(2) (requiring notification to Nuclear Regulatory Commission when a facility or activity licensed or regulated pursuant to the Atomic Energy Act "contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*" (emphasis added)).

[6] See, *e.g.*, 33 U. S. C. §1312(a) (requiring establishment of effluent limitations "[w]henever, in the judgment of the [Environmental Protection Agency (EPA)] Administrator . . . , discharges of pollutants from a point source or group of point sources . . . would interfere with the attainment or maintenance of that water quality . . . which shall assure" various outcomes, such as the "protection of public health" and "public water supplies"); 42 U. S. C. §7412(n)(1)(A) (directing EPA to regulate power plants "if the Administrator finds such regulation is appropriate and necessary").

discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," H. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 27 (1983), and ensuring the agency has engaged in "'reasoned decisionmaking'" within those boundaries, *Michigan*, 576 U. S., at 750 (quoting *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U. S. 359, 374 (1998)); see also *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983). By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

III

The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.

A

In the decades between the enactment of the APA and this Court's decision in *Chevron*, courts generally continued to review agency interpretations of the statutes they administer by independently examining each statute to determine its meaning. Cf. T. Merrill, Judicial Deference to Executive Precedent, 101 Yale L. J. 969, 972–975 (1992). As an early proponent (and later critic) of *Chevron* recounted, courts during this period thus identified delegations of discretionary authority to agencies on a "statute-by-statute basis." A. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 516.

Chevron, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. The question in the case was whether an EPA regulation "allow[ing] States to treat all of the pollution-

emitting devices within the same industrial grouping as though they were encased within a single 'bubble'" was consistent with the term "stationary source" as used in the Clean Air Act. 467 U. S., at 840. To answer that question of statutory interpretation, the Court articulated and employed a now familiar two-step approach broadly applicable to review of agency action.

The first step was to discern "whether Congress ha[d] directly spoken to the precise question at issue." *Id.*, at 842. The Court explained that "[i]f the intent of Congress is clear, that is the end of the matter," *ibid.*, and courts were therefore to "reject administrative constructions which are contrary to clear congressional intent," *id.*, at 843, n. 9. To discern such intent, the Court noted, a reviewing court was to "employ[] traditional tools of statutory construction." *Ibid.*

Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." *Id.*, at 843. In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Ibid.* (footnote omitted). A court instead had to set aside the traditional interpretive tools and defer to the agency if it had offered "a permissible construction of the statute," *ibid.*, even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding," *ibid.*, n. 11. That directive was justified, according to the Court, by the understanding that administering statutes "requires the formulation of policy" to fill statutory "gap[s]"; by the long judicial tradition of according "considerable weight" to Executive Branch interpretations; and by a host of other considerations, including the complexity of the regulatory scheme, EPA's "detailed

and reasoned" consideration, the policy-laden nature of the judgment supposedly required, and the agency's indirect accountability to the people through the President. *Id.*, at 843, 844, and n. 14, 865.

Employing this new test, the Court concluded that Congress had not addressed the question at issue with the necessary "level of specificity" and that EPA's interpretation was "entitled to deference." *Id.*, at 865. It did not matter *why* Congress, as the Court saw it, had not squarely addressed the question, see *ibid.*, or that "the agency ha[d] from time to time changed its interpretation," *id.*, at 863. The latest EPA interpretation was a permissible reading of the Clean Air Act, so under the Court's new rule, that reading controlled.

Initially, *Chevron* "seemed destined to obscurity." T. Merrill, The Story of *Chevron*: The Making of an Accidental Landmark, 66 Admin. L. Rev. 253, 276 (2014). The Court did not at first treat it as the watershed decision it was fated to become; it was hardly cited in cases involving statutory questions of agency authority. See *ibid.* But within a few years, both this Court and the courts of appeals were routinely invoking its two-step framework as the governing standard in such cases. See *id.*, at 276–277. As the Court did so, it revisited the doctrine's justifications. Eventually, the Court decided that *Chevron* rested on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741 (1996); see also, *e.g.*, *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 276–277 (2016); *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 315 (2014); *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 982 (2005).

B

Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA. The "law of deference" that this Court has built on the foundation laid in *Chevron* has instead been "[h]eedless of the original design" of the APA. *Perez*, 575 U. S., at 109 (Scalia, J., concurring in judgment).

1

Chevron defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide *all* relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added). It requires a court to *ignore*, not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the APA. *Chevron*, 467 U. S., at 843, n. 11. And although exercising independent judgment is consistent with the "respect" historically given to Executive Branch interpretations, see, *e.g.*, *Edwards' Lessee*, 12 Wheat., at 210; *Skidmore*, 323 U. S., at 140, *Chevron* insists on much more. It demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time. See 467 U. S., at 863. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is "unambiguous." *Brand X*, 545 U. S., at 982. That regime is the antithesis of the time honored approach the APA prescribes. In fretting over the prospect of "allow[ing]" a judicial interpretation of a statute "to override an agency's" in a dispute before a court, *ibid.*, *Chevron* turns the statutory scheme for judicial review of agency action upside down.

Chevron cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. See

Brief for Respondents in No. 22–1219, pp. 13, 37–38; *post*, at 4–15 (opinion of KAGAN, J.). Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. *Chevron*'s presumption does not, because "[a]n ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two." C. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 445 (1989). As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. 467 U. S., at 865. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional. As the Framers recognized, ambiguities will inevitably follow from "the complexity of objects, . . . the imperfection of the human faculties," and the simple fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist No. 37, at 236.

Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. Of course, when faced with a statutory ambiguity in such a case, the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. Courts in that situation do not throw up their hands because "Congress's instructions have" supposedly "run out," leaving a statutory "gap." *Post*, at 2 (opinion of KAGAN, J.). Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; "every statute's meaning is fixed at the time of enactment." *Wisconsin Cen-*

tral Ltd. v. *United States*, 585 U. S. 274, 284 (2018) (emphasis deleted). So instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.

In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. *Chevron*, 467 U. S., at 843, n. 11. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. And even *Chevron* itself reaffirmed that "[t]he judiciary is the final authority on issues of statutory construction" and recognized that "in the absence of an administrative interpretation," it is "necessary" for a court to "impose its own construction on the statute." *Id.*, at 843, and n. 9. *Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate.

2

The Government responds that Congress must generally

intend for agencies to resolve statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer; because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. See Brief for Respondents in No. 22–1219, pp. 16–19. The dissent offers more of the same. See *post*, at 9–14. But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent.

Beginning with expertise, we recently noted that interpretive issues arising in connection with a regulatory scheme often "may fall more naturally into a judge's bailiwick" than an agency's. *Kisor*, 588 U. S., at 578 (opinion of the Court). We thus observed that "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Ibid.* *Chevron*'s broad rule of deference, though, demands that courts presume just the opposite. Under that rule, ambiguities of all stripes trigger deference. Indeed, the Government and, seemingly, the dissent continue to defend the proposition that *Chevron* applies even in cases having little to do with an agency's technical subject matter expertise. See Brief for Respondents in No. 22–1219, p. 17; *post*, at 10.

But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. "[M]any statutory cases" call upon "courts [to] interpret the mass of technical detail that is the ordinary diet of the law," *Egelhoff* v. *Egelhoff*, 532 U. S. 141, 161 (2001) (Breyer, J., dissenting), and courts did so without issue in agency cases before *Chevron*, see *post*, at 30 (GORSUCH, J., concurring). Courts, after all, do not decide such questions blindly. The parties and

amici in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives. In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U. S., at 140. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 98, n. 8 (1983). Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Skidmore*, 323 U. S., at 140; see, *e.g.*, *County of Maui* v. *Hawaii Wildlife Fund*, 590 U. S. 165, 180 (2020); *Moore*, 95 U. S., at 763.

For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.

Nor does a desire for the uniform construction of federal law justify *Chevron*. Given inconsistencies in how judges apply *Chevron*, see *infra*, at 30–33, it is unclear how much the doctrine as a whole (as opposed to its highly deferential second step) actually promotes such uniformity. In any event, there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.

The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an "agency to fall back on." *Kisor*, 588 U. S., at 575 (opinion of the Court). Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches. See The Federalist, No. 78, at 522–525. They were to construe the law with "[c]lear heads . . . and honest hearts," not with an eye to policy preferences that had not made it into the statute. 1 Works of James Wilson 363 (J. Andrews ed. 1896).

That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

3

In truth, *Chevron*'s justifying presumption is, as Members of this Court have often recognized, a fiction. See *Buffington* v. *McDonough*, 598 U. S. ___, ___ (2022) (GORSUCH,

J., dissenting from denial of certiorari) (slip op., at 11); *Cuozzo*, 579 U. S., at 286 (THOMAS, J., concurring); Scalia, 1989 Duke L. J., at 517; see also *post*, at 15 (opinion of KAGAN, J.). So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable.'" *United States* v. *Mead Corp.*, 533 U. S. 218, 230 (2001) (quoting *Christensen* v. *Harris County*, 529 U. S. 576, 597 (2000) (Breyer, J., dissenting)); see also *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 649 (1990).

Consider the many refinements we have made in an effort to match *Chevron*'s presumption to reality. We have said that *Chevron* applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U. S., at 226–227. In practice, that threshold requirement—sometimes called *Chevron* "step zero"—largely limits *Chevron* to "the fruits of notice-and-comment rulemaking or formal adjudication." 533 U. S., at 230. But even when those processes are used, deference is still not warranted "where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 220 (2016) (quoting *Mead*, 533 U. S., at 227).

Even where those procedural hurdles are cleared, substantive ones remain. Most notably, *Chevron* does not apply if the question at issue is one of "deep 'economic and political significance.'" *King* v. *Burwell*, 576 U. S. 473, 486 (2015). We have instead expected Congress to delegate such authority "expressly" if at all, *ibid.*, for "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s],'"

West Virginia v. *EPA*, 597 U. S. 697, 723 (2022) (quoting *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001); alteration in original). Nor have we applied *Chevron* to agency interpretations of judicial review provisions, see *Adams Fruit Co.*, 494 U. S., at 649–650, or to statutory schemes not administered by the agency seeking deference, see *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 519–520 (2018). And we have sent mixed signals on whether *Chevron* applies when a statute has criminal applications. Compare *Abramski* v. *United States*, 573 U. S. 169, 191 (2014), with *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 704, n. 18 (1995).

Confronted with this byzantine set of preconditions and exceptions, some courts have simply bypassed *Chevron*, saying it makes no difference for one reason or another.[7] And even when they do invoke *Chevron*, courts do not always heed the various steps and nuances of that evolving doctrine. In one of the cases before us today, for example, the First Circuit both skipped "step zero," see 62 F. 4th, at 628, and refused to "classify [its] conclusion as a product of *Chevron* step one or step two"—though it ultimately appears to have deferred under step two, *id.*, at 634.

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[7] See, *e.g.*, *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms and Explosives*, 45 F. 4th 306, 313–314 (CADC 2022), abrogated by *Garland* v. *Cargill*, 602 U. S. ___ (2024); *County of Amador* v. *United States Dept. of Interior*, 872 F. 3d 1012, 1021–1022 (CA9 2017); *Estrada-Rodriguez* v. *Lynch*, 825 F. 3d 397, 403–404 (CA8 2016); *Nielsen* v. *AECOM Tech. Corp.*, 762 F. 3d 214, 220 (CA2 2014); *Alaska Stock, LLC* v. *Houghton Mifflin Harcourt Publishing Co.*, 747 F. 3d 673, 685, n. 52 (CA9 2014); *Jurado-Delgado* v. *Attorney Gen. of U. S.*, 498 Fed. Appx. 107, 117 (CA3 2009); see also D. Brookins, Confusion in the Circuit Courts: How the Circuit Courts Are Solving the *Mead*-Puzzle by Avoiding It Altogether, 85 Geo. Wash. L. Rev. 1484, 1496–1499 (2017) (documenting *Chevron* avoidance by the lower courts); A. Vermeule, Our Schmittian Administrative Law, 122 Harv. L. Rev. 1095, 1127–1129 (2009) (same); L. Bressman, How *Mead* Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443, 1464–1466 (2005) (same).

This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016. See *Cuozzo*, 579 U. S., at 280 (most recent occasion). But *Chevron* remains on the books. So litigants must continue to wrestle with it, and lower courts—bound by even our crumbling precedents, see *Agostini* v. *Felton*, 521 U. S. 203, 238 (1997)—understandably continue to apply it.

The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron*'s fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing *court*," to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added).

IV

The only question left is whether *stare decisis*, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project. It does not. *Stare decisis* is not an "inexorable command," *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), and the *stare decisis* considerations most relevant here—"the quality of [the precedent's] reasoning, the workability of the rule it established, . . . and reliance on the decision," *Knick* v. *Township of Scott*, 588 U. S. 180, 203 (2019) (quoting *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 917 (2018))—all weigh in favor of letting *Chevron* go.

Chevron has proved to be fundamentally misguided. Despite reshaping judicial review of agency action, neither it nor any case of ours applying it grappled with the APA—

the statute that lays out how such review works. Its flaws were nonetheless apparent from the start, prompting this Court to revise its foundations and continually limit its application. It has launched and sustained a cottage industry of scholars attempting to decipher its basis and meaning. And Members of this Court have long questioned its premises. See, *e.g.*, *Pereira* v. *Sessions*, 585 U. S. 198, 219–221 (2018) (Kennedy, J., concurring); *Michigan*, 576 U. S., at 760–764 (THOMAS, J., concurring); *Buffington*, 598 U. S. ___ (opinion of GORSUCH, J.); B. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150–2154 (2016). Even Justice Scalia, an early champion of *Chevron*, came to seriously doubt whether it could be reconciled with the APA. See *Perez*, 575 U. S., at 109–110 (opinion concurring in judgment). For its entire existence, *Chevron* has been a "rule in search of a justification," *Knick*, 588 U. S., at 204, if it was ever coherent enough to be called a rule at all.

Experience has also shown that *Chevron* is unworkable. The defining feature of its framework is the identification of statutory ambiguity, which requires deference at the doctrine's second step. But the concept of ambiguity has always evaded meaningful definition. As Justice Scalia put the dilemma just five years after *Chevron* was decided: "How clear is clear?" 1989 Duke L. J., at 521.

We are no closer to an answer to that question than we were four decades ago. "'[A]mbiguity' is a term that may have different meanings for different judges." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 572 (2005) (Stevens, J., dissenting). One judge might see ambiguity everywhere; another might never encounter it. Compare L. Silberman, Chevron—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 822 (1990), with R. Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 323 (2017). A rule of law that is so wholly "in the eye of the

beholder," *Exxon Mobil Corp.*, 545 U. S., at 572 (Stevens, J., dissenting), invites different results in like cases and is therefore "arbitrary in practice," *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 283 (1988). Such an impressionistic and malleable concept "cannot stand as an every-day test for allocating" interpretive authority between courts and agencies. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 125 (1965).

The dissent proves the point. It tells us that a court should reach *Chevron*'s second step when it finds, "at the end of its interpretive work," that "Congress has left an ambiguity or gap." *Post*, at 1–2. (The Government offers a similar test. See Brief for Respondents in No. 22–1219, pp. 7, 10, 14; Tr. of Oral Arg. 113–114, 116.) That is no guide at all. Once more, the basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied. The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit. So for the dissent's test to have any meaning, it must think that in an agency case (unlike in any other), a court should give up on its "interpretive work" before it has identified that best meaning. But how does a court know when to do so? On that point, the dissent leaves a gap of its own. It protests only that some other interpretive tools—all with pedigrees more robust than *Chevron*'s, and all designed to help courts identify the meaning of a text rather than allow the Executive Branch to displace it—also apply to ambiguous texts. See *post*, at 27. That this is all the dissent can come up with, after four decades of judicial experience attempting to identify ambiguity under *Chevron*, reveals the futility of the

exercise.[8]

Because *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again. Our attempts to do so have only added to *Chevron*'s unworkability, transforming the original two-step into a dizzying breakdance. See *Adams Fruit Co.*, 494 U. S., at 649–650; *Mead*, 533 U. S., at 226–227; *King*, 576 U. S., at 486; *Encino Motorcars*, 579 U. S., at 220; *Epic Systems*, 584 U. S., at 519–520; on and on. And the doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry should *Chevron* be retained. See, *e.g.*, *Cargill* v. *Garland*, 57 F. 4th 447, 465–468 (CA5 2023) (plurality opinion) (May the Government waive reliance on *Chevron*? Does *Chevron* apply to agency interpretations of statutes imposing criminal penalties? Does *Chevron* displace the rule of lenity?), aff'd, 602 U. S. ___ (2024).

Four decades after its inception, *Chevron* has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of "say[ing] what the law is." *Marbury*, 1 Cranch, at 177. And its continuing import is far from clear. Courts have often declined to engage with the doctrine, saying it makes no difference. See n. 7, *supra*. And as noted, we have avoided deferring under *Chevron* since 2016. That trend is nothing new; for decades, we have often declined to invoke *Chevron* even in those cases where it might appear to be applicable. See W. Eskridge & L. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From *Chevron* to *Hamdan*, 96 Geo. L. J. 1083, 1125 (2008). At this point, all

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[8] Citing an empirical study, the dissent adds that *Chevron* "fosters *agreement* among judges." *Post*, at 28. It is hardly surprising that a study might find as much; *Chevron*'s second step is supposed to be hospitable to agency interpretations. So when judges get there, they tend to agree that the agency wins. That proves nothing about the supposed ease or predictability of identifying ambiguity in the first place.

that remains of *Chevron* is a decaying husk with bold pretensions.

Nor has *Chevron* been the sort of "'stable background' rule" that fosters meaningful reliance. *Post*, at 8, n. 1 (opinion of KAGAN, J.) (quoting *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 261 (2010)). Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case. And even if it were possible to predict accurately when courts will apply *Chevron*, the doctrine "does not provide 'a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.'" *Janus*, 585 U. S., at 927 (quoting *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 186 (2018)). To plan on *Chevron* yielding a particular result is to gamble not only that the doctrine will be invoked, but also that it will produce readily foreseeable outcomes and the stability that comes with them. History has proved neither bet to be a winning proposition.

Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with "[u]nexplained inconsistency" being "at most . . . a reason for holding an interpretation to be . . . arbitrary and capricious." *Brand X*, 545 U. S., at 981. But statutory ambiguity, as we have explained, is not a reliable indicator of actual delegation of discretionary authority to agencies. *Chevron* thus allows agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty.

Chevron accordingly has undermined the very "rule of law" values that *stare decisis* exists to secure. *Michigan* v.

Bay Mills Indian Community, 572 U. S. 782, 798 (2014). And it cannot be constrained by admonishing courts to be extra careful, or by tacking on a new batch of conditions. We would need to once again "revis[e] its theoretical basis . . . in order to cure its practical deficiencies." *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009). *Stare decisis* does not require us to do so, especially because any refinements we might make would only point courts back to their duties under the APA to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706. Nor is there any reason to wait helplessly for Congress to correct our mistake. The Court has jettisoned many precedents that Congress likewise could have legislatively overruled. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 485 U. S. 617, 618 (1988) (*per curiam*) (collecting cases). And part of "judicial humility," *post*, at 3, 25 (opinion of KAGAN, J.,), is admitting and in certain cases correcting our own mistakes, especially when those mistakes are serious, see *post*, at 8–9 (opinion of GORSUCH, J.).

This is one of those cases. *Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986), is for us to leave *Chevron* behind.

By doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. See *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 457 (2008). Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund,*

Inc., 573 U. S. 258, 266 (2014) (quoting *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000)). That is not enough to justify overruling a statutory precedent.

* * *

The dissent ends by quoting *Chevron*: "'Judges are not experts in the field.'" *Post*, at 31 (quoting 467 U. S., at 865). That depends, of course, on what the "field" is. If it is legal interpretation, that has been, "emphatically," "the province and duty of the judicial department" for at least 221 years. *Marbury*, 1 Cranch, at 177. The rest of the dissent's selected epigraph is that judges "'are not part of either political branch.'" *Post*, at 31 (quoting *Chevron*, 467 U. S., at 865). Indeed. Judges have always been expected to apply their "judgment" *independent* of the political branches when interpreting the laws those branches enact. The Federalist No. 78, at 523. And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently.

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Because the D. C. and First Circuits relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 22–451 and 22–1219

LOPER BRIGHT ENTERPRISES, ET AL.,
PETITIONERS
22–451 *v.*
GINA RAIMONDO, SECRETARY OF
COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELENTLESS, INC., ET AL., PETITIONERS
22–1219 *v.*
DEPARTMENT OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 28, 2024]

JUSTICE THOMAS, concurring.

I join the Court's opinion in full because it correctly concludes that *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), must finally be overruled. Under *Chevron*, a judge was required to adopt an agency's interpretation of an ambiguous statute, so long as the agency had a "permissible construction of the statute." See *id.*, at 843. As the Court explains, that deference does not comport with the Administrative Procedure Act, which requires judges to decide "all relevant questions of law" and "interpret constitutional and statutory provisions" when reviewing an agency action. 5 U. S. C. §706; see also *ante,* at 18–23; *Baldwin* v. *United States*, 589 U. S. ___, ___–___ (2020) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 4–5).

I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers, as I have previously explained at length. See *Baldwin*, 589 U. S., at ___–___ (dissenting opinion) (slip op., at 2–4); *Michigan* v. *EPA*, 576 U. S. 743, 761–763 (2015) (concurring opinion); see also *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 115–118 (2015) (opinion concurring in judgment). And, I agree with JUSTICE GORSUCH that we should not overlook *Chevron*'s constitutional defects in overruling it.* *Post*, at 15–20 (concurring opinion). To provide "practical and real protections for individual liberty," the Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government. *Perez*, 575 U. S., at 118 (opinion of THOMAS, J.). *Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits.

Chevron compels judges to abdicate their Article III "judicial Power." §1. "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez*, 575 U. S., at 119 (opinion of THOMAS, J.); accord, *post*, at 17–18 (opinion of GORSUCH, J.). The Framers understood that "legal texts . . . often contain ambiguities," and that the judicial power included "the power to resolve these ambiguities over time." *Perez*, 575 U. S., at 119 (opinion of THOMAS, J.); accord, *ante,* at 7–9. But, under *Chevron*, a judge must accept an agency's interpretation of an ambiguous law, even if he thinks another interpretation is correct. *Ante*, at 19. *Chevron* deference thus prevents judges from

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*There is much to be commended in JUSTICE GORSUCH's careful consideration from first principles of the weight we should afford to our precedent. I agree with the lion's share of his concurrence. See generally *Gamble* v. *United States*, 587 U. S. 678, 710 (2019) (THOMAS, J., concurring).

exercising their independent judgment to resolve ambiguities. *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 3); see also *Michigan*, 576 U. S., at 761 (opinion of THOMAS, J.); see also *Perez*, 575 U. S., at 123 (opinion of THOMAS, J.). By tying a judge's hands, *Chevron* prevents the Judiciary from serving as a constitutional check on the Executive. It allows "the Executive . . . to dictate the outcome of cases through erroneous interpretations." *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 4); *Michigan*, 576 U. S., at 763, n. 1 (opinion of THOMAS, J.); see also *Perez*, 575 U. S., at 124 (opinion of THOMAS, J.). Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III's mandate.

Chevron deference also permits the Executive Branch to exercise powers not given to it. "When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it." *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 68 (2015) (THOMAS, J., concurring in judgment). Because the Constitution gives the Executive Branch only "[t]he executive Power," executive agencies may constitutionally exercise only that power. Art. II, §1, cl. 1. But, *Chevron* gives agencies license to exercise judicial power. By allowing agencies to definitively interpret laws so long as they are ambiguous, *Chevron* "transfer[s]" the Judiciary's "interpretive judgment to the agency." *Perez*, 575 U. S., at 124 (opinion of THOMAS, J.); see also *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 4); *Michigan*, 576 U. S., at 761–762 (opinion of THOMAS, J.); *post*, at 18 (GORSUCH, J., concurring).

Chevron deference "cannot be salvaged" by recasting it as deference to an agency's "formulation of policy." *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (internal quotation marks omitted) (slip op., at 3). If that were true, *Chevron*

would mean that "agencies are unconstitutionally exercising 'legislative Powers' vested in Congress." *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 3) (quoting Art. I, §1). By "giv[ing] the force of law to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent," *Chevron* "permit[s] a body other than Congress to perform a function that requires an exercise of legislative power." *Michigan*, 576 U. S., at 762 (opinion of THOMAS, J.) (internal quotation marks omitted). No matter the gloss put on it, *Chevron* expands agencies' power beyond the bounds of Article II by permitting them to exercise powers reserved to another branch of Government.

Chevron deference was "not a harmless transfer of power." *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 3). "The Constitution carefully imposes structural constraints on all three branches, and the exercise of power free of those accompanying restraints subverts the design of the Constitution's ratifiers." *Ibid.* In particular, the Founders envisioned that "the courts [would] check the Executive by applying the correct interpretation of the law." *Id.*, at ___ (slip op., at 4). *Chevron* was thus a fundamental disruption of our separation of powers. It improperly strips courts of judicial power by simultaneously increasing the power of executive agencies. By overruling *Chevron*, we restore this aspect of our separation of powers. To safeguard individual liberty, "[s]tructure is everything." A. Scalia, Foreword: The Importance of Structure in Constitutional Interpretation, 83 Notre Dame L. Rev. 1417, 1418 (2008). Although the Court finally ends our 40-year misadventure with *Chevron* deference, its more profound problems should not be overlooked. Regardless of what a statute says, the type of deference required by *Chevron* violates the Constitution.

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[June 28, 2024]

JUSTICE GORSUCH, concurring.

In disputes between individuals and the government about the meaning of a federal law, federal courts have traditionally sought to offer independent judgments about "what the law is" without favor to either side. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Beginning in the mid-1980s, however, this Court experimented with a radically different approach. Applying *Chevron* deference, judges began deferring to the views of executive agency officials about the meaning of federal statutes. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). With time, the error of this approach became widely appreciated. So much so that this Court has refused to apply *Chevron* deference since 2016. Today, the Court places a tombstone on *Chevron* no one can miss. In doing

so, the Court returns judges to interpretive rules that have guided federal courts since the Nation's founding. I write separately to address why the proper application of the doctrine of *stare decisis* supports that course.

I

A

Today, the phrase "common law judge" may call to mind a judicial titan of the past who brilliantly devised new legal rules on his own. The phrase "*stare decisis*" might conjure up a sense that judges who come later in time are strictly bound to follow the work of their predecessors. But neither of those intuitions fairly describes the traditional common-law understanding of the judge's role or the doctrine of *stare decisis*.

At common law, a judge's charge to decide cases was not usually understood as a license to make new law. For much of England's early history, different rulers and different legal systems prevailed in different regions. As England consolidated into a single kingdom governed by a single legal system, the judge's task was to examine those pre-existing legal traditions and apply in the disputes that came to him those legal rules that were "common to the whole land and to all Englishmen." F. Maitland, Equity, Also the Forms of Action at Common Law 2 (1929). That was "common law" judging.

This view of the judge's role had consequences for the authority due judicial decisions. Because a judge's job was to find and apply the law, not make it, the "opinion of the judge" and "the law" were not considered "one and the same thing." 1 W. Blackstone, Commentaries on the Laws of England 71 (1765) (Blackstone) (emphasis deleted). A judge's decision might bind the parties to the case at hand. M. Hale, The History and Analysis of the Common Law of England 68 (1713) (Hale). But none of that meant the judge had the power to "make a Law properly so called" for society

at large, "for that only the King and Parliament can do." *Ibid.*

Other consequences followed for the role precedent played in future judicial proceedings. Because past decisions represented something "less than a Law," they did not bind future judges. *Ibid.* At the same time, as Matthew Hale put it, a future judge could give a past decision "Weight" as "Evidence" of the law. *Ibid.* Expressing the same idea, William Blackstone conceived of judicial precedents as "evidence" of "the common law." 1 Blackstone 69, 71. And much like other forms of evidence, precedents at common law were thought to vary in the weight due them. Some past decisions might supply future courts with considerable guidance. But others might be entitled to lesser weight, not least because judges are no less prone to error than anyone else and they may sometimes "mistake" what the law demands. *Id.*, at 71 (emphasis deleted). In cases like that, both men thought, a future judge should not rotely repeat a past mistake but instead "vindicate" the law "from misrepresentation." *Id.*, at 70.

When examining past decisions as evidence of the law, common law judges did not, broadly speaking, afford overwhelming weight to any "single precedent." J. Baker, An Introduction to English Legal History 209–210 (5th ed. 2019). Instead, a prior decision's persuasive force depended in large measure on its "Consonancy and Congruity with Resolutions and Decisions of former Times." Hale 68. An individual decision might reflect the views of one court at one moment in time, but a consistent line of decisions representing the wisdom of many minds across many generations was generally considered stronger evidence of the law's meaning. *Ibid.*

With this conception of precedent in mind, Lord Mansfield cautioned against elevating "particular cases" above the "general principles" that "run through the cases, and govern the decision of them." *Rust* v. *Cooper*, 2 Cowp. 629,

632, 98 Eng. Rep. 1277, 1279 (K. B. 1777). By discarding aberrational rulings and pursuing instead the mainstream of past decisions, he observed, the common law tended over time to "wor[k] itself pure." *Omychund* v. *Barker*, 1 Atk. 22, 33, 26 Eng. Rep. 15, 23 (Ch. 1744) (emphasis deleted). Reflecting similar thinking, Edmund Burke offered five principles for the evaluation of past judicial decisions: "They ought to be shewn; first, to be numerous and not scattered here and there;—secondly, concurrent and not contradictory and mutually destructive;—thirdly, to be made in good and constitutional times;—fourthly, not to be made to serve an occasion;—and fifthly, to be agreeable to the general tenor of legal principles." Speech of Dec. 23, 1790, in 3 The Speeches of the Right Honourable Edmund Burke 513 (1816).

Not only did different decisions carry different weight, so did different language within a decision. An opinion's holding and the reasoning essential to it (the *ratio decidendi*) merited careful attention. Dicta, stray remarks, and digressions warranted less weight. See N. Duxbury, The Intricacies of Dicta and Dissent 19–24 (2021) (Duxbury). These were no more than "the vapours and fumes of law." F. Bacon, The Lord Keeper's Speech in the Exchequer (1617), in 2 The Works of Francis Bacon 478 (B. Montagu ed. 1887) (Bacon).

That is not to say those "vapours" were worthless. Often dicta might provide the parties to a particular dispute a "fuller understanding of the court's decisional path or related areas of concern." B. Garner et al., The Law of Judicial Precedent 65 (2016) (Precedent). Dicta might also provide future courts with a source of "thoughtful advice." *Ibid.* But future courts had to be careful not to treat every "hasty expression . . . as a serious and deliberate opinion." *Steel* v. *Houghton*, 1 Bl. H. 51, 53, 126 Eng. Rep. 32, 33 (C. P. 1788). To do so would work an "injustice to [the] memory" of their predecessors who could not expect judicial

remarks issued in one context to apply perfectly in others, perhaps especially ones they could not foresee. *Ibid.* Also, the limits of the adversarial process, a distinctive feature of English law, had to be borne in mind. When a single judge or a small panel reached a decision in a case, they did so based on the factual record and legal arguments the parties at hand have chosen to develop. Attuned to those constraints, future judges had to proceed with an open mind to the possibility that different facts and different legal arguments might dictate different outcomes in later disputes. See Duxbury 19–24.

B

Necessarily, this represents just a quick sketch of traditional common-law understandings of the judge's role and the place of precedent in it. It focuses, too, on the horizontal, not vertical, force of judicial precedents. But there are good reasons to think that the common law's understandings of judges and precedent outlined above crossed the Atlantic and informed the nature of the "judicial Power" the Constitution vests in federal courts. Art. III, §1.

Not only was the Constitution adopted against the backdrop of these understandings and, in light of that alone, they may provide evidence of what the framers meant when they spoke of the "judicial Power." Many other, more specific provisions in the Constitution reflect much the same distinction between lawmaking and lawfinding functions the common law did. The Constitution provides that its terms may be amended only through certain prescribed democratic processes. Art. V. It vests the power to enact federal legislation exclusively in the people's elected representatives in Congress. Art. I, §1. Meanwhile, the Constitution describes the judicial power as the power to resolve cases and controversies. Art. III, §2, cl. 1. As well, it delegates that authority to life-tenured judges, see §1, an assignment that would have made little sense if judges could

usurp lawmaking powers vested in periodically elected representatives. But one that makes perfect sense if what is sought is a neutral party "to interpret and apply" the law without fear or favor in a dispute between others. 2 The Works of James Wilson 161 (J. Andrews ed. 1896) (Wilson); see *Osborn* v. *Bank of United States*, 9 Wheat. 738, 866 (1824).

The constrained view of the judicial power that runs through our Constitution carries with it familiar implications, ones the framers readily acknowledged. James Madison, for example, proclaimed that it would be a "fallacy" to suggest that judges or their precedents could "repeal or alter" the Constitution or the laws of the United States. Letter to N. Trist (Dec. 1831), in 9 The Writings of James Madison 477 (G. Hunt ed. 1910). A court's opinion, James Wilson added, may be thought of as "effective la[w]" "[a]s to the parties." Wilson 160–161. But as in England, Wilson said, a prior judicial decision could serve in a future dispute only as "evidence" of the law's proper construction. *Id.*, at 160; accord, 1 J. Kent, Commentaries on American Law 442–443 (1826).

The framers also recognized that the judicial power described in our Constitution implies, as the judicial power did in England, a power (and duty) of discrimination when it comes to assessing the "evidence" embodied in past decisions. So, for example, Madison observed that judicial rulings "*repeatedly confirmed*" may supply better evidence of the law's meaning than isolated or aberrant ones. Letter to C. Ingersoll (June 1831), in 4 Letters and Other Writings of James Madison 184 (1867) (emphasis added). Extending the thought, Thomas Jefferson believed it would often take "numerous decisions" for the meaning of new statutes to become truly "settled." Letter to S. Jones (July 1809), in 12 The Writings of Thomas Jefferson 299 (A. Bergh ed. 1907).

From the start, too, American courts recognized that not everything found in a prior decision was entitled to equal

weight. As Chief Justice Marshall warned, "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821). To the extent a past court offered views "beyond the case," those expressions "may be respected" in a later case "but ought not to control the judgment." *Ibid.* One "obvious" reason for this, Marshall continued, had to do with the limits of the adversarial process we inherited from England: Only "[t]he question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Id.*, at 399–400.

Abraham Lincoln championed these traditional understandings in his debates with Stephen Douglas. Douglas took the view that a single decision of this Court—no matter how flawed—could definitively resolve a contested issue for everyone and all time. Those who thought otherwise, he said, "aim[ed] a deadly blow to our whole Republican system of government." Speech at Springfield, Ill. (June 26, 1857), in 2 The Collected Works of Abraham Lincoln 401 (R. Basler ed. 1953) (Lincoln Speech). But Lincoln knew better. While accepting that judicial decisions "absolutely determine" the rights of the parties to a court's judgment, he refused to accept that any single judicial decision could "fully settl[e]" an issue, particularly when that decision departs from the Constitution. *Id.*, at 400–401. In cases such as these, Lincoln explained, "it is not resistance, it is not factious, it is not even disrespectful, to treat [the decision] as not having yet quite established a settled doctrine for the country." *Id.*, at 401.

After the Civil War, the Court echoed some of these same points. It stressed that every statement in a judicial opin-

ion "must be taken in connection with its immediate context," *In re Ayers*, 123 U. S. 443, 488 (1887), and stray "remarks" must not be elevated above the written law, see *The Belfast*, 7 Wall. 624, 641 (1869); see also, *e.g.*, *Trebilcock* v. *Wilson*, 12 Wall. 687, 692–693 (1872); *Mason* v. *Eldred*, 6 Wall. 231, 236–238 (1868). During Chief Justice Chase's tenure, it seems a Justice writing the Court's majority opinion would generally work alone and present his work orally and in summary form to his colleagues at conference, which meant that other Justices often did not even review the opinion prior to publication. 6 C. Fairman, History of the Supreme Court of the United States 69–70 (1971). The Court could proceed in this way because it understood that a single judicial opinion may resolve a "case or controversy," and in so doing it may make "effective law" for the parties, but it does not legislate for the whole of the country and is not to be confused with laws that do.

C

From all this, I see at least three lessons about the doctrine of *stare decisis* relevant to the decision before us today. Each concerns a form of judicial humility.

First, a past decision may bind the parties to a dispute, but it provides this Court no authority in future cases to depart from what the Constitution or laws of the United States ordain. Instead, the Constitution promises, the American people are sovereign and they alone may, through democratically responsive processes, amend our foundational charter or revise federal legislation. Unelected judges enjoy no such power. Part I–B, *supra*.

Recognizing as much, this Court has often said that *stare decisis* is not an "'inexorable command.'" *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997). And from time to time it has found it necessary to correct its past mistakes. When it comes to correcting errors of constitutional interpretation, the Court has stressed the importance of doing so, for they

can be corrected otherwise only through the amendment process. See, *e.g.*, *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 248 (2019). When it comes to fixing errors of statutory interpretation, the Court has proceeded perhaps more circumspectly. But in that field, too, it has overruled even longstanding but "flawed" decisions. See, *e.g.*, *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 904, 907 (2007).

Recent history illustrates all this. During the tenures of Chief Justices Warren and Burger, it seems this Court overruled an average of around three cases per Term, including roughly 50 statutory precedents between the 1960s and 1980s alone. See W. Eskridge, Overruling Statutory Precedents, 76 Geo. L. J. 1361, 1427–1434 (1988) (collecting cases). Many of these decisions came in settings no less consequential than today's. In recent years, we have not approached the pace set by our predecessors, overruling an average of just one or two prior decisions each Term.[1] But the point remains: Judicial decisions inconsistent with the written law do not inexorably control.

Second, another lesson tempers the first. While judicial decisions may not supersede or revise the Constitution or federal statutory law, they merit our "respect as embodying the considered views of those who have come before." *Ramos* v. *Louisiana*, 590 U. S. 83, 105 (2020). As a matter of professional responsibility, a judge must not only avoid confusing his writings with the law. When a case comes before him, he must also weigh his view of what the law demands against the thoughtful views of his predecessors. After all, "[p]recedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom

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[1] For relevant databases of decisions, see Congressional Research Service, Table of Supreme Court Decisions Overruled by Subsequent Decisions, Constitution Annotated, https://constitution.congress.gov/resources/decisions-overruled/; see also H. Spaeth et al., 2023 Supreme Court Database, http://supremecourtdatabase.org.

richer than what can be found in any single judge or panel of judges." Precedent 9.

Doubtless, past judicial decisions may, as they always have, command "greater or less authority as precedents, according to circumstances." Lincoln Speech 401. But, like English judges before us, we have long turned to familiar considerations to guide our assessment of the weight due a past decision. So, for example, as this Court has put it, the weight due a precedent may depend on the quality of its reasoning, its consistency with related decisions, its workability, and reliance interests that have formed around it. See *Ramos*, 590 U. S., at 106. The first factor recognizes that the primary power of any precedent lies in its power to persuade—and poorly reasoned decisions may not provide reliable evidence of the law's meaning. The second factor reflects the fact that a precedent is more likely to be correct and worthy of respect when it reflects the time-tested wisdom of generations than when it sits "unmoored" from surrounding law. *Ibid.* The remaining factors, like workability and reliance, do not often supply reason enough on their own to abide a flawed decision, for almost any past decision is likely to benefit some group eager to keep things as they are and content with how things work. See, *e.g.*, *id.*, at 108. But these factors can sometimes serve functions similar to the others, by pointing to clues that may suggest a past decision is right in ways not immediately obvious to the individual judge.

When asking whether to follow or depart from a precedent, some judges deploy adverbs. They speak of whether or not a precedent qualifies as "demonstrably erroneous," *Gamble* v. *United States*, 587 U. S. 678, 711 (2019) (THOMAS, J., concurring), or "egregiously wrong," *Ramos*, 590 U. S., at 121 (KAVANAUGH, J., concurring in part). But the emphasis the adverb imparts is not meant for dramatic effect. It seeks to serve instead as a reminder of a more substantive lesson. The lesson that, in assessing the weight

due a past decision, a judge is not to be guided by his own impression alone, but must self-consciously test his views against those who have come before, open to the possibility that a precedent might be correct in ways not initially apparent to him.

Third, it would be a mistake to read judicial opinions like statutes. Adopted through a robust and democratic process, statutes often apply in all their particulars to all persons. By contrast, when judges reach a decision in our adversarial system, they render a judgment based only on the factual record and legal arguments the parties at hand have chosen to develop. A later court assessing a past decision must therefore appreciate the possibility that different facts and different legal arguments may dictate a different outcome. They must appreciate, too, that, like anyone else, judges are "innately digressive," and their opinions may sometimes offer stray asides about a wider topic that may sound nearly like legislative commands. Duxbury 4. Often, enterprising counsel seek to exploit such statements to maximum effect. See *id.*, at 25. But while these digressions may sometimes contain valuable counsel, they remain "vapours and fumes of law," Bacon 478, and cannot "control the judgment in a subsequent suit," *Cohens*, 6 Wheat., at 399.

These principles, too, have long guided this Court and others. As Judge Easterbrook has put it, an "opinion is not a comprehensive code; it is just an explanation for the Court's disposition. Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *United States* v. *Skoien*, 614 F. 3d 638, 640 (CA7 2010) (en banc); see also *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 341 (1979) (stressing that an opinion is not "a statute," and its language should not "be parsed" as if it were); *Nevada* v. *Hicks*, 533 U. S. 353, 372 (2001) (same). If *stare decisis* counsels respect for the thinking of those who have come before, it also counsels against doing an "injustice to [their] memory" by

overreliance on their every word. *Steel*, 1 Bl. H., at 53, 126 Eng. Rep., at 33. As judges, "[w]e neither expect nor hope that our successors will comb" through our opinions, searching for delphic answers to matters we never fully explored. *Brown* v. *Davenport*, 596 U. S. 118, 141 (2022). To proceed otherwise risks "turn[ing] *stare decisis* from a tool of judicial humility into one of judicial hubris." *Ibid.*

II

Turning now directly to the question what *stare decisis* effect *Chevron* deference warrants, each of these lessons seem to me to weigh firmly in favor of the course the Court charts today: Lesson 1, because *Chevron* deference contravenes the law Congress prescribed in the Administrative Procedure Act. Lesson 2, because *Chevron* deference runs against mainstream currents in our law regarding the separation of powers, due process, and centuries-old interpretive rules that fortify those constitutional commitments. And Lesson 3, because to hold otherwise would effectively require us to endow stray statements in *Chevron* with the authority of statutory language, all while ignoring more considered language in that same decision and the teachings of experience.

A

Start with Lesson 1. The Administrative Procedure Act of 1946 (APA) directs a "reviewing court" to "decide all relevant questions of law" and "interpret" relevant "constitutional and statutory provisions." 5 U. S. C. §706. When applying *Chevron* deference, reviewing courts do not interpret all relevant statutory provisions and decide all relevant questions of law. Instead, judges abdicate a large measure of that responsibility in favor of agency officials. Their interpretations of "ambiguous" laws control even when those interpretations are at odds with the fairest reading of the law an independent "reviewing court" can muster. Agency

officials, too, may change their minds about the law's meaning at any time, even when Congress has not amended the relevant statutory language in any way. *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 982–983 (2005). And those officials may even disagree with and effectively overrule not only their own past interpretations of a law but a court's past interpretation as well. *Ibid.* None of that is consistent with the APA's clear mandate.

The hard fact is *Chevron* "did not even bother to cite" the APA, let alone seek to apply its terms. *United States* v. *Mead Corp.*, 533 U. S. 218, 241 (2001) (Scalia, J., dissenting). Instead, as even its most ardent defenders have conceded, *Chevron* deference rests upon a "*fictionalized* statement of legislative desire," namely, a judicial supposition that Congress implicitly wishes judges to defer to executive agencies' interpretations of the law even when it has said nothing of the kind. D. Barron & E. Kagan, Chevron's Nondelegation Doctrine, 2001 S. Ct. Rev. 201, 212 (Kagan) (emphasis added). As proponents see it, that fiction represents a "policy judgmen[t] about what . . . make[s] for good government." *Ibid.*[2] But in our democracy unelected judges possess no authority to elevate their own fictions over the laws adopted by the Nation's elected representatives. Some might think the legal directive Congress provided in the APA unwise; some might think a different arrangement preferable. See, *e.g.*, *post*, at 9–11 (KAGAN, J., dissenting). But it is Congress's view of "good government," not ours, that controls.

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[2] See also A. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 516–517 (1989) (describing *Chevron*'s theory that Congress "delegat[ed]" interpretive authority to agencies as "fictional"); S. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986) (describing the notion that there exists a "'legislative intent to delegate the law-interpreting function' as a kind of legal fiction").

Much more could be said about *Chevron*'s inconsistency with the APA. But I have said it in the past. See *Buffington* v. *McDonough*, 598 U. S. ___, ___–___ (2022) (opinion dissenting from denial of certiorari) (slip op., at 5–6); *Gutierrez-Brizuela* v. *Lynch*, 834 F. 3d 1142, 1151–1153 (CA10 2016) (concurring opinion). And the Court makes many of the same points at length today. See *ante*, at 18–22. For present purposes, the short of it is that continuing to abide *Chevron* deference would require us to transgress the first lesson of *stare decisis*—the humility required of judges to recognize that our decisions must yield to the laws adopted by the people's elected representatives.[3]

B

Lesson 2 cannot rescue *Chevron* deference. If *stare decisis* calls for judicial humility in the face of the written law, it also cautions us to test our present conclusions carefully against the work of our predecessors. At the same time and as we have seen, this second form of humility counsels us to remember that precedents that have won the endorsement of judges across many generations, demonstrated coherence with our broader law, and weathered the tests of time and experience are entitled to greater consideration than those that have not. See Part I, *supra*. Viewed by each of these lights, the case for *Chevron* deference only grows weaker still.

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[3]The dissent suggests that we need not take the APA's directions quite so seriously because the "finest administrative law scholars" from Harvard claim to see in them some wiggle room. *Post*, at 18 (opinion of KAGAN, J.). But nothing in the APA commands deference to the views of professors any more than it does the government. Nor is the dissent's list of Harvard's finest administrative law scholars entirely complete. See S. Breyer et al., Administrative Law and Regulatory Policy 288 (7th ed. 2011) (acknowledging that *Chevron* deference "seems in conflict with . . . the apparently contrary language of 706"); Kagan 212 (likewise acknowledging *Chevron* deference rests upon a "fictionalized statement of legislative desire").

1

Start with a look to how our predecessors traditionally understood the judicial role in disputes over a law's meaning. From the Nation's founding, they considered "[t]he interpretation of the laws" in cases and controversies "the proper and peculiar province of the courts." The Federalist No. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton). Perhaps the Court's most famous early decision reflected exactly that view. There, Chief Justice Marshall declared it "emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 1 Cranch, at 177. For judges "have neither FORCE nor WILL but merely judgment"—and an obligation to exercise that judgment independently. The Federalist No. 78, at 465. No matter how "disagreeable that duty may be," this Court has said, a judge "is not at liberty to surrender, or to waive it." *United States* v. *Dickson*, 15 Pet. 141, 162 (1841) (Story, J.). This duty of independent judgment is perhaps "the defining characteristi[c] of Article III judges." *Stern* v. *Marshall*, 564 U. S. 462, 483 (2011).

To be sure, this Court has also long extended "great respect" to the "contemporaneous" and consistent views of the coordinate branches about the meaning of a statute's terms. *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827); see also *McCulloch* v. *Maryland*, 4 Wheat. 316, 401 (1819); *Stuart* v. *Laird*, 1 Cranch 299, 309 (1803).[4] But traditionally, that did not mean a court had to "defer" to any "reasonable"

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[4] Accord, *National Lead Co.* v. *United States*, 252 U. S. 140, 145–146 (1920) (affording "great weight" to a "contemporaneous construction" by the executive that had "been long continued"); *Jacobs* v. *Prichard*, 223 U. S. 200, 214 (1912) ("find[ing] no ambiguity in the act" but also finding "strength" for the Court's interpretation in the executive's "immediate and continued construction of the act"); *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572 (1891) (treating as "controlling" a "contemporaneous construction" of a law endorsed "not only [by] the courts but [also by] the departments").

construction of an "ambiguous" law that an executive agency might offer. It did not mean that the government could propound a "reasonable" view of the law's meaning one day, a different one the next, and bind the judiciary always to its latest word. Nor did it mean the executive could displace a pre-existing judicial construction of a statute's terms, replace it with its own, and effectively overrule a judicial precedent in the process. Put simply, this Court was "not bound" by any and all reasonable "administrative construction[s]" of ambiguous statutes when resolving cases and controversies. *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16 (1932). While the executive's consistent and contemporaneous views warranted respect, they "by no means control[led] the action or the opinion of this court in expounding the law with reference to the rights of parties litigant before them." *Irvine* v. *Marshall*, 20 How. 558, 567 (1858); see also A. Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L. J. 908, 987 (2017).

Sensing how jarringly inconsistent *Chevron* is with this Court's many longstanding precedents discussing the nature of the judicial role in disputes over the law's meaning, the government and dissent struggle for a response. The best they can muster is a handful of cases from the early 1940s in which, they say, this Court first "put [deference] principles into action." *Post*, at 21 (KAGAN, J., dissenting). And, admittedly, for a period this Court toyed with a form of deference akin to *Chevron*, at least for so-called mixed questions of law and fact. See, *e.g.*, *Gray* v. *Powell*, 314 U. S. 402, 411–412 (1941); *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131 (1944). But, as the Court details, even that limited experiment did not last. See *ante*, at 10–12. Justice Roberts, in his *Gray* dissent, decried these decisions for "abdicat[ing our] function as a court of review" and "complete[ly] revers[ing] . . . the normal and usual method of construing a statute." 314 U. S., at 420–421. And just a few years later, in *Skidmore* v. *Swift & Co.*, 323

U. S. 134 (1944), the Court returned to its time-worn path.

Echoing themes that had run throughout our law from its start, Justice Robert H. Jackson wrote for the Court in *Skidmore*. There, he said, courts may extend respectful consideration to another branch's interpretation of the law, but the weight due those interpretations must always "depend upon the[ir] thoroughness . . . , the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade." *Id.*, at 140. In another case the same year, and again writing for the Court, Justice Jackson expressly rejected a call for a judge-made doctrine of deference much like *Chevron*, offering that, "[i]f Congress had deemed it necessary or even appropriate" for courts to "defe[r] to administrative construction[,] . . . it would not have been at a loss for words to say so." *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 156 (1944).

To the extent proper respect for precedent demands, as it always has, special respect for longstanding and mainstream decisions, *Chevron* scores badly. It represented not a continuation of a long line of decisions but a break from them. Worse, it did not merely depart from our precedents. More nearly, *Chevron* defied them.

2

Consider next how uneasily *Chevron* deference sits alongside so many other settled aspects of our law. Having witnessed first-hand King George's efforts to gain influence and control over colonial judges, see Declaration of Independence ¶ 11, the framers made a considered judgment to build judicial independence into the Constitution's design. They vested the judicial power in decisionmakers with life tenure. Art. III, §1. They placed the judicial salary beyond political control during a judge's tenure. *Ibid.* And they rejected any proposal that would subject judicial decisions to review by political actors. The Federalist No. 81, at 482;

United States v. *Hansen*, 599 U. S. 762, 786–791 (2023) (THOMAS, J., concurring). All of this served to ensure the same thing: "A fair trial in a fair tribunal." *In re Murchison*, 349 U. S. 133, 136 (1955). One in which impartial judges, not those currently wielding power in the political branches, would "say what the law is" in cases coming to court. *Marbury*, 1 Cranch, at 177.

Chevron deference undermines all that. It precludes courts from exercising the judicial power vested in them by Article III to say what the law is. It forces judges to abandon the best reading of the law in favor of views of those presently holding the reins of the Executive Branch. It requires judges to change, and change again, their interpretations of the law as and when the government demands. And that transfer of power has exactly the sort of consequences one might expect. Rather than insulate adjudication from power and politics to ensure a fair hearing "without respect to persons" as the federal judicial oath demands, 28 U. S. C. §453, *Chevron* deference requires courts to "place a finger on the scales of justice in favor of the most powerful of litigants, the federal government." *Buffington*, 598 U. S., at ___ (slip op., at 9). Along the way, *Chevron* deference guarantees "systematic bias" in favor of whichever political party currently holds the levers of executive power. P. Hamburger, *Chevron* Bias, 84 Geo. Wash. L. Rev. 1187, 1212 (2016).

Chevron deference undermines other aspects of our settled law, too. In this country, we often boast that the Constitution's promise of due process of law, see Amdts. 5, 14, means that "'no man can be a judge in his own case.'" *Williams* v. *Pennsylvania*, 579 U. S. 1, 8–9 (2016); *Calder* v. *Bull*, 3 Dall. 386, 388 (1798) (opinion of Chase, J.). That principle, of course, has even deeper roots, tracing far back into the common law where it was known by the Latin maxim *nemo iudex in causa sua*. See 1 E. Coke, Institutes

of the Laws of England §212, *141a. Yet, under the *Chevron* regime, all that means little, for executive agencies may effectively judge the scope of their own lawful powers. See, *e.g., Arlington* v. *FCC*, 569 U. S. 290, 296–297 (2013).

Traditionally, as well, courts have sought to construe statutes as a reasonable reader would "when the law was made." Blackstone 59; see *United States* v. *Fisher*, 2 Cranch 358, 386 (1805). Today, some call this "textualism." But really it's a very old idea, one that constrains judges to a lawfinding rather than lawmaking role by focusing their work on the statutory text, its linguistic context, and various canons of construction. In that way, textualism serves as an essential guardian of the due process promise of fair notice. If a judge could discard an old meaning and assign a new one to a law's terms, all without any legislative revision, how could people ever be sure of the rules that bind them? *New Prime Inc.* v. *Oliveira*, 586 U. S. 105, 113 (2019). Were the rules otherwise, Blackstone warned, the people would be rendered "slaves to their magistrates." 4 Blackstone 371.

Yet, replace "magistrates" with "bureaucrats," and Blackstone's fear becomes reality when courts employ *Chevron* deference. Whenever we confront an ambiguity in the law, judges do not seek to resolve it impartially according to the best evidence of the law's original meaning. Instead, we resort to a far cruder heuristic: "The reasonable bureaucrat always wins." And because the reasonable bureaucrat may change his mind year-to-year and election-to-election, the people can never know with certainty what new "interpretations" might be used against them. This "fluid" approach to statutory interpretation is "as much a trap for the innocent as the ancient laws of Caligula," which were posted so high up on the walls and in print so small that ordinary people could never be sure what they required. *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952).

The ancient rule of lenity is still another of *Chevron*'s victims. Since the founding, American courts have construed ambiguities in penal laws against the government and with lenity toward affected persons. *Wooden* v. *United States*, 595 U. S. 360, 388–390 (2022) (GORSUCH, J., concurring in judgment). That principle upholds due process by safeguarding individual liberty in the face of ambiguous laws. *Ibid.* And it fortifies the separation of powers by keeping the power of punishment firmly "'in the legislative, not in the judicial department.'" *Id.*, at 391 (quoting *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820)). But power begets power. And pressing *Chevron* deference as far as it can go, the government has sometimes managed to leverage "ambiguities" in the written law to penalize conduct Congress never clearly proscribed. Compare *Guedes* v. *ATF*, 920 F. 3d 1, 27–28, 31 (CADC 2019), with *Garland* v. *Cargill*, 602 U. S. 604 (2024).

In all these ways, *Chevron*'s fiction has led us to a strange place. One where authorities long thought reserved for Article III are transferred to Article II, where the scales of justice are tilted systematically in favor of the most powerful, where legal demands can change with every election even though the laws do not, and where the people are left to guess about their legal rights and responsibilities. So much tension with so many foundational features of our legal order is surely one more sign that we have "taken a wrong turn along the way." *Kisor* v. *Wilkie*, 588 U. S. 558, 607 (2019) (GORSUCH, J., concurring in judgment).[5]

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[5] The dissent suggests that *Chevron* deference bears at least something in common with surrounding law because it resembles a presumption or traditional canon of construction, and both "are common." *Post*, at 8, n. 1, 28–29 (opinion of KAGAN, J.). But even that thin reed wavers at a glance. Many of the presumptions and interpretive canons the dissent cites—including lenity, *contra proferentem*, and others besides—"'embod[y] . . . legal doctrine[s] centuries older than our Republic.'" *Opati* v. *Republic of Sudan*, 590 U. S. 418, 425 (2020). *Chevron* deference can make no such boast. Many of the presumptions and canons the dissent cites also

Finally, consider workability and reliance. If, as I have sought to suggest, these factors may sometimes serve as useful proxies for the question whether a precedent comports with the historic tide of judicial practice or represents an aberrational mistake, see Part I–C, *supra*, they certainly do here.

Take *Chevron*'s "workability." Throughout its short life, this Court has been forced to supplement and revise *Chevron* so many times that no one can agree on how many "steps" it requires, nor even what each of those "steps" entails. Some suggest that the analysis begins with "step zero" (perhaps itself a tell), an innovation that traces to *United States* v. *Mead Corp.*, 533 U. S. 218. *Mead* held that, before even considering whether *Chevron* applies, a court must determine whether Congress meant to delegate to the agency authority to interpret the law in a given field. 533 U. S., at 226–227. But that exercise faces an immediate challenge: Because *Chevron* depends on a judicially implied, rather than a legislatively expressed, delegation of interpretive authority to an executive agency, Part II–A, *supra*, when should the fiction apply and when not? *Mead* fashioned a multifactor test for judges to use. 533 U. S., at

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serve the Constitution, protecting the lines of authority it draws. Take just two examples: The federalism canon tells courts to presume federal statutes do not preempt state laws because of the sovereignty States enjoy under the Constitution. *Bond* v. *United States*, 572 U. S. 844, 858 (2014). The presumption against retroactivity serves as guardian of the Constitution's promise of due process and its ban on *ex post facto* laws, *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265 (1994). Once more, however, *Chevron* deference can make no similar claim. Rather than serve the Constitution's usual rule that litigants are entitled to have an independent judge interpret disputed legal terms, *Chevron* deference works to undermine that promise. As explored above, too, *Chevron* deference sits in tension with many traditional legal presumptions and interpretive principles, representing nearly the *inverse* of the rules of lenity, *nemo iudex*, and *contra proferentem*.

229–231. But that test has proved as indeterminate in application as it was contrived in origin. Perhaps for these reasons, perhaps for others, this Court has sometimes applied *Mead* and often ignored it. See *Brand X*, 545 U. S., at 1014, n. 8 (Scalia, J., dissenting).

Things do not improve as we move up the *Chevron* ladder. At "step one," a judge must defer to an executive official's interpretation when the statute at hand is "ambiguous." But even today, *Chevron*'s principal beneficiary—the federal government—still cannot say when a statute is sufficiently ambiguous to trigger deference. See, *e.g.*, Tr. of Oral Arg. in *American Hospital Assn.* v. *Becerra*, O. T. 2021, No. 20–1114, pp. 71–72. Perhaps thanks to this particular confusion, the search for ambiguity has devolved into a sort of Snark hunt: Some judges claim to spot it almost everywhere, while other equally fine judges claim never to have seen it. Compare L. Silberman, *Chevron*—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 826 (1990), with R. Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 323 (2017).

Nor do courts agree when it comes to "step two." There, a judge must assess whether an executive agency's interpretation of an ambiguous statute is "reasonable." But what does that inquiry demand? Some courts engage in a comparatively searching review; others almost reflexively defer to an agency's views. Here again, courts have pursued "wildly different" approaches and reached wildly different conclusions in similar cases. See B. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2152 (2016) (Kavanaugh).

Today's cases exemplify some of these problems. We have before us two circuit decisions, three opinions, and at least as many interpretive options on the *Chevron* menu. On the one hand, we have the D. C. Circuit majority, which deemed the Magnuson-Stevens Act "ambiguous" and upheld the

agency's regulation as "'permissible.'" 45 F. 4th 359, 365 (2022). On the other hand, we have the D. C. Circuit dissent, which argues the statute is "unambiguou[s]" and that it plainly forecloses the agency's new rule. *Id.*, at 372 (opinion of Walker, J.). And on yet a third hand, we have the First Circuit, which claimed to have identified "clear textual support" for the regulation, yet refused to say whether it would "classify [its] conclusion as a product of *Chevron* step one or step two." 62 F. 4th 621, 631, 634 (2023). As these cases illustrate, *Chevron* has turned statutory interpretation into a game of bingo under blindfold, with parties guessing at how many boxes there are and which one their case might ultimately fall in.

Turn now from workability to reliance. Far from engendering reliance interests, the whole point of *Chevron* deference is to upset them. Under *Chevron*, executive officials can replace one "reasonable" interpretation with another at any time, all without any change in the law itself. The result: Affected individuals "can never be sure of their legal rights and duties." *Buffington*, 598 U. S., at ___ (slip op., at 12).

How bad is the problem? Take just one example. *Brand X* concerned a law regulating broadband internet services. There, the Court upheld an agency rule adopted by the administration of President George W. Bush because it was premised on a "reasonable" interpretation of the statute. Later, President Barack Obama's administration rescinded the rule and replaced it with another. Later still, during President Donald J. Trump's administration, officials replaced that rule with a different one, all before President Joseph R. Biden, Jr.'s administration declared its intention to reverse course for yet a fourth time. See Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048 (2023); *Brand X*, 545 U. S., at 981–982. Each time, the government claimed its new rule was just as "reasonable" as the last. Rather than promoting reliance by fixing the meaning of

the law, *Chevron* deference engenders constant uncertainty and convulsive change even when the statute at issue itself remains unchanged.

Nor are these antireliance harms distributed equally. Sophisticated entities and their lawyers may be able to keep pace with rule changes affecting their rights and responsibilities. They may be able to lobby for new "'reasonable'" agency interpretations and even capture the agencies that issue them. *Buffington*, 598 U. S., at ___, ___ (slip op., at 8, 13). But ordinary people can do none of those things. They are the ones who suffer the worst kind of regulatory whiplash *Chevron* invites.

Consider a couple of examples. Thomas Buffington, a veteran of the U. S. Air Force, was injured in the line of duty. For a time after he left the Air Force, the Department of Veterans Affairs (VA) paid disability benefits due him by law. But later the government called on Mr. Buffington to reenter active service. During that period, everyone agreed, the VA could (as it did) suspend his disability payments. After he left active service for a second time, however, the VA turned his patriotism against him. By law, Congress permitted the VA to suspend disability pay only "for any period for which [a servicemember] receives active service pay." 38 U. S. C. §5304(c). But the VA had adopted a self-serving regulation requiring veterans to file a form asking for the resumption of their disability pay after a second (or subsequent) stint in active service. 38 CFR §3.654(b)(2) (2021). Unaware of the regulation, Mr. Buffington failed to reapply immediately. When he finally figured out what had happened and reapplied, the VA agreed to resume payments going forward but refused to give Mr. Buffington all of the past disability payments it had withheld. *Buffington*, 598 U. S., at ___–___ (slip op., at 1–4).

Mr. Buffington challenged the agency's action as inconsistent with Congress's direction that the VA may suspend disability payments only for those periods when a veteran

returns to active service. But armed with *Chevron*, the agency defeated Mr. Buffington's claim. Maybe the self-serving regulation the VA cited as justification for its action was not premised on the best reading of the law, courts said, but it represented a "'permissible'" one. 598 U. S., at ___ (slip op., at 7). In that way, the Executive Branch was able to evade Congress's promises to someone who took the field repeatedly in the Nation's defense.

In another case, one which I heard as a court of appeals judge, *De Niz Robles* v. *Lynch*, 803 F. 3d 1165 (CA10 2015), the Board of Immigration Appeals invoked *Chevron* to overrule a judicial precedent on which many immigrants had relied, see *In re Briones*, 24 I. & N. Dec. 355, 370 (BIA 2007) (purporting to overrule *Padilla–Caldera* v. *Gonzales*, 426 F. 3d 1294 (CA10 2005)). The agency then sought to apply its new interpretation retroactively to punish those immigrants—including Alfonzo De Niz Robles, who had relied on that judicial precedent as authority to remain in this country with his U. S. wife and four children. See 803 F. 3d, at 1168–1169. Our court ruled that this retrospective application of the BIA's new interpretation of the law violated Mr. De Niz Robles's due process rights. *Id.*, at 1172. But as a lower court, we could treat only the symptom, not the disease. So *Chevron* permitted the agency going forward to overrule a judicial decision about the best reading of the law with its own different "reasonable" one and in that way deny relief to countless future immigrants.

Those are just two stories among so many that federal judges could tell (and have told) about what *Chevron* deference has meant for ordinary people interacting with the federal government. See, *e.g.*, *Lambert* v. *Saul*, 980 F. 3d 1266, 1268–1276 (CA9 2020); *Valent* v. *Commissioner of Social Security*, 918 F. 3d 516, 525–527 (CA6 2019) (Kethledge, J., dissenting); *Gonzalez* v. *United States Atty. Gen.*, 820 F. 3d 399, 402–405 (CA11 2016) (*per curiam*).

What does the federal government have to say about this?

It acknowledges that *Chevron* sits as a heavy weight on the scale in favor of the government, "oppositional" to many "categories of individuals." Tr. of Oral Arg. in No. 22–1219, p. 133 (Relentless Tr.). But, according to the government, *Chevron* deference is too important an innovation to undo. In its brief reign, the government says, it has become a "fundamenta[l] . . . ground rul[e] for how all three branches of the government are operating together." Relentless Tr. 102. But, in truth, the Constitution, the APA, and our longstanding precedents set those ground rules some time ago. And under them, agencies cannot invoke a judge-made fiction to unsettle our Nation's promise to individuals that they are entitled to make their arguments about the law's demands on them in a fair hearing, one in which they stand on equal footing with the government before an independent judge.

C

How could a Court, guided for 200 years by Chief Justice Marshall's example, come to embrace a counter-*Marbury* revolution, one at war with the APA, time honored precedents, and so much surrounding law? To answer these questions, turn to Lesson 3 and witness the temptation to endow a stray passage in a judicial decision with extraordinary authority. Call it "power quoting."

Chevron was an unlikely place for a revolution to begin. The case concerned the Clean Air Act's requirement that States regulate "stationary sources" of air pollution in their borders. See 42 U. S. C. §7401 *et seq*. At the time, it was an open question whether entire industrial plants or their constituent polluting parts counted as "stationary sources." The Environmental Protection Agency had defined entire plants as sources, an approach that allowed companies to replace individual plant parts without automatically triggering the permitting requirements that apply to new sources. *Chevron*, 467 U. S., at 840.

This Court upheld the EPA's definition as consistent with the governing statute. *Id.*, at 866. The decision, issued by a bare quorum of the Court, without concurrence or dissent, purported to apply "well-settled principles." *Id.*, at 845. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue," *Chevron* provided, then "that intention is the law and must be given effect." *Id.*, at 843, n. 9. Many of the cases *Chevron* cited to support its judgment stood for the traditional proposition that courts afford respectful consideration, not deference, to executive interpretations of the law. See, *e.g.*, *Burnet*, 285 U. S., at 16; *United States* v. *Moore*, 95 U. S. 760, 763 (1878). And the decision's sole citation to legal scholarship was to Roscoe Pound, who long championed *de novo* judicial review. 467 U. S., at 843, n. 10; see R. Pound, The Place of the Judiciary in a Democratic Polity, 27 A. B. A. J. 133, 136–137 (1941).

At the same time, of course, the opinion contained bits and pieces that spoke differently. The decision also said that, "if [a] statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U. S., at 843. But it seems the government didn't advance this formulation in its brief, so there was no adversarial engagement on it. T. Merrill, The Story of *Chevron*: The Making of an Accidental Landmark, 66 Admin. L. Rev. 253, 268 (2014) (Merrill). As we have seen, too, the Court did not pause to consider (or even mention) the APA. See Part II–A, *supra.* It did not discuss contrary precedents issued by the Court since the founding, let alone purport to overrule any of them. See Part II–B–1, *supra.* Nor did the Court seek to address how its novel rule of deference might be squared with so much surrounding law. See Part II–B–2, *supra.* As even its defenders have acknowledged, "*Chevron* barely bothered to justify its rule of deference, and the few brief passages on this matter pointed in disparate

directions." Kagan 212–213. "[T]he quality of the reasoning," they acknowledge, "was not high," C. Sunstein, *Chevron* as Law, 107 Geo. L. J. 1613, 1669 (2019).

If *Chevron* meant to usher in a revolution in how judges interpret laws, no one appears to have realized it at the time. *Chevron*'s author, Justice Stevens, characterized the decision as a "simpl[e] . . . restatement of existing law, nothing more or less." Merrill 255, 275. In the "19 argued cases" in the following Term "that presented some kind of question about whether the Court should defer to an agency interpretation of statutory law," this Court cited *Chevron* just once. Merrill 276. By some accounts, the decision seemed "destined to obscurity." *Ibid.*

It was only three years later when Justice Scalia wrote a concurrence that a revolution began to take shape. *Buffington*, 598 U. S., at ___ (slip op., at 8). There, he argued for a new rule requiring courts to defer to executive agency interpretations of the law whenever a "'statute is silent or ambiguous.'" *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 133–134 (1987) (opinion of Scalia, J.). Eventually, a majority of the Court followed his lead. *Buffington*, 598 U. S., at ___ (slip op., at 8). But from the start, Justice Scalia made no secret about the scope of his ambitions. See Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 521 (1989) (Scalia). The rule he advocated for represented such a sharp break from prior practice, he explained, that many judges of his day didn't yet "understand" the "old criteria" were "no longer relevant." *Ibid.* Still, he said, overthrowing the past was worth it because a new deferential rule would be "easier to follow." *Ibid.*

Events proved otherwise. As the years wore on and the Court's new and aggressive reading of *Chevron* gradually exposed itself as unworkable, unfair, and at odds with our separation of powers, Justice Scalia could have doubled down on the project. But he didn't. He appreciated that

stare decisis is not a rule of "if I thought it yesterday, I must think it tomorrow." And rather than cling to the pride of personal precedent, the Justice began to express doubts over the very project that he had worked to build. See *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 109–110 (2015) (opinion concurring in judgment); cf. *Decker* v. *Northwest Environmental Defense Center*, 568 U. S. 597, 617–618, 621 (2013) (opinion concurring in part and dissenting in part). If *Chevron*'s ascent is a testament to the Justice's ingenuity, its demise is an even greater tribute to his humility.[6]

Justice Scalia was not alone in his reconsideration. After years spent laboring under *Chevron*, trying to make sense of it and make it work, Member after Member of this Court came to question the project. See, *e.g.*, *Pereira* v. *Sessions*, 585 U. S. 198, 219–221 (2018) (Kennedy, J., concurring); *Michigan* v. *EPA*, 576 U. S. 743, 760–764 (2015) (THOMAS, J., concurring); *Kisor*, 588 U. S., at 591 (ROBERTS, C. J., concurring in part); *Gutierrez-Brizuela*, 834 F. 3d, at 1153; *Buffington*, 598 U. S., at ___–___ (slip op., at 14–15); Kavanaugh 2150–2154. Ultimately, the Court gave up. Despite repeated invitations, it has not applied *Chevron* deference since 2016. Relentless Tr. 81; App. to Brief for Respondents in No. 22–1219, p. 68a. So an experiment that began only in the mid-1980s effectively ended eight years ago. Along the way, an unusually large number of federal appellate judges voiced their own thoughtful and extensive

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[6] It should be recalled that, when Justice Scalia launched the *Chevron* revolution, there were many judges who "abhor[red] . . . 'plain meaning'" and preferred instead to elevate "legislative history" and their own curated accounts of a law's "purpose[s]" over enacted statutory text. Scalia 515, 521. *Chevron*, he predicted, would provide a new guardrail against that practice. Scalia 515, 521. As the Justice's later writings show, he had the right diagnosis, just the wrong cure. The answer for judges eliding statutory terms is not deference to agencies that may seek to do the same, but a demand that all return to a more faithful adherence to the written law. That was, of course, another project Justice Scalia championed. And as we like to say, "we're all textualists now."

criticisms of *Chevron*. *Buffington*, 598 U. S., at ___–___ (slip op., at 14–15) (collecting examples). A number of state courts did, too, refusing to import *Chevron* deference into their own administrative law jurisprudence. See 598 U. S., at ___ (slip op., at 15).

Even if all that and everything else laid out above is true, the government suggests we should retain *Chevron* deference because judges simply cannot live without it; some statutes are just too "technical" for courts to interpret "intelligently." *Post*, at 9, 32 (dissenting opinion). But that objection is no answer to *Chevron*'s inconsistency with Congress's directions in the APA, so much surrounding law, or the challenges its multistep regime have posed in practice. Nor does history counsel such defeatism. Surely, it would be a mistake to suggest our predecessors before *Chevron*'s rise in the mid-1980s were unable to make their way intelligently through technical statutory disputes. Following their lead, over the past eight years this Court has managed to resolve even highly complex cases without *Chevron* deference, and done so even when the government sought deference. Nor, as far as I am aware, did any Member of the Court suggest *Chevron* deference was necessary to an intelligent resolution of any of those matters.[7] If anything, by affording *Chevron* deference a period of repose before addressing whether it should be retained, the Court has enabled its Members to test the propriety of that precedent and reflect more deeply on how well it fits into the broader architecture of our law. Others may see things differently, see *post*, at 26–27 (dissenting opinion), but the caution the

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[7] See, *e.g., Becerra* v. *Empire Health Foundation, for Valley Hospital Medical Center*, 597 U. S. 424, 434 (2022) (resolving intricate Medicare dispute by reference solely to "text," "context," and "structure"); see also *Sackett* v. *EPA*, 598 U. S. 651 (2023) (same in a complex Clean Water Act dispute); *Johnson* v. *Guzman Chavez*, 594 U. S. 523 (2021) (same in technical immigration case).

Court has exhibited before overruling *Chevron* may illustrate one of the reasons why the current Court has been slower to overrule precedents than some of its predecessors, see Part I–C, *supra*.

None of this, of course, discharges any Member of this Court from the task of deciding for himself or herself today whether *Chevron* deference itself warrants deference. But when so many past and current judicial colleagues in this Court and across the country tell us our doctrine is misguided, and when we ourselves managed without *Chevron* for centuries and manage to do so today, the humility at the core of *stare decisis* compels us to pause and reflect carefully on the wisdom embodied in that experience. And, in the end, to my mind the lessons of experience counsel wisely against continued reliance on *Chevron*'s stray and unconsidered digression. This Court's opinions fill over 500 volumes, and perhaps "some printed judicial word may be found to support almost any plausible proposition." R. Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944). It is not for us to pick and choose passages we happen to like and demand total obedience to them in perpetuity. That would turn *stare decisis* from a doctrine of humility into a tool for judicial opportunism. *Brown*, 596 U. S., at 141.

III

Proper respect for precedent helps "keep the scale of justice even and steady," by reinforcing decisional rules consistent with the law upon which all can rely. 1 Blackstone 69. But that respect does not require, nor does it readily tolerate, a steadfast refusal to correct mistakes. As early as 1810, this Court had already overruled one of its cases. See *Hudson* v. *Guestier*, 6 Cranch 281, 284 (overruling *Rose* v. *Himely*, 4 Cranch 241 (1808)). In recent years, the Court may have overruled precedents less frequently than it did during the Warren and Burger Courts. See Part I–C, *supra*.

But the job of reconsidering past decisions remains one every Member of this Court faces from time to time.[8]

Justice William O. Douglas served longer on this Court than any other person in the Nation's history. During his tenure, he observed how a new colleague might be inclined initially to "revere" every word written in an opinion issued before he arrived. W. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949). But, over time, Justice Douglas reflected, his new colleague would "remembe[r] . . . that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." *Ibid.* And "[s]o he [would] com[e] to formulate his own views, rejecting some earlier ones as false and embracing others." *Ibid.* This process of reexamination, Justice Douglas explained, is a "necessary consequence of our system" in which each judge takes an oath—both "personal" and binding—to discern the law's meaning for himself and apply it faithfully in the cases that come before him. *Id.*, at 736–737.

Justice Douglas saw, too, how appeals to precedent could be overstated and sometimes even overwrought. Judges, he reflected, would sometimes first issue "new and startling decision[s]," and then later spin around and "acquire an acute conservatism" in their aggressive defense of "their

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[8] Today's dissenters are no exceptions. They have voted to overrule precedents that they consider "wrong," *Hurst* v. *Florida*, 577 U. S. 92, 101 (2016) (opinion for the Court by SOTOMAYOR, J., joined by, *inter alios*, KAGAN, J.); *Obergefell* v. *Hodges*, 576 U. S. 644, 665, 675 (2015) (opinion for the Court, joined by, *inter alios*, SOTOMAYOR and KAGAN, JJ.); that conflict with the Constitution's "original meaning," *Alleyne* v. *United States*, 570 U. S. 99, 118 (2013) (SOTOMAYOR, J., joined by, *inter alias*, KAGAN, J., concurring); and that have proved "unworkable," *Johnson* v. *United States*, 576 U. S. 591, 605 (2015) (opinion for the Court, joined by, *inter alios*, SOTOMAYOR and KAGAN, JJ.); see also *Erlinger* v. *United States*, 602 U. S. ___, ___ (2024) (JACKSON, J., dissenting) (slip op., at 1) (arguing *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and the many cases applying it were all "wrongly decided").

new *status quo*." *Id.*, at 737. In that way, even the most novel and unlikely decisions became "coveted anchorage[s]," defended heatedly, if ironically, under the banner of "*stare decisis*." *Ibid.*; see also *Edwards* v. *Vannoy*, 593 U. S. 255, 294, n. 7 (2021) (GORSUCH, J., concurring).

That is *Chevron*'s story: A revolution masquerading as the status quo. And the defense of it follows the same course Justice Douglas described. Though our dissenting colleagues have not hesitated to question other precedents in the past, they today manifest what Justice Douglas called an "acute conservatism" for *Chevron*'s "startling" development, insisting that if this "coveted anchorage" is abandoned the heavens will fall. But the Nation managed to live with busy executive agencies of all sorts long before the *Chevron* revolution began to take shape in the mid-1980s. And all today's decision means is that, going forward, federal courts will do exactly as this Court has since 2016, exactly as it did before the mid-1980s, and exactly as it had done since the founding: resolve cases and controversies without any systemic bias in the government's favor.

Proper respect for precedent does not begin to suggest otherwise. Instead, it counsels respect for the written law, adherence to consistent teachings over aberrations, and resistance to the temptation of treating our own stray remarks as if they were statutes. And each of those lessons points toward the same conclusion today: *Chevron* deference is inconsistent with the directions Congress gave us in the APA. It represents a grave anomaly when viewed against the sweep of historic judicial practice. The decision undermines core rule-of-law values ranging from the promise of fair notice to the promise of a fair hearing. Even on its own terms, it has proved unworkable and operated to undermine rather than advance reliance interests, often to the detriment of ordinary Americans. And from the start, the whole project has relied on the overaggressive use of snippets and stray remarks from an opinion that carried

mixed messages. *Stare decisis*'s true lesson today is not that we are bound to respect *Chevron*'s "startling development," but bound to inter it.

SUPREME COURT OF THE UNITED STATES

Nos. 22–451 and 22–1219

LOPER BRIGHT ENTERPRISES, ET AL.,
PETITIONERS
22–451 *v.*
GINA RAIMONDO, SECRETARY OF
COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELENTLESS, INC., ET AL., PETITIONERS
22–1219 *v.*
DEPARTMENT OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 28, 2024]

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR and JUSTICE JACKSON join,* dissenting.

For 40 years, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), has served as a cornerstone of administrative law, allocating responsibility for statutory construction between courts and agencies. Under *Chevron*, a court uses all its normal interpretive tools to determine whether Congress has spoken to an issue. If the court finds Congress has done so, that is the end of the matter; the agency's views make no difference. But if the court finds, at the end of its interpretive work, that

*JUSTICE JACKSON did not participate in the consideration or decision of the case in No. 22–451 and joins this opinion only as it applies to the case in No. 22–1219.

Congress has left an ambiguity or gap, then a choice must be made. Who should give content to a statute when Congress's instructions have run out? Should it be a court? Or should it be the agency Congress has charged with administering the statute? The answer *Chevron* gives is that it should usually be the agency, within the bounds of reasonableness. That rule has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.

And the rule is right. This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court. Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or

gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority. We defer, the Court has explained, "because of a presumption that Congress" would have "desired the agency (rather than the courts)" to exercise "whatever degree of discretion" the statute allows. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741 (1996).

Today, the Court flips the script: It is now "the courts (rather than the agency)" that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. In recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies. The Court has substituted its own judgment on workplace health for that of the Occupational Safety and Health Administration; its own judgment on climate change for that of the Environmental Protection Agency; and its own judgment on student loans for that of the Department of Education. See, *e.g.*, *National Federation of Independent Business* v. *OSHA*, 595 U. S. 109 (2022); *West Virginia* v. *EPA*, 597 U. S. 697 (2022); *Biden* v. *Nebraska*, 600 U. S. 477 (2023). But evidently that was, for this Court, all too piecemeal. In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country's administrative czar. It defends that move as one (suddenly) required by the (nearly 80-year-old) Administrative Procedure Act. But the Act makes no such demand. Today's decision is not one Congress directed. It is entirely the majority's choice.

And the majority cannot destroy one doctrine of judicial humility without making a laughing-stock of a second. (If opinions had titles, a good candidate for today's would be Hubris Squared.) *Stare decisis* is, among other things, a

way to remind judges that wisdom often lies in what prior judges have done. It is a brake on the urge to convert "every new judge's opinion" into a new legal rule or regime. *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. 215, 388 (2022) (joint opinion of Breyer, SOTOMAYOR, and KAGAN, JJ., dissenting) (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (7th ed. 1775)). *Chevron* is entrenched precedent, entitled to the protection of *stare decisis*, as even the majority acknowledges. In fact, *Chevron* is entitled to the supercharged version of that doctrine because Congress could always overrule the decision, and because so many governmental and private actors have relied on it for so long. Because that is so, the majority needs a "particularly special justification" for its action. *Kisor* v. *Wilkie*, 588 U. S. 558, 588 (2019) (opinion of the Court). But the majority has nothing that would qualify. It barely tries to advance the usual factors this Court invokes for overruling precedent. Its justification comes down, in the end, to this: Courts must have more say over regulation—over the provision of health care, the protection of the environment, the safety of consumer products, the efficacy of transportation systems, and so on. A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power.

I

Begin with the problem that gave rise to *Chevron* (and also to its older precursors): The regulatory statutes Congress passes often contain ambiguities and gaps. Sometimes they are intentional. Perhaps Congress "consciously desired" the administering agency to fill in aspects of the legislative scheme, believing that regulatory experts would be "in a better position" than legislators to do so. *Chevron*, 467 U. S., at 865. Or "perhaps Congress was unable to forge a coalition on either side" of a question, and the contending

parties "decided to take their chances with" the agency's resolution. *Ibid.* Sometimes, though, the gaps or ambiguities are what might be thought of as predictable accidents. They may be the result of sloppy drafting, a not infrequent legislative occurrence. Or they may arise from the well-known limits of language or foresight. Accord, *ante*, at 7, 22. "The subject matter" of a statutory provision may be too "specialized and varying" to "capture in its every detail." *Kisor*, 588 U. S., at 566 (plurality opinion). Or the provision may give rise, years or decades down the road, to an issue the enacting Congress could not have anticipated. Whichever the case—whatever the reason—the result is to create uncertainty about some aspect of a provision's meaning.

Consider a few examples from the caselaw. They will help show what a typical *Chevron* question looks like—or really, what a typical *Chevron* question *is*. Because when choosing whether to send some class of questions mainly to a court, or mainly to an agency, abstract analysis can only go so far; indeed, it may obscure what matters most. So I begin with the concrete:

- Under the Public Health Service Act, the Food and Drug Administration (FDA) regulates "biological product[s]," including "protein[s]." 42 U. S. C. §262(i)(1). When does an alpha amino acid polymer qualify as such a "protein"? Must it have a specific, defined sequence of amino acids? See *Teva Pharmaceuticals USA, Inc.* v. *FDA*, 514 F. Supp. 3d 66, 79–80, 93–106 (DC 2020).
- Under the Endangered Species Act, the Fish and Wildlife Service must designate endangered "vertebrate fish or wildlife" species, including "distinct population segment[s]" of those species. 16 U. S. C. §1532(16); see §1533. What makes one population segment "distinct" from another? Must the Service treat the Washington State population of western gray squirrels as "distinct"

because it is geographically separated from other western gray squirrels? Or can the Service take into account that the genetic makeup of the Washington population does not differ markedly from the rest? See *Northwest Ecosystem Alliance* v. *United States Fish and Wildlife Serv.*, 475 F. 3d 1136, 1140–1145, 1149 (CA9 2007).

- Under the Medicare program, reimbursements to hospitals are adjusted to reflect "differences in hospital wage levels" across "geographic area[s]." 42 U. S. C. §1395ww(d)(3)(E)(i). How should the Department of Health and Human Services measure a "geographic area"? By city? By county? By metropolitan area? See *Bellevue Hospital Center* v. *Leavitt*, 443 F. 3d 163, 174–176 (CA2 2006).
- Congress directed the Department of the Interior and the Federal Aviation Administration to reduce noise from aircraft flying over Grand Canyon National Park—specifically, to "provide for substantial restoration of the natural quiet." §3(b)(1), 101 Stat. 676; see §3(b)(2). How much noise is consistent with "the natural quiet"? And how much of the park, for how many hours a day, must be that quiet for the "substantial restoration" requirement to be met? See *Grand Canyon Air Tour Coalition* v. *FAA*, 154 F. 3d 455, 466–467, 474–475 (CADC 1998).
- Or take *Chevron* itself. In amendments to the Clean Air Act, Congress told States to require permits for modifying or constructing "stationary sources" of air pollution. 42 U. S. C. §7502(c)(5). Does the term "stationary source[]" refer to each pollution-emitting piece of equipment within a plant? Or does it refer to the entire plant, and thus allow escape from the permitting requirement when increased emissions from one piece of equipment are offset by reductions from another? See 467 U. S., at 857, 859.

In each case, a statutory phrase has more than one reasonable reading. And Congress has not chosen among them: It has not, in any real-world sense, "fixed" the "single, best meaning" at "the time of enactment" (to use the majority's phrase). *Ante*, at 22. A question thus arises: Who decides which of the possible readings should govern?

This Court has long thought that the choice should usually fall to agencies, with courts broadly deferring to their judgments. For the last 40 years, that doctrine has gone by the name of *Chevron* deference, after the 1984 decision that formalized and canonized it. In *Chevron*, the Court set out a simple two-part framework for reviewing an agency's interpretation of a statute that it administers. First, the reviewing court must determine whether Congress has "directly spoken to the precise question at issue." 467 U. S., at 842. That inquiry is rigorous: A court must exhaust all the "traditional tools of statutory construction" to divine statutory meaning. *Id.*, at 843, n. 9. And when it can find that meaning—a "single right answer"—that is "the end of the matter": The court cannot defer because it "must give effect to the unambiguously expressed intent of Congress." *Kisor*, 588 U. S., at 575 (opinion of the Court); *Chevron*, 467 U. S., at 842–843. But if the court, after using its whole legal toolkit, concludes that "the statute is silent or ambiguous with respect to the specific issue" in dispute—for any of the not-uncommon reasons discussed above—then the court must cede the primary interpretive role. *Ibid.*; see *supra*, at 4–5. At that second step, the court asks only whether the agency construction is within the sphere of "reasonable" readings. *Chevron*, 467 U. S., at 844. If it is, the agency's interpretation of the statute that it every day implements will control.

That rule, the Court has long explained, rests on a presumption about legislative intent—about what Congress wants when a statute it has charged an agency with implementing contains an ambiguity or a gap. See *id.*, at 843–

845; *Smiley*, 517 U. S., at 740–741. An enacting Congress, as noted above, knows those uncertainties will arise, even if it does not know what they will turn out to be. See *supra*, at 4–5. And every once in a while, Congress provides an explicit instruction for dealing with that contingency—assigning primary responsibility to the courts, or else to an agency. But much more often, Congress does not say. Thus arises the need for a presumption—really, a default rule—for what should happen in that event. Does a statutory silence or ambiguity then go to a court for resolution? Or to an agency? This Court has long thought Congress would choose an agency, with courts serving only as a backstop to make sure the agency makes a reasonable choice among the possible readings. Or said otherwise, Congress would select the agency it has put in control of a regulatory scheme to exercise the "degree of discretion" that the statute's lack of clarity or completeness allows. *Smiley*, 517 U. S., at 741. Of course, Congress can always refute that presumptive choice—can say that, really, it would prefer courts to wield that discretionary power. But until then, the presumption cuts in the agency's favor.[1] The next question is why.

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[1] Note that presumptions of this kind are common in the law. In other contexts, too, the Court responds to a congressional lack of direction by adopting a presumption about what Congress wants, rather than trying to figure that out in every case. And then Congress can legislate, with "predictable effects," against that "stable background" rule. *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 261 (2010). Take the presumption against extraterritoriality: The Court assumes Congress means for its statutes to apply only within the United States, absent a "clear indication" to the contrary. *Id.*, at 255. Or the presumption against retroactivity: The Court assumes Congress wants its laws to apply only prospectively, unless it "unambiguously instruct[s]" something different. *Vartelas* v. *Holder*, 566 U. S. 257, 266 (2012). Or the presumption against repeal of statutes by implication: The Court assumes Congress does not intend a later statute to displace an earlier one unless it makes that intention "clear and manifest." *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 510 (2018). Or the (so far unnamed) presumption against treating a procedural requirement as "jurisdictional" unless "Congress

For one, because agencies often know things about a statute's subject matter that courts could not hope to. The point is especially stark when the statute is of a "scientific or technical nature." *Kisor*, 588 U. S., at 571 (plurality opinion). Agencies are staffed with "experts in the field" who can bring their training and knowledge to bear on open statutory questions. *Chevron*, 467 U. S., at 865. Consider, for example, the first bulleted case above. When does an alpha amino acid polymer qualify as a "protein"? See *supra*, at 5. I don't know many judges who would feel confident resolving that issue. (First question: What even *is* an alpha amino acid polymer?) But the FDA likely has scores of scientists on staff who can think intelligently about it, maybe collaborate with each other on its finer points, and arrive at a sensible answer. Or take the perhaps more accessible-sounding second case, involving the Endangered Species Act. See *supra*, at 5–6. Deciding when one squirrel population is "distinct" from another (and thus warrants protection) requires knowing about species more than it does consulting a dictionary. How much variation of what kind—geographic, genetic, morphological, or behavioral—should be required? A court could, if forced to, muddle through that issue and announce a result. But wouldn't the Fish and Wildlife Service, with all its specialized expertise, do a better job of the task—of saying what, in the context of species protection, the open-ended term "distinct" means? One idea behind the *Chevron* presumption is that Congress—

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clearly states that it is." *Boechler* v. *Commissioner*, 596 U. S. 199, 203 (2022). I could continue, except that this footnote is long enough. The *Chevron* deference rule is to the same effect: The Court generally assumes that Congress intends to confer discretion on agencies to handle statutory ambiguities or gaps, absent a direction to the contrary. The majority calls that presumption a "fiction," *ante*, at 26, but it is no more so than any of the presumptions listed above. They all are best guesses—and usually quite good guesses—by courts about congressional intent.

the same Congress that charged the Service with implementing the Act—would answer that question with a resounding "yes."

A second idea is that Congress would value the agency's experience with how a complex regulatory regime functions, and with what is needed to make it effective. Let's stick with squirrels for a moment, except broaden the lens. In construing a term like "distinct" in a case about squirrels, the Service likely would benefit from its "historical familiarity" with how the term has covered the population segments of other species. *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 153 (1991); see, *e.g.*, *Center for Biological Diversity* v. *Zinke*, 900 F. 3d 1053, 1060–1062 (CA9 2018) (arctic grayling); *Center for Biological Diversity* v. *Zinke*, 868 F. 3d 1054, 1056 (CA9 2017) (desert eagle). Just as a common-law court makes better decisions as it sees multiple variations on a theme, an agency's construction of a statutory term benefits from its unique exposure to all the related ways the term comes into play. Or consider, for another way regulatory familiarity matters, the example about adjusting Medicare reimbursement for geographic wage differences. See *supra*, at 6. According to a dictionary, the term "geographic area" could be as large as a multi-state region or as small as a census tract. How to choose? It would make sense to gather hard information about what reimbursement levels each approach will produce, to explore the ease of administering each on a nationwide basis, to survey how regulators have dealt with similar questions in the past, and to confer with the hospitals themselves about what makes sense. See *Kisor*, 588 U. S., at 571 (plurality opinion) (noting that agencies are able to "conduct factual investigations" and "consult with affected parties"). Congress knows the Department of Health and Human Services can do all those things—and that courts cannot.

Still more, *Chevron*'s presumption reflects that resolving

statutory ambiguities, as Congress well knows, is "often more a question of policy than of law." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 696 (1991). The task is less one of construing a text than of balancing competing goals and values. Consider the statutory directive to achieve "substantial restoration of the [Grand Canyon's] natural quiet." See *supra*, at 6. Someone is going to have to decide exactly what that statute means for air traffic over the canyon. How many flights, in what places and at what times, are consistent with restoring enough natural quiet on the ground? That is a policy trade-off of a kind familiar to agencies—but peculiarly unsuited to judges. Or consider *Chevron* itself. As the Court there understood, the choice between defining a "stationary source" as a whole plant or as a pollution-emitting device is a choice about how to "reconcile" two "manifestly competing interests." 467 U. S., at 865. The plantwide definition relaxes the permitting requirement in the interest of promoting economic growth; the device-specific definition strengthens that requirement to better reduce air pollution. See *id.*, at 851, 863, 866. Again, that is a choice a judge should not be making, but one an agency properly can. Agencies are "subject to the supervision of the President, who in turn answers to the public." *Kisor*, 588 U. S., at 571–572 (plurality opinion). So when faced with a statutory ambiguity, "an agency to which Congress has delegated policymaking responsibilities" may rely on an accountable actor's "views of wise policy to inform its judgments." *Chevron*, 467 U. S., at 865.

None of this is to say that deference to agencies is always appropriate. The Court over time has fine-tuned the *Chevron* regime to deny deference in classes of cases in which Congress has no reason to prefer an agency to a court. The majority treats those "refinements" as a flaw in the scheme, *ante*, at 27, but they are anything but. Consider the rule that an agency gets no deference when construing a statute it is not responsible for administering. See *Epic Systems*

Corp. v. *Lewis*, 584 U. S. 497, 519–520 (2018). Well, of course not—if Congress has not put an agency in charge of implementing a statute, Congress would not have given the agency a special role in its construction. Or take the rule that an agency will not receive deference if it has reached its decision without using—or without using properly—its rulemaking or adjudicatory authority. See *United States* v. *Mead Corp.*, 533 U. S. 218, 226–227 (2001); *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 220 (2016). Again, that should not be surprising: Congress expects that authoritative pronouncements on a law's meaning will come from the procedures it has enacted to foster "fairness and deliberation" in agency decision-making. *Mead*, 533 U. S., at 230. Or finally, think of the "extraordinary cases" involving questions of vast "economic and political significance" in which the Court has declined to defer. *King* v. *Burwell*, 576 U. S. 473, 485–486 (2015). The theory is that Congress would not have left matters of such import to an agency, but would instead have insisted on maintaining control. So the *Chevron* refinements proceed from the same place as the original doctrine. Taken together, they give interpretive primacy to the agency when—but only when—it is acting, as Congress specified, in the heartland of its delegated authority.

That carefully calibrated framework "reflects a sensitivity to the proper roles of the political and judicial branches." *Pauley*, 501 U. S., at 696. Where Congress has spoken, Congress has spoken; only its judgments matter. And courts alone determine when that has happened: Using all their normal interpretive tools, they decide whether Congress has addressed a given issue. But when courts have decided that Congress has not done so, a choice arises. Absent a legislative directive, either the administering agency or a court must take the lead. And the matter is more fit for the agency. The decision is likely to involve the agency's subject-matter expertise; to fall within its sphere of regulatory

experience; and to involve policy choices, including cost-benefit assessments and trade-offs between conflicting values. So a court without relevant expertise or experience, and without warrant to make policy calls, appropriately steps back. The court still has a role to play: It polices the agency to ensure that it acts within the zone of reasonable options. But the court does not insert itself into an agency's expertise-driven, policy-laden functions. That is the arrangement best suited to keep every actor in its proper lane. And it is the one best suited to ensure that Congress's statutes work in the way Congress intended.

The majority makes two points in reply, neither convincing. First, it insists that "agencies have no special competence" in filling gaps or resolving ambiguities in regulatory statutes; rather, "[c]ourts do." *Ante*, at 23. Score one for self-confidence; maybe not so high for self-reflection or -knowledge. Of course courts often construe legal texts, hopefully well. And *Chevron*'s first step takes full advantage of that talent: There, a court tries to divine what Congress meant, even in the most complicated or abstruse statutory schemes. The deference comes in only if the court cannot do so—if the court must admit that standard legal tools will not avail to fill a statutory silence or give content to an ambiguous term. That is when the issues look like the ones I started off with: When does an alpha amino acid polymer qualify as a "protein"? How distinct is "distinct" for squirrel populations? What size "geographic area" will ensure appropriate hospital reimbursement? As between two equally feasible understandings of "stationary source," should one choose the one more protective of the environment or the one more favorable to economic growth? The idea that courts have "special competence" in deciding such questions whereas agencies have "no[ne]" is, if I may say, malarkey. Answering those questions right does not mainly demand the interpretive skills courts possess. Instead, it demands one or more of: subject-matter expertise,

long engagement with a regulatory scheme, and policy choice. It is courts (not agencies) that "have no special competence"—or even legitimacy—when those are the things a decision calls for.

Second, the majority complains that an ambiguity or gap does not "necessarily reflect a congressional intent that an agency" should have primary interpretive authority. *Ante*, at 22. On that score, I'll agree with the premise: It doesn't "necessarily" do so. *Chevron* is built on a *presumption*. The decision does not maintain that Congress in every case wants the agency, rather than a court, to fill in gaps. The decision maintains that when Congress does not expressly pick one or the other, we need a default rule; and the best default rule—agency or court?—is the one we think Congress would generally want. As to *why* Congress would generally want the agency: The answer lies in everything said above about Congress's delegation of regulatory power to the agency and the agency's special competencies. See *supra*, at 9–11. The majority appears to think it is a showstopping rejoinder to note that many statutory gaps and ambiguities are "unintentional." *Ante*, at 22. But to begin, many are not; the ratio between the two is uncertain. See *supra*, at 4–5. And to end, why should that matter in any event? Congress may not have deliberately introduced a gap or ambiguity into the statute; but it knows that pretty much everything it drafts will someday be found to contain such a "flaw." Given that knowledge, *Chevron* asks, what would Congress want? The presumed answer is again the same (for the same reasons): The agency. And as with any default rule, if Congress decides otherwise, all it need do is say.

In that respect, the proof really is in the pudding: Congress basically never says otherwise, suggesting that *Chevron* chose the presumption aligning with legislative intent (or, in the majority's words, "approximat[ing] reality," *ante*, at 22). Over the last four decades, Congress has authorized

or reauthorized hundreds of statutes. The drafters of those statutes knew all about *Chevron*. See A. Gluck & L. Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 928 (fig. 2), 994 (2013). So if they had wanted a different assignment of interpretive responsibility, they would have inserted a provision to that effect. With just a pair of exceptions I know of, they did not. See 12 U. S. C. §25b(b)(5)(A) (exception #1); 15 U. S. C. §8302(c)(3)(A) (exception #2). Similarly, Congress has declined to enact proposed legislation that would abolish *Chevron* across the board. See S. 909, 116th Cong., 1st Sess., §2 (2019) (still a bill, not a law); H. R. 5, 115th Cong., 1st Sess., §202 (2017) (same). So to the extent the majority is worried that the *Chevron* presumption is "fiction[al]," *ante*, at 26—as all legal presumptions in some sense are—it has gotten less and less so every day for 40 years. The congressional reaction shows as well as anything could that the *Chevron* Court read Congress right.

II

The majority's principal arguments are in a different vein. Around 80 years after the APA was enacted and 40 years after *Chevron*, the majority has decided that the former precludes the latter. The APA's Section 706, the majority says, "makes clear" that agency interpretations of statutes "are *not* entitled to deference." *Ante*, at 14–15 (emphasis in original). And that provision, the majority continues, codified the contemporaneous law, which likewise did not allow for deference. See *ante,* at 9–13, 15–16. But neither the APA nor the pre-APA state of the law does the work that the majority claims. Both are perfectly compatible with *Chevron* deference.

Section 706, enacted with the rest of the APA in 1946, provides for judicial review of agency action. It states: "To the extent necessary to decision and when presented, the

reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U. S. C. §706.

That text, contra the majority, "does not resolve the *Chevron* question." C. Sunstein, *Chevron* As Law, 107 Geo. L. J. 1613, 1642 (2019) (Sunstein). Or said a bit differently, Section 706 is "generally indeterminate" on the matter of deference. A. Vermeule, Judging Under Uncertainty 207 (2006) (Vermeule). The majority highlights the phrase "decide all relevant questions of law" (italicizing the "all"), and notes that the provision "prescribes no deferential standard" for answering those questions. *Ante*, at 14. But just as the provision does not prescribe a deferential standard of review, so too it does not prescribe a *de novo* standard of review (in which the court starts from scratch, without giving deference). In point of fact, Section 706 does not specify *any* standard of review for construing statutes. See *Kisor*, 588 U. S., at 581 (plurality opinion). And when a court uses a deferential standard—here, by deciding whether an agency reading is reasonable—it just as much "decide[s]" a "relevant question[] of law" as when it uses a *de novo* standard. §706. The deferring court then conforms to Section 706 "by determining whether the agency has stayed within the bounds of its assigned discretion—that is, whether the agency has construed [the statute it administers] reasonably." J. Manning, *Chevron* and the Reasonable Legislator, 128 Harv. L. Rev. 457, 459 (2014); see *Arlington* v. *FCC*, 569 U. S. 290, 317 (2013) (ROBERTS, C. J., dissenting) ("We do not ignore [Section 706's] command when we afford an agency's statutory interpretation *Chevron* deference; we respect it").[2]

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[2]The majority tries to buttress its argument with a stray sentence or two from the APA's legislative history, but the same response holds. As the majority notes, see *ante*, at 15, the House and Senate Reports each stated that Section 706 "provid[ed] that questions of law are for courts

Section 706's references to standards of review in other contexts only further undercut the majority's argument. The majority notes that Section 706 requires deferential review for agency fact-finding and policy-making (under, respectively, a substantial-evidence standard and an arbitrary-and-capricious standard). See *ante*, at 14. Congress, the majority claims, "surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart" from *de novo* review. *Ibid.* Surely? In another part of Section 706, Congress explicitly referred to *de novo* review. §706(2)(F). With all those references to standards of review—both deferential and not—running around Section 706, what is "telling" (*ante*, at 14) is the absence of any standard for reviewing an agency's statutory constructions. That silence left the matter, as noted above, "generally indeterminate": Section 706 neither mandates nor forbids *Chevron*-style deference. Vermeule 207.[3]

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rather than agencies to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945). But that statement also does not address the standard of review that courts should then use. When a court defers under *Chevron*, it reviews the agency's construction for reasonableness "in the last analysis." The views of Representative Walter, which the majority also cites, further demonstrate my point. He stated that the APA would require courts to "determine independently all relevant questions of law," but he also stated that courts would be required to "exercise . . . independent judgment" in applying the substantial-evidence standard (a deferential standard if ever there were one). 92 Cong. Rec. 5654 (1946). He therefore did not equate "independent" review with *de novo* review; he thought that a court could conduct independent review of agency action using a deferential standard.

[3] In a footnote responding to the last two paragraphs, the majority raises the white flag on Section 706's text. See *ante*, at 15, n. 4. Yes, it finally concedes, Section 706 does not *say* that *de novo* review is required for an agency's statutory construction. Rather, the majority says, "some things go without saying," and *de novo* review is such a thing. See *ibid.* But why? What extra-textual considerations force us to read Section 706 the majority's way? In its footnote, the majority repairs only to history.

And contra the majority, most "respected commentators" understood Section 706 in that way—as allowing, even if not requiring, deference. *Ante*, at 16. The finest administrative law scholars of the time (call them that generation's Manning, Sunstein, and Vermeule) certainly did. Professor Louis Jaffe described something very like the *Chevron* two-step as the preferred method of reviewing agency interpretations under the APA. A court, he said, first "must decide as a 'question of law' whether there is 'discretion' in the premises." Judicial Control of Administrative Action 570 (1965). That is akin to step 1: Did Congress speak to the issue, or did it leave openness? And if the latter, Jaffe continued, the agency's view "if 'reasonable' is free of control." *Ibid.* That of course looks like step 2: defer if reasonable. And just in case that description was too complicated, Jaffe conveyed his main point this way: The argument that courts "must decide all questions of law"—as if there were no agency in the picture—"is, in my opinion, unsound." *Id.*, at 569. Similarly, Professor Kenneth Culp Davis, author of the then-preeminent treatise on administrative law, noted with approval that "reasonableness" review of agency interpretations—in which courts "refused to substitute judgment"—had "survived the APA." Administrative Law 880, 883, 885 (1951) (Davis). Other contemporaneous scholars and experts agreed. See R. Levin, The APA and the Assault on Deference, 106 Minn. L. Rev. 125, 181–183 (2021) (Levin) (listing many of them). They did not see in their own time what the majority finds there today.[4]

But as I will explain below, the majority also gets wrong the most relevant history, pertaining to how judicial review of agency interpretations operated in the years before the APA was enacted. See *infra*, at 19–23.

[4] I concede one exception (whose view was "almost completely isolated," Levin 181), but his comments on Section 706 refute a different aspect of the majority's argument. Professor John Dickinson, as the majority notes, thought that Section 706 precluded courts from deferring to agency interpretations. See Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A. B. A. J. 434, 516 (1947)

Nor, evidently, did the Supreme Court. In the years after the APA was enacted, the Court "never indicated that section 706 rejected the idea that courts might defer to agency interpretations of law." Sunstein 1654. Indeed, not a single Justice so much as floated that view of the APA. To the contrary, the Court issued a number of decisions in those years deferring to an agency's statutory interpretation. See, *e.g.*, *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U. S. 143, 153–154 (1946); *NLRB* v. *E. C. Atkins & Co.*, 331 U. S. 398, 403 (1947); *Cardillo* v. *Liberty Mut. Ins. Co.*, 330 U. S. 469, 478–479 (1947). And that continued right up until *Chevron*. See, *e.g.*, *Mitchell* v. *Budd*, 350 U. S. 473, 480 (1956); *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978). To be clear: Deference in those years was not always given to interpretations that would receive it under *Chevron*. The practice then was more inconsistent and less fully elaborated than it later became. The point here is only that the Court came nowhere close to accepting the majority's view of the APA. Take the language from Section 706 that the majority most relies on: "decide all relevant questions of law." See *ante*, at 14. In the decade after the APA's enactment, those words were used only four times in Supreme Court opinions (all in footnotes)—and never to suggest that courts could not defer to agency interpretations. See Sunstein 1656.

The majority's view of Section 706 likewise gets no support from how judicial review operated in the years leading up to the APA. That prior history matters: As the majority recognizes, Section 706 was generally understood to "restate[] the present law as to the scope of judicial review."

(Dickinson); *ante*, at 16. But unlike the majority, he viewed that bar as "a change" to, not a restatement of, pre-APA law. Compare Dickinson 516 with *ante*, at 15–16. So if the majority really wants to rely on Professor Dickinson, it will have to give up the claim, which I address below, that the law before the APA forbade deference. See *infra*, at 19–23.

Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947); *ante*, at 15–16. The problem for the majority is that in the years preceding the APA, courts became ever more deferential to agencies. New Deal administrative programs had by that point come into their own. And this Court and others, in a fairly short time, had abandoned their initial resistance and gotten on board. Justice Breyer, wearing his administrative-law-scholar hat, characterized the pre-APA period this way: "[J]udicial review of administrative action was curtailed, and particular agency decisions were frequently sustained with judicial obeisance to the mysteries of administrative expertise." S. Breyer et al., Administrative Law and Regulatory Policy 21 (7th ed. 2011). And that description extends to review of an agency's statutory constructions. An influential study of administrative practice, published five years before the APA's enactment, described the state of play: Judicial "review may, in some instances at least, be limited to the inquiry whether the administrative construction is a permissible one." Final Report of Attorney General's Committee on Administrative Procedure (1941), reprinted in Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess., 78 (1941). Or again: "[W]here the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body." *Id.*, at 90–91.[5]

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[5] Because the APA was meant to "restate[] the present law," the judicial review practices of the 1940s are more important to understanding the statute than is any earlier tradition (such as the majority dwells on). But before I expand on those APA-contemporaneous practices, I pause to note that they were "not built on sand." *Kisor* v. *Wilkie*, 588 U. S. 558, 568–569 (2019) (plurality opinion). Since the early days of the Republic, this Court has given significant weight to official interpretations of "ambiguous law[s]." *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827). With the passage of time—and the growth of the administrative sphere—those "judicial expressions of deference increased." H. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 15 (1983). By

Two prominent Supreme Court decisions of the 1940s put those principles into action. *Gray* v. *Powell*, 314 U. S. 402 (1941), was then widely understood as "the leading case" on review of agency interpretations. Davis 882; see *ibid.* (noting that it "establish[ed] what is known as 'the doctrine of Gray v. Powell'"). There, the Court deferred to an agency construction of the term "producer" as used in a statutory exemption from price controls. Congress, the Court explained, had committed the scope of the exemption to the agency because its "experience in [the] field gave promise of a better informed, more equitable, adjustment of the conflicting interests." *Gray*, 314 U. S., at 412. Accordingly, the Court concluded that it was "not the province of a court" to "substitute its judgment" for the agency's. *Ibid.* Three years later, the Court decided *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944), another acknowledged "leading case." Davis 882; see *id.*, at 884. The Court again deferred, this time to an agency's construction of the term "employee" in the National Labor Relations Act. The scope of that term, the Court explained, "belong[ed] to" the agency to answer based on its "[e]veryday experience in the administration of the statute." *Hearst*, 322 U. S., at 130. The Court therefore "limited" its review to whether the agency's reading had "warrant in the record and a reasonable basis in

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the early 20th century, the Court stated that it would afford "great weight" to an agency construction in the face of statutory "uncertainty or ambiguity." *National Lead Co.* v. *United States*, 252 U. S. 140, 145 (1920); see *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572 (1891) ("controlling" weight in "all cases of ambiguity"); *United States* v. *Alabama Great Southern R. Co.*, 142 U. S. 615, 621 (1892) ("decisive" weight "in case of ambiguity"); *Jacobs* v. *Prichard*, 223 U. S. 200, 214 (1912) (referring to the "rule which gives strength" to official interpretations if "ambiguity exist[s]"). So even before the New Deal, a strand of this Court's cases exemplified deference to executive constructions of ambiguous statutes. And then, as I show in the text, the New Deal arrived and deference surged—creating the "present law" that the APA "restated."

law." *Id.*, at 131.[6] Recall here that even the majority accepts that Section 706 was meant to "restate[] the present law" as to judicial review. See *ante*, at 15–16; *supra*, at 19–20. Well then? It sure would seem that the provision allows a deference regime.

The majority has no way around those two noteworthy decisions. It first appears to distinguish between "pure legal question[s]" and the so-called mixed questions in *Gray* and *Hearst*, involving the application of a legal standard to a set of facts. *Ante*, at 11. If in drawing that distinction, the majority intends to confine its holding to the pure type of legal issue—thus enabling courts to defer when law and facts are entwined—I'd be glad. But I suspect the majority has no such intent, because that approach would preserve *Chevron* in a substantial part of its current domain. Cf. *Wilkinson* v. *Garland*, 601 U. S. 209, 230 (2024) (ALITO, J., dissenting) (noting, in the immigration context, that the universe of mixed questions swamps that of pure legal ones). It is frequently in the consideration of mixed questions that the scope of statutory terms is established and their meaning defined. See H. Monaghan, *Marbury* and the

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[6]The majority says that I have "pluck[ed] out" *Gray* and *Hearst*, impliedly from a vast number of not-so-helpful cases. *Ante*, at 13, n. 3. It would make as much sense to say that a judge "plucked out" *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), to discuss substantial-evidence review or "plucked out" *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983), to discuss arbitrary-and-capricious review. *Gray* and *Hearst*, as noted above, were the leading cases about agency interpretations in the years before the APA's enactment. But just to gild the lily, here are a number of other Supreme Court decisions from the five years prior to the APA's enactment that were of a piece: *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 536 (1946); *ICC* v. *Parker*, 326 U. S. 60, 65 (1945); *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 227–228 (1943). The real "pluck[ing]" offense is the majority's—for taking a stray sentence from *Hearst* (*ante*, at 13, n. 3) to suggest that both *Hearst* and *Gray* stand for the opposite of what they actually do.

Administrative State, 83 Colum. L. Rev. 1, 29 (1983) ("Administrative application of law is administrative formulation of law whenever it involves elaboration of the statutory norm"). How does a statutory interpreter decide, as in *Hearst*, what an "employee" is? In large part through cases asking whether the term covers people performing specific jobs, like (in that case) "newsboys." 322 U. S., at 120. Or consider one of the examples I offered above. How does an interpreter decide when one population segment of a species is "distinct" from another? Often by considering that requirement with respect to particular species, like western gray squirrels. So the distinction the majority offers makes no real-world (or even theoretical) sense. If the *Hearst* Court was deferring to an agency on whether the term "employee" covered newsboys, it was deferring to the agency on the scope and meaning of the term "employee."

The majority's next rejoinder—that "the Court was far from consistent" in deferring—falls equally flat. *Ante*, at 12. I am perfectly ready to acknowledge that in the pre-APA period, a deference regime had not yet taken complete hold. I'll go even further: Let's assume that deference was then an on-again, off-again function (as the majority seems to suggest, see *ante*, at 11–12, and 13, n. 3). Even on that assumption, the majority's main argument—that Section 706 *prohibited* deferential review—collapses. Once again, the majority agrees that Section 706 was not meant to change the then-prevailing law. See *ante*, at 15–16. And even if inconsistent, that law cannot possibly be thought to have *prohibited* deference. Or otherwise said: "If Section 706 did not change the law of judicial review (as we have long recognized), then it did not proscribe a deferential standard then known and in use." *Kisor*, 588 U. S., at 583 (plurality opinion).

The majority's whole argument for overturning *Chevron* relies on Section 706. But the text of Section 706 does not support that result. And neither does the contemporaneous

practice, which that text was supposed to reflect. So today's decision has no basis in the only law the majority deems relevant. It is grounded on air.

III

And still there is worse, because abandoning *Chevron* subverts every known principle of *stare decisis*. Of course, respecting precedent is not an "inexorable command." *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). But overthrowing it requires far more than the majority has offered up here. *Chevron* is entitled to *stare decisis*'s strongest form of protection. The majority thus needs an exceptionally strong reason to overturn the decision, above and beyond thinking it wrong. And it has nothing approaching such a justification, proposing only a bewildering theory about *Chevron*'s "unworkability." *Ante*, at 32. Just five years ago, this Court in *Kisor* rejected a plea to overrule *Auer* v. *Robbins*, 519 U. S. 452 (1997), which requires judicial deference to agencies' interpretations of their own regulations. See 588 U. S., at 586–589 (opinion of the Court). The case against overruling *Chevron* is at least as strong. In particular, the majority's decision today will cause a massive shock to the legal system, "cast[ing] doubt on many settled constructions" of statutes and threatening the interests of many parties who have relied on them for years. 588 U. S., at 587 (opinion of the Court).

Adherence to precedent is "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U. S., at 827. It enables people to order their lives in reliance on judicial decisions. And it "contributes to the actual and perceived integrity of the judicial process," by ensuring that those decisions are founded in the law, and not in the "personal preferences" of judges. *Id.*, at 828; *Dobbs*, 597 U. S., at 388 (dissenting opinion).

Perhaps above all else, *stare decisis* is a "doctrine of judicial modesty." *Id.*, at 363. In that, it shares something important with *Chevron*. Both tell judges that they do not know everything, and would do well to attend to the views of others. So today, the majority rejects what judicial humility counsels not just once but twice over.

And *Chevron* is entitled to a particularly strong form of *stare decisis*, for two separate reasons. First, it matters that "Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989); see *Kisor*, 588 U. S., at 587 (opinion of the Court) (making the same point for *Auer* deference). In a constitutional case, the Court alone can correct an error. But that is not so here. "Our deference decisions are balls tossed into Congress's court, for acceptance or not as that branch elects." 588 U. S., at 587–588 (opinion of the Court). And for generations now, Congress has chosen acceptance. Throughout those years, Congress could have abolished *Chevron* across the board, most easily by amending the APA. Or it could have eliminated deferential review in discrete areas, by amending old laws or drafting new laws to include an anti-*Chevron* provision. Instead, Congress has "spurned multiple opportunities" to do a comprehensive rejection of *Chevron*, and has hardly ever done a targeted one. *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015); see *supra*, at 14–15. Or to put the point more affirmatively, Congress has kept *Chevron* as is for 40 years. It maintained that position even as Members of this Court began to call *Chevron* into question. See *ante*, at 30. From all it appears, Congress has not agreed with the view of some Justices that they and other judges should have more power.

Second, *Chevron* is by now much more than a single decision. This Court alone, acting as *Chevron* allows, has upheld an agency's reasonable interpretation of a statute at least 70 times. See Brief for United States in No. 22–1219,

p. 27; App. to *id.*, at 68a–72a (collecting cases). Lower courts have applied the *Chevron* framework on thousands upon thousands of occasions. See K. Barnett & C. Walker, *Chevron* and Stare Decisis, 31 Geo. Mason L. Rev. 475, 477, and n. 11 (2024) (noting that at last count, *Chevron* was cited in more than 18,000 federal-court decisions). The *Kisor* Court observed, when upholding *Auer*, that "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law." 588 U. S., at 587 (opinion of the Court). So too does deference to reasonable agency interpretations of ambiguous statutes—except more so. *Chevron* is as embedded as embedded gets in the law.

The majority says differently, because this Court has ignored *Chevron* lately; all that is left of the decision is a "decaying husk with bold pretensions." *Ante*, at 33. Tell that to the D. C. Circuit, the court that reviews a large share of agency interpretations, where *Chevron* remains alive and well. See, *e.g.*, *Lissack* v. *Commissioner*, 68 F. 4th 1312, 1321–1322 (2023); *Solar Energy Industries Assn.* v. *FERC*, 59 F. 4th 1287, 1291–1294 (2023). But more to the point: The majority's argument is a bootstrap. This Court has "avoided deferring under *Chevron* since 2016" (*ante*, at 32) because it has been preparing to overrule *Chevron* since around that time. That kind of self-help on the way to reversing precedent has become almost routine at this Court. Stop applying a decision where one should; "throw some gratuitous criticisms into a couple of opinions"; issue a few separate writings "question[ing the decision's] premises" (*ante*, at 30); give the whole process a few years . . . and voila!—you have a justification for overruling the decision. *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 950 (2018) (KAGAN, J., dissenting) (discussing the overruling of *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977)); see also, *e.g.*, *Kennedy* v. *Bremerton School Dist.*, 597 U. S. 507, 571–572 (2022) (SOTOMAYOR, J., dissenting) (similar

for *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971)); *Shelby County* v. *Holder*, 570 U. S. 529, 587–588 (2013) (Ginsburg, J., dissenting) (similar for *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966)). I once remarked that this overruling-through-enfeeblement technique "mock[ed] *stare decisis*." *Janus*, 585 U. S., at 950 (dissenting opinion). I have seen no reason to change my mind.

The majority does no better in its main justification for overruling *Chevron*—that the decision is "unworkable." *Ante*, at 30. The majority's first theory on that score is that there is no single "answer" about what "ambiguity" means: Some judges turn out to see more of it than others do, leading to "different results." *Ante*, at 30–31. But even if so, the legal system has for many years, in many contexts, dealt perfectly well with that variation. Take contract law. It is hornbook stuff that when (but only when) a contract is ambiguous, a court interpreting it can consult extrinsic evidence. See *CNH Industrial N.V.* v. *Reese*, 583 U. S. 133, 139 (2018) (*per curiam*). And when all interpretive tools still leave ambiguity, the contract is construed against the drafter. See *Lamps Plus, Inc.* v. *Varela*, 587 U. S. 176, 186–187 (2019). So I guess the contract rules of the 50 States are unworkable now. Or look closer to home, to doctrines this Court regularly applies. In deciding whether a government has waived sovereign immunity, we construe "[a]ny ambiguities in the statutory language" in "favor of immunity." *FAA* v. *Cooper*, 566 U. S. 284, 290 (2012). Similarly, the rule of lenity tells us to construe ambiguous statutes in favor of criminal defendants. See *United States* v. *Castleman*, 572 U. S. 157, 172–173 (2014). And the canon of constitutional avoidance instructs us to construe ambiguous laws to avoid difficult constitutional questions. See *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 494 (2001). I could go on, but the point is made. There are ambiguity triggers all over the law. Somehow everyone seems to get by.

And *Chevron* is an especially puzzling decision to criticize on the ground of generating too much judicial divergence. There's good empirical—meaning, non-impressionistic—evidence on exactly that subject. And it shows that, as compared with *de novo* review, use of the *Chevron* two-step framework fosters *agreement* among judges. See K. Barnett, C. Boyd, & C. Walker, Administrative Law's Political Dynamics, 71 Vand. L. Rev. 1463, 1502 (2018) (Barnett). More particularly, *Chevron* has a "powerful constraining effect on partisanship in judicial decisionmaking." Barnett 1463 (italics deleted); see Sunstein 1672 ("[A] predictable effect of overruling *Chevron* would be to ensure a far greater role for judicial policy preferences in statutory interpretation and far more common splits along ideological lines"). So if consistency among judges is the majority's lodestar, then the Court should not overrule *Chevron*, but return to using it.

The majority's second theory on workability is likewise a makeweight. *Chevron*, the majority complains, has some exceptions, which (so the majority says) are "difficult" and "complicate[d]" to apply. *Ante*, at 32. Recall that courts are not supposed to defer when the agency construing a statute (1) has not been charged with administering that law; (2) has not used deliberative procedures—*i.e.,* notice-and-comment rulemaking or adjudication; or (3) is intervening in a "major question," of great economic and political significance. See *supra*, at 11–12; *ante*, at 27–28. As I've explained, those exceptions—the majority also aptly calls them "refinements"—fit with *Chevron*'s rationale: They define circumstances in which Congress is unlikely to have wanted agency views to govern. *Ante*, at 27; see *supra*, at 11–12. And on the difficulty scale, they are nothing much. Has Congress put the agency in charge of administering the statute? In 99 of 100 cases, everyone will agree on the answer with scarcely a moment's thought. Did the agency use notice-and-comment or an adjudication before rendering an

interpretation? Once again, I could stretch my mind and think up a few edge cases, but for the most part, the answer is an easy yes or no. The major questions exception is, I acknowledge, different: There, many judges have indeed disputed its nature and scope. Compare, *e.g.*, *West Virginia*, 597 U. S., at 721–724, with *id.*, at 764–770 (KAGAN, J., dissenting). But that disagreement concerns, on everyone's view, a tiny subset of all agency interpretations. For the most part, the exceptions that so upset the majority require merely a rote, check-the-box inquiry. If that is the majority's idea of a "dizzying breakdance," *ante*, at 32, the majority needs to get out more.

And anyway, difficult as compared to what? The majority's prescribed way of proceeding is no walk in the park. First, the majority makes clear that what is usually called *Skidmore* deference continues to apply. See *ante*, at 16–17. Under that decision, agency interpretations "constitute a body of experience and informed judgment" that may be "entitled to respect." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). If the majority thinks that the same judges who argue today about where "ambiguity" resides (see *ante*, at 30) are not going to argue tomorrow about what "respect" requires, I fear it will be gravely disappointed. Second, the majority directs courts to comply with the varied ways in which Congress in fact "delegates discretionary authority" to agencies. *Ante*, at 17–18. For example, Congress may authorize an agency to "define[]" or "delimit[]" statutory terms or concepts, or to "fill up the details" of a statutory scheme. *Ante*, at 17, and n. 5. Or Congress may use, in describing an agency's regulatory authority, inherently "flexib[le]" language like "appropriate" or "reasonable." *Ante*, at 17, and n. 6. Attending to every such delegation, as the majority says, is necessary in a world without *Chevron*. But that task involves complexities of its own. Indeed, one reason Justice Scalia supported *Chevron* was that it re-

placed such a "statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption." A. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 516. As a lover of the predictability that rules create, Justice Scalia thought the latter "unquestionably better." *Id.*, at 517.

On the other side of the balance, the most important *stare decisis* factor—call it the "jolt to the legal system" issue—weighs heavily against overruling *Chevron*. *Dobbs*, 597 U. S., at 357 (ROBERTS, C. J., concurring in judgment). Congress and agencies alike have relied on *Chevron*—have assumed its existence—in much of their work for the last 40 years. Statutes passed during that time reflect the expectation that *Chevron* would allocate interpretive authority between agencies and courts. Rules issued during the period likewise presuppose that statutory ambiguities were the agencies' to (reasonably) resolve. Those agency interpretations may have benefited regulated entities; or they may have protected members of the broader public. Either way, private parties have ordered their affairs—their business and financial decisions, their health-care decisions, their educational decisions—around agency actions that are suddenly now subject to challenge. In *Kisor*, this Court refused to overrule *Auer* because doing so would "cast doubt on" many longstanding constructions of rules, and thereby upset settled expectations. 588 U. S., at 587 (opinion of the Court). Overruling *Chevron*, and thus raising new doubts about agency constructions of statutes, will be far more disruptive.

The majority tries to alleviate concerns about a piece of that problem: It states that judicial decisions that have upheld agency action as reasonable under *Chevron* should not be overruled on that account alone. See *ante*, at 34–35. That is all to the good: There are thousands of such decisions, many settled for decades. See *supra*, at 26. But first,

reasonable reliance need not be predicated on a prior judicial decision. Some agency interpretations never challenged under *Chevron* now will be; expectations formed around those constructions thus could be upset, in a way the majority's assurance does not touch. And anyway, how good is that assurance, really? The majority says that a decision's "[m]ere reliance on *Chevron*" is not enough to counter the force of *stare decisis*; a challenger will need an additional "special justification." *Ante*, at 34. The majority is sanguine; I am not so much. Courts motivated to overrule an old *Chevron*-based decision can always come up with something to label a "special justification." Maybe a court will say "the quality of [the precedent's] reasoning" was poor. *Ante*, at 29. Or maybe the court will discover something "unworkable" in the decision—like some exception that has to be applied. *Ante*, at 30. All a court need do is look to today's opinion to see how it is done.

IV

> Judges are not experts in the field, and are not part of either political branch of the Government.
>
> —*Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 865 (1984)

Those were the days, when we knew what we are not. When we knew that as between courts and agencies, Congress would usually think agencies the better choice to resolve the ambiguities and fill the gaps in regulatory statutes. Because agencies *are* "experts in the field." And because they *are* part of a political branch, with a claim to making interstitial policy. And because Congress has charged them, not us, with administering the statutes containing the open questions. At its core, *Chevron* is about respecting that allocation of responsibility—the conferral of primary authority over regulatory matters to agencies, not courts.

Today, the majority does not respect that judgment. It gives courts the power to make all manner of scientific and technical judgments. It gives courts the power to make all manner of policy calls, including about how to weigh competing goods and values. (See *Chevron* itself.) It puts courts at the apex of the administrative process as to every conceivable subject—because there are always gaps and ambiguities in regulatory statutes, and often of great import. What actions can be taken to address climate change or other environmental challenges? What will the Nation's health-care system look like in the coming decades? Or the financial or transportation systems? What rules are going to constrain the development of A.I.? In every sphere of current or future federal regulation, expect courts from now on to play a commanding role. It is not a role Congress has given to them, in the APA or any other statute. It is a role this Court has now claimed for itself, as well as for other judges.

And that claim requires disrespecting, too, this Court's precedent. There are no special reasons, of the kind usually invoked for overturning precedent, to eliminate *Chevron* deference. And given *Chevron*'s pervasiveness, the decision to do so is likely to produce large-scale disruption. All that backs today's decision is the majority's belief that *Chevron* was wrong—that it gave agencies too much power and courts not enough. But shifting views about the worth of regulatory actors and their work do not justify overhauling a cornerstone of administrative law. In that sense too, today's majority has lost sight of its proper role.

And it is impossible to pretend that today's decision is a one-off, in either its treatment of agencies or its treatment of precedent. As to the first, this very Term presents yet another example of the Court's resolve to roll back agency authority, despite congressional direction to the contrary. See *SEC* v. *Jarkesy*, 603 U. S. ___ (2024); see also *supra*, at 3. As to the second, just my own defenses of *stare decisis*—

my own dissents to this Court's reversals of settled law—by now fill a small volume. See *Dobbs*, 597 U. S., at 363–364 (joint opinion of Breyer, SOTOMAYOR, and KAGAN, JJ.); *Edwards* v. *Vannoy*, 593 U. S. 255, 296–297 (2021); *Knick* v. *Township of Scott*, 588 U. S. 180, 207–208 (2019); *Janus*, 585 U. S., at 931–932. Once again, with respect, I dissent.

62 F.4th 621
United States Court of Appeals, First Circuit.

RELENTLESS, INC.; Huntress, Inc.; Seafreeze Fleet LLC, Plaintiffs, Appellants,

v.

UNITED STATES DEPARTMENT OF COMMERCE; Gina M. Raimondo, in her official capacity as Secretary of Commerce; National Oceanic and Atmospheric Administration; Richard Spinrad, in his official capacity as Administrator of NOAA; National Marine Fisheries Service, a/k/a NOAA Fisheries; Janet Coit, in her official capacity as Assistant Administrator for NOAA Fisheries, Defendants, Appellees.

No. 21-1886
|
March 16, 2023

Synopsis

Background: Owners of fishing vessel that harvested Atlantic herring brought action challenging National Marine Fisheries Service (NMFS) final rule implementing industry-funded monitoring for Atlantic herring fishery. The United States District Court for the District of Rhode Island, William E. Smith, J., 561 F.Supp.3d 226, entered summary judgment in government's favor, and owners appealed.

Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that:

NMFS did not exceed its statutory authority when it promulgated rule;

exemption for vessels that intended to catch less than 50 metric tons of herring on trip from industry-funded monitoring requirement was not arbitrary and capricious;

rule did not violate Magnuson-Stevens Fishery Conservation and Management Act's (MSA) optimum yield national standard;

rule did not violate MSA's "best scientific information available" national standard;

rule did not violate MSA's national standard requiring agency to account for "variations among, and contingencies in, fisheries, fishery resources, and catches";

rule did not violate MSA's national standards requiring consideration of fishery resources and cost burdens;

rule did not violate Regulatory Flexibility Act (RFA); and

rule was not unconstitutional exercise of Congress's commerce power.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

***624** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND Hon. William E. Smith, U.S. District Judge

Attorneys and Law Firms

John J. Vecchione, with whom New Civil Liberties Alliance was on brief, for appellants.

Dina B. Mishra, with whom Todd Kim, Assistant Attorney General, Alison C. Finnegan, Daniel Halanien, Environment & Natural Resources Division, U.S. Department of Justice, and Mitch MacDonald, Office of General Counsel, National Oceanic & Atmospheric Administration, were on brief, for appellees.

Before Kayatta, Lipez, and Thompson, Circuit Judges.

Opinion

KAYATTA, Circuit Judge.

Charged with promoting the sustainability of the nation's fisheries, the National Marine Fisheries Service requires vessels fishing for herring on certain fishing trips to carry monitors on board. Although the government trains and certifies these monitors, it does not always pay them for their work. Instead, the vessel owners must procure and pay for certain monitors by contracting with private entities. Owners of two fishing vessels that harvest herring -- plaintiffs Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC -- challenge the agency's authority to promulgate this requirement. The district court granted summary judgment for the government, reasoning that the rule is a permissible

exercise of agency authority under the statute governing fishery stocks and conservation, that its promulgation followed proper procedures, and that it does not violate the Constitution. On appeal, ***625** plaintiffs renew their attacks. Because we agree with the district court that the rule is a permissible exercise of the agency's authority and is otherwise lawful, we affirm. Our reasoning follows.

I.

A.

Atlantic herring fishing is regulated under the Magnuson-Stevens Fishery Conservation and Management Act (the "MSA"), which was enacted to respond to the threat of overfishing and to promote conservation. 16 U.S.C. §§ 1801 et seq. The MSA established eight regional councils that manage the various "fisheries" (defined as "one or more stocks of fish which can be treated as a unit") in their respective regions. Id. §§ 1802(13)(A), 1852(a). The councils accomplish this task primarily by promulgating fishery management plans, which specify the conservation measures "necessary and appropriate" to prevent overfishing, to protect fish stocks, and to promote the sustainability of each fishery. Id. §§ 1852–1853. The MSA sets out elements that fishery management plans shall include, such as a description of the fishery and the optimal yield for the fishery, id. § 1853(a), as well as several elements that plans may include, such as requirements that vessels subject to the plan obtain permits, id. § 1853(b). Fishery management plans must also comply with ten "National Standards" set out in the MSA that identify broad goals and priorities such as minimizing cost, taking communities into account, prioritizing efficiency, and using the best scientific information available. Id. § 1851(a).

The Secretary of Commerce is tasked with reviewing each fishery management plan or amendment and publishing it along with implementing regulations for notice and comment. Id. § 1854(a)–(b). The Secretary has delegated these responsibilities to the National Marine Fisheries Service (NMFS or the "Agency"), a division of the National Oceanic and Atmospheric Administration (NOAA). Regional councils submit plans and amendments to NMFS, which publishes them for notice and comment while undertaking its own review to ensure that the plans are consistent with the MSA, its National Standards, and "any other applicable law." Id. § 1854(a)(1). The Agency must then approve, disapprove, or partially approve the plan or amendment. Id. § 1854(a)(3). Once a plan or amendment is approved, the Agency works with the regional council and completes a notice and comment procedure to issue implementing regulations. Id. § 1854(b).

B.

The New England Fishery Management Council ("New England Council") regulates fisheries in the Atlantic Ocean seaward of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. Id. § 1852(a)(1)(A). This includes the Atlantic herring fishery. The New England Council implemented the current fishery management plan for Atlantic herring in 2000. The plan includes an annual catch limit and restrictions on the location and timing of herring fishing. 50 C.F.R. § 648.200. The Atlantic herring fishery is subject to monitoring, including by government-funded observers using Standardized Bycatch Reporting Methodology (SBRM) to measure bycatch (fish unintentionally caught) on fishing trips. [1] Id. § 648.11(m).

***626** In 2013, the New England Council began a process to provide for the use of industry-funded monitoring to reduce uncertainty around catch estimates. In 2017, the Council approved an Omnibus Amendment, which both provided general guidelines for industry-funded monitoring in all of its fishery management plans and specifically provided for the owners of herring vessels to bear the expense of contracting for some of the monitors engaged on their vessels. Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry-Funded Monitoring, 85 Fed. Reg. 7414, 7414 (Feb. 7, 2020). The Agency approved the amendment in 2018. It published the final rule implementing the amendment and the industry-funded monitoring program for the herring fishery in 2020. 85 Fed. Reg. at 7414.

The rule implementing industry-funded monitoring for the herring fishery (the "Final Rule" or "Rule") does not require monitors on all vessels. Rather, it sets a target percentage (50%) of herring trips to be monitored. Id. at 7417. Observer coverage required under the SBRM program, which is fully paid for by the government, counts toward this target. Additional monitoring, up to a target of 50%, is covered by industry-funded monitoring (so if SBRM observers are placed on 10% of trips, industry would be asked to pay for monitoring on an additional 40% of trips). Id. The Rule requires the Council to reexamine the monitoring coverage targets after two years to consider the results

of increased monitoring, if any, and determine whether to make adjustments. 50 C.F.R. § 648.11(m)(1)(ii)(F). The government bears the administrative expenses associated with the program, including the training and certification of monitors. 85 Fed. Reg. at 7415.

The Rule specifies how industry-funded monitoring will work in practice. Vessels must "declare into" a fishery before beginning a fishing trip, meaning they contact NMFS and announce the species of fish they intend to harvest. 50 C.F.R. § 648.11(m)(2). When a vessel declares into the herring fishery, the Agency then informs it whether a monitor will be required for that trip. Id. § 648.11(m)(3). Trips may receive a waiver of the monitor requirement under several circumstances: if a monitor is not available, if the vessel is carrying certain fishing gear only and does not intend to carry fish, or if the vessel intends to catch less than 50 metric tons of herring on the trip. Id. § 648.11(m)(1)(ii)(D)–(E), (4)(ii). Vessels using certain types of gear are exempt from the requirement to carry a monitor altogether if they use electronic monitoring and portside sampling instead. Id. § 648.11(m)(1)(iii).

When a nonexempt vessel that does not meet the criteria for a waiver declares into the herring fishery, the Agency will inform the vessel whether it needs to carry a monitor for that trip. If so, the vessel must contact one of the private entities that provide certified monitors, and pay that entity its resulting fees and expenses. Id. § 648.11(m)(4). If the vessel cannot find a ***627** monitor after contacting all available providers, it may ask for a waiver. Id.

The precise cost of the industry-funded monitoring program to vessels participating in the herring fishery is unclear. In its notice publishing the Final Rule, the Agency cautioned that "the economic impact of industry-funded monitoring coverage on the herring fishery is difficult to estimate," because it would vary with "sampling costs, fishing effort, SBRM coverage, price of herring, and participation in other fisheries." 85 Fed. Reg. at 7420. The agency also noted that the Environmental Assessment estimated "industry's cost for at-sea monitoring coverage at $710 per day," although this figure would "largely depend on negotiated costs between vessels and monitoring service providers." Id. The Agency further acknowledged that the Rule could reduce vessel returns-to-owner (gross profits minus fixed and operational costs) by around 20%. In total, the New England Council recognized in its amendment adopting the herring plan that "the impacts of [the Rule] on fishery-related businesses and human communities are negative and result from reductions in returns-to-owner."

C.

Plaintiffs participate in the herring fishery using small-mesh bottom trawl gear. They also participate in the mackerel, butterfish, and squid fisheries. Able to freeze fish at sea, their vessels make longer trips, but also have less processing capacity per day (125,000 pounds of fish per day, they state, which equals approximately 57 metric tons) and higher overhead costs than other herring vessels. Plaintiffs' style of fishing also means that they can choose what to catch at sea, so they often declare into multiple fisheries before leaving the dock in order to catch whatever they encounter on the trip.

Plaintiffs assert that due to their unique fishing style, they are disproportionately burdened by carrying monitors, because they make longer trips (during which they may not even catch herring) and therefore need to pay a monitor for more days at sea. They also claim that they cannot avail themselves of any of the exceptions to having to carry monitors under the Rule because of their style of fishing. In particular, they focus on the exemption for trips taking less than 50 metric tons of herring. While most herring trips only last 2–4 days, the vessels claim, their trips last 10–14 days. So although they may catch less than 50 metric tons of herring every 2–4 days, they might catch far more herring in a single trip, and thus cannot use the exemption that is available for shorter trips despite having a similar catch per day.

Plaintiffs therefore have a strong incentive to challenge the Rule. They argue that it is not authorized by the MSA, is arbitrary and capricious in violation of the Administrative Procedure Act (APA), violates the National Standards set forth in the MSA, violates the Regulatory Flexibility Act ("RFA"), and violates the Commerce Clause. Defendants (the Agency, along with the Secretary of Commerce, NOAA, and the Administrators of the Agency) disagree on all counts.

The district court granted summary judgment for the Agency. The court found that the MSA is ambiguous regarding authorization for industry-paid monitors, and that under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Agency's interpretation is entitled to deference. It further found that the Rule does not violate any of the National Standards found in the MSA, and also does not violate

the RFA because the Agency issued a regulatory flexibility analysis ***628** that indicates it considered plaintiffs' concerns, satisfying the statute's procedural requirements. [2] Finally, the court found that the Rule does not violate the Commerce Clause, because it does not force plaintiffs to enter the market for monitors.

II.

We review the district court's grant of summary judgment de novo. Lovgren v. Locke, 701 F.3d 5, 20 (1st Cir. 2012). Judicial review of agency actions under the MSA is governed by the APA. Id.; 16 U.S.C. § 1855(f). We may set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Lovgren, 701 F.3d at 20 (quoting 5 U.S.C. § 706(2)(A)). Our review is limited to the administrative record. Id.

At issue here, principally, is the interpretation of the MSA. Plaintiffs challenge the Agency's authoritative interpretation of the statute as granting it the power to enact the Rule. In considering such a challenge, we employ "the familiar Chevron two-step analysis." Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81, 86 (1st Cir. 2021). "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter ...." Id. (quoting Chevron, 467 U.S. at 842, 104 S.Ct. 2778). Second, "[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Bais Yaakov, 12 F.4th at 86 (quoting Chevron, 467 U.S. at 843, 104 S.Ct. 2778).

In determining whether a statute has clearly spoken to the question at issue, we "apply the 'ordinary tools of statutory construction.' " Flock v. U.S. Dep't of Transp., 840 F.3d 49, 55 (1st Cir. 2016) (quoting City of Arlington v. FCC, 569 U.S. 290, 296, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013)). Further, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 666, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). Rather, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Id. (quoting Brown & Williamson, 529 U.S. at 132–33, 120 S.Ct. 1291). If, after using these tools, we find that there is still relevant ambiguity, "we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." Cuozzo Speed Techs. v. Lee, 579 U.S. 261, 277, 136 S.Ct. 2131, 195 L.Ed.2d 423 (2016).

With these principles in mind, we turn to plaintiffs' challenges to the Agency's authority under the MSA to promulgate the Rule. Plaintiffs argue generally that the MSA does not authorize the Rule, and specifically that other provisions of the MSA establishing fee programs make clear that the Agency has no authority to require industry-funded monitoring in this instance. They further argue that the legislative history and definitions in the MSA support their position.

A.

Plaintiffs' primary contention is that the MSA does not authorize industry-funded ***629** monitoring and that the Agency therefore exceeded its statutory authority in promulgating the Rule. This argument faces an uphill textual climb. Congress expressly provided that fishery management plans may "require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery." 16 U.S.C. § 1853(b)(8).

But, say plaintiffs, "at-sea monitors" -- as the term is used in the industry-funded monitoring program -- are something entirely different than the "observers" authorized by section 1853(b)(8). We disagree. The statutory definition of "observers" in the MSA is quite broad and includes "any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under this [Act]." 16 U.S.C. § 1802(31). This certainly includes at-sea monitors, who are authorized by regulation to be carried on a vessel to collect data for conservation purposes. 50 C.F.R. § 648.11(m)(1)(i) (requiring at-sea monitors to be carried on Atlantic herring vessels); id. § 648.2 (defining "observer or monitor" as "any person authorized by NMFS to collect ... operational fishing data [or] biological data ... for conservation and management purposes"). The narrow differentiation in the notice promulgating the Final Rule, which at one point notes that at-sea monitors, "in contrast to observers," would not collect whole specimens, 85 Fed. Reg. at 7418, does not mean that at-sea monitors do not form a subset of "observers."

Rather, it simply acknowledges that the set of observers is broader than that subset. In short, the MSA explicitly provides for the placement of at-sea monitors on fishing vessels.

Plaintiffs are thus left to argue that Congress somehow conditioned the Agency's right to require monitors on the Agency paying for the cost of the monitors. And this is indeed plaintiffs' most prominently presented argument: Because the statute, they contend, contains no language allowing the Agency to force plaintiffs to pay for those monitors, the Agency lacks the authority to require any such payments (meaning there will be no monitors on board unless the government pays for the monitors). There are two defects with this argument.

1.

First, the "default norm" as "manifest without express statement in literally hundreds of regulations, is that the government does not reimburse regulated entities for the cost of complying with properly enacted regulations, at least short of a taking. If this statute needs clarification on this point, then so too do hundreds of others." Goethel v. U.S. Dep't of Com., 854 F.3d 106, 117–18 (1st Cir. 2017) (Kayatta, J., concurring). When Congress says that an agency may require a business to do "X," and is silent as to who pays for "X," one expects that the regulated parties will cover the cost of "X."

Plaintiffs insist that the requirement to pay for a monitor does not fall into this default norm because it is not a "traditional regulatory cost" and differs from an ordinary instance of requiring a regulated party to bear its own costs. The daily salary of a monitor, they assert, differs from the cost inflicted by other regulatory requirements, such as those mandating permits or particular fishing equipment, in both type (because it pays for a credentialed individual, rather than a thing or a piece of gear) and degree (because it is larger). Moreover, they argue, the compliance cost the MSA inflicts (and that the ***630** Agency should try to reduce per the statute) is represented by the room fishers make available on their vessels to physically host observers -- something far short of paying an at-sea monitor's salary.

To a regulated party, paying the expenses of a credentialed at-sea monitor may well seem different than paying, for example, a vendor who provides fishing gear mandated by a regulation, [3] or for an EPA-required scrubber or monitoring device on a smoke stack. [4] But plaintiffs offer no authority indicating that these differences are material to the question of who pays. To the extent they also argue that the monitors present a different type of costs because they are "federal officers," we disagree. See infra, Section II.B. We therefore see no reason why the default rule does not apply: When Congress expressly authorized plans promulgated under the MSA to require vessels to carry an observer, it presumed that the vessels' owners would bear the cost of compliance, much like an SEC requirement to submit independently audited financials imposes on the regulated entity the cost of paying an independent accountant. See 15 U.S.C. § 77aa(25)–(27).

Nor are we persuaded that the cost of an at-sea monitor is different than other compliance costs because it may be greater than fees imposed elsewhere in the statute. The vessels decry that they may be subject to costs of up to 20% of returns-to-owner, while in other fishery programs, fees for observers are capped at 2% or 3%. But the fact that costs of complying with one regulatory requirement are greater than the costs of complying with another regulatory requirement does not mean that the former is unlawful. [5] Nor do we have here any costs that are so great as to cause us to think that Congress without so stating did not presume that they would be borne by the regulated entities.

2.

Adding belt to suspenders, the government points out that the statutory support for its position need not rely only on the implication raised by the default norm. Section 1858(g)(1)(D) in the MSA allows the Agency to suspend or revoke the license of any vessel if any "payment required for observer services provided to or contracted by the owner or operator [of the vessel] ... has not been paid and is overdue." 16 U.S.C. § 1858(g)(1)(D). This ***631** penalty would make no sense if Congress did not anticipate that owners and/or operators of the vessels would be paying the observers.

Plaintiffs concede that Congress expected that some vessels would have to pay for monitors, but they argue that that expectation was limited to payments required in a few specific instances elsewhere in the MSA in which Congress expressly authorized the imposition of monitor costs on vessels (more on these instances later). But the provision penalizing the nonpayment of observers appears in a general part of the MSA applicable to all fisheries and fishery management plans, rather than in the specific provisions creating particular fee programs. If Congress had meant to apply this provision only

to certain fee programs, it likely would have included it in the sections creating those programs. Or it would have cross-referenced the specific statutes creating fee programs in the penalty provision. See Silva v. Garland, 27 F.4th 95, 103–04 (1st Cir. 2022) (interpreting statutory language broadly, rather than as limited by other statutes, when potentially limiting statutes were not cross-referenced in the broader statute).

The D.C. Circuit, which recently considered a similar challenge to the very same Rule, relied on just such reasoning in rejecting plaintiffs' position that the penalty provisions apply only to a few statutorily specified fee programs. Loper Bright Enters. v. Raimondo, 45 F.4th 359, 368 (D.C. Cir. 2022) (reasoning that "the penalties in a broadly applicable section of the [MSA] appear to recognize the possibility of industry-contracted and funded observers beyond [a single] context"). That court sensibly observed that "[i]f Congress had intended for penalties associated with industry-funded monitoring to apply only in in the foreign fishing context, the court would expect that Congress in the penalty provisions would have specifically referenced foreign vessels or included a cross-reference to the foreign fishing provision." Id.

B.

In an effort to rebut the clear textual support for the Agency's lawful authority to require the vessel owners to pay for at-sea monitors, plaintiffs point to other sections of the MSA that expressly authorize the imposition of fees to be paid to the government to cover certain observer costs. Plaintiffs ask us to reason that because Congress expressly authorized the imposition of fees in three instances, its failure to do so in the instance of observer costs under section 1853(b)(8) must mean that no such costs can be imposed on plaintiffs. They also suggest that to read the MSA as authorizing industry-funded monitoring would render those other fee provisions superfluous, a result we usually try to avoid.

The instances to which plaintiffs point in which the MSA expressly provides for payments of a cost by the vessels are as follows: First, section 1853a authorizes and sets requirements for Limited Access Privilege Programs (LAPPs) to be created in certain fisheries. To support a LAPP, a Council may "provide ... for a program of fees paid by limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities." 16 U.S.C. § 1853a(e)(2). Second, section 1862(a) allows the North Pacific Council to prepare a "fisheries research plan" for any fishery within its jurisdiction except a salmon fishery. Such plans may require that observers be stationed on vessels, and "establish[ ] a system ... of fees." Id. § 1862(a)(1)–(2). Third, section 1827(d) imposes fees "in an amount sufficient to cover ***632** all of the costs of providing an observer aboard that vessel" on foreign fishing vessels in certain circumstances which may result in the incidental taking of billfish. Id. § 1827(d). Plaintiffs contend that these are the only instances in which industry vessels may be required to pay for observers.

This argument falters at the threshold because this is not a case in which the agency need rely only on the default presumption that a regulated party presumably bears its own costs. To the contrary, as we have described in Part II.A.2 of this opinion, the statutory text provides affirmative confirmation that Congress presumed that vessel owners would bear the cost of complying with monitoring requirements. So plaintiffs' effort to use these examples to negate reliance on statutory silence is inapt, or at least insufficient. In any event, the three instances to which plaintiffs point do not present apples-to-apples comparators from which one can infer that anything mentioned in those instances but not in the general observer provision was intentionally omitted from the latter.

First and foremost, no money is paid into government coffers under the industry-funded monitoring program. Instead, vessels are required to obtain and pay for a service from a non-governmental source, just as they would have to pay for a certain type of fishing gear. As the Loper Bright court explained, the fact that Congress instituted a "different funding mechanism" in the North Pacific fishery and for LAPPs, where funds are collected by the Agency and deposited into the Treasury, does not indicate that Congress intended to preclude the entirely different mechanism of industry-funded monitoring. 45 F.4th at 367–68.

Moreover, the North Pacific and LAPP programs are further distinguishable because the fees fund agency programs that include more than direct observer costs. See, e.g., 16 U.S.C. § 1854(d)(2)(A) (allowing fee "to recover the actual costs directly related to the management, data collection, and enforcement of any limited access privilege program," without limiting fee to payment for observers); Fisheries of the Northeastern United States; Amendment 17 to the Atlantic Surfclam and Ocean Quahog Fishery Management Plan, 81 Fed. Reg. 38,969, 38971 (June 15, 2016) (in responding to comment regarding cost recovery program for LAPP, noting

that recoverable costs through fee "would include the costs of issuing and renewing ITQ permits, processing cage tag transfers, and tracking cage tag usage"); 16 U.S.C. § 1862(b)(2)(A) (providing that fees not exceed "the combined cost" of stationing observers, "inputting collected data," and assessing the necessity of a risk-sharing pool); Groundfish Fisheries of the Exclusive Economic Zone off Alaska and Pacific Halibut Fisheries; Observer Program, 77 Fed. Reg. 23,326, 23,339 (April 18, 2012) (explaining that in North Pacific fee program which was eventually adopted, "[o]bserver fees would not be linked to the actual level of observer coverage for individual vessels and plants," but rather "each participant" would pay the same percentage regardless of when it carried observers). In the industry-funded monitoring program at issue here, by contrast, the Agency must pay its own administrative costs and vessels only pay for observers they actually carry. As for the third instance -- fees imposed on foreign vessels for observer costs -- the placement of observers is authorized under a different provision than the one relied on by the Agency, because section 1853(b)(8) authorizes observers only on board "vessel[s] of the United States." But even putting that aside, one can easily see why Congress might opt for a direct fee rather than ***633** relying on foreign owners to arrange for observers themselves. With treaties, international agreements, and foreign relations at stake, it makes sense that Congress would have opted for extra specificity. [6]

Plaintiffs also contend that the costs under the Final Rule are actually fees paid to the Agency. To build this argument, they claim that privately contracted monitors are government employees or agents. To that end, plaintiffs describe the monitors engaged by private companies as "federal officers." To justify this relabeling, the plaintiffs point to a penalty provision which provides that interfering with an "observer" or "data collector" is prohibited by federal law, 16 U.S.C. § 1857(1)(L), as well as a decision upholding a conviction for sexually harassing an at-sea monitor in violation of this law. See United States v. Cusick, No. 11-cr-10066, 2012 WL 442005, at *6 (D. Mass. Feb. 9, 2012). But, establishing that Congress intended to deter the harassment of monitors falls well short of establishing that Congress intended to turn those monitors into "federal officers." And the MSA expressly distinguishes the provision that prohibits assaulting "any observer" or "data collector," 16 U.S.C. § 1857(1)(L), from a provision prohibiting similar actions against "officer[s]," id. § 1857(1)(D)-(F).

C.

Finally, plaintiffs argue that the legislative history confirms their preferred interpretation of the statute. They note that amendments to the MSA enacted in 1990, which added the fee provisions for observers in the North Pacific, indicated that "nothing in [that] section should be construed as affecting the rights and responsibilities of other Regional Fishery Management Councils." H.R. Rep. No. 101-393, at 31 (1989). We have already explained why the industry-funded monitoring program at issue here does not impose a fee. And in rejecting plaintiffs' challenge to the observer rule, we do not (nor did the Agency) rely on any contention that anything in that section altered another Council's rights and responsibilities by granting new authority to require plaintiffs to carry observers on board. To the contrary, the Councils already had that authority, as acknowledged in the very legislative history on which plaintiffs rely. See H.R. Rep. No. 101-393, at 28 (1989) (stating that "the Councils already have -- and have used -- such authority" to require that observers be carried on board). [7]

***

In sum, we have no trouble finding that the Agency's interpretation of its authority ***634** to require at-sea monitors who are paid for by owners of regulated vessels does not "exceed[ ] the bounds of the permissible." Barnhart v. Walton, 535 U.S. 212, 218, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002). We need not decide whether we classify this conclusion as a product of Chevron step one or step two. Congress expressly authorized NMFS to require vessels to carry monitors. And at the very least, it is certainly reasonable for the Agency to conclude that its exercise of that authority is not contingent on its payment of the costs of compliance.

III.

Having found that the MSA authorizes the adoption of a rule requiring vessels to procure at their expense the services of an at-sea monitor, we now consider plaintiffs' other challenges to the Agency's decision process and procedure in adopting the Rule.

A.

Plaintiffs argue that the Rule is arbitrary and capricious because it allows for waivers for trips on which a vessel plans to catch less than 50 metric tons of herring. This exemption benefits mostly small mesh bottom trawlers and single midwater trawlers that make short trips and plan on catches of less than 50 metric tons of herring. Plaintiffs point out that their larger scale operation, having the capacity to freeze and hold more fish, catches around 50 metric tons per day but may harvest many more tons than that on a per-trip basis. Hence, the waiver is practically unavailable to them. The result, they argue, is that plaintiffs would have to pay for an at-sea monitor on a single 14-day trip in which they catch 343 metric tons of herring, but a hypothetical smaller boat catching 49 metric tons on each of seven back-to-back 2-day trips (for a total of the same 343 metric tons) would not have to pay for a monitor at all. Additionally, the flexibility to stay at sea for longer means that plaintiffs declare into multiple fisheries before leaving the dock, which means they may declare that they will catch herring but not actually take any herring. Thus, not only can they not use the exemption, but they may be forced to pay for a herring monitor on a trip where no herring is caught. Plaintiffs argue that these features render the Rule and the exemptions arbitrary and capricious.

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Sorreda Transp., LLC v. DOT, 980 F.3d 1, 3 (1st Cir. 2020) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). Under this deferential standard, "[a]n agency rule is arbitrary and capricious if the agency lacks a rational basis for adopting it -- for example, if the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise." Associated Fisheries of Me., Inc. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997).

Here, the Agency expressly considered plaintiffs' objections and rejected them. It stated:

> In an effort to minimize the economic impact of industry-funded monitoring, the Council explicitly considered measures to address Seafreeze's concern about disproportional impacts on its vessels, including considering alternatives for coverage waivers for trips when landings would be less than 20-percent herring or less than 50 mt of herring per ***635** day. Ultimately, the Council determined that the potential for a relatively high herring catches per trip aboard those vessels warranted additional monitoring and chose the 50 mt per trip threshold.

85 Fed. Reg. at 7426. The Agency also found it highly unlikely that plaintiffs would be paying as much as they claimed for trips that did not take herring, based on cost estimates contained in the Environmental Assessment. Id. So plaintiffs cannot argue that the Agency failed to consider their objections.[8] Nor do they develop any contention that the explanation given by the agency relied on any factors prohibited by Congress or ran counter to the available evidence.

And the rationale given by the Agency -- "that the potential for a relatively high herring catches per trip aboard those vessels warranted additional monitoring" -- does not strike us as "so implausible that it cannot be attributed to a difference in view or the applicable agency expertise." Associated Fisheries of Me., 127 F.3d at 109. To the contrary, determinations as to whether monitoring will be more effective on a per-trip basis or per-day basis seem squarely within the expertise of the Agency. Although we agree that the Agency could have provided a more thorough explanation than it did, we do not find the per-trip waiver to be arbitrary and capricious on its face. Certainly, one can see why monitoring per trip rather than per day may be easier to administer, and why plaintiffs' uncertainty about how much herring they will decide to catch might counsel for including a monitor rather than not. See id. at 111 ("Whether or not we, if writing on a pristine page, would have reached the same set of conclusions is not the issue. What matters is that the administrative judgment, right or wrong, derives from the record, possesses a rational basis, and evinces no mistake of law.")

B.

Plaintiffs further contend that the Rule violates several National Standards contained in the MSA. All fishery management plans must be consistent with ten National Standards, which "are broadly worded statements of the MSA's objectives for all fishery conservation and management measures." Lovgren, 701 F.3d at 32. "The purposes of the national standards are many, and can be in tension with one another." Id. As such, "we will uphold a regulation against a claim of inconsistency with a 'national standard' under § 1851 if the [Agency] had a 'rational basis' for it." Id. (quoting Or. Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1119 (9th Cir. 2006)).

First, plaintiffs allege that the Rule violates National Standard One (which requires plans to "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery," 16 U.S.C. § 1851(a)(1)) because it disproportionately burdens them although they take less bycatch and herring than other types of trawlers, and because it allows boats taking more herring to harvest without monitors. The government counters that the purpose of the industry-funded monitoring requirement -- more accurately tracking catch -- will allow better calibration of regulation, and thus furthers the goals of National Standard One. We agree that the rule implementing industry-funded monitoring is consistent with the Standard for this reason. The district court also pointed out that plaintiffs' argument here relates to the distribution of herring catch between vessels, not the optimum yield for the fishery as a whole. This mismatch between plaintiffs' complaint and the actual ***636** subject of the Standard further renders their challenge under National Standard One unavailing.

Second, plaintiffs allege that the Rule violates National Standard Two, which requires that plans "be based upon the best scientific information available," 16 U.S.C. § 1851(a)(2), because it burdens them without "scientific evidence of clear increase in Atlantic herring stocks" as a result of the Rule. But they do not actually allege that the Agency ignored specific scientific data or point to better data available. "If no one proposed anything better, then what is available is the best." Massachusetts ex rel. Div. of Marine Fisheries v. Daley, 170 F.3d 23, 30 (1st Cir. 1999). National Standard Two does not require the Agency to wait to regulate because it does not have certain data. See 50 C.F.R. § 600.315(e)(2) ("The fact that scientific information concerning a fishery is incomplete does not prevent the preparation or implementation of an FMP."). Nor does it prohibit an agency from regulating in the face of some uncertainty about the effects of its chosen rule. See Coastal Conservation Ass'n v. U.S. Dep't of Com., 846 F.3d 99, 109 (5th Cir. 2017) (explaining that where economic impacts of rule were uncertain because they depended on the choices of several parties, "[t]he National Standards [did] not require analysis of unpredictable, and thus unavailable, data"). Where, as here, plaintiffs point to no data they say should have been considered or relied upon -- and where the very purpose of the Rule is to gather better data to be used in future fishery management -- we find that the regulation complies with National Standard Two. See Massachusetts ex rel. Div. of Marine Fisheries, 170 F.3d at 30; see also Coastal Conservation Ass'n, 846 F.3d at 109 (finding that National Standard Two was not violated where no one pointed to data that Secretary had ignored, and citing cases doing the same).

The Rule also does not violate National Standard Six (which requires the Agency to account for "variations among, and contingencies in, fisheries, fishery resources, and catches," 16 U.S.C. § 1851(a)(6)). The regulations implementing this National Standard focus on maintaining flexibility to adjust to uncertainty or changed circumstances. 50 C.F.R. § 600.335; see J.H. Miles & Co. v. Brown, 910 F. Supp. 1138, 1155 (E.D. Va. 1995) ("National Standard Six, on its face, dictates flexibility on the part of fishery managers. It suggests that the Secretary and his designees must be prepared to address uncertainties or changes that might arise."). Plaintiffs' challenge has nothing to do with flexibility to adjust to changing circumstances, but rather protests that the Rule does not adequately take their unique style of fishing or community into account. As with their challenge based on National Standard One, this mismatch between what the Standard requires and the nature of Plaintiffs' challenge renders their complaints unavailing. We do not see anything in the National Standard that requires the Agency to change its regulations to eliminate all differential impacts on all of the varied types of vessels. See Ace Lobster Co. v. Evans, 165 F. Supp. 2d 148, 182 (D.R.I. 2001) ("There is no requirement in national standard 6 or anywhere else in the statute that defendant finely attune its regulations to each and every fishing vessel in the offshore fishery.").

Finally, the Rule does not violate National Standards Seven and Eight, which require the Agency to consider fishery resources and cost burdens. See 16 U.S.C. § 1851(a)(7) (plans "shall, where practicable, minimize costs and avoid unnecessary duplication"); id. § 1851(a)(8) (plans shall

"utiliz[e] economic and social ***637** data ... to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities"). Plaintiffs argue that the Rule violates these standards because their boats bear heavier regulatory burdens than other boats. As a result, they claim, National Standard Seven "has been completely ignored," and National Standard Eight "has been violated in the same way" because "Appellants are not more damaging" to the fishery, but their community bears the brunt of severe impacts.

Our precedent suggests that "the required analysis of alternatives and impacts [under National Standard 8] is subject to a rule of reason, for study could go on forever." Little Bay Lobster Co. v. Evans, 352 F.3d 462, 470 (1st Cir. 2003). "About the best a court can do is ask whether the [Agency] has examined the impacts of, and alternatives to, the plan [it] ultimately adopts and whether a challenged failure to carry the analysis further is clearly unreasonable, taking account of the usual considerations ...." Id. Moreover, we are mindful that "the plain language of [National Standard] 8 and its advisory guidelines make clear that these obligations are subordinate to the MSA's overarching conservation goals." Lovgren, 701 F.3d at 35.

Here, the Agency has done what is required under National Standards Seven and Eight. The National Standards require consideration, not adoption, of alternatives; they also require the Agency to minimize costs "where practicable," not to eliminate cost burdens entirely. The Agency considered various coverage targets to meet its goal of gathering additional data, balanced those targets with costs, and selected a 50% monitoring target. Similarly, it adopted a waiver for boats taking less than 50 metric tons of herring per trip, after considering and rejecting Relentless' proposed alternative waiver. 85 Fed. Reg. at 7425–26. The New England Council's Omnibus Amendment also considered in detail the economic impacts to industry participants using various gear types. The Agency explained how exemptions for vessels catching below a certain weight threshold per trip would minimize cost impacts. 85 Fed. Reg. at 7430. Nothing in our prior opinions suggests that the National Standards require that cost and community impacts, even those disproportionately borne by some regulated parties, must be eliminated or distributed exactly evenly under National Standards Seven and Eight among those who employ different methods of fishing.

Plaintiffs' challenges under each of the National Standards boil down to arguments that the Rule burdens them more heavily than it burdens others without a clear enough justification, or without adopting an alternative they suggested. But they have not proffered the types of evidence or argument under which courts have found that agency actions violate the National Standards. For example, they do not argue that the differential treatment of different fishers under the Rule was based not on scientific data, but on political compromise. See Hadaja, Inc. v. Evans, 263 F. Supp. 2d 346, 354 (D.R.I. 2003); Hall v. Evans, 165 F. Supp. 2d 114, 136 (D.R.I. 2001). They also cannot show that no reason was given either for the Rule itself or for the scope of the exceptions. See Massachusetts ex rel. Div. of Marine Fisheries, 170 F.3d at 31–32; Hall, 165 F. Supp. 2d at 137–38. The Agency gave reasons for adopting the Rule and the waivers; the fact that those reasons were unsatisfactory to these plaintiffs does not mean that the Rule violates the National Standards.

This is not to say that the Rule, or the Agency's explanation for it, is a model of ***638** clarity. Plaintiffs point out several features of the Rule (for example, the hypothetical ability of a boat to take more overall herring with no monitoring under the structure of the exemptions) that might cause one to wonder if the Agency could have tailored the rule more precisely or chosen a different alternative. But adoption of the Rule, and consideration of alternatives, was the Agency's prerogative; it met its obligations to respond to comments and explain the reason for the Rule's adoption and structure. Plaintiffs' criticisms that the Rule does not account for peculiarities of their specific businesses under all hypothetical scenarios do not convince us that the Rule violates the National Standards.

C.

Plaintiffs also contend that the Rule violates the RFA, which requires agencies to consider the effects of their actions on small businesses. Associated Fisheries of Me., 127 F.3d at 110, 116. Agencies must publish interim and final regulatory flexibility analyses in the Federal Register along with Notices of Proposed Rulemaking, and make them available for comment in the same way. 5 U.S.C. §§ 603–04. These analyses are reviewable under the APA in a similar manner to final agency actions. Id. § 611.

Here, the Final Rule states that the Agency considered the impact of the Rule on small businesses, and, to address that impact, set the monitoring target at 50% of trips (rather than 75% or 100%) and allowed waivers on certain types of trips.

85 Fed. Reg. at 7429–30. Plaintiffs argue that the Agency nonetheless violated the RFA because it did not consider the effect of its actions on, or include recommendations to assist, businesses that freeze catch at sea like themselves. They also argue that the Agency did not adequately respond to comments in response to the RFA, did not consider data regarding a drop in fishermen, and did not make a plan to ensure monitors are allocated fairly across the fleet.

The RFA "does not alter the substantive mission of the agencies" but creates "procedural obligations." Little Bay Lobster, 352 F.3d at 470–71. The Agency met those here. The Agency explained potential impacts on small businesses and accordingly described how it mitigated those impacts, largely by setting the monitoring coverage target at 50% and by setting a weight threshold for monitored trips that would exempt many small businesses from the requirement to carry a monitor. 85 Fed. Reg. at 7429–30. The Agency also explained why it disagreed that small businesses would be forced out of fishing. Finally, as discussed above, it explained why it did not adopt alternative measures that Relentless suggested. 75 Fed. Reg. at 7426. Plaintiffs' suggestion that the Agency could have done more to respond to their specific concerns is not without some appeal. But the RFA only required the Agency to consider and respond to comments and to evaluate the impact of its action on small businesses. It did so here. See Little Bay Lobster, 352 F.3d at 471 (noting that "there is no requirement as to the amount of detail with which specific comments need to be discussed," and that "[t]he agency's obligation is simply to make a reasonable good faith effort to address comments and alternatives.")

D.

Finally, plaintiffs claim that, by forcing them "to participate in the market" for at-sea monitors, the Rule is an unconstitutional exercise of Congress's commerce power under the Supreme Court's decision in NFIB v. Sebelius, 567 U.S. 519, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012). That case, plaintiffs argue, held that Congress ***639** cannot force individuals to become active in a market in which they do not already participate. They argue that because Congress has forced them to become unwilling participants in the market for at-sea monitors, the Rule is unconstitutional since it is beyond the power of the Commerce Clause.

We reject this contention. Plaintiffs harvest a national resource for economic gain. But no one is forcing plaintiffs to participate in any market. Rather, they choose to engage in an activity that has long been subject to regulation. In so doing, they can hardly complain about complying with the otherwise lawful regulations that govern the manner in which they engage in that activity merely because compliance requires some payment to another person, whether a seller of nets or life preservers, or a seller of monitoring services. [9]

IV.

For the foregoing reasons, we hold that the rule requiring plaintiffs to bear the costs of complying with on-board monitor regulation is authorized by Congress and is otherwise immune to plaintiffs' assorted procedural and substantive challenges. We therefore affirm the judgment of the district court.

All Citations

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Footnotes

1 The MSA requires that all fishery management plans "establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery." 16 U.S.C. § 1853(a)(11). The New England Council, along with the Mid-Atlantic Council, developed an SBRM omnibus amendment in 2015 that implements this requirement. Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Standardized Bycatch Reporting Methodology Omnibus Amendment, 80 Fed. Reg. 37,182 (June 30, 2015); 50 C.F.R. § 648.18. The methodology in that omnibus amendment, which is primarily implemented through the Northeast Fisheries Observer Program placement of observers on vessels, applies to several fisheries, including the herring fishery. 50 C.F.R. § 648.18. Although

the SBRM has been heavily litigated, see Oceana, Inc. v. Ross, 920 F.3d 855, 859–60 (D.C. Cir. 2019), it is not at issue in this appeal.

2 The district court also found that the Rule did not violate the APA because the comment periods for an amendment and its implementing rule overlapped. Plaintiffs do not challenge this finding on appeal.

3 See 16 U.S.C. § 1853(b)(4) (allowing fishery management plans to "prohibit, limit, condition, or require the use of specified types and quantities of fishing gear"); 50 C.F.R. § 622.188 (requiring certain types of gear in order to possess South Atlantic snapper-grouper).

4 See 42 U.S.C. § 7412(d)(2) (requiring EPA to promulgate standards "requir[ing] the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section"); 40 C.F.R. § 61.122 (defining emission standard from kilns at elemental phosphorous plants, and noting that compliance will be shown if certain scrubbers are installed and operated); id. § 61.126 (requiring owner or operator of source "using a wet-scrubbing emission control device" to "install, calibrate, maintain, and operate a monitoring device").

5 It is not clear that the plaintiffs will face a 20% reduction in their returns-to-owner. The Final Rule states that the monitoring program "has the potential to reduce annual [returns-to-owner] ... up to 20 percent." But that figure represents an estimate across all types of fishing equipment; the New England Council's Omnibus Amendment shows that for small-mesh bottom trawl vessels, the type of gear Relentless uses, median returns to owner were expected to be reduced only by 5.4%. Applied only to vessels that take more than 50 metric tons of herring per trip, returns to owner could be reduced even less, by a median of 2.5%.

6 In their reply brief, plaintiffs also point to section 1821(h)(6), which provides that if there are insufficient appropriations to station an observer on each foreign vessel, the Secretary shall "establish a reasonable schedule of fees that certified observers or their agents shall be paid" by foreign fishing vessel operators. 16 U.S.C. § 1821(h)(6). As an initial matter, this argument was raised for the first time on reply, and absent exceptional circumstances we consider it waived. See Gottlieb v. Amica Mut. Ins., 57 F.4th 1, 11 (1st Cir. 2022). Even if we were to consider this argument, we would not find that this provision renders the Agency's interpretation unreasonable. It makes sense that Congress would provide more detail in a sensitive area (foreign relations) where it wanted to ensure observer coverage, rather than leaving such coverage to the discretion of the Agency or a regional Council. Such a provision does not suggest that Congress did not delegate authority to the Agency to require industry-funded monitoring in other instances. See Loper Bright, 45 F.4th at 367–68.

7 The Agency also points to regulations that implement industry-funded monitoring in other fisheries. See, e.g., 50 C.F.R. § 648.11(k)(4)-(5) (sea scallop vessels required to carry observers must arrange and pay for those observers).

8 Plaintiffs presented no evidence that their hypothetical scenarios actually occur.

9 To the extent plaintiffs challenge the Rule as violating constitutional controls on taxing, appropriations, and spending, U.S. Const. art. I, §§ 1, 7, 8, those challenges are referenced only in passing, are undeveloped, and are therefore waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). Similarly, any potential Fourth Amendment argument was not raised in the briefing on appeal, and is therefore waived.

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846 F.3d 492
United States Court of Appeals, Second Circuit.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., Riverkeeper, Inc., Waterkeeper Alliance, Inc., Trout Unlimited, Inc., National Wildlife Federation, Environment America, Environment New Hampshire, Environment Rhode Island, Environment Florida, State of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington, Plaintiffs–Appellees, Government of the Province of Manitoba, Canada, Consolidated Plaintiff–Appellee, Miccosukee Tribe of Indians of Florida, Friends of the Everglades, Florida Wildlife Federation, Sierra Club, Intervenor Plaintiffs–Appellees,

v.

United States ENVIRONMENTAL PROTECTION AGENCY, Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency, Defendants–Appellants–Cross Appellees, State of Colorado, State of New Mexico, State of Alaska, Arizona Department of Water Resources, State of Idaho, State of Nebraska, State of North Dakota, State of Nevada, State of Texas, State of Utah, State of Wyoming, Central Arizona Water Conservation District, Central Utah Water Conservancy District, City and County of Denver, by and through its Board of Water Commissioners, City and County of San Francisco Public Utilities Commission, City of Boulder [Colorado], City of Aurora [Colorado], El Dorado Irrigation District, Idaho Water Users Association, Imperial Irrigation District, Kane County [Utah] Water Conservancy District, Las Vegas Valley Water District, Lower Arkansas Valley Water Conservancy District, Metropolitan Water District of Southern California, National Water Resources Association, Salt Lake & Sandy [Utah] Metropolitan Water District, Salt River Project, San Diego County Water Authority, Southeastern Colorado Water Conservancy District, The City of Colorado Springs, acting by and through its enterprise Colorado Springs Utilities, Washington County [Utah] Water District, Western Urban Water Coalition, [California] State Water Contractors, City of New York, Intervenor Defendants–Appellants–Cross Appellees, Northern Colorado Water Conservancy District, Intervenor Defendant,

v.

South Florida Water Management District, Intervenor Defendant–Appellant–Cross Appellant.

Docket Nos. 14-1823, 14-1909, 14-1991, 14-1997, 14-2003
|
August Term, 2015
|
Argued: December 1, 2015
|
Decided: January 18, 2017

Synopsis

Background: Environmental groups, states, and Canadian province filed actions against Environmental Protection Agency (EPA) and its administrator seeking review of final rule excluding from National Pollutant Discharge Elimination System's (NPDES) permitting requirements discharges from water transfers. After actions were consolidated, environmental groups, states, Indian tribes, municipal water providers, and city intervened. The United States District Court for the Southern District of New York, Kenneth M. Karas, J., entered summary judgment in plaintiffs' and intervenor-plaintiffs' favor. EPA and its administrator appealed.

Holdings: The Court of Appeals, Sack, Circuit Judge, held that:

Federal Water Pollution Control Act (FWPCA) did not clearly and unambiguously speak directly to the question of whether NPDES permits were required for water transfers;

EPA's adoption of rule was not arbitrary and capricious; and

EPA rule was based on reasonable interpretation of FWPCA.

Reversed.

Chin, Circuit Judge, dissented, and filed separate opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Codenotes

Negative Treatment Reconsidered
40 C.F.R. § 122.3(i)

***497** Appeal from the United States District Court for the Southern District of New York

Attorneys and Law Firms

***498** BARBARA D. UNDERWOOD, Solicitor General (Steven C. Wu, Deputy Solicitor General; Judith N. Vale, Assistant Solicitor General; Lemuel Srolovic, Bureau Chief; Philip Bein, Watershed Inspector General; Meredith Lee-Clark, Assistant Attorney General, Environmental Protection Bureau, on the brief), for Eric T. Schneiderman, Attorney General of the State of New York, New York, New York, for Plaintiffs–Appellees the States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, and Washington, and the Province of Manitoba.

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JULIE STEINER (Larry Sonnenshein & Hilary Meltzer, on the briefs), for Zachary W. Carter, Corporation Counsel of the City of New York, New York, New York, for Intervenor Defendant–Appellant–Cross Appellee City of New York.

JAMES EDWARD NUTT, South Florida Water Management District, West Palm Beach, Florida, for Intervenor Defendant–Appellant–Cross–Appellant South Florida Water Management District.

***499** Annette M. Quill, Senior Assistant Attorney General, State of Colorado, Denver, Colorado, (on the briefs), for Intervenor–Defendants–Appellants–Cross Appellees States of Colorado, New Mexico, Alaska, Arizona (Department of Water Resources), Idaho, Nebraska, Nevada, North Dakota, Texas, Utah, and Wyoming.

Ellen B. Steen, Danielle Hallcom Quist, American Farm Bureau Federation, Washington, District of Columbia; Staci Braswell, Florida Farm Bureau Federation, Gainesville, Florida; Timothy S. Bishop, Michael B. Kimberly, Mayer Brown LLP, Washington, District of Columbia, (on the brief), for Amici Curiae—American Farm Bureau Federation and Florida Farm Bureau Federation.

Laura Murphy & Patrick Parenteau, Environmental & Natural Resources Law Clinic, Vermont Law School, South Royalton, Vermont, (on the brief), for Amici Curiae—Leon G. Billings, Tom Jorling, Jeffrey G. Miller, Robert W. Adler, William Andreen, Harrison C. Dunning, Mark Squillace, and Sandra B. Zellmer.

Kamala D. Harris, Attorney General; Robert W. Byrne, Senior Assistant Attorney General; Gavin G. McCabe, Supervising Deputy Attorney General; William Jenkins, Deputy Attorney General; State of California Department of Justice, Office of the Attorney General, San Francisco, California, (on the brief), for Amicus Curiae—State of California by and through the California Department of Water Resources.

Michael A. Swiger, Charles R. Sensiba, Sharon L. White, Van Ness Feldman, LLP, Washington, District of Columbia, (on the brief), for Amici Curiae—National Hydropower Association, Northwest Hydroelectric Association, American Public Power Association, Sabine River Authority of Texas, Sabine River Authority State of Louisiana, and Oglethorpe Power Corporation.

Before: Sack, Chin, and Carney, Circuit Judges.

Opinion

Sack, Circuit Judge:

"Water, water, everywhere / Nor any drop to drink." [2] Because New York City cannot tap the rivers, bays, and ocean that inhabit, surround, or, on occasion, inundate it to slake the thirst of its many millions of residents, it must instead draw water primarily from remote areas north of the City, mainly the Catskill Mountain/Delaware River watershed west of the Hudson River, and the Croton Watershed east of the Hudson River and closer to New York City. [3] Water is drawn from the Schoharie Reservoir [4] through the eighteen-mile-long Shandaken Tunnel into the Esopus Creek. The Creek's water, in turn, flows into another reservoir, then through an aqueduct, and then through several more reservoirs and tunnels alongside the Hudson River, having crossed the River to its Eastern shore some 50 miles north of New York City. Eventually, it arrives at its final destination: the many taps, faucets, and the like within the City's five boroughs.

The movement of water from the Schoharie Reservoir through the Shandaken ***500** Tunnel into the Esopus Creek is what is known as a "water transfer," an activity that conveys or connects waters of the United States without subjecting those waters to any intervening industrial, municipal, or commercial use. Water transfers are an integral part of America's water-supply infrastructure, of which the Schoharie Reservoir system is but a very small part. Each year, thousands of water transfers are employed in the course of bringing water to homes, farms, and factories not only in the occasionally rain-soaked Eastern, Southern, and Middle– and North-Western portions of the country, but also in the arid West (including large portions of the Southwest). Usable bodies of water in the West tend to be scarce, and most precipitation there falls as snow, often in sparsely populated areas at considerable distance from their water authorities' urban and agricultural clientele.

Historically, the United States Environmental Protection Agency (the "EPA") has taken a hands-off approach to water transfers, choosing not to subject them to the requirements of the National Pollutant Discharge Elimination System ("NPDES") permitting program established by the Clean Water Act in 1972. Some have criticized the EPA for this approach. They argue that like ballast water in ships, [5] water transfers can move harmful pollutants from one body of water to another, potentially putting local ecosystems, economies, and public health at risk. While acknowledging these concerns, the EPA has held fast to its position. Indeed, following many lawsuits seeking to establish whether NPDES permits are required for water transfers, the EPA formalized its stance in 2008—more than three decades after the passage of the Clean Water Act—in a rule known as the "Water Transfers Rule."

Shortly thereafter, several environmentalist organizations and state, provincial, and tribal governments challenged the Rule by bringing suit against the EPA and its Administrator in the United States District Court for the Southern District of New York. After many entities—governmental, tribal, and private—intervened on either side of the case, the district court (Kenneth M. Karas, *Judge*) granted summary judgment for the plaintiffs, vacating the Rule and remanding the matter to the EPA. In a thorough, closely reasoned, and detailed opinion, the district court concluded that although *Chevron* deference is applicable and requires the courts to defer to the EPA and uphold the Rule if it is reasonable, the Rule represented an unreasonable interpretation of the Clean Water Act, and was therefore invalid under the deferential two-step framework for judicial review established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The court held that the Rule was contrary to the requirements established by the Act.

The Federal Government and the intervenor-defendants timely appealed. Despite the district court's herculean efforts and its careful and exhaustive explanation for the result it reached, we now reverse for the reasons set forth below.

At step one of the *Chevron* analysis, we conclude—as did the district court—that the Clean Water Act does not speak directly to the precise question of whether NPDES permits are required for water transfers, and that it is therefore necessary to proceed to *Chevron*'s second step. At step two of the *Chevron* analysis, we conclude—contrary to the district court—that the Water Transfers Rule's interpretation of the Clean Water Act is reasonable. We view the EPA's promulgation of ***501** the Water Transfers Rule here as precisely the sort of policymaking decision that the Supreme Court designed the *Chevron* framework to insulate from judicial second- (or third-) guessing. It may well be that, as the plaintiffs argue, the Water Transfers Rule's interpretation of the Clean Water Act is not the interpretation best designed to achieve the Act's overall goal of restoring and protecting the quality of the nation's waters. But it is nonetheless an interpretation supported by valid considerations: The Act does not require that water quality be improved whatever the cost or means, and the Rule preserves state authority over many aspects of water regulation, gives regulators flexibility to balance the need to improve water quality with the potentially high costs of compliance with an NPDES permitting program, and allows for several alternative means for regulating water transfers. While we might prefer an interpretation more consistent with what appear to us to be the most prominent goals of the Clean Water Act, *Chevron* tells us that so long as the agency's statutory interpretation is reasonable, what we might prefer is irrelevant.

BACKGROUND [6]

The Clean Water Act and the National Pollutant Discharge Elimination System ("NPDES") Permitting Program

In 1972, following several events such as the 1969 "burning" of the Cuyahoga River in Cleveland, Ohio that increased national concern about pollution of our nation's waters, Congress enacted the Federal Water Pollution Control Act ("FWPCA") Amendments of 1972, 86 Stat. 816, *as amended*, 33 U.S.C. § 1251 *et seq.*, commonly known as the Clean Water Act (sometimes hereinafter the "Act" or the "CWA"). Congress's principal objective in passing the Act was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress also envisioned that the Act's passage would enable "the discharge of pollutants into the navigable waters [to] be eliminated by 1985." *Id.* § 1251(a)(1). Although time has proven this projection to have been over-optimistic at best, it is our understanding that the Act has succeeded to a significant degree in cleaning up our nation's waters. [7]

***502** The Act "prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102, 124 S.Ct. 1537, 158 L.Ed.2d 264 ("*Miccosukee*") (quoting 33 U.S.C. § 1311(a)). The statute defines the discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source," [8] 33 U.S.C. § 1362(12)(A), where "navigable waters" means "the waters of the United States, including the territorial seas," *id.* § 1362(7). The principal provision under which such a discharge may be allowed is Section 402, which establishes the "National Pollutant Discharge Elimination System" ("NPDES") permitting program. 33 U.S.C. § 1342. With narrow exceptions not relevant here, a party must acquire an NPDES permit in order to discharge a specified amount of a specified pollutant. *See id.*; *Miccosukee*, 541 U.S. at 102, 124 S.Ct. 1537. Thus, without an NPDES permit, it is unlawful for a party to discharge a pollutant into the nation's navigable waters.

"[B]y setting forth technology-based effluent limitations and, in certain cases, additional water quality based effluent limitations[,]the NPDES permit 'defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the [Act].' " *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 492 (2d Cir. 2005) (third brackets in original) (quoting *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976)). Noncompliance with an NPDES permit's conditions is a violation of the Clean Water Act. 33 U.S.C. § 1342(h). Once an NPDES permit has been issued, the EPA, states, and citizens can bring suit in federal court to enforce it. *See id.* §§ 1319(a)(3), 1365(a).

The Act envisions "cooperative federalism" in the management of the nation's water resources. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 167, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (referring to the Act as an example of "cooperative federalism"); *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) (the Act "anticipates a partnership between the States and the Federal Government"). Reflecting that approach, states typically control the NPDES permitting programs as they apply to waters within their borders, subject to EPA approval. *See* 33 U.S.C. §§ 1314(i)(2), 1342(b)-(c). [9] The Act also

preserves states' "primary responsibilities and rights" to abate pollution, *id.* § 1251(b), including their traditional prerogatives to "plan the development and use (including restoration, preservation, and enhancement) of ... water resources," *id.* and to "allocate quantities of water within [their] jurisdiction," *id.* § 1251(g), [10] subject to the federal ***503** floor on environmental protection set by the Act and regulations promulgated thereunder by the EPA, *see Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 580 (2d Cir. 2015).

Water Transfers and the Water Transfers Rule [11]

According to EPA regulations, a "water transfer" is "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). Water transfers take a variety of forms. A transfer may be accomplished, for example, through artificial tunnels and channels, or natural streams and water bodies; and through active pumping or passive direction. There are thousands of water transfers currently in place in the United States, including at least sixteen major diversion projects west of the Mississippi River. Many of the largest U.S. cities draw on water transfers to bring drinkable water to their residents. The City of New York's "water supply system ... relies on transfers of water among its [nineteen] collecting reservoirs. The City provides approximately 1.2 billion gallons of ... water a day to nine million people—nearly half of the population of New York State." Letter Dated August 7, 2006, from Mark D. Hoffer, General Counsel, City of New York Department of Environmental Protection to EPA, at 1, J.A. at 331.

The parties and *amici* tell us that water transfers are of special significance in the Western United States. Because much precipitation in the West falls as snow, water authorities there must capture water when and where the snow falls and melts, typically in remote and sparsely populated areas, and then transport it to agricultural and urban sites where it is most needed. *See* Western States Br. 1-2; *see also* State of California *Amicus* Br. 16 n.5. Colorado, for example, engages in over forty interbasin diversions in order to serve the State's water needs. *See* Letter Dated July 17, 2006, from Brian N. Nazarenus, Chair, Colorado Water Quality Control Commission, to Water Docket, EPA, at 1, J.A. at 320. California uses the "California State Water Project," a complex water delivery system based on interbasin transfers from Northern California to Southern California, to serve the water needs of 25 million of its 37 million residents. *See* State of California *Amicus* Br. 3-10. Water transfers are also obviously crucial to agriculture, conveying water to enormously important farming regions such as the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, the Snake River Valley of Idaho, and the Yakima Valley of Washington. *See* Water Districts Br. 16-19.

At the same time, though, water transfers, like ballast water in ships, *see generally Nat. Res. Def. Council*, 808 F.3d at 561–62, can move pollutants from one body of water to another, potentially endangering ecosystems, portions of the economy, and public health near the receiving water body —and possibly beyond. Despite these risks, for many years the EPA has taken a ***504** passive approach to regulating water transfers, effectively exempting them from the NPDES permitting system. The States have also generally adopted a hands-off policy. [12]

During the 1990s and 2000s, prior to its codification in the Water Transfers Rule, the EPA's position was challenged by, among others, environmentalist groups, which filed several successful lawsuits asserting that NPDES permits were required for some specified water transfers. *See, e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) ("*Catskill II*"), *cert. denied*, 549 U.S. 1252, 127 S.Ct. 1373, 167 L.Ed.2d 160 (2007); *N. Plains Res. Council v. Fid. Expl. & Dev. Co.*, 325 F.3d 1155 (9th Cir.), *cert. denied*, 540 U.S. 967, 124 S.Ct. 434, 157 L.Ed.2d 312 (2003); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill I*"); *see also Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 521 U.S. 1119, 117 S.Ct. 2510, 138 L.Ed.2d 1013 (1997). None of these decisions classified the EPA's views on the regulation of water transfers as sufficiently formal to warrant *Chevron* deference. *See, e.g.*, *Catskill II*, 451 F.3d at 82 (declining to apply *Chevron* deference framework); *Catskill I*, 273 F.3d at 491 (same).

In response, the EPA took steps to formalize its position. In August 2005, the EPA's Office of General Counsel and Office of Water issued a legal memorandum written by then-EPA General Counsel Ann R. Klee (the "Klee Memorandum") that argued that Congress did not intend for water transfers to be subject to the NPDES permitting program. The EPA proposed a formal rule incorporating this interpretation on June 7, 2006, 71 Fed. Reg. 32,887, and then, following notice-and-comment rulemaking proceedings, on June 13, 2008,

adopted a final rule entitled "National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule" (the "Water Transfers Rule"), 73 Fed. Reg. 33,697-708 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)).

The Water Transfers Rule's summary states:

> EPA is issuing a regulation to clarify that water transfers are not subject to regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program. This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This rule focuses exclusively on water transfers and does not affect any other activity that may be subject to NPDES permitting requirements.

Id. at 33,697.

The Rule states that water transfers "do not require NPDES permits because they do not result in the 'addition' of a pollutant." [13] *Id.* at 33,699. No NPDES permit is required if "the water being conveyed ***505** [is] a water of the U.S. prior to being discharged to the receiving waterbody" and the water is transferred "from one water of the U.S. to another water of the U.S." [14] *Id.* (footnote omitted). Thus, even if a water transfer conveys waters in which pollutants are present, it does not result in an "addition" to "the waters of the United States," because the pollutant is already present in "the waters of the United States." Under the EPA's view, an "addition" of a pollutant under the Act occurs only "when pollutants are introduced from outside the waters being transferred." *Id.* at 33,701. On appeal—but not in the Water Transfers Rule itself—the EPA characterizes this interpretation of Section 402 of the Clean Water Act as embracing what is often referred to as the "unitary-waters" reading of the statutory language, *see* EPA Br. 15-16, 54, which we will discuss further below.

In the Water Transfers Rule, the EPA justified its interpretation of the Act in an explanation spanning nearly four pages of the Federal Register, touching on the text of Section 402, the structure of the Act, and pertinent legislative history. *See* Water Transfers Rule, 73 Fed. Reg. at 33,700-03. The EPA explained that its "holistic approach to the text" of the statute was "needed here in particular because the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters." *Id.* at 33,701. The agency also responded to a wide variety of public comments on the proposed Rule. *See id.* at 33,703-06.

District Court Proceedings

On June 20, 2008, a group of environmental conservation and sporting organizations filed a complaint against the EPA and its Administrator (then Stephen L. Johnson, now Gina McCarthy) in the United States District Court for the Southern District of New York. The States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, and Washington, and the Province of Manitoba, Canada (collectively, the "Anti-Rule States") did the same on October 2, 2008. In their complaints, the plaintiffs requested that the district court hold unlawful and set aside the Water Transfers Rule pursuant to Section 706(2) of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706(2). [15] In October 2008, the district court consolidated the two cases and granted a motion by the City of New York to intervene in support of the defendants.

At about the same time these actions were filed, five parallel petitions for review of the Water Transfers Rule were filed in the First, Second, and Eleventh Circuits. On July 22, 2008, the United States Judicial Panel on Multidistrict Litigation consolidated these petitions and randomly assigned ***506** them to the Eleventh Circuit. The Eleventh Circuit then consolidated a sixth petition for review, and stayed all of these petitions pending its disposition of *Friends of the Everglades v. South Florida Water Management District,* 570 F.3d 1210 (11th Cir. 2009) ("*Friends I*"), a separate but conceptually related case. The district court in the case now before us granted the EPA's motion to stay the proceedings pending the Eleventh Circuit's resolution of *Friends I* and the six consolidated petitions. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 630 F.Supp.2d 295, 307 (S.D.N.Y. 2009). In June 2009, the Eleventh Circuit issued a decision in *Friends I*, 570 F.3d 1210 (11th Cir. 2009), *reh'g en banc denied*, 605 F.3d 962 (2010), *cert. denied*, 562 U.S. 1082, 131 S.Ct. 643, 645, 178 L.Ed.2d 512, *and cert. denied sub nom. Miccosukee Tribe v. S. Fla. Water Mgmt. Dist.*, 562 U.S. 1082, 131 S.Ct. 645, 178 L.Ed.2d 512 (2010), according

Chevron deference to, and upholding, the Water Transfers Rule. *Id.* at 1227–28. Then, on October 26, 2012, the Circuit issued a decision dismissing the six consolidated petitions for lack of subject-matter jurisdiction under 33 U.S.C. § 1369(b)(1). *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1286, 1289 (11th Cir. 2012) ("*Friends II*"), *cert. denied*, —— U.S. ——, 134 S.Ct. 421, 187 L.Ed.2d 280, *and cert. denied sub nom. U.S. Sugar Corp. v. Friends of the Everglades*, —— U.S. ——, 134 S.Ct. 422, 187 L.Ed.2d 280, *and cert. denied sub nom. S. Fla. Water Mgmt. Dist. v. Friends of the Everglades*, —— U.S. ——, 134 S.Ct. 422, 187 L.Ed.2d 280 (2013). The district court in the case at bar lifted the stay on December 17, 2012, the date the Eleventh Circuit's mandate in *Friends II* was issued.

On January 30, 2013, the district court granted multiple applications on consent to intervene as plaintiffs and defendants under Federal Rule of Civil Procedure 24. This added as intervenor-plaintiffs the Miccosukee Tribe of Indians of Florida, Friends of the Everglades, the Florida Wildlife Federation, and the Sierra Club, and as intervenor-defendants the States of Alaska, Arizona (Department of Water Resources), Colorado, Idaho, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Wyoming, and various municipal water providers from Western states. The parties filed multiple motions and cross-motions for summary judgment.

On March 28, 2014, the district court granted the plaintiffs' motions for summary judgment and denied the defendants' cross-motions. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 8 F.Supp.3d 500 (S.D.N.Y. 2014). At the first step of the *Chevron* analysis, the district court decided that the Clean Water Act is ambiguous as to whether Congress intended the NPDES program to apply to water transfers. *Id.* at 518–32. The district court then proceeded to the second step of the *Chevron* analysis, at which it struck down the Water Transfers Rule as an unreasonable interpretation of the Act. *Id.* at 532–67.

The defendants and intervenor-defendants other than the Northern Colorado Water Conservancy District (hereinafter "the defendants") timely appealed.

DISCUSSION

"On appeal from a grant of summary judgment in a challenge to agency action under the APA, we review the administrative record and the district court's decision *de novo*." *Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 173–74 (2d Cir. 2006). We conclude that the Water Transfers Rule is a reasonable interpretation of the Clean Water Act and is therefore entitled to *Chevron* deference. Accordingly, we reverse the judgment of the district court.

***507** We evaluate challenges to an agency's interpretation of a statute that it administers within the two-step *Chevron* deference framework. *Lawrence + Mem'l Hosp. v. Burwell*, 812 F.3d 257, 264 (2d Cir. 2016). At *Chevron* Step One, we ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778. If the statutory language is "silent or ambiguous," however, we proceed to *Chevron* Step Two, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute" at issue. *Id.* at 843, 104 S.Ct. 2778. If it is—i.e., if it is not "arbitrary, capricious, or manifestly contrary to the statute," *id.* at 844, 104 S.Ct. 2778—we will accord deference to the agency's interpretation of the statute so long as it is supported by a reasoned explanation, and "so long as the construction is 'a reasonable policy choice for the agency to make,' " *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) ("*Brand X*") (quoting *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778).

This framework has been fashioned as a means for the proper resolution of administrative-law disputes that involve all three branches of the Federal Government, seriatim.

First, the Legislative Branch, Congress, passes a bill that reflects its judgment on the issue—in the case before us, the Clean Water Act. After the head of the Executive Branch, the President, signs that bill, it becomes the law of the land.

Second, the Executive Branch, if given the authority to do so by legislation, may address the issue through its authorized administrative agency or agencies, typically although not necessarily by regulation—in this case the EPA through its Water Transfer Rule. In doing so, the executive agency must defer to the Legislative Branch by following the law or laws that it has enacted and that cover the matter.

Only last, in case of a challenge to the Legislative Branch's authority to pass the law, or to the Executive Branch's

authority to administer it in the manner that it has chosen to adopt, may we in the Judicial Branch become involved in the process. When we do so, though, we are not only last, we are least: We must defer both to the Legislative Branch by refraining from reviewing Congress's legislative work beyond determining what the statute at issue means and whether it is constitutional, and to the Executive Branch by using the various principles of deference, including *Chevron* deference, which we conclude is applicable in the case at bar. For us to decide for ourselves what in fact is the preferable route for addressing the substantive problem at hand would be directly contrary to this constitutional scheme. What we may think to be the best or wisest resolution of problems of water transfers and pollution emphatically does not matter.

Abiding by this constitutional scheme, we begin at *Chevron* Step One. We conclude, as did the district court, that Congress did not in the Clean Water Act clearly and unambiguously speak to the precise question of whether NPDES permits are required for water transfers. It is therefore necessary to proceed to *Chevron* Step Two, under which we conclude that the EPA's interpretation of the Act in the Water Transfers Rule represents a reasonable policy choice to which we must defer. The question is whether the Clean Water Act can support the EPA's interpretation, taking into account the full ***508** panoply of interpretive considerations advanced by the parties. Ultimately, we conclude that the Water Transfers Rule satisfies *Chevron*'s deferential standard of review because it is supported by a reasoned explanation that sets forth a reasonable interpretation of the Act.

I. *Chevron* Step One

At *Chevron* Step One, "the [reviewing] court must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " *City of Arlington v. FCC*, —— U.S. ——, 133 S.Ct. 1863, 1868, 185 L.Ed.2d 941 (2013) (quoting *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778). To determine whether a statute is ambiguous, we employ "traditional tools of statutory construction" to ascertain if "Congress had an intention on the precise question at issue" that "must be given effect." *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778.

The issue before us at this point, then, is whether the Act plainly requires a party to acquire an NPDES permit in order to make a water transfer. We agree with the district court that the Clean Water Act does not clearly and unambiguously speak to that question. We will begin, however, by addressing the plaintiffs' argument that we previously held otherwise in *Catskill I*, 273 F.3d 481 (2d Cir. 2001), and *Catskill II*, 451 F.3d 77 (2d Cir. 2006).

A. Catskill I *and* Catskill II

The plaintiffs argue that this case can be resolved at *Chevron* Step One because we held in *Catskill I* and *Catskill II* that the Clean Water Act unambiguously requires NPDES permits for water transfers. We disagree with the plaintiffs' reading of those decisions because our application there of the deference standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), and *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)—so-called "*Skidmore*" or "*Skidmore/Mead*" deference—and the reasoning underlying the decisions make clear that we have not previously held that the statutory language at issue here is unambiguous, such that we cannot defer under *Chevron* to the EPA's interpretation of the Clean Water Act in the Water Transfers Rule.

In *Catskill I*, we held that that the City of New York [16] violated the Clean Water Act by transferring turbid water [17] from the Schoharie Reservoir through the Shandaken Tunnel into the Esopus Creek without an NPDES permit, because the transfer of turbid water into the Esopus Creek was an "addition" of a pollutant. 273 F.3d at 489–94. Following our remand in *Catskill I*, the district court assessed a $5,749,000 civil penalty against New York City and ordered the City to obtain a permit for the operation of the Shandaken Tunnel. The City's appeal from that ruling was resolved in *Catskill II*, in which we reaffirmed the holding of *Catskill I*. *Catskill II*, 451 F.3d at 79.

In both *Catskill I* and *Catskill II*, we applied the *Skidmore* deference standard to informal policy statements by the EPA that interpreted the same provision of the Act at issue here not to require NPDES permits for water transfers. *See* ***509** *id.* at 83–84 & n.5 (noting that under *Skidmore* "[w]e ... defer to the agency interpretation according to its 'power to persuade' " and "declin[ing] to defer to the EPA['s]" informal interpretation of the CWA as expressed in the Klee Memorandum (quoting *Mead*, 533 U.S. at 235, 121 S.Ct. 2164)); *Catskill I*, 273 F.3d at 490–91 (applying *Skidmore* to the EPA's position as expressed in informal policy statements and litigation positions, and concluding that "we do not find the EPA's position to be persuasive"). *Skidmore* instructs that "the rulings, interpretations and opinions" of an agency may

constitute "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161. The appropriate level of deference accorded to an agency's interpretation of a statute under the *Skidmore* standard depends on the interpretation's "power to persuade," which in turn depends on, *inter alia*, "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Id.* This "approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other." *Mead*, 533 U.S. at 228, 121 S.Ct. 2164 (internal citations omitted). [18]

Although the *Chevron* and *Skidmore* deference standards differ in application, they are similar in one respect: As with *Chevron* deference, we will defer to the agency's interpretation under the *Skidmore* standard only when the statutory language at issue is ambiguous. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008) (suggesting that it is "unnecessary" to engage in *Skidmore* analysis if "the statute itself speaks clearly to the point at issue"); *Exxon Mobil Corp. & Affiliated Cos. v. Comm'r of Internal Revenue*, 689 F.3d 191, 200 n.13 (2d Cir. 2012) (explaining that *Skidmore* analysis applies to "an agency's interpretation of an ambiguous statute"); *Wong v. Doar*, 571 F.3d 247, 258 (2d Cir. 2009) (concluding that "Congress did not speak directly to the issue" before proceeding to apply *Skidmore* deference); *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004) ("[D]eference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004) ("If the statute is clear and unambiguous, no deference is required and the plain meaning of Congress will be enforced."). As commentators have noted, although the Supreme Court has not explicitly stated "that *Skidmore* necessarily includes a 'step one' inquiry along the lines of *Chevron* [S]tep [O]ne[,] ... in practice, *Skidmore* generally does include a 'step one,' " in which a court "first review[s] the statute for a plain meaning [to] determin[e] [whether] the statute [is] ambiguous." Kristin E. Hickman & Matthew D. Krueger, ***510** *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1280 (2007) (collecting cases).

But as the dissent correctly notes, *see* Dissent at 541–42, it does not follow that a particular application of the *Skidmore* framework implies a threshold conclusion that the relevant statutory language is ambiguous. Although a court could first conclude that the text is unambiguous—and therefore that *Skidmore* deference is inappropriate or unnecessary [19]—it could instead engage in *Skidmore* analysis without answering this threshold question by considering the statutory text as one of several factors relevant to determining whether the agency interpretation has the "power to persuade." *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161. Yet even under this approach, courts will not rely on agency interpretations that are inconsistent with unambiguous statutory language. *See, e.g.*, *EEOC v. Arabian American Oil*, 499 U.S. 244, 257, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (declining to rely on an agency interpretation that "lack[ed] support in the plain language of the statute" after considering the statutory language as one of several factors relevant to *Skidmore* analysis). [20] Thus, regardless of whether or not a court makes a threshold ambiguity determination, "the *Skidmore* standard implicitly replicates *Chevron*'s first step." Hickman & Krueger, *supra*, at 1247.

Our application of the *Skidmore* deference standard in *Catskill I* and *Catskill II* makes clear that we did not decide and have not decided that the statutory language at issue in this case—"addition ... to navigable waters"—is unambiguous. Although we did not explicitly conclude in those cases that the statutory text was ambiguous, we made clear that we did not intend to foreclose the EPA from adopting a unitary-waters reading of the Act (i.e., waters of the United States means all of those waters rather than each of them) in a formal rule; indeed, we stated in *Catskill I* that "[i]f the EPA's position had been adopted in a rulemaking or other formal proceeding, [*Chevron*] deference ... might be appropriate." *Catskill I*, 273 F.3d at 490–91 & n.2. This statement implies that we thought the relevant statutory text was at least possibly ambiguous.

The few references to "plain meaning" in *Catskill I* and *Catskill II* do not compel a different conclusion. The crucial interpretive question framed by *Catskill I*—which we identified as the "crux" of the appeal—was "the meaning of 'addition,' which the Act does not define." *Id.* at 486. As the dissent points out, *see* Dissent at 543–44, we concluded in *Catskill I* that, based on the "plain meaning" of that term, the transfer of turbid water resulted in "an 'addition' of a 'pollutant' from a 'point source' [21] ... to a 'navigable water.' " ***511** *Catskill I*, 273 F.3d at 492. [22] We do not, however, think that by referring to the "plain meaning" of "addition" in *Catskill I* we were holding that the broader statutory phrase "addition ... to navigable

waters" *unambiguously* referred to a collection of individual "navigable waters"—such that the term "to navigable waters" could possibly mean only "to *a* navigable water" or "to *any* navigable water," and not to "navigable waters" in the collective singular (i.e., "*all* the qualifying navigable waters viewed as a single, 'unitary' entity"). Nowhere in *Catskill I* did we state that "navigable waters" or the broader phrase "addition ... to navigable waters" could bear only one meaning based on the unambiguous language contained in the statute. Such a statement would have been inconsistent with our acknowledgment that *Chevron* deference might be owed to a more formal agency interpretation.

Nor did we make any such statement in *Catskill II*. There, we began by succinctly summarizing *Catskill I* as "concluding that the discharge of water containing pollutants from one distinct water body into another is an 'addition of [a] pollutant' under the CWA." *Catskill II*, 451 F.3d at 80 (brackets in original) (citing *Catskill I*, 273 F.3d at 491–93). We then again rejected the City's arguments in favor of reconsidering *Catskill I*, including its argument in favor of the "unitary-water theory of navigable waters," essentially for the reasons stated in *Catskill I*—most importantly, that these arguments "simply overlook[ed]" the "plain language" and "ordinary meaning" of the term "addition." *Id.* at 81–84. We also noted that in the then-recent *Miccosukee* decision, the Supreme Court noted the existence of the unitary-waters theory and raised possible arguments against it, providing further support for our rejection of the theory in *Catskill I*. *Catskill II*, 451 F.3d at 83 (citing *Miccosukee*, 541 U.S. at 105–09, 124 S.Ct. 1537). Nowhere did we state that the phrase "addition ... to navigable waters" was unambiguous such that it would preclude *Chevron* deference in the event that the EPA adopted a formal rule. We held only that the EPA's position, as expressed in an informal interpretation, was unpersuasive under the *Skidmore* framework. *Id.* at 83 & n.5 (noting that under *Skidmore* "[w]e ... defer to the agency interpretation according to its 'power to persuade' " and "declin[ing] to ***512** defer to the EPA" under that standard (quoting *Mead*, 533 U.S. at 235, 121 S.Ct. 2164)).

The best interpretation of *Catskill I* and *Catskill II*, we think, is that those decisions set forth what those panels saw as the most persuasive reading of the phrase "addition ... to navigable waters" in light of how the word "addition" is plainly and ordinarily understood. *Catskill I* and *Catskill II* did not hold that "addition ... to navigable waters" could bear only one meaning, such that the EPA could not interpret the phrase differently in an interpretive rule. Therefore, as the district court concluded, neither *Catskill I* nor *Catskill II* requires us to resolve this appeal at *Chevron* Step One.

B. Statutory Text, Structure, and Purpose

Having determined that the meaning of the relevant provision of the Clean Water Act has not been resolved by prior case law, we turn to the overall statute and its context. In evaluating whether Congress has directly spoken to whether NPDES permits are required for water transfers, we employ the "traditional tools of statutory construction." *Li v. Renaud*, 654 F.3d 376, 382 (2d Cir. 2011) (quoting *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778). We examine the statutory text, structure, and purpose as reflected in its legislative history. *See id.* If the statutory text is ambiguous, we also examine canons of statutory construction. *See Lawrence + Mem'l Hosp.*, 812 F.3d at 264; *see also Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 301 (3d Cir. 2015), *cert. denied*, —— U.S. ——, 136 S.Ct. 1246, 194 L.Ed.2d 176 (2016); *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012); *EEOC v. Seafarers Int'l Union*, 394 F.3d 197, 203 (4th Cir. 2005).

1. Statutory text and structure.

"As with any question of statutory interpretation, we begin with the text of the statute to determine whether the language at issue has a plain and unambiguous meaning." *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 108 (2d Cir. 2012). The statutory language at issue is found in Sections 301, 402, and 502 of the Clean Water Act. Section 301(a) states that "[e]xcept as in compliance with [the Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 402(a)(1) states that the EPA may issue an NPDES permit allowing the "discharge of any pollutant, or combination of pollutants, notwithstanding [Section 301(a)]," so long as the discharge meets certain requirements specified by the Clean Water Act and the permit. *See id.* § 1342(a)(1). Section 502 defines the term "discharge of a pollutant," in relevant part, as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Section 502 also defines the term "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). But nowhere do these provisions speak directly to the question of whether an NPDES permit may be required for a water transfer.

Nor is the meaning of the relevant statutory text plain. The question, as we have indicated above, is whether "addition of any pollutant to navigable waters"—or, "addition of any pollutant to the waters of the United States"—refers to *all*

navigable waters, meaning *all* of the waters of the United States viewed as a singular whole, or to *individual* navigable waters, meaning *one of* the waters of the United States. The term "waters" may be used in either sense: As the Eleventh Circuit observed, "[i]n ordinary usage 'waters' can collectively refer to several different bodies of water such as 'the waters of the Gulf coast,' or ***513** can refer to any one body of water such as 'the waters of Mobile Bay.' " *Friends I*, 570 F.3d at 1223. The Supreme Court too has noted that the phrase "[w]aters of the United States," as used in Section 502, is "in some respects ambiguous." *Rapanos v. United States*, 547 U.S. 715, 752, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (internal quotation marks omitted) (emphasis removed). The statutory text yields no clear answer to the question before us; it could support either of the interpretations proposed by the parties. [23] Thus, based on the text alone, we remain at sea.

Unfortunately, placing this statutory language in the broader context of the Act as a whole does not help either. A statutory provision's plain meaning may be "understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute." *Louis Vuitton*, 676 F.3d at 108 (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003)). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, —— U.S. ——, 136 S.Ct. 1061, 1070, 194 L.Ed.2d 108 (2016) (internal quotation marks omitted) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 132 S.Ct. 1350, 1357, 182 L.Ed.2d 341 (2012)). Examination of the other uses of the terms "navigable waters" and "waters" elsewhere in the Clean Water Act does not establish that these terms can bear only one meaning. The Clean Water Act sometimes regulates individual water bodies and other times entire water systems.

As the plaintiffs and the dissent point out, several other provisions in the Clean Water Act suggest that "navigable waters" refers to any of several individual water bodies, specifically the Act's references to:

- "the navigable waters involved," 33 U.S.C. § 1313(c)(2)(A), (c)(4);
- "those waters or parts thereof," *id.* § 1313(d)(1)(B);
- "all navigable waters," *id.* § 1314(a)(2);
- "any navigable waters," *id.* § 1314(f)(2)(F);
- "those waters within the State" and "all navigable waters in such State," *id.* § 1314(l)(1)(A)-(B);
- "all navigable waters in such State" and "all navigable waters of such State," *id.* § 1315(b)(1)(A)-(B); and
- "the navigable waters within the jurisdiction of such State," "navigable waters within [the State's] jurisdiction," and "any of the navigable waters," *id.* § 1342.

But this pattern of usage does not establish that "navigable waters" cannot ever refer to all waters as a singular whole because it also suggests that when Congress wants to make clear that it is using "navigable waters" in a particular sense, it can and sometimes does provide additional language as a beacon to guide interpretation. *Cf. Rapanos*, 547 U.S. at 732–33, 126 S.Ct. 2208 (holding that "[t]he use of the definite article ('the') and the plural number ('waters')" made clear that § 1362(7) is limited to "fixed bodies of water," such as "streams, ... oceans, rivers, [and] lakes," ***514** and does not extend to "ordinarily dry channels through which water occasionally or intermittently flows"). [24] If Congress had thought about the question and meant for Section 502(12) of the Clean Water Act to refer to individual water bodies, it could have referred to something like "any addition of any pollutant to *a navigable water* from any point source," or "any addition of any pollutant to *any navigable water* from any point source." As the plaintiffs and the dissent would have it, the phrases "addition to navigable waters," "addition to a navigable water," and "addition to any navigable water" necessarily mean the same thing, at least in the context of the Act. We do not disagree that the phrases *could* be interpreted to have the same meaning, but we disagree that this interpretation is clearly and unambiguously mandated in light of how the terms "navigable waters" and "waters" are used in other sections of the Act.

We thus see nothing in the language or structure of the Act that indicates that Congress clearly spoke to the precise question at issue: whether Congress intended to require NPDES permits for water transfers.

2. Statutory purpose and legislative history

Inasmuch as the statutory text, context, and structure have yielded no definitive answer to the question before us, we conclude the first step of our *Chevron* analysis by looking to whether Congress's purpose in enacting the Clean Water Act

establishes that the phrase "addition ... to navigable waters" can reasonably bear only one meaning. *See Gen. Dynamics*, 540 U.S. at 600, 124 S.Ct. 1236 (using both statutory purpose and history at *Chevron* Step One). Beginning with the name of the statute, it seems clear enough that the predominant goal of the Clean Water Act is to ensure that our nation's waters are "clean," at least in the sense of being reasonably free of pollutants. The Act itself states that its main objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The plaintiffs and the dissent argue that exempting water transfers from the NPDES permitting program could frustrate the achievement of this goal by allowing unmonitored transfers of polluted water from one water body to another. *Cf. Catskill II*, 451 F.3d at 81 (observing that a unitary-waters interpretation of navigable waters would allow for "the transfer of water from a heavily polluted, even toxic, water body to one that was pristine").

As the Supreme Court has noted, however, "no law pursues its purpose at all costs." *Rapanos*, 547 U.S. at 752, 126 S.Ct. 2208. We see no reason to think that the Clean Water Act is an exception. To the contrary, the Clean Water Act is "among the most complex" of federal statutes, and it "balances a welter of consistent and inconsistent goals," *Catskill I*, 273 F.3d at 494, establishing a complicated scheme of federal regulation employing both federal and state implementation and supplemental state regulation, *see, e.g.*, 33 U.S.C. § 1251(g) (federal agencies must cooperate with state and local governments to develop "comprehensive solutions" for pollution "in concert with ... managing water resources"). In this regard, the Act largely preserves states' traditional authority over water allocation and use, while according ***515** the EPA a degree of policymaking discretion and flexibility with respect to water quality standards—both of which might well counsel against requiring NPDES permits for water transfers and instead in favor of letting the States determine what administrative regimen, if any, applies to water transfers. Accordingly, Congress's broad purposes and goals in passing the Act do not alone establish that the Act unambiguously requires that water transfers be subject to NPDES permitting.

Even careful analysis of the Clean Water Act's legislative history does not help us answer the interpretive question before us. Although we are generally "reluctant to employ legislative history at step one of *Chevron* analysis," legislative history is at times helpful in resolving ambiguity; for example, when the " 'interpretive clues [speak] almost unanimously,' making Congress's intent clear 'beyond reasonable doubt.' " *Mizrahi v. Gonzales*, 492 F.3d 156, 166 (2d Cir. 2007) (quoting *Gen. Dynamics*, 540 U.S. at 586, 590, 124 S.Ct. 1236). But here Congress has not left us a trace of a clue as to its intent. The more than 3,000-page legislative history of the Clean Water Act appears to be silent, or very nearly so, as to the applicability of the NPDES permitting program to water transfers. *See generally* Comm. on Env't. & Pub. Works, 95th Cong., 2d Sess., A Legislative History of the Clean Water Act of 1977 & A Continuation of the Legislative History of the Federal Water Pollution Control Act (1978); Comm. on Pub. Works, 93rd Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973). As we noted in *Catskill I*, the legislative history does not speak to the meaning of the term "addition" standing alone, 273 F.3d at 493, suggesting that the history is similarly silent as to the meaning of the broader phrase that includes this term, "addition ... to navigable waters."

Finally and tellingly, neither the parties nor *amici* have pointed us to any legislative history that clearly addresses the applicability of the NPDES permitting program to water transfers. What few examples from the legislative history they have cited—such as the strengthening of the permit requirements in Section 301(b)(1)(C) to include water quality-based limits in addition to technology-based limitations, *see* William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 Stan. Envtl. L.J. 215, 270, 275-77 (2003), and broad aspirational statements about the elimination of water pollution and the need to regulate every point source by the report of the Senate's Environment and Public Works Committee, S. Rep. No. 92-414, at 3738, 3758 (1971), provide at most keyhole-view insights into Congress's intent. They do not speak to the issue before us with the "high level of clarity" necessary to resolve the textual ambiguity before us at *Chevron* Step One. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007). The question is whether Congress has "*directly* spoken," *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778, to whether NPDES permits are required for water transfers—not whether it has made a stray or oblique reference to that issue here and there.

3. Canons of statutory construction

The traditional canons of statutory construction also provide no clear answer to the question whether Congress intended that the NPDES permitting system apply to water transfers.

First, the dissent asserts that the Water Transfers Rule violates the principle that " '[w]here Congress explicitly enumerates certain exceptions to a general ***516** prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent,' " *Hillman v. Maretta*, —— U.S. ——, 133 S.Ct. 1943, 1953, 186 L.Ed.2d 43 (2013) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980)). *See* Dissent at 537–39. Contrary to the dissent's assertion, however, that canon of construction is not applicable where, as here, the issue is not whether to create an implied exception to a general prohibition, but the scope of the general prohibition itself. [25]

Second, the plaintiffs invoke the canon of construction that a "statute should be interpreted in a way that avoids absurd results." *SEC v. Rosenthal*, 650 F.3d 156, 162 (2d Cir. 2011) (quoting *United States v. Venturella*, 391 F.3d 120, 126 (2d Cir. 2004)). They again underscore their arguments concerning statutory purpose in arguing that by allowing for the unpermitted transfer of polluted water from one water body to another, the Water Transfers Rule is contrary to the Act's principal stated objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Additionally, the plaintiffs argue that the Water Transfers Rule may undermine the ability of downstream states to protect themselves from the pollution generated by upstream states.

The simplicity of the plaintiffs' approach helps cloak their arguments with considerable force. But we are ultimately not persuaded that they establish that the Clean Water Act unambiguously forecloses the EPA's interpretation in the Water Transfers Rule. Indeed, it is unclear to us how one can argue persuasively that the Water Transfers Rule leads to a result so absurd that the result could not possibly have been intended by Congress, while asserting at the same time that it codifies the EPA's practice of not issuing NPDES permits that has prevailed for decades without Congressional course-correction of any kind. In light of the immense importance of water transfers, it seems more likely that Congress has contemplated the very result that the plaintiffs argue is foreclosed by the Act, and acquiesced in that result.

Furthermore, as the plaintiffs would have it, the EPA and the States could not, consistent with the Clean Water Act, select *any* policy that does not improve water quality as much as is possible. But the Clean Water Act is more flexible than that. Far from establishing a maximalist scheme under which water quality must be pursued at all costs, the Act leaves a considerable amount of policymaking discretion in the hands of both the EPA and the States—entirely understandably in light of its "welter of consistent and inconsistent goals." *Catskill I*, 273 F.3d at 494. We cannot say that the Act could not reasonably be read to permit water transfers to be exempt from the NPDES permitting program, in light of the possibility that other measures will do. Although the ***517** tension between the Rule's reading of the Act and the statute's overall goal of improving water quality casts some doubt on the reasonableness of the Rule, it may nevertheless be understandable and permissible if it furthers other objectives of the statute.

We think that the legislative compromises embodied in the Act counsel against the application of the absurdity canon here. We generally apply that canon only "where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result and where the alleged absurdity is so clear as to be obvious to most anyone." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470–71, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (Kennedy, J., concurring in the judgment) (citation omitted). Exempting water transfers from the NPDES program does not, we conclude, lead directly to a result so absurd it could not possibly have been contemplated by Congress.

As to the effect of the Rule on downstream states, even in the absence of NPDES permitting for water transfers, the States can seek to protect themselves against polluted water transfers through other means—for example, through filing a common-law nuisance or trespass lawsuit in the polluting state's courts, *see, e.g.*, *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497–98, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987)—even if the protections provided by such lawsuits are less robust than those that would be available through the NPDES permitting program's application to transfers. [26] The inconsistency of the Water Transfers Rule with the Clean Water Act's primary objective may be a strike against its reasonableness, but only one strike, which is not enough for the EPA's position to be "out."

Third, arguing to the contrary, the defendants and *amicus curiae* State of California argue that we should reject the plaintiffs' preferred interpretation of Section 402 of the Clean Water Act (i.e., that permits are required for water transfers) based on a clear-statement rule and principles of federalism derived from the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. United States Army Corps*

of Engineers, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) ("*SWANCC*"), and *Rapanos*, as well as the Tenth Amendment. If that were so, it would make our task much easier. But we think it is incorrect. To the extent that *SWANCC* and *Rapanos* establish a clear-statement rule, it does not apply here.

In *SWANCC*, the Supreme Court addressed the "Migratory Bird Rule" issued by the U.S. Army Corps of Engineers (the "Corps") under which the Corps asserted jurisdiction pursuant to Section 404(a) of the Clean Water Act to require permits for the discharge of dredged or fill material into intrastate waters used as habitat by migratory birds. *SWANCC*, 531 U.S. at 163–64, 121 S.Ct. 675. The Rule applied even to small, isolated ponds located entirely within a single state, such as those located in the abandoned sand and gravel pit there at issue. *See id.* at 163–65, 121 S.Ct. 675. The Court reasoned that, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, [it] expect[s] a clear indication that Congress intended that result," and that "[t]his concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional ***518** state power." *Id.* at 172–73, 121 S.Ct. 675. Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 173, 121 S.Ct. 675 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988)). The Supreme Court rejected the Corps' interpretation because (1) the Migratory Bird Rule "raise[d] significant constitutional questions" with respect to Congress's authority under the Commerce Clause; (2) Congress had not clearly stated "that it intended § 404(a) to reach an abandoned sand and gravel pit"; and (3) the Corps' interpretation of Section 404(a) "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 173–74, 121 S.Ct. 675.

In *Rapanos*, a plurality of the Supreme Court rejected the EPA's interpretation of the Clean Water Act as providing authority to regulate isolated wetlands lying near ditches or artificial drains that eventually empty into "navigable waters" because the wetlands are adjacent to "waters of the United States." *Rapanos*, 547 U.S. at 723-24, 729, 739, 126 S.Ct. 2208. The plurality rejected the interpretation because it "would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land," which was impermissible because a " 'clear and manifest' statement from Congress" is required "to authorize an unprecedented intrusion" into an area of "traditional state authority" such as the regulation of land use. *Id.* at 738, 126 S.Ct. 2208 (citation omitted). Citing *SWANCC*, the Court also noted that "the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power," which further counseled in favor of requiring a clear statement from Congress in order to authorize such jurisdiction. *Id.* (citing *SWANCC*, 531 U.S. at 173, 121 S.Ct. 675).

The clear-statement rule articulated in *SWANCC* and *Rapanos* does not apply here. The case at bar presents no question regarding Congress's authority under the Commerce Clause, inasmuch as it is undisputed that Congress has the power to regulate navigable waters and to delegate its authority to do so. *SWANCC* and *Rapanos* both involved attempts by the Army Corps of Engineers to extend the scope of the phrase "navigable waters" to include areas not traditionally understood to be such. They were therefore treated as attempts by the Corps to stretch the limits of its delegated authority vis-à-vis the States. Here, the EPA is not seeking to expand the universe of waters deemed to be "navigable." The question before us is not whether the EPA has the authority to regulate water transfers; it is whether the EPA is using (or not using) that authority in a permissible manner.

The Clean Water Act was *designed* to alter the federal-state balance with respect to the regulation of water quality. Congress passed the Act precisely because it found inconsistent state-by-state regulation not up to the task of restoring and maintaining the integrity of the nation's waters. *See* S. Rep. No. 95-370, at 1 (1977) (the Act is intended to be a "comprehensive revision of national water quality policy"). True, as the defendants point out, water allocation is an area of traditional state authority. But again, we are concerned here not with water allocation, but with water quality. We know of no authority or accepted principle that would require a "clear statement" by Congress before ***519** the EPA could adopt the plaintiffs' preferred interpretation of the Act.

Fourth, and finally, several of the defendants raise the related argument that requiring permits for water transfers under the plaintiffs' preferred interpretation would pose a serious Tenth Amendment[27] problem because it would upset the traditional balance of federal and state power with respect to water regulation. This, in turn, would violate

the canon of constitutional avoidance, which provides that if one of two competing statutory interpretations "would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 380–81, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts."). These defendants argue that the EPA's interpretation must prevail because it avoids this constitutional problem.

But the plaintiffs' proposed interpretation raises no Tenth Amendment concerns that we can discern because it would not result in federal overreach into states' traditional authority to allocate water quantities. The Clean Water Act's preservation of states' water-allocation authority "do[es] not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 720, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994). As we noted in *Catskill II*, the "flexibility built into the [Act] and the NPDES permit scheme," which includes variances, general permits, and the consideration of costs in setting effluent limitations, "allow[s] federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either."[28] 451 F.3d at 85–86. The resolution of this appeal is not dictated by a clear-statement rule or the Tenth Amendment, but rather by straightforward considerations of statutory interpretation.

We conclude, then, that Congress did not in the Clean Water Act speak directly to the question of whether NPDES permits are required for water transfers.[29] The Act is therefore silent or ambiguous as to this question, which means that this case cannot be resolved by the Step One analysis under *Chevron*. *See also Friends I*, 570 F.3d at 1227 (similarly concluding at *Chevron* Step One that the statutory phrase "addition ... to navigable waters" ***520** is ambiguous). Accordingly, we proceed to Step Two. *See New York v. FERC*, 783 F.3d 946, 954 (2d Cir. 2015).

II. *Chevron* Step Two

At last, we reach the application of the second step of *Chevron* analysis, upon which our decision to reverse the district court's judgment turns. We conclude that the EPA's interpretation of the Clean Water Act is reasonable and neither arbitrary nor capricious. Although the Rule may or may not be the best or most faithful interpretation of the Act in light of its paramount goal of restoring and protecting the quality of U.S. waters, it is supported by several valid arguments—interpretive, theoretical, and practical. And the EPA's interpretation of the Act as reflected in the Rule seems to us to be precisely the kind of policymaking decision that *Chevron* is designed to protect from overly intrusive judicial review. As we have already pointed out, although we might prefer a different rule more clearly guaranteed to reach the environmental concerns underlying the Act, *Chevron* analysis requires us to recognize that our preference does not matter. We conclude that the Water Transfers Rule satisfies *Chevron*'s deferential standard of review, and, accordingly, we reverse the judgment of the district court.

A. Legal Standard

The question for the reviewing court at *Chevron* Step Two is "whether the agency's answer [to the interpretive question] is based on a permissible construction of the statute." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 54, 131 S.Ct. 704, 178 L.Ed.2d 588 (2011) (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778). We will not disturb an agency rule at *Chevron* Step Two unless it is "arbitrary or capricious in substance, or manifestly contrary to the statute." *Id.* at 53, 131 S.Ct. 704 (quoting *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 242, 124 S.Ct. 1741, 158 L.Ed.2d 450 (2004)); *see also Lawrence + Mem'l Hosp.*, 812 F.3d at 264. Generally, an agency interpretation is not "arbitrary, capricious, or manifestly contrary to the statute" if it is "reasonable." *See Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S.Ct. 2117, 2125, 195 L.Ed.2d 382 (2016) ("[A]t [*Chevron*'s] second step the court must defer to the agency's interpretation if it is 'reasonable.' " (quoting *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778)); *Mayo*, 562 U.S. at 58, 131 S.Ct. 704 ("[T]he second step of *Chevron* ... asks whether the [agency's] rule is a 'reasonable interpretation' of the enacted text." (quoting *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778)); *Lee v. Holder*, 701 F.3d 931, 937 (2d Cir. 2012); *Adams v. Holder*, 692 F.3d 91, 95 (2d Cir. 2012). The agency's view need not be "the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009) (emphasis in original). This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). When

interpreting ambiguous statutory language "involves difficult policy choices," deference is especially appropriate because "agencies are better equipped to make [these choices] than courts." *Brand X*, 545 U.S. at 980, 125 S.Ct. 2688.

"Even under this deferential standard, however, agencies must operate within the bounds of reasonable interpretation," *Michigan v. EPA*, —— U.S. ——, 135 S.Ct. 2699, 2707, 192 L.Ed.2d 674 (2015) (internal quotation marks omitted), and we therefore will not defer to an agency ***521** interpretation if it is not supported by a reasoned explanation, *see Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011). An agency interpretation would surely be "arbitrary" or "capricious" if it were picked out of a hat, or arrived at with no explanation, even if it might otherwise be deemed reasonable on some unstated ground.

In the course of its *Chevron* Step Two analysis, the district court incorporated the standard for evaluating agency action under APA § 706(2)(A) set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) ("*State Farm*"), a much stricter and more exacting review of the agency's rationale and decisionmaking process than the *Chevron* Step Two standard. Under that section, a reviewing court may set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In *State Farm*, the Supreme Court explained that under Section 706(2)(A),

> an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. at 43, 103 S.Ct. 2856. On appeal, the plaintiffs urge us to incorporate the *State Farm* standard into our *Chevron* Step Two analysis, and to affirm the district court's vacatur of the Rule for essentially the same reasons stated by the court. While we have great respect for the district court's careful and searching analysis of the EPA's rationale for the Water Transfers Rule, we conclude that it erred by incorporating the *State Farm* standard into its *Chevron* Step Two analysis and thereby applying too strict a standard of review. An agency's initial interpretation of a statutory provision should be evaluated only under the *Chevron* framework, which does not incorporate the *State Farm* standard. *State Farm* review may be appropriate in a case involving a non-interpretive rule or a rule setting forth a changed interpretation of a statute; but that is not so in the case before us.

As the Supreme Court, our Circuit, and other Courts of Appeals have made reasonably clear, *State Farm* and *Chevron* provide for related but distinct standards for reviewing rules promulgated by administrative agencies. *See, e.g.*, *Encino*, 136 S.Ct. at 2125–26; *Judulang v. Holder*, 565 U.S. 42, 132 S.Ct. 476, 483 n.7, 181 L.Ed.2d 449 (2011); *Nat. Res. Def. Council*, 808 F.3d at 569; *New York v. FERC*, 783 F.3d at 958; *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 53 (2d Cir. 2003); *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 324 (2d Cir. 2003); *see also, e.g.*, *Shays v. FEC*, 414 F.3d 76, 96–97 (D.C. Cir. 2005); *Arent v. Shalala*, 70 F.3d 610, 619 (D.C. Cir. 1995) (Wald, J., concurring). *State Farm* is used to evaluate whether a rule is procedurally defective as a result of flaws in the agency's decisionmaking process. *See Encino*, 136 S.Ct. at 2125; *FERC v. Elec. Power Supply Ass'n*, —— U.S. ——, 136 S.Ct. 760, 784, 193 L.Ed.2d 661 (2016). *Chevron*, by contrast, is generally used to evaluate whether the conclusion reached as a result of that process—an agency's interpretation of a statutory provision it administers—is reasonable. *See Encino*, 136 S.Ct. at 2125; *Entergy*, 556 U.S. at 217–18, 129 S.Ct. 1498. A litigant challenging a rule may challenge it under *State Farm*, *Chevron*, or both. As Judge Wald explained,

> ***522** there are certainly situations where a challenge to an agency's regulation will fall squarely within one rubric, rather than the other. For example, we might invalidate an agency's decision under *Chevron* as inconsistent with its statutory mandate, even though we do not believe the decision reflects an arbitrary policy choice. Such a result might occur when we believe the agency's course of action to be the most appropriate and effective means of

> achieving a goal, but determine that Congress has selected a different—albeit, in our eyes, less propitious—path. Conversely, we might determine that although not barred by statute, an agency's action is arbitrary and capricious because the agency has not considered certain relevant factors or articulated any rationale for its choice. Or, along similar lines, we might find a regulation arbitrary and capricious, while deciding that *Chevron* is inapplicable because Congress' delegation to the agency is so broad as to be virtually unreviewable.

Arent, 70 F.3d at 620 (Wald, J., concurring) (citation and footnotes omitted).

Much confusion about the relationship between *State Farm* and *Chevron* seems to arise because both standards purport to provide a method by which to evaluate whether an agency action is "arbitrary" or "capricious," and *Chevron* Step Two analysis and *State Farm* analysis often, though not always, take the same factors into consideration and therefore overlap. *See Judulang*, 132 S.Ct. at 483 n.7 (stating, in a case governed by the *State Farm* standard, that had the Supreme Court applied *Chevron*, the "analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance" (internal quotation marks omitted)); *Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 204 (D.C. Cir. 2015) (noting that it is "often the case" that an agency's "interpretation of its authority under *Chevron* Step Two overlaps with our arbitrary and capricious review under 5 U.S.C. § 706(2)(A)"); *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 57 (D.C. Cir. 2000) ("The second step of *Chevron* analysis and *State Farm* arbitrary and capricious review overlap, but are not identical."). We read the case law to stand for the proposition that where a litigant brings both a *State Farm* challenge and a *Chevron* challenge to a rule, and the *State Farm* challenge is successful, there is no need for the reviewing court to engage in *Chevron* analysis. As the Supreme Court has explained, "where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation." *Encino*, 136 S.Ct. at 2125.[30] In other words, if an interpretive rule was promulgated in a procedurally defective manner, it will be set aside regardless of whether its interpretation of the statute is reasonable. If the rule is not defective under *State Farm*, though, that conclusion does not avoid the need for a *Chevron* analysis, which does not incorporate the *State Farm* standard of review. In fact, in many recent cases, we have applied ***523** *Chevron* Step Two without applying *State Farm* or conducting an exacting review of the agency's decisionmaking and rationale. *See, e.g.*, *Stryker v. SEC*, 780 F.3d 163, 167 (2d Cir. 2015); *Florez v. Holder*, 779 F.3d 207, 211–12 (2d Cir. 2015); *Lee*, 701 F.3d at 937; *Adams*, 692 F.3d at 95; *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012).

Several other considerations also counsel against employing the searching *State Farm* standard of review of the agency's decisionmaking and rationale at *Chevron* Step Two. The Supreme Court has decided that agencies are not obligated to conduct detailed fact-finding or cost-benefit analyses when interpreting a statute—which suggests that the full-fledged *State Farm* standard may not apply to rules that set forth for the first time an agency's interpretation of a particular statutory provision. *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (an agency may interpret an ambiguous statutory provision by making "judgments about the way the real world works" without making formal factual findings); *Entergy*, 556 U.S. at 223, 129 S.Ct. 1498 (absent statutory language to the contrary, an agency is not required to conduct cost-benefit analysis under *Chevron*); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."). These decisions seem to establish that while an agency may support its statutory interpretation with factual materials or cost-benefit analyses, an agency need not do so in order for its interpretation to be regarded as reasonable.

Further, the Supreme Court has cautioned that *State Farm* is "inapposite to the extent that it may be read as prescribing more searching judicial review" in a case involving an agency's "first interpretation of a new statute." *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 502 n.20, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002); *see also Judulang*, 132 S.Ct. at 483 n.7 (stating that "standard arbitrary or capricious review under the APA" was appropriate because the agency action at issue was "not an interpretation of any statutory language" (internal quotation marks and brackets omitted)). Dovetailing with this point, the Supreme Court

held in *Brand X* and *Fox Television Stations* that when an agency changes its interpretation of a particular statutory provision, this change is reviewable under APA § 706(2)(A), and will be set aside if the agency has failed to provide a "reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television*, 556 U.S. at 516, 129 S.Ct. 1800; *Brand X*, 545 U.S. at 981, 125 S.Ct. 2688 (explaining that "[u]nexplained inconsistency" is "a reason for holding an [agency] interpretation to be an arbitrary and capricious change from agency practice under the [APA]"). Of course, if *all* interpretive rules were reviewable under APA § 706(2)(A) and the *State Farm* standard, these pronouncements in *Brand X* and *Fox Television Stations* would have been unnecessary. We also note that applying a reasonableness standard to the agency's decisionmaking and rationale at *Chevron* Step Two instead of a heightened *State Farm*-type standard promotes respect for agencies' policymaking discretion and promotes policymaking flexibility.

For these reasons, the plaintiffs' challenge to the Water Transfers Rule is properly analyzed under the *Chevron* framework, which does not incorporate the ***524** *State Farm* standard.[31] We will therefore address only whether the EPA provided a reasoned rationale for the Water Transfers Rule, and whether the Rule's interpretation of the Clean Water Act is reasonable. As to the former, the question is not whether the EPA's reasoning was flawless, impervious to counterarguments, or complete—the EPA only must have provided a reasoned explanation for its action.

B. Reasoned Rationale for the EPA's Interpretation

We conclude that the EPA provided a reasoned explanation for its decision in the Water Transfers Rule to interpret the Clean Water Act as not requiring NPDES permits for water transfers. We can see from the EPA's rationale how and why it arrived at the interpretation of the Clean Water Act set forth in the Water Transfers Rule. It is clear that the EPA based the Rule on a holistic interpretation of the Clean Water Act that took into account the statutory language, the broader statutory scheme, the statute's legislative history, the EPA's longstanding position that water transfers are not subject to NPDES permitting, congressional concerns that the statute not unnecessarily burden water quantity management activities, and the importance of water transfers to U.S. infrastructure. *See* Water Transfers Rule, 73 Fed. Reg. at 33,699-33,703.

In the Water Transfers Rule, the EPA analyzed the text of the statute, explaining how its interpretation was justified by its understanding of the phrase "the waters of the United States," *id.* at 33,701, as well as by the broader statutory scheme, noting that the Clean Water Act provides for several programs and regulatory initiatives other than the NPDES permitting program that could be used to mitigate pollution caused by water transfers, *id.* at 33,701-33,702. The EPA also justified the Rule by reference to statutory purpose, noting its view that "Congress intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities," and that Congress intended to create a "balance ... between federal and State oversight of activities affecting the nation's waters." *Id.* at 33,701. The EPA also stated that subjecting water transfers to NPDES permitting could affect states' ability to effectively allocate water and water rights, *id.* at 33,702, and explained how its interpretation was justified in light of the Act's legislative history, *see id.* at 33,703. The EPA concluded by addressing several public comments on the Rule, and explaining in a reasoned manner why it rejected proposed alternative readings of the Clean Water Act. *See id.* at 33,703-33,706.

This rationale, while not immune to criticism or counterargument, was sufficiently reasoned to clear *Chevron*'s rather minimal requirement that the agency give a reasoned explanation for its interpretation. We see nothing illogical in the EPA's rationale.[32] The agency provided a sufficiently ***525** reasoned explanation for its interpretation of the Clean Water Act in the Water Transfers Rule. The Rule's interpretation of the Clean Water Act was therefore not adopted in an "arbitrary" or "capricious" manner. Accordingly, we must address whether the Rule's interpretation of the Clean Water Act was, ultimately, reasonable.

C. Reasonableness of the EPA's Interpretation

Having concluded that the EPA offered a sufficient explanation for adopting the Rule, we next examine whether the Rule reasonably interprets the Clean Water Act. We conclude that it does. The EPA's interpretation of the Clean Water Act as reflected in the Rule is supported by several valid arguments—interpretive, theoretical, and practical. The permissibility of the Rule is reinforced by longstanding practice and acquiescence by Congress, recent case law, practical concerns regarding compliance costs, and the existence of alternative means for regulating pollution resulting from water transfers.

First, as far as we have been able to determine, in the nearly forty years since the passage of the Clean Water Act, water transfers have never been subject to a general NPDES permitting requirement. Congress thus appears to have, however silently, acquiesced in this state of affairs. This may well reflect an intent not to require NPDES permitting to be imposed in every situation in which it might be required, including as a means for regulating water transfers. This in turn suggests that the EPA's unitary-waters interpretation of Section 402 of the Act in the Water Transfers Rule is reasonable.

Second, the Supreme Court's decision in *Miccosukee* and the Eleventh Circuit's decision in *Friends I* support this conclusion. *Miccosukee* was decided before the EPA issued the Water Transfers Rule and, absent the interpretation of an agency rule, did not involve the application of *Chevron*. It was a citizen suit against the South Florida Water Management District (the "District"), which is also an intervenor-defendant in the instant proceedings. The *Miccosukee* plaintiffs argued that the District was impermissibly operating a pumping facility without an NPDES permit. 541 U.S. at 98–99, 124 S.Ct. 1537. The district court granted summary judgment to the plaintiffs; the Eleventh Circuit affirmed. *Id.* at 99, 124 S.Ct. 1537. The Supreme Court vacated the judgment and remanded the case on the ground that granting summary judgment was inappropriate because further factual findings as to whether the two water bodies at issue were meaningfully distinct were necessary. *Id.* In its decision, the Supreme Court addressed three key questions. First, it asked whether the definition of "discharge of a pollutant" in Section 502 of the Clean Water Act (33 U.S.C. § 1362(12)) reaches point sources that do not themselves generate pollutants. The Court held that it does. *Miccosukee*, 541 U.S. at 105, 124 S.Ct. 1537.

Second, the Court addressed whether "all the water bodies that fall within the Act's definition of 'navigable waters' (that is, all 'the waters of the United States, including the territorial seas,' § 1362(7)) ***526** should be viewed unitarily for purposes of NPDES permitting requirements." *Id.* at 105–06, 124 S.Ct. 1537. The Court declined to defer to the EPA's "longstanding" view to that effect because "the Government d[id] not identify any administrative documents in which [the] EPA ha[d] espoused that position"; in point of fact, "the agency once reached the opposite conclusion." *Id.* at 107, 124 S.Ct. 1537. As the dissent points out, the Supreme Court suggested that it took a dim view of the unitary-waters reading of the CWA, stating that: "several NPDES provisions might be read to suggest a view contrary to the unitary-waters approach"; "[t]he 'unitary waters' approach could also conflict with current NPDES regulations"; and "[t]he NPDES program ... appears to address the movement of pollutants among water bodies, at least at times." *Id.* at 107–8, 124 S.Ct. 1537. But the Court also seemed to acknowledge that the statute could be interpreted in different ways:

> It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. § 1251(g). On the other hand, it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs. *See* 40 CFR §§ 122.28, 123.25 (2003).

Id. at 108, 124 S.Ct. 1537. Ultimately, the Court declined to rule on the unitary-waters theory because the parties did not raise the argument before the Eleventh Circuit or in their briefs supporting and opposing the Court's grant of *certiorari*. Instead, the Court did no more than note that unitary-waters arguments would be open to the parties on remand. *Id.* at 109, 124 S.Ct. 1537.

Third, the Supreme Court addressed whether a triable issue of fact existed as to whether the water transfer at issue was between "meaningfully distinct" water bodies, and thus required an NPDES permit. The Court held that such a triable issue did exist, and vacated and remanded for further fact-finding. *Id.* at 109–12, 124 S.Ct. 1537. The Court stated that if after reviewing the full record, the district court concluded that the water transfer was not between two meaningfully distinct bodies of water, then the District would not need to obtain an NPDES permit in order to operate the pumping facility. *Id.* at 112, 124 S.Ct. 1537. Thus, it seems as though the purpose of the remand was (a) to address the parties' unitary-waters arguments as a preliminary legal matter, and (b) to engage in fact-finding necessary to resolve the case if the argument as to unitary-waters did not prevail.

With respect to the unitary-waters interpretation of Section 402, then, *Miccosukee* suggested that a unitary-waters interpretation of the statute was unlikely to prevail because it was not the *best* reading of the statute, but did not conclude that it was an *unreasonable* reading of the statute.

By acknowledging the arguments against requiring NPDES permits for water transfers, and noting that unitary-waters arguments would be open to the parties on remand, the Court can be read to have suggested that such arguments are reasonable, even if not, in the Court's view, preferable.

This interpretation of *Miccosukee* is reflected in subsequent case law interpreting that decision. In *Catskill II*, we expressed our view that "*Miccosukee* did no more ***527** than note the existence of the [unitary-waters] theory and raise possible arguments against it." 451 F.3d at 83. And in *Friends I*, the Eleventh Circuit concluded, despite its discussion of *Miccosukee*, that the Water Transfers Rule's interpretation of the CWA *is* entitled to *Chevron* deference. *See Friends I*, 570 F.3d at 1217–18, 1225, 1228.

Friends I provides further support for the reasonableness of the Rule's interpretation. Like *Miccosukee*, the decision addressed whether the District was required to obtain NPDES permits to conduct certain specified water transfers. *See Friends I*, 570 F.3d at 1214. This time, however, the issue was addressed *after* the EPA had issued the Water Transfers Rule, and the deferential framework of *Chevron* therefore applied. In *Friends I*, the parties did not contest that the donor water bodies (canals from which water was pumped into Lake Okeechobee) and the receiving water body (the lake) were "navigable waters." *Id.* at 1216. Because under *Miccosukee* the NPDES "permitting requirement does not apply unless the bodies of water are meaningfully distinct," the question was therefore "whether moving an existing pollutant from one navigable water body to another is an 'addition ... to navigable waters' of that pollutant." *Id.* at 1216 & n.4 (quoting 33 U.S.C. § 1362(12)). The District argued, based on the "unitary waters theory," that "it is not an 'addition ... to navigable waters' to move existing pollutants from one navigable water to another." *Id.* at 1217. "An addition occurs, under this theory, only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters." *Id.*

The Eleventh Circuit agreed. It began its analysis by surveying relevant prior decisions, noting that "[t]he unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate." *Id.* (collecting cases). In the time since those decisions were issued, however, there "ha[d] been a change. An important one. Under its regulatory authority, the EPA ha[d then-]recently issued a regulation adopting a final rule specifically addressing this very question. Because that regulation was not available at the time of the earlier decisions," including *Catskill I*, *Catskill II*, and *Miccosukee*, "they [we]re not precedent against it." *Id.* at 1218. Therefore, the question before the Court was whether to give *Chevron* deference to the Rule. "All that matters is whether the regulation is a reasonable construction of an ambiguous statute." *Id.* at 1219. The cases on which the plaintiffs relied —which included *Catskill I*, *Catskill II*, and *Miccosukee*— were therefore unhelpful because there was then no formal rule to which to apply the *Chevron* framework. "Deciding how best to construe statutory language is not the same thing as deciding whether a particular construction is within the ballpark of reasonableness." *Id.* at 1221.

The court then engaged in a *Chevron* analysis strikingly similar to the one we are tasked with conducting here. As to the plain meaning of the statutory language, the Eleventh Circuit determined that the key question was whether " 'to navigable waters' means to *all* navigable waters as a singular whole." *Id.* at 1223 (emphasis in original). This question could not be resolved by looking to the common meaning of the word "waters," which could be used to refer to several different bodies of water collectively (e.g., "the waters of the Gulf coast") or to a single body of water (e.g., "the waters of Mobile Bay"). *Id.* After examining the statutory language in the context of the Clean Water Act as a whole, the court then noted that Congress knew how to use the term "any navigable waters" in other statutory provisions when ***528** it wanted to protect individual water bodies (even though it at times used the unmodified term "navigable waters" for the same meaning), and determined that the Act's goals were so broad as to be unhelpful in answering this difficult, specific question. *See id.* at 1224–27. The court therefore concluded that the statutory language was ambiguous, and that the EPA's unitary-waters reading of Section 402 was reasonable. *Id.* at 1227–28. The Court of Appeals explained, using an analogy we think is applicable to in the case before us:

> Sometimes it is helpful to strip a legal question of the contentious policy interests attached to it and think about it in the abstract using a hypothetical. Consider the issue this way: Two buckets sit side by side, one with four marbles in it and the other with none. There is a rule prohibiting "any addition of any marbles to buckets by any person." A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket. Has the marble-mover "add[ed] any marbles to buckets"? On one hand, as the [plaintiffs] might argue, there are now two marbles in a bucket where there were none before, so an addition of marbles has occurred. On the other hand, as the

> [District] might argue and as the EPA would decide, there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred. Whatever position we might take if we had to pick one side or the other we cannot say that either side is unreasonable.

Id. at 1228 (first brackets in original).

Following *Friends I*, the Eleventh Circuit in *Friends II* dismissed several petitions for direct appellate review of the Water Transfers Rule on the grounds that the Court lacked subject-matter jurisdiction under the Act (specifically, 33 U.S.C. §§ 1369(b)(1)(E), (F)) and could not exercise hypothetical jurisdiction. *Friends II*, 699 F.3d at 1286–89. In the course of doing so, the Eleventh Circuit clarified its holding in *Friends I* that "the water-transfer rule was a reasonable interpretation of an ambiguous provision of the Clean Water Act," and therefore passed muster under *Chevron*'s deferential standard of review. *Id.* at 1285. We are in general agreement with the *Friends I* approach, and in complete agreement with its conclusion that we must give *Chevron* deference to the EPA's interpretation of Section 402 of the Act in the Water Transfers Rule. [33]

***529** Another factor favoring the reasonableness of the Water Transfers Rule's interpretation of the Clean Water Act is that compliance with an NPDES permitting scheme for water transfers is likely to be burdensome and costly for permittees, and may disrupt existing water transfer systems. For instance, several intervenor-defendant water districts assert that it could cost an estimated $4.2 billion to treat just the most significant water transfers in the Western United States, and that obtaining an NPDES permit and complying with its conditions could cost a single water provider hundreds of millions of dollars. *See* Water Districts Br. 21. Similarly, intervenor-defendant New York City submits that if it is not granted the permanent variances it has requested in its most recent permit application, it will be forced to construct an expensive water-treatment plant, *see* NYC Br. 22-23, 28-30, 35-37, 55-56, and *amicus curiae* the State of California argues that requiring NPDES permits would put a significant financial and logistical strain on the California State Water Project, *see* State of California *Amicus* Br. 16. Further, *amici curiae* the American Farm Bureau Federation and Florida Farm Bureau Federation argue that the invalidation of the Water Transfers Rule would (i) throw the status of agricultural water-flow plans into doubt, and (ii) require state water agencies to increase revenues to pay for permits for levies and dams, which they would likely accomplish by raising agricultural and property taxes, and which in turn would raise farmers' costs and hurt their international economic competitiveness. *See* Farmer *Amici* Br. 2-3. The potential for such disruptive results, if accurate, would provide further support for the EPA's decision to interpret the statutory ambiguity at issue so as not to require NPDES permits for water transfers. [34]

Yet another consideration supporting the reasonableness of the Water Transfers Rule is that several alternatives could regulate pollution in water transfers even in the absence of an NPDES permitting scheme, including: nonpoint source programs; [35] other federal statutes and regulations (like the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, and the Surface Water Treatment Rule, 40 C.F.R. § 141.70 *et seq.*); the Federal Energy Regulatory Commission's regulatory scheme for non-federal hydropower dams; state permitting programs that have more stringent requirements than the NPDES program, *see* 33 U.S.C. § 1370(1); other state authorities and laws; interstate compacts; and international treaties. [36] The availability of these ***530** regulatory alternatives further points towards the reasonableness of the EPA's interpretation of the Act in the Water Transfers Rule.

With respect to other state authorities and laws, the Act "recognizes that states retain the primary role in planning the development and use of land and water resources, allocating quantities of water within their jurisdictions, and regulating water pollution, as long as those state regulations are not less stringent than the requirements set by the CWA." *Catskill II*, 451 F.3d at 79 (citations omitted). To these ends, states can rely on statutory authorities at their disposal for regulating the potentially negative water quality impacts of water transfers. [37] States can also enforce water quality standards through their certification authority under Section 401 of the Clean Water Act, which requires that applicants for federal licenses or permits obtain a state certification that any discharge of pollutants will comply with the water-quality standards applicable to the receiving water body. *See* 33 U.S.C. § 1341; *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386, 126 S.Ct. 1843, 164 L.Ed.2d 625 (2006); *PUD No. 1*, 511 U.S. at 712, 114 S.Ct. 1900.

States have still more regulatory tools at their disposal. State agencies may be granted specific authority to address particular pollution or threats of pollution. For example, in New York, the NYSDEC is authorized and directed to promulgate rules to protect the recreational uses—such as

trout fishing and canoeing—of waters affected by certain large reservoirs such as the Schoharie Reservoir. *See* N.Y. Envtl. Conserv. Law §§ 15–0801, 15–0805 (McKinney 2008). And as discussed above, states likely can also bring common-law nuisance suits to enjoin and abate pollution. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) ***531** (the common law of the state in which the point source is located can provide a basis for a legal challenge to an interstate discharge or transfer). Lastly, although water transfers apparently do not often have interstate or international effects, the States and the Federal Government can address any such effects through interstate compacts or treaties,[38] as well as Section 310 of the Clean Water Act, which authorizes an EPA-initiated procedure for abating international pollution, 33 U.S.C. § 1320. The existence of these available regulatory alternatives suggests that exempting water transfers from the NPDES permitting program would not necessarily defeat the fundamental water-quality aims of the Clean Water Act, which further counsels in favor of the reasonableness of the Water Transfers Rule. We need not now evaluate the effectiveness of such alternatives; we note only that their existence suggests that the Rule is reasonable.

The plaintiffs advance several other arguments against the reasonableness of the Water Transfers Rule's interpretation of the Clean Water Act. Ultimately, none persuades us that the Rule is an unreasonable interpretation of the Clean Water Act.

The plaintiffs first argue, as we have noted, that the Water Transfers Rule arises out of an unreasonable reading of the Act because it subverts the main objective of the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), by allowing "the transfer of water from a heavily polluted, even toxic, water body to one that was pristine," *Catskill II*, 451 F.3d at 81. While this is a powerful argument against the EPA's position, we are not convinced that it establishes that the Water Transfers Rule is an unreasonable interpretation of the Clean Water Act, which is "among the most complex" of federal statutes and "balances a welter of consistent and inconsistent goals." *Catskill I*, 273 F.3d at 494. Congress's overarching goal in passing the Act does not imply that the EPA could not accommodate some of the compromises and other policy concerns embedded in the statute in promulgating the Water Transfers Rule.

Some plaintiffs also argue that the EPA's interpretation of Section 402 contained in the Water Transfers Rule is unreasonable in light of the EPA's interpretation of Section 404. They point out that the EPA has interpreted the phrase "discharge of dredged ... material into the navigable waters" from Section 404 to require a permit when dredged material is moved from one location to another within the same water body, regardless of whether the dredged material is ever removed from the water. *See* 33 U.S.C. § 1344(a); 40 C.F.R. § 232.2. They argue that if moving dredged material from one part of a water body to another part of that same water body is an "addition ... into ... the waters of the United States," *see* 40 C.F.R. § 232.2, then it is unreasonable to say that the movement of heavily polluted water from one water body into a pristine water body is not also an "addition" to "waters" that would require an NPDES permit.

But Section 404 contains different language that suggests that a different interpretation of the term "addition" is appropriate in analyzing that section. Section 404 concerns "dredged material," which, as the EPA pointed out in the Water Transfers Rule, "by its very nature comes from a waterbody." 73 Fed. Reg. at 33,703. As the Fifth Circuit has observed, in the context of Section 404, one cannot reasonably interpret the phrase "addition ***532** ... into ... the waters of the United States" to refer only to the addition of dredged material from the "outside world"—that is, from outside the "waters of the United States"—because the dredged material comes from within the waters of the United States itself. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983). Interpreting Section 404 so as not to require permits for dredged material already present in "the waters of the United States" would effectively mean that dredged material would *never* be subject to Section 404 permitting, eviscerating Congress's intent to establish a dredge-and-fill permitting system. By contrast, Section 402 concerns a much broader class of pollutants than Section 404, and the Water Transfers Rule's interpretation of Section 402 would not require the dismantling of existing NPDES permitting programs. The EPA can therefore reasonably interpret what constitutes an "addition" into "the waters of the United States" differently under each provision.[39]

Finally, we think that the plaintiffs' reliance on *Clark v. Martinez*, 543 U.S. 371, 386–87, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005), and *Sorenson v. Sec'y of the Treasury of U.S.*, 475 U.S. 851, 860, 106 S.Ct. 1600, 89 L.Ed.2d 855 (1986), is misplaced. In *Clark*, the Supreme Court cautioned against "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark*, 543 U.S. at 386, 125 S.Ct. 716. But that cautionary statement

referred to an interpretation of a specific subsection of the Immigration and Nationality Act that would give a phrase one meaning when applied to the first of three categories of aliens, and another meaning when applied to the second of those categories. *See id.* at 377–78, 386, 125 S.Ct. 716. It does not follow that an agency cannot interpret similar, ambiguous statutory language in one section of a statute differently than similar language contained in another, entirely distinct section. In *Sorenson*, the Supreme Court noted in *dicta* that there is a presumption that "identical words used in different parts of the same act are intended to have the same meaning," 475 U.S. at 860, 106 S.Ct. 1600 (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87, 55 S.Ct. 50, 79 L.Ed. 211 (1934)). But this is no more than a presumption. It can be rebutted by evidence that Congress intended the words to be interpreted differently in each section, or to leave a gap for the agency to fill. *See Duke*, 549 U.S. at 575–76, 127 S.Ct. 1423 ("There is, then, no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically." (internal quotation marks omitted)). Here, there is evidence that Congress gave the EPA the discretion to interpret the terms "addition" and the broader phrases "addition ... to navigable waters" (Section 402) and "addition ... into ... the waters of the United States" (40 C.F.R. § 232.2, defining "discharge of dredged material" in Section 404) differently.

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* * *

In sum, the Water Transfers Rule's interpretation of the Clean Water Act—which exempts water transfers from the NPDES permitting program—is supported by several reasonable arguments. The EPA's interpretation need not be the "only possible interpretation," nor need it be "the interpretation deemed *most* reasonable." *Entergy*, 556 U.S. at 218, 129 S.Ct. 1498 (emphasis in original). And even though, as we note yet again, we might conclude that it is not the interpretation that would most effectively further the Clean Water Act's principal focus on water quality, it is reasonable nonetheless. Indeed, in light of the potentially serious and disruptive practical consequences of requiring NPDES permits for water transfers, the EPA's interpretation here involves the kind of "difficult policy choices that agencies are better equipped to make than courts." *Brand X*, 545 U.S. at 980, 125 S.Ct. 2688. Because the Water Transfers Rule is a reasonable construction of the Clean Water Act supported by a reasoned explanation, it survives deferential review under *Chevron*, and the district court's decision must therefore be reversed.

CONCLUSION

For the foregoing reasons, we defer under *Chevron* to the EPA's interpretation of the Clean Water Act in the Water Transfers Rule. Accordingly, we reverse the judgment of the district court and reinstate the challenged rule.

Chin, Circuit Judge, dissenting:
I respectfully dissent.

The Clean Water Act (the "Act") prohibits the "discharge of any pollutant by any person" from "any point source" to "navigable waters" of the United States, without a permit. 33 U.S.C. §§ 1311(a), 1362(12)(A). The question presented is whether a transfer of water containing pollutants from one body of water to another—say, in upstate New York, from the more-polluted Schoharie Reservoir through the Shandaken Tunnel to the less-polluted Esopus Creek—is subject to these provisions.

The United States Environmental Protection Agency ("EPA") takes the position that such a transfer is not covered, on what has been called the "unitary waters" theory—all water bodies in the United States, that is, all lakes, rivers, streams, etc., constitute a single unit, and therefore the transfer of water from a pollutant-laden water body to a pristine one is not an "addition" of pollutants to the "navigable waters" of the United States because the pollutants are already present in the overall single unit. Consequently, in a rule adopted in 2008 (the "Water Transfers Rule"), EPA determined that water transfers from one water body to another, without intervening industrial, municipal, or commercial activity, were excluded from the permitting requirements of the National Pollutant Discharge Elimination System ("NPDES"), even if dirty water was transferred from a polluted water body to a clean one. The majority holds that the Water Transfers Rule is a reasonable interpretation of the Act. I disagree.

As the majority notes, we evaluate EPA's interpretation of the Act under the two-step framework of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). At step one, we consider whether Congress has "unambiguously expressed" its intent. *Riverkeeper Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004). If so, we "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778. If the statute

is "silent or ambiguous," however, we turn to step two ***534** and determine " 'whether the agency's answer is based on a permissible construction of the statute,' which is to say, one that is 'reasonable,' not 'arbitrary, capricious, or manifestly contrary to the statute.' " *Riverkeeper*, 358 F.3d at 184 (quoting *Chevron*, 467 U.S. at 843-44, 104 S.Ct. 2778).

I would affirm the district court's decision to vacate the Water Transfers Rule. First, I would hold at *Chevron* step one that the plain language and structure of the Act is unambiguous and clearly expresses Congress's intent to prohibit the transfer of polluted water from one water body to another distinct water body without a permit. In my view, Congress did not intend to give a pass to interbasin transfers of dirty water, and excluding such transfers from permitting requirements is incompatible with the goal of the Act to protect our waters. [1] Second, prior decisions of this Court and the Supreme Court make clear that the unitary waters theory is inconsistent with the plain and ordinary meaning of the text of the Act and its purpose. Third, even assuming there is any ambiguity, I would hold at *Chevron* step two that the Water Transfers Rule is an unreasonable, arbitrary, and capricious interpretation of the Act. Accordingly, I dissent.

I

I begin with the language of the Act, its structure, and its purpose.

A. *The Statutory Language*

The Act provides that "the discharge of any pollutant by any person shall be unlawful," 33 U.S.C. § 1311(a), except to the extent allowed by other provisions, including, for example, those provisions establishing the NPDES permit program, 33 U.S.C. § 1342.

The Act defines "*discharge* of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (emphasis added). It defines "*pollutant*" to include solid, industrial, agricultural, and biological waste. *Id.* § 1362(6) (emphasis added). It defines "*navigable waters*" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7) (emphasis added). And it defines a "*point source*" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14) (emphasis added). The Act does not define the word "*addition*."

In my view, the plain language of the Act makes clear that the permitting requirements apply to water transfers from one distinct body of water through a conveyance to another. As noted, the Act prohibits "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). The transfer of contaminated water from a more-polluted water body through a conveyance, such as a tunnel, to a distinct, less-polluted water body is the "addition" of a pollutant (contained in the contaminated water) to "navigable waters" (the less-polluted water body) ***535** from a "point source" (the conveyance). In the context of this case, as we held in *Catskill I*:

> Here, water is artificially diverted from its natural course and travels several miles from the [Schoharie] Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility. When the water and the suspended sentiment therein passes from the Tunnel into the Creek, an "addition" of a "pollutant" from a "point source" has been made to a "navigable water," and the terms of the statute are satisfied.

273 F.3d at 492.

EPA contends that such a transfer of contaminated water, from a polluted body of water to a distinct and pristine one, is not an "addition" because all the waters of the United States are to be "considered collectively," EPA Br. at 2, that is, because the polluted and pristine bodies of water are both part of the waters of the United States and all the waters of the United States are considered to be one unit, the transfer of pollutants

from one part of the unit to another part is not an "addition." I do not believe the words of the Act can be so interpreted. The critical words for our purposes are "addition" and "navigable waters." I take them in reverse order.

1. *"Navigable Waters"*

EPA's position—accepted by the majority—requires us to add words to the Act, as we must construe "navigable waters" to mean "*all* the navigable waters of the United States, considered *collectively*." *Contra* *Dean v. United States*, 556 U.S. 568, 572, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009) (courts must "ordinarily resist reading words or elements into a statute that do not appear on its face") (quoting *Bates v. United States*, 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997)).

EPA also argues that if Congress had intended the NPDES permitting requirements to apply to individual water bodies, it would have inserted the word "any" before "navigable waters." *See* 33 U.S.C. § 1362(12)(A) ("any addition of any pollutant to navigable waters from any point source"). This interpretation is flawed, for the use of the plural "waters" obviates the need for the word "any." The use of the plural "waters" indicates that Congress was referring to individual water bodies, not one collective water body. The Supreme Court addressed this precise issue in its discussion of "the waters of the United States" in *Rapanos v. United States*. There the Court considered the issue of whether § 1362(7)'s definition of "navigable waters" meant "waters of the United States," and the Court squarely held that "waters" referred to "individual bodies," not one collective body:

> But "the waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") shows plainly that § 1362(7) *does not refer to water in general*. In this form, "the waters" refers more narrowly to water "[a]s found in streams and *bodies* forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or *bodies*." Webster's New International Dictionary 2882.

547 U.S. 715, 732, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (alterations in original) (emphases added). Hence, the Supreme Court concluded the plural form "waters" does not refer to "water in general," but to ***536** water *bodies* such as streams, lakes and ponds. [2]

As the majority acknowledges, the Act contains multiple provisions suggesting that the term "navigable waters" refers to multiple water bodies, not one national collective water body. Op. at 513 (citing 33 U.S.C. §§ 1313(c)(2)(A), (c)(4), 1313(d)(1)(B), 1314(2), 1314(f)(2)(F), 1314(l)(1)(A)-(B), 1342). [3] Likewise, EPA's own regulations suggest that "navigable waters" refers to individual water bodies. For example, 40 C.F.R. § 122.45(g)(4) regulates intake credits. As the Supreme Court has observed, this regulation is incompatible with the "unitary waters" theory:

> The "unitary waters" approach could also conflict with current NPDES regulations. For example, 40 C.F.R. § 122.45(g)(4)(2003) allows an industrial water user to obtain "intake credit" for pollutants present in the water that it withdraws from navigable waters. When the permit holder discharges the water after use, it does not have to remove pollutants that were in the water before it was withdrawn. There is a caveat, however: EPA extends such credit "only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made." The NPDES program thus appears to address the movement of pollutants among water bodies, at least at times.

S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 107–08, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004). In all of these instances, the phrase "navigable waters" refers to individual water bodies and not one collective national water body. Indeed, neither the majority nor the parties have identified a single provision in the Act where "navigable waters" refers to the waters of the United States as a unitary whole.

2. *"Addition"*

EPA's interpretation also requires us to twist the meaning of the word "addition." ***537** Because the word "addition" is not defined in the Act, we consider its common meaning. *See* *S.D. Warren Co. v. Me. Bd. of Environ. Prot.*, 547 U.S. 370, 376, 126 S.Ct. 1843, 164 L.Ed.2d 625 (2006) (in considering the definition of "discharge" in 33 U.S.C. § 1362(12), noting that where a word is "neither defined in the statute nor a term of art, we are left to construe it 'in accordance with its ordinary or natural meaning' " (citing *FDIC v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994))); *see also* *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979) (words should be interpreted according to their "ordinary, contemporary, common meaning").

The ordinary meaning of "addition" is "the result of adding: anything added: increase, augmentation." *Webster's Third New International Dictionary of the English Language Unabridged* 24 (1968); *see also Webster's New World Dictionary of the American Language* 16 (2d College ed. 1970 and 1972) ("a joining of a thing to another thing"). Transferring water containing pollutants from a polluted water body to a clean water body is "adding" something to the latter; there is an "addition"—an increase in the number of pollutants in the second water body. In this context, "addition" means adding a pollutant to "navigable waters" when that pollutant would not otherwise have been in those "navigable waters." Words should be given their "contextually appropriate ordinary meaning," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 70 (2012), and the context here is a statute intended to eliminate water pollution discharges. *See* Catskill I, 273 F.3d at 486. That context makes clear that the word "addition" encompasses an increase in pollution caused by an interbasin transfer of water.

The plain words of the statute thus make clear that Congress did not intend to except water transfers from §§ 1311 and 1362 of the Act.

B. *The Structure of the Act*

Congress's intent to require a permit for interbasin water transfers is even clearer when we consider the statutory language in light of the Act's structure. In determining whether Congress has spoken to the precise question at issue, we consider the words of the statute in "their context and with a view to their place in the overall statutory scheme," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000), because "the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context," *King v. Burwell*, —— U.S. ——, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) (citing *Brown & Williamson*, 529 U.S. at 133, 120 S.Ct. 1291); *see also Util. Air Regulatory Grp. v. EPA*, —— U.S. ——, 134 S.Ct. 2427, 2442, 189 L.Ed.2d 372 (2014) ("reasonable statutory interpretation must account for both 'the specific context in which ... language is used' and 'the broader context of the statute as a whole' " (citations omitted)); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) (a "fundamental canon of statutory construction" is "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

Here, EPA's "unitary waters" theory, when considered in the context of other provisions of the Act, contravenes Congress's unambiguous intent to subject interbasin transfers to permitting requirements and is therefore unreasonable. *See King*, 135 S.Ct. at 2489 (a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory ***538** scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law" (citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988))).

First, the Water Transfers Rule creates an exemption to permitting requirements, in violation of the canon *expressio unius est exclusio alterius*, which cautions against finding implied exceptions where Congress has created explicit ones. Section 1311(a) of the Act prohibits "[t]he discharge of any pollutant by any person." 33 U.S.C. § 1311(a). The Supreme Court has held that "*every* point source discharge" is covered by the Act:

> Congress' intent in enacting the [1972] Amendments [to the Federal Water Pollution Control Act] was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals. The "major purpose" of the Amendments was clearly to "establish a *comprehensive* long-range policy for the elimination of water pollution." S. Rep. No. 92-414, at 95, 2 Leg. Hist. 1511 (emphasis supplied). No Congressman's remarks on the legislation were complete without reference to the "comprehensive" nature of the Amendments.

See City of Milwaukee v. Illinois, 451 U.S. 304, 318, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981).

Congress created specific exceptions to the prohibition on the discharge of pollutants, as § 1311(a) bans such discharges "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344." 33 U.S.C. § 1311(a). These include specific exemptions to the NPDES permitting requirements for, *e.g.*, return flows from irrigated agriculture, 33 U.S.C. § 1342(l)(1), stormwater runoff, 33 U.S.C. § 1342(l)(2), and discharging dredged or fill material

into navigable waters, 33 U.S.C. § 1344(a). Congress did not create an exception for interbasin water transfers.

It is well-settled that when exceptions are explicitly enumerated, courts should not infer additional exceptions. *See Hillman v. Maretta*, —— U.S. ——, 133 S.Ct. 1943, 1953, 186 L.Ed.2d 43 (2013) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent." (citing *Andrus v. Glover Constr., Co.*, 446 U.S. 608, 616–617, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980))). This prohibition against implying exceptions has been applied to the Act's permitting requirements. *See NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) ("The wording of the statute, legislative history and precedents are clear: the EPA Administrator does not have authority to except categories of point sources from the permit requirements of § [1342]"); *Nw. Envir. Advocates v. EPA*, 537 F.3d 1006, 1021–22 (9th Cir. 2008) (EPA may not "exempt certain categories of discharge from the permitting requirement"); *N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003) ("Only Congress may amend the CWA to create exemptions from regulation."). Defendants' position that all water transfers between water bodies are exempt from § 1342 permitting requirements is a substantial exemption that Congress did not create.

Second, the Act also sets forth a specific plan for individual water bodies. The Act requires States to establish water-quality standards for each distinct water body ***539** within its borders. *See* 33 U.S.C. § 1313(c)(1), (2)(A). To establish water-quality standards, a State must designate a use for every waterway and establish criteria for "the amounts of pollutants that may be present in [those] water bodies without impairing" their uses. *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 (1st Cir. 2012) (citing 33 U.S.C. § 1313(c)(2)(A)). The NPDES permit program is "the primary means" by which the Act seeks to achieve its water-protection goals. *Arkansas v. Oklahoma*, 503 U.S. 91, 101–02, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992). The NPDES program covers all "point sources," including "any pipe, ditch, channel, [or] tunnel," 33 U.S.C. § 1362(14), and a broad range of pollutants, including chemicals, biological materials, rock, and sand, *id.* § 1362(6).

This carefully designed plan to fight water pollution would be severely undermined by an EPA-created exception for water transfers. A State's efforts to control water-quality standards in its individual lakes, rivers, and streams would be disrupted if contaminated water could be transferred from a polluted water body to a pristine one without a NPDES permit. It is hard to imagine that Congress could have intended such a broad and potentially devastating exception. Indeed, exempting water transfers from the NPDES program would undermine the ability of downstream States to protect themselves from the pollution generated by upstream States. The NPDES program provides a procedure for resolving disputes between States over discharges. *See Upper Blackstone Water Pollution Abatement Dist.,* 690 F.3d at 15 (citing *City of Milwaukee,* 451 U.S. at 325–26, 101 S.Ct. 1784). When a State applies for a permit that may affect the water quality of a downstream State, EPA must notify the applying State and the downstream State. If the downstream State determines that the discharge "will violate its water quality standards, it may submit its objections and request a public hearing." *Id.* If water transfers are exempt from NPDES requirements, the ability of downstream States to protect themselves from upstream states sending their pollution across the border will be severely curtailed. [4]

The City and certain of the States argue that subjecting water transfers to permitting requirements will be extremely burdensome. As we have repeatedly recognized, however, there is ample flexibility in the NPDES permitting process to address dischargers' concerns. *See Catskill Mountains v. EPA*, 451 F.3d 77, 85–86 (2d Cir. 2006) (*"Catskill II"*); *see also Nw. Envtl.,* 537 F.3d at 1010 ("Obtaining a permit under the CWA need not be an onerous process."). The draft permit issued in this case allows for variable turbidity level restrictions by season and exemptions from ***540** the limitations in times of drought to remedy emergency threats or threats to public health or safety. *Catskill II,* 451 F.3d at 86. Point source operators can also seek a variance from limits. *See* 40 C.F.R. § 125.3(b).

In addition, much of the concern over water transfers involved agricultural use, but water diversions from a "navigable water" for agricultural use direct water *away* from a "navigable water," and thus do not trigger the need for a § 402 permit. Waters returning to a "navigable water" which are "agricultural stormwater discharges" and "return flows from irrigated agriculture" are specifically exempted from the statutory definition of "point source." 33 U.S.C. § 1362(14); *see also* 33 U.S.C. § 1342(l) (exempting "discharges composed entirely of return flows from irrigated agriculture" from permitting requirements).

Thus, the catastrophic results of applying NPDES permits to water transfers bemoaned by appellants are exaggerated. [5]

Third, as discussed above, Congress used the phrase "navigable waters" to refer to individual water bodies in numerous provisions of the Act. Another well-settled rule of statutory interpretation holds that the same words in a statute bear the same meaning. *See Sullivan v. Stroop,* 496 U.S. 478, 483, 110 S.Ct. 2499, 110 L.Ed.2d 438 (1990) ("the 'normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning.' " (internal citations omitted)); *Prus v. Holder*, 660 F.3d 144, 147 (2d Cir. 2011) ("the normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning"). When the Act is read as a whole, it is clear that Congress did not intend the phrase "navigable waters" to be interpreted as a single water body because that interpretation is "inconsisten[t] with the design and structure of the statute as a whole." *Utility Air*, 134 S.Ct. at 2442; *see also* Scalia & Garner, *Reading Law* 63 ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.").

Accordingly, in my opinion, the structure and context of the Act show clearly that Congress did not intend to exempt water transfers from the permitting requirements.

C. *The Purpose of the Act*

The Act was passed in 1972 to address environmental harms caused by the discharge of pollutants into water bodies. As the Act itself explains, its purpose was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *accord Miccosukee*, 541 U.S. at 102, 124 S.Ct. 1537; *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 490–91 (2d Cir. 2005); *see also Catskill I*, 273 F.3d at 486 ("[T]he Act contains the lofty goal of eliminating water pollution discharges altogether.").

The Water Transfers Rule is simply inconsistent with the purpose of the Act and undermines the NPDES permit program. It creates a broad exemption that will manifestly interfere with Congress's desire to eliminate water pollution discharges. As the majority acknowledges, water transfers are a real concern. Artificial transfers of contaminated water present substantial risks to water quality, the environment, the economy, and public health. If interbasin ***541** transfers are not regulated, there is a substantial risk that industrial waste, toxic algae, invasive species, and human and animal contaminants will flow from one water body to another. Accepting the argument that water transfers are not covered by the Act on the theory that pollutants are not being added but merely moved around surely undermines Congress's intent to restore and maintain the integrity of our waters. *See* Robert A. Katzmann, *Judging Statutes* 31 (2014) ("The task of the judge is to make sense of legislation in a way that is faithful to Congress's purposes.").

In sum, based on the plain words of §§ 1311 and 1362, the structure and design of the Act, and its overall purpose, I would hold that Congress has "unambiguously expressed" its intent to subject water transfers to the Act's permitting requirements.

II

As the majority notes, our Court has twice interpreted these precise provisions of the Act as applied to these very facts. *See Catskill I*, 273 F.3d at 484–85; *Catskill II*, 451 F.3d at 79–80. The decisions are not controlling, however, because EPA had not yet adopted the Water Transfers Rule and we conducted our review under a different deference standard. *See Catskill I*, 273 F.3d at 490 ("If the EPA's position had been adopted in a rulemaking or other formal proceeding, [*Chevron*] deference *might* be appropriate." (emphasis added)); *Catskill II*, 451 F.3d at 82 ("The City concedes that this EPA interpretation is not entitled to *Chevron* deference."). Nonetheless, the two decisions are particularly helpful to the analysis at hand. Similarly, Supreme Court decisions have also suggested that EPA's unitary waters theory is inconsistent with the plain wording of the Act.

A. *Catskill I and II*

In *Catskill I* and *II*, we conducted our inquiry under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), and *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). *See Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 83 n.5. [6] Our application of the *Skidmore/Mead* framework does not imply that we found the Act to be ambiguous. Rather, to the contrary, we concluded in *Catskill I* and *II* that the meaning of the Act was plain and unambiguous.

1. *Skidmore*

Under *Skidmore,* the court applies a lower level of deference to certain agency interpretations and considers "the agency's expertise, the care it took in reaching its conclusions, the formality with which it promulgates its interpretations, the consistency of its views over time, and the ultimate persuasiveness of its arguments." ***542** *Community Health Ctr. v. Wilson–Coker*, 311 F.3d 132, 138 (2d Cir. 2002); *accord In re New Times Sec. Servs., Inc.*, 371 F.3d 68, 83 (2d Cir. 2004); *see Skidmore*, 323 U.S. at 140, 65 S.Ct. 161. The appropriate level of deference afforded an agency's interpretation of a statute depends on its "power to persuade." *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). Unlike *Chevron*, however, *Skidmore* does not require a court to make a threshold finding that the statute is ambiguous before considering the persuasiveness of the agency's interpretation. Instead, *Skidmore* merely supplies the appropriate framework for reviewing agency interpretations that "lack the force of law." *Id.*

As the majority notes, the Supreme Court has never explicitly held that courts must find ambiguity before applying the *Skidmore* framework. While there is some scholarly authority for the proposition that " 'the *Skidmore* standard implicitly replicates *Chevron*'s first step,' " Op. at 510 (quoting Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard,* 107 Colum. L. Rev. 1235, 1247 (2007)), the Supreme Court has decided numerous cases under *Skidmore* without finding that a statute's language was ambiguous, *see, e.g., EEOC v. Arabian American Oil*, 499 U.S. 244, 257, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (applying *Skidmore* without finding ambiguity in statute and noting that agency's interpretation "lacks support in the plain language of the statute"); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11, 100 S.Ct. 883, 63 L.Ed.2d 154 (1980) (applying *Skidmore* without finding ambiguity in statute and holding that regulation was permissible after considering statute's "language, structure and legislative history"); *see generally* Richard J. Pierce, Jr., I *Admin. L. Treatise* § 6.4 (5th ed. 2010).

Of course, the Supreme Court did not hold, in either *Skidmore* or *Mead*, that ambiguity was a threshold requirement to applying the framework. *See Mead*, 533 U.S. at 235, 121 S.Ct. 2164 (An agency ruling is entitled to "respect proportional to its 'power to persuade,'.... Such a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, and any other sources of weight." (citations omitted)); *Skidmore*, 323 U.S. at 164, 65 S.Ct. 161 ("The weight of [an agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). Rather, the *Skidmore/Mead* framework adopts a less rigid, more flexible approach, *see U.S. Freightways Corp. v. Comm'r*, 270 F.3d 1137, 1142 (7th Cir. 2001) (referring to "the flexible approach *Mead* described, relying on ... *Skidmore*"), as it presents "a more nuanced, context-sensitive rubric" for determining the level of deference a court will give to an agency interpretation, Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 836 (2001); *see also* Pierce, *supra*, § 6.4, at 444 ("The Court has referred to a variety of factors that can give an agency statement 'power to persuade.' ... [N]o single factor is dispositive....").

Ambiguity in a statute, of course, can be a factor, and in the sliding-scale analysis of the *Skidmore/Mead* framework, the "power to persuade" of an agency determination can be affected by the clarity—or lack thereof—of the statute it is interpreting. Indeed, upon applying the *Skidmore/Mead* framework, a court may uphold—or reject—an agency interpretation because the interpretation is consistent with—or contradicts—a statute whose meaning is clear. *See* Pierce, *supra*, § 6.4, at 443. Here, we ***543** did not defer to the agency's interpretation of the Act in *Catskill I* and *II,* precisely because the Water Transfers Rule contravened the plain meaning of the Act.

2. *The Plain Meaning of the Act*

The majority dismisses the notion that we ruled on the plain meaning of the Act in *Catskill I* and *II,* asserting that there were only a "few references to 'plain meaning' " in our decisions. Op. at 510. To the contrary, through both our words and our reasoning, we made clear repeatedly in *Catskill I* and *II* that the agency's unitary waters theory was inconsistent with the unambiguous plain meaning of the Act.

In *Catskill I*, we held that defendants' interpretation was "inconsistent with the *ordinary meaning* of the word 'addition.' " 273 F.3d at 493 (emphasis added). Specifically, we held that there is an "addition" of a pollutant into navigable water from the "outside world"—thus triggering the permitting requirement—any time such an "addition" is from "*any place* outside the particular water body to which

pollutants are introduced." *Id.* at 491 (emphasis added). We reasoned that:

> Given the *ordinary meaning* of the [Act]'s text and our holding in *Dague*, we cannot accept the *Gorsuch* and *Consumers Power* courts' understanding of "addition," at least insofar as it implies acceptance of what the *Dubois* court called a "singular entity" theory of navigable waters, in which an addition to one water body is deemed an addition to all of the waters of the United States.... We properly rejected that approach in *Dague*. *Such a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants*. Such an interpretation is *inconsistent with the ordinary meaning* of the word "addition."

Id. at 493 (emphases added). [7] As a result, we held that "the transfer of water containing pollutants from one body of water to another, distinct body of water is *plainly* an addition and thus a 'discharge' that demands an NPDES permit." *Id.* at 491 (emphasis added). Accordingly, we clearly were relying on the plain meaning of the Act in reaching our conclusion.

We also noted that "[e]ven if we were to conclude that the proper application of the statutory text to the present facts was sufficiently ambiguous to justify reliance on the legislative history of the statute, ... that source of legislative intent would not help the City." 273 F.3d at 493. That language certainly makes clear we concluded the statutory text was *not* ambiguous.

Finally, in the penultimate paragraph of *Catskill I*, we made absolutely clear that our holding was based on the plain meaning of the statutory text. We held:

> In any event, none of the statute's broad purposes sways us from what we find to be the *plain meaning of its text*.... Where a statute seeks to balance competing policies, congressional intent is ***544** not served by elevating one policy above the others, particularly where the balance struck *in the text* is *sufficiently clear to point to an answer*. We find that the *textual* requirements of the discharge prohibition in § 1331(a) and the definition of "discharge of a pollutant" in § 1362(12) are met here.

Id. at 494 (emphases added). [8]

Our analysis in *Catskill II* was similar, as we dismissed defendants' arguments as merely "warmed-up" versions of those rejected in *Catskill I*, made no more compelling by EPA's new "holistic" interpretation of the statute. 451 F.3d at 82. We rejected New York City's " 'holistic arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute,' " because, we concluded, they "simply overlook its *plain language*." *Id.* at 84. (emphasis added). We noted our dismissal of the unitary waters theory in *Catskill I* based on the ordinary meaning of the word "addition":

> We also rejected the City's "unitary water" theory of navigable waters, which posits that all of the navigable waters of the United States constitute a single water body, such that the transfer of water from any body of water that is part of the navigable waters to any other could never be an addition. We pointed out that this theory would lead to the *absurd result* that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an "addition" of pollutants

> and would not be subject to the [Act]'s NPDES permit requirements. *Catskills I* rejected the "unitary water" theory as inconsistent with the *ordinary meaning* of the word "addition."

Id. at 81 (emphasis added) (internal citations omitted). Again, we considered the very interpretation of "navigable waters" proffered in the current appeal and rejected it based on "the plain meaning" of the Act's text. *Id.* at 82. [9]

I do not suggest that we are bound by our prior decisions. But in both decisions, we carefully considered the statutory language, and in both decisions, based on the plain wording of the text, we rejected an interpretation of §§ 1311 and 1362 that construes "navigable waters" and "the waters of the United States" to mean a single ***545** water body. Hence, we have twice rejected the theory based on the plain language of the Act. That plain language has not changed, and neither should our conclusion as to its meaning.

B. *The Supreme Court Precedents*

Finally, although the Supreme Court has not explicitly ruled on the validity of EPA's "unitary waters" theory, it has expressed serious reservations. In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004), the Court strongly suggested that the theory is not reasonable. First, the Court remanded for fact-finding on whether the two water bodies at issue were "meaningfully distinct water bodies." 541 U.S. at 112, 124 S.Ct. 1537. That disposition follows from Judge Walker's soup ladle analogy in *Catskill I*: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle)." 273 F.3d at 492. In *Catskill II*, we noted that such a transfer would be an intrabasin transfer, from one water body back into the same water body, and we then applied the analogy to the facts of this case: "The Tunnel's discharge ... was like scooping soup from one pot and depositing it in another pot, thereby adding soup to the second pot, an interbasin transfer." 451 F.3d at 81. In *Miccosukee*, the Supreme Court cited the "soup ladle" analogy with approval, and remanded the case to the district court to determine whether the water bodies in question were "two pots of soup, not one." 541 U.S. at 109–10, 124 S.Ct. 1537; *see also id.* at 112, 124 S.Ct. 1537. If the "unitary waters" theory were valid, however, there would have been no need to resolve this factual question. If all the navigable waters of the United States were deemed one collective national body, there would be no need to consider whether individual water bodies were distinct—there would be no need to determine whether there were two pots of soup or one.

Second, as previously discussed, the Court observed that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." *Id.* at 107, 124 S.Ct. 1537. The Court noted that under the Act, states "may set individualized ambient water quality standards by taking into consideration 'the designated uses of the navigable waters involved,' " thereby affecting local NPDES permits. *Id.* (quoting 33 U.S.C. § 1313(c)(2)(A)). "This approach," the Court wrote, "suggests that the Act protects individual water bodies as well as the 'waters of the United States' as a whole." *Id.* [10]

Subsequent Supreme Court decisions support this reading of *Miccosukee*. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.,* the Supreme Court held that a water transfer between one portion of a river through a concrete channel to a lower portion of the same river did not trigger a NPDES permit requirement. —— U.S. ——, 133 S.Ct. 710, 184 L.Ed.2d 547 (2013). The Court observed that "[w]e held [in *Miccosukee*] that th[e] water transfer would count as a discharge of pollutants under the CWA *only if* the canal and the reservoir were 'meaningfully distinct water bodies.' " *Id.* at 713 (emphasis added) (citations omitted). In holding that "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA," *id.* the Court again suggested ***546** that it *would* be a discharge of pollutants if the transfer were between two *different* water bodies.

In *Miccosukee*, the Supreme Court acknowledged the concerns that have been raised about the burdens of permitting, but also observed that "it may be that such permitting authority is *necessary to protect water quality*, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs." 541 U.S. at 108, 124 S.Ct. 1537 (emphasis added). Indeed, recognizing the importance of safeguarding drinking water, Congress created an extensive

system to protect this precious resource, a system that would be undermined by exempting interbasin water transfers.

Hence, the Supreme Court's decisions in *Miccosukee* and *Los Angeles County* support the conclusion that water transfers between two distinct water bodies are not exempt from the Act.

III

In my view, then, Congress has "unambiguously expressed" its intent to subject interbasin water transfers to the requirements of §§ 1311 and 1362 of the Act. Accordingly, I would affirm the judgment of the district court based on step one of *Chevron*. Even assuming, however, that the statutory text is ambiguous, I agree with the district court that the Water Transfers Rule also fails at *Chevron* step two because it is an unreasonable and manifestly contrary interpretation of the Act, largely for the reasons set forth in the district court's thorough and carefully-reasoned decision. I add the following:

First, *Chevron* deference has its limits. "Deference does not mean acquiescence," *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992), and "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking," *Judulang v. Holder*, 565 U.S. 42, 132 S.Ct. 476, 484–85, 181 L.Ed.2d 449 (2011).

Second, an agency's interpretation of an ambiguous statute is not entitled to deference where the interpretation is "at odds" with the statute's "manifest purpose," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001), or the agency's actions " 'deviate from or ignore the ascertainable legislative intent,' " *Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 867 (D.C. Cir. 2000) (quoting *Small Refiner Lead Phase–Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983)). *See* Katzmann, *Judging Statutes* 31 ("The task of the judge is to make sense of legislation in a way that is faithful to Congress's purposes. When the text is ambiguous, a court is to provide the meaning that the legislature intended. In that circumstance, the judge gleans the purpose and policy underlying the legislation and deduces the outcome most consistent with those purposes."). As discussed above, in my view the Water Transfers Rule is manifestly at odds with Congress's clear intent in passing the Act.

Third, the Water Transfers Rule is not entitled to deference because it will lead to absurd results. *See Michigan v. EPA*, —— U.S. ——, 135 S.Ct. 2699, 2707, 192 L.Ed.2d 674 (2015) ("No regulation is 'appropriate' if it does 'significantly more harm than good.' "); *see also* Scalia & Garner, *Reading Law* 234 ("A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve."). Indeed, this Court has already held—twice—that the "unitary waters" theory would lead to absurd results. In *Catskill I*, we concluded that "[n]o one can *reasonably* argue that the water in the Reservoir and the Esopus are in any ***547** sense the 'same,' such that 'addition' of one to the other is a logical impossibility." 273 F.3d at 492 (emphasis added). In *Catskill II*, we rejected the "unitary water" theory for a second time, observing that it "would lead to the *absurd* result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an 'addition' of pollutants." 451 F.3d at 81 (emphasis added). It would be an absurd result indeed for the Act to be read to allow the unlimited transfer of polluted water to clean water. Clean drinking water is a precious resource, and Congress painstakingly created an elaborate permitting system to protect it. Deference has its limits; I would not defer to an agency interpretation that threatens to undermine that entire system.

* * *

I would affirm the judgment of the district court, and, accordingly, I dissent.

All Citations

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Footnotes

1 Peter D. Nichols also appeared at oral argument on behalf of Intervenor-Defendants-Appellants-Cross Appellees States of Colorado, New Mexico, Alaska, Arizona (Department of Water Resources), Idaho, Nebraska, Nevada, North Dakota, Texas, Utah, and Wyoming.

2 Samuel Taylor Coleridge, *The Rime of the Ancient Mariner* pt. II, st. 9 (1798) (as many high school students likely already know).

3 For a New York State Department of Environmental Conservation map of the system, *see* New York City's Water Supply System, N.Y.C. Dep't of Envtl. Prot., http://www.dec.ny.gov/docs/water_pdf/nycsystem.pdf (last visited July 18, 2016), *archived at* https://perma.cc/JG4J-FP3E.

4 The reservoir is "roughly 110 miles from New York City.... [It] is one of two reservoirs in the City's Catskill system, and the northernmost reservoir in the entire [New York City] Water Supply System." *Schoharie*, N.Y.C. Dep't of Envtl. Prot., http://www.nyc.gov/html/dep/html/watershed_protection/schoharie.shtml (last visited July 18, 2016), *archived at* https://perma.cc/ZPV4-EPCZ.

5 *See generally* *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 561–62 (2d Cir. 2015).

6 The parties and *amici* (we use the abbreviations here that we adopt for the remainder of this opinion) have filed sixteen briefs taking opposing positions on the validity of the Water Transfers Rule, as follows:

- Anti-Water Transfers Rule:
- The States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, and Washington, and the Province of Manitoba (collectively, the "Anti-Rule States").
- Leon G. Billings *et al.*
- The Miccosukee Tribe of Indians of Florida *et al.*
- Catskill Mountains Chapter of Trout Unlimited, Inc. *et al.* (collectively, the "Sportsmen and Environmental Organization Plaintiffs").
- Pro-Water Transfers Rule:
- The State of California.
- The United States Environmental Protection Agency and Gina McCarthy (collectively, the "EPA").
- The American Farm Bureau Federation and Florida Farm Bureau Federation (collectively, the "Farmer *Amici*").
- National Hydropower Association *et al.* (collectively, the "Hydropower *Amici*").
- The City of New York ("NYC").
- South Florida Water Management District.
- Central Arizona Water Conservation District *et al.* (the "Water Districts").
- The States of Colorado, New Mexico, Alaska, Arizona (Department of Water Resources), Idaho, Nebraska, Nevada, North Dakota, Texas, Utah, and Wyoming (the "Western States," and, together with the Water Districts, the "Western Parties").

7 *See, e.g.*, Michael Rotman, *Cuyahoga River Fire*, Cleveland Historical, *http://clevelandhistorical.org/items/show/63#.V0XS7eRcjRs* (last visited July 18, 2016), *archived at* https://perma.cc/5VVP-TTAY.

8 A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," other than in the case of "agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14).

9 The EPA has authorized forty-six states and the U.S. Virgin Islands to implement the NPDES program. *NPDES State Program Information*, EPA, https://www.epa.gov/npdes/npdes-state-program-information (last updated Feb. 19, 2016; last visited July 18, 2016), *archived at* https://perma.cc/7M4V-469F.

10 The Act's statement regarding the preservation of states' water-allocation authority was added by the Clean Water Act of 1977, also known as the "1977 Amendments" to the Act. *See* Pub L. No. 95–217, § 5(a), 91 Stat. 1566, 1567 (codified as amended at 33 U.S.C. § 1251(g)).

11 In this section, we refer to the contents of various documents supplied by the parties and *amici*. This information was not admitted into evidence in any judicial proceeding. We think, though, that it is at least plausible, and that even when treated as part of the argument, it supplies a general picture of the factual background of this appeal against which our legal conclusions may better be understood.

12 Pennsylvania is the only NPDES permitting authority that regularly issues NPDES permits for water transfers. *See* Water Transfers Rule, 73 Fed. Reg. at 33,699 pt. II.

13 The Rule added a new subsection to 40 C.F.R. § 122.3, which lists the pollutant discharges that are exempted from NPDES permitting. The new subsection provides:

> Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

40 C.F.R. § 122.3(i).

14 "Waters of the U.S." are defined for purposes of the NPDES program in 40 C.F.R. § 122.2, but without addressing what precisely is within the scope of the term, Water Transfers Rule, 73 Fed. Reg. at 33,699 n.2. In 2015, the EPA and the U.S. Army Corps of Engineers adopted a new rule modifying the definition of "waters of the United States." Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,055-37,056 (June 29, 2015). "That rule is currently stayed nationwide, pending resolution of claims that the rule is arbitrary, capricious, and contrary to law." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, —— U.S. ——, 136 S.Ct. 1807, 1812 n.1, 195 L.Ed.2d 77 (2016) (citing *In re EPA*, 803 F.3d 804, 807–09 (6th Cir. 2015)). Regardless of how expansively the term is interpreted, we would still be faced with the question of whether the EPA could permissibly exempt from NPDES permitting the transfer of water from one "water of the U.S." to another "water of the U.S."

15 The Anti-Rule States also sought a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

16 In addition to the City of New York, the New York City Department of Environmental Protection and its Commissioner at the time, Joel A. Miele, Sr., were also defendants in *Catskill I*.

17 Turbid water is water carrying high levels of solids in suspension. *Catskill I*, 273 F.3d at 488.

18 The Supreme Court's 2001 decision in *Mead* breathed new life into *Skidmore*, which as one court recently put it, "has had a rough go of it ever since the birth of *Chevron*. Like the figurative older child neglected in the wake of a new sibling's arrival, in 1984 *Skidmore* was relegated to the status of an administrative law sideshow while the courts fawned over *Chevron*." *Angiotech Pharmaceuticals Inc. v. Lee*, 191 F.Supp.3d 509, 616, (E.D. Va. 2016) (Ellis, J.). Remarkably, "by the age of just three and a half years, courts had cited *Chevron* over six hundred times, and by the time *Chevron* turned sixteen," a year before *Mead*, "some were ready to declare *Skidmore* dead altogether." *Id.* (collecting cases and secondary sources).

19 *Skidmore* deference would be inappropriate with respect to an agency interpretation that is inconsistent with unambiguous statutory text. But with respect to an agency interpretation consistent with the unambiguous text, *Skidmore* deference would simply be unnecessary.

20 The dissent stresses that *Skidmore* analysis is flexible and that the clarity of statutory language is one factor among many in assessing an agency interpretation's power to persuade. *See* Dissent at 542. *Skidmore* is not, however, so flexible that a court could accord *Skidmore* deference to an agency interpretation inconsistent with unambiguous statutory text. Any interpretation inconsistent with unambiguous statutory language necessarily lacks persuasive power. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11, 100 S.Ct. 883, 63 L.Ed.2d 154 (1980) (explaining that "[a] regulation is [not] entitled to deference" under *Skidmore* if "it can be said not to be a reasoned and supportable interpretation of the [statute]").

21 *See supra* note 8 for the definition of "point source" contained it 33 U.S.C. § 1362(14).

22 In *Catskill I*, we also discussed the so-called "dams cases," *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). In these opinions, the District of Columbia and Sixth Circuits deferred to the EPA's position that water released back into the same surrounding water from which it was taken is not an "addition" to navigable waters under the CWA, even though the water so released contained material that either was or could be considered a pollutant. *Gorsuch*, 693 F.2d at 174–75, 183; *Consumers Power*, 862 F.2d at 584–87, 589. We noted that our definition of "addition" was consistent with the holdings in the dams cases, because "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Catskill I*, 273 F.3d at 492. We explained that *Catskill I* was factually distinguishable from those cases because it involved the discharge of water from one distinct body of water (the Schoharie Reservoir) into another (the Esopus Creek). *Id.* at 491–92. *Gorsuch* and *Consumers Power* have no bearing on the meaning of the term "navigable waters" because the discharges at issue in those cases would not constitute "addition[s] ... to navigable waters" either under a unitary-waters theory (because the potential pollutants in the dams cases were already within the navigable waters) or a non-unitary-waters theory (because those potential pollutants were not transferred from one navigable water body to another). These two cases therefore have no bearing on the outcome of this appeal.

23 We find the dissent's arguments relating to the ordinary meaning of the term "addition" to be unpersuasive. *See* Dissent at 536–37. We agree that the ordinary meaning of that term refers to an increase or an augmentation. But that dictionary definition does not answer the question at issue here: whether such an increase or augmentation occurs when a pollutant is moved from one body of water to another. In addressing that question, we must consider the entire statutory phrase, "addition ... to navigable waters," not simply the definition of the term "addition."

24 Contrary to the dissent's suggestion, the Supreme Court's holding in *Rapanos* does not compel the conclusion that the statutory phrase "navigable waters" is unambiguous because that phrase, unlike the phrase addressed in *Rapanos*, is not limited by a definite article. *See* Dissent at 535–37.

25 The dissent's argument proceeds as follows: (1) the Act imposes a general ban on "the discharge of any pollutant," defined by Section 502 as "any addition ... to navigable waters"; (2) the Act specifies certain exemptions to the general ban; and (3) the Water Transfers Rule must be rejected because it effectively creates an implied exemption to the general ban on the discharge of pollutants. *See* Dissent at 537–39. This strikes us as decidedly circular: It presupposes that the scope of the general ban on the discharge of pollutants, as defined by Section 502, extends to water transfers in order to conclude that the Water Transfers Rule is an exemption from that general ban. This argument, therefore, is unhelpful because it sidesteps the question at issue here—whether "any addition ... to navigable waters" is ambiguous.

26 Although common-law nuisance and trespass lawsuits may take a long time to work through the court system, preliminary injunctions may be available in urgent cases.

27 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

28 There is no reason to think that applying the NPDES program to water transfers would turn the prior appropriation doctrine ("first in time, first in right") on its head, as some of the defendants insist. *See* Western States Br. 31-32. NPDES permits merely put restrictions on water discharges, without changing priority or ownership rights.

29 The dissent asserts that in reaching this conclusion we are effectively construing "navigable waters" to mean all the navigable waters of the United States, collectively. *See* Dissent at 535. Not so: By concluding that the phrase "addition ... to navigable waters" is ambiguous for purposes of *Chevron* Step One, we are emphatically declining to adopt any construction of the statute in the first instance. We are instead acknowledging that Congress has left the task of resolving that ambiguity to the EPA by delegating to that agency the authority "to make rules carrying the force of law" to which we must defer so long as they are reasonable. *Mead*, 533 U.S. at 226–27, 121 S.Ct. 2164.

30 In *Encino*, which was decided after the briefing in this appeal had been completed, the Supreme Court declined to defer under *Chevron* to a Department of Labor regulation that departed from a longstanding earlier position due to a "lack of reasoned explication," inasmuch as the agency gave "almost no reasons at all" for the change in policy, and instead issued only vague blanket statements. 136 S.Ct. at 2127. Thus, the plaintiffs' indisputably proper procedural challenge was successful, and therefore the regulation was not entitled to *Chevron* deference, rendering an analysis under the two-step *Chevron* framework unnecessary. *See id.* at 2125–26.

31 None of the plaintiffs argue that the Rule was procedurally defective under APA § 706(2)(A), except for the Sportsmen and Environmental Organization Plaintiffs, who do so only in the context of a *Chevron* Step Two argument. *See* Sportsmen and Environmental Organization Pls.' Br. at 36-54, 58. In any event, as we have explained above, the interpretive Rule here is properly reviewed only under the *Chevron* standard, which does not incorporate the *State Farm* standard.

32 The district court criticized the EPA's rationale for the Water Transfers Rule on the grounds that it was illogical for EPA to reason that: (1) Congress did not intend to subject water transfers to NPDES permitting; (2) therefore, water transfers do not constitute an addition to navigable waters; (3) because water transfers are not an "addition," they do not constitute a "discharge of a pollutant" under § 301(a), and therefore do not require an NPDES permit. *Catskill III*, 8 F.Supp.3d at 543. According to the district court, because the NPDES program is only one of many provisions that regulate discharges made unlawful under § 301(a), step (1) could not possibly lead to steps (2) and (3)—that is, Congressional intent not to regulate water transfers under the NPDES program does not imply Congressional intent not to regulate water transfers under the other programs for regulating discharges of pollutants. *Id.* at 544. But the Water Transfers Rule did not exempt

water transfers from any of the other programs for regulating discharges of pollutants—it applies only to the NPDES program.

33 The Supreme Court's more recent decision in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, —— U.S. ——, 133 S.Ct. 710, 184 L.Ed.2d 547 (2013), on which some of the plaintiffs and the dissent rely, does not suggest that the Water Transfers Rule's interpretation of the Clean Water Act is or is not reasonable. In *Los Angeles County*, the Supreme Court held that "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA," reasoning that, "[u]nder a common understanding of the meaning of the word 'add,' no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body." *Id.* at 713. This conclusion is consistent with both a unitary-waters reading of the CWA (under which a discharge of a pollutant occurs only when the pollutant is first introduced to any of the navigable waters), and with a non-unitary-waters reading (under which a discharge of a pollutant occurs only when a pollutant is first introduced from a particular navigable water to another, and not when it moves around within the same navigable water).

The Supreme Court's opinion in *Los Angeles County* does not discuss the definition of "navigable waters," nor does it imply a definition of that term. True, the Supreme Court characterized *Miccosukee* as holding that a "water transfer would count as a discharge of pollutants under the CWA only if the canal and the reservoir were 'meaningfully distinct water bodies.' " *Id.* (quoting *Miccosukee*, 541 U.S. at 112, 124 S.Ct. 1537). But this cannot change what the *Miccosukee* majority opinion actually said, and, as we discussed above, *Miccosukee* indicates that a unitary-waters reading may be "within the ballpark of reasonableness." *See Friends I*, 570 F.3d at 1221. Ultimately, *Los Angeles County* does not provide support for either side of the debate over the unitary-waters theory encapsulated in the Water Transfers Rule.

34 The district court made no findings of fact in the course of answering the purely legal question before it, and we express no view as to the likelihood that requiring NPDES permits for water transfers would lead to the results identified above. We note only that concerns that such results might arise are plausible and could support the EPA's interpretation of the Clean Water Act in the Water Transfers Rule.

35 Examples of nonpoint source programs are state water quality management plans and total maximum daily loads (commonly called "TMDLs"). *See* EPA Br. 30; EPA Reply Br. 19-20; NYC Br. 51-53; Western States Br. 37-38; Western Parties J. Reply 25-28.

36 One example of such a treaty is the Boundary Waters Treaty of 1909, *Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada*, Int'l Joint Comm'n, art. IV (May 13, 1910), *available at* http://www.ijc.org/en_/BWT (last visited July 18, 2016), *archived at* https://perma.cc/M3F3-NWLT. *See* Western States Br. 46-47.

37 For instance, the States and their agencies generally have broad authority to prevent the pollution of the States' waters. Colorado's Water Quality Control Commission is authorized to promulgate regulations providing for mandatory or prohibitory precautionary measures concerning any activity that could cause the quality of any state waters to be in violation of any water quality standard. *See, e.g.*, Colo. Rev. Stat. §§ 25–8–205(1)(c), 25–8–503(5). In addition, New Mexico's State Engineer is authorized to deny a water transfer permit if he or she finds that the transfer will be detrimental to the State's public welfare (for example, by jeopardizing water quality). *See* N.M. Stat. Ann. § 72–5–23; *Stokes v. Morgan*, 101 N.M. 195, 680 P.2d 335, 341 (1984) (suggesting that the State Engineer could deny a permit to change the point of diversion and place of use of groundwater rights where "intrusion of poor quality water could result in impairment of existing rights"). In California, interbasin transfers are already subject to water quality regulation separate from the federal NPDES permitting authority by California's State Water Resources Control Board and the State's regional water quality control boards. *See* Cal. Water Code §§ 1257-58, 13263; *Lake Madrone Water Dist. v.*

State Water Res. Control Bd., 209 Cal.App.3d 163, 174, 256 Cal.Rptr. 894, 901 (1989) (noting that California "may enact more stringent controls on discharges than are required by the [Clean Water Act]"); *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d 82, 127–30, 149–52, 227 Cal.Rptr. 161, 185–87, 200–02 (1986) (California's State Water Resources Control Board can reexamine previously issued water-rights permits to address newly discovered water-quality matters). And the State of New York's Department of Environmental Conservation (the "NYSDEC") enforces its own water quality standards outside of the NPDES permitting program. *See, e.g.*, N.Y. Envtl. Conserv. Law §§ 15–0313(2) (the NYSDEC is authorized to modify water quality standards and to reclassify the State's waters), 17-0301 (the NYSDEC has authority to classify waters and apply different standards of quality and purity to waters in different classes), 17-0501 (general prohibition on water pollution).

38 *See supra* note 36.

39 In any event, there is no requirement that the same term used in different provisions of the same statute be interpreted identically. *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574–76, 127 S.Ct. 1423, 167 L.Ed.2d 295 (2007). Indeed, "[i]t is not impermissible under *Chevron* for an agency to interpret [the same] imprecise term differently in two separate sections of a statute which have different purposes." *Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990), *cert. denied sub nom. Abbott Labs. v. Kessler*, 502 U.S. 819, 112 S.Ct. 76, 116 L.Ed.2d 49 (1991); *see also Aquarius Marine Co. v. Peña*, 64 F.3d 82, 88 (2d Cir. 1995) (an agency has "discretion to undertake independent interpretations of the same term in different statutes").

1 The term "interbasin transfer" refers to an artificial or man-made conveyance of water between two distinct water bodies that would not otherwise be connected. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 489–93 (2d Cir. 2001) ("*Catskill I*"); *see also* 40 C.F.R. § 122.3(i) ("water transfer" is "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use").

2 The majority writes that the Supreme Court's holding in *Rapanos* "does not compel the conclusion that the statutory phrase 'navigable waters' is unambiguous because that phrase, unlike the phrase in *Rapanos*, is not limited by a definite article." Op. at 514, n.24. While *Rapanos* may not "compel" that conclusion, it certainly supports it. In *Rapanos,* the Supreme Court was interpreting the same definition of "navigable waters" in operation here, § 1362(7), which defines "navigable waters" as "the waters of the United States." The lack of the word "the" before "navigable waters" in § 1362(12)(A) hardly negates the Supreme Court's holding that the definition of "navigable waters" as found in § 1362(7) does not refer to water in general, but water bodies. Moreover, the existence or non-existence of a definite article before a noun, on its own, has no bearing on the plural or singular nature of a noun. "The" can be used to refer to a particular person or thing or a group. *See* Bryan A. Garner, *Garner's Modern American Usage: The Authority on Grammar, Usage and Style*, 883 (3rd Ed. 2009) ("The definite article can be used to refer to a group < the basketball team > or, in some circumstances, a plural < The ideas just keep on flowing >.").

3 There are additional sections in which the term "navigable waters" clearly refers to individual water bodies. *See, e.g.*, 33 U.S.C. §§ 1341 (requiring any applicant for federal license or permit "to conduct any activity, including but not limited to, the construction or operation of facilities which may result in any discharge in the navigable waters" to obtain a state certification that any discharge of pollutants will comply with the *receiving* water body's water-quality standard), 1344(a) (requiring permits for "[d]ischarge into navigable waters at specified disposal sites" by establishing a separate permit program for discharges of "dredged or fill material," which by definition come from water bodies); *see also* 33 U.S.C. §§ 1313(a), (d)(1)(A), 1313(e)(4), 1314(l)(1), (b)(1), (d)(2)(D), (h)(9), (h)(11)(B).

4 Downstream states would have to resort to common law nuisance suits in the courts of the polluting state, instead of addressing permit violations with EPA. As the district court points out, "EPA never explains how

states, post Water Transfers Rule, can address interstate pollution effects 'through their WQS [water quality standards] and TMDL [total maximum daily loads] programs' or 'pursuant to state authorities preserved by section 510,' given that states do not have authority to require other states to adhere to effluent limitations or state-based regulations. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987)." *Catskill Mountains Chapter of Trout Unlimited v. U.S. E.P.A.*, 8 F.Supp.3d 500, 552 (2014). Indeed, at oral argument before the district court, counsel for the State of Colorado conceded that a downstream State's only remedy for interstate pollution of this sort is a common-law nuisance suit and "drink[ing] dirty water until this case makes its way up to the courts." *Id.* at 553. This cannot be what Congress intended.

5 In addition, general permits can be issued to "an entire class of hypothetical dischargers in a given geographic region," and thus covered discharges can commence automatically without an individualized application process. *Nw. Envtl.*, 537 F.3d at 1011 (citations omitted); *see* 40 C.F.R. § 122.28.

6 While we discussed *Mead* and *Skidmore* in *Catskill I* and *II*, we rejected EPA's position as unpersuasive. In *Catskill I* we held:

> [C]ourts do not face a choice between *Chevron* deference and no deference at all. Administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference: the agency position should be followed to the extent persuasive. *See Mead*, 121 S.Ct. at 2175–76 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). For the reasons that follow, however, we do not find the EPA's position to be persuasive.

273 F.3d at 491. In *Catskill II*, we observed that because EPA's position was not the product of a formal rulemaking, the most EPA could hope for was to persuade the court of the reasonableness of its position under *Skidmore,* a position we did not accept. *Catskill II*, 451 F.3d at 83 n.5 ("[W]e do not find the ['holistic'] argument persuasive and therefore decline to defer to the EPA.").

7 In *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), the City of Burlington argued that "pollutants would be 'added' only when they are introduced into navigable waters for the first time," *id.* at 1354, an argument mirroring those raised by defendants here. We rejected the contention, in light of "the intended broad reach of § 1311(a)," noting "that the definition of 'discharge of a pollutant' refers to 'any point source' without limitation." *Id.* at 1355 (quoting 33 U.S.C. § 1362(12)). We rejected the assertion that water flowing from a pond to a marsh was not an "addition." *See Catskill I*, 273 F.3d at 492.

8 At least one commentator has agreed that we found in *Catskill I* that "the statute's plain meaning was clear." Jeffrey G. Miller, *Plain Meaning, Precedent and Metaphysics, Interpreting the "Addition" Element of the Clean Water Act Offense*, 44 Envtl. L. Rep. News & Analysis 10770, 10792 (2014) ("Although the Second Circuit did not explicitly employ the two-step *Chevron* deference test to EPA's water transfer rule, it left no doubt as to how it would have decided the case under *Chevron*. With regard to the first step, whether the statute is ambiguous, the court in *Catskill I* held that the statute's plain meaning was clear.").

9 The majority suggests that we ruled on the meaning of "addition" based on the plain meaning of the statute without reaching the meaning of "addition ... *to navigable waters*." Op. at 510 (emphasis added) ("We do not ... think that by referring to the 'plain meaning' of 'addition' in *Catskill I* we were holding that the broader statutory phrase 'addition ... to navigable waters' unambiguously referred to a collection of individual 'navigable waters.' " (internal citations and quotations omitted)). It is not possible, however, to define "addition" without defining the object to which the addition is made, as the concepts are inexorably linked. It is clear from our reasoning in *Catskill I* and *II*, that we considered the *entire phrase* in reaching our conclusion. Thus, when we stated "that the discharge of water containing pollutants from one distinct water body to another is an 'addition of

[a] pollutant' under the CWA," we could only have meant that the discharge of water containing pollutants constitutes "an 'addition' of [a] pollutant" *to navigable waters*. *Catskill II,* 451 F.3d at 80.

10 In *Catskill II*, we concluded that "[o]ur rejection of [the unitary waters] theory in *Catskill I* ... is supported by *Miccosukee*, not undermined by it." 451 F.3d at 83.

795 F.2d 156
United States Court of Appeals,
District of Columbia Circuit.

Richard J. ORLOSKI, Appellant,
v.
FEDERAL ELECTION COMMISSION, Appellee.

No. 85–5012
|
Argued Dec. 17, 1985.
|
Decided July 11, 1986.

Synopsis

Challenger sought review of Federal Election Commission's determination that corporate contributions to picnic sponsored by congressman were not prohibited contributions to a campaign. The United States District Court for the District of Columbia, Oliver Gasch, J., affirmed. The Court of Appeals, Swygert, Senior Circuit Judge, sitting by designation, held that: (1) Federal Election Campaign Act does not prohibit use of objective test for determining whether corporate donation was made for purpose of influencing election; (2) fact that corporate donation was made with consent of candidate did not mean that a contribution had been made; and (3) evidence sustained finding that picnic was a nonpolitical event so that corporate donations were not prohibited.

Affirmed.

Attorneys and Law Firms

***157 **112** Richard J. Orloski, pro se.

Carol A. Laham, Federal Election Com'n, with whom Charles N. Steele, General Counsel and Richard B. Bader, Asst. General Counsel, Federal Election Com'n were on brief, for appellee.

Before ROBINSON, Chief Judge, BORK, Circuit Judge, and SWYGERT, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit. [*]

Opinion for the Court filed by Senior Circuit Judge SWYGERT.

Opinion

SWYGERT, Senior Circuit Judge:

In this case, we review the Federal Election Commission's method for determining whether corporate funding of an event sponsored by an incumbent congressman is illegal under the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.* (1982) ("the Act").

***158 **113** Richard J. Orloski appeals from an order of the district court affirming the Federal Election Commission's refusal to investigate his complaint that supporters of Representative Donald L. Ritter violated the Act by sponsoring an event funded in part by corporations shortly before the 1982 federal election. We affirm.

This litigation arises from the 1982 congressional election in the Fifteenth District of Pennsylvania. Orloski, the Democratic candidate, lost the election to the incumbent Republican candidate, Ritter. On September 30, 1982 Orloski filed a complaint with the Federal Election Commission ("the FEC" or "the Commission"). On November 10, 1982 the FEC gave notice to the parties that there was no "reason to believe" that the Act had been violated. Orloski sought review of the determination in the federal district court. The original complaint was dismissed by the district court by joint stipulation on May 26, 1983 to give Orloski an opportunity to present to the FEC additional factual allegations to support his original complaint. The district court also granted summary judgment in favor of the Commission based on Orloski's original complaint. A new complaint, containing these old, as well as new, factual allegations was filed on June 11, 1983.

In his supplemental complaint, Orloski alleged the following facts. Approximately thirty-eight days before the election, on September 25, 1982, the Lehigh Valley Senior Citizens Advisory Committee organized by Ritter sponsored a picnic for more than one thousand senior citizens. Ritter had a poor voting record on senior citizens' issues and had been given a "zero" rating by the National Council of Senior Citizens. Ritter's poor voting record was a major issue in the campaign, and Ritter had never before planned or given a senior citizens' picnic. At the picnic Ritter spoke to the group and indicated to them that he was working to save Social Security benefits and that "as long as he was in Congress, he was committed to that goal."

Orloski further alleged that Ritter's reelection campaign workers, including Ritter's campaign manager, Alex Rosza, planned and attended the picnic. The park where the picnic was held was ringed with posters urging the reelection of Ritter, and red, white, and blue campaign labels and buttons reading "Don Ritter—Congress" were worn by the workers, which were paid for by Ritter's reelection committee. Senior citizens' literature determined by the Franking Commission to be political was distributed. McCormack Equipment, Inc. provided free bus transportation to the picnic; HGF Management Corporation and Newhart Foods, Inc. provided free food. Ritter personally paid for other services that were not in-kind contributions.

According to Orloski, the three corporations first stated that they were not donating the services because the picnic was a political event and, under the Act, corporate donations to political events are illegal. Later the corporations admitted making the donations, claiming that the picnic was a non-political event. Orloski further alleged that one of Ritter's campaign aides stated that the corporate busing and food donations were in-kind donations to the Senior Citizens Advisory Committee and that it solicited and received in-kind donations to hold political rallies for Ritter.

In addition to making these allegations, Orloski stated that the same people who solicited funds for the Ritter for Congress Committee solicited the corporate donations for the picnic, that two of the corporations making the donations were run by traditional Republican contributors who had in the past contributed to Ritter's reelection campaign, and that Orloski supporters had been physically prohibited from attending the closed picnic and from handing out their own campaign literature. Finally, Orloski alleged that, after the picnic, the Senior Citizens Advisory Committee paid for radio advertisements supporting Ritter's reelection; that the Senior Citizens Advisory Committee did not meet in 1982; and that therefore it could not have planned the event.

Based on the foregoing allegations, Orloski claimed that the picnic was a political ***159** ****114** rally in support of Ritter's reelection campaign and, as a result, the Ritter for Congress Committee, the Senior Citizens Advisory Committee, and the three corporations had violated various provisions of the Act. Specifically, the Senior Citizens Advisory Committee violated the Act by failing to register with the FEC as a political committee, *see* 2 U.S.C. § 433; the three corporations violated the Act by making corporate contributions to the Ritter Campaign Committee and to the Senior Citizens Advisory Committee to finance the picnic, *see* 2 U.S.C. § 441b(a); the Ritter for Congress Committee and the Senior Citizens Advisory Committee violated the Act by receiving corporate contributions, *see* 2 U.S.C. § 441b(a).

Pursuant to 2 U.S.C. § 437g(a)(1), the FEC solicited a response to these allegations. On October 22, 1982 and August 12, 1983 J. Jackson Eaton, attorney for the Ritter Campaign Committee, responded on behalf of the Ritter for Congress Committee, the Senior Citizens Advisory Committee, and the three corporations. He denied that the picnic was a political rally in support of Ritter's reelection. He stated that no one at the picnic expressly advocated the reelection of Ritter or the defeat of Orloski or solicited or accepted contributions on behalf of Ritter, and he asserted that no campaign speeches were made, no campaign literature was passed out, no campaign staff members were present, and no posters or other campaign material were available except those distributed by Orloski's staff. He also stated that the Senior Citizens Advisory Committee was one of several issue-oriented, non-political, non-partisan advisory groups established by Ritter several years before.

Eaton further asserted that the material available at the picnic consisted of Social Security handbooks, Medicare handbooks, retirement literature, and consumer brochures. He submitted a senior citizens' report bearing Ritter's name that was available at the picnic and noted that it had previously been distributed to constituents through Ritter's congressional office by franked mail. He also observed that notice of the picnic had been included in a mailing approved by the Franking Commission.

He did not deny that free food and transportation were provided by McCormack Equipment, Inc., Newhart Foods, Inc., and HCF Management Corporation, or that Rosza, Jeff Werley, and Joseph McHugh were at the picnic. He stated, however, that Rosza was not the campaign manager or a campaign staff member at that time. Rather, he was a member of Ritter's legislative staff and Lehigh Valley administrator for Ritter. Ritter's campaign manager was John Kachmar. Werley and McHugh were congressional staff members. After the picnic McHugh became assistant campaign manager, at which time he took a leave of absence from the congressional office. Eaton submitted copies of payroll authorizations showing that Kachmar and McHugh had been terminated from the congressional payroll.

Eaton also submitted a copy of the name-tags worn by each person attending the picnic indicating that the tags did not have Ritter's name printed on them. He also stated that Ritter's congressional staff members may have worn tags identifying them as part of Ritter's staff, but that no election tags were used.

Eaton also addressed the issue of the mailing of correspondence to Ritter's constituents which was approved by the Franking Commission. He responded that the Commission does not approve the mailing of political material at any time and does not approve the use of franking privileges sixty days prior to an election regardless of the nature of the literature. Therefore, he argued that Orloski's allegation that the Commission had determined the mailer to be political was untrue.

Eaton further contended that the disputed radio advertisements only mentioned that Senior Citizens Advisory Committee had been formed by Ritter and did not suggest an endorsement. He submitted a copy of the text of the only radio advertisement that mentioned Senior Citizens Advisory Committee. He also indicated that ***160 **115** Senior Citizens Advisory Committee met three times during 1982, and he submitted the congressional form letters that had been sent to Senior Citizens Advisory Committee members notifying them of the meetings. Finally, he denied that any physical threats were made by Ritter's staff to the Orloski representatives, and he submitted twenty-two photographs taken the day of the picnic in support of his contention that no campaign posters were at the event and no campaign buttons were worn.

Based on this information, and without giving Orloski an opportunity to respond, the FEC ruled (5–0), on November 8, 1983, there was "no reason to believe that the Act had been violated" and that, as a result, no further investigation was required. *See* 2 U.S.C. § 437g(a)(2). In its decision, the FEC first observed that 2 U.S.C. § 441b(a) prohibits corporations from making "any contribution or expenditure ... in connection with any federal election," and any political committee from accepting these prohibited contributions. It noted, however, that in AO 1980–89, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5537, AO 1980–22, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5479, and AO 1980–16, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5474, it had interpreted the Act to mean that corporate funding of events sponsored by congressmen who are candidates for reelection is not prohibited by section 441b(a) if those events are non-political. This interpretation was based on the FEC's view that the Act does not prohibit all corporate donations; it only prohibits corporate "contributions and expenditures." "Contributions" and "expenditures" are defined in the Act as donations made for political purposes—i.e., "for the purpose of influencing any election." Corporate donations made for non-political purposes are therefore permissible.

In each of the advisory opinions, the FEC decided that it would infer from the nature of the event funded whether a corporation made a donation for political or nonpolitical purposes. If the event was non-political the corporate donation would conclusively be presumed to have been for non-political purposes. Similarly, if the event was political, the corporate donation would conclusively be presumed to have been for political purposes. The FEC further determined that an event sponsored by a congressman who was also a candidate for reelection is non-political if it is an event sponsored in the congressman's capacity as a member of Congress, not in his capacity as a candidate for Congress. Recognizing, however, that all events cannot be neatly categorized as either non-political or political, because all congressional events have some political ramifications, *see United States v. Brewster,* 408 U.S. 501, 512, 92 S.Ct. 2531, 2537, 33 L.Ed.2d 507 (1972), the FEC adopted the following test for distinguishing between political and non-political congressional events. An event is non-political if (1) there is an absence of any communication expressly advocating the nomination or election of the congressman appearing or the defeat of any other candidate, and (2) there is no solicitation, making, or acceptance of a campaign contribution for the congressman in connection with the event.

Applying that test to the facts of this case, the FEC ruled that the Senior Citizens Advisory Committee picnic was a non-political event and hence the corporate donations were permissible and did not need to be reported by the Senior Citizens Advisory Committee because they were made for non-political purposes. Because Orloski did not make any allegations that campaign contributions had been solicited, made, or accepted at the picnic, the FEC focused its analysis on whether any impermissible communications had been made. Based on the buttons and literature submitted by Eaton, the FEC ruled that neither contained any communication expressly advocating Ritter's reelection or Orloski's defeat. It further ruled that Ritter's speech did not expressly advocate Ritter's reelection or Orloski's defeat. Orloski's summary of the speech demonstrated that Ritter was merely "addressing

his constituents on a particular subject." It accepted Eaton's ***161** ****116** contention that congressional staff members in charge of the event only wore name-tags identifying them as such and not election tags. Based on memoranda and the text of the radio advertisements submitted by Eaton, the FEC accepted Eaton's contention that the Senior Citizens Advisory Committee acted merely as a liaison between Ritter and his constituents and did not act as a political committee. The FEC also ruled that the posters did not constitute a form of communication at the picnic because the posters ringed the park and were not actually in it. The FEC therefore dismissed the complaint.

Orloski filed an action in the federal district court to review the FEC's decision to dismiss his complaint without an investigation. The district judge granted summary judgment in favor of the FEC finding that (1) the FEC's interpretation of the Act was "sufficiently reasonable" to be accepted by a reviewing court, (2) the FEC's decision not to investigate the allegations of the complaint was not arbitrary or capricious or an abuse of discretion, and (3) under the "reason to believe" standard, the FEC could consider all of the evidence and make a subjective evaluation of the claim.

With respect to the FEC's reasons for refusing to investigate the complaint, the district judge held that all of the documentary evidence submitted by Eaton supported the FEC's conclusion that there had been no express advocacy of Ritter's reelection or Orloski's defeat. He further held that Orloski's allegations that the congressional staff members wore name tags reading "Don Ritter-Congress" was not inconsistent with the conclusion that there was no express advocacy of Ritter's reelection. He also agreed with the Commission that it was irrelevant, under the FEC's two-part test, that traditional Republic donors had funded the event or that several of the donors in several local newspaper articles had characterized the picnic as a political event. Regarding the latter allegation, the district judge agreed with the FEC that it was the FEC's job to determine the nature of an event sponsored by a Congressman.

Orloski challenges all three of the district judge's rulings on appeal.

I

The standard to be applied by this court in reviewing the FEC's decision not to investigate Orloski's complaint is whether the FEC has acted "contrary to law." *See* 2 U.S.C. § 437g(a)(8)(C). The FEC's decision is "contrary to law" if (1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act, *see* discussion *infra* at 161, or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion. *See, e.g., FEC v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 31, 37, 102 S.Ct. 38, 41, 44, 70 L.Ed.2d 23 (1981); *In re Carter-Mondale Reelection Committee,* 642 F.2d 538, 542 (D.C.Cir.1980).

The first issue raised by this appeal is whether the FEC's two-part test for distinguishing permissible donations to non-political events from prohibited corporate donations to campaign events is an impermissible interpretation of the Act. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Court delineated the approach to be followed when reviewing an agency's construction of its enabling statute:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. ***162** ****117** Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842–43, 104 S.Ct. at 2781–82. *Accord Chemical Mfrs. Ass'n v. Natural Resources Defense Council,* 470 U.S. 116, ——, 105 S.Ct. 1102, 1108, 84 L.Ed.2d 90 (1985) (court need not find that agency's construction of the statute is the only permissible one, but rather that it is a "sufficiently rational" one to preclude the court from substituting its judgment for that of the agency).

The first step in our review of the FEC's interpretation is to determine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc.,* 467 U.S. at 842, 104 S.Ct. at 2781. To make this determination, we look to the plain language of the statute, its legislative history, and its objectives as expressed either explicitly or implicitly in the Act.

The relevant statutory language is found in 2 U.S.C. §§ 431(8)(A), 431(9)(A), and 441b(a). Section 441b(a) prohibits corporations from making "contribution[s] or expenditure[s] in connection with any election to any political office," and makes it unlawful for candidates and political committees to receive such corporate "contributions." Section 433 requires political committees receiving "contributions" or making "expenditures" to file a statement with the Commission. *See* 2 U.S.C. §§ 441b(a), 433. Section 431(8)(A) of the Act provides:

The term "contribution" includes—

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.

Section 431(9)(A) of the Act provides:

The term "expenditure" includes—

> (i) any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.

Orloski argues first that the FEC's interpretation violates the express language of the Act because the phrase "for the purposes of influencing any election" unambiguously requires the FEC, when deciding whether a prohibited contribution or expenditure has been made, to conduct a subjective inquiry—i.e., make its determination solely on the basis of the state of mind of the donor and not on the nature of the funded event. If the donor admits that he intended to influence the election, the FEC is precluded from deciding on the basis of other facts that the donor has not made a "contribution" and the recipient has not received one. We are not persuaded.

We find nothing in the quoted phrase or anywhere else in the Act that prohibits the FEC from adopting an objective test for determining when a corporate donation is made "for the purposes of influencing any election." In fact, as the FEC points out, the Act may implicitly mandate an objective test. The subjective test advocated by Orloski would condition a recipient's liability for receiving corporate donations solely on the state of mind of the donor. Even if the donation did not in fact directly or indirectly influence the election, the recipient would be liable under the Act for receiving an illegal corporate contribution if the corporation intended to influence the election by making the donation. Moreover, clearly the test adopted in this case does not ignore the state of mind of the donor. It is a common legal practice to infer intent from underlying circumstances. In this case, the FEC's objective test is used to infer the probable intent of both the donor and the donee.

Orloski further argues that the fact that the term "contribution" also includes "expenditures" "placed in cooperation with, or with consent of a candidate, his agents or an authorized committee of the candidate" precludes the FEC's interpretation. *See* 2 U.S.C. § 441a(b)(2)(B)(i). We reject this argument. There is no doubt in this case that Ritter and his agents consented to the disputed corporate donations. But the mere fact that corporate ***163 **118** donations were made with the consent of the candidate does not mean that a "contribution" within the meaning of the Act has been made. Under the Act this type of "donation" is only a "contribution" if it first qualifies as an "expenditure" and, under the FEC's interpretation, such a donation is not an expenditure unless someone at the funded

event expressly advocates the reelection of the incumbent or the defeat of an opponent or solicits or accepts money to support the incumbent's reelection. This expanded definition of "contribution" in section 431(8)(A)(i) therefore does not mean that the FEC's interpretation violates the Act.

Orloski refers us to no other statutory language, nor can we locate any, that directly or indirectly conflicts with the FEC's objective test. Orloski does not dispute the FEC's view that the Act only prohibits corporations from making donations that are "for the purposes of influencing any election" or "in connection with any elections," not those that support congressional events. The Act itself does not define the key phrases—"for the purposes of influencing any election" or "in connection with any election." Indeed, the Supreme Court has observed that the phrases "for the purposes of influencing any election" and "relative to any clearly-identified candidate" are ambiguous. *Buckley v. Valeo,* 424 U.S. 1, 40–41, 79, 80, 96 S.Ct. 612, 645, 663, 664, 46 L.Ed.2d 659 (1976).

Similarly, we find nothing in the legislative history of the Act that forecloses the FEC's interpretation of "contribution" or "expenditure" in this limited context. Nor does Orloski identify any. There is no legislative history indicating that Congress intended to prohibit all corporate donations, and there is "no legislative history to guide us in determining the scope of the critical phrase 'for the purposes of influencing any election.' " *Buckley,* 424 U.S. at 77, 96 S.Ct. at 662.

Finally, the Act's purposes do not indicate that Congress disapproves of the FEC's interpretation in this case. The purposes of the Act are to limit spending in federal election campaigns and to eliminate the actual or perceived pernicious influence over candidates for elective office that wealthy individuals or corporations could achieve by financing the "political warchests" of those candidates. *See Buckley,* 424 U.S. at 25–26, 96 S.Ct. at 637–38. Although these purposes indicate that Congress intended to sharply curtail and to regulate in detail campaign financing, they do not directly speak to any limitations on non-campaign financing, and thus they do not indicate how Congress intended the Commission to deal with corporate financing of congressional events.

Orloski contends, however, that the FEC's interpretation has been foreclosed by Congress because it undercuts the statutory purposes in two ways. First, it permits individual contributors to circumvent the statutory maximum on individual contributions by using money from corporations they control to fund events sponsored by incumbents they wish to reelect. Second, it permits corporations to circumvent the prohibitions of section 441b(a) by financing "congressional events" shortly before the election that undeniably have an effect on the election.

Orloski's contention is unpersuasive. It is not the FEC's interpretation in this case that leads to these apparent conflicts with the statutory purposes. It is any interpretation of the Act that permits corporations to make non-political donations because any favorable communication an incumbent has with his constituents necessarily influences the electorate to vote for him in the next election. Thus, any corporate funding of congressional events indirectly influences the election. Yet Orloski does not contest the FEC's threshold determination that the Act permits non-political corporate donations, and he concedes that nowhere in the Act did Congress expressly limit an incumbent's right to communicate with his constituency or a corporation's right to fund "congressional events," even in an election year.

In deciding whether Congress has directly spoken to the precise question at issue in ***164 **119** this case through the statute's purposes, we do not look at these purposes in a vacuum; rather, we look to how these purposes are expressed through the statutory language. "The invocation of disembodied purposes, reasons cut loose from language is a sure way to frustrate rather than to implement the statute. *Walton v. United Consumers Club, Inc.,* 786 F.2d 303, 310 (7th Cir.1986). In this case, the purposes must be read against the clear statutory language that prohibits some corporate donations, but, by necessary implication, permits others. It becomes readily apparent upon reading the statute and its purposes in this way that Congress left a large gap between the obviously impermissible and the obviously permissible. This gap creates the potential for a broad range of differing interpretations of the Act, the legitimacy of each being heavily dependent upon the degree to which it undercuts the statutory purposes. Thus, in our view, Orloski's contention is not relevant at this stage of our analysis. Rather it is relevant to the question of whether the FEC's interpretation is entitled to judicial deference. If the FEC's interpretation unduly compromises the Act's purposes, it is not a " 'reasonable accommodation' " under the Act, and it would therefore not be entitled to deference. *See Chevron, U.S.A., Inc.,* 467 U.S. at 845, 104 S.Ct. at 2783, quoting *United States v. Shimer,* 367 U.S. 374, 382, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961).

We conclude therefore that nothing in the statute or its legislative history indicates, either expressly or implicitly, where Congress intended the FEC to draw the line between impermissible corporate financing of federal election campaigns and permissible corporate financing of legislative activities.

The next question, then, is whether the courts should defer to the FEC's interpretation as a permissible construction of the Act. The Supreme Court has held that the FEC is "precisely the type of agency to which deference should presumptively be afforded." *Democratic Senatorial Campaign Committee,* 454 U.S. at 37, 102 S.Ct. at 45. In reaching this result, the Court observed that the FEC has been vested by Congress with " 'primary and substantial responsibility for administering and enforcing the Act,' ... [and] [it] has the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred." *Id.* at 37, 102 S.Ct. at 45, quoting *Buckley,* 424 U.S. at 109, 112 n. 153, 96 S.Ct. at 677, 679 n. 153. It further observed that the FEC is expressly authorized by statute, *see* 2 U.S.C. § 437c(b)(1), to "formulate general policy with respect to administration of this Act" and that the FEC, an inherently bipartisan agency, is responsible for deciding "issues charged with the dynamics of party politics, often under the pressure of an impending election." 454 U.S. at 37, 102 S.Ct. at 45. We also note that Congress requires the Commission to issue advisory opinions regarding application of the Act upon receipt of written request. *See* 2 U.S.C. § 437f. This implies that Congress intended the Commission to fill in gaps left in the statute and to resolve any ambiguities in the statutory language. For these reasons, the FEC's interpretation of the Act should be accorded considerable deference. *See also Democratic Senatorial Campaign Committee v. FEC,* 660 F.2d 773, 782 n. 2 (D.C.Cir.1980) (Wilkey, J., dissenting), *rev'd on other grounds,* 454 U.S. 27, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981).

In deciding whether to defer to the agency's interpretation of the Act, the courts look to many factors, among them being the "thoroughness, validity and consistency of ... [the] agency's reasoning." *Democratic Senatorial Campaign Committee,* 454 U.S. at 37, 102 S.Ct. at 44.

We have been unable to locate any FEC advisory opinion or General Counsel's report that sets forth the FEC's specific reasons for adopting the interpretation at issue in this case. Nor have we found any case in which this interpretation has been challenged and defended by the FEC. As a result, it is impossible for us to review the thoroughness of the FEC's rationale. Notwithstanding ***165 **120** the FEC's failure to produce a detailed analysis in support of its interpretation, we believe the FEC's interpretation is still entitled to judicial deference for several reasons.

First, we believe that the FEC's interpretation represents a "reasonable accommodation" between the Act's objectives and administrative exigencies.

Administrative exigencies mandate that the FEC adopt an objective, bright-line test for distinguishing between permissible and impermissible corporate donations. As we have previously noted, an objective test is required to coordinate the liabilities of donors and donees. The bright-line test also is necessary to enable donees and donors to easily conform their conduct to the law and to enable the FEC to take the rapid, decisive enforcement action that is called for in the highly-charged political arena.

A subjective test based upon the totality of the circumstances would inevitably curtail permissible conduct. It would also unduly burden the FEC with requests for advisory opinions concerning the legitimacy of corporate funding of an event sponsored by an incumbent, and with complaints by disgruntled opponents who could take advantage of a totality of the circumstances test to harass the sponsoring candidate and his supporters. It would further burden the agency by forcing it to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint, even those involving the most mundane allegations. It would also considerably delay enforcement action. Rarely could the FEC dismiss a complaint without soliciting a response because the FEC would need to know all the facts bearing on motive before making its "reason to believe" determination.

The objective, bright-line test adopted by the FEC also does not unduly compromise the Act's purposes. Clearly, the FEC's interpretation is one of the most favorable to corporations and incumbents that the agency could have adopted. For example, the agency might have adopted the stricter test advocated by Orloski that any congressional event within six weeks of an election is conclusively presumed to be political. *Cf.* Regulations on the Use of the Congressional Frank By Members of the House of Representatives and Rules of Practice in Proceedings Before the House Commission on Congressional Mailing Standards ch. 4 at 30–31, (Feb.1984) (Franking Commission prohibits sending mail out under the frank at any time less than sixty days before an election).

Nonetheless, the FEC's interpretation does not create the potential for gross abuse. It applies only to corporate funding of legislative events sponsored by a congressman. These events by their very nature ordinarily provide a corporation with only limited opportunity to give any significant financial support to a candidate. *See, e.g.,* AO 1980–89, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5537; AO 1980–16, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5474; AO 1980–22, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5479. In this case, for example, the corporate donations consisted of "in excess of one thousand hamburgers, an unknown quantity of salad and potato salad and bus transportation." Although we do not know the exact value of these goods and services, it is unlikely that it is so great that Ritter would be induced to compromise his position as a congressman in favor of the three corporations in order to return that support or to ensure similar financing in the future.

Moreover, the FEC's test still prohibits a corporation from making a donation that has the direct effects of expressly advocating its candidate's reelection or of soliciting financial support. Thus, a corporation has limited ability to engage in the type of effective electioneering that might precipitate substantial political favors. In general, therefore, under the FEC's interpretation, corporations can make little more than insignificant, indirect donations to a candidate's political warchest, which are unlikely to give the corporations improper influence over candidates for federal office or to ***166** ****121** significantly increase the level of campaign spending.

Second, the FEC has consistently adhered to this interpretation, without congressional objection, for at least eight years. In 1974, Congress amended the Act to create the FEC to administer and obtain voluntary compliance with the Act. In 1975 the FEC appeared to be leaning toward the view that any funding that had not been expressly appropriated by Congress for legislative activities was a contribution or expenditure under the Act. *See* AO 1975–14, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5107. It is unclear whether the FEC took any enforcement action under this view. Not long after *Buckley* was handed down, however, the FEC appeared to change course and it adopted the interpretation at issue in this case. *See* AO 1978–4, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5293; AO 1977–54, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5301. This interpretation was adopted and applied over the dissents of Commissioners Staebler and Harris who objected to the change without a discussion of reasons for "overruling" AO 1975–14, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5107; AO 1979–2, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5399; and Opinion of Counsel 1975–125, and who characterized the literal application of this test as a "dangerous departure." AO 1980–22, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5479; AO 1977–42, 1 Federal Election Campaign Financing Guide (CCH) ¶ 5313.

Notwithstanding these dissents, as far as we can determine, this interpretation has been applied consistently since 1977 and without dissent since April 1980 and this case represents the first court challenge to the FEC's interpretation, suggesting that it has proven workable to most candidates and that it has not led to gross abuses.

Third, the recent history of the Act leads us to believe that Congress would approve of the line drawn by the FEC. In the 1979 amendments to the Act, Congress did not alter the definitions of contributions or expenditures to include a definition of "for the purposes of influencing any election" even though the Court had observed in *Buckley* that the phrase was ambiguous. The 1979 amendments, which included changes (not relevant here) in the definitions of "contributions" and "expenditures," were made two years after the FEC adopted the interpretation applied in this case. We presume that Congress was aware at the time of consideration and passage of these amendments of the interpretation the Commission had placed on the Act. Its failure to modify this interpretation signifies to a degree its acquiescence in the FEC's interpretation.

In addition, in hearings before the Senate on proposed revisions of the Act, members of Congress and the public expressed displeasure with some of the FEC's restrictive interpretations of the Act. *See* Application and Administration of Federal Campaign Act of 1971, Amended Hearings Before the Committee on Rules and Administration, United States Senate, 97th Cong., 1st Sess. (1981). Many members of Congress were unhappy with what they perceived to be the FEC's overly-rigid adherence to the strict wording of the statute which led the FEC to take, at times, questionable enforcement decisions. Critics of the FEC observed that the FEC was created not only to enforce the Act so that the public would have more confidence in federal elections, but also to encourage voluntary compliance. Voluntary compliance would not easily be achieved if the FEC adopted interpretations of the Act that were difficult to understand and

apply. Such interpretations would also lead to a reduction in permissible "contributions," "expenditures," or donations, a result Congress could not possibly have intended because its members are heavily dependent upon such funding. *See also FEC v. Gus Savage for Congress,* 606 F.Supp. 541, 546–47 (N.D.Ill.1985).

Finally, we note that the FEC's interpretation is consistent with *Buckley,* in which the Supreme Court held that under the first amendment, the phrases "for purposes of influencing any election" and "in connection with any election" must be defined as the "express advoca[cy] [of] the election or defeat of a clearly-identifiable ***167 **122** candidate," a definition that was subsequently incorporated into the Act. *See* 2 U.S.C. § 431(17). To be sure, the Court limited these definitions to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions, *see Buckley,* 424 U.S. at 78–80, 96 S.Ct. at 663–64. Nonetheless the fact that the Court in *Buckley* formulated these definitions for this statutory language demonstrates that the FEC's similar interpretation of the same language is logical, reasonable, and consistent with the overall statutory framework. The fact that the FEC adopted this interpretation for all relevant statutory provisions, even where not constitutionally required, only adds to its reasonableness for it enhances the consistency and even-handedness with which the FEC ultimately administers the Act.

We, therefore, conclude that the FEC's interpretation is entitled to judicial deference. We recognize that this interpretation carries with it a greater potential for abuse than does the interpretation advocated by Orloski. Indeed, it can be argued that this interpretation is at the outer bounds of permissible choice. But because it is still a "reasonable choice within a gap left open by Congress ... [Orloski's] challenge must fail." *Chevron, U.S.A., Inc.,* 467 U.S. at 866, 104 S.Ct. at 2793. Any complaints about the wisdom of that interpretation are properly directed to the legislature, not this court. *Manufacturers Ass'n,* 470 U.S. at ——, 105 S.Ct. at 1112; *Chevron, U.S.A., Inc.,* 467 U.S. at 866, 104 S.Ct. at 2793.

II

Having decided that the FEC's interpretation of the Act is permissible, we now turn to the question of whether the FEC's determination, under its two-part test, that the Senior Citizens Advisory Committee picnic was a non-political event was arbitrary or capricious or otherwise an abuse of discretion. As the district judge observed "[t]his is an extremely deferential standard which requires affirmance if a rational basis for the agency's decision is shown." *Orloski v. FEC,* No. 83–3513, Memorandum Opinion at 4 (D.D.C., Dec. 6, 1984). We hold that a rational basis has been shown in this case.

Orloski did not allege that any campaign contributions for Ritter were solicited or accepted at the event so our review is limited to the FEC's analysis regarding impermissible campaign communications. The district judge, in a detailed analysis of the evidence presented to the FEC, summarized *supra* at 158–60, found that the FEC's conclusion that there had been no "express advocacy" of Ritter's reelection at the picnic was not arbitrary or capricious or otherwise an abuse of discretion. We have reviewed the evidence submitted to the FEC, and we have little to add to the district judge's succinct, but thorough analysis. True, many of the uncontested facts of this case do suggest that Ritter sponsored the picnic before the election in order to muster support among the elderly. On these facts, it might appear somewhat disingenuous to conclude that at least one purpose of the picnic was not to influence the federal election in the 15th congressional district. But we have previously concluded that the FEC's narrow interpretation of the Act is sufficiently reasonable to be entitled to judicial deference because, in this politically-charged area, bright-line tests are virtually mandated even though they may occasionally lead to what appears, at first glance, to be somewhat artificial results. In this case, the undisputed facts establish that the sponsors of the picnic strictly adhered to the FEC's narrow guidelines, and that therefore the FEC properly concluded that the picnic was a nonpolitical event.

III

Orloski also challenges FEC's decision on procedural grounds. He argues that the FEC was required either to give him an opportunity to reply to Eaton's response or to make its "reason to believe" determination solely on the basis of Orloski's well-placed allegations without making any credibility determinations. In the alternative, he argues that the FEC impermissibly failed to consider the evidence he presented.

***168** ****123** We reject Orloski's first argument as a basis for reversing the FEC's decision for three reasons:

(1) Section 437g(a)(1) requires the FEC to notify parties charged in a complaint and to give them an opportunity to respond. This suggests that Congress determined that the FEC should make preliminary investigative decisions on the basis of all the information submitted to it by the charging and responding parties. *See also Antosh v. FEC,* 599 F.Supp. 850, 855 (D.D.C.1984); *Common Cause v. FEC,* 489 F.Supp. 738, 744 (D.D.C.1980); *In re Federal Election Campaign Act Litigation,* 474 F.Supp. 1044, 1046 (D.D.C.1979). The "reason to believe" standard also itself suggests that the FEC is entitled, and indeed required, to make subjective evaluation of claims. *See Common Cause v. FEC,* 489 F.Supp. at 738. Orloski appears to concede this when he argues that a district court must review the FEC's decision not to investigate by considering, *inter alia,* the credibility of the allegations and all of the information available to the FEC.

(2) Although we are troubled by the secretive nature of these preliminary investigative proceedings in which disputed factual questions may be resolved without giving the parties an opportunity to argue the questions fully, we need not decide today the extent to which and under what circumstances the FEC should afford greater adversarial procedural safeguards in these preliminary matters. In this case, the material facts are not in dispute. The major factual disputes center on which Ritter staff members were present at the picnic and in what capacity they appeared and whether Orloski's supporters were physically barred from attending the affair. Even if these disputes had been resolved in favor of Orloski it would not have affected the FEC's conclusion that there was no "express advocacy" as defined by the FEC or no solicitation, making, or acceptance of any campaign contributions.

(3) Finally, Orloski did have an opportunity to read Eaton's first set of responses filed on October 22, 1982 before filing his first district court complaint. In that complaint, Orloski included a line-by-line rebuttal to each of Eaton's responses. This line-by-line rebuttal was also presented to the FEC in Orloski's supplemental complaint filed on June 11, 1983. And Eaton's second set of responses did not materially differ from his first set. Thus, Orloski did have the opportunity to respond to any facts alleged by Eaton.

We also find Orloski's alternative argument to be without merit. The FEC clearly carefully considered all of the evidence presented by Orloski.

The decision of the district court sustaining the decision of the FEC is affirmed.

All Citations

795 F.2d 156, 254 U.S.App.D.C. 111, 55 USLW 2058

Footnotes

* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1982).

98 F.3d 1372
United States Court of Appeals,
District of Columbia Circuit.

AMERICAN MUNICIPAL POWER-OHIO, Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY, Respondent.

No. 95-1290.
|
Argued Sept. 3, 1996.
|
Decided Oct. 29, 1996.

Synopsis

Association of municipal electric systems sought review of Environmental Protection Agency's (EPA) interpretation of term "thermal energy" in Clean Air Act (CAA) section pertaining to transfer of unused emission allowances upon reduced utilization or shutdown by units that opted into acid rain program. The Court of Appeals, Tatel, Circuit Judge, held that as reasonably interpreted by EPA, "thermal energy" means thermal output produced by combustion source used directly as part of manufacturing process but not used to produce electricity.

So ordered.

***1372 **209** On Petition for Review of an Order of the Environmental Protection Agency.

Attorneys and Law Firms

David R. Straus, Washington, DC, argued the cause and filed the briefs, for petitioner.

Scott J. Jordan, Attorney, United States Department of Justice, Washington, DC, with whom Lois J. Schiffer, Assistant Attorney General, was on the brief, argued the cause, for respondent.

Before: EDWARDS, Chief Judge, ROGERS and TATEL, Circuit Judges.

Opinion

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

An association of municipal electric systems challenges an Environmental Protection Agency rule interpreting the term "thermal energy" in section 410(f) of the 1990 Clean Air Act Amendments. According to petitioner, EPA's definition of the term denies its members an opportunity to transfer emissions allowances that other participants in Title IV's acid rain program enjoy. Because ***1373 **210** we conclude that EPA's interpretation is reasonable, we deny the petition for review.

I.

In Title IV of the Clean Air Act Amendments of 1990, Congress established a program to reduce acid rain by limiting the sulfur dioxide emissions of electric utilities through a system of transferable emissions allowances. 42 U.S.C. §§ 7651-7651*o* (1994). Under the program, EPA allocates annual emissions allowances to each utility "unit" based on the unit's past fuel consumption and emissions rate. 42 U.S.C. §§ 7651b(a)(1), 7651d; *see generally Texas Mun. Power Agency v. EPA,* 89 F.3d 858 (D.C.Cir.1996). If a unit's emissions exceed its allowances, the unit must either reduce emissions or obtain additional allowances. Conversely, a unit that has lowered its emissions rate, or has reduced its utilization or shut down, can either "bank" excess allowances for future use, or transfer them to another utility. By capping the number of allowances at 8.95 million tons of sulfur dioxide per year, *see* 42 U.S.C. §§ 7651b(a)(1) (basic allowances of 8.9 million tons), 7651d(a)(3) (providing for an additional 50,000 tons), the program aims to reduce annual sulfur dioxide emissions by ten million tons from 1980 levels, 42 U.S.C. § 7651(b).

Industrial sources of emissions, as well as existing units of small utilities-for example, those owned and operated by petitioner's members-are not required to participate in the allowance system. *See* 42 U.S.C. §§ 7651a(8) (unit serving a generator of less than 25 megawatts not an "existing unit"), 7651d(a)(1) (applying allowance requirements to each "existing utility unit"). Under section 410 of the Act, however, these units may "opt-in" to the program and receive allowances. 42 U.S.C. § 7651i(a). Allowances allocated to opt-in units are not counted toward the 8.95-million-ton cap. 42 U.S.C. § 7651b(a)(1). Opt-in units which lower their emissions rates are free to save or sell their unused allowances. But unlike utility units required to participate in

the program, opt-in units may not transfer unused allowances after shutting down, unless the transfer falls within an exception for "thermal energy" set forth in section 410(f). That section, the meaning of which is the sole issue in this case, provides as follows:

> Any unit designated under this section shall not transfer or bank allowances produced as a result of reduced utilization or shutdown, *except that,* such allowances may be transferred or carried forward for use in subsequent years to the extent that the reduced utilization or shutdown results from the replacement of *thermal energy* from the unit designated under this section, with thermal energy generated by any other unit or units subject to the requirements of this subchapter, and the designated unit's allowances are transferred or carried forward for use at such other replacement unit or units.

42 U.S.C. § 7651i(f) (emphasis added).

EPA interprets "thermal energy" in section 410(f) to mean "the thermal output produced by a combustion source used directly as part of a manufacturing process but not used to produce electricity." 40 C.F.R. § 72.2 (1995). Because small utilities, unlike most industrial sources, do not produce "thermal energy" as defined by the agency, they cannot take advantage of section 410(f)'s exception to obtain allowances by opting-in and then retiring their existing units. Thus, when small utilities shut down old units, either replacing them or buying electricity from other utilities, they must purchase emissions allowances.

II.

Petitioner AMP-Ohio, an association of some seventy-seven municipal electric systems, challenges EPA's interpretation of the thermal energy exception as contrary to the language, purpose, and legislative history of Title IV. This presents us with a typical *Chevron* issue. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Using "traditional tools of statutory construction," we first examine whether the statute "directly [speaks] to the precise question at issue." *Id.* at 842 & 843 n. 9, 104 S.Ct. at 2781 & 2782 n. 9. If so, we follow the statute's instructions. But "if the statute is silent or ambiguous with respect to the specific ***1374** ****211** issue," we defer to the agency's interpretation, provided that it is reasonable. *Id.* at 843-44, 104 S.Ct. at 2781-83.

Title IV does not define "thermal energy," nor does its legislative history suggest a clear Congressional intent regarding the meaning of this more or less technical term. For this reason, we cannot "begin and end our analysis at *Chevron's* first step," as we could in *Backcountry Against Dumps v. EPA,* 100 F.3d 147, 150 (D.C.Cir.1996), another case this Court decides today. Rather, we proceed to step two of *Chevron,* asking whether EPA's interpretation of the term is reasonable.

Asserting that EPA's interpretation is too narrow, petitioner argues that the agency should define "thermal energy" to mean simply "heat," consistent with the term's literal meaning. Semantically speaking, petitioner has a point: Webster's defines "thermal energy" as "energy in the form of heat." *See Webster's Third International Dictionary* 2373 (1993). Under petitioner's definition of the term, small utility units would fall within the thermal energy exception because their units, like all those subject to Title IV, literally produce "heat." *See* 42 U.S.C. § 7651a(15) (defining "unit" as "a fossil fuel-fired combustion device").

Although petitioner's definition may well be plausible, we have little trouble concluding that EPA's interpretation of the thermal energy exception is reasonable. *See Chevron,* 467 U.S. at 843 n. 11, 104 S.Ct. at 2782 n. 11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction...."). Most important, the agency's definition is supported by the language of section 410(f) because it gives meaning to the word "thermal." *See Qi-Zhuo v. Meissner,* 70 F.3d 136, 139 (D.C.Cir.1995) ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage."). If Congress had intended the thermal energy exception to apply to every opt-in unit, as it would under petitioner's definition, the word "thermal" would not have been needed.

EPA's interpretation is also compatible with the thermal energy exception's narrow purpose. The exception's author

and principal proponent described its purpose as assuring "access to adequate allowances for independent power producers which are a small but increasingly important group of cogenerators of energy." 136 Cong. Rec. S3027 col.1 (daily ed. Mar. 22, 1990) (statement of Sen. Wirth). Explaining specifically how the exception would benefit this group, he stated:

> An independent power producer might-for example-enter into an arrangement with a papermill, where the mill shuts down its dirty boiler and agrees to buy steam from a cleaner facility from an IPP. The independent producer produces steam as an intermediate step toward generating electricity, so it has steam to sell. In this case, the independent producer ought to be able to purchase any unused allowances from the papermill.

Id. The only evidence of legislative intent behind the thermal energy exception, this statement supports EPA's construction. By permitting allowance transfers where industrial facilities shut down and receive steam from outside cogenerators, EPA's interpretation accomplishes precisely what the Senator's example calls for.

We are unpersuaded by petitioner's effort to paint a different picture of the legislative history. Neither the Senate bill, on which Title IV is based, nor the House bill contained an exemption from the allowance system for small utility units. *See* S. 1630, 101st Cong., 1st Sess. (1989); H.R. 3030, 101st Cong., 2d Sess. (1989). Thus, the opt-in provisions in each of the bills, including the thermal energy exception, applied to industrial sources, not small utility units. While Congress was reconciling the two bills in conference, small utility units received an eleventh-hour reprieve which shifted them into the opt-in program. *See* H.R.Rep. No. 952, 101st Cong., 2d Sess. 343 (1990), U.S.Code Cong. & Admin.News 1990, pp. 3385, 3875. To us, this suggests that Congress simply may never have considered whether utility units could or should fall within section 410(f)'s exception for "thermal energy."

***1375** ****212** EPA's interpretation of the thermal energy exception is also consistent with how the Federal Energy Regulatory Commission uses the words "thermal energy" in its rules implementing the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601 *et seq.* (1994). 18 C.F.R. § 290 *et seq.* (1996). Those rules distinguish, as EPA has here, between electrical energy and "useful" thermal energy, the latter meaning steam or other heat used in an industrial process. *See* 18 C.F.R. §§ 292.202(c) (defining "cogeneration facility"), 292.202(h) (defining "useful thermal energy output"). Although FERC's views are not controlling, we think it significant that another federal agency with relevant expertise takes essentially the same position as EPA, particularly since the distinction between "steam for industry" and "electricity" that forms the basis for FERC's rules appears in some of Title IV's provisions. For example, the definitions of "utility unit" and "industrial source" are both based, in part, on the two different end-uses of a unit's thermal output. *See* 42 U.S.C. §§ 7651a(17)(C) (exempting "[a] unit that cogenerates steam and electricity" from the definition of "utility unit" under certain circumstances), 7651a(24) (defining "industrial source" as, among other things, "a unit that does not serve a generator that produces electricity").

Finally, EPA's interpretation of section 410(f) supports Title IV's principal goal of reducing sulfur dioxide emissions. Because allowances allocated to opt-in units are not counted towards the statutorily mandated 8.95-million-ton allowance cap, we think it was not unreasonable for EPA to interpret the scope of the exception narrowly in order to limit the number of additional allowances the exception might create. Petitioner's credible argument that a broader exception would encourage small utilities to retire their old, dirty units sooner suggests only that EPA's definition may be shortsighted, not that it is implausible. Whether the environmental benefits from earlier emissions reductions at small utilities outweigh the environmental costs of raising the allowance ceiling is a question for EPA and Congress, not this Court. *See Chevron,* 467 U.S. at 864, 104 S.Ct. at 2792 ("Such policy arguments are more properly addressed to legislators or administrators, not to judges.").

Petitioner's remaining arguments require only brief responses. First, petitioner asserts that we owe less deference to EPA's interpretation of section 410(f) because an EPA comment letter, written four years before the agency issued its final rule, stated that the thermal energy exception "appear [ed]" applicable to small utility units. *See* Letter, EPA Office of Air and Radiation, to Tom Fitzpatrick, SFT, Inc. (Mar. 7, 1991). We think it obvious that a preliminary assessment that the agency subsequently retracted can have no effect on our review of EPA's final rule. Petitioner also contends

that EPA's interpretation of section 410(f) will exclude small utility units from the opt-in program entirely because those units cannot cost-effectively reduce their emissions. But a study commissioned by EPA suggests to the contrary-that the participation rate of small utility units, although low, will be comparable to that of industrial sources. *See* Potential Opt-ins Among Small Utility Units and Industrial Boilers 12 (Draft, Nov. 8, 1991). Finally, petitioner argues that EPA's interpretation will result in "significant competitive harm" to municipal utilities because large,investor-owned utilities are free to transfer allowances when their old units shut down. If this argument has merit-which is not at all obvious given the exemption existing small utility units enjoy-petitioner should make it in a different forum. Congress can level the playing field; we cannot. " 'Our Constitution vests such responsibilities in the political branches.' " *Chevron,* 467 U.S. at 866, 104 S.Ct. at 2793 (quoting *TVA v. Hill,* 437 U.S. 153, 195, 98 S.Ct. 2279, 2302, 57 L.Ed.2d 117 (1978)).

Because EPA's interpretation of section 410(f) is consistent with its language and legislative history, and with the purposes of Title IV, we deny the petition for review.

So ordered.

All Citations

98 F.3d 1372, 43 ERC 1449, 321 U.S.App.D.C. 209, 65 USLW 2335, 27 Envtl. L. Rep. 20,474

362 F.3d 817
United States Court of Appeals,
District of Columbia Circuit.

PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, Appellee,
National Urban Indian Coalition and National Alliance for the Mentally Ill of Michigan, Appellants,
v.
Tommy G. THOMPSON, in his official capacity as Secretary, United States Department of Health and Human Services, et al., Appellees.

Nos. 03-5117 and 03–5118.
|
Argued Dec. 12, 2003.
|
Decided April 2, 2004.

Synopsis

Background: Organization of prescription drug manufacturers challenged validity of Michigan plan requiring manufacturer rebates for certain state Medicaid and non-Medicaid drug purchases in order to stay on automatic coverage lists. The United States District Court for the District of Columbia, 259 F.Supp.2d 39, John D. Bates, J., granted summary judgment for government, and appeal was taken.

Holdings: The Court of Appeals, Karen LeCraft Henderson, Circuit Judge, held that:

initiative was not illegal formulary under the Social Security Act;

approval of portion of initiative requiring manufacturers to give rebates to non-Medicaid state programs was not arbitrary or capricious; and

initiative did not violate Supremacy Clause or Commerce Clause.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

***818 **376** Appeals from the United States District Court for the District of Columbia (No. 02cv01306).

Attorneys and Law Firms

Jonathan S. Franklin argued the cause for the appellants. Darrel J. Grinstead and H. Christopher Bartolomucci were on brief.

Bert W. Rein, Michael L. Sturm, Eve Klindera Reed and Dineen Pashoukos Wasylik were on brief for appellants National Urban Indian Coalition and National Alliance for the Mentally Ill of Michigan.

Daniel J. Popeo and Richard A. Samp were on brief for amici curiae Washington Legal Foundation et al.

Alisa B. Klein, Attorney, United States Department of Justice, argued the cause for the appellees. Peter D. Keisler, Assistant Attorney General, Roscoe C. Howard, Jr., United States Attorney, and Mark B. Stern, Attorney, United States Department of Justice, were on brief.

Michael A. Cox, Attorney General, State of Michigan, Thomas Case, Solicitor General, State of Michigan, Charles J. Cooper, Hamish P. M. Hume, Gordon D. Todd, Derek L. Shaffer and Elisebeth C. Cook were on brief for Michigan Department of Community Health.

Bruce Vignery, Dorothy Siemon, Sarah Lock and Michael R. Schuster were on brief for amicus curiae American Association of Retired Persons.

Before: HENDERSON and ROGERS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion

Opinion filed for the court by Circuit Judge HENDERSON.

KAREN LeCRAFT HENDERSON, Circuit Judge:

The appellants, the Pharmaceutical Research and Manufacturers of America (PhRMA) and two non-profit organizations, the National Alliance for the Mentally Ill of Michigan (NAMI) and the National Urban Indian Coalition (NUIC) (referred to jointly as Non–Profits), [1] appeal ***819 **377** the district court's summary judgment rejecting their challenge to the " Michigan Best Practices Initiative" (Initiative), a low-cost state prescription drug coverage program—for beneficiaries of Medicaid and of two

non-Medicaid state health programs—which was designed by the State of Michigan and approved by the Secretary of the United States Department of Health and Human Services (Secretary, HHS). Under the Initiative, if a drug manufacturer does not sign each of two specified rebate agreements with Michigan—one to provide rebates for drugs the state purchases for Medicaid recipients and the other to provide identical rebates for drugs the state purchases for the two non-Medicaid state health programs—the drug will be covered under the programs subject to "prior authorization." The appellants argue, as they did below, that the Initiative violates (1) the "formulary"[2] provision of the Medicaid outpatient drug payment statute, 42 U.S.C. § 1396r–8(d)(4), because it excludes from its drug formulary those drugs for which prior authorization is required; (2) the general statutory mandate that Medicaid services be provided in a manner consistent with the best interests of the recipients, 42 U.S.C.A. § 1396a(a)(19); and (3) the Commerce Clause of the United States Constitution because it requires manufacturers to charge the same prices both within and without Michigan. Because the district court correctly rejected each of these arguments, we affirm the summary judgment.[3]

I.

The Medicaid program, jointly funded by the federal government and the states, pays for medical services to low-income persons pursuant to state plans approved by the Secretary. *See* 42 U.S.C. § 1396a(a)-(b). The statutory rebate provisions require that, in order for a state to receive Medicaid payments for a covered ***820 **378** outpatient drug, the drug's manufacturer must have entered into an agreement to rebate a specified portion of the drug's price pursuant to a state plan approved by the Secretary. 42 U.S.C. § 1396r–8(a)(1). In recent years, some states have gone beyond the required Medicaid rebate agreement and "have enacted supplemental rebate programs to achieve additional cost savings on Medicaid purchases as well as for purchases made by other needy citizens." *PhRMA v. Walsh,* 538 U.S. 644, 123 S.Ct. 1855, 1860, 155 L.Ed.2d 889 (2003). The Initiative is one such supplemental program.

The Initiative began in October 2001 when Michigan's governor convened the Pharmacy & Therapeutics Committee (Committee), made up of physicians and pharmacists, with instructions to review the "Michigan Pharmaceutical Product List" (MPPL), a listing of all drugs covered by any program operated by Michigan's Department of Community Health (DCH), including those requiring prior authorization. The Committee studied 40 therapeutic drug classes and in each class designated two or more as "Therapeutically Advantageous," that is, as having a clinical advantage over other drugs in the class without regard to cost. Declaration of David Viele, Deputy Director of DCH (Viele Decl.) ¶ ¶ 15–17. These "best in class" drugs were designated as "Preferred Drugs" and were included on the MPPL for automatic reimbursement under the Initiative. The best-in-class drug available at the lowest cost anywhere in the United States (taking into account the mandatory Medicaid rebate) was designated as the "reference drug" and all drugs in the class priced comparably with it were also listed on the MPPL as Preferred Drugs for automatic reimbursement. *Id*. ¶ ¶ 20–21. All remaining drugs were labeled "non-preferred drugs" and were listed on the MPPL with an asterisk signifying required prior authorization for reimbursement—unless the manufacturer signed both a "Supplemental Drug–Rebate Agreement" (Medicaid Agreement) requiring the manufacturer to rebate to the state the difference between the price of the drug and the price of the reference drug for Medicaid purchases and a "Non–Medicaid State Funded Rebate Agreement" (Non–Medicaid Agreement), extending the additional rebate to Michigan's non-Medicaid state prescription drug programs. *Id*. ¶ ¶ 22, 24–25, 29.

In Fall 2001 DCH submitted to the Secretary a proposed State Plan Amendment to Michigan's State Medicaid Plan incorporating the Initiative's provisions for approval pursuant to 42 U.S.C. § 1396. The Secretary approved use of the Medicaid Agreement in a letter dated January 24, 2002 and of the additional Non–Medicaid Agreement in a letter dated December 5, 2002 (Non–Medicaid Approval Letter). The Secretary limited approval of the non-Medicaid rebate program, however, to only two of the four Michigan health programs for which it was proposed: the Elder Prescription Insurance Company Program (EPIC), which provides prescription drug coverage to low-income seniors, and the Maternity Outpatient Medical Service (MOMS), which provides pre-natal care, including drug coverage, to low-income, adolescent and incarcerated females and to Medicaid beneficiaries eligible for emergency services only.

On June 28, 2002 PhRMA filed this action challenging the Secretary's approval of the prior authorization provisions in both the Medicaid Agreement and the Non–Medicaid Agreement. DCH intervened on the side of the Secretary and the Non–Profits intervened in support of PhRMA. In a decision dated March 28, 2003 the district court granted

summary judgment in favor of the Secretary and ***821** ****379** DCH. PhRMA and the Non–Profits filed timely appeals.

After the district court entered judgment, the United States Supreme Court issued its decision in *PhRMA v. Walsh,* 538 U.S. 644, 123 S.Ct. 1855, 1860, 155 L.Ed.2d 889 (2003), which affirmed the First Circuit's vacatur of a preliminary injunction preventing implementation of Maine's Medicaid-covered outpatient drug program which, like Michigan's, requires prior authorization for a Medicaid drug if its manufacturer has not agreed to provide rebates both for Medicaid and for non-Medicaid state prescription drug programs.[4] In *Walsh* the Supreme Court expressly rejected PhRMA's challenges to Maine's program based on Medicaid's "best interests" requirement, albeit without a majority opinion, and, by a majority, on the Commerce Clause. The analyses in *Walsh* enlighten ours here.

II.

We review the district court's grant of summary judgment *de novo* pursuant to the Administrative Procedure Act and therefore will uphold the Secretary's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). *See Arizona v. Thompson,* 281 F.3d 248, 253 (D.C.Cir.2002) (citing *Indep. Petroleum Ass'n of Am. v. DeWitt,* 279 F.3d 1036 (D.C.Cir.2002); *Dr. Pepper/Seven-Up Cos. v. FTC,* 991 F.2d 859, 862 (D.C.Cir.1993)). There is some question, however, what level of deference the court should accord the Secretary's interpretation of the Medicaid drug payment statute. Ordinarily we review an agency's interpretation of a statute it is charged with implementing under the familiar and deferential two-part framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The appellants assert, however, that the Secretary's decisions approving the Initiative are due only minimal deference, if any, under a line of Supreme Court decisions beginning with *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), and culminating in *United States v. Mead,* 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). *Cf. PhRMA v. Thompson,* 251 F.3d 219, 224 (D.C.Cir.2001) (finding it unnecessary to decide whether Secretary's approval of Vermont Medicaid plan is entitled to *Chevron* deference). We disagree and conclude the Secretary's decisions are entitled to *Chevron* deference. *Accord Texas v. HHS,* 61 F.3d 438, 440 (5th Cir.1995); *Georgia v. Shalala,* 8 F.3d 1565, 1573 (11th Cir.1993).

The appellants contend that the Secretary's decisions do not qualify for *Chevron* deference because they do not carry the force of law. In particular, the appellants assert the Secretary's statutory interpretations here are not the result of a formal administrative process, do not involve agency expertise, are inconsistent with previous HHS interpretations and were developed solely in response to this lawsuit. Thus, the appellants argue, the Secretary's interpretations are akin to " 'interpretations contained in policy statements, agency manuals, and enforcement guidelines,' " which are "beyond the *Chevron* pale." *Mead,* 533 U.S. at 234, 121 S.Ct. at 2175 (quoting *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000)). This argument overlooks the nature of the Secretary's authority. This is not a ***822** ****380** case of implicit delegation of authority through the grant of general implementation authority. In the case of the Medicaid payment statute, the Congress expressly conferred on the Secretary authority to review and approve state Medicaid plans as a condition to disbursing federal Medicaid payments. *See* 42 U.S.C. § 1396 ("The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance."). In carrying out this duty, the Secretary is charged with ensuring that each state plan complies with a vast network of specific statutory requirements, *see generally* 42 U.S.C. 1396a, including the prescription rebate agreement provision in section 1396r–8. Through this " express delegation of specific interpretive authority," *Mead,* 533 U.S. at 229, 121 S.Ct. at 2172, the Congress manifested its intent that the Secretary's determinations, based on interpretation of the relevant statutory provisions, should have the force of law. The Secretary's interpretations of the Medicaid Act are therefore entitled to *Chevron* deference. *See Mead,* 533 U.S. at 227, 121 S.Ct. at 2171 ("When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." (quoting *Chevron,* 467 U.S. at 843–44, 104 S.Ct. at 2781–83)).[5] Accordingly, we now review the appellants' substantive challenges under *Chevron*.

A. The Statutory Formulary Provision

First, the appellants assert the Initiative's prior authorization requirement violates section 1396r–8(d)(4), which governs formularies. We conclude the Secretary's approval of the Initiative's prior authorization requirement rests on a permissible construction of the statute under *Chevron*.

The Medicaid rebate provisions, enacted in 1990, expressly authorize a state "to subject to prior authorization *any* covered outpatient drug" so long as the state "provides response by telephone or other telecommunication device within 24 hours of a request for prior authorization" and "provides for the dispensing of at least 72–hour supply of a covered outpatient prescription drug in an emergency situation." 42 U.S.C. § 1396r–8(d)(1)(A), (5(A)-(B)).[6] In ***823** ****381** 1993 the Congress added the formulary provision which authorizes a state to create a drug "formulary" of covered drugs that is " developed by a committee consisting of physicians, pharmacists, and other appropriate individuals appointed by the Governor of the State." *Id.* § 1396r–8(d)(4)(A). The provision further directs that each formulary must "include [ ] the covered outpatient drugs of any manufacturer which has entered into and complies with a [rebate] agreement under [section 1396r–8(a)]" and permits "[a] covered outpatient drug [to] be excluded with respect to the treatment of a specific disease or condition for an identified population (if any) only if ... the excluded drug does not have a significant, clinically meaningful therapeutic advantage in terms of safety, effectiveness, or clinical outcome of such treatment for such population over other drugs included in the formulary and there is a written explanation (available to the public) of the basis for the exclusion." 42 U.S.C. § 1396r–8(d)(4)(B)-(C). In addition, the state is required to "permit[ ] coverage of a drug excluded from the formulary ... pursuant to a prior authorization program that is consistent with [section 1396r–8(d)(5)]." *Id.* § 1396r–8(d)(4)(D).

The appellants contend that the Initiative's prior authorization requirement violates the formulary provision because it excludes the asterisked drugs[7] from the MPPL based on their price rather than their therapeutic value and because the Secretary has not provided the requisite written explanation for the exclusion. The Secretary does not dispute that the MPPL is a formulary, *see* Fed. Appellees' Br. at 28, but, relying on the Supreme Court's opinion in *Walsh,* asserts that the Initiative's prior authorization program was implemented pursuant to the general prior authorization authority conferred by section 1396r–8(d)(1)(A) and is expressly exempted from the formulary restrictions in section 1396r–8(d)(4)(B)-(C) by the final sentence of section 1396r–8(d)(4): "A prior authorization program established under [section 1396r–8(d)(5)] is not a formulary subject to the requirements of [section 1396r–8(d)(4)]."[8] The appellants respond that the Secretary's construction permits a state to gut the restriction on formulary exclusion in section 1396r–8(d)(4)(C) by simply attaching the label "prior authorization program" to what is really a formulary drug exclusion. They point out that, under the Secretary's interpretation, the formulary provision serves no purpose because its end result—drug availability restricted by prior authorization—can be more easily achieved, that is, without running the gauntlet of subsection 396r–8(d)(4)(C), if a state simply invokes prior authorization authority up front under section (d)(1)(A).

Under the *Chevron* framework, "[i]f ... 'Congress has directly spoken to the precise question at issue,' we must give effect to Congress's 'unambiguously expressed intent' " but "[i]f 'the statute is silent or ambiguous with respect to the specific issue,' we ask whether the agency's position rests on a 'permissible construction of the statute.' " *Beverly Health & Rehab. Servs. v. Nat'l Labor Relations Bd.,* 317 F.3d 316, 321 (D.C.Cir.2003) (quoting ***824** ****382** *Chevron,* 467 U.S. at 842–43, 104 S.Ct. at 2781–82) (additional quotations omitted). Applying this standard we conclude that the Secretary's position, at least as applied to the circumstances here, reflects a permissible construction of the statutory provisions under *Chevron*.

We acknowledge that there is tension, if not actual inconsistency, between the broad prior authorization power granted under subsection (d)(1)(A), buttressed by the final exempting sentence of subsection (d)(4), and the apparent intent of the formulary provision to broaden drug availability. The appellants are correct that under the Secretary's construction the formulary provision simply gives the states an alternate, and more cumbersome, means of subjecting drugs to prior authorization. Nonetheless, the tension is a necessary consequence of the language the Congress drafted. The Secretary's construction permits all of the language to be given its plain meaning, albeit with a somewhat anomalous result. The appellants' construction, on the other hand, would require a crabbed reading of subsection (d)(1)(A) and of the final sentence of subsection (d)(4) and yet would not produce a coherent statutory scheme. Given these choices—neither entirely satisfactory—we believe the Secretary reasonably chose an interpretation consistent with the literal meaning of

the statutory language. We note the Eleventh Circuit approved the same construction in *PhRMA v. Meadows,* 304 F.3d 1197 (11th Cir.2002), *cert. denied,* 538 U.S. 1056, 123 S.Ct. 2213, 155 L.Ed.2d 1105 (2003). [9]

B. The Best Interests of Medicaid Recipients

Next, the appellants argue, as in *Walsh,* that the Medicaid Agreement violates the general statutory requirement that a state Medicaid plan "provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and *the best interests of the recipients*." 42 U.S.C.A. § 1396a(a)(19) (emphasis added). Specifically, they argue that, by making a drug available to Medicaid beneficiaries without prior authorization *only* if the drug's manufacturer has signed the Non–Medicaid Agreement, the Initiative benefits EPIC and MOMS participants at the expense of Medicaid beneficiaries and therefore is not in the best interests of Medicaid recipients. We reject this argument as well.

We first consider whether the Secretary's interpretation of section 1396a(a)(19) is permissible under *Chevron* and find that it is. The Secretary construes the best interests requirement to allow a state to establish a Medicaid prior ***825** ****383** authorization program in order to secure rebates on drugs for non-Medicaid populations if "a state demonstrates 'through appropriate evidence that the prior authorization program will further the goals and objectives of the Medicaid program.' " Fed. Appellant's Br. at 29 (quoting 9/18/2002 HHS Letter to State Medicaid Directors at 3). Specifically, the Secretary concluded that "by making prescription drugs accessible to the EPIC and MOMS populations, which are closely related to Medicaid populations in terms of financial and medical need, it is reasonable to conclude that these populations (and in the case of the MOMS program, their children) will maintain or improve their health status and be less likely to become Medicaid eligible." Non–Medicaid Approval Letter at 2. Conversely, in the Secretary's view, the failure to implement the Non–Medicaid Agreement could require cuts in the two non-Medicaid programs that "will necessarily result in some individuals enrolling in Medicaid, and for others, lead to a decline in their health status and resources that will result in Medicaid eligibility or increased Medicaid expenses" and the "[i]ncreased Medicaid enrollments and expenditures for newly qualified Medicaid recipients will strain already scarce Medicaid resources in a time of State budgetary shortfalls." *Id*. at 3. The Secretary's conclusion that a prior authorization program that serves Medicaid goals in this way can be consistent with Medicaid recipients' best interests, as required by section 1396a(a)(19), is reasonable on its face. If the prior authorization program prevents borderline populations in Non–Medicaid programs from being displaced into a state's Medicaid program, more resources will be available for existing Medicaid beneficiaries. Six Justices in *Walsh* acknowledged that such an effect can be in the best interests of Medicaid beneficiaries. [10] The plurality decision there, authored by Justice Stevens and joined by Justices Souter and Ginsburg, relied on precisely this reasoning in determining that Maine's program served the best interests of Medicaid recipients, *see* 123 S.Ct. at 1867–68 ("[T]here is the possibility that, by enabling some borderline aged and infirm persons better access to prescription drugs earlier, Medicaid expenses will be reduced. If members of this borderline group are not able to purchase necessary prescription medicine, their conditions may worsen, causing further financial hardship and thus making it more likely that they will end up in the Medicaid program and require more expensive treatment."). In her separate opinion, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, also suggested that this rationale, although "not self-evident," would suffice if supported by facts in the record. 123 S.Ct. at 1881.

Having concluded the Secretary's statutory interpretation is permissible, we must next consider whether his specific determination that the Initiative serves valid Medicaid goals is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). We conclude that it is not. The two Michigan Non–Medicaid programs, unlike Maine's program (or the two other Michigan programs for which the Secretary declined to approve a Medicaid prior authorization requirement, *see* Letter from Medicaid Administrator Scully to DCH Director Olszewski), are open only to "borderline" populations many of whom may become Medicaid beneficiaries without the support of EPIC and MOMS. *See Walsh,* 123 S.Ct. at 1878 (O'Connor, J.) ****384** ***826** (rejecting plurality rationale in part because Maine Program was "open to all Maine residents, rich and poor," did "not purport to further a Medicaid-related purpose" and was "not tailored to have such an effect"). [11] The EPIC program provides prescription drug benefits to seniors age 65 and older with household income levels below 200% of the federal poverty level. Michigan estimated that 3% of its beneficiaries (the figure used in similar calculations

by the neighboring states of Indiana and Wisconsin), or 3,000 persons, would convert to Medicaid without the EPIC program. Based on an average monthly cost per member of $1,220, Michigan calculated that EPIC saves the state Medicaid program $44,147,760 per year. For the MOMS program, which provides prenatal care for women below 185% of the federal poverty level, adolescents under 18, persons eligible under Medicaid for emergency services only and incarcerated beneficiaries, Michigan focused on newborns who would be at risk for neonatal intensive care in the absence of prenatal care. Based on state birth data, Michigan estimated that 3.2% of babies born to the 5,287 MOMS beneficiaries who will not become Medicaid-eligible, or 169 newborns, would require neonatal intensive care in the absence of MOMS prenatal care. Then, based on the average annual cost for neonatal intensive care of $27,461 per infant, Michigan estimated MOMS saved Medicaid $4,646,002 per year. While the record support for Michigan's estimates is less than overwhelming, it is sufficient to persuade us the Secretary's determination of Medicaid-related benefit is not arbitrary, particularly given the absence of any demonstrable significant impediment to Medicaid services from Michigan's prior authorization requirement. *See* 123 S.Ct. at 1868 (plurality concluding that prior authorization program must not "severely curtail[ ] Medicaid recipients' access to prescription drugs"); *id.* at 1881 (O'Connor, J.) (noting "concrete evidence of the burdens that Maine Rx's prior-authorization requirement would impose on Medicaid beneficiaries").

The undisputed evidence establishes that the Initiative's prior authorization procedure affords Medicaid beneficiaries reasonable and prompt access to those drugs subject to prior authorization. Under the Initiative, DCH's pharmacy benefits manager immediately authorizes a prior authorization drug if (1) the drug is needed "due to a specific medical condition or necessity, such as a drug allergy"; (2) the beneficiary has used the drug for several months and changing drugs is "medically inadvisable"; (3) the beneficiary has tried available drugs in the class and experienced "treatment failure or side effects"; or (4) the drug works better in combination with other medications the beneficiary uses. Viele Decl. ¶ 46. If the drug fits none of these categories, the request is "immediately forwarded" to a pharmacist who "after further conversation with the physician" either authorizes the drug or "informs the physician of his right to appeal to a DCH physician." *Id.* ¶ 47. If the request is not "immediately resolved with a DCH physician," the treating physician may prescribe an emergency 72–hour supply. *Id.* ¶ 48. Perhaps most important, at the end of the prior authorization process, "the prescribing physician has the final say as to whether or not the requested ***827** ****385** drug will be approved" provided he can "attest to medical necessity." *Id.* ¶ 49. And the available data confirm that in practice the prior authorization requirement has proved neither burdensome nor overly time-consuming. [12]

C. Commerce Clause

Finally, PhRMA contends the Initiative violates the Commerce Clause because it "has the 'practical effect' of controlling out-of-state prices." PhRMA Opening Br. at 54 (quoting *Healy v. Beer Inst.,* 491 U.S. 324, 336, 109 S.Ct. 2491, 2499, 105 L.Ed.2d 275 (1989)). PhRMA reasons that a manufacturer that wishes to raise the price of a drug in a particular state must consider the effect of the change on drug sales in Michigan. As an example, the appellants note that "if the manufacturer is considering lowering the price of a [reference] drug, doing so would require the manufacturer to lower the price of other drugs in the same therapeutic class in Michigan if it wishes to avoid prior authorization." PhRMA Opening Br. at 57. PhRMA's theory rests on an attenuated and speculative causal relationship between the Initiative's prior authorization requirement and the price a manufacturer charges for a reference drug out-of-state and, as the district court recognized, the claimed effect, if any, "will occur only sporadically and incidentally," 259 F.Supp.2d at 83. Most important, any interstate effect on prices is the result not of provisions peculiar to the Initiative, but of the federal Medicaid rebate statute which requires that the rebate reflect the difference between the "average manufacturer price" and the "best price," that is, "the lowest price available from the manufacturer during the rebate period to any wholesaler, retailer, provider, health maintenance organization, nonprofit entity, or governmental entity within the United States." 42 U.S.C. § 1396r–8(c)(A), (C). It is this federal provision that requires interstate price conformity. Thus, here, as in *Walsh,* the state prior authorization program "does not 'regulate the price of an[ ] out-of-state transaction by its express terms or its inevitable effect.' " *Walsh,* 123 S.Ct. at 1857 (quoting *PhRMA v. Concannon,* 249 F.3d 66, 81 (2001)).

* * *

For the foregoing reasons the judgment of the district court is

Affirmed.

All Citations

362 F.3d 817, 360 U.S.App.D.C. 375, Med & Med GD (CCH) P 301,431

Footnotes

1 The district court held that NAMI lacked standing to pursue this action. 259 F.Supp.2d at 52. We need not resolve NAMI's appeal of this ruling because both PhRMA and NUIC have standing and NUIC raises the same arguments on appeal as NAMI. *See Central Fla. Enters. v. FCC,* 683 F.2d 503, 505 n. 3 (D.C.Cir.1982) ("[W]e need not resolve the issue of [appellant organization's] standing since it raises no issues not raised by [broadcaster appellant] that would affect the disposition of the appeal, making irrelevant whether we view their submissions as those of parties or of amici.")

2 "Webster's New Collegiate Dictionary (1994) defines a 'formulary' as 'a book listing medicinal substances and formulas.' " *PhRMA v. Meadows,* 304 F.3d 1197, 1202 (11th Cir.2002), *cert. denied,* 538 U.S. 1056, 123 S.Ct. 2213, 155 L.Ed.2d 1105 (2003).

3 Michigan argues that the appellants have no private right of action for injunctive relief against the state based on Justices Scalia's and Thomas's separate opinions in *PhRMA v. Walsh,* 538 U.S. 644, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003). *See* 123 S.Ct. at 1878 (Scalia, J., concurring in judgment) ("[T]he remedy for the State's failure to comply with the obligations it has agreed to undertake under the Medicaid Act is set forth in the Act itself: termination of funding by the Secretary of the Department of Health and Human Services.") (citing *Blessing v. Freestone,* 520 U.S. 329, 349, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997); *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 1539–40, 67 L.Ed.2d 694 (1981); 42 U.S.C. § 1396c); *id.* at 1878 (Thomas, J., concurring in the judgment) (because "Spending Clause legislation 'is much in the nature of a contract,' " there are "serious questions as to whether third parties may sue to enforce Spending Clause legislation—through pre-emption or otherwise") (quoting *Pennhurst,* 451 U.S. at 17, 101 S.Ct. at 1539–40; citing *Blessing v. Freestone,* 520 U.S. 329, 349–350, 117 S.Ct. 1353, 1363–64, 137 L.Ed.2d 569 (1997)). By addressing the merits of the parties' arguments without mention of any jurisdictional flaw, the remaining seven Justices appear to have *sub silentio* found no flaw. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94–102, 118 S.Ct. 1003, 1012–16, 140 L.Ed.2d 210 (1998) (federal courts must ensure they have jurisdiction before considering merits).

4 Unlike Michigan's non-Medicaid programs, Maine's was open to all state residents and the drugs were purchased by the program's members rather than by the state. 123 S.Ct. at 1860.

5 Nonetheless, we note that, while "the overwhelming number of ... cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication," *Chevron* deference may be warranted "even when no such administrative formality was required and none was afforded." *Mead,* 533 U.S. at 230–31, 121 S.Ct. at 2172–74 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 256–57, 263, 115 S.Ct. 810, 813–14, 816–17, 130 L.Ed.2d 740 (1995)). Further, the Secretary's approval decisions are of a different order from the customs classifications at issue in *Mead*. The *Mead* Court observed that 49 different customs offices issued 10,000 to 15,000 customs classifications each year, that "their treatment by the agency makes it clear that a letter's binding character as a ruling stops short of third parties" and that the agency "in fact warned against assuming any right of detrimental reliance." *Mead,* 533 U.S. at 233, 121 S.Ct. at 2174–75 (citing 19 C.F.R. § 177.9(c) (2000)). In contrast, HHS considers

state Medicaid plans for the fifty states and the District of Columbia and has promulgated a uniform prior authorization policy for them. *See* 9/18/2002 HHS Letter to State Medicaid Directors at 2.

6 The appellants do not dispute that the Initiative complies with the two statutory requirements. *See* Viele Decl. ¶ ¶ 47–48.

7 As noted above, *supra* p. 820, drugs subject to prior authorization are marked with asterisks on the MPPL.

8 The appellants assert that on appeal the Secretary relies on the *Walsh* decision to the exclusion of "any other defense." PhRMA Reply Br. at 4 n.1; *see also id*. at 12. The Secretary's argument, as we read it, is that *Walsh* confirms his position below.

9 The Eleventh Circuit, however, decided the issue under step one of *Chevron,* concluding that there is no inconsistency given the "unequivocal" language of section (d)(1)(A), granting broad prior authorization authority (expressly set out as an alternative to restricting coverage through a formulary), and of the final sentence of section (d)(4), exempting section (d)(1)(A) programs from the formulary restrictions. *PhRMA v. Meadows,* 304 F.3d at 1210–11. The Secretary's construction is also consistent with the various opinions in *Walsh* which, in addressing the parties' "best interests" arguments, appear to assume, without expressly deciding, that it is permissible for a state to subject drugs in a formulary to prior authorization, although the opinions differ as to the circumstances under which prior authorization may be imposed. This construction is also consistent with the *Walsh* Court's construction of the final sentence of section 1396r–8(d)(4), albeit in dictum, to mean that "a prior authorization program that complies with the 24–hour and 72–hour conditions is not subject to the limitations imposed on formularies." *Walsh,* 123 S.Ct. at 1862 (citing 42 U.S.C. § 1396r–8(d)(4)).

10 These Justices did not invoke *Chevron* deference, presumably because the Secretary had not reviewed Maine's program and participated in the case only as amicus curiae.

11 We note that our arbitrary-and-capricious standard favors the Secretary's finding of benefit, while in *Walsh* the preliminary injunction abuse-of-discretion standard, as Justice O'Connor noted, favored affirming the district court's granting of the injunction. *See* 123 S.Ct. at 1881 (citing *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931–32, 95 S.Ct. 2561, 2567–68, 45 L.Ed.2d 648 (1975)).

12 In July 2002, for example, all but 19% of prior authorization requests placed with the program's call center were resolved in two to three minutes of conversation and only 2.2% were not approved at the pharmacist stage. Viele Decl. ¶ 51. Further, from February to July 2002 calls to the center averaged 2–3 minutes, discussions with pharmacists, when necessary, lasted 2–6 minutes, appeals to DCH physicians were resolved within 24 hours and facsimile requests were typically resolved within 24 hours. *Id*. ¶ 50.

116 S.Ct. 1730
Supreme Court of the United States

Barbara SMILEY, Petitioner,
v.
CITIBANK (SOUTH DAKOTA), N. A.

No. 95–860
|
Argued April 24, 1996.
|
Decided June 3, 1996.

Synopsis
Credit card holder sued national bank that issued card, alleging that bank charged excessive late charges on her account. The Superior Court, Los Angeles County, No. BC059202, Melvin B. Grover, J., dismissed action, and card holder appealed. The Court of Appeal affirmed. The Supreme Court, Mosk, Acting C.J., 11 Cal.4th 138, 44 Cal.Rptr.2d 441, 900 P.2d 690, granted review and affirmed. Certiorari was granted. The Supreme Court, Justice Scalia, held that term "interest" in provision of National Bank Act that provides that national bank may charge its loan customers "interest" at rate allowed by laws of state where bank is located, encompasses credit-card late-payment fees.

Affirmed.

Procedural Posture(s): On Appeal.

****1731** ***735** Syllabus [*]

Petitioner, a resident of California, held credit cards issued by respondent, a national bank located in South Dakota. She filed suit in state court, alleging that late-payment fees charged by respondent, although legal under South Dakota law, violated California law. Respondent moved for judgment on the pleadings, contending that petitioner's state-law claims were pre-empted by a provision of the National Bank Act of 1864 that permits a national bank to charge its loan customers "interest at the rate allowed by the laws of the State ... where the bank is located," 12 U.S.C. § 85, see *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed.2d 534. The California Superior Court, accepting respondent's argument that credit card late-payment fees constitute "interest" for purposes of § 85, granted respondent's motion. The State Court of Appeal and State Supreme Court affirmed.

Held: The Comptroller of the Currency has reasonably interpreted the term "interest" in § 85 to include late-payment fees, see 12 CFR § 7.4001(a), and petitioner has failed to establish that the Court should not accord its customary deference to the Comptroller's interpretation of an ambiguous provision of the National Bank Act. Pp. 1732–1736.

(a) Where a provision of the National Bank Act is ambiguous, the Court, pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–845, 104 S.Ct. 2778, 2781–2783, 81 L.Ed.2d 694, defers to reasonable judgments of the Comptroller, the official charged with administering the Act. *NationsBank of N. C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–257, 115 S.Ct. 810, 813, 130 L.Ed.2d 740. Petitioner's argument that deference is not owing to the recently adopted 12 CFR § 7.4001(a) is unpersuasive. The validity of the Comptroller's interpretation is not affected by the fact that the regulation was issued more than 100 years after § 85 was enacted or that it was litigation, including this very suit, which disclosed the need for the regulation. And the distinction that the regulation makes between those charges designated as interest and those not so classified is not arbitrary or capricious. See *Chevron, supra*, at 844, 104 S.Ct., at 2782. Petitioner errs in contending that an agency interpretation that contradicts a prior agency position is necessarily invalid; in any event, she fails to show that a change of official agency position has occurred here. Finally, the issue here, the meaning of § 85, does not bring into play the pre-emption considerations that petitioner raises. Pp. 1732–1735.

***736** b) The Comptroller's interpretation of the statutory term "interest" is reasonable. There is no indication that, at the time of the passage of the National Bank Act, common usage of the word "interest" or the phrase "at the rate allowed" required that interest charges be expressed as functions of time and amount owing. Nor is there support for petitioner's contention that the late fees are "penalties" rather than "interest." See *Citizens' Nat. Bank of Kansas City v. Donnell*, 195 U.S. 369, 25 S.Ct. 49, 49 L.Ed. 238. Pp. 1735–1736.

11 Cal.4th 138, 44 Cal.Rptr.2d 441, 900 P.2d 690 (1995), affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

Michael D. Donovan, Los Angeles, CA, for petitioner.

Richard B. Kendall, Los Angeles, CA, for respondent.

Irving L. Gornstein, Washington, DC, for the United States as amicus curiae, by special leave of the Court.

Opinion

****1732** ***737** Justice SCALIA delivered the opinion of the Court.

Section 30 of the National Bank Act of 1864, Rev. Stat. § 5197, as amended, 12 U.S.C. § 85, provides that a national bank may charge its loan customers "interest at the rate allowed by the laws of the State ... where the bank is located." In *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.,* 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978), we held that this provision authorizes a national bank to charge out-of-state credit-card customers an interest rate allowed by the bank's home State, even when that rate is higher than what is permitted by the States in which the cardholders reside. The question in this case is whether § 85 also authorizes a national bank to charge late-payment fees that are lawful in the bank's home State but prohibited in the States where the cardholders reside—in other words, whether the statutory term "interest" encompasses late-payment fees.

I

Petitioner, a resident of California, held two credit cards —a "Classic Card" and a "Preferred Card"—issued by respondent, ***738** a national bank located in Sioux Falls, South Dakota. The Classic Card agreement provided that respondent would charge petitioner a late fee of $15 for each monthly period in which she failed to make her minimum monthly payment within 25 days of the due date. Under the Preferred Card agreement, respondent would impose a late fee of $6 if the minimum monthly payment was not received within 15 days of its due date; and an additional charge of $15 or 0.65% of the outstanding balance on the Preferred Card, whichever was greater, if the minimum payment was not received by the *next* minimum monthly payment due date. Petitioner was charged late fees on both cards.

These late fees are permitted by South Dakota law, see S.D. Codified Laws §§ 54–3–1, 54–3–1.1 (1990 and Supp.1995). Petitioner, however, is of the view that exacting such "unconscionable" late charges from California residents violates California law, and in 1992 brought a class action against respondent on behalf of herself and other California holders of respondent's credit cards, asserting various statutory and common-law claims. [1] Respondent moved for judgment on the pleadings, contending that petitioner's claims were pre-empted by § 85. The Superior Court of Los Angeles County initially denied respondent's motion, but the California Court of Appeal, Second Appellate District, issued a writ of mandate directing the Superior Court to either grant the motion or show cause why it should not be required to do so. The Superior Court chose the former course, and the Court of Appeal affirmed its dismissal of the complaint, 26 Cal.App.4th 1767, 32 Cal.Rptr.2d 562 (1994). The Supreme Court of California granted review and affirmed, two ***739** justices dissenting. 11 Cal.4th 138, 44 Cal.Rptr.2d 441, 900 P.2d 690 (1995). We granted certiorari. 516 U.S. 1087, 116 S.Ct. 806, 133 L.Ed.2d 753 (1996).

II

In light of the two dissents from the opinion of the Supreme Court of California, see 11 Cal.4th, at 165, 177, 44 Cal.Rptr.2d, at 459, 467, 900 P.2d, at 708, 716 (Arabian, J., dissenting, and George, J., dissenting), and in light of the opinion of the Supreme Court of New Jersey creating the conflict that has prompted us to take this case, [2] it would be difficult indeed to contend that the word "interest" in the National Bank Act is unambiguous with regard to the point ****1733** at issue here. It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–845, 104 S.Ct. 2778, 2781–2783, 81 L.Ed.2d 694 (1984). As we observed only last Term, that practice extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws. "The Comptroller of the Currency," we said, "is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws." *NationsBank of N. C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 256–257, 115 S.Ct. 810, 813, 130 L.Ed.2d 740 (1995) (citations and internal quotation marks omitted).

On March 3, 1995, which was after the California Superior Court's dismissal of petitioner's complaint, the Comptroller of the Currency noticed for public comment a proposed regulation ***740** dealing with the subject before us, see 60 Fed.Reg. 11924, 11940, and on February 9, 1996, which was after the California Supreme Court's decision, he adopted the following provision:

> "The term 'interest' as used in 12 U.S.C. § 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports." 61 Fed.Reg. 4869 (to be codified in 12 CFR § 7.4001(a)).

Petitioner proposes several reasons why the ordinary rule of deference should not apply to this regulation. First, petitioner points to the fact that this regulation was issued more than 100 years after the enactment of § 85, and seemingly as a result of this and similar litigation in which the Comptroller has participated as *amicus curiae* on the side of the banks. The 100–year delay makes no difference. To be sure, agency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist. But neither antiquity nor contemporaneity with the statute is a condition of validity. We accord deference to agencies under *Chevron,* not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant ***741** for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows. See *Chevron, supra,* at 843–844, 104 S.Ct., at 2782. Nor does it matter that the regulation was prompted by litigation, including this very suit. Of course we deny deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 212, 109 S.Ct. 468, 473–474, 102 L.Ed.2d 493 (1988). The deliberateness of such positions, if not indeed their authoritativeness, is suspect. But we have before us here a full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation, see 5 U.S.C. § 553; *Thompson v. Clark,* 741 F.2d 401, 409 (C.A.D.C.1984). That it was litigation which disclosed the need for the regulation is irrelevant.

Second, petitioner contends that the Comptroller's regulation is not deserving of our deference because "there is no rational basis for distinguishing the various charges [it] has denominated interest ... from those charges it has denominated 'non-interest.' " Reply Brief for Petitioner 14. We disagree. ****1734** As an analytical matter, it seems to us perfectly possible to draw a line, as the regulation does, between (1) "payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended," and (2) all other payments. To be sure, in the broadest sense *all* payments connected in any way with the loan—including reimbursement of the lender's costs in processing the application, insuring the loan, and appraising the collateral —can be regarded as "compensating [the] creditor for [the] extension of credit." But it seems to us quite possible and rational to distinguish, as the regulation does, between those charges that are *specifically assigned* ***742** to such expenses and those that are assessed for simply making the loan, or for the borrower's default. In its logic, at least, the line is not "arbitrary [or] capricious," and thereby disentitled to deference under *Chevron,* see 467 U.S., at 844, 104 S.Ct., at 2782. Whether it is "arbitrary [or] capricious" as an interpretation of what the *statute* means—or perhaps even (what *Chevron* also excludes from deference) "manifestly contrary to the statute"—we will discuss in the next Part of this opinion.

Finally, petitioner argues that the regulation is not entitled to deference because it is inconsistent with positions taken by the Comptroller in the past. Of course the mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, see, *e.g., Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 46–57, 103 S.Ct. 2856, 2868–2874, 77 L.Ed.2d 443 (1983), or change that does not take account of legitimate reliance on prior interpretation, see, *e.g., United States v. Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 670–675, 93 S.Ct. 1804, 1814–1817, 36

L.Ed.2d 567 (1973); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 295, 94 S.Ct. 1757, 1772, 40 L.Ed.2d 134 (1974), may be "arbitrary, capricious [or] an abuse of discretion," 5 U.S.C. § 706(2)(A). But if these pitfalls are avoided, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.

In any case, we do not think that anything which can accurately be described as a change of official agency position has occurred here. The agency's Notice of Proposed Rulemaking asserted that the new regulation "reflect[s] current law and [Office of the Comptroller of the Currency (OCC)] interpretive letters," 60 Fed.Reg. 11929 (1995), and the Statement of Basis and Purpose accompanying the final adoption stated that "[t]he final ruling is consistent with OCC interpretive letters in this area ... and reflects the position the OCC has taken in *amicus curiae* briefs in litigation pending in many state and Federal courts," ***743** 61 Fed.Reg. 4859 (1996) (citing OCC interpretive letters). Petitioner points only to (1) a June 1964 letter from the Comptroller to the President's Committee on Consumer Interests, which states that "[c]harges for late payments, credit life insurance, recording fees, documentary stamp are illustrations of charges which are made by some banks which would not properly be characterized as interest," see App. to Brief for Petitioner 5a; and (2) a 1988 opinion letter from the Deputy Chief Counsel of the OCC stating "it is my position that [under § 85] the laws of the states where the banks are located ... determine whether or not the banks can impose the foregoing fees and charges [including late fees] on Iowa residents," OCC Interpretive Letter No. 452, reprinted in 1988–1989 Transfer Binder, CCH Fed. Banking L. Rep. ¶ 85,676, p. 78,064 (1988). We doubt whether either of these statements was sufficient in and of itself to establish a binding agency policy—the former, because it was too informal, and the latter because it only purported to represent the position of the Deputy Chief Counsel in response to an inquiry concerning particular banks. Nor can it even be argued that the two statements *reflect* a prior agency policy, since, in addition to contradicting the regulation before us here, they also contradict one another—the former asserting that "interest" is a nationally uniform concept, and the latter that it is to be determined by reference to state law. What these statements ****1735** show, if anything, is that there was good reason for the Comptroller to promulgate the new regulation, in order to eliminate uncertainty and confusion.

In addition to offering these reasons why 12 CFR § 7.4001(a) in particular is not entitled to deference, petitioner contends that *no* Comptroller interpretation of § 85 is entitled to deference, because § 85 is a provision that pre-empts state law. She argues that the "presumption against ... pre-emption" announced in *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 518, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), in effect trumps *Chevron,* and requires a court to make its own interpretation of § 85 that ***744** will avoid (to the extent possible) pre-emption of state law. This argument confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts. That is *not* the question at issue here; there is no doubt that § 85 pre-empts state law. In *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.,* 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978), we dismissed petitioners' argument that the "exportation" of interest rates from the bank's home State would "significantly impair the ability of States to enact effective usury laws" with the observation that "[t]his impairment ... has always been implicit in the structure of the National Bank Act.... [T]he protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court." *Id.,* at 318–319, 99 S.Ct., at 550–551. What *is* at issue here is simply the meaning of a provision that does not (like the provision in *Cipollone*) deal with pre-emption, and hence does not bring into play the considerations petitioner raises. [3]

III

Since we have concluded that the Comptroller's regulation deserves deference, the question before us is not whether it represents the best interpretation of the statute, but ***745** whether it represents a reasonable one. The answer is obviously yes.

Petitioner argues that the late fees charged by respondent do not constitute "interest" because they "do not vary based on the payment owed or the time period of delay." Brief for Petitioner 32–33. We do not think that such a limitation must be read into the statutory term. Most legal dictionaries of the era of the National Bank Act did not place such a limitation upon "interest." See, *e.g.,* 1 J. Bouvier, A Law Dictionary 652 (6th ed. 1856) ("The compensation which is paid by the borrower to the lender or by the debtor to the creditor for ... use

[of money]"); 2 A. Burrill, A Law Dictionary and Glossary 90 (2d ed. 1860); 11 American and English Encyclopedia of Law 379 (J. Merrill ed. 1890). But see J. Wharton, Law Lexicon or Dictionary of Jurisprudence 391 (2d Am. ed. 1860). The definition of "interest" that we ourselves set out in *Brown v. Hiatts,* 15 Wall. 177, 185, 21 L.Ed. 128 (1873), decided shortly after the enactment of the National Bank Act, likewise contained no indication that it was limited to charges expressed as a function of time or of amount owing: "Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money or as damages for its detention." See also *Hollowell v. Southern Building & Loan Assn.,* 120 N.C. 286, 26 S.E. 781 (1897) ("[A]ny charges made against [the borrower] in excess of the lawful rate of interest, whether called 'fines,' 'charges,' ****1736** ' dues,' or 'interest,' are in fact interest, and usurious").

Petitioner suggests another source for the asserted requirement that the charges be time- and rate-based: What is authorized by § 85, she notes, is the charging of interest "at the rate allowed" by the laws of the bank's home State. This requires, in her view, that the interest charges be expressed as functions of time and amount owing. It would be surprising to find such a requirement in the Act, if only because it would be so pointless. Any flat charge may, of course, readily be converted to a percentage charge—which ***746** was indeed the basis for 19th-century decisions holding that flat charges violated state usury laws establishing maximum "rates." See, *e.g., Craig v. Pleiss,* 26 Pa. 271, 272–273 (1856); *Hollowell, supra,* at 286, 26 S.E., at 781. And there is no apparent reason why home-state-approved percentage charges should be permissible but home-state-approved flat charges unlawful. In any event, common usage at the time of the National Bank Act prevents the conclusion that the Comptroller's refusal to give the word "rate" the narrow meaning petitioner demands is unreasonable. The 1849 edition of Webster's gives as one of the definitions of "rate" the "[p]rice or amount stated or fixed on any thing." N. Webster, American Dictionary of the English Language 910. To illustrate this sense of the word, it provides the following examples: "A king may purchase territory at too dear a *rate.* The *rate* of interest is prescribed by law." *Ibid.* Cf. 2 Bouvier, *supra,* at 421 (defining "rate of exchange" as "the price at which a bill drawn in one country upon another, may be sold in the former").

Finally, petitioner contends that the late fees cannot be "interest" because they are "penalties." To support that dichotomy, she points to our opinion in *Meilink v. Unemployment Reserves Comm'n of Cal.,* 314 U.S. 564, 570, 62 S.Ct. 389, 392, 86 L.Ed. 458 (1942). But *Meilink* involved a provision of the Bankruptcy Act that disallowed debts owing to governmental entities "as a penalty," except for "the amount of the pecuniary loss sustained by the act ... out of which the penalty ... arose, with ... such interest as may have accrued thereon according to law." *Id.,* at 566, 62 S.Ct., at 390. Obviously, this provision uses "interest" to mean *only* that interest which is exacted as commercial compensation, and *not* that interest which is exacted as a penalty. A word often takes on a more narrow connotation when it is expressly opposed to another word: "car," for example, has a broader meaning by itself than it does in a passage speaking of "cars and taxis." In § 85, the term "interest" is *not* used in contradistinction to "penalty," and ***747** there is no reason why it cannot include interest charges imposed for that purpose. More relevant than *Meilink* is our opinion in *Citizens' Nat. Bank of Kansas City v. Donnell,* 195 U.S. 369, 25 S.Ct. 49, 49 L.Ed. 238 (1904), which did involve § 85 (or, more precisely, its predecessor, Rev.Stat. § 5197). There, a bank argued that a 12% charge on overdrafts did not violate a state law setting an 8% ceiling on interest rates because, *inter alia,* the overdraft charge "was a penalty because of a failure to pay a debt when due." *Id.,* at 373–374, 25 S.Ct., at 50. We dismissed the argument out of hand: "The suggestions as to the twelve per cent charge on overdrafts do not seem to us to need answer." *Id.,* at 374, 25 S.Ct., at 50.

* * *

Petitioner devotes much of her brief to the question whether the meaning of "interest" in § 85 can constitutionally be left to be defined by the law of the bank's home State —a question that is not implicated by the Comptroller's regulation. Because the regulation is entitled to deference, and because the Comptroller's interpretation of § 85 is not an unreasonable one, the decision of the Supreme Court of California must be affirmed.

It is so ordered.

All Citations

517 U.S. 735, 116 S.Ct. 1730, 135 L.Ed.2d 25, 64 USLW 4399, 96 Cal. Daily Op. Serv. 3922, 96 Daily Journal D.A.R. 6399

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 By way of common-law claims, petitioner's complaint alleged breach of duty of good faith and fair dealing; unjust enrichment; fraud and deceit; negligent misrepresentation; and breach of contract. It also alleged violation of Cal. Bus. & Prof.Code Ann. § 17200 (West Supp.1996) (prohibiting unlawful business practices) and Cal. Civ.Code Ann. § 1671 (West 1985) (invalidating unreasonable liquidated damages).

2 *Sherman v. Citibank (South Dakota), N. A.,* 143 N.J. 35, 668 A.2d 1036 (1995). The Supreme Court of Colorado and the United States Court of Appeals for the First Circuit have adopted the same interpretation as the Supreme Court of California. See *Copeland v. MBNA America Bank, N. A.,* 907 P.2d 87 (Colo.1995); *Greenwood Trust Co. v. Massachusetts,* 971 F.2d 818, 829–831 (C.A.1 1992) (dictum), cert. denied, 506 U.S. 1052, 113 S.Ct. 974, 122 L.Ed.2d 129 (1993).

3 In a four-line footnote on the last page of her reply brief, and unpursued in oral argument, petitioner raised the point that deferring to the regulation in this case involving antecedent transactions would make the regulation retroactive, in violation of *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208–209, 109 S.Ct. 468, 471–472, 102 L.Ed.2d 493 (1988). Reply Brief for Petitioner 20, n. 17. There might be substance to this point if the regulation replaced a prior agency interpretation—which, as we have discussed, it did not. Where, however, a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means.

125 S.Ct. 2688
Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, et al., Petitioners,
v.
BRAND X INTERNET SERVICES et al.
Federal Communications Commission and United States, Petitioners,
v.
Brand X Internet Services et al.

Nos. 04–277, 04–281
|
Argued March 29, 2005.
|
Decided June 27, 2005.

Synopsis

Background: Petitions were filed seeking review of Federal Communications Commission's (FCC) declaratory ruling that cable companies providing broadband Internet access did not provide "telecommunications service," and hence were exempt from mandatory regulation under Title II of Communications Act. The United States Court of Appeals for the Ninth Circuit, 345 F.3d 1120, vacated in part. Certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

Chevron framework applied;

FCC's ruling was lawful construction of Communications Act under *Chevron*; and

FCC's ruling was not arbitrary or capricious under Administrative Procedure Act (APA).

Reversed and remanded.

Justice Stevens and Justice Breyer filed concurring opinions.

Justice Scalia filed dissenting opinion in which Justice Souter and Justice Ginsburg joined in part.

****2689** ***967** Syllabus [*]

Consumers traditionally access the Internet through "dial-up" connections provided via local telephone lines. Internet service providers (ISPs), in turn, link those calls to the Internet network, not only by providing a physical connection, but also by offering consumers the ability to translate raw data into information they may both view on their own computers and transmit to others connected to the Internet. Technological limitations of local telephone wires, however, retard the speed at which Internet data may be transmitted through such "narrowband" connections. "Broadband" Internet service, by contrast, transmits data at much higher speeds. There are two principal kinds of broadband service: cable modem service, which transmits data between the Internet and users' computers via the network of television cable lines owned by cable companies, and Digital Subscriber Line (DSL) service, which uses high-speed wires owned by local telephone companies. Other ways of ****2690** transmitting high-speed Internet data, including terrestrial-and satellite-based wireless networks, are also emerging.

The Communications Act of 1934, as amended by the Telecommunications Act of 1996, defines two categories of entities relevant here. "Information service" providers—those "offering ... a capability for [processing] information via telecommunications," 47 U.S.C. § 153(20)—are subject to mandatory regulation by the Federal Communications Commission as common carriers under Title II of the Act. Conversely, telecommunications carriers—*i.e.,* those "offering ... telecommunications for a fee directly to the public ... regardless of the facilities used," § 153(46)—are not subject to mandatory Title II regulation. These two classifications originated in the late 1970's, as the Commission developed rules to regulate data-processing services offered over telephone wires. Regulated "telecommunications service" under the 1996 Act is the analog to "basic service" under the prior regime, the *Computer II* rules. ***968** Those rules defined such service as a "pure" or "transparent" transmission capability over a communications path enabling the consumer to transmit an ordinary-language message to another point without computer processing or storage of the information, such as via a telephone or a facsimile. Under the 1996 Act, "[i]nformation service" is the analog to "enhanced" service, defined by the *Computer II* rules as computer-processing applications that act on the subscriber's information, such as voice and data storage services, as well as "protocol conversion," *i.e.,*

the ability to communicate between networks that employ different data-transmission formats.

In the *Declaratory Ruling* under review, the Commission classified broadband cable modem service as an "information service" but not a "telecommunications service" under the 1996 Act, so that it is not subject to mandatory Title II common-carrier regulation. The Commission relied heavily on its *Universal Service Report,* which earlier classified "non-facilities-based" ISPs—those that do not own the transmission facilities they use to connect the end user to the Internet—solely as information-service providers. Because Internet access is a capability for manipulating and storing information, the Commission concluded, it was an "information service." However, the integrated nature of such access and the high-speed wire used to provide it led the Commission to conclude that cable companies providing it are not "telecommunications service" providers. Adopting the *Universal Service Report's* reasoning, the Commission held that cable companies offering broadband Internet access, like non-facilities-based ISPs, do not offer the end user telecommunications service, but merely use telecommunications to provide end users with cable modem service.

Numerous parties petitioned for review. By judicial lottery, the Court of Appeals for the Ninth Circuit was selected as the venue for the challenge. That court granted the petitions in part, vacated the *Declaratory Ruling* in part, and remanded for further proceedings. In particular, the court held that the Commission could not permissibly construe the Communications Act to exempt cable companies providing cable modem service from mandatory Title II regulation. Rather than analyzing the permissibility of that construction under the deferential framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, however, the court grounded that holding in the *stare decisis* effect of its decision in *AT & T Corp. v. Portland,* 216 F.3d 871, which had held that cable modem service is a "telecommunications service."

****2691** *Held:* The Commission's conclusion that broadband cable modem companies are exempt from mandatory common-carrier regulation is a lawful ***969** construction of the Communications Act under *Chevron* and the Administrative Procedure Act. Pp. 2699–2712.

1. *Chevron's* framework applies to the Commission's interpretation of "telecommunications service." Pp. 2699–2702.

(a) *Chevron* governs this Court's review of the Commission's construction. See, *e.g., National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.,* 534 U.S. 327, 333–339, 122 S.Ct. 782, 151 L.Ed.2d 794. *Chevron* requires a federal court to defer to an agency's construction, even if it differs from what the court believes to be the best interpretation, if the particular statute is within the agency's jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency's construction is reasonable. 467 U.S., at 843–844, and n. 11, 865–866. The Commission's statutory authority to "execute and enforce" the Communications Act, § 151, and to "prescribe such rules and regulations as may be necessary ... to carry out the [Act's] provisions," § 201(b), give the Commission power to promulgate binding legal rules; the Commission issued the order under review in the exercise of that authority; and there is no dispute that the order is within the Commission's jurisdiction. Pp. 2699–2700.

(b) The Ninth Circuit should have applied *Chevron's* framework, instead of following the contrary construction it adopted in *Portland.* A court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. See *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 740–741, 116 S.Ct. 1730. Because *Portland* held only that the *best* reading of § 153(46) was that cable modem service was "telecommunications service," not that this was the only permissible reading or that the Communications Act unambiguously required it, the Ninth Circuit erred in refusing to apply *Chevron.* Pp. 2700–2702.

2. The Commission's construction of § 153(46)'s "telecommunications service" definition is a permissible reading of the Communications Act at both steps of *Chevron's* test. Pp. 2702–2710.

(a) For the Commission, the question whether cable companies providing cable modem service "offe[r]" telecommunications within § 153(46)'s meaning turned on the nature of the functions offered the *end user.* Seen from the consumer's point of view, the Commission concluded, the cable wire is used to access the World Wide Web,

newsgroups, etc., rather than "transparently" to transmit and receive ordinary-language messages without computer processing or storage of the message. The integrated character of this offering led the Commission to conclude that cable companies do not make a stand-alone, transparent offering of telecommunications. Pp. 2702–2704.

***970** b) The Commission's construction of § 153(46) is permissible at *Chevron's* first step, which asks whether the statute's plain terms "directly addres[s] the precise question at issue." 467 U.S., at 843, 104 S.Ct. 2778. This conclusion follows both from the ordinary meaning of "offering" and the Communications Act's regulatory history. Pp. 2704–2708.

(1) Where a statute's plain terms admit of two or more reasonable ordinary usages, the Commission's choice of one of them is entitled to deference. See, *e.g.,* ****2692** *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 498, 122 S.Ct. 1646, 152 L.Ed.2d 701. It is common usage to describe what a company "offers" to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product. What cable companies providing cable modem service "offer" is finished Internet service, though they do so using the discrete components composing the end product, including data transmission. Such functionally integrated components need not be described as distinct "offerings." Pp. 2704–2706.

(2) The Commission's traditional distinction between basic and enhanced service also supports the conclusion that the Communications Act is ambiguous about whether cable companies "offer" telecommunications with cable modem service. Congress passed the Act's definitions against the background of this regulatory history, and it may be assumed that the parallel terms "telecommunications service" and "information service" substantially incorporated the meaning of "basic" and "enhanced" service. That history in at least two respects confirms that the term "telecommunications service" is ambiguous. First, in the *Computer II* order establishing the terms "basic" and "enhanced" services, the Commission defined those terms functionally, based on how the consumer interacts with the provided information, just as the Commission did in the order under review. Cable modem service is not "transparent" in terms of its interaction with customer-supplied information; the transmission occurs only in connection with information processing. It was therefore consistent with the statute's terms for the Commission to assume that the parallel term "telecommunications service" in § 153(46) likewise describes a "pure" or "transparent" communications path not necessarily separately present in an integrated information-processing service from the end user's perspective. Second, the Commission's application of the basic/enhanced service distinction to non-facilities-based ISPs also supports the Court's conclusion. The Commission has historically not subjected non-facilities-based information-service providers to common-carrier regulation. That history suggests, in turn, that the Act does not unambiguously classify non-facilities-based ISPs as "offerors" of telecommunications. If the Act does not unambiguously classify such providers as "offering telecommunications,"it ***971** also does not unambiguously so classify facilities-based information-service providers such as cable companies; the relevant definitions do not distinguish the two types of carriers. The Act's silence suggests, instead, that the Commission has the discretion to fill the statutory gap. Pp. 2706–2708.

(c) The Commission's interpretation is also permissible at *Chevron's* step two because it is "a reasonable policy choice for the agency to make," 467 U.S., at 845, 104 S.Ct. 2778. Respondents argue unpersuasively that the Commission's construction is unreasonable because it allows any communications provider to evade common-carrier regulation simply by bundling information service with telecommunications. That result does not follow from the interpretation adopted in the *Declaratory Ruling*. The Commission classified cable modem service solely as an information service because the telecommunications input used to provide cable modem service is not separable from the service's data-processing capabilities, but is part and parcel of that service and integral to its other capabilities, and therefore is not a telecommunications offering. This construction does not leave all information-service offerings unregulated under Title II. It is plain, for example, that a local telephone company cannot escape regulation ****2693** by packaging its telephone service with voice mail because such packaging offers a transparent transmission path—telephone service—that transmits information independent of the information-storage capabilities voice mail provides. By contrast, the high-speed transmission used to provide cable modem service is a functionally integrated component of Internet service because it transmits data only in connection with the further processing of information and is necessary to provide such service. The Commission's construction therefore was more limited than respondents assume.

Respondents' argument that cable modem service does, in fact, provide "transparent" transmission from the consumer's perspective is also mistaken. Their characterization of the "information-service" offering of Internet access as consisting only of access to a cable company's e-mail service, its Web page, and the ability it provides to create a personal Web page conflicts with the Commission's reasonable understanding of the nature of Internet service. When an end user accesses a third party's Web site, the Commission concluded, he is equally using the information service provided by the cable company as when he accesses that company's own Web site, its e-mail service, or his personal Web page. As the Commission recognized, the service that Internet access providers offer the public is Internet access, not a transparent ability (from the end user's perspective) to transmit information. Pp. 2708–2710.

***972** 3. The Court rejects respondent MCI, Inc.'s argument that the Commission's treatment of cable modem service is inconsistent with its treatment of DSL service and is therefore an arbitrary and capricious deviation from agency policy under the Administrative Procedure Act, see 5 U.S.C. § 706(2)(A). MCI points out that when local telephone companies began to offer Internet access through DSL technology, the Commission required them to make the telephone lines used to provide DSL available to competing ISPs on nondiscriminatory, common-carrier terms. Respondents claim that the Commission has not adequately explained its decision not to regulate cable companies similarly.

The Court thinks that the Commission has provided a reasoned explanation for this decision. The traditional reason for its *Computer II* common-carrier treatment of facilities-based carriers was that the *telephone network* was the primary, if not the exclusive, means through which information-service providers could gain access to their customers. The Commission applied the same treatment to DSL service based on that history, rather than on an analysis of contemporaneous market conditions. The Commission's *Declaratory Ruling,* by contrast, concluded that changed market conditions warrant different treatment of cable modem service. Unlike at the time of the DSL order, substitute forms of Internet transmission exist today, including wireline, cable, terrestrial wireless, and satellite. The Commission therefore concluded that broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market. There is nothing arbitrary or capricious about applying a fresh analysis to the cable industry. Pp. 2710–2711.

345 F.3d 1120, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, O'CONNOR, KENNEDY, and BREYER, JJ., joined. STEVENS, J., *post,* p. 2712, and BREYER, J., *post,* p. 2712, filed concurring opinions. SCALIA, J., filed a dissenting opinion, in which SOUTER and ****2694** GINSBURG, JJ., joined as to Part I, *post,* p. 2713.

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Opinion

Justice THOMAS delivered the opinion of the Court.

*973 Title II of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.,* subjects all providers of "telecommunications servic[e]" to mandatory common-carrier regulation, § 153(44). In the order under review, the *974 Federal Communications Commission concluded that cable companies that sell broadband Internet service do not provide "telecommunications servic[e]" as the Communications Act defines that term, and hence are exempt from mandatory common-carrier regulation under Title II. We must decide whether that conclusion is a lawful construction of the Communications Act under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* We hold that it is.

I

The traditional means by which consumers in the United States access the network of interconnected computers that make up the Internet is through "dial-up" connections provided over local telephone facilities. See 345 F.3d 1120, 1123–1124 (C.A.9 2003) (cases below); *In re Inquiry Concerning High–Speed Access to the Internet Over Cable and Other Facilities,* 17 FCC Rcd. 4798, 4802–4803, ¶ 9, 2002 WL 407567 (2002) (hereinafter *Declaratory Ruling*). Using these connections, consumers access the Internet by making calls with computer modems through the telephone wires owned by local phone companies. See *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 489–490, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) (describing the physical structure of a local telephone exchange). Internet service providers (ISPs), in turn, link those calls to the Internet network, **2696 not only by providing a physical connection, but also by offering consumers the ability to translate raw Internet data into information they may both view on their personal computers and transmit to other computers connected to the Internet. See *In re Federal–State Joint Board on Universal Service,* 13 FCC Rcd. 11501,

11531, ¶ 63, 1998 WL 166178 (1998) (hereinafter *Universal Service Report* or *Report*); P. Huber, M. Kellogg, & J. Thorne, Federal Telecommunications Law 988 (2d ed.1999) (hereinafter Huber); 345 F.3d, at 1123–1124. Technological limitations of local telephone wires, however, retard the speed at which data from the Internet may be transmitted ***975** through end users' dial-up connections. Dial-up connections are therefore known as "narrowband," or slower speed, connections.

"Broadband" Internet service, by contrast, transmits data at much higher speeds. There are two principal kinds of broadband Internet service: cable modem service and Digital Subscriber Line (DSL) service. Cable modem service transmits data between the Internet and users' computers via the network of television cable lines owned by cable companies. See *id.,* at 1124. DSL service provides high-speed access using the local telephone wires owned by local telephone companies. See *WorldCom, Inc. v. FCC,* 246 F.3d 690, 692 (C.A.D.C.2001) (describing DSL technology). Cable companies and telephone companies can either provide Internet access directly to consumers, thus acting as ISPs themselves, or can lease their transmission facilities to independent ISPs that then use the facilities to provide consumers with Internet access. Other ways of transmitting high-speed Internet data into homes, including terrestrial- and satellite-based wireless networks, are also emerging. *Declaratory Ruling* 4802, ¶ 6.

II

At issue in these cases is the proper regulatory classification under the Communications Act of broadband cable Internet service. The Act, as amended by the Telecommunications Act of 1996, 110 Stat. 56, defines two categories of regulated entities relevant to these cases: telecommunications carriers and information-service providers. The Act regulates telecommunications carriers, but not information-service providers, as common carriers. Telecommunications carriers, for example, must charge just and reasonable, nondiscriminatory rates to their customers, 47 U.S.C. §§ 201–209, design their systems so that other carriers can interconnect with their communications networks, § 251(a)(1), and contribute to the federal "universal service" fund, § 254(d). ***976** These provisions are mandatory, but the Commission must forbear from applying them if it determines that the public interest requires it. §§ 160(a), (b). Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications, see §§ 151–161.

These two statutory classifications originated in the late 1970's, as the Commission developed rules to regulate data-processing services offered over telephone wires. That regime, the "*Computer II* " rules, distinguished between "basic" service (like telephone service) and "enhanced" service (computer-processing service offered over telephone lines). *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* 77 F.C.C.2d 384, 417–423, ¶¶ 86–101, 1980 WL 356789 (1980) (hereinafter *Computer II Order*). The *Computer II* rules defined both basic and enhanced services ****2697** by reference to how the consumer perceives the service being offered.

In particular, the Commission defined "basic service" as "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Id.,* at 420, ¶ 96. By "pure" or "transparent" transmission, the Commission meant a communications path that enabled the consumer to transmit an ordinary-language message to another point, with no computer processing or storage of the information, other than the processing or storage needed to convert the message into electronic form and then back into ordinary language for purposes of transmitting it over the network—such as via a telephone or a facsimile. *Id.,* at 419–420, ¶¶ 94–95. Basic service was subject to common-carrier regulation. *Id.,* at 428, ¶ 114.

"[E]nhanced service," however, was service in which "computer processing applications [were] used to act on the ***977** content, code, protocol, and other aspects of the subscriber's information," such as voice and data storage services, *id.,* at 420–421, ¶ 97, as well as "protocol conversion" (*i.e.,* ability to communicate between networks that employ different data-transmission formats), *id.,* at 421–422, ¶ 99. By contrast to basic service, the Commission decided not to subject providers of enhanced service, even enhanced service offered via transmission wires, to Title II common-carrier regulation. *Id.,* at 428–432, ¶¶ 115–123. The Commission explained that it was unwise to subject enhanced service to common-carrier regulation given the "fast-moving,

competitive market" in which they were offered. *Id.,* at 434, ¶ 129.

The definitions of the terms "telecommunications service" and "information service" established by the 1996 Act are similar to the *Computer II* basic-and enhanced-service classifications. "Telecommunications service"—the analog to basic service—is "the offering of telecommunications for a fee directly to the public ... regardless of the facilities used." 47 U.S.C. § 153(46). "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." § 153(43). "Telecommunications carrier[s]"—those subjected to mandatory Title II common-carrier regulation—are defined as "provider[s] of telecommunications services." § 153(44). And "information service"—the analog to enhanced service—is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...." § 153(20).

In September 2000, the Commission initiated a rulemaking proceeding to, among other things, apply these classifications to cable companies that offer broadband Internet service directly to consumers. In March 2002, that rulemaking culminated in the *Declaratory Ruling* under review in these cases. In the *Declaratory Ruling,* the Commission concluded ***978** that broadband Internet service provided by cable companies is an "information service" but not a "telecommunications service" under the Act, and therefore not subject to mandatory Title II common-carrier regulation. In support of this conclusion, the Commission relied heavily on its *Universal Service Report*. See *Declaratory Ruling* 4821–4822, ¶¶ 36–37 (citing *Universal Service Report*). The *Universal Service Report* classified "non-facilities-based" ISPs—those that do not own the transmission facilities they use to connect the end user to the Internet—solely as information-service ****2698** providers. See *Universal Service Report* 11533, ¶ 67. Unlike those ISPs, cable companies own the cable lines they use to provide Internet access. Nevertheless, in the *Declaratory Ruling,* the Commission found no basis in the statutory definitions for treating cable companies differently from non-facilities-based ISPs: Both offer "a single, integrated service that enables the subscriber to utilize Internet access service ... and to realize the benefits of a comprehensive service offering." *Declaratory Ruling* 4823, ¶ 38. Because Internet access provides a capability for manipulating and storing information, the Commission concluded that it was an information service. *Ibid.*

The integrated nature of Internet access and the high-speed wire used to provide Internet access led the Commission to conclude that cable companies providing Internet access are not telecommunications providers. This conclusion, the Commission reasoned, followed from the logic of the *Universal Service Report*. The *Report* had concluded that, though Internet service "involves data transport elements" because "an Internet access provider must enable the movement of information between customers' own computers and distant computers with which those customers seek to interact," it also "offers end users information-service capabilities inextricably intertwined with data transport." *Universal Service Report* 11539–11540, ¶ 80. ISPs, therefore, were not "offering ... telecommunications ... directly to the public," ***979** § 153(46), and so were not properly classified as telecommunications carriers, see *id.,* at 11540, ¶ 81. In other words, the Commission reasoned that consumers use their cable modems not to transmit information "transparently," such as by using a telephone, but instead to obtain Internet access.

The Commission applied this same reasoning to cable companies offering broadband Internet access. Its logic was that, like non-facilities-based ISPs, cable companies do not "offe[r] telecommunications service to the end user, but rather ... merely us[e] telecommunications to provide end users with cable modem service." *Declaratory Ruling* 4824, ¶ 41. Though the Commission declined to apply mandatory Title II common-carrier regulation to cable companies, it invited comment on whether under its Title I jurisdiction it should require cable companies to offer other ISPs access to their facilities on common-carrier terms. *Id.,* at 4839, ¶ 72. Numerous parties petitioned for judicial review, challenging the Commission's conclusion that cable modem service was not telecommunications service. By judicial lottery, the Court of Appeals for the Ninth Circuit was selected as the venue for the challenge.

The Court of Appeals granted the petitions in part, vacated the *Declaratory Ruling* in part, and remanded to the Commission for further proceedings. In particular, the Court of Appeals vacated the ruling to the extent it concluded that cable modem service was not "telecommunications service" under the Communications Act. It held that the Commission could not permissibly construe the Communications Act to exempt cable companies providing Internet service from Title II

regulation. See 345 F.3d, at 1132. Rather than analyzing the permissibility of that construction under the deferential framework of *Chevron,* 467 U.S. 837, 104 S.Ct. 2778, however, the Court of Appeals grounded its holding in the *stare decisis* effect of *AT & T Corp. v. Portland,* 216 F.3d 871 (C.A.9 2000). See 345 F.3d, at 1128–1132. *Portland* held that cable modem service was a "telecommunications service," ***980** though the court in that case was not reviewing an administrative proceeding ****2699** and the Commission was not a party to the case. See 216 F.3d, at 877–880. Nevertheless, *Portland's* holding, the Court of Appeals reasoned, overrode the contrary interpretation reached by the Commission in the *Declaratory Ruling*. See 345 F.3d, at 1130–1131.

We granted certiorari to settle the important questions of federal law that these cases present. 543 U.S. 1018, 125 S.Ct. 655, 160 L.Ed.2d 494 (2004).

III

We first consider whether we should apply *Chevron's* framework to the Commission's interpretation of the term "telecommunications service." We conclude that we should. We also conclude that the Court of Appeals should have done the same, instead of following the contrary construction it adopted in *Portland.*

A

In *Chevron,* this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S., at 865–866, 104 S.Ct. 2778. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. *Id.,* at 843–844, and n. 11, 104 S.Ct. 2778.

The *Chevron* framework governs our review of the Commission's construction. Congress has delegated to the Commission the authority to "execute and enforce" the Communications Act, § 151, and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act, § 201(b); *AT & T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366, 377–378, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). These provisions give the Commission the authority to promulgate ***981** binding legal rules; the Commission issued the order under review in the exercise of that authority; and no one questions that the order is within the Commission's jurisdiction. See *Household Credit Services, Inc. v. Pfennig,* 541 U.S. 232, 238–239, 124 S.Ct. 1741, 158 L.Ed.2d 450 (2004); *United States v. Mead Corp.,* 533 U.S. 218, 231–234, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Christensen v. Harris County,* 529 U.S. 576, 586–588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). Hence, as we have in the past, we apply the *Chevron* framework to the Commission's interpretation of the Communications Act. See *National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.,* 534 U.S. 327, 333–339, 122 S.Ct. 782, 151 L.Ed.2d 794 (2002); *Verizon,* 535 U.S., at 501–502, 122 S.Ct. 1646.

Some of the respondents dispute this conclusion, on the ground that the Commission's interpretation is inconsistent with its past practice. We reject this argument. Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 46–57, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). For if the agency adequately explains the reasons for a reversal of policy, "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities ****2700** of a statute with the implementing agency." *Smiley v. Citibank (South Dakota), N. A.,* 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996); see also *Rust v. Sullivan,* 500 U.S. 173, 186–187, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Barnhart v. Walton,* 535 U.S. 212, 226, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002) (SCALIA, J., concurring in part and concurring in judgment). "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis," *Chevron, supra,* at 863–864, 104 S.Ct. 2778, for example, in response to changed factual circumstances, or a change in administrations, see *State Farm, supra,* at 59, 103 S.Ct. 2856 (REHNQUIST, J., concurring in part and dissenting in part). That is no doubt why ***982** in *Chevron* itself, this Court deferred to an agency interpretation

that was a recent reversal of agency policy. See 467 U.S., at 857–858, 104 S.Ct. 2778. We therefore have no difficulty concluding that *Chevron* applies.

B

The Court of Appeals declined to apply *Chevron* because it thought the Commission's interpretation of the Communications Act foreclosed by the conflicting construction of the Act it had adopted in *Portland.* See 345 F.3d, at 1127–1132. It based that holding on the assumption that *Portland's* construction overrode the Commission's, regardless of whether *Portland* had held the statute to be unambiguous. 345 F.3d, at 1131. That reasoning was incorrect.

A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself. *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley, supra,* at 740–741, 116 S.Ct. 1730. Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps. See 467 U.S., at 843–844, and n. 11, 104 S.Ct. 2778. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute ***983** unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

A contrary rule would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. The Court of Appeals' rule, moreover, would "lead to the ossification of large portions of our statutory law," ****2701** *Mead,* 533 U.S., at 247, 121 S.Ct. 2164 (SCALIA, J., dissenting), by precluding agencies from revising unwise judicial constructions of ambiguous statutes. Neither *Chevron* nor the doctrine of *stare decisis* requires these haphazard results.

The dissent answers that allowing an agency to override what a court believes to be the best interpretation of a statute makes "judicial decisions subject to reversal by executive officers." *Post,* at 2719 (opinion of SCALIA, J.). It does not. Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. In all other respects, the court's prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable). The precedent has not been "reversed" by the agency, any more than a federal court's interpretation of a State's law can be said to have been "reversed" by a ***984** state court that adopts a conflicting (yet authoritative) interpretation of state law.

The Court of Appeals derived a contrary rule from a mistaken reading of this Court's decisions. It read *Neal v. United States,* 516 U.S. 284, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996), to establish that a prior judicial construction of a statute categorically controls an agency's contrary construction. 345 F.3d, at 1131–1132; see also *post,* at 2719, n. 11 (SCALIA, J., dissenting). *Neal* established no such proposition. *Neal* declined to defer to a construction adopted by the United States Sentencing Commission that conflicted with one the Court previously had adopted in *Chapman v. United States,* 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). *Neal, supra,* at 290–295, 116 S.Ct. 763. *Chapman,* however, had held the relevant statute to be unambiguous. See 500 U.S., at 463, 111 S.Ct. 1919 (declining to apply the rule of lenity given the statute's clear language). Thus, *Neal* established only that a precedent holding a statute to be unambiguous forecloses a contrary agency construction. That limited holding accorded with this Court's prior decisions, which had held that a court's interpretation of a statute trumps an agency's under

the doctrine of *stare decisis* only if the prior court holding "determined a statute's *clear* meaning." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 131, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) (emphasis added); see also *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 536–537, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992). Those decisions allow a court's prior interpretation of a statute to override an agency's interpretation only if the relevant court decision held the statute unambiguous.

Against this background, the Court of Appeals erred in refusing to apply *Chevron* to the Commission's interpretation of the definition of "telecommunications service," 47 U.S.C. § 153(46). Its prior decision in *Portland* held only that the *best* reading of § 153(46) was that cable modem service was a "telecommunications service," not that it was the *only permissible* reading of the statute. See 216 F.3d, at 877–880. Nothing in *Portland* held that the Communications ***985** Act unambiguously required treating cable Internet providers as telecommunications carriers. Instead, the court noted that it was "not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine," ****2702** *id.,* at 876, 104 S.Ct. 2778; and the court invoked no other rule of construction (such as the rule of lenity) requiring it to conclude that the statute was unambiguous to reach its judgment. Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction. *Portland* did not do so.

As the dissent points out, it is not logically necessary for us to reach the question whether the Court of Appeals misapplied *Chevron* for us to decide whether the Commission acted lawfully. See *post,* at 2721 (opinion of SCALIA, J.). Nevertheless, it is no "great mystery" why we are reaching the point here. *Ibid.* There is genuine confusion in the lower courts over the interaction between the *Chevron* doctrine and *stare decisis* principles, as the petitioners informed us at the certiorari stage of this litigation. See Pet. for Cert. of Federal Communications Commission et al. in No. 04–281, pp. 19–23; Pet. for Cert. of National Cable & Telecomm. Assn. et al. in No. 04–277, pp. 22–29. The point has been briefed. See Brief for Federal Petitioners 38–44; Brief for Cable–Industry Petitioners 30–36. And not reaching the point could undermine the purpose of our grant of certiorari: to settle authoritatively whether the Commission's *Declaratory Ruling* is lawful. Were we to uphold the *Declaratory Ruling* without reaching the *Chevron* point, the Court of Appeals could once again strike down the Commission's rule based on its *Portland* decision. *Portland* (at least arguably) could compel the Court of Appeals once again to reverse the Commission despite our decision, since our conclusion that it is *reasonable* to read the Communications Act to classify cable modem service solely as an "information ***986** service" leaves untouched *Portland's* holding that the Commission's interpretation is not the *best* reading of the statute. We have before decided similar questions that were not, strictly speaking, necessary to our disposition. See, *e.g., Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (requiring the Courts of Appeals to adhere to our directly controlling precedents, even those that rest on reasons rejected in other decisions); *Roper v. Simmons,* 543 U.S. 551, 628–629, 125 S.Ct. 1183, 1199–1200, 161 L.Ed.2d 1 (2005) (SCALIA, J., dissenting) (criticizing this Court for not reaching the question whether the Missouri Supreme Court erred by failing to follow directly controlling Supreme Court precedent, though that conclusion was not necessary to the Court's decision). It is prudent for us to do so once again today.

IV

We next address whether the Commission's construction of the definition of "telecommunications service," 47 U.S.C. § 153(46), is a permissible reading of the Communications Act under the *Chevron* framework. *Chevron* established a familiar two-step procedure for evaluating whether an agency's interpretation of a statute is lawful. At the first step, we ask whether the statute's plain terms "directly addres[s] the precise question at issue." 467 U.S., at 843, 104 S.Ct. 2778. If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is "a reasonable policy choice for the agency to make." *Id.,* at 845, 104 S.Ct. 2778. The Commission's interpretation is permissible at both steps.

A

We first set forth our understanding of the interpretation of the Communications Act that the Commission embraced. The issue before the Commission was whether cable companies providing cable ****2703** modem service are providing a "telecommunications service" in addition to an "information service."

***987** The Commission first concluded that cable modem service is an "information service," a conclusion unchallenged here. The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications ...." § 153(20). Cable modem service is an information service, the Commission reasoned, because it provides consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications. That service enables users, for example, to browse the World Wide Web, to transfer files from file archives available on the Internet via the "File Transfer Protocol," and to access e-mail and Usenet newsgroups. *Declaratory Ruling* 4821, ¶ 37; *Universal Service Report* 11537, ¶ 76. Like other forms of Internet service, cable modem service also gives users access to the Domain Name System (DNS). DNS, among other things, matches the Web page addresses that end users type into their browsers (or "click" on) with the Internet Protocol (IP) addresses [1] of the servers containing the Web pages the users wish to access. *Declaratory Ruling* 4821–4822, ¶ 37. All of these features, the Commission concluded, were part of the information service that cable companies provide consumers. *Id.,* at 4821–4823, ¶¶ 36–38; see also *Universal Service Report* 11536–11539, ¶¶ 75–79.

At the same time, the Commission concluded that cable modem service was not "telecommunications service." "Telecommunications service" is "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). "Telecommunications," in turn, is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." ***988** § 153(43). The Commission conceded that, like all information-service providers, cable companies use "telecommunications" to provide consumers with Internet service; cable companies provide such service via the high-speed wire that transmits signals to and from an end user's computer. *Declaratory Ruling* 4823, ¶ 40. For the Commission, however, the question whether cable broadband Internet providers "offer" telecommunications involved more than whether telecommunications was one necessary component of cable modem service. Instead, whether that service also includes a telecommunications "offering" "turn[ed] on the nature of the functions the *end user* is offered," *id.,* at 4822, ¶ 38 (emphasis added), for the statutory definition of "telecommunications service" does not "res[t] on the particular types of facilities used," *id.,* at 4821, ¶ 35; see § 153(46) (definition of "telecommunications service" applies "regardless of the facilities used").

Seen from the consumer's point of view, the Commission concluded, cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access: "As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." ****2704** *Declaratory Ruling* 4823, ¶ 39. The wire is used, in other words, to access the World Wide Web, newsgroups, and so forth, rather than "transparently" to transmit and receive ordinary-language messages without computer processing or storage of the message. See *supra,* at 2697 (noting the *Computer II* notion of "transparent" transmission). The integrated character of this offering led the Commission to conclude that cable modem service is not a "stand-alone," transparent offering of telecommunications. *Declaratory Ruling* 4823–4825, ¶¶ 41–43.

***989** B

This construction passes *Chevron's* first step. Respondents argue that it does not, on the ground that cable companies providing Internet service necessarily "offe[r]" the underlying telecommunications used to transmit that service. The word "offering" as used in § 153(46), however, does not unambiguously require that result. Instead, "offering" can reasonably be read to mean a "stand-alone" offering of telecommunications, *i.e.,* an offered service that, from the user's perspective, transmits messages unadulterated by computer processing. That conclusion follows not only from the ordinary meaning of the word "offering," but also from the regulatory history of the Communications Act.

1

Cable companies in the broadband Internet service business "offe[r]" consumers an information service in the form of Internet access and they do so "via telecommunications," § 153(20), but it does not inexorably follow as a matter of ordinary language that they also "offe[r]" consumers the high-speed data transmission (telecommunications) that is an input used to provide this service, § 153(46). We have held that where a statute's plain terms admit of two or more reasonable

ordinary usages, the Commission's choice of one of them is entitled to deference. See *Verizon,* 535 U.S., at 498, 122 S.Ct. 1646 (deferring to the Commission's interpretation of the term "cost" by reference to an alternative linguistic usage defined by what "[a] merchant who is asked about 'the cost of providing the goods' " might "reasonably" say); *National Railroad Passenger Corporation v. Boston & Maine Corp.,* 503 U.S. 407, 418, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (agency construction entitled to deference where there were "alternative dictionary definitions of the word" at issue). The term "offe[r]" as used in the definition of telecommunications service, § 153(46), is ambiguous in this way.

***990** It is common usage to describe what a company "offers" to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product, as the dissent concedes. See *post,* at 2713–2714 (opinion of SCALIA, J.). One might well say that a car dealership "offers" cars, but does not "offer" the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis. It would, in fact, be odd to describe a car dealership as "offering" consumers the car's components in addition to the car itself. Even if it is linguistically permissible to say that the car dealership "offers" engines when it offers cars, that shows, at most, that the term "offer," when applied to a commercial transaction, is ambiguous about whether it describes only the offered finished product, or the product's discrete components as well. It does not show that no other usage is permitted.

The question, then, is whether the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering. ****2705** See *ibid.* We think that they are sufficiently integrated, because "[a] consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access." *Supra,* at 2703. In the telecommunications context, it is at least reasonable to describe companies as not "offering" to consumers each discrete input that is necessary to providing, and is always used in connection with, a finished service. We think it no misuse of language, for example, to say that cable companies providing Internet service do not "offer" consumers DNS, even though DNS is essential to providing Internet access. *Declaratory Ruling* 4810, n. 74, 4822–4823, ¶ 38. Likewise, a telephone company "offers" consumers a transparent transmission path that conveys an ordinary-language message, not necessarily the data-transmission ***991** facilities that also "transmi[t] ... information of the user's choosing," § 153(43), or other physical elements of the facilities used to provide telephone service, like the trunks and switches, or the copper in the wires. What cable companies providing cable modem service and telephone companies providing telephone service "offer" is Internet service and telephone service respectively—the finished services, though they do so using (or "via") the discrete components composing the end product, including data transmission. Such functionally integrated components need not be described as distinct "offerings."

In response, the dissent argues that the high-speed transmission component necessary to providing cable modem service is necessarily "offered" with Internet service because cable modem service is like the offering of pizza delivery service together with pizza, and the offering of puppies together with dog leashes. *Post,* at 2714–2715 (opinion of SCALIA, J.). The dissent's appeal to these analogies only underscores that the term "offer" is ambiguous in the way that we have described. The entire question is whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance. As the Commission has candidly recognized, "the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service." *Universal Service Report* 11530, ¶ 60. Because the term "offer" can sometimes refer to a single, finished product and sometimes to the "individual components in a package being offered" (depending on whether the components "still possess sufficient identity to be described ***992** as separate objects," *post,* at 2714), the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission, not by warring analogies.

We also do not share the dissent's certainty that cable modem service is so obviously like pizza delivery service and the combination of dog leashes and dogs that the Commission could not reasonably have thought otherwise. *Post,* at 2714. For example, unlike the transmission component of Internet

service, delivery service and dog leashes are not integral components of the finished products (pizzas and pet dogs). One can pick up a pizza rather than having it delivered, and one can own **2706 a dog without buying a leash. By contrast, the Commission reasonably concluded, a consumer cannot purchase Internet service without also purchasing a connection to the Internet and the transmission always occurs in connection with information processing. In any event, we doubt that a statute that, for example, subjected offerors of "delivery" service (such as Federal Express and United Parcel Service) to common-carrier regulation would unambiguously require pizza-delivery companies to offer their delivery services on a common-carrier basis.

2

The Commission's traditional distinction between basic and enhanced service, see *supra,* at 2696–2697, also supports the conclusion that the Communications Act is ambiguous about whether cable companies "offer" telecommunications with cable modem service. Congress passed the definitions in the Communications Act against the background of this regulatory history, and we may assume that the parallel terms "telecommunications service" and "information service" substantially incorporated their meaning, as the Commission has held. See, *e.g.,* *993 *In re Federal–State Joint Board on Universal Service,* 12 FCC Rcd. 8776, 9179–9180, ¶ 788, 1997 WL 236383 1997) (noting that the "definition of enhanced services is substantially similar to the definition of information services" and that "all services previously considered 'enhanced services' are 'information services' "); *Commissioner v. Keystone Consol. Industries, Inc.,* 508 U.S. 152, 159, 113 S.Ct. 2006, 124 L.Ed.2d 71 (1993) (noting presumption that Congress is aware of "settled judicial and administrative interpretation[s]" of terms when it enacts a statute). The regulatory history in at least two respects confirms that the term "telecommunications service" is ambiguous.

First, in the *Computer II Order* that established the terms "basic" and "enhanced" services, the Commission defined those terms functionally, based on how the consumer interacts with the provided information, just as the Commission did in the order below. See *supra,* at 2696–2697. As we have explained, Internet service is not "transparent in terms of its interaction with customer supplied information," *Computer II Order* 420, ¶ 96; the transmission occurs in connection with information processing. It was therefore consistent with the statute's terms for the Commission to assume that the parallel term "telecommunications service" in 47 U.S.C. § 153(46) likewise describes a "pure" or "transparent" communications path not necessarily separately present, from the end user's perspective, in an integrated information-service offering.

The Commission's application of the basic/enhanced-service distinction to non-facilities-based ISPs also supports this conclusion. The Commission has long held that "all those who provide some form of transmission services are not necessarily common carriers." *Computer II Order* 431, ¶ 122; see also *id.,* at 435, ¶ 132 ("acknowledg[ing] the existence of a communications component" in enhanced-service offerings). For example, the Commission did not subject to common-carrier regulation those service providers that offered enhanced services over telecommunications facilities, but that did not themselves own the underlying facilities—so-called "non-facilities-based" providers. See *994 *Universal Service Report* 11530, ¶ 60. Examples of these services included database services in which a customer used telecommunications to access information, such as Dow Jones News and Lexis, as well as "value added networks," which lease wires from common carriers and provide transmission as well as protocol-processing **2707 service over those wires. See *In re Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry),* 3 FCC Rcd. 1150, 1153, n. 23, 1988 WL 487743 (1988); *supra,* at 2697 (explaining protocol conversion). These services "combin[ed] communications and computing components," yet the Commission held that they should "always be deemed enhanced" and therefore not subject to common-carrier regulation. *Universal Service Report* 11530, ¶ 60. Following this traditional distinction, the Commission in the *Universal Service Report* classified ISPs that leased rather than owned their transmission facilities as pure information-service providers. *Id.,* at 11540, ¶ 81.

Respondents' statutory arguments conflict with this regulatory history. They claim that the Communications Act unambiguously classifies as telecommunications carriers all entities that use telecommunications inputs to provide information service. As respondent MCI concedes, this argument would subject to mandatory common-carrier regulation all information-service providers that use telecommunications as an input to provide information service to the public. Brief for Respondent MCI., Inc., 30. For example, it would subject to common-carrier regulation non-facilities-based ISPs that own no transmission facilities. See *Universal Service Report* 11532–11533, ¶

66. Those ISPs provide consumers with transmission facilities used to connect to the Internet, see *supra,* at 2695, and so, under respondents' argument, necessarily "offer" telecommunications to consumers. Respondents' position that all such entities are necessarily "offering telecommunications" therefore entails mandatory common-carrier regulation of entities that the Commission ***995** never classified as "offerors" of basic transmission service, and therefore common carriers, under the *Computer II* regime.[2] See *Universal Service Report* 11540, ¶ 81 (noting past Commission policy); *Computer and Communications Industry Assn. v. FCC,* 693 F.2d 198, 209 (C.A.D.C.1982) (noting and upholding Commission's *Computer II* "finding that enhanced services ... are not common carrier services within the scope of Title II"). We doubt that the parallel term "telecommunications service" unambiguously worked this abrupt shift in Commission policy.

Respondents' analogy between cable companies that provide cable modem service and facilities-based enhanced-service providers—that is, enhanced-service providers who own the transmission facilities used to provide those services—fares no better. Respondents stress that under the *Computer II* rules the Commission regulated such providers more heavily than non-facilities-based providers. The Commission required, for example, local telephone companies that provided enhanced services to offer their wires on a common-carrier basis to competing enhanced-service providers. See, *e.g., In re Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry),* 104 F.C.C.2d 958, 964, ¶ 4, 1986 WL 292006 (1986) (hereinafter *Computer III Order*). Respondents ****2708** argue that the Communications Act unambiguously requires the same treatment for cable companies because cable companies also own the facilities they use to provide cable modem service (and therefore information service).

***996** We disagree. We think it improbable that the Communications Act unambiguously freezes in time the *Computer II* treatment of facilities-based information-service providers. The Act's definition of "telecommunications service" says nothing about imposing more stringent regulatory duties on facilities-based information-service providers. The definition hinges solely on whether the entity "offer[s] telecommunications for a fee directly to the public," 47 U.S.C. § 153(46), though the Act elsewhere subjects facilities-based carriers to stricter regulation, see § 251(c) (imposing various duties on facilities-based local telephone companies). In the *Computer II* rules, the Commission subjected facilities-based providers to common-carrier duties not because of the nature of the "offering" made by those carriers, but rather because of the concern that local telephone companies would abuse the monopoly power they possessed by virtue of the "bottleneck" local telephone facilities they owned. See *Computer II Order* 474–475, ¶¶ 229, 231; *Computer III Order* 968–969, ¶ 12; *Verizon,* 535 U.S., at 489–490, 122 S.Ct. 1646 (describing the naturally monopolistic physical structure of a local telephone exchange). The differential treatment of facilities-based carriers was therefore a function not of the definitions of "enhanced-service" and "basic service," but instead of a choice by the Commission to regulate more stringently, in its discretion, certain entities that provided enhanced service. The Act's definitions, however, parallel the definitions of enhanced and basic service, not the facilities-based grounds on which that policy choice was based, and the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction. In fact, it has invited comment on whether it can and should do so. See *supra,* at 2698.

In sum, if the Act fails unambiguously to classify non-facilities-based information-service providers that use telecommunications inputs to provide an information service as "offer[ors]" of "telecommunications," then it also fails unambiguously ***997** to classify facilities-based information-service providers as telecommunications-service offerors; the relevant definitions do not distinguish facilities-based and non-facilities-based carriers. That silence suggests, instead, that the Commission has the discretion to fill the consequent statutory gap.

C

We also conclude that the Commission's construction was "a reasonable policy choice for the [Commission] to make" at *Chevron's* second step. 467 U.S., at 845, 104 S.Ct. 2778.

Respondents argue that the Commission's construction is unreasonable because it allows any communications provider to "evade" common-carrier regulation by the expedient of bundling information service with telecommunications. Respondents argue that under the Commission's construction a telephone company could, for example, offer an information service like voice mail together with telephone service, thereby avoiding common-carrier regulation of its telephone service.

We need not decide whether a construction that resulted in these consequences would be unreasonable because we do not believe that these results follow from the construction the Commission adopted. As we understand the *Declaratory Ruling*, the Commission did not say that any telecommunications service that is priced or ****2709** bundled with an information service is automatically unregulated under Title II. The Commission said that a telecommunications input used to provide an information service that is not "separable from the data-processing capabilities of the service" and is instead "part and parcel of [the information service] and is integral to [the information service's] other capabilities" is not a telecommunications offering. *Declaratory Ruling* 4823, ¶ 39; see *supra,* at 2703–2704.

This construction does not leave all information-service offerings exempt from mandatory Title II regulation. "It is plain," for example, that a local telephone company "cannot ***998** escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail." *Universal Service Report* 11530, ¶ 60. That is because a telephone company that packages voice mail with telephone service offers a transparent transmission path—telephone service—that transmits information independent of the information-storage capabilities provided by voice mail. For instance, when a person makes a telephone call, his ability to convey and receive information using the call is only trivially affected by the additional voice-mail capability. Equally, were a telephone company to add a time-of-day announcement that played every time the user picked up his telephone, the "transparent" information transmitted in the ensuing call would be only trivially dependent on the information service the announcement provides. By contrast, the high-speed transmission used to provide cable modem service is a functionally integrated component of that service because it transmits data only in connection with the further processing of information and is necessary to provide Internet service. The Commission's construction therefore was more limited than respondents assume.

Respondents answer that cable modem service does, in fact, provide "transparent" transmission from the consumer's perspective, but this argument, too, is mistaken. Respondents characterize the "information-service" offering of Internet access as consisting only of access to a cable company's e-mail service, its Web page, and the ability it provides consumers to create a personal Web page. When a consumer goes beyond those offerings and accesses content provided by parties other than the cable company, respondents argue, the consumer uses "pure transmission" no less than a consumer who purchases phone service together with voice mail.

This argument, we believe, conflicts with the Commission's understanding of the nature of cable modem service, an understanding we find to be reasonable. When an end user ***999** accesses a third-party's Web site, the Commission concluded, he is equally using the information service provided by the cable company that offers him Internet access as when he accesses the company's own Web site, its e-mail service, or his personal Web page. For example, as the Commission found below, part of the information service cable companies provide is access to DNS service. See *supra,* at 2703. A user cannot reach a third-party's Web site without DNS, which (among other things) matches the Web site address the end user types into his browser (or "clicks" on with his mouse) with the IP address of the Web page's host server. See P. Albitz & C. Liu, DNS and BIND 10 (4th ed. 2001) (For an Internet user, "DNS is a must. ... [N]early all of the Internet's network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer"). It is at least reasonable to think of DNS as a "capability for ... acquiring ... retrieving, utilizing, or making available" Web site addresses and ****2710** therefore part of the information service cable companies provide. 47 U.S.C. § 153(20).[3] Similarly, the Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or "cache," popular content on local computer servers. See *Declaratory Ruling* 4810, ¶ 17, and n. 76. Cacheing obviates the need for the end user to download anew information from third-party ***1000** Web sites each time the consumer attempts to access them, thereby increasing the speed of information retrieval. In other words, subscribers can reach third-party Web sites via "the World Wide Web, and browse their contents, [only] because their service provider offers the 'capability for ... acquiring, [storing] ... retrieving [and] utilizing ... information.' " *Universal Service Report* 11538, ¶ 76 (quoting 47 U.S.C. § 153(20)). "The service that Internet access providers offer to members of the public is Internet access," *Universal Service Report* 11539, ¶ 79, not a transparent ability (from the end user's perspective) to transmit information. We therefore conclude that the Commission's construction was reasonable.

V

Respondent MCI, Inc., urges that the Commission's treatment of cable modem service is inconsistent with its treatment of DSL service, see *supra,* at 2696 (describing DSL service), and therefore is an arbitrary and capricious deviation from agency policy. See 5 U.S.C. § 706(2)(A). MCI points out that when local telephone companies began to offer Internet access through DSL technology in addition to telephone service, the Commission applied its *Computer II* facilities-based classification to them and required them to make the telephone lines used to transmit DSL service available to competing ISPs on nondiscriminatory, common-carrier terms. See *supra,* at 2708 (describing *Computer II* facilities-based classification of enhanced-service providers); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 13 FCC Rcd. 24012, 24030–24031, ¶¶ 36–37, 1998 WL 458500 (1998) (hereinafter *Wireline Order*) (classifying DSL service as a telecommunications service). MCI claims that the Commission's decision not to regulate cable companies similarly under Title II is inconsistent with its DSL policy.

We conclude, however, that the Commission provided a reasoned explanation for treating cable modem service differently ***1001** from DSL service. As we have already noted, see *supra,* at 2699–2700, the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.[4] It has ****2711** done so here. The traditional reason for its *Computer II* common-carrier treatment of facilities-based carriers (including DSL carriers), as the Commission explained, was "that the *telephone network* [was] the primary, if not exclusive, means through which information service providers can gain access to their customers." *Declaratory Ruling* 4825, ¶ 44 (emphasis in original; internal quotation marks omitted). The Commission applied the same treatment to DSL service based on that history, rather than on an analysis of contemporaneous market conditions. See *Wireline Order* 24031, ¶ 37 (noting DSL carriers' "continuing obligation" to offer their transmission facilities to competing ISPs on nondiscriminatory terms).

The Commission in the order under review, by contrast, concluded that changed market conditions warrant different treatment of facilities-based cable companies providing Internet access. Unlike at the time of *Computer II,* substitute forms of Internet transmission exist today: "[R]esidential high-speed access to the Internet is evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite." *Declaratory Ruling* 4802, ¶ 6; see also *U.S. Telecom Assn. v. FCC,* 290 F.3d 415, 428 (C.A.D.C.2002) (noting Commission findings of "robust competition ... in the broadband market"). The Commission concluded that " 'broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.' " *Declaratory Ruling* 4802, ¶ 5. ***1002** This, the Commission reasoned, warranted treating cable companies unlike the facilities-based enhanced-service providers of the past. *Id.,* at 4825, ¶ 44. We find nothing arbitrary about the Commission's providing a fresh analysis of the problem as applied to the cable industry, which it has never subjected to these rules. This is adequate rational justification for the Commission's conclusions.

Respondents argue, in effect, that the Commission's justification for exempting cable modem service providers from common-carrier regulation applies with similar force to DSL providers. We need not address that argument. The Commission's decision appears to be a first step in an effort to reshape the way the Commission regulates information-service providers; that may be why it has tentatively concluded that DSL service provided by facilities-based telephone companies should also be classified solely as an information service. See *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 17 FCC Rcd. 3019, 3030, ¶ 20, 2002 WL 252714 (2002). The Commission need not immediately apply the policy reasoning in the *Declaratory Ruling* to all types of information-service providers. It apparently has decided to revisit its longstanding *Computer II* classification of facilities-based information-service providers incrementally. Any inconsistency between the order under review and the Commission's treatment of DSL service can be adequately addressed when the Commission fully reconsiders its treatment of DSL service and when it decides whether, pursuant to its ancillary Title I jurisdiction, to require cable companies to allow independent ISPs access to their facilities. See *supra,* at 2698 and 2711. We express no view on those matters. In particular, we express no view on how the Commission should, or lawfully may, classify DSL service.

****2712** * * *

The questions the Commission resolved in the order under review involve a "subject matter [that] is technical, complex, ***1003** and dynamic." *Gulf Power,* 534 U.S., at 339, 122 S.Ct. 782. The Commission is in a far better position to address these questions than we are. Nothing in the

Communications Act or the Administrative Procedure Act makes unlawful the Commission's use of its expert policy judgment to resolve these difficult questions. The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, concurring.

While I join the Court's opinion in full, I add this caveat concerning Part III–B, which correctly explains why a court of appeals' interpretation of an ambiguous provision in a regulatory statute does not foreclose a contrary reading by the agency. That explanation would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity.

Justice BREYER, concurring.

I join the Court's opinion because I believe that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority—though perhaps just barely. I write separately because I believe it important to point out that Justice SCALIA, in my view, has wrongly characterized the Court's opinion in *United States v. Mead Corp.,* 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). He states that the Court held in *Mead* that "some unspecified degree of formal process" before the agency "was required" for courts to accord the agency's decision deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Post,* at 2718 (dissenting opinion); see also *post,* at 2718–2719 (formal process is "at least the only safe harbor").

Justice Scalia has correctly characterized the way in which he, *in dissent,* characterized the Court's *Mead* opinion. 533 U.S., at 245–246, 121 S.Ct. 2164. But the Court said the opposite. An ***1004** agency action qualifies for *Chevron* deference when Congress has explicitly or implicitly delegated to the agency the authority to "fill" a statutory "gap," including an interpretive gap created through an ambiguity in the language of a statute's provisions. *Chevron, supra,* at 843–844, 104 S.Ct. 2778; *Mead, supra,* at 226–227, 121 S.Ct. 2164. The Court said in *Mead* that such delegation "may be shown *in a variety of ways, as by* an agency's power to engage in adjudication or notice-and-comment rulemaking, *or by some other indication of a comparable congressional intent.*" 533 U.S., at 227, 121 S.Ct. 2164 (emphasis added). The Court explicitly stated that the absence of notice-and-comment rulemaking did "not decide the case," for the Court has "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Id.,* at 231, 121 S.Ct. 2164. And the Court repeated that it "has recognized *a variety of indicators* that Congress would expect *Chevron* deference." *Id.,* at 237, 121 S.Ct. 2164 (emphasis added).

It is not surprising that the Court would hold that the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute. It is not a necessary condition because an agency might arrive at an authoritative interpretation of a congressional enactment in other ways, including ways that Justice SCALIA mentions. ****2713** See, *e.g., Mead, supra,* at 231, 121 S.Ct. 2164. It is not a sufficient condition because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue. Cf. *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 600, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004) (rejecting agency's answer to question whether age discrimination law forbids discrimination against the relatively young).

Thus, while I believe Justice SCALIA is right in emphasizing that *Chevron* deference may be appropriate in the absence ***1005** of formal agency proceedings, *Mead* should not give him cause for concern.

Justice SCALIA, with whom Justice SOUTER and Justice GINSBURG join as to Part I, dissenting.

The Federal Communications Commission (FCC or Commission) has once again attempted to concoct "a whole new regime of regulation (or of free-market competition)" under the guise of statutory construction. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,* 512 U.S. 218, 234, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994). Actually, in these cases, it might be more accurate to say the Commission has attempted to establish a whole new regime of *non*-regulation, which will make for more or less free-market competition, depending upon whose experts are believed. The important fact, however, is that the Commission has chosen to achieve this through an implausible reading of the statute, and has thus exceeded the authority given it by Congress.

I

The first sentence of the FCC ruling under review reads as follows: "Cable modem service provides high-speed access to the Internet, *as well as* many applications or functions that can be used with that access, over cable system facilities." *In re Inquiry Concerning High–Speed Access to the Internet Over Cable and Other Facilities,* 17 FCC Rcd. 4798, 4799, ¶ 1, 2002 WL 407567 (2002) (hereinafter *Declaratory Ruling*) (emphasis added; footnote omitted). Does this mean that cable companies "offer" high-speed access to the Internet? Surprisingly not, if the Commission and the Court are to be believed.

It happens that cable-modem service is popular precisely because of the high-speed access it provides, and that, once connected with the Internet, cable-modem subscribers often use Internet applications and functions from providers other than the cable company. Nevertheless, for purposes of classifying ***1006** what the cable company does, the Commission (with the Court's approval) puts all the emphasis on the rest of the package (the additional "applications or functions"). It does so by claiming that the cable company does not "offe[r]" its customers high-speed Internet access because it offers that access only in conjunction with particular applications and functions, rather than "separate[ly]," as a "stand-alone offering." *Id.,* at 4802, ¶ 7, 4823, ¶ 40.

The focus on the term "offer" appropriately derives from the statutory definitions at issue in these cases. Under the Telecommunications Act of 1996, 110 Stat. 59, " 'information service' " involves the capacity to generate, store, interact with, or otherwise manipulate "information via telecommunications." 47 U.S.C. § 153(20). In turn, " 'telecommunications' " is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." § 153(43). Finally, ****2714** " 'telecommunications service' " is defined as "the offering of telecommunications for a fee directly to the public ... regardless of the facilities used." § 153(46). The question here is whether cable-modem-service providers "offe[r] ... telecommunications for a fee directly to the public." If so, they are subject to Title II regulation as common carriers, like their chief competitors who provide Internet access through other technologies.

The Court concludes that the word "offer" is ambiguous in the sense that it has " 'alternative dictionary definitions' " that might be relevant. *Ante,* at 2704 (quoting *National Railroad Passenger Corporation v. Boston & Maine Corp.,* 503 U.S. 407, 418, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992)). It seems to me, however, that the analytic problem pertains not really to the meaning of "offer," but to the identity of what is offered. The relevant question is whether the individual components in a package being offered still possess sufficient identity to be described as separate objects of the offer, or whether they have been ***1007** so changed by their combination with the other components that it is no longer reasonable to describe them in that way.

Thus, I agree (to adapt the Court's example, *ante,* at 2704) that it would be odd to say that a car dealer is in the business of selling steel or carpets because the cars he sells include both steel frames and carpeting. Nor does the water company sell hydrogen, nor the pet store water (though dogs and cats are largely water at the molecular level). But what is sometimes true is not, as the Court seems to assume, *always* true. There are instances in which it is ridiculous to deny that one part of a joint offering is being offered merely because it is not offered on a " 'stand-alone' " basis, *ante,* at 2704.

If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage," *ibid.,* would prevent them from answering: "No, we do not offer delivery—but if you order a pizza from us, we'll bake it for you and then bring it to your house." The logical response to this would be something on the order of, "so, you *do* offer delivery." But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: "No, even though we bring the pizza to your house, we are not actually 'offering' you delivery, because the delivery that we provide to our end users is 'part and parcel' of our pizzeria-pizza-at-home service and is 'integral to its other capabilities.' " Cf. *Declaratory Ruling* 4823, ¶ 39; *ante,* at 2703, 2708–2709. [1] Any reasonable customer would conclude at that point that his interlocutor was either crazy or following some too-clever-by-half legal advice.

In short, for the inputs of a finished service to qualify as the objects of an "offer" (as that term is reasonably understood), it is perhaps a sufficient, *but surely not a necessary,* condition that the seller offer separately "each discrete input ***1008** that is necessary to providing ... a finished service," *ante,* at 2705. The pet store may have a policy of selling puppies only with leashes, but any customer will say that it *does*

offer puppies—because a leashed puppy is still a puppy, even though it is not offered on a "stand-alone" basis.

Despite the Court's mighty labors to prove otherwise, *ante,* at 2704–2710, the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded ****2715** as being on offer—especially when seen from the perspective of the consumer or the end user, which the Court purports to find determinative, *ante,* at 2704, 2706, 2709, 2710. The Commission's ruling began by noting that cable-modem service provides *both* "high-speed access to the Internet" *and* other "applications and functions," *Declaratory Ruling* 4799, ¶ 1, because that is exactly how any reasonable consumer would perceive it: as consisting of two separate things.

The consumer's view of the matter is best assessed by asking what other products cable-modem service substitutes for in the marketplace. Broadband Internet service provided by cable companies is one of the three most common forms of Internet service, the other two being dial-up access and broadband Digital Subscriber Line (DSL) service. *Ante,* at 2695–2696. In each of the other two, the physical transmission pathway to the Internet is sold—indeed, *is legally required* to be sold—separately from the Internet functionality. With dial-up access, the physical pathway comes from the telephone company, and the Internet service provider (ISP) provides the functionality.

> "In the case of Internet access, the end user utilizes two different and distinct services. One is the transmission pathway, a telecommunications service that the end user purchases from the telephone company. The second is the Internet access service, which is an enhanced service provided by an ISP.... Th[e] functions [provided by the ISP] are separate from the transmission pathway ***1009** over which that data travels. The pathway is a regulated telecommunications service; the enhanced service offered over it is not." FCC, Office of Plans and Policy, Oxman, The FCC and the Unregulation of the Internet, p. 13 (Working Paper No. 31, July 1999), available at http://www. fcc.gov/ Bureaus/OPP/ working_papers/oppwp31.pdf(as visited June 24, 2005, and available in Clerk of Court's case file). [2]

As the Court acknowledges, *ante,* at 2710, DSL service has been similar to dial-up service in the respect that the physical connection to the Internet must be offered separately from Internet functionality. [3] Thus, customers shopping for dial-up or DSL service will not be able to use the Internet unless they get both someone to provide them with a physical connection and someone to provide them with applications and functions such as e-mail and Web access. It is therefore inevitable that customers will regard the competing cable-modem service as giving them *both* computing functionality *and* the physical pipe by which that functionality comes to their computer —both the pizza and the delivery service that nondelivery pizzerias require to be purchased from the cab company. [4]

****2716** ***1010** Since the delivery service provided by cable (the broad-band connection between the customer's computer and the cable company's computer-processing facilities) is downstream from the computer-processing facilities, there is no question that it merely serves as a conduit for the information services that have already been "assembled" by the cable company in its capacity as ISP. This is relevant because of the statutory distinction between an "information service" and "telecommunications." The former involves the capability of getting, processing, and manipulating information. § 153(20). The latter, by contrast, involves no "change in the form or content of the information as sent and received." § 153(43). When cable-company-assembled information enters the cable for delivery to the subscriber, the information service is already complete. The information has been (as the statute requires) generated, acquired, stored, transformed, processed, retrieved, utilized, or made available. All that remains is for the information in its final, unaltered form, to be delivered (via telecommunications) to the subscriber.

This reveals the insubstantiality of the fear invoked by both the Commission and the Court: the fear of what will happen to ISPs that do not provide the physical pathway to Internet access, yet still use telecommunications to acquire the pieces necessary to assemble the information that they pass back to their customers. According to this *reductio, ante,* at 2706–2708, if cable-modem-service providers are deemed to provide "telecommunications service," then so must *all* ISPs because they all "use" telecommunications in providing Internet functionality (by connecting to other ***1011** parts of the Internet, including Internet backbone providers, for example). In terms of the pizzeria analogy, this is equivalent to saying that, if the pizzeria "offers" delivery, *all* restaurants "offer" delivery, because the ingredients of the food they serve their customers have come from other places; no matter how their customers get the food (whether by eating it at the restaurant, or by coming to pick it up themselves), they still consume a product for which delivery

was a necessary "input." This is nonsense. Concluding that delivery of the finished pizza constitutes an "offer" of delivery does not require the conclusion that the serving of prepared food includes an "offer" of delivery. And that analogy does not even do the point justice, since " 'telecommunications service' " is defined as "the offering of telecommunications for a fee *directly to the public."* § 153(46) (emphasis added). The ISPs' use of telecommunications in their processing of information is not offered directly to the public.

The "regulatory history" on which the Court depends so much, *ante,* at 2706–2708, provides another reason why common-carrier regulation of all ISPs is not a worry. Under its *Computer Inquiry* rules, which foreshadowed the definitions of "information" and "telecommunications" services, *ante,* at 2696–2697, the Commission forbore from regulating as common carriers "value-added networks"—non-facilities-based providers who leased basic services from common carriers and bundled them with enhanced services; it said that they, unlike facilities-based providers, would be deemed to provide only enhanced ****2717** services, *ante,* at 2706–2707. [5] That ***1012** same result can be achieved today under the Commission's statutory authority to forbear from imposing most Title II regulations. § 160. In fact, the statutory criteria for forbearance—which include what is "just and reasonable," "necessary for the protection of consumers," and "consistent with the public interest," §§ 160(a)(1), (2), (3)—correspond well with the kinds of policy reasons the Commission has invoked to justify its peculiar construction of "telecommunications service" to exclude cable-modem service.

The Court also puts great stock in its conclusion that cable-modem subscribers cannot avoid using information services provided by the cable company in its ISP capacity, even when they only click-through to other ISPs. *Ante,* at 2709–2710. For, even if a cable-modem subscriber uses e-mail from another ISP, designates some page not provided by the cable company as his home page, and takes advantage of none of the other standard applications and functions provided by the cable company, he will still be using the cable company's Domain Name System (DNS) server and, when he goes to popular Web pages, perhaps versions of them that are stored in the cable company's cache. This argument suffers from at least two problems. First, in the context of telephone services, the Court recognizes a *de minimis* exception to contamination of a telecommunications service by an information service. *Ante,* at 2708–2709. A similar exception would seem to apply to the functions in question here. DNS, in particular, is scarcely more than routing information, ***1013** which is expressly excluded from the definition of "information service." § 153(20). [6] Second, it is apparently possible to sell a telecommunications service separately from, although in conjunction with, ISP-like services; that is precisely what happens in the DSL context, and the Commission does not contest that it *could* be done in the context of cable. The only impediment appears to be the Commission's failure to require from cable companies the unbundling that it ****2718** required of facilities-based providers under its *Computer Inquiry.*

Finally, I must note that, notwithstanding the Commission's self-congratulatory paean to its deregulatory largesse, *e.g.,* Brief for Federal Petitioners 29–32, it concluded the *Declaratory Ruling* by asking, as the Court paraphrases, "whether under its Title I jurisdiction [the Commission] should require cable companies to offer other ISPs access to their facilities on common-carrier terms." *Ante,* at 2698; see also Reply Brief for Federal Petitioners 9; Tr. of Oral Arg. 17. In other words, what the Commission hath given, the Commission may well take away—unless it doesn't. This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions. The main source of the Commission's regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance by concluding that the definition of "telecommunications service" is ambiguous and does not (in ***1014** its current view) apply to cable-modem service. It contemplates, however, altering that (unnecessary) outcome, not by changing the law (*i.e.,* its construction of the Title II definitions), but by reserving the right to change the facts. Under its undefined and sparingly used "ancillary" powers, the Commission might conclude that it can order cable companies to "unbundle" the telecommunications component of cable-modem service. [7] And presto, Title II will then apply to them, because they will finally be "offering" telecommunications service! Of course, the Commission will still have the statutory power to forbear from regulating them under § 160 (which it has already tentatively concluded it would do, *Declaratory Ruling* 4847–4848, ¶¶ 94–95). Such Möbius–strip reasoning mocks the principle that the statute constrains the agency in any meaningful way.

After all is said and done, after all the regulatory cant has been translated, and the smoke of agency expertise blown away, it remains perfectly clear that someone who sells cable-modem service is "offering" telecommunications. For that

simple reason set forth in the statute, I would affirm the Court of Appeals.

II

In Part III–B of its opinion, the Court continues the administrative-law improvisation project it began four years ago in *United States v. Mead Corp.,* 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). To the extent it set forth a comprehensible rule,[8] *Mead* drastically ***1015** limited the categories of agency action that would qualify for deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). For example, the position taken by an agency before the Supreme Court, with full approval of the agency head, would not qualify. Rather, some unspecified degree of formal process was required—or was at least the only safe ****2719** harbor. See *Mead, supra,* at 245–246, 121 S.Ct. 2164 (SCALIA, J., dissenting).[9]

This meant that many more issues appropriate for agency determination would reach the courts without benefit of an agency position entitled to *Chevron* deference, requiring the courts to rule on these issues de novo.[10] As I pointed out in ***1016** dissent, this in turn meant (under the law as it was understood until today)[11] that many statutory ambiguities that might be resolved in varying fashions by successive agency administrations would be resolved finally, conclusively, and forever, by federal judges—producing an "ossification of large portions of our statutory law," 533 U.S., at 247, 121 S.Ct. 2164. The Court today moves to solve this problem of its own creation by inventing yet another breathtaking novelty: judicial decisions subject to reversal by executive officers.

Imagine the following sequence of events: FCC action is challenged as ultra vires under the governing statute; the litigation reaches all the way to the Supreme Court of the United States. The Solicitor General sets forth the FCC's official position (approved by the Commission) regarding ****2720** interpretation of the statute. Applying *Mead,* however, the Court denies the agency position *Chevron* deference, finds that the *best* interpretation of the statute contradicts the agency's position, and holds the challenged agency action unlawful. The agency promptly conducts a rulemaking, and ***1017** adopts a rule that comports with its earlier position—in effect disagreeing with the Supreme Court concerning the best interpretation of the statute. According to today's opinion, the agency is thereupon free to take the action that the Supreme Court found unlawful.

This is not only bizarre. It is probably unconstitutional. As we held in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948), Article III courts do not sit to render decisions that can be reversed or ignored by executive officers. In that case, the Court of Appeals had determined it had jurisdiction to review an order of the Civil Aeronautics Board awarding an overseas air route. By statute such orders were subject to Presidential approval and the order in question had in fact been approved by the President. *Id.,* at 110–111, 68 S.Ct. 431. In order to avoid any conflict with the President's foreign-affairs powers, the Court of Appeals concluded that it would review the board's action "as a regulatory agent of Congress," and the results of that review would remain subject to approval or disapproval by the President. *Id.,* at 112–113, 68 S.Ct. 431. As I noted in my *Mead* dissent, 533 U.S., at 248, 121 S.Ct. 2164, the Court bristled at the suggestion: "Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Waterman, supra,* at 113, 68 S.Ct. 431. That is what today's decision effectively allows. Even when the agency itself is party to the case in which the Court construes a statute, the agency will be able to disregard that construction and seek *Chevron* deference for its contrary construction the next time around.[12]

***1018** Of course, like *Mead* itself, today's novelty in belated remediation of *Mead* creates many uncertainties to bedevil the lower courts. A court's interpretation is conclusive, the Court says, only if it holds that interpretation to be "the *only permissible* reading of the statute," and not if it merely holds it to be "the *best* reading." *Ante,* at 2701–2702. Does this mean that in future statutory-construction cases involving agency-administered statutes courts must specify (presumably in dictum) which of the two they are holding? And what of the many cases decided in the past, before this dictum's requirement was established? Apparently, silence on the point means that the court's decision is subject to agency reversal: "Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction."[13] *Ante,* at 2702 (I have not ****2721** made, and as far as I know the Court has not made, any calculation of how many hundreds of past statutory decisions

are now agency-reversible because of failure to include an "unambiguous" finding. I suspect the number is very large.) How much extra work will it entail for each court confronted with an agency-administered statute to determine whether it has reached, not only the right ("best") result, but "the only permissible" result? Is the standard for "unambiguous" under the Court's new agency-reversal rule the same as the standard for "unambiguous" under step one of *Chevron?* (If so, ***1019** of course, every case that reaches step two of *Chevron* will be agency-reversible.) Does the "unambiguous" dictum produce *stare decisis* effect even when a court is *affirming,* rather than *reversing,* agency action—so that in the future the agency *must adhere* to that affirmed interpretation? If so, does the victorious agency have the right to appeal a Court of Appeals judgment in its favor, on the ground that the text in question is in fact not (as the Court of Appeals held) unambiguous, so the agency should be able to change its view in the future?

It is indeed a wonderful new world that the Court creates, one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators.[14] I would adhere to what has been the rule in the past: When a court interprets a statute without *Chevron* deference to agency views, its interpretation (whether or not asserted to rest upon an unambiguous text) is the law. I might add that it is a great mystery why any of this is relevant here. *Whatever* the *stare decisis* effect of *AT & T Corp. v. Portland,* 216 F.3d 871 (C.A.9 2000), in the Ninth Circuit, it surely does not govern this Court's decision. And—despite the Court's peculiar, self-abnegating suggestion to the contrary, *ante,* at 2702—the Ninth Circuit would already be obliged to ***1020** abandon *Portland's* holding in the face of *this Court's* decision that the Commission's construction of "telecommunications service" is entitled to deference and is reasonable. It is a sadness that the Court should go so far out of its way to make bad law.

I respectfully dissent.

All Citations

545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820, 73 USLW 4659, 05 Cal. Daily Op. Serv. 5631, 05 Daily Journal D.A.R. 7749, 36 Communications Reg. (P&F) 173, 18 Fla. L. Weekly Fed. S 482, 32 A.L.R. Fed. 2d 651

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 IP addresses identify computers on the Internet, enabling data packets transmitted from other computers to reach them. See *Universal Service Report* 11531, ¶ 62; Huber 985.

2 The dissent attempts to escape this consequence of respondents' position by way of an elaborate analogy between ISPs and pizzerias. *Post,* at 2716 (opinion of SCALIA, J.). This analogy is flawed. A pizzeria "delivers" nothing, but ISPs plainly provide transmission service directly to the public in connection with Internet service. For example, with dial-up service, ISPs process the electronic signal that travels over local telephone wires, and transmit it to the Internet. See *supra,* at 2695–2696; Huber 988. The dissent therefore cannot deny that its position logically would require applying presumptively mandatory Title II regulation to all ISPs.

3 The dissent claims that access to DNS does not count as use of the information-processing capabilities of Internet service because DNS is "scarcely more than routing information, which is expressly excluded from the definition of 'information service.' " *Post,* at 2717, and n. 6 (opinion of SCALIA, J.). But the definition of information service does not exclude "routing information." Instead, it excludes "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20). The dissent's argument therefore begs the question because it assumes that Internet service is a "telecommunications system" or "service" that DNS manages

(a point on which, contrary to the dissent's assertion, *post,* at 2717, n. 6, we need take no view for purposes of this response).

4 Respondents vigorously argue that the Commission's purported inconsistent treatment is a reason for holding the Commission's construction impermissible under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Any inconsistency bears on whether the Commission has given a reasoned explanation for its current position, not on whether its interpretation is consistent with the statute.

1 The myth that the pizzeria does not offer delivery becomes even more difficult to maintain when the pizzeria advertises quick delivery as one of its advantages over competitors. That, of course, is the case with cable broadband.

2 See also *In re Federal–State Joint Board on Universal Service,* 13 FCC Rcd. 11501, 11571–11572, ¶ 145 (1998) (end users "obtain telecommunications service from local exchange carriers, and then use information services provided by their Internet service provider and [Web site operators] in order to access [the Web]").

3 In the DSL context, the physical connection is generally resold to the consumer by an ISP that has taken advantage of the telephone company's offer. The consumer knows very well, however, that the physical connection is a necessary component for Internet access which, just as in the dial-up context, is not provided by the ISP.

4 The Court contends that this analogy is inapposite because one need not have a pizza delivered, *ante,* at 2705–2706, whereas one must purchase the cable connection in order to use cable's ISP functions. But the ISP functions provided by the cable company *can* be used without cable delivery—by accessing them from an Internet connection other than cable. The merger of the physical connection and Internet functions in cable's offerings has nothing to do with the " 'inextricably intertwined,' " *ante,* at 2698, nature of the two (like a car and its carpet), but is an artificial product of the cable company's marketing decision not to offer the two separately, so that the Commission could (by the *Declaratory Ruling* under review here) exempt it from common-carrier status.

5 The Commission says forbearance cannot explain why value-added networks were not regulated as basic-service providers because it was not given the power to forbear until 1996. Reply Brief for Federal Petitioners 3–4, n. 1. It is true that when the Commission ruled on value-added networks, the statute did not explicitly provide for forbearance—any more than it provided for the categories of basic and enhanced services that the *Computer Inquiry* rules established, and through which the forbearance was applied. The D.C. Circuit, however, had long since recognized the Commission's discretionary power to "forbear from Title II regulation." *Computer and Communications Industry Assn. v. FCC,* 693 F.2d 198, 212 (C.A.D.C.1982).

The Commission also says its *Computer Inquiry* rules should not apply to cable because they were developed in the context of telephone lines. Brief for Federal Petitioners 35–36; see also *ante,* at 2708. But to the extent that the statute imported the *Computer Inquiry* approach, there is no basis for applying it differently to cable than to telephone lines, since the definition of "telecommunications service" applies "regardless of the facilities used." 47 U.S.C. § 153(46).

6 The Court says that invoking this explicit exception from the definition of information services, which applies only to the "management, control, or operation of a telecommunications system or the management of a telecommunications service," § 153(20), begs the question whether cable-modem service includes a telecommunications service, *ante,* at 2710, n. 3. I think not, and cite the exception only to demonstrate that the incidental functions do not *prevent* cable from including a telecommunications service *if it otherwise qualifies.*

It is rather the Court that begs the question, saying that the exception cannot apply because cable is not a telecommunications service.

7 Under the Commission's assumption that cable-modem-service providers are not providing "telecommunications services," there is reason to doubt whether it can use its Title I powers to impose common-carrier-like requirements, since § 153(44) specifically provides that a "telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services" (emphasis added), and "this chapter" includes Titles I and II.

8 For a description of the confusion *Mead* has produced, see Vermeule, *Mead* in the Trenches, 71 Geo. Wash. L.Rev. 347, 361 (2003) (concluding that "the Court has inadvertently sent the lower courts stumbling into a no-man's land"); Bressman, How *Mead* Has Muddled Judicial Review of Agency Action, 58 Vand.L.Rev. 1443, 1475 (2005) ("*Mead* has muddled judicial review of agency action").

9 Justice BREYER attempts to clarify *Mead* by repeating its formulations that the Court has "sometimes found reasons" to give *Chevron* deference in a (still-unspecified) "variety of ways" or because of a (still-unspecified) "variety of indicators," *ante,* at 2712 (concurring opinion) (internal quotation marks and emphasis omitted). He also notes that deference is sometimes inappropriate for reasons unrelated to the agency's process. Surprising those who thought the Court's decision not to defer to the agency in *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004), depended on its conclusion that there was "no serious question ... about purely textual ambiguity" in the statute, *id.,* at 600, 124 S.Ct. 1236, Justice BREYER seemingly attributes that decision to a still-underdeveloped exception to *Chevron* deference—one for "unusually basic legal question[s]," *ante,* at 2713. The Court today (thankfully) does not follow this approach: It bases its decision on what it sees as statutory ambiguity, *ante,* at 2708, without asking whether the classification of cable-modem service is an "unusually basic legal question."

10 It is true that, even under the broad basis for deference that I propose (viz., any agency position that plainly has the approval of the agency head, see *United States v. Mead Corp.,* 533 U.S. 218, 256–257, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (SCALIA, J., dissenting)), some interpretive matters will be decided *de novo,* without deference to agency views. This would be a rare occurrence, however, at the Supreme Court level—at least with respect to matters of any significance to the agency. Seeking to achieve 100% agency control of ambiguous provisions through the complicated method the Court proposes is not worth the incremental benefit.

11 The Court's unanimous holding in *Neal v. United States,* 516 U.S. 284, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996), plainly rejected the notion that any form of deference could cause the Court to revisit a prior statutory-construction holding: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis,* and we assess an agency's later interpretation of the statute against that settled law." *Id.,* at 295, 116 S.Ct. 763. The Court attempts to reinterpret this plain language by dissecting the cases *Neal* cited, noting that they referred to previous determinations of " 'a statute's clear meaning.' " *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 537, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992) (quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 131, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990)). But those cases reveal that today's focus on the term "clear" is revisionist. The oldest case in the chain using that word, *Maislin Industries,* did not rely on a prior decision that held the statute to be clear, but on a run-of-the-mill statutory interpretation contained in a 1908 decision. *Id.,* at 130–131, 110 S.Ct. 2759. When *Maislin Industries* referred to the Court's prior determination of "a statute's clear meaning," it was referring to the fact that the prior decision had made the statute clear, and was not conducting a retrospective inquiry into whether the prior decision had declared the statute itself to be clear on its own terms.

12 The Court contends that no reversal of judicial holdings is involved, because "a court's opinion as to the best reading of an ambiguous statute ... is not authoritative," *ante,* at 2701. That fails to appreciate the difference

between a *de novo* construction of a statute and a decision whether to defer to an agency's position, which does not even "*purport* to give the statute a judicial interpretation." *Mead, supra,* at 248, 121 S.Ct. 2164 (SCALIA, J., dissenting). Once a court has decided upon its *de novo* construction of the statute, there no longer is a "different construction" that is "consistent with the court's holding," *ante,* at 2701, and available for adoption by the agency.

13 Suggestive of the same chaotic undermining of all prior judicial decisions that do not explicitly renounce ambiguity is the Court's explanation of why agency departure from a prior judicial decision does not amount to overruling: "[T]he agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of [ambiguous] statutes [it is charged with administering]." *Ante,* at 2701.

14 Further deossification may already be on the way, as the Court has hinted that an agency construction unworthy of *Chevron* deference may be able to trump one of our statutory-construction holdings. In *Edelman v. Lynchburg College,* 535 U.S. 106, 114, 122 S.Ct. 1145, 152 L.Ed.2d 188 (2002), the Court found "no need to resolve any question of deference" because the Equal Employment Opportunity Commission's rule was "the position we would adopt even if ... we were interpreting the statute from scratch." It nevertheless refused to say whether the agency's position was "the only one permissible." *Id.,* at 114, n. 8, 122 S.Ct. 1145 (internal quotation marks omitted). Justice O'CONNOR appropriately "doubt [ed] that it is possible to reserve" the question whether a regulation is entitled to *Chevron* deference "while simultaneously maintaining ... that the agency is free to change its interpretation" in the future. 535 U.S., at 122, 122 S.Ct. 1145 (opinion concurring in judgment). In response, the Court cryptically said only that "not all deference is deference under *Chevron.*" *Id.,* at 114, n. 8, 122 S.Ct. 1145.

(ORDER LIST: 603 U.S.)

TUESDAY, JULY 2, 2024

CERTIORARI -- SUMMARY DISPOSITIONS

22-863 DIAZ-RODRIGUEZ, RAFAEL V. GARLAND, ATT'Y GEN.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. ___ (2024).

22-868 BASTIAS, ARIEL M. V. GARLAND, ATT'Y GEN.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. ___ (2024).

22-1246 EDISON ELEC. INST., ET AL. V. FERC, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. ___ (2024).

22-7630 McCALL, DANIEL N. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further

consideration in light of *Erlinger* v. *United States*, 602 U. S. ___ (2024).

23-32) LANG, EDWARD J. V. UNITED STATES
)
23-94) MILLER, GARRET V. UNITED STATES

The petitions for writs of certiorari are granted. The judgment is vacated, and the cases are remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Fischer* v. *United States*, 603 U. S. ___ (2024).

23-133 FOSTER, ARLEN V. DEPT. OF AGRICULTURE, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. ___ (2024).

23-374 GARLAND, ATTY GEN. V. RANGE, BRYAN D.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *United States* v. *Rahimi*, 602 U. S. ___ (2024).

23-376 UNITED STATES V. DANIELS, PATRICK D.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *United States* v. *Rahimi*, 602 U. S. ___ (2024).

States Court of Appeals for the Tenth Circuit for further consideration in light of *United States* v. *Rahimi*, 602 U. S. ___ (2024).

23-847 TURTLE MOUNTAIN BAND, ET AL. V. ND LEGISLATIVE ASSEMBLY, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eighth Circuit with instructions to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Justice Jackson, dissenting: In my view, the party seeking vacatur has not established equitable entitlement to that remedy. See *Acheson Hotels, LLC* v. *Laufer*, 601 U. S. 1, 18-20 (2023) (Jackson, J., concurring in the judgment).

23-876 KC TRANSPORT, INC. V. SU, ACTING SEC. OF LABOR, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. ___ (2024).

23-910 ANTONYUK, IVAN, ET AL. V. JAMES, STEVEN G., ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *United States* v. *Rahimi*, 602 U. S. ___ (2024).

23-913 SOLIS-FLORES, CESAR V. GARLAND, ATT'Y GEN.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United

SUPREME COURT OF THE UNITED STATES

No. 22–1008

CORNER POST, INC., PETITIONER *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[July 1, 2024]

JUSTICE BARRETT delivered the opinion of the Court.

The default statute of limitations for suits against the United States requires "the complaint [to be] filed within six years after the right of action first accrues." 28 U. S. C. §2401(a). We must decide when a claim brought under the Administrative Procedure Act "accrues" for purposes of this provision. The answer is straightforward. A claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action.

I

Corner Post is a truckstop and convenience store located in Watford City, North Dakota. It was incorporated in 2017, and in 2018, it opened for business. Like most merchants, Corner Post accepts debit cards as a form of payment. While convenient for customers, debit cards are costly for merchants: Every transaction requires them to pay an "interchange fee" to the bank that issued the card. The amount of the fee is set by the payment networks, like Visa and Mastercard, that process the transaction between

the banks of merchants and cardholders. The cost quickly adds up. Since it opened, Corner Post has paid hundreds of thousands of dollars in interchange fees—which has meant higher prices for its customers.

Interchange fees have long been a sore point for merchants. For many years, payment networks had free rein over the fee amount—and because they used the promise of per-transaction profit to compete for the banks' business, they had significant incentive to raise the fees. Merchants—who would lose customers if they declined debit cards—had little choice but to pay whatever the networks charged. Left unregulated, interchange fees ballooned.

Congress eventually stepped in. The Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 tasks the Federal Reserve Board with setting "standards for assessing whether the amount of any interchange transaction fee . . . is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 124 Stat. 2068, 15 U. S. C. §1693*o*–2(a)(3)(A). Discharging this duty, the Board promulgated Regulation II, which sets a maximum interchange fee of $0.21 per transaction plus .05% of the transaction's value. See Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43394, 43420 (2011). The Board published the rule on July 20, 2011.

Four months later, a group of retail-industry trade associations and individual retailers sued the Board, arguing that Regulation II allows costs that the statute does not. See *NACS* v. *Board of Governors of FRS*, 958 F. Supp. 2d 85, 95–96 (DC 2013). The District Court agreed, *id.*, at 99–109, but the D. C. Circuit reversed, concluding "that the Board's rules generally rest on reasonable constructions of the statute," *NACS* v. *Board of Governors of FRS*, 746 F. 3d 474, 477 (2014).

Corner Post, of course, did not exist when the Board

adopted Regulation II or even during the D. C. Circuit litigation. But after opening its doors, it too became frustrated by interchange fees, and in 2021, joined a suit brought against the Board under the Administrative Procedure Act (APA). The complaint alleges that Regulation II is unlawful because it allows payment networks to charge higher fees than the statute permits. See 5 U. S. C. §§706(2)(A), (C).

The District Court dismissed the suit as barred by 28 U. S. C. §2401(a), the applicable statute of limitations, 2022 WL 909317, *7–*9 (ND, Mar. 11, 2022), and the Eighth Circuit affirmed, *North Dakota Retail Assn.* v. *Board of Governors of FRS*, 55 F. 4th 634 (2022). Following other Circuits, it distinguished between "facial" challenges to a rule (like Corner Post's challenge to Regulation II) and challenges to a rule "as-applied" to a particular party. *Id.*, at 640–641. The Eighth Circuit held that "when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation." *Id.*, at 641. On this view, §2401(a)'s 6-year limitations period began in 2011, when the Board published Regulation II, and expired in 2017, before Corner Post swiped its first debit card. See *id.*, at 643. Corner Post's suit was therefore too late.

The Eighth Circuit's decision deepened a circuit split over when §2401(a)'s statute of limitations begins to run for APA suits challenging agency action. At least six Circuits now hold that the limitations period for "facial" APA challenges begins on the date of final agency action—*e.g.*, when the rule was promulgated—regardless of when the plaintiff was injured. See, *e.g.*, *id.*, at 641; *Wind River Min. Corp.* v. *United States*, 946 F. 2d 710, 715 (CA9 1991); *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Serv.*, 112 F. 3d 1283, 1287 (CA5 1997); *Harris* v. *FAA*, 353 F. 3d 1006, 1009–1010 (CADC 2004); *Hire Order Ltd.* v. *Marianos*, 698 F. 3d 168, 170 (CA4 2012); *Odyssey Logistics & Tech. Corp.* v. *Iancu*, 959 F. 3d 1104, 1111–1112 (CA Fed.

2020). By contrast, the Sixth Circuit has stated a generally applicable rule that §2401(a)'s limitations period begins when the plaintiff is injured by agency action, even if that injury did not occur until many years after the action became final. *Herr* v. *United States Forest Serv.*, 803 F. 3d 809, 820–822 (2015) ("When a party first becomes aggrieved by a regulation that exceeds an agency's statutory authority more than six years after the regulation was promulgated, that party may challenge the regulation without waiting for enforcement proceedings" (emphasis deleted)). We granted certiorari to resolve the split. 600 U. S. ___ (2023).

II

Three statutory provisions control our analysis: 5 U. S. C. §702 and §704, the relevant APA provisions, and 28 U. S. C. §2401(a), the relevant statute of limitations. The APA provisions grant Corner Post a cause of action subject to certain conditions, and §2401(a) sets the window within which Corner Post can assert its claim.

Section 702 authorizes persons injured by agency action to obtain judicial review by suing the United States or one of its agencies, officers, or employees. See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141 (1967). It provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U. S. C. §702. We have explained that §702 "requir[es] a litigant to show, at the outset of the case, that he is injured in fact by agency action." *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 127 (1995). Thus, a litigant cannot bring an APA claim unless and until she suffers an injury.[1]

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[1]The dissent asserts that §702 "restricts *who* may challenge agency

While §702 equips injured parties with a cause of action, §704 limits the agency actions that are subject to judicial review. Unless another statute makes the agency's action reviewable (and none does for Regulation II), judicial review is available only for "final agency action." §704. In most cases, then, a plaintiff can only challenge an action that "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U. S. 154, 177–178 (1997) (internal quotation marks omitted). Note that §702's injury requirement and §704's finality requirement work hand in hand: Each is a "necessary, but not by itself . . . sufficient, ground for stating a claim under the APA." *Herr*, 803 F. 3d, at 819.

The applicable statute of limitations, 28 U. S. C. §2401(a), contains the language we must interpret: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years *after the right of action first accrues*." (Emphasis added.) This provision applies generally to suits against the United States unless the timing provision of a more specific statute displaces it. See, *e.g.*, 33 U. S. C. §1369(b) (deadline to challenge certain agency actions under the Clean Water Act).

The Board contends that an APA claim "accrues" when agency action is "final" for purposes of §704—injury, it says,

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action," yet its injury requirement "says nothing about" the cause of action or elements of the claim. *Post*, at 16. But surely the dissent does not mean to suggest that an *uninjured* person may bring an APA claim. Whether one calls injury a restriction on who may sue or an element of the cause of action, the relevant, undisputed point is that a plaintiff cannot sue under the APA unless she is "injured in fact by agency action." *Newport News*, 514 U. S., at 127.

is necessary for the suit but irrelevant to the statute of limitations.[2] We disagree. A right of action "accrues" when the plaintiff has a "complete and present cause of action"—*i.e.*, when she has the right to "file suit and obtain relief." *Green* v. *Brennan*, 578 U. S. 547, 554 (2016) (internal quotation marks omitted). An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured.

III

Congress enacted §2401(a) in 1948, two years after it enacted the APA. See 62 Stat. 971. Section 2401(a)'s predecessor was the statute-of-limitations provision for the Little Tucker Act, which gave district courts jurisdiction over non-tort monetary claims not exceeding $10,000 against the United States. See §24, 36 Stat. 1093 ("That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made"); Brief for Professor Aditya Bamzai et al. as *Amici Curiae* 5–6. When Congress revised and recodified the Judicial Code in 1948, it converted the Little Tucker Act's statute of limitations into a general statute of limitations for all

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[2] The Board leaves open the possibility that someone could bring an as-applied challenge to a rule when the agency relies on that rule in enforcement proceedings against that person, even if more than six years have passed since the rule's promulgation. But Corner Post, as a merchant rather than a payment network, is not regulated by Regulation II—so it will never be the target of an enforcement action in which it could challenge that rule. JUSTICE KAVANAUGH asserts that "Corner Post can obtain relief in this case only because the APA authorizes vacatur of agency rules." *Post*, at 1 (concurring opinion). Whether the APA authorizes vacatur has been subject to thoughtful debate by Members of this Court. See, *e.g.*, *United States* v. *Texas*, 599 U. S. 670, 693–702 (2023) (GORSUCH, J., concurring in judgment). We took this case only to decide how §2401(a)'s statute of limitations applies to APA claims. We therefore assume without deciding that vacatur is available under the APA.

suits against the Government—replacing "under this paragraph" with "every civil action against the United States." But Congress continued to start the 6-year limitations period when the right "accrues." Compare 36 Stat. 1093 ("after the right accrued for which the claim is made") with §2401(a) ("after the right of action first accrues").

In 1948, as now, "accrue" had a well-settled meaning: A "right accrues when it comes into existence," *United States* v. *Lindsay*, 346 U. S. 568, 569 (1954)—*i.e.*, "'when the plaintiff has a complete and present cause of action,'" *Gabelli* v. *SEC*, 568 U. S. 442, 448 (2013) (quoting *Wallace* v. *Kato*, 549 U. S. 384, 388 (2007)). This definition has appeared "in dictionaries from the 19th century up until today." *Gabelli*, 568 U. S., at 448. Legal dictionaries in the 1940s and 1950s uniformly explained that a cause of action "'accrues' when a suit may be maintained thereon." Black's Law Dictionary 37 (4th ed. 1951) (Black's); see also, *e.g.*, Ballentine's Law Dictionary 15–16 (2d ed. 1948) (Ballentine's) ("[A]ccrual of cause of action" defined as the "coming or springing into existence of a right to sue" (boldface deleted)). Thus, we have explained that a cause of action "does not become 'complete and present' for limitations purposes"—it does not *accrue*—"until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997).

Importantly, contemporaneous dictionaries also explained that a cause of action accrues "on [the] date that damage is sustained and not [the] date when causes are set in motion which ultimately produce injury." Black's 37. "[I]f an act is not legally injurious until certain consequences occur, it is not the mere doing of the act that gives rise to a cause of action, but the subsequent occurrence of damage or loss as the consequence of the act, and *in such case no cause of action accrues until the loss or damage occurs*." Ballentine's 16 (emphasis added). Thus, when Congress used the phrase "right of action first accrues" in

§2401(a), it was well understood that a claim does not "accrue" as soon as the defendant acts, but only after the plaintiff suffers the injury required to press her claim in court.

Our precedent treats this definition of accrual as the "standard rule for limitations periods." *Green*, 578 U. S., at 554. "We have repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, 418 (2005) (quoting *Bay Area Laundry*, 522 U. S., at 201). It is "unquestionably the traditional rule" that "[a]bsent other indication, a statute of limitations begins to run at the time the plaintiff 'has the right to apply to the court for relief.'" *TRW Inc.* v. *Andrews*, 534 U. S. 19, 37 (2001) (Scalia, J., concurring in judgment) (quoting 1 H. Wood, Limitation of Actions §122a, p. 684 (rev. 4th ed. 1916) (Wood)). Conversely, we have "reject[ed]" the possibility that a "limitations period commences at a time when the [plaintiff] could not yet file suit" as "inconsistent with basic limitations principles." *Bay Area Laundry*, 522 U. S., at 200.

This traditional rule constitutes a strong background presumption. While the "standard rule can be displaced such that the limitations period begins to run before a plaintiff can file a suit," we "'will not infer such an odd result in the absence of any such indication' in the text of the limitations period." *Green*, 578 U. S., at 554 (quoting *Reiter* v. *Cooper*, 507 U. S. 258, 267 (1993)). "Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry*, 522 U. S., at 201.

There is good reason to conclude that Congress codified the traditional accrual rule in §2401(a). Nothing "in the text of [§2401(a)'s] limitations period" gives any indication that it begins to run before the plaintiff has a complete and

present cause of action. *Green*, 578 U. S., at 554. Rather, §2401(a) uses standard language that had a well-settled meaning in 1948: "right of action first accrues." Moreover, Congress knew how to depart from the traditional rule to create a limitations period that begins with the defendant's action instead of the plaintiff's injury: Just six years before it enacted §2401(a), Congress passed the Emergency Price Control Act of 1942, which required challenges to Office of Price Administration actions to be filed "[w]ithin a period of sixty days *after the issuance of any regulation or order*." §203(a), 56 Stat. 31 (emphasis added); see also Administrative Orders Review Act (Hobbs Act), §4, 64 Stat. 1130 (1950) (allowing petitions for review "within sixty days after entry of" a "final order reviewable under this Act"). Section 2401(a), by contrast, stuck with the standard accrual language.

Section 2401(a) thus operates as a statute of limitations rather than a statute of repose. "[A] statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 7–8 (2014) (quoting Black's 1546 (9th ed. 2009)). That describes §2401(a), with its reference to when the right of action "accrues," to a tee. "A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action" that is "measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." 573 U. S., at 8. Such statutes bar "'any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury.'" *Ibid.* (quoting Black's 1546). That describes statutes like the Hobbs Act, which sets a filing deadline of 60 days from the "entry" of the agency order. 64 Stat. 1130. Statutes of limitations "require plaintiffs to pursue diligent prosecution of known claims"; statutes of repose reflect a "legislative judgment that a defendant should be free from liability after the

legislatively determined period of time." *CTS Corp.*, 573 U. S., at 8–9 (internal quotation marks omitted).[3] The Board asks us to interpret §2401(a) as a defendant-protective statute of repose that begins to run when agency action becomes final. But §2401(a)'s plaintiff-focused language makes it an accrual-based statute of limitations.

* * *

Section 2401(a) embodies the plaintiff-centric traditional rule that a statute of limitations begins to run only when the plaintiff has a complete and present cause of action. Because injury, not just finality, is required to sue under the APA, Corner Post's cause of action was not complete and present until it was injured by Regulation II. Therefore, its suit is not barred by the statute of limitations.

IV

The Board concedes that some claims accrue for purposes of §2401(a) when the plaintiff has a complete and present cause of action—in other words, it admits that "accrue" carries its usual meaning for some claims. But it argues that facial challenges to agency rules are different, accruing when agency action is final rather than when the plaintiff can assert her claim. See also *post*, at 5–6 (JACKSON, J., dissenting). The Board raises several arguments to support its position, but none work.

A

The Board puts the most weight on the many specific statutory review provisions that start the clock at finality. See also *post*, at 12–15 (JACKSON, J., dissenting). The

[3] Perplexingly, the dissent rejects this distinction, *post*, at 10–11, even though our precedent clearly recognizes it: *CTS Corp.* acknowledged the "substantial overlap between the policies of the two types of statute" but concluded nonetheless that "each has a distinct purpose and each is targeted at a different actor." 573 U. S., at 8.

Hobbs Act, for example, requires persons aggrieved by certain final orders and regulations of the Federal Communications Commission, Secretary of Agriculture, and Secretary of Transportation, among others, to petition for review "within 60 days after [the] entry" of the final agency action. 28 U. S. C. §§2342, 2344; see also, *e.g.*, 29 U. S. C. §655(f) (suits challenging Occupational Safety and Health Administration standards must be filed "prior to the sixtieth day after such standard is promulgated"). The Board contends that such statutes reflect a standard administrative-law practice of starting the limitations period when "any proper plaintiff" can challenge the final agency action. Brief for Respondent 9. There is "no sound basis," it insists, "for instead applying a challenger-by-challenger approach to calculate the limitations period on APA claims." *Ibid.*; see also *post*, at 9–10 (JACKSON, J., dissenting).

1

This argument hits the immutable obstacle of §2401(a)'s text. Unlike the specific review provisions that the Board cites, §2401(a) does *not* refer to the date of the agency action's "entry" or "promulgat[ion]"; it says "right of action first accrues." That textual difference matters. To begin, the latter language reflects a statute of limitations and the former a statute of repose. Moreover, the specific review provisions actually undercut the Board's argument, because they illustrate that Congress has sometimes employed the Board's preferred final-agency-action rule—but did not do so in §2401(a). As we observed in *Rotkiske* v. *Klemm*, it is "particularly inappropriate" to read language into a statute of limitations "when, as here, Congress has shown that it knows how to adopt the omitted language or provision." 589 U. S. 8, 14 (2019).

In arguing to the contrary, *post*, at 12–16, the dissent ignores the textual differences between §2401(a) and finality-

focused specific review provisions—flouting *Rotkiske*'s admonition to heed such distinctions. According to the dissent, we cannot expect "Congress to have explicitly stated that accrual in §2401(a) starts at the point of final agency action when §2401(a) is a residual provision" that applies generally. *Post*, at 15. But §2401(a)'s text reflects a choice: Congress took the Little Tucker Act's plaintiff-focused limitations period—which began when "the right accrued for which the claim is made," 36 Stat. 1093—and made it generally applicable to "every" suit against the United States, §2401(a); see Part III, *supra*. Congress could have created a separate residual provision for suits challenging agency action and pegged its limitations period to the moment of finality, using statutes like the Emergency Price Control Act as a model. It chose a different path.

Undeterred, the dissent insists that by the time §2401(a) was enacted, Congress had "uniformly expressed [a] judgment" that the limitations period for agency suits should be defendant-centric and start with finality. *Post*, at 14. Again, this argument disregards §2401(a)'s text in favor of alleged congressional intent divined from *other* statutes with very different language. "As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text"; the Court "may not 'replace the actual text with speculation as to Congress' intent.'" *Oklahoma* v. *Castro-Huerta*, 597 U. S. 629, 642 (2022) (quoting *Magwood* v. *Patterson*, 561 U. S. 320, 334 (2010)).

In any event, the dissent misunderstands the history. See *post*, at 14, and n. 6. (Notably, the Board itself does not make this argument.) While the Emergency Price Control Act of 1942 preceded the APA (1946) and §2401(a) (1948), most finality-focused limitations provisions, like the Hobbs Act (1950), came later. See *post*, at 12–13, and n. 5; *e.g.*, 5 U. S. C. §7703(b)(1) (added by 92 Stat. 1143 (1978)). To conjure its supposed backdrop, the dissent cites a hodgepodge

of other pre-1948 statutes that started the clock at finality. *Post*, at 14, n. 6. But these statutes generally governed challenges to orders adjudicating a party's own rights—what we today might call "as-applied" challenges. For example, 7 U. S. C. §194(a) provided a 30-day limitations period for a meatpacker to appeal an order finding that the packer "has violated or is violating any provision" of the statute regulating business practices in the meatpacking industry. 42 Stat. 161–162; see also, *e.g.*, 15 U. S. C. §45(c) (persons required by a Federal Trade Commission order to cease a business practice may obtain review of that order within 60 days). Statutes like these do not contradict the plaintiff-centric standard accrual rule, because a party subject to such an order suffers legally cognizable injury at the same time that the order becomes final.[4]

Thus, even if the "intention" Congress "expressed" in textually distinct statutes could overcome §2401(a)'s language, *post*, at 14, the dissent's history would not support its supposed background presumption—that the limitations period for facial challenges to regulations begins when the rule becomes final even if the plaintiff does not yet have a complete and present cause of action. Instead, the best course, as always, is to stick with the ordinary meaning of the text that actually applies, §2401(a). Given the settled, plaintiff-centric meaning of "right of action first accrues" in

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[4]There is another reason to doubt the dissent's supposed background limitations principle for facial challenges to agency rules: In the 1940s, "most administrative activity was adjudicative in nature"; agencies "rarely, if ever, adopted sweeping regulations." K. Hickman & R. Pierce, 1 Administrative Law §1.3, p. 26 (7th ed. 2024). The dissent errs by extrapolating a general congressional intent that all agency suits be subject to a finality-based limitations rule based on pre-1948 statutes that governed a subset of agency actions—adjudicative orders—and were enacted before facial challenges to regulations became common. It is hard to see how provisions governing when a party may challenge an order adjudicating her own rights could set any kind of background rule for facial APA challenges to generally applicable regulations.

1948—not to mention in the Little Tucker Act—the dissent cannot "displace" this "standard rule" with scattered citations to different, inapposite statutes. *Green*, 578 U. S., at 554.

2

The standard accrual rule that §2401(a)'s limitations period exemplifies is *plaintiff specific*—even if repose provisions like the Hobbs Act eschew a "challenger-by-challenger" approach. Brief for Respondent 9. The Board's rule would start the limitations period applicable to the plaintiff not when *she* had a complete and present cause of action but when the agency action was final and, theoretically, some *other* plaintiff was injured and could have sued. But §2401(a)'s text focuses on a specific plaintiff: "*the* complaint is filed within six years after *the* right of action first accrues." (Emphasis added.)

The dissent disputes §2401(a)'s plaintiff specificity by pointing out that it does not say "*the plaintiff's* right of action first accrues." *Post*, at 9. True, but it does use the definite article "the" to link "*the* complaint" with "*the* right of action." So the most natural interpretation is that its limitations period begins when *the cause of action associated with the complaint*—the plaintiff's cause of action—is complete. And while the dissent cites dictionary definitions of "accrue" that mention "'*a* right to sue,'" *ibid.*, the statute's use of the definite article "the" takes precedence. The Board and the dissent read §2401(a) as if it says "the complaint is filed within six years after a right of action [*i.e.*, *anyone's* right of action] first accrues"—which, of course, it does not.

In fact, we have explained that the traditional accrual rule looks to when "*the* plaintiff"—this particular plaintiff—"has a complete and present cause of action." *Green*, 578 U. S., at 554 (internal quotation marks omitted; emphasis added). No precedent suggests that the traditional rule contemplates the Board's hypothetical "when could

someone else have sued" sort of inquiry.[5] Rather, the "statute of limitations begins to run at the time *the plaintiff* has the right to apply to the court for relief." *TRW Inc.*, 534 U. S., at 37 (opinion of Scalia, J.) (internal quotation marks omitted; emphasis added).[6]

Importing the Board's special administrative-law rule into §2401(a) would create a defendant-focused rule for agency suits while retaining the traditional challenger-specific accrual rule for other suits against the United States. That would give the same statutory text—"right of action first accrues"—different meanings in different contexts, even though those words had a single, well-settled meaning when Congress enacted §2401(a). See Part III, *supra*. The Board's interpretation would thereby decouple the statute of limitations from any injury "such that the limitations period begins to run before a plaintiff can file a suit"—for *some*, *but not all*, suits governed by §2401(a). *Green*, 578 U. S., at 554. We "will not infer such an odd result in the

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[5] While the dissent attempts to cabin our precedent describing the plaintiff-specific standard accrual rule, nothing in those cases suggests that the rule is only plaintiff-specific for "plaintiff-specific causes of action." *Post*, at 10; see, *e.g.*, *Gabelli* v. *SEC*, 568 U. S. 442, 448 (2013) (The "'standard rule'" that a "claim accrues 'when the plaintiff has a complete and present cause of action'" has "governed since the 1830s" and "appears in dictionaries from the 19th century up until today"). And regardless, the dissent's assertion that "administrative-law claims" are *not* "plaintiff specific," *post*, at 6, is mystifying given that an APA plaintiff cannot sue until *she* suffers an injury, see 5 U. S. C. §702; n. 1, *supra*. By emphasizing the plaintiff-agnostic aspects of facial challenges to agency action, *post*, at 10, 16–18, the dissent conflates the defendant-focused *substance* of an APA claim with its plaintiff-specific *cause of action*.

[6] Moreover, there may be cases where *no one* is injured and able to sue at the time of final agency action—*e.g.*, if the agency delays a rule's enforcement—but the Board would still start the clock then. Cf. *Toilet Goods Assn., Inc.* v. *Gardner*, 387 U. S. 158, 162–166 (1967) (agency rule was final but challenge was not yet ripe). So the Board's position cannot be reconciled even with a challenger-agnostic form of the traditional accrual rule, which at least would require that *someone* have a complete and present cause of action before the limitations period begins.

absence of any such indication in the text of the limitations period." *Ibid.* (internal quotation marks omitted).

B

Turning to §2401(a)'s text, the Board draws significance from this sentence: "The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." This language, the Board stresses, "necessarily reflects Congress's understanding that a claim can 'accrue[]' for purposes of Section 2401(a)" even when a person is unable to sue. Brief for Respondent 24. True enough. It is a mystery, however, why the Board finds this helpful. The tolling exception applies when the plaintiff *had* a complete and present cause of action after he was injured but his legal disability or absence from the country "prevent[ed] him from bringing a timely suit." *Goewey* v. *United States*, 222 Ct. Cl. 104, 113, 612 F. 2d 539, 544 (1979) (*per curiam*). What matters for accrual is when the plaintiff had "the *right* to apply to the court for relief," not whether some external impediment prevented her from doing so. Wood §122a, at 684 (emphasis added). The exception, therefore, sheds no light on when the clock started ticking for Corner Post—but it does show Congress's concern for plaintiffs who might lose a cause of action through no fault of their own.

C

The Board also leans on our precedent—namely, *Reading Co.* v. *Koons*, 271 U. S. 58 (1926), and *Crown Coat Front Co.* v. *United States*, 386 U. S. 503 (1967)—to support its unusual interpretation of "accrual." See also *post*, at 6–9 (JACKSON, J., dissenting). Again, the Board comes up empty.

In *Koons*, we interpreted the statute of limitations under the Federal Employers' Liability Act, which barred actions

brought more than two years after "'the cause of action accrued.'" 271 U. S., at 60 (quoting ch. 149, §6, 35 Stat. 66). We held that the plaintiff's wrongful-death claim accrued when the employee died, even though the estate's administrator was not appointed until later and the administrator was "the only person authorized by the statute to maintain the action." 271 U. S., at 60. The Board interprets *Koons* to hold that a claim accrued at a time when no plaintiff could sue. Thus, the Board reasons, it is consistent with the meaning of "accrue" to say that Corner Post's claim "accrued" before it could sue.

The Board's characterization of *Koons* is incomplete. *Koons* explained that the administrator "acts only for the benefit of persons specifically designated in the statute," and at the "time of death there are identified persons for whose benefit the liability exists and who can start the machinery of the law in motion to enforce it, by applying for the appointment of an administrator." *Id.*, at 62. If a beneficiary sued in her individual capacity immediately after the employee's death, she could amend her suit to describe herself as "executor or administrator of the decedent." *Ibid.* So "at the death of decedent, there are real parties in interest who may procure the action to be brought." *Id.*, at 62–63. While it is true that the claim accrued before any particular administrator was appointed, the beneficiaries on whose behalf any administrator would seek relief—the "real parties in interest"—had the right to "procure the action" after the employee died. Given this unique context, *Koons* does not contradict the proposition that a claim generally accrues when the plaintiff has a complete and present cause of action.

Nor does *Crown Coat*. That case concerned a contract dispute in which a Government contractor sought an equitable adjustment to the payment it received. 386 U. S., at 507. The contract required the contractor to present its claim to the contracting officer and Armed Services Board

of Contract Appeals; its claim was "not subject to adjudication in the courts" until it was denied by the Board. *Id.*, at 511. The question presented was whether §2401(a)'s statute of limitations began to run when the Board issued its final determination or at an earlier date. *Id.*, at 507.

We held that the right of action first accrued when the Board denied the contractor's claim, because the contractor had "the right to resort to the courts only upon the making of that administrative determination." *Id.*, at 512. We explained that §2401(a)'s phrase "right of action" refers to "the right to file a civil action in the courts against the United States." *Id.*, at 511. Given the contract's administrative-exhaustion requirement, "the contractor's claim was subject only to administrative, not judicial, determination in the first instance"; the plaintiff was "not legally entitled to ask the courts to adjudicate [its] claim as an original matter." *Id.*, at 511–512, 515. So its "claim or right to bring a civil action against the United States" did not "matur[e]" until the Board made its final decision. *Id.*, at 514. *Crown Coat* thus supports Corner Post: The Court interpreted §2401(a) to embody the traditional rule that a claim accrues when the plaintiff has the right to bring suit in court.

Notwithstanding *Crown Coat*'s holding, the Board and the dissent try to marshal support from its dicta. The Court noted that it is hazardous "to define for all purposes when a 'cause of action' first 'accrues'"; it cautioned that those words should be "'interpreted in the light of the general purposes of the statute and of its other provisions'" and the "'practical ends'" served by time limitations. *Id.*, at 517 (quoting *Koons*, 271 U. S., at 62). Seizing on this language, the Board insists that the word "accrues" is a chameleon, taking on different meanings in different contexts—and in the administrative-law context, a right of action "accrues" when a regulation is final, full stop. See also *post*, at 6 (JACKSON, J., dissenting) (citing *Crown Coat* for the proposition that "the word 'accrues' lacks any fixed meaning").

The Board and the dissent vastly overread—in fact, they misread—*Crown Coat*. The Court did not suggest that the same words "right of action first accrues" *in a single statute* should mean different things in different contexts—which is how the Board and the dissent would have us interpret §2401(a). Rather, the Court made its observation in the course of distinguishing §2401(a) from a statutory scheme that departed from the traditional accrual rule.[7] 386 U. S., at 516–517. Moreover, as we have already explained, the Court interpreted §2401(a)—the very statute at issue in this case—to start the clock when the plaintiff is "legally entitled" to file suit. *Id.*, at 515. It also specifically rejected the Government's position that the time can run even before a plaintiff's "civil action against the United States matures." *Id.*, at 514; see also *ibid.* (noting that the Government's position "would have unfortunate impact"). We therefore do not read *Crown Coat*'s "general purposes" language to contradict either its holding or the "'standard rule' for limitations periods." *Green*, 578 U. S., at 554.

Even if *Crown Coat*'s dicta supported sapping "accrues" of any "fixed meaning," *post*, at 6 (JACKSON, J., dissenting), this approach has been contravened by the weight of subse-

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[7]The Court distinguished the limitations scheme at issue in *McMahon* v. *United States*, 342 U. S. 25 (1951). That scheme involved two statutes: one requiring "actions to be brought within two years after 'the cause of action arises'" and another "permit[ting] court action only if the claim ha[d] been administratively disallowed, but set[ting] no time within which a claim must be presented to the administrative body." *Crown Coat*, 386 U. S., at 516–517. The *McMahon* Court held that the claim accrued not after the administrative disallowance that would enable the plaintiff to sue in court, but at the time of the plaintiff's earlier injury. 342 U. S., at 27. *Crown Coat* attributed this holding to the unique two-statute context: "[P]ostpon[ing] the usual time of accrual of the cause of action [*i.e.*, the time of injury] until the date of disallowance" would have "permit[ted] the claimant to postpone indefinitely the commencement of the running of the statutory period." 386 U. S., at 517; see *McMahon*, 342 U. S., at 27.

quent precedent. Our limitations cases from the last several decades have instead emphasized the strength of the traditional, plaintiff-centric accrual rule and demanded that departures be justified by the statutory "text of the limitations period." *Green*, 578 U. S., at 554; see also, *e.g.*, *Graham County*, 545 U. S., at 418–419 (explaining that in *Reiter* v. *Cooper*, 507 U. S., at 267, the Court "declin[ed] to countenance the 'odd result' that a federal cause of action and statute of limitations arise at different times 'absen[t] . . . any such indication in the statute'"); *Bay Area Laundry*, 522 U. S., at 201.

D

Finally, the Board raises policy concerns. It emphasizes that agencies and regulated parties need the finality of a 6-year cutoff. After that point, facial challenges impose significant burdens on agencies and courts. Moreover, if they are successful, such challenges upset the reliance interests of the agencies and regulated parties that have long operated under existing rules. See also *post*, at 18–24 (JACKSON, J., dissenting).

"[P]leas of administrative inconvenience . . . never 'justify departing from the statute's clear text.'" *Niz-Chavez* v. *Garland*, 593 U. S. 155, 169 (2021) (quoting *Pereira* v. *Sessions*, 585 U. S 198, 217 (2018)). Congress could have chosen different language in §2401(a) or created a general statute of repose for agencies. It did not.

That is enough to dispatch the Board's policy arguments, but we add that its concerns are overstated. Put aside facial challenges like Corner Post's. Regulated parties "may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings against them" or "petition an agency to reconsider a longstanding rule and then appeal the denial of that petition." *Herr*, 803 F. 3d, at 821–822. So even on the Board's preferred interpretation, "[a] federal regulation that makes it six years without being

contested does not enter a promised land free from legal challenge." *Id.*, at 821. Likewise, the dissent imagines an alternative reality of total finality that simply does not exist. See *post*, at 21–23.

Moreover, the opportunity to challenge agency action does not mean that new plaintiffs will always win or that courts and agencies will need to expend significant resources to address each new suit. Given that major regulations are typically challenged immediately, courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent. If neither this Court nor the relevant court of appeals has weighed in, a court may be able to look to other circuits for persuasive authority. And if no other authority upholding the agency action is persuasive, the court may have more work to do, but there is all the more reason for it to consider the merits of the newcomer's challenge.[8]

Turning to the other side of the policy ledger, the Board slights the arguments supporting the plaintiff-centric accrual rule. In addition to being compelled by §2401(a)'s text, this rule vindicates the APA's "basic presumption" that anyone injured by agency action should have access to judicial review. *Abbott Labs.*, 387 U. S., at 140. It also respects our "deep-rooted historic tradition that everyone

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[8] It also may be that some injuries can only be suffered by entities that existed at the time of the challenged action. Corner Post suggests that only parties that existed during the rulemaking process can claim to have been injured by a "procedural" shortcoming, like a deficient notice of proposed rulemaking. Reply Brief 18–19. We need not resolve that issue here because there is no dispute that Corner Post proffered an injury that does not depend on its having existed when the Board promulgated Regulation II: the rule's alleged conflict with the Durbin Amendment. The dissent's observation that "the claims in this case *are* procedural," *post*, at 18, is confused. Even if some of Corner Post's claims might be procedural, its central claim—that the regulation violates the statute—is a prototypical substantive challenge.

should have his own day in court." *Richards* v. *Jefferson County*, 517 U. S. 793, 798 (1996) (internal quotation marks omitted). Under the Board's finality rule, only those fortunate enough to suffer an injury within six years of a rule's promulgation may bring an APA suit. Everyone else—no matter how serious the injury or how illegal the rule—has no recourse.[9]

The dissent also raises a host of policy arguments masquerading as "matter[s] of congressional intent." *Post*, at 18–24. And it warns that today's opinion will "devastate the functioning of the Federal Government." *Post*, at 23. This claim is baffling—indeed, bizarre—in a case about a statute of limitations. The Solicitor General, whose mandate is to protect the interests of the Federal Government, comes nowhere close to suggesting that a plaintiff-centric interpretation of §2401(a) spells the end of the United States as we know it. Perhaps the dissent believes that the Code of Federal Regulations is full of substantively illegal regulations vulnerable to meritorious challenges; or perhaps it believes that meritless challenges will flood federal courts that are too incompetent to reject them. We have more confidence in both the Executive Branch and the Judiciary. But we do agree with the dissent on one point: "'[T]he ball is in Congress' court.'" *Post*, at 24 (quoting *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618, 661 (2007) (Ginsburg, J., dissenting)). Section 2401(a) is 75 years old. If it is a poor fit for modern APA litigation, the

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[9] Corner Post has no other way to obtain meaningful review of Regulation II. Because Regulation II does not directly regulate it, it will never be subject to enforcement actions in which it may challenge the rule's legality. See n. 2, *supra.* Nor is the ability to petition the Board for rulemaking to change Regulation II a sufficient substitute for *de novo* judicial review of its lawfulness: The agency's "discretionary decision to decline to take new action" would be subject only to "deferential judicial review." *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 588 U. S. 1, 25 (2019) (KAVANAUGH, J., concurring in judgment).

solution is for Congress to enact a distinct statute of limitations for the APA.

* * *

An APA claim does not accrue for purposes of §2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action. Because Corner Post filed suit within six years of its injury, §2401(a) did not bar its challenge to Regulation II. We reverse the Eighth Circuit's judgment to the contrary and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 22–1008

CORNER POST, INC., PETITIONER *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[July 1, 2024]

JUSTICE KAVANAUGH, concurring.

I agree with the Court that a claim under the Administrative Procedure Act accrues when the plaintiff is injured by the challenged agency rule. I also agree with the Court that today's decision vindicates the APA's "'basic presumption' that anyone injured by agency action should have access to judicial review." *Ante*, at 21 (quoting *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967)).

I write separately to explain a crucial additional point: Corner Post can obtain relief in this case only because the APA authorizes vacatur of agency rules.

Corner Post challenged an agency rule that regulates the fees that banks may charge. But Corner Post is not a bank regulated by the rule. Rather, it is a business that must pay the fees charged by the banks who are regulated by the rule. Corner Post complains that the agency rule allows banks to charge fees that are unreasonably high.

Corner Post's suit is a typical APA suit. An unregulated plaintiff such as Corner Post often will sue under the APA to challenge an allegedly unlawful agency rule that regulates others but also has adverse downstream effects on the plaintiff. In those cases, an injunction barring the agency from enforcing the rule against the plaintiff would not help the plaintiff, because the plaintiff is not regulated

by the rule in the first place. Instead, the unregulated plaintiff can obtain meaningful relief only if the APA authorizes vacatur of the agency rule, thereby remedying the adverse downstream effects of the rule on the unregulated plaintiff.

The APA empowers federal courts to "hold unlawful and set aside agency action" that, as relevant here, is arbitrary and capricious or is contrary to law. 5 U. S. C. §706(2). The Federal Government and the federal courts have long understood §706(2) to authorize vacatur of unlawful agency rules, including in suits by unregulated plaintiffs who are adversely affected by an agency's regulation of others.

Recently, the Government has advanced a far-reaching argument that the APA does not allow vacatur. See Brief for Respondent 42; Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, pp. 40–44. Invoking a few law review articles, the Government contends that the APA's authorization to "set aside" agency action does not allow vacatur, but instead permits a court only to enjoin an agency from enforcing a rule against the plaintiff.

If the Government were correct on that point, Corner Post could not obtain any relief in this suit because, to reiterate, Corner Post is not regulated by the rule to begin with. And the APA would supply no remedy for most other *unregulated* but adversely affected parties who traditionally have brought, and regularly still bring, APA suits challenging agency rules.

The Government's position would revolutionize long-settled administrative law—shutting the door on entire classes of everyday administrative law cases. The Government's newly minted position is both novel and wrong. It "disregards a lot of history and a lot of law." M. Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J. 2305, 2311 (2024).

The APA authorizes vacatur of agency rules; therefore, Corner Post can obtain relief in this case.

I

Corner Post owns a truck stop and convenience store in rural North Dakota. When a customer uses a debit card at its business, Corner Post must pay a fee (known as an interchange fee) to the bank that processes the customer's transaction.

As the Court explains, the Dodd-Frank Act requires the Federal Reserve Board to "prescribe regulations" for assessing whether interchange fees are "reasonable and proportional to the cost incurred" in processing a debit-card transaction. 15 U. S. C. §1693*o*–2(a)(3)(A); see *ante*, at 2. Pursuant to the Act, the Board has issued a rule that sets a maximum fee of about 21 cents per transaction. 76 Fed. Reg. 43394, 43420 (2011). For convenience, I will refer to that rule as the fee rule.

Corner Post is not subject to the fee rule. Corner Post does not charge interchange fees to its customers, and Corner Post lacks any authority to set those fees. But because Corner Post must *pay* the fees to banks, it is affected by the agency's rule setting the maximum fees that banks may charge. In particular, Corner Post would be harmed by a fee rule that allows unreasonably high fees and would benefit from a fee rule that more strictly limits the fees that banks may charge.

The APA authorizes any person who has been "adversely affected or aggrieved" by a "final agency action" to obtain judicial review in federal district court. 5 U. S. C. §§702, 704. In an APA suit, the district court "shall" "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." §706(2)(A).

Corner Post filed this APA suit because it believes that the fee rule allows banks to charge unreasonably high fees. In particular, Corner Post argues that the Board's 21-cent fee cap is unreasonably high and therefore arbitrary and capricious under the APA. Corner Post asked the Federal

District Court to vacate the fee rule on the ground that the Board must more strictly regulate bank fees (in other words, that the Board must set a lower cap on the fees that banks may charge).

Corner Post would not be able to obtain relief in its lawsuit through any remedy other than vacatur. Corner Post could not obtain relief through an injunction forbidding the Board from enforcing the rule against it. That is because the rule does not regulate Corner Post and therefore is not and cannot be enforced against Corner Post in the first place. Nor could Corner Post secure relief through an injunction against banks; the APA does not authorize suits against private parties.

Corner Post instead needs a remedy that acts directly on the fee rule—specifically, by vacating it. Indeed, without vacatur, it is hard to imagine what kind of lawsuit Corner Post could file. At oral argument, the Government ultimately seemed to acknowledge that reality and the necessity of the vacatur remedy if Corner Post is to obtain any relief in this case. See Tr. of Oral Arg. 76 ("it's possible that the only way to provide this party relief would be vacatur").[1]

II

For Corner Post to obtain relief, an important question therefore is whether the APA authorizes vacatur of unlawful agency actions, including agency rules.

The answer is yes—in light of the text and history of the

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[1] A plaintiff could not challenge the fee rule by suing to "compel agency action" that is "unlawfully withheld or unreasonably delayed." 5 U. S. C. §706(1). The remedy of compelling agency action applies if an agency fails to issue a required rule. But here, the Board issued a rule, and the question is whether the rule set a reasonable fee cap. It would therefore make little sense to say that the fee rule has been "withheld" or "delayed." Indeed, it seems that §706(1) has almost never been used to challenge extant agency rules, as opposed to challenging the absence of required rules.

APA, the longstanding and settled precedent adhering to that text and history, and the radical consequences for administrative law and individual liberty that would ensue if vacatur were suddenly no longer available.

The text and history of the APA authorize vacatur. The text directs courts to "set aside" unlawful agency actions. 5 U. S. C. §706(2)(A). When Congress enacted the APA in 1946, the phrase "set aside" meant "cancel, annul, or revoke." Black's Law Dictionary 1612 (3d ed. 1933); see also Black's Law Dictionary 1537 (4th ed. 1951) (same); Bouvier's Law Dictionary 1103 (W. Baldwin ed. 1926) ("To annul; to make void; as, to set aside an award"). At that time, it was common for an appellate court that reversed the decision of a lower court to direct that the lower court's "judgment" be "set aside," meaning vacated. *E.g.*, *Shawkee Mfg. Co.* v. *Hartford-Empire Co.*, 322 U. S. 271, 274 (1944). Likewise, Congress used the phrase "set aside" in many pre-APA statutes that plainly contemplated the vacatur of agency actions.[2]

The APA incorporated that common and contemporaneous meaning of "set aside." When a federal court sets aside an agency action, the federal court vacates that order—in much the same way that an appellate court vacates the judgment of a trial court.

The APA prescribes the same "set aside" remedy for all categories of "agency action," including agency adjudicative orders and agency rules. §§551(13), 706(2). When a federal court concludes that an agency adjudicative order is

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[2] See, *e.g.*, Hepburn Act of 1906, ch. 3591, §5, 34 Stat. 584, 592 (courts could "enjoin, set aside, annul, or suspend any order or requirement of" the Interstate Commerce Commission); Securities Exchange Act of 1934, ch. 404, §25(a), 48 Stat. 881, 902 (authorizing courts "to affirm, modify, and enforce or set aside [an] order" of the SEC); Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, §701(f)(3), 52 Stat. 1040, 1055–1056 (authorizing a court to "affirm the order" of the FDA, "or to set it aside in whole or in part, temporarily or permanently").

unlawful, the court must vacate that order. Around the time when Congress enacted the APA, the phrase "set aside" the agency order meant vacate that order. See, *e.g.*, *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952). And because federal courts must "set aside" agency rules in the same way that they set aside agency orders, successful challenges to agency rules must award the same remedy. See M. Sohoni, The Power To Vacate a Rule, 88 Geo. Wash. L. Rev. 1121, 1131–1134 (2020). In short, to "set aside" a rule is to vacate it.

Longstanding precedent reinforces the text. Over the decades, this Court has affirmed countless decisions that vacated agency actions, including agency rules. See, *e.g.*, *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 591 U. S. 1, 36, and n. 7 (2020); *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 486 (2001); *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. 361, 364–365 (1986). Those decisions vacated the challenged agency rules rather than merely providing injunctive relief that enjoined enforcement of the rules against the specific plaintiffs. See, *e.g.*, *Regents of Univ. of Cal.*, 591 U. S., at 9 (holding that the rescission of a major federal program "must be vacated"). And the D. C. Circuit—which handles the lion's share of the country's administrative law cases—has likewise long recognized vacatur as the usual relief when a court holds that agency rules are unlawful. See, *e.g.*, *National Mining Assn.* v. *United States Army Corps of Engineers*, 145 F. 3d 1399, 1409 (CADC 1998). In the words of the D. C. Circuit: "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon* v. *Thornburgh*, 878 F. 2d 484, 495, n. 21 (CADC 1989).

Importantly, as Corner Post's lawsuit shows, the availability of vacatur determines not only the extent of the

relief that courts may award in APA suits by *regulated* parties, but also whether *unregulated* parties can obtain relief under the APA at all. In most APA litigation brought by unregulated but adversely affected parties, a plaintiff can obtain relief only through vacatur of the adverse agency action. Prohibiting courts from vacating agency actions would essentially close the courthouse doors on those unregulated plaintiffs—a radical change to administrative law that would insulate a broad swath of agency actions from any judicial review.[3]

Vacatur is therefore essential to fulfill the "basic presumption of judicial review" for parties who have been "adversely affected or aggrieved" by federal agency action. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (quotation marks omitted). The Court has long applied that "strong presumption" unless there is a "persuasive reason to believe" that Congress intended to bar review of certain actions. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986) (quotation marks omitted); see also, *e.g.*, *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. 9, 22–23 (2018); *Sackett* v. *EPA*, 566 U. S. 120, 128–131 (2012). Eliminating the vacatur remedy would contravene the strong *Abbott Laboratories* presumption by insulating many agency rules from meaningful judicial review (which perhaps is the Government's motivation for its recent campaign).

The absence of vacatur would also create an asymmetry. For example, without the vacatur remedy, a *bank* could still challenge the Board's regulation of interchange fees in a suit for injunctive relief. The bank might argue that the fee cap is too low and that the Board should be enjoined from enforcing the cap against the bank—a result that would

[3]Most of the recent academic and judicial discussion of this issue has addressed suits by regulated parties. That discussion has largely missed a major piece of the issue—suits by unregulated but adversely affected parties.

allow the bank to charge higher fees. But because Corner Post is not subject to the Board's regulation, it could not contend that the fee cap is too high and that the Board should be enjoined from keeping the cap so high. So Corner Post would be precluded from suing even though the allegedly unlawful regulation is causing it monetary injury.[4]

III

Eliminating vacatur as a remedy would terminate entire classes of administrative litigation that have traditionally been brought by unregulated parties.[5]

One example is the wide range of administrative law suits in which businesses target the allegedly unlawful under-regulation of other businesses, such as their

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[4] Absent vacatur, the remedy for a *regulated* plaintiff would not automatically extend to other regulated parties. For example, if a district court issued an injunction that prevents the Board from enforcing the fee rule against one bank, the Board would still be able to enforce the fee rule against other banks. For those other banks to obtain the same relief, they would need to either (i) file similar APA suits and request similar injunctions or (ii) wait and see if the fee rule is temporarily enjoined or held unlawful by either the relevant court of appeals or this Court. In that respect, eliminating the vacatur remedy would delay relief for many regulated parties. That said, in light of vertical *stare decisis*, the consequences for regulated parties of eliminating vacatur would not be as severe as the consequences for unregulated parties. See *Labrador* v. *Poe*, 601 U. S. ___, ___ (2024) (KAVANAUGH, J., concurring in grant of stay) (slip op., at 8–9); cf. W. Baude & S. Bray, Proper Parties, Proper Relief, 137 Harv. L. Rev. 153, 183 (2023) (when the Supreme Court "holds a statute to be unconstitutional or a rule to be unlawful, it may be *as good as* vacated").

[5] This opinion focuses primarily on administrative litigation that arises under the APA. But Congress has also enacted special statutory review provisions that similarly authorize federal courts to "set aside" specific agency actions. See, *e.g.*, 15 U. S. C. §78y(a) (orders of the SEC); 16 U. S. C. §825*l*(b) (FERC); 28 U. S. C. §2342 (the FCC, the Atomic Energy Commission, and other agencies). By arguing that the APA's use of "set aside" does not authorize vacatur, the Government implies that vacatur is also unavailable under those similar review provisions.

competitors. For example, in *National Credit Union Administration* v. *First National Bank & Trust Co.*, several banks challenged the decision of a federal agency to approve a series of amendments to the charter of a federal credit union, a competitor of the banks. 522 U. S. 479, 484–485 (1998). The amendments were controversial because they expanded the markets in which the credit union could operate, thereby increasing competition against the banks. The Court held that the banks could sue under the APA to challenge the agency's approval of those charter amendments, and also that the agency's approval of the amendments was unlawful. Of course, the District Court could remedy the banks' harm only by vacating the approval of the amendments. In short, for the plaintiff in *First National Bank* to have a remedy, the APA must have authorized vacatur.

Those competitor suits are ubiquitous in administrative law. Some plaintiffs have challenged the favorable classification of a competitor's drugs or medical products, see, *e.g.*, *American Bioscience, Inc.* v. *Thompson*, 269 F. 3d 1077 (CADC 2001); a research guideline that increased competition for federal grants, see, *e.g.*, *Sherley* v. *Sebelius*, 610 F. 3d 69 (CADC 2010); and a competitor's exemption from a generally applicable rule, see, *e.g.*, *Regular Common Carrier Conference* v. *United States*, 793 F. 2d 376 (CADC 1986) (arose under the review provision in 28 U. S. C. §2342). The Court has consistently held that the plaintiffs incurring those injuries are "adversely affected or aggrieved by agency action" within the meaning of the APA. 5 U. S. C. §702; see *First Nat. Bank*, 522 U. S., at 488, 499; *Investment Company Institute* v. *Camp*, 401 U. S. 617, 618–621 (1971); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 157 (1970). But such competitor suits would be largely if not entirely eradicated if the APA and similar statutory review provisions did not authorize vacatur.

Suits where one business challenges the under-regulation of another go well beyond competitor suits. One example is the Court's landmark decision in *Motor Vehicle Manufacturers Association of United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U. S. 29 (1983). That case arose when several insurance companies challenged a federal agency's rescission of safety standards for new motor vehicles. The Court held that the agency's decision to rescind those safety standards was subject to the same degree of judicial review as the decision to issue the standards in the first place. See *id.*, at 40–44. The Court also concluded that the rescission of the safety standards was arbitrary and capricious. See *id.*, at 44–57.

At no point in that landmark opinion on the judicial review of agency actions did the Court state (or need to state) the obvious: Because the agency did not regulate the insurers themselves, the insurers could obtain relief from the downstream effects of the agency's rescission of the safety standards only if the insurers could obtain vacatur of that rescission. The Court did not dwell on that remedial point because the availability of vacatur was presumably obvious to all involved. Only now—some 40 years later—does the Government imply that the premise of *State Farm* was mistaken.

The Government's new position would also largely eliminate the common form of environmental litigation where private citizens sue a federal agency based on the externalities that an agency action is likely to produce. Litigation often arises when a federal agency approves a development project with potential effects on the environment or on other property owners. Examples include the construction of a new pipeline, see *Delaware Riverkeeper Network* v. *FERC*, 753 F. 3d 1304 (CADC 2014), or the mining of federal land, see *WildEarth Guardians* v. *Jewell*, 738 F. 3d 298 (CADC 2013). In those cases, the plaintiff generally cannot bring an APA suit

against the developer, who is usually a private party. See §704 (authorizing review of "agency action"). Instead, the plaintiff typically sues the federal agency that approved the development and asks a federal court to vacate that approval.

Some of those suits proceed under the APA; others proceed under federal statutory review provisions that similarly authorize courts to "set aside" agency action. See, *e.g.*, 15 U. S. C. §717r(b) (Natural Gas Act); 16 U. S. C. §825*l*(b) (Federal Power Act). Regardless, all of those suits depend on the availability of vacatur.

Many APA suits similarly challenge federal emissions limits or efficiency standards for cars, trucks, and other sources of pollution. See, *e.g.*, *American Public Gas Assn.* v. *Department of Energy*, 72 F. 4th 1324 (CADC 2023). When a plaintiff alleges that an emissions limit does too little to stop third parties from polluting the environment, the plaintiff cannot bring an APA suit against the third party. Rather, the plaintiff must sue the agency that enacted the emissions limit. If the vacatur remedy were unavailable, the agency that enacted the emissions limit would never face litigation from unregulated parties seeking stricter limits; the agency could face litigation only from regulated parties seeking looser limits.

Workers and their unions also regularly challenge agency rules that rescind or loosen federal workplace safety standards. See, *e.g.*, *Transportation Div. of Int'l Assn. of Sheet Metal, Air, Rail, and Transp. Workers* v. *Federal Railroad Admin.*, 988 F. 3d 1170 (CA9 2021) (railroad industry); *United Steel* v. *Mine Safety and Health Admin.*, 925 F. 3d 1279 (CADC 2019) (mining industry). Those suits often arise under statutory review provisions that, like the APA, authorize courts to "set aside" agency actions. See, *e.g.*, 28 U. S. C. §2342(7) (railroad industry); 30 U. S. C. §816(a)(1) (mining industry). And the suits all depend on the availability of vacatur as a remedy. In particular, the

workers may prevail in those suits only through vacatur of the agency rules. So if "set aside" did not mean vacate, workplace safety rules could be challenged from only one direction—by employers who want less regulation, not by workers who want more regulation.

The examples of standard agency litigation that depend on the availability of vacatur are seemingly endless. Vacatur was essential when American workers challenged a Department of Labor rule that unlawfully allowed employers to access inexpensive foreign labor, with the effect of lowering American workers' wages. See *Mendoza* v. *Perez*, 754 F. 3d 1002 (CADC 2014). Vacatur was essential when a county challenged the Department of the Interior's allowance for Indian gaming on nearby land. See *Butte Cty.* v. *Hogen*, 613 F. 3d 190 (CADC 2010). Vacatur is often essential when a State challenges an agency action that does not regulate the State directly but has adverse downstream effects on the State. See, *e.g.*, *Department of Commerce* v. *New York*, 588 U. S. 752 (2019).[6]

I will stop there. But to be clear, I could go on all day (and then some) listing cases where vacatur was necessary for an unregulated but adversely affected plaintiff in an

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[6] In some circumstances, usually when a court rules that an agency must provide additional explanation for the challenged agency action or must regulate some entity or activity *more* extensively, some courts have remanded to the agency without vacatur. Remand without vacatur is essentially a shorthand way of vacating a rule and staying the vacatur pending the agency's completion of an additional required action, such as providing additional explanation or issuing a new, more stringent rule. I do not address that practice here, which has been the subject of some debate. See *Checkosky* v. *SEC*, 23 F. 3d 452, 462–465 (CADC 1994) (Silberman, J.) (explaining the practice); see also *id.*, at 493, n. 37 (Randolph, J.) (noting that courts and parties alternatively may avoid any "difficulties" associated with vacatur by "a stay of the mandate"). Importantly for present purposes, the view that vacatur is "*authorized* by the APA is a basic proposition shared by *both* sides of the debate over remand without vacatur." M. Sohoni, The Power To Vacate a Rule, 88 Geo. Wash. L. Rev. 1121, 1178 (2020).

APA suit to obtain relief.

IV

Against all of that text, history, precedent, and common sense, the Government has recently rejected the straightforward and long-accepted conclusion that the phrase "set aside" in the APA authorizes vacatur. Instead, the Government contends that plaintiffs harmed by agency rules must seek injunctions against enforcement of those rules. See Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, pp. 40–44. One effect of the Government's new position would be to insulate many agency rules from meaningful judicial review in suits by unregulated but adversely affected parties.

To support its new position, the Government has offered an array of arguments.

First, the Government says that vacatur of a federal rule is akin to a nationwide injunction—in other words, an injunction that prohibits the Government from enforcing a law against *anyone*, not just the parties in a specific case. The Government has contended that equitable relief is ordinarily limited to the parties in a specific case. Therefore, nationwide injunctions would be permissible only if Congress authorized them.

But in the APA, Congress did in fact depart from that baseline and authorize vacatur. As noted above, the text of the APA expressly authorizes federal courts to "set aside" agency action. 5 U. S. C. §706(2). "Unlike judicial review of statutes, in which courts enter judgments and decrees only against litigants, the APA" and related statutory review provisions "go further by empowering the judiciary to act directly against the challenged agency action." J. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 1012 (2018). The text of §706(2) directs federal courts to vacate agency actions in the same way that appellate courts vacate the judgments of trial courts. See M. Sohoni, The

Power To Vacate a Rule, 88 Geo. Wash. L. Rev. 1121, 1131–1134 (2020). The text of the APA therefore authorizes vacatur of agency rules. By contrast, Congress has rarely authorized courts to act directly on federal statutes or to prohibit their enforcement against nonparties. As a result, background equitable principles may control in those non-APA cases.

Second, the Government argues that the remedies available in APA suits are not governed by §706(2), which directs courts to "set aside" agency action, but instead are governed by §703. That argument is weak. Section 703 determines the "form of proceeding" for suits under the APA and identifies the federal actors against whom an "action for judicial review may be brought."[7] But "no court has ever held that Section 703 implicitly delimits the kinds of remedies available in an APA suit." M. Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J. 2305, 2337 (2024). For good reason: As explained above, the ordinary meaning of "set aside" in §706(2) has long been understood to refer to the remedy of vacatur. The conclusion that §706 governs remedies is also supported by §706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed"—unmistakably a remedy. By contrast, the text of §703 "speaks to venue and forms of proceedings, not to remedies, and regardless, its

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[7] Section 703 states: "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

listing of the available forms of proceedings is nonexhaustive." Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J., at 2337.

To support its novel reliance on §703, the Government suggests that the phrase "set aside" in §706(2) may refer to a "rule of decision directing the reviewing court to disregard unlawful" agency actions in "resolving the case before it," rather than the remedy of vacatur. Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, at 40. But the leading cases and legal dictionaries at the time of the APA's enactment did not use "set aside" in that manner. They instead referred to setting aside (that is, vacating) judgments—a meaning entirely consistent with the APA's authorization to vacate agency actions. See *supra*, at 5. The Government's position instead relies on some colloquial uses of the phrase "set aside" in federal constitutional challenges to state statutes. See, *e.g.*, Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, at 41 (citing *Mallinckrodt Chemical Works* v. *Missouri ex rel. Jones*, 238 U. S. 41, 54 (1915)); see also *Mallinckrodt*, 238 U. S., at 54 (referring to "one who seeks to set aside a state statute as repugnant to the Federal Constitution"). That is a thin basis for suddenly prohibiting entire categories of long-common administrative litigation.

Third, the Government seizes on legislative history to argue that Congress did not expect the APA to create new remedies against unlawful agency actions. But vacatur was not a new remedy. On the contrary, several pre-APA statutes authorized courts to "set aside" specific kinds of agency actions, such as orders by the Interstate Commerce Commission. See n. 2, *supra*. This Court correctly understood those statutes to authorize vacatur. For example, in litigation regarding the regulation of railroads, this Court held that an unlawful ICC order was "void." *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464 (1935). Similar examples abound. See, *e.g.*, Sohoni, The

Past and Future of Universal Vacatur, 133 Yale L. J., at 2329–2335 (collecting cases). By similarly authorizing courts to "set aside" agency actions, the APA likewise authorized vacatur. §706(2).

Moreover, although vacatur was not as common in the years surrounding the APA's enactment, there is a simple explanation for that: Courts had few occasions to set aside agency rules before this Court's 1967 decision in *Abbott Laboratories* v. *Gardner*, which significantly expanded the opportunities for facial, pre-enforcement review of agency rules. 387 U. S. 136, 139–141. Indeed, it was not until *Abbott Laboratories* that "preenforcement review of agency rules" became "the norm, not the exception." S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 1137 (2d ed. 1985).

The Government's current position on vacatur would *de facto* overrule *Abbott Laboratories* as to suits by unregulated parties. Not surprisingly, the Government's current position on vacatur sounds very similar to Justice Fortas' dissent in a companion case to *Abbott Laboratories*, where he lamented that in the wake of those decisions, a court would be able to "suspend the operation of regulations in their entirety." *Gardner* v. *Toilet Goods Assn., Inc.*, 387 U. S. 167, 175 (1967). In any event, to the extent that the Government worries that vacatur of rules (as opposed to orders) is more common today than it was in the 1950s, the Government's true grievance is with *Abbott Laboratories*.

Fourth, the Government objects to the real-world consequences that occur when a federal district court wrongly vacates a lawful rule. I appreciate that concern. But federal law already gives the Government tools to mitigate those consequences—if not avoid them altogether. When the Government believes that a district court has erroneously vacated a rule (or erroneously issued a preliminary injunction against a rule), the Government may promptly seek a stay in the relevant federal court of

appeals. To determine whether to grant a stay, the court of appeals may then promptly review the Government's likelihood of success on the merits, among other factors. If the court of appeals denies a stay, the Government may seek further review in this Court. See *Labrador* v. *Poe*, 601 U. S. ___, ___ (2024) (KAVANAUGH, J., concurring in grant of stay) (slip op., at 2). The Government's frustration with the occasional incorrect district court vacatur of an agency rule is understandable. But especially given the readily accessible and regularly utilized procedures for staying a district court's vacatur,[8] we should not overreact by entirely gutting vacatur as a remedy and thereby barring unregulated but adversely affected parties from bringing APA suits.

Not surprisingly, when asked at oral argument in this case about the extraordinary consequences of its new no-vacatur position, the Government seemed to backpedal and hedge a bit. The Government suggested that vacatur may actually still be appropriate if it is "the only way to give the party before the court relief." Tr. of Oral Arg. 76. The Government also said that "it's possible that the only way to provide" Corner Post "relief would be vacatur." *Ibid.*

I appreciate the Government's apparent attempt to back away from its extreme stance. But in doing so, the Government also revealed the weakness of its position. The meaning of "set aside" in the APA cannot reasonably depend on the specific party before the court. Either the APA authorizes vacatur, or it does not.

More to the point, the Government's answer at oral argument is a solution in search of a problem. The federal courts have long interpreted the APA to authorize vacatur of agency actions. Both the text and the history of the APA support that interpretation, and courts have had no real

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[8] If the problem became sufficiently severe, the Executive Branch could always ask Congress to limit the remedies available under the APA.

difficulty applying the remedy in practice. Some 78 years after the APA and 57 years after *Abbott Laboratories*, I would not suddenly throw out that sound and settled interpretation of the APA and eliminate entire classes of historically common and vitally important litigation against federal agencies.

* * *

The Government's crusade against vacatur would create "strange and even absurd consequences." Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J., at 2340. In this opinion, I have described one such consequence: It would leave unregulated plaintiffs like Corner Post without a remedy in APA challenges to agency rules. The Government's position therefore would fundamentally reshape administrative law, leaving administrative agencies with extraordinary new power to issue rules free from potential suits by unregulated but adversely affected parties—businesses, environmental plaintiffs, workers, the list goes on.

I agree with the longstanding consensus—a consensus based on text, history, precedent, and common sense—that vacatur is an appropriate remedy when a federal court holds that an agency rule is unlawful. Because vacatur remains an available remedy under the APA, Corner Post can obtain meaningful relief if it prevails in this lawsuit.

SUPREME COURT OF THE UNITED STATES

No. 22–1008

CORNER POST, INC., PETITIONER *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[July 1, 2024]

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

More than half a century ago, this Court highlighted the long-recognized "hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.'" *Crown Coat Front Co.* v. *United States*, 386 U. S. 503, 517 (1967). Today, the majority throws that caution to the wind and engages in the same kind of misguided reasoning about statutory limitations periods that we have previously admonished.

The flawed reasoning and far-reaching results of the Court's ruling in this case are staggering. First, the reasoning. The text and context of the relevant statutory provisions plainly reveal that, for facial challenges to agency regulations, the 6-year limitations period in 28 U. S. C. §2401(a) starts running when the rule is published. The Court says otherwise today, holding that the broad statutory term "accrues" requires us to conclude that the limitations period for Administrative Procedure Act (APA) claims runs from the time of a plaintiff's injury. Never mind that this Court's precedents tell us that the meaning of "accrues" is context specific. Never mind that, in the administrative-law context, limitations statutes uniformly run from the

moment of agency action. Never mind that a plaintiff's injury is utterly irrelevant to a facial APA claim. According to the Court, we must ignore all of this because, for other kinds of claims, accrual begins at the time of a plaintiff's injury.

Next, the results. The Court's baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses. It also allows well-heeled litigants to game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline.

The majority refuses to accept the straightforward, commonsense, and singularly plausible reading of the limitations statute that Congress wrote. In doing so, the Court wreaks havoc on Government agencies, businesses, and society at large. I respectfully dissent.

I

When a claim accrues depends on the nature of the claim. See *Crown Coat*, 386 U. S., at 517. So, understanding the context in which *these* claims arose is essential to determining when Congress meant for them to accrue. The facts of this very case illustrate the absurdity of the majority's one-size-fits-all approach. The procedural history is also a prime example of the gamesmanship that statutory limitations periods are enacted to prevent.

A

Start with the relevant agency regulation. In 2010, Congress required the Federal Reserve Board to issue rules for debit-card transaction fees. See 15 U. S. C. §1693*o*–2(a)(1). The Board did as Congress instructed. As relevant here, in

2011, the Board issued Regulation II, capping debit-card interchange fees at 21 cents per transaction plus 0.05 percent of the transaction. 76 Fed. Reg. 43420 (2011) (codified at 12 CFR §253.3(b) (2022)).

As often happens, affected parties challenged Regulation II almost immediately after the Board issued it Several large trade groups sued under the APA, alleging that Regulation II was, in several respects, arbitrary, capricious, and not in accordance with law. *NACS* v. *Board of Governors of FRS*, 958 F. Supp. 2d 85, 95–96 (DC 2013). Ultimately, the D. C. Circuit rejected that challenge in relevant part. *NACS* v. *Board of Governors of FRS*, 746 F. 3d 474, 477 (2014). And, a few months after that, we denied certiorari. See 574 U. S. 1121 (2015).

B

Now consider the facts of this challenge. In the majority's telling, this is about a single "truckstop and convenience store located in Watford City, North Dakota." *Ante,* at 1.

Not quite. Rather, two large trade groups initially filed this action in 2021—a full decade after the Federal Reserve Board finalized the debit-card-fee regulations at issue. Those groups were the North Dakota Petroleum Marketers Association, a "trade association that has existed since the mid-1950s," and the North Dakota Retail Association, another trade group. App. to Pet. for Cert. 53. Corner Post, which had only opened its doors in 2018, was not a party to the trade groups' initial complaint. The Government moved to dismiss the pleading, invoking §2401(a)'s 6-year statute of limitations. In response, the trade groups sought leave to amend.

It was only then that Corner Post was added as a plaintiff. And, importantly, other than the addition of Corner Post, the trade groups' complaint remained practically identical to the untimely one they had filed before. Other than a few changes of phrasing and some newly available

2019 data, the amended complaint alleged the same facts and sought the same relief as the original pleading. It also included the exact same legal claims—verbatim. The only material change to the amended complaint was the addition of Corner Post.

Thus, even before I analyze the statute of limitations arguments, one can see that this case is the poster child for the type of manipulation that the majority now invites—new groups being brought in (or created) just to do an end run around the statute of limitations.[1] To repeat: The claims in Corner Post's lawsuit were not new or in any way distinct (even in wording) from the pre-existing and untimely claims of the trade organizations that had been around for decades.

This time, however, when the Government renewed its motion to dismiss, the plaintiffs made the case all about Corner Post. The plaintiffs argued that, because Corner Post had not yet formed as a company when the Board issued Regulation II, it simply could not be subjected to a 6-year limitations period that ran from when the challenged regulation issued back in 2011. (One wonders how a company that formed against the backdrop of a long-settled rule could possibly be entitled to complain, or claim injury, related to the regulatory environment in which it willingly entered—but I digress.) Rather than accepting that the untimely challenge remained so, Corner Post demanded a personalized, plaintiff-specific limitations rule, giving an entity six years from when *it* was first affected by a

[1] If this case illustrates one type of gamesmanship, one does not need to think hard to imagine other examples. A cash-only business that announces its intent to accept debit cards and thereby claiming injury from the debit-card rule. New owners that buy out a shop, insisting that they too are entitled to challenge the debit-card rule based on their status as new entrants into the marketplace. It is telling that, even as the majority says that the moment of the plaintiff's injury marks the start of the limitations period for facial APA challenges, the majority fails to describe precisely when that injury occurs in this context.

Government action to file a facial challenge.

The District Court rejected Corner Post's argument, following the lead of every court of appeals that had ever addressed accrual of an APA facial challenge.[2] It held that the addition of Corner Post as a plaintiff did not make a difference to the timeliness of the business groups' claims. The Eighth Circuit affirmed, holding that "when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation." *North Dakota Retail Assn.* v. *Board of Governors of FRS*, 55 F. 4th 634, 641 (2022).

II

But here we are. Three-quarters of a century after Congress enacted the APA, a majority of this Court rejects the consensus view that, for facial challenges to agency rules, the statutory 6-year limitations period runs from the publication of the rule. Instead, it holds that an APA claim accrues "when the plaintiff is injured by final agency action." *Ante,* at 1. The majority maintains that the text of §2401(a) demands this result. But if that answer is so obvious, one wonders why no court proclaimed it until more than 75 years after all the statutory pieces were in place.

To explain how the majority got this ruling wrong, I find it necessary to provide the right answer. Here, the relevant

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[2] The majority's opinion says we took this case to resolve a circuit split, suggesting that the Sixth Circuit had reached the contrary conclusion. See *ante,* at 3–4. It had not. In *Herr* v. *United States Forest Serv.*, 803 F. 3d 809 (2015), the Sixth Circuit addressed accrual in the context of an *as-applied* challenge after the Government had threatened enforcement. There, the Circuit pegged accrual to the moment of the injury allegedly caused by application of the rule to the plaintiff, see *id.*, at 820, and did not discuss whether that same accrual rule would apply to facial challenges. Since *Herr*, neither the Sixth Circuit nor any district court within it has extended *Herr*'s rule to facial challenges to final agency actions, and at least one District Court has expressly rejected such an extension. See *Linney's Pizza, LLC* v. *Board of Governors of FRS*, 2023 WL 6050569, *2–*4 (ED Ky., Sept. 15, 2023).

statutory text is the catchall limitations provision for suits brought against the United States: §2401(a) of Title 28 of the United States Code. All agree that there are two key terms in that provision—"accrues" and "the right of action." *Ibid.* The majority misreads both. Contrary to the Court's rigid reading, the word "accrues" lacks any fixed meaning. See *Crown Coat*, 386 U. S., at 517. Instead, the meaning of accrue for the purpose of a statute of limitations is determined by the particular "right of action" at issue. For many kinds of legal claims, accrual is plaintiff specific because the claims themselves are plaintiff specific. But facial administrative-law claims are not. This means that, in the administrative-law context, the limitations period begins not when a plaintiff is injured, but when a rule is finalized.

A

When sovereign immunity has been waived, the Federal Government is often sued, and Congress has enacted statutes of limitations to ensure that those lawsuits are brought in a timely fashion. Because such suits arise in different contexts, Congress has enacted different statutes of limitations for different types of suits.

Most statutes of limitations are context specific. For example, a tort claim against the United States typically must be brought "within two years after such claim accrues." 28 U. S. C. §2401(b). By contrast, a party challenging certain administrative orders must seek review "within 60 days after [the order's] entry." §2344. Many more examples of context-specific limitations periods in the U. S. Code abound. See, *e.g.*, §2501 (claims over which the United States Court of Federal Claims has jurisdiction must be brought within six years); 33 U. S. C. §1369(b)(1) (challenges to certain standards adopted by the Environmental Protection Agency under the Clean Water Act must commence "within 120 days from the date of . . . promulgation").

The statute at issue here—28 U. S. C. §2401(a)—supplements those specific provisions. In doing so, §2401(a) serves a special purpose: to act as a catchall that imposes an outer time limit on claims brought against the United States when no other statute of limitations applies. Under §2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." This catchall limitations statute has been applied in a range of contexts, including APA claims (like this one), contract claims, see *Crown Coat*, 386 U. S., at 510–511, and more, see, *e.g.*, *Natural Resources Defense Council* v. *Haaland*, 102 F. 4th 1045, 1074 (CA9 2024) (claims under the Endangered Species Act).

Consistent with the broad scope of its potential application, §2401(a) uses broad language. It starts the 6-year clock when "the right of action first accrues." §2401(a). No more elaboration or specificity is given. So, what *does* the sparse text of §2401(a) tell us?

To start, the statute tells us to look at when "the right of action *first* accrues." (Emphasis added.) The word "first" directs us to start the clock at the earliest possible opportunity once the claim accrues. From the text alone, then, we know that this moment in time should happen sooner rather than later. But *when* that moment occurs depends on the meaning of both "the right of action" and "accrues."

Next, the provision uses the unadorned phrase "the right of action." Because this statute is applicable to a broad range of causes of action against the Government, the underlying statute (here the APA) provides "the right of action," not §2401(a) itself. Put another way, the §2401(a) catchall applies to different causes of action, and those causes of action establish different legal claims. Though the right of action is not the same for an APA claim as it is for an Endangered Species Act claim, §2401(a)'s broad "right of action" language applies to both of these claims, and more.

B

A proper understanding of the word "accrues" makes clear that this term is far more flexible and context dependent than the majority appreciates. Crucially, the Court has said this very thing before—more than once, in fact. We have long understood that it is simply not "possible to assign the word 'accrued' any definite technical meaning which by itself would enable us to say whether the statutory period begins to run at one time or the other." *Reading Co.* v. *Koons*, 271 U. S. 58, 61–62 (1926); see also *Crown Coat*, 386 U. S., at 517 (recognizing "the hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues'").

But, for some reason, that does not stop the majority from trying here. Its opinion repeatedly asserts that the ordinary meaning of accrual is that claims accrue only when a plaintiff can sue. See *ante,* at 6–10.[3] But even the majority acknowledges that its preferred definition of accrual is not universal; it is, at most, "the '*standard* rule'" that "can be displaced." *Ante,* at 8 (quoting *Green* v. *Brennan*, 578 U. S. 547, 554 (2016); emphasis added).

Far from imposing a one-size-fits-all definition of the word "accrue," this Court has traditionally taken a claim-specific view: "[A] right accrues when it comes into existence." *United States* v. *Lindsay*, 346 U. S. 568, 569 (1954). For example, in *McMahon* v. *United States*, 342 U. S. 25 (1951), we held that, under the Suits in Admiralty Act, a claim accrued when a seaman was injured, even though he could not yet sue at that time. See *id.*, at 27–28. In *Crown*

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[3] The majority insists on a single definition of "accrued," but it cannot keep its story straight as to what that definition is. Its opinion offers multiple formulations, stating that a claim accrues "when it comes into existence," "when the plaintiff has a complete and present cause of action," "when a suit may be maintained thereon," and, also, "after the plaintiff suffers the injury." *Ante,* at 7–8 (internal quotation marks omitted). These distinctions can make a difference.

Coat, we held the opposite—a claim brought under 28 U. S. C. §1346 did not accrue at the time of injury, but rather at the moment of final administrative action, because a plaintiff could not sue until the agency action was final. See 386 U. S., at 513–514, 517–518. The point is *not* that these cases all point in one direction or the other with respect to the meaning of accrue. Instead, our cases illustrate what this Court has expressly stated: The term "accrued" lacks "any definite technical meaning," *Reading*, 271 U. S., at 61.

The majority nevertheless decrees today that accrual must always be plaintiff specific—*i.e.,* that a claim cannot accrue until "this particular plaintiff" can bring suit. *Ante,* at 14. But that is not what §2401(a) says. It does not say that the clock starts when *the plaintiff's* right of action first accrues; rather, §2401(a) starts the clock when "*the* right of action first accrues." (Emphasis added.) In other words, the limitations provision here focuses on the claim being brought without regard for who brings it.

The dictionary definitions on which the majority relies further highlight this important observation. A claim accrues, according to those definitions, "'when *a* suit may be maintained thereon'" or upon the "'coming or springing into existence of *a* right to sue.'" *Ante,* at 7 (emphasis added) (first quoting Black's Law Dictionary 37 (4th ed. 1951), then quoting Ballentine's Law Dictionary 15–16 (2d ed. 1948)). Again, and notably, these dictionaries speak of *a* right to sue, not *the plaintiff's* right to sue. Like §2401(a) itself, these definitions do not support the majority's assertion that accrual is necessarily plaintiff specific.

Of course, many of our cases *do* say that a claim accrues when "'the plaintiff has a complete and present cause of action.'" *E.g.*, *Gabelli* v. *SEC*, 568 U. S. 442, 448 (2013); *Wallace* v. *Kato*, 549 U. S. 384, 388 (2007); *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, 418 (2005); *Bay Area Laundry and Dry*

Cleaning Pension Trust Fund v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997). But those statements were made in the context of particular cases, each of which dealt with plaintiff-specific causes of action. See, *e.g.*, *Gabelli*, 568 U. S., at 446 (civil enforcement claim by the Securities and Exchange Commission); *Wallace*, 549 U. S., at 388 (false imprisonment and arrest claims); *Graham County*, 545 U. S., at 412 (retaliation claim against an employer); *Bay Area Laundry*, 522 U. S., at 195 (claim alleging failure to make required payments to employee pension funds).

Here is what I mean by this. When a complaint brought against a defendant asserts, "You falsely imprisoned me," or "You retaliated against me," it is making a legal claim that is specific to the particular plaintiff. But, as discussed below, it is not similarly plaintiff specific to bring a claim saying, for example, that a particular regulation is invalid because it "exceeds the Board's statutory authority," or because the Government "failed to consider important aspects of the problem," as the complaint here alleges. App. to Pet. for Cert. 80, 82. So, while accrual may sometimes—even usually—be plaintiff specific, that is just because underlying legal claims are often plaintiff specific. The precedents the majority cites never say otherwise; *i.e.*, they do not tell us that accrual must *always* be plaintiff specific.

The majority's other hard-and-fast distinction—between statutes of limitations and statutes of repose—fares no better. See *ante,* at 9–10. The majority sets up a dichotomy: Statutes of limitations are plaintiff-centric rules that "'require plaintiffs to pursue diligent prosecution of known claims,'" while statutes of repose emphasize finality and are tied to "'the last culpable act or omission of the defendant.'" *Ante,* at 9 (quoting *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 8 (2014)). The problem is that statutes of limitations and statutes of repose, while different, are not nearly as different as the majority imagines. It is true that statutes of repose are considered to be "defendant-protective."

Ante, at 10. But the same is true of statutes of limitations. "The very purpose of a period of limitation is that there may be, at some definitely ascertainable period, an end to litigation." *Reading*, 271 U. S., at 65; see also *Gabelli*, 568 U. S., at 448 (repose is a "'basic polic[y] of all limitations provisions'"). In fact, according to one of the dictionaries the majority cites, "[s]tatutes of limitation *are* statutes of repose." Black's Law Dictionary, at 1077 (emphasis added). The difference is that unlike statutes of repose, statutes of limitations have more than one purpose: they bring finality for defendants *and* prevent plaintiffs from sleeping on their rights. Understanding these dual functions sheds no light whatsoever on what to do when those competing purposes point in different directions.[4]

III

Because different claims accrue at different times, we must look to the specific types of claims that the plaintiffs have brought and consider the context in which the limitations period operates. "Cases under [one statute] do not necessarily rule . . . claims" brought under another. *Crown Coat*, 386 U. S., at 517. And our understanding of accrual for limitations purposes has always been context specific. See, *e.g.*, *Wallace*, 549 U. S., at 389 (relying on torts treatises to explain the "distinctive rule" for commencement of limitations period for false imprisonment suits); *Franconia Associates* v. *United States*, 536 U. S. 129, 142–144 (2002) (citing contracts treatises to explain that contract claims accrue at the moment of breach); *Merck & Co.* v. *Reynolds*,

[4] Here, these purposes are at odds because repose favors starting the clock at the moment of final agency action, whereas a plaintiff-specific limitations rule would be targeted at a plaintiff's injury to ensure plaintiffs don't sleep on their rights. In the administrative-law context, one has to choose between those objectives; no one rule can equally achieve both of these ends.

559 U. S. 633, 644–646 (2010) (applying fraud-specific discovery rule to determine accrual). In other words, to understand when "the right of action" accrues under §2401(a), we must understand what the right of action is.

A

The right of action that is invoked in many administrative-law cases, including this one, is a statutory claim that an agency has violated certain legal requirements when it took a certain action, such that the agency's action itself is invalid. See, *e.g.,* 5 U. S. C. §706(2). And Congress has repeatedly made clear, through various statutory enactments, that in the administrative-law context, the statute of limitations for filing a claim that seeks to invalidate the agency action runs from the moment of final agency action.

Take the Administrative Orders Review Act (also known as the Hobbs Act), for example. See 28 U. S. C. §2342. That statute is the exclusive mechanism for reviewing certain orders issued by over a half-dozen federal agencies. The Act requires suits to be brought "within 60 days after [the] entry" of any final agency order. §2344. There are many other similar statutes. In its brief, the Government provided us with more than two dozen statutory provisions where the limitations period starts running at the moment of final agency action—whether that action is the publication of a rule, or the issuance of an order, or something else. See Brief for Respondent 15–17, and n. 4. And, as the Government itself acknowledges, even that list is not comprehensive. See Tr. of Oral Arg. 51 ("Candidly, we got to a page-long footnote and stopped").[5]

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[5] No kidding. On top of the dozens of examples that the Government provided, there are many, many others. See, *e.g.*, 5 U. S. C. §7703(b)(1)(A) ("[A] petition to review a final order or final decision of the [Merit Systems Protection] Board shall be filed . . . within 60 days after the Board issues notice of the final order or decision of the Board"); 15 U. S. C. §80b–13(a) ("Any person or party aggrieved by an order issued by the [Securities and Exchange] Commission under this subchapter

Despite the dozens of statutes that start the limitations period at the moment of final agency action, neither Corner Post nor the majority identifies a single statute in the administrative-law context—either now or before 1948—that takes any other approach. This tells us exactly the message that Congress might have expected courts to infer when interpreting §2401(a): For administrative-law actions, a claim accrues at the moment of final agency action.

The Court says we must ignore these other statutes because they post-date Congress's 1948 enactment of §2401(a). See *ante,* at 12–14. The majority's reasoning is doubly wrong. First, it is wrong on the facts. Even before 1948, Congress consistently started limitations periods in the administrative-law context at the moment of the last

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may obtain a review of such order . . . by filing . . . within sixty days after the entry of such order, a written petition"); 30 U. S. C. §1276(a)(2) ("Any [covered] order or decision . . . shall be subject to judicial review on or before 30 days from the date of such order or decision"); 38 U. S. C. §7266(a) ("[T]o obtain review . . . of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is issued"); 42 U. S. C. §405(g) ("Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision"); §1395*oo*(f)(1) ("Providers shall have the right to obtain judicial review of any final decision of the [Provider Reimbursement Review] Board . . . by a civil action commenced within 60 days of the date on which notice of any final decision by the Board . . . is received"); §7607(b)(1) ("Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise"); 49 U. S. C. §1153(b)(1) (petitions seeking review of National Transportation Safety Board orders that relate to aviation matters "must be filed not later than 60 days after the order is issued").

agency action.[6] Then, as now, Congress decided that the deadline for reviewing agency actions should be pegged to the action under review. Second, the majority misses the broader point: Whenever Congress imposes a deadline to challenge an agency decision, the limitations period always starts at the moment of the last agency action. We should pay attention to the uniformly expressed judgment of Congress, and read §2401(a) accordingly.

Somehow, the majority draws the opposite conclusion. In its view, either Congress's consistently expressed intention is irrelevant to what §2401(a) means, or Congress's failure to explicitly express that intention in the text of §2401(a) indicates that Congress decided otherwise in this particular statute (after all, Congress could have expressly pegged accrual to final agency action in §2401(a) but did not do so). See *ante,* at 8–10.[7] But mechanically drawing these sorts

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[6] See, *e.g.*, 42 Stat. 162 (1921) (codified at 7 U. S. C. §194(a)) (meatpackers must appeal agency orders within 30 days after service of order); 48 Stat. 1093 (1934) (codified as amended at 47 U. S. C. §402(c)) (Federal Communications Commission orders must be challenged in court "within twenty days after the decision complained of is effective"); 49 Stat. 860 (1935) (codified at 16 U. S. C. §825*l*(b)) (orders issued by the Federal Power Commission pursuant to the Public Utility Act of 1935 must be challenged in court "within sixty days after the order of the Commission"); 49 Stat. 980 (1935) (codified at 27 U. S. C. §204(h)) (orders related to alcohol permits must be challenged "within sixty days after the entry of such order"); 52 Stat. 112 (1938) (codified at 15 U. S. C. §45) (Federal Trade Commission cease-and-desist orders must be challenged "within sixty days from the date of the service of such order"); 52 Stat. 831 (1938) (codified at 15 U. S. C. §717r(b)) (orders issued by the Federal Power Commission pursuant to the Natural Gas Act must be challenged in court "within sixty days after the order of the Commission"); 52 Stat. 1053 (1938) (codified at 21 U. S. C. §355(h)) (orders related to new drug applications must be challenged in court "within sixty days after the entry of such order"); 54 Stat. 501 (1940) (orders apportioning costs for certain bridge projects must be challenged in court "within three months after the date such order is issued").

[7] The majority criticizes my review of congressional action in this area, but fails to adequately explore the record itself. *Ante,* at 12–14. The

of negative inferences when interpreting statutes can be risky. "Context counts, and it is sometimes difficult to read much into the absence of a word that is present elsewhere in a statute." *Bartenwerfer* v. *Buckley*, 598 U. S. 69, 78 (2023).

The majority's approach overlooks relevant context in all sorts of ways, including the fact that §2401(a) is a catchall provision that applies to a variety of actions—that is, the language we are interpreting here does not apply *only* in the administrative-law context. It applies to *every* suit against the United States not covered by another statute of limitations. One cannot expect for Congress to have explicitly stated that accrual in §2401(a) starts at the point of final agency action when §2401(a) is a residual provision that also applies to claims that do not involve agency action at all.[8]

Frankly, it was also entirely unnecessary for Congress to be explicit regarding its intentions. Again, in the administrative-law context, the consistent rule is *not* the plaintiff-specific accrual rule that exists in other contexts (*e.g.,* torts), but the rule that applies every time Congress has ever mentioned a limitations period with respect to a suit against an agency: The claim accrues at the moment of final agency action. So it is no wonder that Congress did not expressly mention this in the text of §2401(a)—it did not have to, for those who have a basic understanding of its statutes.

What is more, the standard accrual rule for the administrative-law context makes perfect sense. The APA itself focuses on the agency's action, not on the plaintiff. Section 704 subjects certain "agency action[s]" to judicial review.

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majority's conclusion that the accrual rule is plaintiff specific for APA claims is no more than *ipse dixit*.

[8] Contra the majority, see *ante,* at 12, the fact that Congress *could* have opted to enact a specific statutory review provision for APA claims says nothing about how we should apply the catchall review provision here.

Section 706 lays out the scope of judicial review. As relevant here, courts shall "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. §706(2)(A). Other subsections of §706 likewise focus exclusively on what the *agency* did. Did the *agency* act "in excess of statutory jurisdiction"? §706(2)(C). Did the *agency* act "without observance of procedure required by law"? §706(2)(D).

Section 702 is not to the contrary. The majority suggests otherwise, characterizing §702 as "equip[ping] injured parties with a cause of action." *Ante,* at 5. This is a misleading characterization. Section 702 restricts *who* may challenge agency action: only those "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." It is simply a limitation on who can sue. As such, it says nothing about the cause of action that such a person might bring, nor does it establish that an injury is an element of the claim, as the majority mistakenly suggests.[9] And that is for good reason, since, in administrative

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[9]The majority puts too much stock in the fact that §702 references an injury: That reference actually does no more than highlight the distinction between what constitutes a claim and who can bring that claim. See *ante,* at 4–5, and n. 1. This type of distinction is commonplace in many areas of our jurisprudence. Take, for example, the constitutional standing doctrine, which limits eligible plaintiffs to those who have suffered an injury in fact that is both traceable to the defendant's conduct and redressable in court. See *FDA* v. *Alliance for Hippocratic Medicine*, 602 U. S. 367, 380–385 (2024). Whether a particular plaintiff has standing to sue says nothing about the elements of the claim itself. See *Haaland* v. *Brackeen*, 599 U. S. 255, 291 (2023) ("We do not reach the merits of these claims because no party before the Court has standing to raise them"). The distinction between what a claim is and who can bring it applies with full force here. Section 702 codifies an injury requirement for bringing APA claims. Whether a particular plaintiff was "adversely affected or aggrieved by agency action within the meaning of a relevant statute" under §702 is a threshold inquiry about whether she is an appropriate plaintiff; it has no bearing on whether the agency did, in fact,

actions, the claim itself remains focused on the agency. See *Crown Coat*, 386 U. S., at 513 ("The focus of the court action is the validity of the administrative decision").

The way that courts review agency actions also reinforces this basic observation. Courts do not look at what happened to the plaintiff or what happened after the rulemaking—they look only at the rule and the rulemaking process itself. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 (1943). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U. S. 138, 142 (1973) (*per curiam*). Anything that happened after the rule's publication (including, perhaps, some injury to a regulated party) does not matter to an APA claim. So, the available claims, causes of action, and evidence are the same regardless of who brings the challenge or when they bring it.

Again, the complaint in this case proves the point. Before Corner Post was added as a plaintiff, the complaint alleged that (1) Regulation II is contrary to law and exceeds the Board's statutory authority, and (2) Regulation II is arbitrary and capricious. See Complaint in *North Dakota Retail Assn.* v. *Board of Governors of FRS*, No. 1:21–cv–00095 (D ND), ECF Doc. 1, pp. 32–36. After Corner Post was added as a plaintiff, the complaint made exactly those same two legal claims. See App. to Pet. for Cert. 79–84. Before Corner Post was added, the contrary-to-law claim said that the Board considered impermissible costs and capped interchange fees in a way that was not proportional to the specific costs of each transaction. See ECF Doc. 1, at 32–34. After Corner Post was added, the contrary-to-law claim said the exact same thing. See App. to Pet. for Cert. 79–81. Be-

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act in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," §706(2).

fore the addition of Corner Post, the arbitrary-and-capricious claim said that the Board failed to consider certain congressional instructions, relied on factors that Congress did not intend for it to consider, and ran counter to evidence before the Board. See ECF Doc. 1, at 34–36. Those claims, too, were unchanged after the addition of Corner Post. See App. to Pet. for Cert. 82–84.

From the pleadings filed in this case, three observations stand out. First, these APA claims, like all APA claims, are about what the agency itself did, so the logical point to start the clock is the moment the agency acted. Second, the claims that Corner Post brings are not specific to it—they are identical to the untimely claims the coplaintiff trade groups brought before. And, finally, although the majority puts procedural challenges to the side—asserting that its holding does not extend to those, see *ante,* at 21, n. 8—the claims in this case *are* procedural, so the majority's line-drawing exercise is meaningless.

B

On the matter of congressional intent, the consistent accrual rule in the administrative-law context (the limitations period starts running at the time of the final agency action) is patently superior to the majority's reading of §2401(a). Congress enacts statutes of limitations to achieve basic policy goals: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella* v. *Wood*, 528 U. S. 549, 555 (2000); see also *Gabelli*, 568 U. S., at 448. For APA claims, where rulemakings apply to the public writ large, repose and certainty would *never* exist if any and every newly formed entity can challenge every agency regulation in existence. Stated simply, the majority has adopted an implausible reading of §2401(a), because, as I explain below, a plaintiff-specific accrual rule operating in this context undermines each of the central goals of all limitations

provisions.

First, repose. This principle means that, at some point, litigation must end. Under the majority's reading of the statute, it never will. Instead of putting a stop to things after six years, §2401(a) now does nothing to prevent agency rules from being forever subjected to legal challenge by newly formed entities (or, as this case illustrates, by old entities that can find or create new entities to graft onto their complaint).[10]

Second, elimination of stale claims. The majority forces courts and agencies to parse cold administrative records. Long after the action in question, courts may be ill equipped to review decades-old administrative explanations.

Last, certainty. As I explain in Part IV, *infra*, the majority's approach creates uncertainty for the Government and every entity that relies on the Government to function. Agency rulemaking serves important "notice and predictability purposes." *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U. S. 50, 69 (2011) (Scalia, J., concurring). When an administrative agency changes its own rules, it follows specific, established processes, so parties have some predictability about how the rules of the road might change. But when every rule on the books can perpetually be challenged by any new plaintiff, and is thus subject to limitless ad hoc amendment, no policy determination can ever be put to rest, and certainty about the rules that govern will forever remain elusive.

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[10] The fact that "courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent," *ante,* at 21, is irrelevant. What we are deciding now is how the statute of limitations should be interpreted, and more specifically, whether it makes sense to interpret it in a way that is inconsistent with the purpose of such statutes.

IV

Today's ruling is not only baseless. It is also extraordinarily consequential. In one fell swoop, the Court has effectively eliminated any limitations period for APA lawsuits, despite Congress's unmistakable policy determination to cut off such suits within six years of the final agency action. The Court has decided that the clock starts for limitations purposes whenever a new regulated entity is created. This means that, from this day forward, administrative agencies can be sued in perpetuity over every final decision they make.

The majority's ruling makes legal challenges to decades-old agency decisions fair game, even though courts of appeals had previously applied §2401(a) to find untimely a range of belated APA challenges. For example, a lower court rejected an APA challenge to the Food and Drug Administration's approval of the abortion medication mifepristone that was brought more than two decades after the relevant agency action. See *Alliance for Hippocratic Medicine* v. *FDA*, 78 F. 4th 210, 242 (CA5 2023). A 2008 APA challenge to a 1969 ruling by the Bureau of Alcohol, Tobacco, Firearms and Explosives implementing the Gun Control Act was also bounced on statute of limitations grounds. See *Hire Order Ltd.* v. *Marianos*, 698 F. 3d 168, 170 (CA4 2012). Other unquestionably tardy APA suits have been dismissed on similar grounds too.[11]

No more. After today, even the most well-settled agency

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[11] See, *e.g.*, *Alabama* v. *PCI Gaming Auth.*, 801 F. 3d 1278, 1292 (CA11 2015) (2013 challenge to Secretary of Interior's 1984, 1992, and 1995 decisions to take certain land into trust for tribes); *Wong* v. *Doar*, 571 F. 3d 247, 263 (CA2 2009) (2007 challenge to 1980 Medicaid regulation); *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Serv.*, 112 F. 3d 1283, 1286–1287 (CA5 1997) (1994 challenge to 1979 National Park Service regulations); *Shiny Rock Mining Corp.* v. *United States*, 906 F. 2d 1362, 1365–1366 (CA9 1990) (1984 challenges to 1964 and 1965 land management orders).

regulations can be placed on the chopping block. And please take note: The fallout will not stop with new challenges to old rules involving the most contentious issues of today. *Any* established government regulation about *any* issue—say, workplace safety, toxic waste, or consumer protection—can now be attacked by *any* new regulated entity within six years of the entity's formation. A brand new entity could pop up and challenge a regulation that is *decades* old; perhaps even one that is as old as the APA itself. No matter how entrenched, heavily relied upon, or central to the functioning of our society a rule is, the majority has announced open season.

Still, in issuing its ruling in this case, the Court seems oddly oblivious to the most foreseeable consequence of the accrual rule it is adopting: Giving every new entity in a regulated industry its own personal statute of limitations to challenge longstanding regulations affects our Nation's economy. Why? Because administrative agencies establish the baseline rules around which businesses and individuals order their lives. When an agency publishes a final rule, and the period for challenging that rule passes, people in that industry understand that the agency's policy choice is the law and act accordingly. They make investments because of it. They change their practices because of it. They enter contracts in light of it. They may not like the rule, but they live and work with it, because that is what the Rule of Law requires. It is profoundly destabilizing—and also acutely unfair—to permit newcomers to bring legal challenges that can overturn settled regulations long after the rest of the competitive marketplace has adapted itself to the regulatory environment.

Moreover, as I have explained, the Court's ruling in this case allows for every new entity to challenge any and every rule that an agency has ever adopted. It is extraordinarily presumptuous that an entity formed in full view of an

agency's rules, by founders who can choose to enter the industry or not, can demand that well-established rules of engagement be revisited. But even setting aside those commonsense fairness concerns, the constant churn of potential attacks on an agency's rules by new entrants can harm *all* entities in a regulated industry. At any time, anyone can come along and potentially cause every entity to have to adjust its whole operations manual, since any rule (no matter how well settled) might be subject to alteration. Indeed, the obvious need for stability in the rules that govern an industry is precisely why a defined period for challenging the rules was needed at all.

Knowledgeable *amici* have explained that the majority's approach to accrual of the statute of limitations for APA claims undermines the "[s]tability, predictability, and consistency [that] enable[s] small businesses to survive and thrive." Brief for Small Business Associations as *Amici Curiae* 5. And there is no question that long-term uncertainty "hinders the ability of businesses to plan effectively." *Id.,* at 9. The majority's accrual rule unnecessarily creates "frequent, inconsistent, judicially-driven policy changes that do not involve the sort of careful balancing envisioned in the normal process of regulatory change." *Id.,* at 12. And, again, one might think that preventing such chaos is precisely why Congress enacted a statute of limitations in the first place.

Seeking to minimize the fully foreseeable and potentially devastating impact of its ruling, the majority maintains that there is nothing to see here, because not every lawsuit brought by a new industry upstart will win, and, at any rate, many agency regulations are already subject to challenge. See *ante,* at 21. But this myopic rationalization overlooks other significant changes that this Court has wrought this Term with respect to the longstanding rules governing review of agency actions. The discerning reader will know that the Court has handed down other decisions this Term

that likewise invite and enable a wave of regulatory challenges—decisions that carry with them the possibility that well-established agency rules will be upended in ways that were previously unimaginable. Doctrines that were once settled are now unsettled, and claims that lacked merit a year ago are suddenly up for grabs.

In *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. ___ (2024), for example, the Court has reneged on a blackletter rule of administrative law that had been foundational for the last four decades. *Id.*, at ___ (slip op., at 30). Under that prior interpretive doctrine, courts deferred to agency interpretations of ambiguous statutes that Congress authorized the agency to administer. Now, every legal claim conceived of in those last four decades—and before—can possibly be brought before courts newly unleashed from the constraints of any such deference. See Tr. of Oral Arg. 74 (Assistant to the Solicitor General explaining that this result "would magnify the effect of" overruling *Chevron*).

Put differently, a fixed statute of limitations, running from the agency's action, was one barrier to the chaotic upending of settled agency rules; the requirement that deference be given to an agency's reasonable interpretations concerning its statutory authority to issue rules was another. The Court has now eliminated both. Any new objection to any old rule must be entertained and determined *de novo* by judges who can now apply their own unfettered judgment as to whether the rule should be voided.

* * *

At the end of a momentous Term, this much is clear: The tsunami of lawsuits against agencies that the Court's holdings in this case and *Loper Bright* have authorized has the potential to devastate the functioning of the Federal Government. Even more to the present point, that result simply cannot be what Congress intended when it enacted legislation that stood up and funded federal agencies and

vested them with authority to set the ground rules for the individuals and entities that participate in our economy and our society. It is utterly inconceivable that §2401(a)'s statute of limitations was meant to permit fresh attacks on settled regulations from all new comers forever. Yet, that is what the majority holds today.

But Congress still has a chance to address this absurdity and forestall the coming chaos. It can opt to correct this Court's mistake by clarifying that the statutes it enacts are designed to facilitate the functioning of agencies, not to hobble them. In particular, Congress can amend §2401(a), or enact a specific review provision for APA claims, to state explicitly what any such rule *must* mean if it is to operate as a limitations period in this context: Regulated entities have six years from the date of the agency action to bring a lawsuit seeking to have it changed or invalidated; after that, facial challenges must end. By doing this, Congress can make clear that lawsuits bringing facial claims against agencies are not personal attack vehicles for new entities created just for that purpose. So, while the Court has made a mess of this pivotal statute, and the consequences are profound, "the ball is in Congress' court." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618, 661 (2007) (Ginsburg, J., dissenting).

SUPREME COURT OF THE UNITED STATES

No. 22–859

SECURITIES AND EXCHANGE COMMISSION, PETITIONER *v.* GEORGE R. JARKESY, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 27, 2024]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In 2013, the Securities and Exchange Commission initiated an enforcement action against respondents George Jarkesy, Jr., and Patriot28, LLC, seeking civil penalties for alleged securities fraud. The SEC chose to adjudicate the matter in-house before one of its administrative law judges, rather than in federal court where respondents could have proceeded before a jury. We consider whether the Seventh Amendment permits the SEC to compel respondents to defend themselves before the agency rather than before a jury in federal court.

I

A

In the aftermath of the Wall Street Crash of 1929, Congress passed a suite of laws designed to combat securities fraud and increase market transparency. Three such statues are relevant here: The Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. 48 Stat. 74, 15 U. S. C. §§77a *et seq*.; 48 Stat.

881, 78a *et seq.*; 54 Stat. 847, 80b–1 *et seq*. These Acts respectively govern the registration of securities, the trading of securities, and the activities of investment advisers. Their protections are mutually reinforcing and often overlap. See *Lorenzo* v. *SEC*, 587 U. S. 71, 80 (2019). Although each regulates different aspects of the securities markets, their pertinent provisions—collectively referred to by regulators as "the antifraud provisions," App. to Pet. for Cert. 73a, 202a—target the same basic behavior: misrepresenting or concealing material facts.

The three antifraud provisions are Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Section 206 of the Investment Advisers Act. Section 17(a) prohibits regulated individuals from "obtain[ing] money or property by means of any untrue statement of a material fact," as well as causing certain omissions of material fact. 15 U. S. C. §77q(a)(2). As implemented by Rule 10b–5, Section 10(b) prohibits using "any device, scheme, or artifice to defraud," making "untrue statement[s] of . . . material fact," causing certain material omissions, and "engag[ing] in any act . . . which operates or would operate as a fraud." 17 CFR §240.10b–5 (2023); see 15 U. S. C. §78j(b). And finally, Section 206(b), as implemented by Rule 206(4)–8, prohibits investment advisers from making "any untrue statement of a material fact" or engaging in "fraudulent, deceptive, or manipulative" acts with respect to investors or prospective investors. 17 CFR §§275.206(4)–8(a)(1), (2); see 15 U. S. C. §80b–6(4).

To enforce these Acts, Congress created the SEC. The SEC may bring an enforcement action in one of two forums. First, the Commission can adjudicate the matter itself. See §§77h–1, 78u–2, 78u–3, 80b–3. Alternatively, it can file a suit in federal court. See §§77t, 78u, 80b–9. The SEC's choice of forum dictates two aspects of the litigation: The procedural protections enjoyed by the defendant, and the remedies available to the SEC.

Procedurally, these forums differ in who presides and makes legal determinations, what evidentiary and discovery rules apply, and who finds facts. Most pertinently, in federal court a jury finds the facts, depending on the nature of the claim. See U. S. Const., Amdt. 7. In addition, a life-tenured, salary-protected Article III judge presides, see Art. III, §1, and the litigation is governed by the Federal Rules of Evidence and the ordinary rules of discovery.

Conversely, when the SEC adjudicates the matter in-house, there are no juries. Instead, the Commission presides and finds facts while its Division of Enforcement prosecutes the case. The Commission may also delegate its role as judge and factfinder to one of its members or to an administrative law judge (ALJ) that it employs. See 15 U. S. C. §78d–1. In these proceedings, the Commission or its delegee decides discovery disputes, see, *e.g.*, 17 CFR §201.232(b), and the SEC's Rules of Practice govern, see 17 CFR §201.100 *et seq*. The Commission or its delegee also determines the scope and form of permissible evidence and may admit hearsay and other testimony that would be inadmissible in federal court. See §§201.320, 201.326.

When a Commission member or an ALJ presides, the full Commission can review that official's findings and conclusions, but it is not obligated to do so. See §201.360; 15 U. S. C. §78d–1. Judicial review is also available once the proceedings have concluded. See §§77i(a), 78y(a)(1), 80b–13(a). But such review is deferential. By law, a reviewing court must treat the agency's factual findings as "conclusive" if sufficiently supported by the record, *e.g.*, §78y(a)(4); see *Richardson* v. *Perales*, 402 U. S. 389, 401 (1971), even when they rest on evidence that could not have been admitted in federal court.

The remedy at issue in this case, civil penalties, also originally depended upon the forum chosen by the SEC. Except in cases against registered entities, the SEC could obtain civil penalties only in federal court. See Insider Trading

Sanctions Act of 1984, §2, 98 Stat. 1264; Securities Enforcement Remedies and Penny Stock Reform Act of 1990, §§101, 201–202, 104 Stat. 932–933, 935–938. That is no longer so. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 124 Stat. 1376. That Act "ma[de] the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court." H. R. Rep. No. 111–687, p. 78 (2010). In other words, the SEC may now seek civil penalties in federal court, or it may impose them through its own in-house proceedings. See Dodd-Frank Act, §929P(a), 124 Stat. 1862–1864 (codified in relevant part as amended at 15 U. S. C. §§77h–1(g), 78u–2(a), 80b–3(i)(1)).

Civil penalties rank among the SEC's most potent enforcement tools. These penalties consist of fines of up to $725,000 per violation. See §§77h–1(g), 78u–2, 80b–3(i). And the SEC may levy these penalties even when no investor has actually suffered financial loss. See *SEC* v. *Blavin*, 760 F. 2d 706, 711 (CA6 1985) (*per curiam*).

B

Shortly after passage of the Dodd-Frank Act, the SEC began investigating Jarkesy and Patriot28 for securities fraud. Between 2007 and 2010, Jarkesy launched two investment funds, raising about $24 million from 120 "accredited" investors—a class of investors that includes, for example, financial institutions, certain investment professionals, and high net worth individuals. App. to Pet. for Cert. 72a–73a, 110a, n. 72; see 17 CFR §230.501. Patriot28, which Jarkesy managed, served as the funds' investment adviser. According to the SEC, Jarkesy and Patriot28 misled investors in at least three ways: (1) by misrepresenting the investment strategies that Jarkesy and Patriot28 employed, (2) by lying about the identity of the funds' auditor and prime broker, and (3) by inflating the funds' claimed value

so that Jarkesy and Patriot28 could collect larger management fees. App. to Pet. for Cert. 80a–86a, 95a–105a. The SEC initiated an enforcement action, contending that these actions violated the antifraud provisions of the Securities Act, the Securities Exchange Act, and the Investment Advisers Act, and sought civil penalties and other remedies.

Relying on the new authority conferred by the Dodd-Frank Act, the SEC opted to adjudicate the matter itself rather than in federal court. In 2014, the presiding ALJ issued an initial decision. *Id.*, at 155a–225a. The SEC reviewed the decision and then released its final order in 2020. *Id.*, at 71a–154a. The final order levied a civil penalty of $300,000 against Jarkesy and Patriot28, directed them to cease and desist committing or causing violations of the antifraud provisions, ordered Patriot28 to disgorge earnings, and prohibited Jarkesy from participating in the securities industry and in offerings of penny stocks. *Id.*, at 152a–154a.

Jarkesy and Patriot28 petitioned for judicial review. 34 F. 4th 446, 450 (CA5 2022). A divided panel of the Fifth Circuit granted their petition and vacated the final order. *Id.*, at 449–450. Applying a two-part test from *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989), the panel held that the agency's decision to adjudicate the matter in-house violated Jarkesy's and Patriot28's Seventh Amendment right to a jury trial. 34 F. 4th, at 451. First, the panel determined that because these SEC antifraud claims were "akin to [a] traditional action[] in debt," a jury trial would be required if this case were brought in an Article III court. *Id.*, at 454; see *id.*, at 453–455. It then considered whether the "public rights" exception applied. That exception permits Congress, under certain circumstances, to assign an action to an agency tribunal without a jury, consistent with the Seventh Amendment. See *id.*, at 455–459. The panel concluded that the exception did not apply, and that therefore the case should have been brought in federal court,

where a jury could have found the facts pertinent to the defendants' fraud liability. Based on this Seventh Amendment violation, the panel vacated the final order. *Id.*, at 459.

It also identified two further constitutional problems. First, it determined that Congress had violated the nondelegation doctrine by authorizing the SEC, without adequate guidance, to choose whether to litigate this action in an Article III court or to adjudicate the matter itself. See *id.*, at 459–463. The panel also found that the insulation of the SEC ALJs from executive supervision with two layers of for-cause removal protections violated the separation of powers. See *id.*, at 463–466. Judge Davis dissented. *Id.*, at 466–479. The Fifth Circuit denied rehearing en banc, 51 F. 4th 644 (2022), and we granted certiorari, 600 U. S. ___ (2023).

II

This case poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud. Our analysis of this question follows the approach set forth in *Granfinanciera* and *Tull* v. *United States*, 481 U. S. 412 (1987). The threshold issue is whether this action implicates the Seventh Amendment. It does. The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.

Since this case does implicate the Seventh Amendment, we next consider whether the "public rights" exception to Article III jurisdiction applies. This exception has been held to permit Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial. The exception does not apply here because the present action does not fall within

any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury. The Seventh Amendment therefore applies and a jury is required. Since the answer to the jury trial question resolves this case, we do not reach the nondelegation or removal issues.

A

We first explain why this action implicates the Seventh Amendment.

1

The right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U. S. 474, 486 (1935). Commentators recognized the right as "the glory of the English law," 3 W. Blackstone, Commentaries on the Laws of England 379 (8th ed. 1778) (Blackstone), and it was prized by the American colonists. When the English began evading American juries by siphoning adjudications to juryless admiralty, vice admiralty, and chancery courts, Americans condemned Parliament for "subvert[ing] the rights and liberties of the colonists." Resolutions of the Stamp Act Congress, Art. VIII (Oct. 19, 1765), reprinted in Sources of Our Liberties 270, 271 (R. Perry & J. Cooper eds. 1959). Representatives gathered at the First Continental Congress demanded that Parliament respect the "great and inestimable privilege of being tried by their peers of the vicinage, according to the [common] law." 1 Journals of the Continental Congress, 1774–1789, p. 69 (Oct. 14, 1774) (W. Ford ed. 1904). And when the English continued to try Americans without juries, the Founders cited the practice as a justification for

severing our ties to England. See Declaration of Independence ¶20; see generally *Erlinger* v. *United States*, 602 U. S. ___, ___–___ (2024).

In the Revolution's aftermath, perhaps the "most success[ful]" critique leveled against the proposed Constitution was its "want of a . . . provision for the trial by jury in civil cases." The Federalist No. 83, p. 495 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis deleted). The Framers promptly adopted the Seventh Amendment to fix that flaw. In so doing, they "embedded" the right in the Constitution, securing it "against the passing demands of expediency or convenience." *Reid* v. *Covert*, 354 U. S. 1, 10 (1957) (plurality opinion). Since then, "every encroachment upon it has been watched with great jealousy." *Parsons* v. *Bedford*, 3 Pet. 433, 446 (1830).

2

By its text, the Seventh Amendment guarantees that in "[s]uits at common law, . . . the right of trial by jury shall be preserved." In construing this language, we have noted that the right is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. *Curtis* v. *Loether*, 415 U. S. 189, 193 (1974). As Justice Story explained, the Framers used the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence." *Parsons*, 3 Pet., at 446. The Amendment therefore "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Id.*, at 447.

The Seventh Amendment extends to a particular statutory claim if the claim is "legal in nature." *Granfinanciera*, 492 U. S., at 53. As we made clear in *Tull*, whether that claim is statutory is immaterial to this analysis. See 481 U. S., at 414–415, 417–425. In that case, the Government sued a real estate developer for civil penalties in federal

court. The developer responded by invoking his right to a jury trial. Although the cause of action arose under the Clean Water Act, the Court surveyed early cases to show that the statutory nature of the claim was not legally relevant. "Actions by the Government to recover civil penalties under statutory provisions," we explained, "historically ha[d] been viewed as [a] type of action in debt requiring trial by jury." *Id.*, at 418–419. To determine whether a suit is legal in nature, we directed courts to consider the cause of action and the remedy it provides. Since some causes of action sound in both law and equity, we concluded that the remedy was the "more important" consideration. *Id.*, at 421 (brackets and internal quotation marks omitted); see *id.*, at 418–421.

In this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy. See *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 255 (1993). What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to "restore the status quo." *Tull*, 481 U. S., at 422. As we have previously explained, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Austin* v. *United States*, 509 U. S. 602, 610 (1993) (internal quotation marks omitted). And while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to "punish culpable individuals." *Tull*, 481 U. S., at 422. Applying these principles, we have recognized that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law." *Ibid.* The same is true here.

To start, the Securities Exchange Act and the Investment

Advisers Act condition the availability of civil penalties on six statutory factors: (1) whether the alleged misconduct involved fraud, deceit, manipulation, or deliberate or reckless disregard for regulatory requirements, (2) whether it caused harm, (3) whether it resulted in unjust enrichment, accounting for any restitution made, (4) whether the defendant had previously violated securities laws or regulations, or had previously committed certain crimes, (5) the need for deterrence, and (6) other "matters as justice may require." §§78u–2(c), 80b–3(i)(3). Of these, several concern culpability, deterrence, and recidivism. Because they tie the availability of civil penalties to the perceived need to punish the defendant rather than to restore the victim, such considerations are legal rather than equitable.

The same is true of the criteria that determine the size of the available remedy. The Securities Act, the Securities Exchange Act, and the Investment Advisers Act establish three "tiers" of civil penalties. See §§77h–1(g)(2), 78u–2(b), 80b–3(i)(2). Violating a federal securities law or regulation exposes a defendant to a first tier penalty. A second tier penalty may be ordered if the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard for regulatory requirements. Finally, if those acts also resulted in substantial gains to the defendant or losses to another, or created a "significant risk" of the latter, the defendant is subject to a third tier penalty. Each successive tier authorizes a larger monetary sanction. See *ibid.*

Like the considerations that determine the availability of civil penalties in the first place, the criteria that divide these tiers are also legal in nature. Each tier conditions the available penalty on the culpability of the defendant and the need for deterrence, not the size of the harm that must be remedied. Indeed, showing that a victim suffered harm is not even required to advance a defendant from one tier to the next. Since nothing in this analysis turns on "restor[ing] the status quo," *Tull*, 481 U. S., at 422, these factors

show that these civil penalties are designed to be punitive.

The final proof that this remedy is punitive is that the SEC is not obligated to return any money to victims. See *id.*, at 422–423. Although the SEC can choose to compensate injured shareholders from the civil penalties it collects, see 15 U. S. C. §7246(a), it admits that it is not required to do so, see App. to Pet. for Cert. 124a, n. 116 (citing 17 CFR §201.1100). Such a penalty by definition does not "restore the status quo" and can make no pretense of being equitable. *Tull*, 481 U. S., at 422.

In sum, the civil penalties in this case are designed to punish and deter, not to compensate. They are therefore "a type of remedy at common law that could only be enforced in courts of law." *Ibid.* That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims. See *id.*, at 421–423.

The close relationship between the causes of action in this case and common law fraud confirms that conclusion. Both target the same basic conduct: misrepresenting or concealing material facts. Compare 15 U. S. C. §§77q(a)(2), 78j(b), 80b–6(4); 17 CFR §§240.10b–5(b), 275.206(4)–8(a)(1), with Restatement (Third) of Torts: Liability for Economic Harm, §§9, 13 (2018); see also, *e.g.*, *Pauwels* v. *Deloitte LLP*, 83 F. 4th 171, 189–190 (CA2 2023) (identifying the elements of common law fraud under New York law); *Conroy* v. *Regents of Univ. of Cal.*, 45 Cal. 4th 1244, 1254–1255, 203 P. 3d 1127, 1135 (2009) (same for California law); *Wesdem, L.L.C.* v. *Illinois Tool Works, Inc.*, 70 F. 4th 285, 291 (CA5 2023) (same for Texas law). That is no accident. Congress deliberately used "fraud" and other common law terms of art in the Securities Act, the Securities Exchange Act, and the Investment Advisers Act. *E.g.*, 15 U. S. C. §77q(a)(3) (prohibiting any practice "which operates . . . as a fraud"). In so doing, Congress incorporated prohibitions from common law fraud into federal securities law. The SEC has followed

suit in rulemakings. Rule 10b–5, for example, prohibits "any device, scheme, or artifice to defraud," and "engag[ing] in any act . . . which operates or would operate as a fraud." 17 CFR §§240.10b–5(a), (c).

Congress's decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law "ancestor." *Foster* v. *Wilson*, 504 F. 3d 1046, 1050 (CA9 2007). "[W]hen Congress transplants a common-law term, the old soil comes with it." *United States* v. *Hansen*, 599 U. S. 762, 778 (2023) (internal quotation marks omitted). Our precedents therefore often consider common law fraud principles when interpreting federal securities law. *E.g.*, *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 343–344 (2005) (evaluating pleading requirements in light of the "common-law roots of the securities fraud action"); *Schreiber* v. *Burlington Northern, Inc.*, 472 U. S. 1, 7 (1985) ("The meaning the Court has given the term 'manipulative' [in §10b of the Securities Exchange Act] is consistent with the use of the term at common law . . . ." (footnote omitted)); *Chiarella* v. *United States*, 445 U. S. 222, 227–229 (1980) (explaining that insider trading liability under Rule 10b–5 is rooted in the common law duty of disclosure); *Basic Inc.* v. *Levinson*, 485 U. S. 224, 253 (1988) (White, J., concurring in part and dissenting in part) ("In general, the case law developed in this Court with respect to §10(b) and Rule 10b–5 has been based on doctrines with which we, as judges, are familiar: common-law doctrines of fraud and deceit.").

That is not to say that federal securities fraud and common law fraud are identical. In some respects, federal securities fraud is narrower. For example, federal securities law does not "convert every common-law fraud that happens to involve securities into a violation." *SEC* v. *Zandford*, 535 U. S. 813, 820 (2002). It only targets certain subject matter and certain disclosures. In other respects,

federal securities fraud is broader. For example, federal securities fraud employs the burden of proof typical in civil cases, while its common law analogue traditionally used a more stringent standard. See *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 387–390 (1983). Courts have also not typically interpreted federal securities fraud to require a showing of harm to be actionable by the SEC. See, *e.g.*, *Blavin*, 760 F. 2d, at 711; *SEC* v. *Life Partners Holdings, Inc.*, 854 F. 3d 765, 779 (CA5 2017). Nevertheless, the close relationship between federal securities fraud and common law fraud confirms that this action is "legal in nature." *Granfinanciera*, 492 U. S., at 53.

B

1

Although the claims at issue here implicate the Seventh Amendment, the Government and the dissent argue that a jury trial is not required because the "public rights" exception applies. Under this exception, Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment. But this case does not fall within the exception, so Congress may not avoid a jury trial by preventing the case from being heard before an Article III tribunal.

The Constitution prohibits Congress from "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). Once such a suit "is brought within the bounds of federal jurisdiction," an Article III court must decide it, with a jury if the Seventh Amendment applies. *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011). These propositions are critical to maintaining the proper role of the Judiciary in the Constitution: "Under 'the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government' adopted in the Constitution, 'the judicial Power of

the United States'" cannot be shared with the other branches. *Id.*, at 483 (quoting *United States* v. *Nixon*, 418 U. S. 683, 704 (1974); alteration in original). Or, as Alexander Hamilton wrote in The Federalist Papers, "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" The Federalist No. 78, at 466 (quoting 1 Montesquieu, The Spirit of Laws 181 (10th ed. 1773)).

On that basis, we have repeatedly explained that matters concerning private rights may not be removed from Article III courts. *Murray's Lessee*, 18 How., at 284; *Granfinanciera*, 492 U. S., at 51–52; *Stern*, 564 U. S., at 484. A hallmark that we have looked to in determining if a suit concerns private rights is whether it "is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'" *Id.*, at 484 (quoting *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)). If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory. *Stern*, 564 U. S., at 484.

At the same time, our precedent has also recognized a class of cases concerning what we have called "public rights." Such matters "historically could have been determined exclusively by [the executive and legislative] branches," *id.*, at 493 (internal quotation marks omitted), even when they were "presented in such form that the judicial power [wa]s capable of acting on them," *Murray's Lessee*, 18 How., at 284. In contrast to common law claims, no involvement by an Article III court in the initial adjudication is necessary in such a case.

The decision that first recognized the public rights exception was *Murray's Lessee*. In that case, a federal customs collector failed to deliver public funds to the Treasury, so the Government issued a "warrant of distress" to compel him to produce the withheld sum. 18 How., at 274–275.

Pursuant to the warrant, the Government eventually seized and sold a plot of the collector's land. *Id.*, at 274. Plaintiffs later attacked the purchaser's title, arguing that the initial seizure was void because the Government had audited the collector's account and issued the warrant itself without judicial involvement. *Id.*, at 275.

The Court upheld the sale. It explained that pursuant to its power to collect revenue, the Government could rely on "summary proceedings" to compel its officers to "pay such balances of the public money" into the Treasury "as may be in their hands." *Id.*, at 281, 285. Indeed, the Court observed, there was an unbroken tradition—long predating the founding—of using these kinds of proceedings to "enforce payment of balances due from receivers of the revenue." *Id.*, at 278; see *id.*, at 281. In light of this historical practice, the Government could issue a valid warrant without intruding on the domain of the Judiciary. See *id.*, at 280–282. The challenge to the sale thus lacked merit.

This principle extends beyond cases involving the collection of revenue. In *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320 (1909), we considered the imposition of a monetary penalty on a steamship company. Pursuant to its plenary power over immigration, Congress had excluded immigration by aliens afflicted with "loathsome or dangerous contagious diseases," and it authorized customs collectors to enforce the prohibition with fines. *Id.*, at 331–334. When a steamship company challenged the penalty under Article III, we upheld it. Congress's power over foreign commerce, we explained, was so total that no party had a "'vested right'" to import anything into the country. *Id.*, at 335 (quoting *Buttfield* v. *Stranahan*, 192 U. S. 470, 493 (1904)). By the same token, Congress could also prohibit immigration by certain classes of persons and enforce those prohibitions with administrative penalties assessed without a jury. See *Oceanic Steam Navigation Co.*, 214 U. S., at

339–340.[1]

In *Ex parte Bakelite Corp.*, we upheld a law authorizing the President to impose tariffs on goods imported by "unfair methods of competition." 279 U. S. 438, 446 (1929). The law permitted him to set whatever tariff was necessary, subject to a statutory cap, to produce fair competition. If the President was "satisfied the unfairness [was] extreme," the law even authorized him to "exclude[]" foreign goods entirely. *Ibid.* Because the political branches had traditionally held exclusive power over this field and had exercised

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[1]The dissent asserts that *Oceanic Steam Navigation* stands for the proposition that the public rights exception applies to any exercise of power granted to Congress. *Post*, at 10–11 (opinion of SOTOMAYOR, J). It must be reading from a different case than we are. *Oceanic Steam Navigation* expressly confines its analysis to the exercise of Congress's power over *foreign* commerce. 214 U. S., at 339 ("It is insisted that the decisions just stated and the legislative practices referred to are inapposite here, because they all relate to subjects peculiarly within the authority of the legislative department of the Government, and which, from the necessity of things, required the concession that administrative officers should have the authority to enforce designated penalties without resort to the courts. But over no conceivable subject is the legislative power of Congress more complete than it is over that with which the act we are now considering deals."); *id.*, at 334 (explaining that the statute "rest[s] . . . upon the authority of Congress over *foreign* commerce and its right to control the coming of aliens into the United States" (emphasis added)); *id.*, at 340 (citing "the authority of Congress over the right to bring aliens into the United States"); see *id.*, at 339 (discussing congressional power over "the valuation of imported merchandise," "'importers,'" and "tariff[s]" (quoting *Bartlett* v. *Kane*, 16 How. 263, 274 (1854)); 214 U. S., at 334 (expressly acknowledging and avoiding comment on "'limitations'" of Congress's "'interstate commerce'" power because this case concerns instead Congress's exercise of its "'plenary power in respect to the exclusion of merchandise brought from *foreign* countries'" (quoting *Buttfield* v. *Stranahan*, 192 U. S. 470, 492 (1904); emphasis added). Nowhere does *Oceanic Steam Navigation* say that the public rights exception applies to cases concerning the securities markets or interstate commerce more broadly. The rules the dissent purports to locate in *Oceanic Steam Navigation* are therefore wholly inapposite.

it, we explained that the assessment of tariffs did not implicate Article III. *Id.*, at 458, 460–461.

This Court has since held that certain other historic categories of adjudications fall within the exception, including relations with Indian tribes, see *United States* v. *Jicarilla Apache Nation*, 564 U. S. 162, 174 (2011), the administration of public lands, *Crowell* v. *Benson*, 285 U. S. 22, 51 (1932), and the granting of public benefits such as payments to veterans, *ibid.*, pensions, *ibid.*, and patent rights, *United States* v. *Duell*, 172 U. S. 576, 582–583 (1899).

Our opinions governing the public rights exception have not always spoken in precise terms. This is an "area of frequently arcane distinctions and confusing precedents." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 583 (1985) (internal quotation marks omitted). The Court "has not 'definitively explained' the distinction between public and private rights," and we do not claim to do so today. *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325, 334 (2018).

Nevertheless, since *Murray's Lessee*, this Court has typically evaluated the legal basis for the assertion of the doctrine with care. The public rights exception is, after all, an *exception*. It has no textual basis in the Constitution and must therefore derive instead from background legal principles. *Murray's Lessee* itself, for example, took pains to justify the application of the exception in that particular instance by explaining that it flowed from centuries-old rules concerning revenue collection by a sovereign. See 18 How., at 281–285. Without such close attention to the basis for each asserted application of the doctrine, the exception would swallow the rule.[2]

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[2] The dissent would brush away these careful distinctions and unfurl a new rule: that whenever Congress passes a statute "entitl[ing] the Government to civil penalties," the defendant's right to a jury and a neutral Article III adjudicator disappears. See *post*, at 2 (opinion of SOTOMAYOR, J.). It bases this rule not in the constitutional text (where it would find

From the beginning we have emphasized one point: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can . . . withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee*, 18 How., at 284. We have never embraced the proposition that "practical" considerations alone can justify extending the scope of the public rights exception to such matters. *Stern*, 564 U. S., at 501. "[E]ven with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." *Northern Pipeline Constr. Co.*, 458 U. S., at 69, n. 23 (plurality opinion) (citing *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 548–549, and n. 21 (1962) (plurality opinion)). And for good reason: "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside

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no foothold), nor in the ratification history (where again it would find no support), nor in a careful, category-by-category analysis of underlying legal principles of the sort performed by *Murray's Lessee* (which it does not attempt), nor even in a case-specific functional analysis (also not attempted). Instead, the dissent extrapolates from the outcomes in cases concerning unrelated applications of the public rights exception and from one opinion, *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n,* 430 U. S. 442 (1977). The result is to blur the distinctions our cases have drawn in favor of the legally unsound principle that just because the Government may extract civil penalties in administrative tribunals in some contexts, it must always be able to do so in all contexts.

The dissent also appeals to practice, ignoring that the statute Jarkesy and Patriot28 have been prosecuted under is barely over a decade old. It is also unclear how practice could transmute a private right into a public one, or how the absence of legal challenges brought by one generation could waive the individual rights of the next. Practice may be probative when it reflects the settled institutional understandings of the branches. That case is far weaker when the rights of individuals are directly at stake.

Article III." *Stern*, 564 U. S., at 484.

2

This is not the first time we have considered whether the Seventh Amendment guarantees the right to a jury trial "in the face of Congress' decision to allow a non-Article III tribunal to adjudicate" a statutory "fraud claim." 492 U. S., at 37, 50. We did so in *Granfinanciera*, and the principles identified in that case largely resolve this one.

Granfinanciera involved a statutory action for fraudulent conveyance. As codified in the Bankruptcy Code, the claim permitted a trustee to void a transfer or obligation made by the debtor before bankruptcy if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U. S. C. §548(a)(2)(A) (1982 ed., Supp. V). Actions for fraudulent conveyance were well known at common law. 492 U. S., at 43. Even when Congress added these claims to the Bankruptcy Code in 1978, see 92 Stat. 2600, it preserved parties' rights to a trial by jury, 492 U. S., at 49–50. In 1984, however, Congress designated fraudulent conveyance actions "core [bankruptcy] proceedings" and authorized non-Article III bankruptcy judges to hear them without juries. *Id.*, at 50.

The issue in *Granfinanciera* was whether this designation was permissible under the public rights exception. *Ibid.* We explained that it was not. Although Congress had assigned fraudulent conveyance claims to bankruptcy courts, that assignment was not dispositive. See *id.*, at 52. What mattered, we explained, was the substance of the suit. "[T]raditional legal claims" must be decided by courts, "whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears." *Ibid.* To determine whether the claim implicated the Seventh Amendment, the Court applied the principles distilled in *Tull*. We examined whether the matter was "from [its] nature subject to 'a suit at common law.'" 492 U. S., at 56

(some internal quotation marks omitted); see *id.*, at 43–50. A survey of English cases showed that "actions to recover . . . fraudulent transfers were often brought at law in late 18th-century England." *Id.*, at 43. The remedy the trustee sought was also one "traditionally provided by law courts." *Id.*, at 49. Fraudulent conveyance actions were thus "quintessentially suits at common law." *Id.*, at 56.

We also considered whether these actions were "closely intertwined" with the bankruptcy regime. *Id.*, at 54. Some bankruptcy claims, such as "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," *id.*, at 56, are highly interdependent and require coordination. Resolving such claims fairly is only possible if they are all submitted at once to a single adjudicator. Otherwise, parties with lower priority claims can rush to the courthouse to seek payment before higher priority claims exhaust the estate, and an orderly disposition of a bankruptcy is impossible. Other claims, though, can be brought in standalone suits, because they are neither prioritized nor subordinated to related claims. Since fraudulent conveyance actions fall into that latter category, we concluded that these actions were not "closely intertwined" with the bankruptcy process. *Id.*, at 54. We also noted that Congress had already authorized jury trials for certain bankruptcy matters, demonstrating that jury trials were not generally "incompatible" with the overall regime. *Id.*, at 61–62 (internal quotation marks omitted).

We accordingly concluded that fraudulent conveyance actions were akin to "suits at common law" and were not inseparable from the bankruptcy process. *Id.*, at 54, 56. The public rights exception therefore did not apply, and a jury was required.

3

Granfinanciera effectively decides this case. Even when an action "originate[s] in a newly fashioned regulatory

scheme," what matters is the substance of the action, not where Congress has assigned it. *Id.*, at 52. And in this case, the substance points in only one direction.

According to the SEC, these are actions under the "anti-fraud provisions of the federal securities laws" for "fraudulent conduct." App. to Pet. for Cert. 72a–73a (opinion of the Commission). They provide civil penalties, a punitive remedy that we have recognized "could only be enforced in courts of law." *Tull*, 481 U. S., at 422. And they target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles. See *supra*, at 10–12. In short, this action involves a "matter[] of private rather than public right." *Granfinanciera*, 492 U. S., at 56. Therefore, "Congress may not 'withdraw'" it "'from judicial cognizance.'" *Stern*, 564 U. S., at 484 (quoting *Murray's Lessee*, 18 How., at 284).

4

Notwithstanding *Granfinanciera*, the SEC contends the public rights exception still applies in this case because Congress created "new statutory obligations, impose[d] civil penalties for their violation, and then commit[ted] to an administrative agency the function of deciding whether a violation ha[d] in fact occurred." Brief for Petitioner 21 (internal quotation marks omitted).

The foregoing from *Granfinanciera* already does away with much of the SEC's argument. Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal." 492 U. S., at 52. Nor does the fact that the SEC action "originate[d] in a newly fashioned regulatory scheme" permit Congress to siphon this action away from an Article III court. *Ibid.* The constructive fraud claim in *Granfinanciera* was also statutory, see *id.*, at 37, but we nevertheless explained that the public rights exception did not apply. Again, if the action resembles a traditional legal

claim, its statutory origins are not dispositive. See *id.*, at 52, 56.

The SEC's sole remaining basis for distinguishing *Granfinanciera* is that the Government is the party prosecuting this action. See Brief for Petitioner 26–28; see also Tr. of Oral Arg. 25 (Principal Deputy Solicitor General) (the "critical distinction" in the public rights analysis is "enforcement by the executive"); *id.*, at 26 (identifying as "the constitutionally relevant distinction" that "this is something that has been assigned to a federal agency to enforce"). But we have never held that "the presence of the United States as a proper party to the proceeding is . . . sufficient" by itself to trigger the exception. *Northern Pipeline Constr. Co.*, 458 U. S., at 69, n. 23 (plurality opinion). Again, what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled. See *ibid.* The object of this SEC action is to regulate transactions between private individuals interacting in a pre-existing market. To do so, the Government has created claims whose causes of action are modeled on common law fraud and that provide a type of remedy available only in law courts. This is a common law suit in all but name. And such suits typically must be adjudicated in Article III courts.

5

The principal case on which the SEC and the dissent rely is *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 430 U. S. 442 (1977). Because the public rights exception as construed in *Atlas Roofing* does not extend to these civil penalty suits for fraud, that case does not control. And for that same reason, we need not reach the suggestion made by Jarkesy and Patriot28 that *Tull* and *Granfinanciera* effectively overruled *Atlas Roofing* to the extent that case construed the public rights exception to allow the adjudication of civil penalty suits in administrative

tribunals.[3]

The litigation in *Atlas Roofing* arose under the Occupational Safety and Health Act of 1970 (OSH Act), a federal regulatory regime created to promote safe working conditions. *Id.*, at 444–445. The Act authorized the Secretary of Labor to promulgate safety regulations, and it empowered the Occupational Safety and Health Review Commission (OSHRC) to adjudicate alleged violations. *Id.*, at 445–446. If a party violated the regulations, the agency could impose civil penalties. *Id.*, at 446.

Unlike the claims in *Granfinanciera* and this action, the OSH Act did not borrow its cause of action from the common law. Rather, it simply commanded that "[e]ach employer . . . shall comply with occupational safety and health standards promulgated under this chapter." 84 Stat. 1593, 29 U. S. C. §654(a)(2) (1976 ed.). These standards bring no common law soil with them. Cf. *Hansen*, 599 U. S., at 778. Rather than reiterate common law terms of art, they instead resembled a detailed building code. For example, the OSH Act regulations directed that a ground trench wall of "Solid Rock, Shale, or Cemented Sand and Gravels" could be constructed at a 90 degree angle to the ground. 29 CFR §1926.652, Table P–1 (1976); see *Atlas Roofing*, 430 U. S., at 447 (discussing Table P–1). But a wall of "Compacted Angular Gravels" needed to be sloped at 63 degrees, and a wall of "Well Rounded Loose Sand" at 26 degrees. §1926.652, Table P–1. The purpose of this regime was not to enable the Federal Government to bring or adjudicate

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[3] The dissent chides us for "leav[ing] open the possibility that *Granfinanciera* might have overruled *Atlas Roofing*." *Post*, at 25, n. 8 (opinion of SOTOMAYOR, J.). But the author of *Atlas Roofing* certainly thought that *Granfinanciera* may have done so. See *Granfinanciera*, 492 U. S., at 79 (White, J., dissenting) ("Perhaps . . . *Atlas Roofing* is no longer good law after today's decision."); see also *id.*, at 71, n. 1 (*Granfinanciera* "can be read as overruling or severely limiting" *Atlas Roofing*).

claims that traced their ancestry to the common law. Rather, Congress stated that it intended the agency to "develop[] innovative methods, techniques, and approaches for dealing with occupational safety and health problems." 29 U. S. C. §651(b)(5) (1976 ed.). In both concept and execution, the Act was self-consciously novel.

Facing enforcement actions, two employers alleged that the adjudicatory authority of the OSHRC violated the Seventh Amendment. See *Atlas Roofing*, 430 U. S., at 448–449. The Court rejected the challenge, concluding that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment[]." *Id.*, at 455. As the Court explained, the case involved "a new cause of action, and remedies therefor, unknown to the common law." *Id.*, at 461. The Seventh Amendment, the Court concluded, was accordingly "no bar to . . . enforcement outside the regular courts of law." *Ibid.*

The cases that *Atlas Roofing* relied upon did not extend the public rights exception to "traditional legal claims." *Granfinanciera*, 492 U. S., at 52. Instead, they applied the exception to actions that were "'not . . . suit[s] at common law or in the nature of such . . . suit[s].'" *Atlas Roofing*, 430 U. S., at 453 (quoting *Jones & Laughlin Steel Corp.*, 301 U. S., at 48); see *Atlas Roofing*, 430 U. S., at 450–451 (discussing, *e.g.*, *Murray's Lessee*, *Ex parte Bakelite Corp.*, *Helvering* v. *Mitchell*, 303 U. S. 391 (1938), and *Oceanic Steam Navigation Co.*). Indeed, the Court recognized that if a case did involve a common law action or its equivalent, a jury was required. See 430 U. S., at 455 ("'[W]here the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial.'" (quoting *Pernell* v. *Southall Realty*, 416 U. S. 363, 383 (1974)); *Atlas Roofing*, 430 U. S., at 458–459 (jury required

when "courts of law supplied a cause of action and an adequate remedy to the litigant").

Atlas Roofing concluded that Congress could assign the OSH Act adjudications to an agency because the claims were "unknown to the common law." 430 U. S., at 461. The case therefore does not control here, where the statutory claim is "'in the nature of'" a common law suit. *Id.*, at 453 (quoting *Jones & Laughlin*, 301 U. S., at 48). As we have explained, Jarkesy and Patriot28 were prosecuted for "fraudulent conduct," App. to Pet. for Cert. 72a, and the pertinent statutory provisions derive from, and are interpreted in light of, their common law counterparts, see 15 U. S. C. §§77q(a)(2), 78j(b), 80b–6(4); 17 CFR §§240.10b–5(b), 275.206(4)–8(a)(1); *Basic Inc.*, 485 U. S., at 253 (opinion of White, J.).

The reasoning of *Atlas Roofing* cannot support any broader rule. The dissent chants "*Atlas Roofing*" like a mantra, but no matter how many times it repeats those words, it cannot give *Atlas Roofing* substance that it lacks.[4]

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[4] Reading the dissent, one might also think that *Atlas Roofing* is among this Court's most celebrated cases. As the concurrence shows, *Atlas Roofing* represents a departure from our legal traditions. See *post*, at 12–20 (opinion of GORSUCH, J.).

This view is also reflected in the scholarship. Commentators writing comprehensively on Article III and agency adjudication have often simply ignored the case. See, *e.g.*, R. Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915 (1988) (no citation to *Atlas Roofing*); J. Harrison, Public Rights, Private Privileges, and Article III, 54 Ga. L. Rev. 143 (2019) (same); W. Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511 (2020) (same).

Others who have considered it have offered nothing but a variety of criticisms. See, *e.g.*, R. Kirst, Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment, 126 U. Pa. L. Rev. 1281, 1294 (1978) (through its "careless use of precedent," *Atlas Roofing* did "not recognize or [mis]understood" "careful distinctions developed by . . . earlier judges"); G. Young, Federal Courts & Federal Rights, 45 Brooklyn L. Rev. 1145, 1153 (1979) ("The *Atlas* Court . . . failed to offer an adequate justification for its interpretation of the sev-

Even as *Atlas Roofing* invoked the public rights exception, the definition it offered of the exception was circular. The exception applied, the Court said, "in cases in which 'public rights' are being litigated—*e. g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes." 430 U. S., at 450; see *id.*, at 458.

After *Atlas Roofing*, this Court clarified in *Tull* that the Seventh Amendment does apply to novel statutory regimes, so long as the claims are akin to common law claims. See 481 U. S., at 421–423. In addition, we have explained that the public rights exception does not apply automatically whenever Congress assigns a matter to an agency for adjudication. See *Granfinanciera*, 492 U. S., at 52.

For its part, the dissent also seems to suggest that *Atlas Roofing* establishes that the public rights exception applies whenever a statute increases governmental efficiency. *Post*, at 15 (opinion of SOTOMAYOR, J.). Again, our precedents foreclose this argument. As *Stern* explained, effects like increasing efficiency and reducing public costs are not enough to trigger the exception. See 564 U. S., at 501; *INS* v. *Chadha*, 462 U. S. 919, 944 (1983). Otherwise, evading

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enth amendment, either in terms of precedent or the language and history of the amendment."); M. Redish & D. La Fave, Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 Wm. & Mary Bill of Right J. 407, 436 (1995) (criticizing *Atlas Roofing* for failing to "provid[e] a principled basis upon which to determine the proper scope of congressional power to remove the civil jury from federal adjudications"); V. Amar, Implementing an Historical Version of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines, 47 S. Tex. L. Rev. 291, 298 (2005) (questioning *Atlas Roofing* for "invert[ing] and turn[ing] on its head the *Apprendi* doctrine's central insight that juries are most important to check the power of the state" (emphasis deleted)); C. Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 604–605, and n. 189 (2007) (describing *Atlas Roofing* as "misus[ing]" precedent to "deny the novelty of its holding" and "drive a wedge" into the traditional understanding of the public-private rights distinction). We express no opinion on these various criticisms.

the Seventh Amendment would become nothing more than a game, where the Government need only identify some slight advantage to the public from agency adjudication to strip its target of the protections of the Seventh Amendment.

The novel claims in *Atlas Roofing* had never been brought in an Article III court. By contrast, law courts have dealt with fraud actions since before the founding, and Congress had authorized the SEC to bring such actions in Article III courts and still authorizes the SEC to do so today. See 3 Blackstone 41–42; §§77t, 78u, 80b–9. Given the judiciary's long history of handling fraud claims, it cannot be argued that the courts lack the capacity needed to adjudicate such actions.

In short, *Atlas Roofing* does not conflict with our conclusion. When a matter "from its nature, is the subject of a suit at the common law," Congress may not "withdraw [it] from judicial cognizance." *Murray's Lessee*, 18 How., at 284.

* * *

A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator. Rather than recognize that right, the dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands. Jarkesy and Patriot28 are entitled to a jury trial in an Article III court. We do not reach the remaining constitutional issues and affirm the ruling of the Fifth Circuit on the Seventh Amendment ground alone.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 22–859

SECURITIES AND EXCHANGE COMMISSION, PETITIONER *v.* GEORGE R. JARKESY, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 27, 2024]

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring.

The Court decides a single issue: Whether the Security and Exchange Commission's use of in-house hearings to seek civil penalties violates the Seventh Amendment right to a jury trial. It does. As the Court details, the government has historically litigated suits of this sort before juries, and the Seventh Amendment requires no less.

I write separately to highlight that other constitutional provisions reinforce the correctness of the Court's course. The Seventh Amendment's jury-trial right does not work alone. It operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property. The Seventh Amendment guarantees the right to trial by jury. Article III entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles. Taken together, all three provisions vindicate the Constitution's promise of a "fair trial in a fair tribunal." *In re Murchison*, 349 U. S. 133, 136 (1955).

I

In March 2013, the SEC's Commissioners approved

charges against Mr. Jarkesy. The charges were serious; the agency accused him of defrauding investors. The relief the agency sought was serious, too: millions of dollars in civil penalties. See SEC, Division of Enforcement's Post-Hearing Memorandum of Law in *In re John Thomas Capital Management Group, LLC*, Admin. Proc. File No. 3–15255, pp. 28–29 (SEC, Apr. 7, 2014). For most of the SEC's 90-year existence, the Commission had to go to federal court to secure that kind of relief against someone like Mr. Jarkesy. *Ante*, at 3–4. Proceeding that way in this case hardly would have promised him an easy ride. But it would have at least guaranteed Mr. Jarkesy a jury, an independent judge, and traditional procedures designed to ensure that anyone caught up in our judicial system receives due process.

In 2010, however, all that changed. With the passage of the Dodd Frank Act, Congress gave the SEC an alternative to court proceedings. Now, the agency could funnel cases like Mr. Jarkesy's through its own "adjudicatory" system. See 124 Stat. 1376, 1862–1865. That is the route the SEC chose when it filed charges against Mr. Jarkesy.

There is little mystery why. The new law gave the SEC's Commissioners—the same officials who authorized the suit against Mr. Jarkesy—the power to preside over his case themselves and issue judgment. To be sure, the Commissioners opted, as they often do, to send Mr. Jarkesy's case in the first instance to an "administrative law judge" (ALJ). See 17 CFR §201.110 (2023). But the title "judge" in this context is not quite what it might seem. Yes, ALJs enjoy some measure of independence as a matter of regulation and statute from the lawyers who pursue charges on behalf of the agency. But they remain servants of the same master—the very agency tasked with prosecuting individuals like Mr. Jarkesy. This close relationship, as others have long recognized, can make it "extremely difficult, if not impossible, for th[e ALJ] to convey the image of being an impartial fact finder." B. Segal, The Administrative Law

Judge, 62 A. B. A. J. 1424, 1426 (1976). And with a jury out of the picture, the ALJ decides not just the law but the facts as well.[1]

Going in, then, the odds were stacked against Mr. Jarkesy. The numbers confirm as much: According to one report, during the period under study the SEC won about 90% of its contested in-house proceedings compared to 69% of its cases in court. D. Thornley & J. Blount, SEC In-House Tribunals: A Call for Reform, 62 Vill. L. Rev. 261, 286 (2017) (Thornley). Reportedly, too, one of the SEC's handful of ALJs even warned individuals during settlement discussions that he had found defendants liable in every contested case and never once "'ruled against the agency's enforcement division.'" *Axon Enterprise, Inc.* v. *FTC*, 598 U. S. 175, 213–214 (2023) (GORSUCH, J., concurring in judgment).

The shift from a court to an ALJ didn't just deprive Mr. Jarkesy of the right to an independent judge and a jury. He also lost many of the procedural protections our courts supply in cases where a person's life, liberty, or property is at stake. After an agency files a civil complaint in court, a defendant may obtain from the SEC a large swathe of documents relevant to the lawsuit. See Fed. Rule Civ. Proc. 26(b)(1). He may subpoena third parties for testimony and documents and take 10 oral depositions—more with the court's permission. Rule 45; Rule 30(a)(2)(A)(i). A court has flexibility, as well, to set deadlines for discovery and other matters to meet the needs of the case. See Rule 16. And

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[1] In many agencies, litigants are not even entitled to have ALJs, with their modicum of protections, decide their cases. These agencies use "administrative judges." Some agencies can replace these administrative judges if they don't like their decisions. And some of these judges may move in and out of prosecutorial and adjudicatory roles, or move in and out of the very industries their agencies regulate. See *United States* v. *Arthrex, Inc.*, 594 U. S. 1, 36–37 (2021) (GORSUCH, J., concurring in part and dissenting in part).

come trial, the Federal Rules of Evidence apply, meaning that hearsay is generally inadmissible and witnesses must usually testify in person, subject to cross-examination. See Fed. Rule Evid. 802.

Things look very different in agency proceedings. The SEC has a responsibility to provide "documents that contain material exculpatory evidence." 17 CFR §201.230(b)(3). But the defendant enjoys no general right to discovery. Though ALJs enjoy the power to issue subpoenas on the request of litigants like Mr. Jarkesy, §201.232(a), they "often decline to issue [them] or choose to significantly narrow their scope," G. Mark, SEC and CFTC Administrative Proceedings, 19 U. Pa. J. Const. L. 45, 68 (2016). Oral depositions are capped at five, with another two if the ALJ grants permission. §201.233(a). In some cases, an administrative trial must take place as soon as 1 month after service of the charges, and that hearing must follow within 10 months in even the most complex matters. §201.360(a)(2)(ii). The rules of evidence, including their prohibition against hearsay, do not apply with the same rigor they do in court. §201.235(a)(5); see §201.230. For that reason, live testimony often gives way to "investigative testimony"—that is, a "sworn statement" taken outside the presence of the defendant or his counsel. §201.235(b).

How did all this play out in Mr. Jarkesy's case? Accompanying its charges, the SEC disclosed 700 gigabytes of data—equivalent to between 15 and 25 million pages of information—it had collected during its investigation. App. to Pet. for Cert. 164a; Complaint in *Jarkesy* v. *U. S. SEC*, No. 1:14–cv–00114 (DDC, Jan. 29, 2014), ECF Doc. 1, ¶49, pp. 12–13. Over Mr. Jarkesy's protest that it would take "two lawyers or paralegals working twelve-hour days over four decades to review," *ibid.*, the ALJ gave Mr. Jarkesy 10 months to prepare for his hearing, see App. to Pet. for Cert. 156a. Then, after conducting that hearing, the ALJ turned around and obtained from the Commission "an extension of

six months to file [her] initial decision." *In re John Thomas Capital Management Group LLC*, SEC Release No. 9631, p. 1 (Aug. 13, 2014). The reason? The "'size and complexity of the proceeding.'" *Id.*, at 2. When that decision eventually arrived seven months after the hearing, the ALJ agreed with the SEC on every charge. See App. to Pet. for Cert. 155a–156a, 212a.

Mr. Jarkesy had the right to appeal to the Commission, but appeals to that politically accountable body (again, the same body that approved the charges) tend to go about as one might expect. The Commission may decline to review the ALJ's decision. §201.411(b)(2). If it chooses to hear the case, it may *increase* the penalty imposed on the defendant. Thornley 286. A defendant unhappy with the result can seek further review in court, though that process will take more time and money, too. Nor will he find a jury there, only a judge who must follow the agency's findings if they are supported by "'more than a mere scintilla'" of evidence. *Biestek* v. *Berryhill*, 587 U. S. 97, 103 (2019).

Mr. Jarkesy filed an appeal anyway. The Commission agreed to review the ALJ's decision. It then afforded itself the better part of six years to issue an opinion. And, after all that, it largely agreed with the ALJ. See App. to Pet. for Cert. 71a–74a. None of this likely came as a surprise to the SEC employees in the Division of Enforcement responsible for pressing the action against Mr. Jarkesy. While his appeal was pending, employees in that division—including an "'Enforcement Supervisor'" in the regional office prosecuting Mr. Jarkesy—accessed confidential memos by the Commissioners' advisors about his appeal. See SEC, Second Commission Statement Relating to Certain Administrative Adjudications 3 (June 2, 2023).

II

A

If administrative proceedings like Mr. Jarkesy's seem a

thoroughly modern development, the British government and its agents engaged in a strikingly similar strategy in colonial America. Colonial administrators routinely steered enforcement actions out of local courts and into vice-admiralty tribunals where they thought they would win more often. These tribunals lacked juries. They lacked truly independent judges. And the procedures materially differed from those available in everyday common-law courts.

The vice-admiralty courts in the Colonies began as rough equivalents of English courts of admiralty. E. Surrency, The Courts in the American Colonies, 11 Am. J. Legal Hist. 347, 355 (1967). These courts generally concerned themselves with maritime matters arising on "the oceans and rivers and their immediate shores." C. Ubbelohde, The Vice-Admiralty Courts and the American Revolution 19 (1960) (Ubbelohde). And the proceedings they used accorded more with civil law traditions than common law ones. Among other things, this meant officials could try cases against colonists without a jury. *Id.*, at 21.

Confined to admiralty disputes, perhaps the lack of a jury would have proven unexceptional (as juries were not usually required in such cases then, nor are they today). See, *e.g.*, *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U. S. 438, 448 (2001). But Parliament deployed these juryless tribunals in the Colonies to new ends that, according to John Adams, could fill "'volumes.'" Ubbelohde vii. The creep away from the original province of those courts began with the grant of authority over violations of certain trade and customs laws. But in the decade before the Revolution, the drip, drip, drip of expanding power became a torrent, as Parliament allowed more and more actions to be brought in colonial vice-admiralty courts.

Many of the matters added to vice-admiralty jurisdiction in the Colonies would have required juries in England. *Id.*, at 112. But as the Massachusetts royal governor explained,

colonial juries "'were not to be trusted.'" D. Lovejoy, Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764–1776, 16 Wm. & Mary Q. 459, 468 (1959). Even violations that did not implicate the jury right normally would have been heard in England "before a court in [one's] own neighborhood or county where [one] could count on traditional common-law procedure." *Id.*, at 471. But by expanding the reach of vice-admiralty jurisdiction in the Colonies, Parliament denied similar protections to Americans. See *Erlinger* v. *United States*, 602 U. S. ___, ___ (2024) (slip op., at 5).

Vice-admiralty court judges also lacked independence. While judges in England since the end of the seventeenth century generally enjoyed the protection of tenure during good behavior, colonial judges usually served at the pleasure of the royal administration. See *United States* v. *Will*, 449 U. S. 200, 218–219 (1980). And, doing away with the pretense of impartiality entirely, some vice-admiralty judges held dual appointments—for instance, as colonial attorneys general and vice-admiralty judges. Ubbelohde 162–163.

Like the modern SEC, British colonial officials were not *required* to bring many of their cases before the vice-admiralty courts. Often, Parliament gave those officials the option to proceed in either the ordinary common-law courts or the vice-admiralty courts. Unsurprisingly, though, they sought to file where they were most likely to win. And "[i]n this contest, the vice-admiralty courts were usually the victors." *Id.*, at 21.

B

The abuses of these courts featured prominently in the calls for revolution. In the First Continental Congress, the assembled delegates condemned how Parliament "extend[ed] the jurisdiction of Courts of Admiralty," complained how colonial judges were "dependent on the

Crown," and demanded the right to the "common law of England" and the "great and inestimable privilege" of a jury trial. Declaration and Resolves of the First Continental Congress, Oct. 14, 1774, in 1 Journals of the Continental Congress, 1774–1789, pp. 68–69 (W. Ford 1904 ed.). Two years later, the drafters of the Declaration of Independence repeated these concerns, admonishing the King for "ma[king] Judges dependent on his Will alone," ¶11, and "[f]or depriving [the colonists] in many cases, of the benefits of Trial by Jury," ¶20. By that point, however, the "musket fire at Lexington and Concord . . . signaled the end not only of the vice-admiralty courts, but of all British rule in America." Ubbelohde 190.

When the smoke settled, the American people went to great lengths to prevent a backslide toward anything like the vice-admiralty courts. *Erlinger*, 602 U. S., at ___–___ (slip op., at 5–6). One product of these efforts was Article III of the Constitution. There, the Constitution provided that "[t]he judicial Power"—the power over "Cases" and "Controversies"—would lie with life-tenured, salary-protected judges. §§1–2; see *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325, 346 (2018) (GORSUCH, J., dissenting). As the Court has recognized, this meant the Executive Branch could "exercise no part of th[e] judicial power." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 275 (1856), "no matter how court-like [its] decisionmaking process might appear," *Ortiz* v. *United States*, 585 U. S. 427, 465 (2018) (ALITO, J., dissenting). Nor could Congress "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty"—the traditional scope of the "judicial Power." *Murray's Lessee*, 18 How., at 284; see Art. III, §2.

Despite these guarantees, many at the founding thought Article III didn't go far enough. Yes, it promised a defendant an independent judge rather than one dependent on

those who hold political power. But what would stop Congress from requiring litigants to navigate vice-admiralty's alien procedures in *all* federal cases? Or from making "federal processes" even *more* byzantine, so "as to [effectively] destroy [individual] rights?" Letter from a Federal Farmer (Jan. 20, 1788), in 2 The Complete Anti-Federalist 328 (H. Storing ed. 1981).

And what about civil juries? "[T]he jury trial," one prominent Anti-Federalist observed, "brings with it an open and public discussion of all causes, and excludes secret and arbitrary proceedings." Letter from a Federal Farmer (Jan. 18, 1788), in *id.*, at 320 (Federal Farmer 15). The participation of ordinary Americans "drawn from the body of the people" serves another function, too: "If the conduct of judges shall . . . tend to subvert the laws, and change the forms of government, the jury may check them." *Ibid.* As originally composed, however, the Constitution promised a trial by jury for "all Crimes," but said nothing about civil cases. Art III, §2, cl. 3. Some wondered, did this mean judges, not juries, would be "left masters as to facts" in civil disputes? Federal Farmer 15, at 322. If so, asked another, "what satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen"? Essay of a Democratic Federalist (Oct. 17, 1787), in 3 Complete Anti-Federalist 61.

The answer to these concerns was the Bill of Rights. *Erlinger*, 602 U. S., at ___ (slip op., at 6). As the Court details, the Seventh Amendment promised the right to a jury trial in "'[s]uits at common law.'" *Ante*, at 8 (quoting Amdt. 7). But because the Constitution was designed to "endure for ages to come," *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819), this did not mean only those "suits, which the common law recognized among its old and settled proceedings," *Parsons* v. *Bedford*, 3 Pet. 433, 447 (1830). The founding

generation anticipated the possibility Congress would introduce new causes of action and perhaps new remedies, too. See *ibid.* Accordingly, this Court has long understood the Seventh Amendment's protections to apply in "all [civil] suits which are not of equity [or] admiralty jurisdiction." *Ibid.*; accord, *ante*, at 8–9. In this way, the Seventh Amendment seeks to ensure there will be no juryless vice-admiralty courts in the United States.

The Fifth Amendment's Due Process Clause addressed remaining concerns about the processes that would attend trials before independent judges and juries. It provided that the government may not deprive anyone of "life, liberty, or property, without due process of law." As originally understood, this provision prohibited the government from "depriv[ing] a person of those rights without affording him the benefit of (at least) those customary procedures to which freemen were entitled by the old law of England." *Sessions* v. *Dimaya*, 584 U. S. 148, 176 (2018) (GORSUCH, J., concurring in part and concurring in judgment) (internal quotation marks omitted); see *Erlinger*, 602 U. S., at ___–___ (slip op., at 6–7).

More than that, because it was "the peculiar province of the judiciary" to safeguard life, liberty, and property, due process often meant *judicial* process. 1 St. George Tucker, Blackstone's Commentaries, Editor's App. 358 (1803). That is, if the government sought to interfere with those rights, nothing less than "the process and proceedings of the common law" had to be observed before any such deprivation could take place. 3 J. Story, Commentaries on the Constitution of the United States §1783, p. 661 (1833) (Story). In other words, "'due process of law' generally implie[d] and include[d] . . . *judex* [a judge], regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings." *Murray's Lessee*, 18 How., at 280. This constitutional baseline was designed to serve

as "a restraint on the legislative" branch, preventing Congress from "mak[ing] any process 'due process of law,' by its mere will." *Id.*, at 276.

C

These three constitutional provisions were meant to work together, and together they make quick work of this case. In fact, each provision requires the result the Court reaches today.

First, because the "'matter'" before us is one "which, from its nature, is the subject of a suit at the common law," *id.*, at 284, "the responsibility for deciding [it] rests with Article III judges in Article III courts." *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011). Nor does it make a difference whether we think of the SEC's action here as a civil-penalties suit or something akin to a traditional fraud claim: At the founding, both kinds of actions were tried in common-law courts. See *ante*, at 9–13 (discussing civil penalties); see also, *e.g.*, *Pasley* v. *Freeman*, 3 T. R. 51, 100 Eng. Rep. 450 (K. B. 1789) (action for fraud); *Baily* v. *Merrell*, 3 Bulst. 94, 81 Eng. Rep. 81 (K. B. 1615) (same). And that tells us all we need to know that the SEC's in-house civil-penalty scheme violates Article III by "withdraw[ing]" the matter "from judicial cognizance" and handing it over to the Executive Branch for an in-house trial. *Murray's Lessee*, 18 How., at 284; see *supra*, at 7–8.

Second, because the action the SEC seeks to pursue is not the stuff of equity or admiralty jurisdiction but the sort of suit historically adjudicated before common-law courts, the Seventh Amendment guarantees Mr. Jarkesy the right to have his case decided by a jury of his peers. In this regard, it is irrelevant that the SEC derived its power to sue under a "new statut[e]" or that the agency proceeded under "a new cause of action." Brief for Petitioner 13, 22 (internal quotation marks omitted). As we have seen, the government cannot evade the Seventh Amendment so easily. See *ante*, at

9; *supra*, at 8–10.

Third, were there any doubt, the Due Process Clause confirms these conclusions. Cf. *Murray's Lessee*, 18 How., at 275 (explaining that the Article III challenge before the Court could "best be considered" as raising a due process question). Because the penalty the SEC seeks would "depriv[e]" Mr. Jarkesy of "property," Amdt. 5, due process demands nothing less than "the process and proceedings of the common law," 3 Story §1783, at 661. That means the regular course of trial proceedings with their usual protections, see *Murray's Lessee*, 18 How., at 280, not the use of ad hoc adjudication procedures before the same agency responsible for prosecuting the law, subject only to hands-off judicial review, see *supra*, at 10–11.

III

A

The government resists these conclusions. As the government sees it, this case implicates the so-called public rights exception. One that defeats not only Mr. Jarkesy's right to trial by jury, but also his right to proceed before an independent trial judge consistent with traditional judicial processes. That is, on the government's account, not only does the Seventh Amendment fall away; so does the usual operation of Article III and the Due Process Clause.

In the government's view, the public rights exception "*at a minimum* allows Congress to create new statutory obligations, impose civil penalties for their violation, and then commit to an administrative agency the function of deciding whether a violation has in fact occurred." Brief for Petitioner 21 (emphasis added; internal quotation marks omitted). Put plainly, all that need be done to dispense almost entirely with three separate constitutional provisions is an Act of Congress creating some new statutory obligation. And, the government continues, this case easily meets that standard because the proceeding against Mr. Jarkesy is one

"brought by the government against a private party" under a statute designed "to remedy harm to the public at large." *Id.*, at 24 (internal quotation marks omitted).

The Court rightly rejects these arguments. See *ante*, at 19–21. No one denies that, under the public rights exception, Congress may allow the Executive Branch to resolve certain matters free from judicial involvement in the first instance. *Ante*, at 6, 14–15. But, despite its misleading name, the exception does not refer to *all* matters brought by the government against an individual to remedy public harms, or even all those that spring from a statute. See *ante*, at 16–17. Instead, public rights are a narrow class defined and limited by history. As the Court explains, that class has traditionally included the collection of revenue, customs enforcement, immigration, and the grant of public benefits. *Ante*, at 15–17.

How did these matters find themselves categorized as public rights? Competing explanations abound. Some have pointed to ancient practical considerations. In *Murray's Lessee*, for example, the Court reasoned that the "[i]mperative necessity" of tax collection for a functional state had long caused governments to treat "claims for public taxes" differently from "all others." 18 How., at 282. Others have theorized that "the core of the judicial power" concerns the disposition of the "three 'absolute' rights" "to life, liberty, and property." *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U. S. 665, 713–714 (2015) (THOMAS, J., dissenting). Public rights, the theory goes, involve matters originally understood to fall outside this core. *Id.*, at 714. So, for example, "[a]lthough Congress could authorize executive agencies to dispose of *public* rights in land—often by means of adjudicating a claimant's qualifications for a land grant under a statute—the United States had to go to the courts if it wished to revoke" that grant, which had become the owner's private property. *Id.*, at 715. There are still other theories yet. See, *e.g.*, *Stern*, 564 U. S., at 489.

Whatever their roots, traditionally recognized public rights have at least one feature in common: a serious and unbroken historical pedigree. See *Culley* v. *Marshall*, 601 U. S. 377, 397–398 (2024) (GORSUCH, J., concurring); *ante*, at 14–17. For good reason. If the Article III "judicial Power" encompasses "the stuff of the traditional actions at common law tried by the courts of Westminster in 1789," *ante*, at 14 (internal quotation marks omitted), it follows that matters traditionally adjudicated outside those courts might *not* fall within Article III's ambit. See *Stern*, 564 U. S., at 504–505 (Scalia, J., concurring) ("[A]n Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary"). So too with the Due Process Clause. If that clause sets customary common-law practice as the ordinary procedural baseline, see Part II–B, *supra*, clear historical evidence of a different practice might warrant a departure from that baseline, see *Murray's Lessee*, 18 How., at 280. That's why this Court has said "'a process of law . . . must be taken to be due process of law' if it enjoys 'the sanction of settled usage both in England and in this country.'" *Culley*, 601 U. S., at 397 (GORSUCH, J., concurring) (quoting *Hurtado* v. *California*, 110 U. S. 516, 528 (1884)).

With the public rights exception viewed in this light, the government's invocation of it in this case cannot succeed. Starting with a "'presumption . . . in favor of Article III courts'" and their usual attendant processes, *ante*, at 18, we look for some "deeply rooted" tradition of nonjudicial adjudication before permitting a case to be tried in a different forum under different procedures, *Culley*, 601 U. S., at 397 (GORSUCH, J., concurring). We have upheld summary procedures for customs collection, for example, because they were consistent with both "the common and statute law of England prior to the emigration of our ancestors" and "the laws of many of the States at the time of the adoption of" the Constitution. *Murray's Lessee*, 18 How., at 280; see

ante, at 14–15. But when it comes to the kind of civil-penalty suit before us, that same history points in the opposite direction, suggesting actions of this sort belong before an independent judge, a jury, and decided in a trial that accords with traditional judicial procedures. *Ante*, at 9–13; *supra*, at 11–12. Just as SEC practices themselves largely reflected as recently as 2010.

B

If all that's so, why might the government feel comfortable invoking the public rights exception? To be fair, much of it may have to do with this Court. Some of our past decisions have allowed the government to chip away at the courts' historically exclusive role in adjudicating private rights—and juries' accompanying role in that adjudication. This process began, of all places, in an admiralty case.

In *Crowell* v. *Benson*, 285 U. S. 22 (1932), this Court faced a constitutional challenge to the Longshoremen's and Harbor Workers' Compensation Act of 1927. The Act directed employers to compensate employees for injuries occurring at sea. 44 Stat. 1426. The law further assigned primary responsibility for deciding liability disputes to an Executive Branch official, the deputy commissioner of the United States Employees' Compensation Commission. *Id.*, at 1435–1437; *Crowell*, 285 U. S., at 42–43. The Court acknowledged that this regime empowered the deputy commissioner to decide in the first instance the monetary "liability of one individual to another." *Id.*, at 51. The Court recognized that this amounted to a classic "private right" suit of the kind traditionally tried in court. *Ibid.* The Court even conceded that, under the law, the factual "findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final": An Article III court could not review the facts anew. *Id.*, at 46. But the Court upheld the scheme and its limited judicial review anyway.

To get there took a dash of fiction and a pinch of surmise. From time to time, the Court observed, judges appoint their own special "masters and commissioners" to prepare reports on fact issues or damages. *Id.*, at 51. These reports are nonbinding and "essentially . . . advisory." *Ibid.* Judges themselves remain the decisionmakers. In *Crowell*, the Court embraced the fiction that Executive Branch officials might similarly act as assistants or adjuncts to Article III courts. And because judges often adopt the proposed findings of their masters and commissioners, the Court surmised, Article III posed no bar to Congress taking a further step and *requiring* judges to treat the findings of Executive Branch officials as essentially "final." *Id.*, at 46. "To hold otherwise," the Court reasoned, "would be to defeat the obvious purpose of the legislation": "to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Ibid.*

Crowell itself only went so far, however. The case fell within federal courts' admiralty jurisdiction, and tribunals sitting in admiralty in England and America alike had long heard certain matters falling within the public rights exception. See *Culley*, 601 U. S., at 398 (GORSUCH, J., concurring). In deciding those matters, courts had long tolerated some flexibility in procedures, had long restricted appellate review of factual findings, and had always proceeded without a jury. *Crowell*, 285 U. S., at 45, 53.

Soon, though, none of that mattered. Almost in a blink, the admiralty limitation was discarded, and more and more agencies began assuming adjudicatory functions previously reserved for judges and juries, employing novel procedures that sometimes bore faint resemblance to those observed in court. Along the way, prominent voices in and out of government expressed concern at this development. Consider just two typical examples. Were an agency endowed with

the power to assess civil penalties, advised a committee overseen by Attorney General (soon-to-be Justice) Robert H. Jackson, "the aggrieved person" should at least "be permitted review de novo by a Federal district court." Final Report of Attorney General's Committee on Administrative Procedure 147 (1941). That was the only way, the committee opined, "to resolve any doubts concerning the constitutionality of the procedure." *Ibid.* Around the same time, a committee of the American Bar Association led by Roscoe Pound sounded a similar alarm. Administrative agencies, the committee warned, had a "tendency to mix up rule making, investigation, prosecution, the advocate's function, the judge's function, and the function of enforcing the judgment, so that the whole proceeding from end to end is one to give effect to a complaint." Report of the Special Committee on Administrative Law, 63 Ann. Rep. 331, 351 (1938).

The high-water mark of the movement toward agency adjudication may have come in 1977 in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442. Some have read that decision to suggest the category of public rights might encompass pretty much any case arising under any "'new statutory obligations,'" Brief for Petitioner 22 (quoting *Atlas Roofing*, 430 U. S., at 450). It is a view the government essentially espouses in this case. But without reference to any constitutional text or history to guide what does or does not qualify as a public right, that view has (unsurprisingly) proven wholly unworkable.

It did not take long for this Court to realize as much. Just 12 years later, in *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989), this Court cabined *Atlas Roofing* so narrowly that the author of *Atlas Roofing* complained that the Court had "overrul[ed]" it. 492 U. S., at 71, n. 1 (White, J., dissenting); see *ante*, at 23, n. 3. Far from endorsing the notion that any new statutory obligation could qualify for

treatment as a public right, for example, the Court in *Granfinancieria* read *Atlas Roofing* as having "left the term 'public rights' undefined." 492 U. S., at 51, n. 8. And since then this Court has, in one case after another, "adhere[d]" only to *Atlas Roofing's* "general teaching" that Congress may constitutionally adopt "new statut[es]" assigning matters that indeed qualify as "public rights . . . to an administrative agency." 492 U. S., at 51 (internal quotation marks omitted); see, *e.g.*, *Stern*, 564 U. S., at 489–490; *Oil States*, 584 U. S., at 345.

Yet, even after the Court moved away from *Atlas Roofing*, our public rights jurisprudence remained muddled. Since then, the Court has suggested that public rights might include those "involving statutory rights that are integral parts of a public regulatory scheme." *Granfinanciera*, 492 U. S., at 55, n. 10. We have changed course and tried our hand at a five-factor balancing test. See *Stern*, 564 U. S., at 491 (describing *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986)). We have replaced that test with one that considers "at least seven different" factors. 564 U. S., at 504 (Scalia, J., concurring). And at one time or another, these factors have included the consideration of "the concerns that drove Congress to depart from the requirements of Article III." *Schor*, 478 U. S., at 851. So, for example, we have asked whether insistence on "the institutional integrity of the Judicial Branch" would "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Ibid.*

Today, the Court does much to return us to a more traditional understanding of public rights. Adhering to *Granfinancieria*, the Court rejects the government's overbroad reading of *Atlas Roofing* and recognizes that the kind of atextual and ahistorical (not to mention confusing) tests it inspired do little more than ask policy questions the Constitution settled long ago. Yes, a limited category of public rights were originally and even long before understood to

be susceptible to resolution without a court, jury, or the other usual protections an Article III court affords. But outside of those limited areas, we have no license to deprive the American people of their constitutional right to an independent judge, to a jury of their peers, or to the procedural protections at trial that due process normally demands. Let alone do so whenever the government wishes to dispense with them.

This Court does not subject other constitutional rights to such shabby treatment. We have "reaffirm[ed]," many times and "emphatically[,] that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988). We have rejected a framework for Second Amendment challenges that would balance the right to bear arms against "'other important governmental interests.'" *District of Columbia* v. *Heller*, 554 U. S. 570, 634 (2008). It is hornbook Fourth Amendment law that "[a] generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Georgia* v. *Randolph*, 547 U. S. 103, 115, n. 5 (2006). And even though the Sixth Amendment's guarantee of a jury trial in criminal cases may have "'its weaknesses and the potential for misuse,'" *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968), we continue to insist that it "be jealously preserved," *Patton* v. *United States*, 281 U. S. 276, 312 (1930); see *Ramos* v. *Louisiana*, 590 U. S. 83, 110–111 (2020) (plurality opinion); *Erlinger*, 602 U. S., at ___ (slip op., at 18) ("There is no efficiency exception to the . . . Sixth Amendmen[t]").

Why should Article III, the Seventh Amendment, or the Fifth Amendment's promise of due process be any different? None of them exists to "protec[t] judicial authority for its own sake." *Oil States*, 584 U. S., at 356 (GORSUCH, J., dissenting). They exist to "protect the individual." *Bond* v. *United States*, 564 U. S. 211, 222 (2011). And their protec-

tions are no less vital than those afforded by other constitutional provisions. As American colonists learned under British rule, "the right of trial" means little "when the actual administration of justice is dependent upon caprice, or favour, [or] the will of rulers." 3 Story §1568, at 426; *id.*, §1783, at 661. In recognizing as much today, the Court essentially follows the advice of Justices Brennan and Marshall, "limit[ing] the judicial authority of non-Article III federal tribunals to th[o]se few, long-established exceptions" that bear the sanction of history, and "countenanc[ing] no further erosion." *Schor*, 478 U. S., at 859 (Brennan, J., joined by Marshall, J., dissenting).

C

The dissent's competing account of public rights is astonishing. On its telling, the Constitution might impose some (undescribed) limits on the power of the government to send cases "involving the liability of one individual to another" to executive tribunals for resolution. *Post*, at 22 (opinion of SOTOMAYOR, J.). But, thanks to public rights doctrine, the dissent insists, the Constitution imposes *no* limits on the government's power to seek civil penalties "outside the regular courts of law where there are no juries." *Post*, at 2. In that field, the Constitution falls silent. The dissent does not even attempt to deploy any of the contrived balancing tests that emerged in *Atlas Roofing*'s aftermath to rein in the government's power. But where in Article III, the Seventh Amendment, and due process can the dissent find this new rule? What about founding-era practice or original meaning? And why would a Constitution drawn up to protect against arbitrary government action make it easier for the government than for private parties to escape its dictates? The dissent offers no answers.

To be sure, the dissent tries to appeal to precedent. It even asserts that our decisions support, "*without exception*," its sweeping conception of public rights doctrine. *Post*, at

12 (emphasis added). But the dissent's approach to our precedents is like a picky child at the dinner table. It selects only a small handful while leaving much else untouched. To start, the dissent lingers briefly on *Murray's Lessee*—but not long enough to explain the opinion's conception of Article III, due process, or the extended historical inquiry that led the Court to conclude the collection of revenue concerned a public right. See *post*, at 9–10; *supra*, at 8, 10–14.

The 19th century behind it (for it does not trouble with the founding era), the dissent turns to *Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320 (1909). Drawing on that decision, the dissent contends that "Congress [has] routinely 'impose[d] appropriate obligations'" by statute and given "'executive officers the power to enforce'" them "'without the necessity of invoking the judicial power.'" *Post*, at 11 (quoting *Stranahan*, 214 U. S., at 339). Notably absent from the dissent's account, however, is the decision's discussion of Congress's long-recognized and extensive authority over the field of immigration, the area of law at issue there. See *id.*, at 339. Unmentioned, too, is *Stranahan*'s explanation that what links immigration to other public rights like "tariff[s], . . . internal revenue, taxation," and "foreign commerce" is that, "'from the beginning[,] Congress has exercised a plenary power'" over them "because they all relate to subjects peculiarly within the authority of the legislative department." *Id.*, at 334, 339.

Really, one has to wonder: If the public rights exception is as broad and unqualified as the dissent asserts, why did our predecessors bother to discuss history or Congress's peculiar powers when it comes to revenue and immigration? Why didn't the Court simply announce the rule the dissent would have us announce today: that our Constitution does not stand in the way of "agency adjudications of statutory claims . . . brought by the Government in its sovereign ca-

pacity"? *Post*, at 4. The answer, of course, is that the Constitution has never countenanced the dissent's notion that the Executive is free to reassign virtually any civil case in which it is a party to its own tribunals where its own employees decide cases and inconvenient juries and traditional trial procedures go by the boards.

That my dissenting colleagues plow ahead anyway with their remarkable conception of public rights is all the more puzzling considering how regularly they have argued *against* that sort of sweeping concentration of governmental power. The dissenters have recognized that a "lack of standardized procedural safeguards" can leave government enforcement schemes "vulnerable to abuse" and individuals subject to coercive "pressure from unchecked prosecutors." *Culley*, 601 U. S., at 405, 407 (SOTOMAYOR, J., joined by KAGAN and JACKSON, JJ., dissenting). They have contended that the Judiciary has an affirmative obligation to supply "meaningful remedies," trials before judges and juries included, even when "Congress or the Executive has [already] created a remedial process." *Egbert* v. *Boule*, 596 U. S. 482, 524–525 (2022) (SOTOMAYOR, J., joined by, *inter alios*, KAGAN, J., dissenting) (internal quotation marks omitted; emphasis deleted). And like most every current Member of this Court at one time or another, they have acknowledged that the jury-trial right "stands as one of the Constitution's most vital protections against arbitrary government." *United States* v. *Haymond*, 588 U. S. 634, 637 (2019) (plurality opinion).

The dissent's conception of public rights is so unqualified that it refuses to commit itself on the question whether even muted forms of judicial review—such as asking executive tribunals to muster "more than a mere scintilla" of evidence in support of their rulings—are constitutionally required in the essentially unbounded class of cases that fall within its conception of public rights. See Part I, *supra*; *post*, at 8, n. 4. Gone, too, is any role for the jury—for why would the

government ever go to court if it may more readily secure a win before its own employees? The only attempt to mitigate the havoc its rule would wreak comes when the dissent declares that "'[t]he public-rights doctrine does not extend to . . . criminal matters.'" *Post*, at 27, n. 9. But the dissent does not (and cannot) explain how that fits with all else it says. If, as the dissent insists, a public right is any "new right" that "belongs to the public and inheres in the Government in its sovereign capacity," *post*, at 28, what could possibly better fit the description than the enforcement of new criminal laws? See *Shinn* v. *Martinez Ramirez*, 596 U. S. 366, 376 (2022) ("The power to convict and punish criminals lies at the heart of the States' residuary and inviolable sovereignty" (internal quotation marks omitted)).[2]

All but admitting its view has no support in "historical practice dating back to the founding," the dissent chastises the Court for daring to rely on that practice to flesh out the scope of the public rights exception. *Post*, at 18. It would be so much simpler, the dissent says, to adopt its rule permitting the government to skirt oversight by judge and jury alike whenever it enacts a new law. And, true enough, "a principle that the government always wins surely would be simple for judges to implement." *United States* v. *Rahimi*, 602 U. S. ___, ___ (2024) (GORSUCH, J., concurring) (slip op., at 6). But looking to original meaning and historical practice informing it is exactly how this Court proceeds in so

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[2]The best the dissent can do is to observe that "Article III itself prescribes that '[t]he trial of all Crimes . . . shall be by Jury.'" *Post*, at 27, n. 9 (quoting §2, cl. 3). That response might be reassuring if the dissent's treatment of the Seventh Amendment didn't supply a roadmap for working around it. On the dissent's telling, the Seventh Amendment can be dispensed with at will: It applies "only in judicial proceedings," and not whenever the government chooses to assign a matter to its own in-house tribunals. *Post*, at 5. And under that logic, there is no apparent reason why the government could not evade Article III's jury-trial right just as easily, simply by choosing to route criminal prosecutions through executive agencies.

many other contexts where we seek to honor the Constitution's demands—including, notably, when we seek to ascertain the scope of the *criminal* jury-trial right and the defendant's attendant right to confront his accusers. See *Erlinger*, 602 U. S., at ___–___ (slip op., at 19–20); *Crawford* v. *Washington*, 541 U. S. 36, 50 (2004). What's more, this approach has the virtue of "keep[ing] judges in their proper lane" by "seeking to honor the supreme law the people have ordained rather than substituting our will for theirs." *Rahimi*, 602 U. S., at ___–___ (GORSUCH, J., concurring) (slip op., at 4–5); see *Crawford*, 541 U. S., at 67.

It is hard, as well, to take seriously the dissent's charges of unworkability and unpredictability. At least until today, the dissenters supported procedural protections for those in the government's sights in civil as well as criminal cases. What kind of protections? Often, they have argued, it depends on a judicial balancing test. One that is "flexible," defies "technical conception," lacks "fixed content," and will "not always yield the same result" even when applied in similar circumstances. *Culley*, 601 U. S., at 413 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). As we have seen, that was essentially the course some pursued, too, when it came to the public rights exception in the fallout from *Atlas Roofing*. See Part III–B, *supra*. But that kind of "'we know it when we see it'" approach to constitutional rights, *post*, at 21, can hardly claim any serious advantages when it comes to workability or predictability.

Failing all else, the dissent retreats to *Atlas Roofing*. At least that decision, it insists, supports its nearly boundless conception of public rights. The dissent goes so far as to accuse the Court of undermining "*stare decisis* and the rule of law," *post*, at 15, and engaging in "a power grab," *post*, at 37, by failing to give *Atlas Roofing* its broadest possible construction. It's a "disconcerting" accusation indeed, *post*, at 36, and a misdirected one at that. Construed as broadly as the dissent proposes, *Atlas Roofing*'s view of public rights

stands as an outlier in our jurisprudence—with no apparent support in original meaning, at odds with prior precedent, and inconsistent with later precedent as well. See *ante*, at 25, n. 4; Part III–B, *supra*. Meanwhile, the Court's alternative construction of *Altas Roofing* fits far more comfortably with all those legal sources. In that respect, the majority's approach is of a piece with *Granfinanciera*'s similar approach 25 years ago. And, more broadly, it is of a piece with our usual practice of construing "loose language" found in a prior judicial opinion in a way that better conforms it to the mainstream of our precedents. *Groff* v. *DeJoy*, 600 U. S. 447, 474 (2023) (SOTOMAYOR, J., concurring). As the dissenters have previously acknowledged, that course is neither unusual nor at odds with *stare decisis*. See *id.*, at 474–475; see also *Brown* v. *Davenport*, 596 U. S. 118, 141 (2022) ("We neither expect nor hope that our successors will comb these pages for stray comments and stretch them beyond their context—all to justify an outcome inconsistent with this Court's reasoning and judgments").

Were there any doubt about the propriety of the Court's treatment of *Atlas Roofing*, consider one more feature of the alternative the dissent proposes. In defending the broadest possible construction of *Atlas Roofing*'s public rights discussion, the dissent necessarily endorses that decision's exceptionally narrow conception of the Seventh Amendment. See *post*, at 6. After all, as public rights expand, so too the jury-trial right must contract. Yet *Atlas Roofing*'s discussion of the jury-trial right, no less than its discussion of public rights, is difficult to square with precedent and original meaning.

Recall that, from the start, the Seventh Amendment was understood to protect that right "not merely" in suits recognized at common law, but in "*all* suits which are" of legal, as opposed to "equity [or] admiralty[,] jurisdiction." *Parsons*, 3 Pet., at 447 (emphasis added); see Part II–B, *supra*. This Court repeated that understanding of the Amendment

until well into the 1970s, noting, for example, that "the applicability of the constitutional right to jury trial in actions enforcing statutory rights" was "a matter too obvious to be doubted." *Curtis* v. *Loether*, 415 U. S. 189, 193 (1974) (internal quotation marks omitted); accord, *Pernell* v. *Southall Realty*, 416 U. S. 363, 375 (1974) (the Seventh "Amendment requires trial by jury in actions unheard of at common law"). And the Court rejected the notion that a statute must present "a close equivalent" to a common-law cause of action; the jury-trial right attached, we said, so long as the "action involve[d] rights and remedies of the sort traditionally enforced in an action at law." *Ibid.*

Atlas Roofing ignored all of that. Instead, it suggested, "[t]he phrase 'Suits at common law' has been construed to refer to cases tried *prior* to the adoption of the Seventh Amendment in courts of law." 430 U. S., at 449 (emphasis added). That cramped construction of the Seventh Amendment was, of course, a key move in *Atlas Roofing*. For without it, the Court would have been hard pressed to suggest the public rights doctrine permits Congress to route any "'new cause of action'" for adjudication before agencies where juries do not sit. *Post*, at 14 (quoting *Atlas Roofing*, 430 U. S., at 461).

Almost immediately, however, the Court rejected *Atlas Roofing*'s analysis, not just with respect to public rights doctrine but the Seventh Amendment, too. Returning to our mainstream precedents, the Court reaffirmed the applicability of the Seventh Amendment to new causes of action, first in *Tull* v. *United States*, 481 U. S. 412 (1987), and then in *Granfinanciera*. See *ante*, at 8–9. And by 1990, our case law had come full circle, announcing once again what has always been true: that "[t]he right to a jury trial includes more than the common-law forms of action recognized in 1791." *Teamsters* v. *Terry*, 494 U. S. 558, 564.

Today, the Court respects and follows this longstanding

message in our Seventh Amendment precedents. The dissent chooses another path entirely—adopting a reading of *Atlas Roofing* that leads not only to an implausibly broad construction of public rights, but to an implausibly narrow understanding of the jury-trial guarantee as well. One wholly at odds with precedents both old and new. Nor is the dissent shy about its real motivation—and it has nothing to do with respect for precedent but much more to do with a "power grab": Holding the government to the Constitution's promise of a jury trial, the dissent insists, would impose "constraints on what," in its view, "modern-day adaptable governance must look like." *Post*, at 37. All of which, at bottom, amounts to little more than a complaint with the Constitution's revolutionary promise of popular oversight of government officials—and with those judges who would honor that promise.

*

People like Mr. Jarkesy may be unpopular. Perhaps even rightly so: The acts he allegedly committed may warrant serious sanctions. But that should not obscure what is at stake in his case or others like it. While incursions on old rights may begin in cases against the unpopular, they rarely end there. The authority the government seeks (and the dissent would award) in this case—to penalize citizens without a jury, without an independent judge, and under procedures foreign to our courts—certainly contains no such limits. That is why the Constitution built "high walls and clear distinctions" to safeguard individual liberty. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 239 (1995). Ones that ensure even the least popular among us has an independent judge and a jury of his peers resolve his case under procedures designed to ensure a fair trial in a fair forum. In reaffirming all this today, the Court hardly leaves the SEC without ample powers and recourse. The agency is free to pursue all of its charges against Mr.

Jarkesy. And it is free to pursue them exactly as it had always done until 2010: In a court, before a judge, and with a jury. With these observations, I am pleased to concur.

SUPREME COURT OF THE UNITED STATES

No. 22–859

SECURITIES AND EXCHANGE COMMISSION, PETITIONER *v.* GEORGE R. JARKESY, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 27, 2024]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

Throughout our Nation's history, Congress has authorized agency adjudicators to find violations of statutory obligations and award civil penalties to the Government as an injured sovereign. The Constitution, this Court has said, does not require these civil-penalty claims belonging to the Government to be tried before a jury in federal district court. Congress can instead assign them to an agency for initial adjudication, subject to judicial review. This Court has blessed that practice repeatedly, declaring it "the 'settled judicial construction'" all along; indeed, "'from the beginning.'" *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 460 (1977). Unsurprisingly, Congress has taken this Court's word at face value. It has enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations. Congress had no reason to anticipate the chaos today's majority would unleash after all these years.

Today, for the very first time, this Court holds that Congress violated the Constitution by authorizing a federal agency to adjudicate a statutory right that inheres in the

Government in its sovereign capacity, also known as a public right. According to the majority, the Constitution requires the Government to seek civil penalties for federal-securities fraud before a jury in federal court. The nature of the remedy is, in the majority's view, virtually dispositive. That is plainly wrong. This Court has held, without exception, that Congress has broad latitude to create statutory obligations that entitle the Government to civil penalties, and then to assign their enforcement outside the regular courts of law where there are no juries.

Beyond the majority's legal errors, its ruling reveals a far more fundamental problem: This Court's repeated failure to appreciate that its decisions can threaten the separation of powers. Here, that threat comes from the Court's mistaken conclusion that Congress cannot assign a certain public-rights matter for initial adjudication to the Executive because it must come only to the Judiciary.

The majority today upends longstanding precedent and the established practice of its coequal partners in our tripartite system of Government. Because the Court fails to act as a neutral umpire when it rewrites established rules in the manner it does today, I respectfully dissent.

I

The story of this case is straightforward. The Securities and Exchange Commission (SEC or Commission) investigated respondents George Jarkesy and his advisory firm Patriot28, LLC, for alleged violations of federal-securities laws in connection with the launch of two hedge funds.

In deciding how and where to enforce these laws, the SEC could have filed suit in federal court or adjudicated the matter in an administrative enforcement action subject to judicial review. See 15 U. S. C. §§77h–1, 77t, 78u, 78u–2, 78u–3, 80b–3, 80b–9. The SEC opted for the latter. In 2013, the SEC initiated an administrative enforcement action against respondents, alleging violations of the Securities

Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. Specifically, the SEC alleged that respondents falsely told brokers and investors that: (1) a prominent accounting firm would audit the hedge funds; (2) a prominent investment bank would serve as the funds' prime broker; and (3) one of the funds would invest 50% of its capital in certain life-insurance policies. In reality, the audit never took place, the bank never opened a prime brokerage account, and the hedge fund invested less than 20% of its capital in the life-insurance policies. In addition to misrepresenting the funds' investment strategies, respondents allegedly overvalued the funds' holdings to charge higher management fees.

The SEC assigned the action to one of its administrative law judges, who held an evidentiary hearing and issued a lengthy initial decision, concluding that respondents in fact had violated the three securities laws. The full Commission reviewed the initial decision and reached the same determination. The Commission also denied respondents' constitutional challenges to the order, including that the agency's in-house adjudication violated respondents' Seventh Amendment right to a jury trial in federal court. Ultimately, the SEC ordered respondents to pay a civil penalty of $300,000 and to cease and desist from violating the federal-securities laws. It also barred Jarkesy from doing certain things in the securities industry and ordered Patriot28 to disgorge $685,000 in illicit profits.

Respondents filed a petition for review in the Fifth Circuit. 34 F. 4th 446, 466 (2022). A divided panel granted the petition and vacated the SEC's order. The panel held, over the dissent of Judge Davis, that respondents were entitled to a jury trial in federal court under the Seventh Amendment because the federal-securities antifraud provisions were similar to common-law fraud claims to which the jury-trial right would attach. See *id.*, at 451–459. Because the SEC forced respondents to proceed within the agency, the

Court of Appeals held that the SEC violated respondents' Seventh Amendment rights and thus vacated the SEC's order. *Id.*, at 465–466.[1]

The majority affirms the Fifth Circuit's decision, notwithstanding the mountain of precedent against it. A faithful application of our precedent would have led, inexorably, to upholding the statutory scheme that Congress enacted for the SEC's in-house adjudication of federal-securities claims.

II

The majority did not need to break any new ground to resolve respondents' Seventh Amendment challenge. This Court's longstanding precedent and established government practice uniformly support the constitutionality of administrative schemes like the SEC's: agency adjudications of statutory claims for civil penalties brought by the Government in its sovereign capacity. See Part II–B (*infra*, at 7–14). In assessing the constitutionality of such adjudications, the political branches' "'[l]ong settled and established practice,'" which this Court has upheld and reaffirmed time and again, is entitled to "'great weight.'" *Chiafalo* v. *Washington*, 591 U. S. 578, 592–593 (2020) (quoting *The Pocket Veto Case*, 279 U. S. 655, 689 (1929)); accord, *Vidal* v. *Elster*, 602 U. S. 286, 323 (2024) (BARRETT, J., concurring in part); *id.*, at 330 (SOTOMAYOR, J., concurring in judgment); *Consumer Financial Protection Bureau* v. *Community Financial Services Assn. of America, Ltd.*, 601 U. S. 416, 442

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[1] As the majority notes, respondents also prevailed on two other constitutional challenges in the Court of Appeals. See *ante,* at 6. The divided panel concluded that: (1) the SEC's discretion to bring the case within the agency instead of federal court violated the nondelegation doctrine; and (2) a for-cause restriction on the Administrative Law Judge's removal violated Article II and the separation of powers. 34 F. 4th 446, 459–465 (CA5 2022). I disagree with the ruling below on both points. Because the majority does not reach these issues, though, I address only the Seventh Amendment challenge discussed in the majority's opinion.

(2024) (KAGAN, J., concurring).

A

There are two key constitutional provisions at issue here. One is the Seventh Amendment, which "preserve[s]" the "right of trial by jury" in "Suits at common law, where the value in controversy shall exceed twenty dollars." The other is Article III's Vesting Clause, which provides that the "judicial Power of the United States . . . shall be vested" in federal Article III courts. This case presents the familiar interplay between these two provisions.

Although this case involves a Seventh Amendment challenge, the principal question at issue is one rooted in Article III and the separation of powers. That is because, as the majority rightly acknowledges, the Seventh Amendment's jury-trial right "applies" only in "an Article III court." *Ante,* at 7. That conclusion follows from both the text of the Constitution and this Court's precedents.

As to the text, the Amendment is limited to "Suits at common law." That means two things. First, that the right applies only in judicial proceedings. The term "suit," after all, refers to "the prosecution of some demand in a Court of justice," *Cohens* v. *Virginia*, 6 Wheat. 264, 407 (1821) (Marshall, C. J.), or a "proceeding in a court of justice," *Weston* v. *City Council of Charleston*, 2 Pet. 449, 464 (1829) (same) ("The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit"). Consistent with that understanding, this Court has held repeatedly that "the Seventh Amendment is not applicable to administrative proceedings." *Tull* v. *United States*, 481 U. S. 412, 418, n. 4 (1987); accord, *Atlas Roofing*, 430 U. S., at 454–455; *Curtis* v. *Loether*, 415 U. S. 189, 195 (1974). Factfinding by a jury is "incompatible with the whole concept of administrative adjudication," which empowers executive officials to find the relevant facts and apply the law to

those facts like juries do in a courtroom. *Pernell* v. *Southall Realty*, 416 U. S. 363, 383 (1974) (collecting cases).

Second, the requirement that the "'[s]uit'" must be one "'at common law'" means that the claim at issue must be "'legal in nature.'" *Ante,* at 8. So, whether a defendant is entitled to a jury under the Seventh Amendment depends on both the forum and the cause of action. If the claim is in an Article III proceeding, then the right to a jury attaches if the claim is "legal in nature" and the amount in controversy exceeds $20. *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 53 (1989); *Atlas Roofing*, 430 U. S., at 454, n. 12, 461, n. 16. Yet when, as here, the claim proceeds in a non-Article III forum, the relevant question becomes whether "Congress properly assign[ed the] matter" for decision to that forum consistent with Article III and the separation of powers. *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325, 345 (2018). In other words, the question is whether Congress improperly bestowed federal judicial power on a non-Article III forum. See *id.*, at 334 (Congress cannot "'confer the Government's "judicial Power" on entities outside Article III'" (quoting *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011))).[2]

The conclusion that Congress properly assigned a matter to an agency for adjudication therefore necessarily "resolves [any] Seventh Amendment challenge." *Oil States*, 584 U. S., at 345 (explaining that if non-Article III adjudication

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[2] Since the founding, Executive Branch officials have adjudicated certain matters, while others have required resolution in an Article III court. An executive official properly vested with the authority to find facts, apply the law to those facts, and impose the consequences prescribed by law exercises executive power under Article II, not judicial power under Article III. See *Arlington* v. *FCC*, 569 U. S. 290, 305, n. 4 (2013) (explaining that agency rulemaking and adjudications may "take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power'" (quoting Art. II, §1, cl. 1)).

is permissible, then "'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder'" (quoting *Granfinanciera*, 492 U. S., at 53–54)); see W. Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511, 1571 (2020) ("The Article III analysis should be conducted first, on its own. And then . . . if the non-Article III adjudication is permissible, the Seventh Amendment should be ignored"). When executive power is at stake, Congress does not violate Article III or the Seventh Amendment by authorizing a nonjury factfinder to adjudicate the dispute.

So, the critical issue in this type of case is whether Congress can assign a particular matter to a non-Article III factfinder.

B

For more than a century and a half, this Court has answered that Article III question by pointing to the distinction between "private rights" and "public rights." See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856) (recognizing public-rights exception). The distinction is helpful because public rights always can be assigned outside of Article III. They "'do not require judicial determination'" under the Constitution, even if they "'are susceptible of it.'" *Crowell* v. *Benson*, 285 U. S. 22, 50 (1932) (quoting *Ex parte Bakelite Corp.*, 279 U. S. 438, 451 (1929)).

The majority says that aspects of the public-rights doctrine have been confusing. See *ante,* at 17. That might be true for cases involving wholly private disputes, but not for cases where the Government is a party.[3] It has long been

[3] Every case that has expressed consternation about the precise contours of the public-rights doctrine, including those cited by the majority, involve only private disputes—or, more precisely, "disputes to which the Federal Government is not a party in its sovereign capacity." *Granfi-*

settled and undisputed that, at a minimum, a matter of public rights arises "between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell*, 285 U. S., at 50; *Oil States*, 584 U. S., at 335 (describing the "Court's longstanding formulation of the public-rights doctrine"); accord, *Granfinanciera*, 492 U. S., at 51, and n. 8; *Atlas Roofing*, 430 U. S., at 452, 457; *Ex parte Bakelite Corp.*, 279 U. S., at 451. Indeed, "from the time the doctrine of public rights was born, in 1856," everyone understood that public rights "'arise "between the government and others,"'" and refer to "rights *of the public*—that is, rights pertaining to claims brought by or against the United States." *Granfinanciera*, 492 U. S., at 68–69 (Scalia, J., concurring in part and concurring in judgment); see *ibid.* (collecting sources). So, while this Court has recognized public rights in certain disputes between private parties, see *infra*, at 19–20, the doctrine's heartland consists of claims belonging to the Government.

When a claim belongs to the Government as sovereign, the Constitution permits Congress to enact new statutory obligations, prescribe consequences for the breach of those obligations, and then empower federal agencies to adjudicate such violations and impose the appropriate penalty. See *Atlas Roofing*, 430 U. S., at 450–455 (collecting cases).[4]

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nanciera, S. A. v. *Nordberg*, 492 U. S. 33, 55, n. 10 (1989) (involving dispute between private parties in bankruptcy court); see *ante*, at 17 (citing *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325, 332–334 (2018) (involving patent dispute between private parties before the U. S. Patent and Trademark Office); *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 575 (1985) (involving challenge to arbitration procedure for private parties disputing data compensation under federal pesticide registration program)); see also *Stern* v. *Marshall*, 564 U. S. 462, 469–470 (2011) (involving dispute between private parties in bankruptcy court); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 56–57 (1982) (plurality opinion) (same).

[4]Judicial review of these agency decisions allows Congress to avoid

This Court has repeatedly emphasized these unifying principles through an unbroken series of cases over almost 200 years.

1

Start at the beginning, with *Murray's Lessee* in 1856. In that case, the Government issued a warrant to compel a federal customs collector to produce public funds that the Government determined the collector had unlawfully withheld. See 18 How., at 274–275. The Government executed the warrant to seize and sell a plot of the collector's land to make up for the withheld funds. See *id.*, at 274. In upholding the sale of the seized property, this Court concluded that the Government's in-house assessment and collection of taxes and penalties based on a federal official's adjudication of the facts did not violate Article III. The scheme was

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any due process concerns that might arise from having executive officials deprive someone of their property without review in an Article III court. See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 455, n. 13 (1977) ("[T]hese cases do not present the question whether Congress may commit the adjudication of public rights and the imposition of fines for their violation to an administrative agency without any sort of intervention by a court at any stage of the proceedings"); accord, *Oil States*, 584 U. S., at 344 (same); Tr. of Oral Arg. 29 (Principal Deputy Solicitor General) (stating that "the Court has emphasized that judicial review of agency action may well be required" and the Due Process Clause may "ha[ve] something to say" about that requirement). The concurrence reproaches this dissent for declining to address any potential deficiencies in this administrative scheme, as well as failing to specify which forms of judicial review may be constitutionally required, see *ante,* at 22 (opinion of GORSUCH, J.), even though respondents did not raise any due process challenge in this case. Deciding whether this statutory scheme is procedurally deficient and so circumscribes judicial review that it violates due process would be inconsistent with the "settled principles of party presentation and adversarial testing." *Vidal* v. *Elster*, 602 U. S. 286, 328 (2024) (SOTOMAYOR, J., concurring in judgment) (citing *Maslenjak* v. *United States*, 582 U. S. 335, 354 (2017) (GORSUCH, J., joined by THOMAS, J., concurring in part and concurring in judgment)).

constitutional, the Court said, because "public rights" were at issue. *Id.*, at 284. In other words, the dispute arose between the Government and the customs collector in connection with the Government's exercise of its constitutional power to collect revenue. Congress could have brought such claims, if it wanted, "within the cognizance of the courts of the United States, as it may deem proper." *Ibid.* The Court thus endorsed that constitutional balance: Congress could decide whether to assign a public-rights dispute to the Executive for initial adjudication subject to judicial review or to an Article III federal court for resolution.

Fast forward half a century. In *Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320, 338–340 (1909), the Court upheld a customs official's imposition of a penalty on a steamship company that violated immigration laws barring the entry of certain classes of people into the country. The customs official determined the facts, adjudicated the violation, and enforced the statutory prohibition on immigration through the assessment of a monetary penalty. See *id.*, at 329. The Court noted the breadth of Congress's immigration power and held that the civil-penalty statutory scheme at issue was "beyond all question constitutional." *Id.*, at 342. Yet, far from restricting the public-rights doctrine to this particular exercise of congressional power or to specific prerogatives, the *Stranahan* Court went out of its way to explain that the "settled judicial construction" that civil-penalty claims brought by the Government could be assigned to the Executive for initial adjudication extended "not only as to tariff, but as to internal revenue, taxation, and other subjects," including the regulation of foreign commerce. *Id.*, at 339; see also *id.*, at 334–335.

Importantly, *Stranahan* rejected the "proposition" that, in "cases of penalty or punishment, . . . enforcement must depend upon the exertion of judicial power, either by civil or criminal process." *Id.*, at 338. In words that could have

been written in response to today's ruling, the Court explained that such a "proposition magnifies the judicial to the detriment of all other departments of the Government, disregards many previous adjudications of this court, and ignores practices often manifested and hitherto deemed to be free from any possible constitutional question." *Ibid.* For that reason, the validity of legislation authorizing the non-Article III adjudication of civil-penalty claims does not turn on the Judiciary's assessment of whether it is necessary for executive officials "to enforce designated penalties without resort to the courts." *Id.*, at 339. Whether or not such legislation violates Article III depends on whether Congress acted pursuant to a "grant of power made by the Constitution," and not on whether it "relate[s] to subjects peculiarly within the authority of the legislative department of the Government" or on the circumstances that might have "caused Congress to exert a specified power." *Id.*, at 339–340.

By the time *Stranahan* was decided, Congress already routinely "impose[d] appropriate obligations and sanction[ed] their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." *Id.*, at 339. Far from limiting the public-rights doctrine to the particular context in *Stranahan* and prior cases, this Court has expressly rejected the notion that the public-rights doctrine is so confined. See *infra*, at 18–19. This Court has repeatedly approved Congress's assignment of public rights to agencies in diverse areas of the law, reflecting Congress's varied constitutional powers.[5] A nonexhaustive list includes "interstate and foreign commerce, taxation, immigration, the public lands, public health, the

[5]The majority's fixation on this dissent's discussion of *Stranahan*, see *ante,* at 16, n. 1, misses the fact that *Stranahan* exists within a long line of cases recognizing the diverse areas of the law comprising the public-rights doctrine.

facilities of the post office, pensions, and payments to veterans," *Crowell*, 285 U. S., at 51, and n. 13 (collecting cases); see also, *e.g.*, *Helvering* v. *Mitchell*, 303 U. S. 391, 401–404 (1938) (administrative penalty for underpayment of taxes); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 22–24, 48–49 (1937) (reinstatement of dismissed employee and backpay in adjudication of unfair-labor-practices claim under the National Labor Relations Act); *Phillips* v. *Commissioner*, 283 U. S. 589, 591–592 (1931) (deficiency assessments for unpaid taxes); *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting*, 287 U. S. 329, 334–335 (1932) (fines for violation of immigration law barring entry of certain classes of individuals); *Ex parte Bakelite Corp.*, 279 U. S., at 446–447, 451, 458 (adjudication of unfair-methods-of-competition and unfair-acts claims, and imposition of additional duties under customs law); *Passavant* v. *United States*, 148 U. S. 214, 215–216, 220 (1893) (penalty for undervaluation of imported merchandise).

The list could go on and on. That is because, in every case where the Government has acted in its sovereign capacity to enforce a new statutory obligation through the administrative imposition of civil penalties or fines, this Court, without exception, has sustained the statutory scheme authorizing that enforcement outside of Article III.

2

A unanimous Court made this exact point nearly half a century ago in *Atlas Roofing*. That was the last time this Court considered a public-rights case where the constitutionality of an in-house adjudication of statutory claims brought by the Government was at issue. That case presented the same question as this one: Whether the Seventh Amendment permits Congress to commit the adjudication of a new cause of action for civil penalties to an administrative agency. 430 U. S., at 444. The Court said it did.

In *Atlas Roofing*, the Court explained how Congress identified a national problem, concluded that existing legal remedies were inadequate to address it, and then created a new statutory scheme that endorsed Executive in-house enforcement as a solution. Specifically, Congress found "that work-related deaths and injuries had become a 'drastic' national problem," and that existing causes of action, including tort actions for negligence and wrongful death, did not adequately "protect the employee population from death and injury due to unsafe working conditions." *Id.*, at 444–445. In response, Congress enacted the Occupational Safety and Health Act of 1970 (OSHA) to require employers "to avoid maintaining unsafe or unhealthy working conditions." *Id.*, at 445. OSHA in turn "empower[ed] the Secretary of Labor to promulgate health and safety standards," and the Occupational Safety and Health Review Commission to impose civil penalties on employers maintaining unsafe working conditions, regardless of whether any worker was in fact injured or killed. *Id.*, at 445–446.

Two employers that had been assessed civil penalties for OSHA violations resulting in the death of employees challenged the constitutionality of the statute's enforcement procedures. They observed that "a suit in a federal court by the Government for civil penalties for violation of a statute is a suit for a money judgment[,] which is classically a suit at common law." *Id.*, at 449. Therefore, the employers claimed, the Seventh Amendment right to a jury attached and Congress could not assign the matter to an agency for resolution. See *ibid.*

This Court upheld OSHA's statutory scheme. It relied on the long history of public-rights cases endorsing Congress's now-settled practice of assigning the Government's rights to civil penalties for violations of a statutory obligation to in-house adjudication in the first instance. See *id.*, at 450–455. In light of this "history and our cases," the Court con-

cluded that, where Congress "create[s] a new cause of action, and remedies therefor, unknown to the common law," it is free to "plac[e] their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved." *Id.*, at 460–461. "That is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law." *Id.*, at 455; see *id.*, at 461, n. 16.

The "new rule" and "legally unsound principle" that the majority accuses this dissent of "unfurl[ing]" today, *ante,* at 17–18, n. 2, is the one that this Court declared "'settled judicial construction' . . . 'from the beginning'": "[T]he Government could commit the enforcement of statutes and the imposition and collection of fines . . . for administrative enforcement, without judicial trials," even if the same action would have required a jury trial if committed to an Article III court. *Atlas Roofing*, 430 U. S., at 460 (collecting cases); accord, *Elting*, 287 U. S., at 334 (Congress "may lawfully impose appropriate obligations, sanction their enforcement by reasonable money penalties, and invest in administrative officials the power to impose and enforce them"); *Stranahan*, 214 U. S., at 339 (Congress may "impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power").

C

It should be obvious by now how this case should have been resolved under a faithful and straightforward application of *Atlas Roofing* and a long line of this Court's precedents. The constitutional question is indistinguishable. The majority instead wishes away *Atlas Roofing* by burying it at the end of its opinion and minimizing the unbroken line of cases on which *Atlas Roofing* relied. That approach

to precedent significantly undermines this Court's commitment to *stare decisis* and the rule of law.

This case may involve a different statute from *Atlas Roofing*, but the schemes are remarkably similar. Here, just as in *Atlas Roofing*, Congress identified a problem; concluded that the existing remedies were inadequate; and enacted a new regulatory scheme as a solution. The problem was a lack of transparency and accountability in the securities market that contributed to the Great Depression of the 1930s. See *ante,* at 1. The inadequate remedies were the then-existing state statutory and common-law fraud causes of action. The solution was a comprehensive federal scheme of securities regulation consisting of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. See *ibid.* In particular, Congress enacted these securities laws to ensure "full disclosure" and promote ethical business practices "in the securities industry," *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186 (1963), as well as to "protect investors against manipulation of stock prices," *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 195 (1976).

The prophylactic nature of the statutory regime also is virtually indistinguishable from the OSHA scheme at issue in *Atlas Roofing*. Among other things, these securities laws prohibit the misrepresentation or concealment of various material facts through the imposition of federal registration and disclosure requirements. See *ante,* at 2. Critically, federal-securities laws do not require proof of actual reliance on an investor's misrepresentations or that an "investor has actually suffered financial loss." *Ante,* at 4; see also *SEC* v. *Life Partners Holdings, Inc.* 854 F. 3d 765, 779 (CA5 2017); *SEC* v. *Blavin*, 760 F. 2d 706, 711 (CA6 1985) (*per curiam*). OSHA too prohibits conduct that could, but does not necessarily, injure a private person. *Atlas Roofing*, 430 U. S., at 445 (OSHA remedies "exis[t] whether or not an employee is

actually injured or killed as a result of the [unsafe or unhealthy working] condition"). The employer's failure to maintain safe and healthy working conditions violates OSHA even if there is no actionable harm to an employee, just as a misrepresentation to investors in connection with the buying or selling of securities violates federal-securities law even if there is no actual injury to the investors.

Moreover, both here and in *Atlas Roofing*, Congress empowered the Government to institute administrative enforcement proceedings to adjudicate potential violations of federal law and impose civil penalties on a private party for those violations, all while making the final agency decision subject to judicial review. In bringing a securities claim, the SEC seeks redress for a "violation" that "is committed against the United States rather than an aggrieved individual," which "is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Kokesh* v. *SEC*, 581 U. S. 455, 463 (2017). Put differently, the SEC seeks to "'remedy harm to the public at large'" for violation of the Government's rights. *Ibid.* The Government likewise seeks to remedy a public harm when it enforces OSHA's prohibition of unsafe working conditions.

Ultimately, both cases arise between the Government and others in connection with the performance of the Government's constitutional functions, and involve the Government acting in its sovereign capacity to bring a statutory claim on behalf of the United States in order to vindicate the public interest. They both involve, as *Atlas Roofing* put it, "new cause[s] of action, and remedies therefor, unknown to the common law." 430 U. S., at 461. Neither Article III nor the Seventh Amendment prohibits Congress from assigning the enforcement of these new "Governmen[t] rights to civil penalties" to non-Article III adjudicators, and thus "supplying speedy and expert resolutions of the issues involved." *Id.*, at 450, 461. In a world where precedent means

something, this should end the case. Yet here it does not.

III

The practice of assigning the Government's right to civil penalties for statutory violations to non-Article III adjudication had been so settled that it become an undisputable reality of how "our Government has actually worked." *Consumer Financial Protection Bureau*, 601 U. S., at 445 (KAGAN, J., concurring). That is why the Court has had no cause to address this kind of constitutional challenge since its unanimous decision in *Atlas Roofing*. The majority takes a wrecking ball to this settled law and stable government practice. To do so, it misreads this Court's precedents, ignores those that do not suit its thesis, and advances distinctions created from whole cloth.

The majority's treatment of the public-rights doctrine is not only incomplete, but is gerrymandered to produce today's result. See Part III–A (*infra*, at 17–21). Unable to explain that doctrine, the majority effectively ignores the Article III threshold question to focus instead on two Seventh Amendment cases: *Tull* v. *United States*, 481 U. S. 412 (1987), and *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989). Neither involved the in-house adjudication of statutory claims brought by the Government pursuant to its sovereign powers, which is the critical fact under this Court's precedent. See Part III–B–1 (*infra*, at 22–24) (discussing *Tull*); Part III–B–2 (*infra*, at 24–29) (discussing *Granfinanciera*). The majority and the concurrence then predictably fail to distinguish *Atlas Roofing*, which resolved the Seventh Amendment question for cases like this one implicating that critical fact. See Part III–C (*infra*, at 29–32).

A

To start, it is almost impossible to discern how the majority defines a public right and whether its view of the doctrine is consistent with this Court's public-rights cases. The

majority at times seems to limit the public-rights exception to areas of its own choosing. It points out, for example, that some public-rights cases involved the collection of revenue, customs law, and immigration law, see *ante*, at 14–17, and that *Atlas Roofing* involved OSHA and not "civil penalty suits for fraud," *ante*, at 22.[6] Other times, the majority highlights a particular practice predating the founding, such as the "unbroken tradition" in *Murray's Lessee* of executive officials issuing warrants of distress to collect revenue. *Ante*, at 15; see also *ante*, at 13–14 (GORSUCH, J., concurring). Needless to say, none of these explanations for the doctrine is satisfactory. What is the legal principle behind saying only these areas and no further? This Court has rejected that kind of arbitrary line-drawing in cases like *Stranahan* and *Atlas Roofing*. How does the requirement of a historical practice dating back to the founding, or "flow[ing] from centuries-old rules," *ante*, at 17, account for the broad universe of public-rights cases in the United States Reporter? The majority does not say.

The majority's only other theory fares no better. The majority seems to suggest that a common thread underlying these cases is that "the political branches had traditionally held exclusive power over th[ese] field[s] and had exercised it." *Ante,* at 16–17. To the extent the majority thinks this is a distinction, it fails for at least two reasons.

First, *Atlas Roofing* expressly rejected the argument that the public-rights doctrine is limited to particular exercises of congressional power. The employers in *Atlas Roofing* argued "that cases such as *Murray's Lessee*, *Elting*, [*Stranahan*], *Phillips*, and *Helvering* all deal with the exercise of sovereign powers that are inherently in the exclusive do-

[6] The majority also cites cases involving "relations with Indian tribes, the administration of public lands, and the granting of public benefits such as payments to veterans, pensions, and patent rights." *Ante,* at 17 (citations omitted).

main of the Federal Government and critical to its very existence—the power over immigration, the importation of goods, and taxation." 430 U. S., at 456. Cabining the cases in that way, the employers argued that "[t]he theory of those cases is inapplicable where the Government exercises other powers that [they] regard[ed] as less fundamental, less exclusive, and less vital to the existence of the Nation, such as the power to regulate commerce among the several States, the latter being the power Congress sought to exercise in enacting [OSHA]." *Ibid.* The Court rejected the employers' argument, explaining that nothing in those cases turned on those particular exercises of the Government's authority. See *id.*, at 456–457; cf. *Crowell*, 285 U. S., at 51 (offering a list of "[f]amiliar illustrations of . . . exercise[s]" of Congress's constitutional authority that have fallen within the public-rights exception to Article III).

Second, even if *Atlas Roofing* had not explicitly rejected the proposed distinction here, the majority cannot reconcile its restrictive view of the public-rights doctrine with *Atlas Roofing* and other precedents. For example, it is unclear how OSHA, or the National Labor Relations Act at issue in *Jones & Laughlin*, would fit the majority's view of the public-rights doctrine, or why the exercise of interstate-commerce power to enact those statutes would be any different from the exercise of that same power to enact the federal-securities laws at issue here. See *Atlas Roofing*, 430 U. S., at 457 ("It is also apparent that *Jones & Laughlin*, *Pernell*, and *Curtis* are not amenable to the limitations suggested by [the employers]").

The majority's description of the doctrine also fails to account for public rights that do not belong to the Federal Government in its sovereign capacity. See *Granfinanciera*, 492 U. S., at 54 ("[T]he Federal Government need not be a party for a case to revolve around 'public rights'"). This Court, after all, has rejected the confinement of public rights to that heartland. See *ibid.* ("[W]e [have] rejected the

view that 'a matter of public rights must at a minimum arise "between the government and others"'"). Conspicuously absent from the majority's discussion are, for example, cases in which this Court held that Congress could assign a private federally created action that was "closely integrated into a public regulatory scheme" for adjudication in a non-Article III forum. *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 594 (1985). These cases include, for example, an agency's adjudication of state-law counterclaims to an investor's federal action against its broker, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 835–836, 847–850 (1986), and the arbitration of data-compensation disputes among participants in the Environmental Protection Agency's pesticide registration scheme, *Thomas*, 473 U. S., at 571, 589–592. Both *Thomas* and *Schor* thus upheld the non-Article III adjudication of disputes between private parties, which naturally did not involve the Government in its sovereign capacity.

Even accepting the majority's public-rights-are-confusing defense, its "strategy for dealing with the confusion is not to offer a theory for rationalizing this body of law," but to provide an incomplete and unprincipled account of the doctrine. *Haaland* v. *Brackeen*, 599 U. S. 255, 279 (2023). The majority references, but does not explain, "distinctions our cases have drawn," *ante*, at 18, n. 2, also cherry-picking some cases and ignoring others. Indeed, in lieu of a coherent theory, all the majority has to offer is a list of five "historic categories of adjudications [that] fall within the exception," *ante*, at 14–17, and maybe (just maybe) OSHA, which the majority reluctantly adds to the mix at the end of its opinion for good measure, see *ante*, at 22–24. The majority ignores countless public-rights cases and entire strands of the doctrine, and fails to heed its own admonition that "close attention" must be paid "to the basis for each asserted

application of the doctrine." *Ante,* at 17.[7]

The majority also attacks a strawman when it asserts that "precedents foreclose th[e] argument" that the public-rights doctrine "applies whenever a statute increases governmental efficiency." *Ante,* at 26; see also *ante,* at 19 (GORSUCH, J., concurring). No one has made that argument in this case; not the Government and certainly not this dissent. The fact that certain rights might be susceptible to speedy and expert resolution through non-Article III adjudication is not what makes them "rights *of the public*—that is, rights pertaining to claims brought by or against the United States." *Granfinanciera*, 492 U. S., at 68–69 (Scalia, J., concurring in part and concurring in judgment).

It is not clear what else, if anything, might qualify as a public right, or what is even left of the doctrine after today's opinion. Rather than recognize the long-settled principle that a statutory right belonging to the Government in its sovereign capacity falls within the public-rights exception to Article III, the majority opts for a "we know it when we see it" formulation. This Court's precedents and our coequal branches of Government deserve better.

B

Rather than relying on *Atlas Roofing* or the relevant public-rights cases, the majority instead purports to follow *Tull* and *Granfinanciera*. The former involved a suit in federal court and the latter involved a dispute between private parties. So, just like that, the majority ventures off on the wrong path. Indeed, as explained below, both the majority and the concurrence miss the critical distinction drawn in

[7] Among other things, the concurrence accuses this dissent of behaving like a "picky child at the dinner table." *Ante,* at 21 (opinion of GORSUCH, J.). The precedents, though, speak for themselves. It is the majority and concurrence that pick and choose among public-rights cases, excluding broad strands of precedent constituting the doctrine.

this Court's precedents between the non-Article III adjudication of public-rights matters involving the liability of one individual to another and those involving claims belonging to the Government in its sovereign capacity.

According to the majority, respondents are entitled to a jury trial in federal court because, as here, *Tull* involved a Government claim for civil penalties, and *Granfinanciera* looked to the common law to determine if a statutory cause of action was legal in nature. By focusing on the remedy in this case, and the perceived similarities between the statutory cause of action and a common-law analogue, the majority elides the critical distinction between those cases and this one: Whether Congress assigned the Government's sovereign rights to civil penalties to a non-Article III factfinder for adjudication.

1

The majority bafflingly proclaims that "the remedy is all but dispositive" in this case, *ante,* at 9, ignoring that *Atlas Roofing* and countless precedents before it rejected that proposition. Not content to take just a page from the employers' challenge in *Atlas Roofing*, the majority has taken their whole brief, resuscitating yet another theory that this Court has long foreclosed. The employers in *Atlas Roofing* argued that the Seventh Amendment prohibited Congress from assigning to an agency the same remedy at issue here: civil penalties. See 430 U. S., at 450 ("Petitioners . . . claim that . . . assign[ing] the function of adjudicating the Government's rights to civil penalties for [a statutory] violation . . . deprive[s] a defendant of his Seventh Amendment jury right"). This Court rejected that argument outright, citing a long line of cases involving the Executive's adjudication of statutory claims for civil penalties brought by the Government in its sovereign capacity. *Id.*, at 450–455 (collecting cases).

As discussed above, this Court has long endorsed statutory schemes authorizing agency adjudicators to find violations and award civil penalties to the Government. See *supra*, at 9–12. Long before *Atlas Roofing*, this Court held that the Constitution permits Congress to enact statutory obligations and then "sanction their enforcement by reasonable money penalties" by government officials "without the necessity of invoking the judicial power." *Stranahan*, 214 U. S., at 339; see *id.*, at 338–339 (collecting cases). That the SEC imposed civil penalties on respondents therefore has little, if any, bearing on the resolution of this case.

Again, even if over a century of precedent did not foreclose the majority's argument, it fails on its own terms. The majority relies almost entirely on *Tull*, which held that statutory claims for civil penalties were "a type of remedy at common law" that entitled a defendant to a jury trial. 481 U. S., at 422; see *id.*, at 425. Critically, however, the *Tull* Court's analysis took place in an entirely different context: federal court. See *ante,* at 8–9 ("In [*Tull*], the Government sued a real estate developer for civil penalties [under the Clean Water Act] *in federal court*" (emphasis added)). *Tull* did not present the question at issue in *Atlas Roofing* and other cases involving non-Article III adjudication of Government claims in the first instance. Rather, *Tull* stands for the unremarkable proposition that, when the Government sues an entity for civil penalties in federal district court, the Seventh Amendment entitles the defendant "to a jury trial to determine his liability on the legal claims." 481 U. S., at 425.

That conclusion says nothing about the constitutionality of the SEC's in-house adjudicative scheme. *Atlas Roofing* and its predecessors could not have been clearer on this point: Congress can assign the enforcement of a statutory obligation for in-house adjudication to executive officials, "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a

federal court of law instead of an administrative agency." 430 U. S., at 455. Although "the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary, in which event jury trial would be required," the Government "could also validly opt for administrative enforcement, without judicial trials." *Id.*, at 460 (citing *Stranahan*, 214 U. S., at 339; *Hepner* v. *United States*, 213 U. S. 103 (1909); *United States* v. *Regan*, 232 U. S. 37 (1914); *Helvering*, 303 U. S., at 402–403; *Crowell*, 285 U. S., at 50–51); *Curtis*, 415 U. S., at 195 (explaining that Congress can "entrust [the] enforcement of statutory rights to an administrative process . . . free from the strictures of the Seventh Amendment," but must abide by the Amendment when it does so "in an ordinary civil action in the district courts").

It would have been quite remarkable for *Tull*, which involved a claim in federal court, to overrule silently more than a century of caselaw involving non-Article III adjudications of the Government's rights to civil penalties for statutory violations. Of course, *Tull* did no such thing. *Tull* even reaffirmed *Atlas Roofing* by emphasizing that the Seventh Amendment depends on the forum, not just the remedy, because it "is not applicable to administrative proceedings." 481 U. S., at 418, n. 4 (citing *Atlas Roofing*, 430 U. S., at 454; *Pernell*, 416 U. S., at 383). For the majority to pretend otherwise is wishful thinking at best.

2

The majority next argues that the "close relationship" between the federal-securities laws and common-law fraud "confirms that this action is 'legal in nature,'" and entitles respondents to a jury trial. *Ante,* at 13. That argument does not fare any better than the argument on remedy. Again, the majority bends inapposite case law to an illogical thesis. *Granfinanciera*, on which the majority relies to make its cause-of-action argument, set forth the public-

rights analysis only for "disputes to which the Federal Government is not a party in its sovereign capacity." 492 U. S., at 55, n. 10. For cases that, as here, involve the Government in its sovereign capacity, the *Granfinanciera* Court plainly stated that "Congress may fashion causes of action that are closely *analogous* to common-law claims and [still] place them beyond the ambit of the Seventh Amendment by assigning their resolution to a [non-Article III] forum in which jury trials are unavailable." *Id.*, at 52 (citing *Atlas Roofing*, 430 U. S., at 450–461).[8]

The Court held in *Granfinanciera* that "a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer." 492 U. S., at 36. In doing so, the Court noted that actions to recover such transfers through a claim of fraudulent conveyance were traditionally available at common law. See

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[8]The majority leaves open the possibility that *Granfinanciera* might have overruled *Atlas Roofing*. See *ante,* at 22–23. That suggestion strains credulity. By my count, *Granfinanciera* favorably cites to *Atlas Roofing* at least 12 times. See 492 U. S., at 48, 51–54, 57, 60–61; see also *id.*, at 65 (Scalia, J., concurring in part and concurring in judgment). It even reaffirmed the definition of public rights from *Atlas Roofing*, declaring that the Court "adhere[d] to that general teaching . . . in *Atlas Roofing*." 492 U. S., at 51. The majority's only response is to say that Justice White thought *Granfinanciera* may have overruled *Atlas Roofing*. See *ante,* at 23, n. 3; see also *ante,* at 17 (GORSUCH, J., concurring). That is misleading at best. When Justice White said in his *Granfinanciera* dissent that the Court's opinion in that case could be read as overruling or limiting portions of several cases, including *Atlas Roofing*, he was referring to his understanding that *Atlas Roofing* also extended to private disputes. See *Granfinanciera*, 492 U. S., at 79–83; see also Tr. of Oral Arg. 58–59 (Principal Deputy Solicitor General explaining that Justice White understood "*Atlas Roofing* to speak [also] to the private parties cases," not just to cases involving the Government, which "is really a through line that the Court has never questioned"). With respect to claims involving the Government, such as those at issue here, *Granfinanciera* expressly reaffirmed *Atlas Roofing* and "adhere[d] to [its] general teaching." 492 U. S., at 51.

id., at 43–49. That did not resolve the case, however. Unlike in *Tull*, the proceeding at issue in *Granfinanciera* was in a non-Article III forum (*i.e.*, a bankruptcy court). So, to answer whether Congress could assign the fraudulent-conveyance claim to a bankruptcy judge for decision, Congress needed to decide whether the "legal cause of action involve[d] 'public rights.'" 492 U. S., at 53.

Granfinanciera explains that there are two ways to identify a "public right." First, there are the matters in which Congress enacts a statutory cause of action that "inheres in, or lies against, the Federal Government in its sovereign capacity." *Id.*, at 53 (citing *Atlas Roofing*, 430 U. S., at 458). These matters necessarily arise between the Government and the people in connection with the Government's exercise of its constitutional authority. See *supra,* at 7–8. In these cases, the Court said, *Atlas Roofing* controls the public-rights analysis. See *Granfinanciera*, 492 U. S., at 51, 53. The Court explained that "Congress may effectively supplant a common law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity." *Id.*, at 53 (citing *Atlas Roofing*, 430 U. S., at 458).

The second kind of public right that *Granfinanciera* recognized involves "disputes to which the Federal Government is not a party in its sovereign capacity," 492 U. S., at 55, n. 10, that is, usually "[w]holly private" disputes, *id.*, at 51. The public-rights analysis in these private-dispute cases looks different: "The crucial question, *in cases not involving the Federal Government*, is whether 'Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.'" *Id.*, at 54 (quoting *Thomas*, 473 U. S., at 593–594;

emphasis added; alterations omitted).

These two approaches together stand for the proposition that "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, *and* if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." 492 U. S., at 54–55 (emphasis added). Once in federal court, "[i]f the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial." *Id.*, at 55.

Because *Granfinanciera* did not involve a statutory right that belonged to the Government in its sovereign capacity, *Atlas Roofing* did not control the outcome. Instead, the Court applied the private-disputes test to determine whether fraudulent-conveyance "actions were 'closely intertwined' with the bankruptcy regime." *Ante*, at 20 (quoting *Granfinanciera*, 492 U. S., at 54). The Court held that the fraudulent-conveyance actions "were not inseparable from the bankruptcy process," and thus the public-rights exception did not apply. *Ante*, at 20 (citing *Granfinanciera*, 492 U. S., at 54, 56).

The majority brushes aside this critical distinction between *Atlas Roofing* and *Granfinanciera* in one sentence. That "the Government is the party prosecuting this action," the majority writes, is meaningless because this Court has "never held that the 'presence of the United States as a proper party to the proceeding is . . . sufficient' by itself to trigger the exception." *Ante*, at 22 (quoting *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 69, n. 23 (1982) (plurality opinion)). Here, too, the majority attacks a strawman. The SEC does not claim that the mere presence of the United States as a proper party necessarily means that a public right is at issue. See Reply Brief 8, n. 2 (disclaiming this argument).[9] Of course "what matters is

[9] Indeed, "the public-rights doctrine does not extend to any criminal

the substance" of the claim. *Ante*, at 21.

By no means, though, does this case involve a "purely taxonomic change." *Granfinanciera*, 492 U. S., at 61. Congress did not just repackage a common-law claim under a new label. It created new statutory obligations and an entire federal scheme. See *supra*, at 14–16.[10] Perhaps most importantly, Congress created a new right unknown to the common law that, unlike common-law fraud, belongs to the public and inheres in the Government in its sovereign capacity. That is why, when the SEC seeks to enforce the federal-securities laws, it does so to remedy the harm to the United States. See *supra*, at 16. It seeks to protect the integrity of the securities market as a whole through the imposition of new and distinct remedies like civil penalties

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matters, although the Government is a proper party." *Northern Pipeline Constr. Co.*, 458 U. S., at 70, n. 24 (plurality opinion) (citing *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955)). That is so not only because this Court has held as much, but also because Article III itself prescribes that "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury." §2, cl. 3. In other words, Article III requires criminal trials to take place before a jury in federal court, but says nothing about civil-penalty claims brought by the Government. Beyond criminal trials, the Solicitor General also concedes that, under this Court's precedents, the public-rights doctrine does not apply when the Government brings a common-law claim in a proprietary capacity. See Reply Brief 8, n. 2.

[10] The majority spills much ink on the perceived similarities between federal-securities fraud and common-law fraud, only to conclude that the causes of action are not identical. That conclusion was inevitable because of critical differences between the two. Even if Congress drew upon common-law fraud when it enacted federal-securities laws, see *ante,* at 11–12, this Court has repeatedly disclaimed any suggestion that Congress federalized a common-law fraud claim. See, *e.g.*, *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 162 (2008) ("Section 10(b) does not incorporate common-law fraud into federal law"); *SEC* v. *Zandford*, 535 U. S. 813, 820 (2002) ("[T]he statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of §10(b)"); *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 388–389 (1983) ("[T]he antifraud provisions of the securities laws are not coextensive with common-law doctrines of fraud").

and orders barring violators from holding certain positions and performing certain activities in the industry. See 15 U. S. C. §§77h–1(f), and (g), 78u–2, 78u–3(f).

For these reasons, "[a]n action brought by an Executive Branch agency to enforce federal securities laws is not the same as an action brought by one individual against another for monetary or injunctive relief of the sort that law courts (with juries) in England or the States have traditionally heard." Brief for Professor John Golden et al. as *Amici Curiae* 3. Congress did not unlawfully "siphon" a traditional legal action "away from an Article III court" when it enacted the federal-securities laws and provided for their enforcement within the SEC. *Ante,* at 21.

The majority asserts that "*Granfinanciera* effectively decides this case." *Ante*, at 20. That can only be true, though, if one ignores what *Granfinanciera* actually says: Its public-rights analysis of whether an action is closely intertwined with a federal regulatory program only applies "in cases not involving the Federal Government." 492 U. S., at 54. The analysis from *Atlas Roofing* controls where, as here, "'the Government is involved in its sovereign capacity under an otherwise valid statute.'" 492 U. S., at 51 (quoting *Atlas Roofing*, 430 U. S., at 458).

C

Both cases relied on by the majority, *Tull* and *Granfinanciera*, reaffirm that *Atlas Roofing* controls precisely in circumstances like the ones at issue in this case. That is why the majority's late-stage attempt to distinguish *Atlas Roofing* fails. The majority's principal argument that the OSHA scheme in *Atlas Roofing* "did not borrow its cause of action from the common law" and was instead a "self-consciously novel" scheme that "resembled a detailed building code," *ante,* at 23–24, is flawed on multiple fronts.

First, OSHA's cause of action should be largely irrelevant under the majority's view that the remedy of civil penalties

is effectively dispositive under *Tull*. *Atlas Roofing*, and many other cases involving non-Article III adjudications, also involved civil penalties designed to punish and deter, and yet the majority does not expressly disavow them. Logically, then, either *Atlas Roofing* and countless other cases were wrongly decided, or the majority's view on civil penalties is wrong.

Second, because the majority elides the critical distinction between *Atlas Roofing* and *Granfinanciera*, it fails to grapple with the fact that this case, like *Atlas Roofing* and unlike *Granfinanciera*, involves the Government acting in its sovereign capacity to enforce a statutory violation. That makes the right at issue a "public right" that Congress can take outside the purview of Article III, even when the new cause of action is analogous to a common-law claim.

Third, the relationship between the federal-securities laws (including their antifraud provisions) and common-law fraud is materially indistinguishable from the relationship between OSHA and the common-law torts of wrongful death and negligence. Unlike their common-law comparators, neither statute requires actionable harm to an individual. See *supra*, at 15. In arguing that OSHA's scheme was "self-consciously" novel in ways unknown to the common law, the majority points to the granularity of OSHA standards. *Ante,* at 23–24. Yet lawyers and regulated parties in the securities industry would be surprised to hear that this could be a distinguishing feature. Anyone familiar with the industry knows securities laws are replete with specific and exceedingly detailed requirements implementing the statute's disclosure and antifraud provisions. See, *e.g.*, 17 CFR §275.206(4)–1(b) (2023) (prohibiting testimonials and endorsements that do not satisfy requirements without meeting complex disclosure requirements); §275.206(4)–2(a) (prohibiting investment advisers from having custody of client funds or securities unless specific requirements are

met, including qualifications, notices, and account statements).

The majority further rests on the notion that Congress drew inspiration from the common law in enacting the antifraud provisions of the federal-securities laws, whereas OSHA's new statutory duty did not bring any common-law soil with it. See *ante,* at 23–24. Yet both statutes share elements with claims at common law that Congress deemed inadequate to address the national problems that prompted it to legislate. See *supra*, at 14–15. Still, even accepting that federal-securities laws bring common-law soil with them and OSHA does not, the majority does not explain why that is a constitutionally relevant distinction.[11]

In sum, all avenues by which the majority attempts to distinguish *Atlas Roofing* fail. The majority cannot escape the entrenched principle that a "legal cause of action involves 'public rights'" that can be taken outside of Article III if the "statutory right is . . . closely intertwined with a federal regulatory program Congress has power to enact" *or* if it "belongs to [o]r exists against the Federal Government." *Granfinanciera*, 492 U. S., at 53–54.[12] In both *Atlas Roofing* and this case, a public right exists. In both statutory

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[11] In *Tull* v. *United States*, 481 U. S. 412 (1987), for example, there was no common-law soil brought into that federal regulatory regime, and the Seventh Amendment still applied. Indeed, no one can argue that "[t]he purpose of [the Clean Water Act] was . . . to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law." *Ante*, at 23–24.

[12] The concurrence's assertion that the majority is "follow[ing] the advice of Justices Brennan and Marshall" by "'limit[ing] the judicial authority of non-Article III federal tribunals'" is misleading. *Ante,* at 20 (quoting *Schor*, 478 U. S., at 859 (Brennan, J., joined by Marshall, J., dissenting)). Justice Brennan in his *Schor* dissent wrote that he would limit the authority of non-Article III tribunals to three recognized exceptions: (1) territorial courts; (2) courts-martial; and (3) forums adjudicating public-rights matters. As examples of the public-rights category, Justice Brennan cited *Murray's Lessee*, *Ex parte Bakelite*, *Crowell*, *Thomas*, and his plurality opinion in *Northern Pipeline*. See *Schor*, 478 U. S., at

schemes, regardless of any perceived resemblance to the common law, Congress enacted a new cause of action that created a statutory right belonging to the United States for the Government to enforce pursuant to its sovereign powers.

IV

A faithful and straightforward application of this Court's longstanding precedent should have resolved this case. Faithful "[a]dherence to precedent is 'a foundation stone of the rule of law.'" *Kisor* v. *Wilkie*, 588 U. S. 558, 586 (2019) (quoting *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014)). It allows courts to function, and be perceived, as courts, and not as political entities. "'It promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" 588 U. S., at 586–587 (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991); alterations omitted). That is why, "even in constitutional cases, a departure from precedent 'demands special justification.'" *Gamble* v. *United States*, 587 U. S. 678, 691 (2019) (quoting *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984)).

Today's decision disregards these foundational principles.[13] Time will tell what is left of the public-rights doc-

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859. As those citations demonstrate, both Justices Brennan and Marshall certainly thought that public-rights matters extend to certain private disputes that do not involve the Government as a party, as well as disputes involving the Government in connection with different exercises of congressional power. Indeed, it was Justice Brennan who reaffirmed *Atlas Roofing* in his opinion for the *Granfinanciera* Court and explained that a public right includes, at a minimum, a statutory right that "belongs to [o]r exists against the Federal Government." 492 U. S., at 53–54.

[13] Precedents should not be so easily discarded based on the views of

trine. Less uncertain, however, are the momentous consequences that flow from the majority's insistence that the Government's rights to civil penalties must now be tried before a jury in federal court. The majority's decision, which strikes down the SEC's in-house adjudication of civil-penalty claims on the ground that such claims are legal in nature and entitle respondents to a federal jury, effects a seismic shift in this Court's jurisprudence. Indeed, "[i]f you've never heard of a statute being struck down on that ground," and you recall having read countless cases approving of that arrangement, "you're not alone." *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 294 (2020) (KAGAN, J., concurring in judgment with respect to severability and dissenting in part).

The majority pulls a rug out from under Congress without even acknowledging that its decision upends over two centuries of settled Government practice. The United States, led by then-Solicitor General Robert Bork and then-Assistant Attorney General for the Civil Division Rex Lee, told this Court in *Atlas Roofing* that "during the whole of our history, regulatory fines and penalties have been collected by non-jury procedures pursuant to . . . legislative decisions," and that "[i]t would be most remarkable if, at this late date, the Seventh Amendment were construed to outlaw this consistent rule of government followed for two centuries." Brief for Respondents in *Atlas Roofing*, O. T. 1976, No. 75–746, etc., pp. 81–82. This Court agreed and upheld that practice, it seemed, once and for all.

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some commentators, or on whether or not a particular case is "celebrated." *Ante*, at 25, n. 4. *Atlas Roofing* and the long line of cases before it are precedents from this Court entitled to *stare decisis* effect. Indeed, this Court has reaffirmed and repeatedly cited *Atlas Roofing* with approval. See, *e.g.*, *Oil States*, 584 U. S., at 344–345; *Stern*, 564 U. S., at 489–490; *Granfinanciera*, 492 U. S., at 48, 51–54, 60–61; *id.*, at 65–66 (Scalia, J., concurring in part and concurring in judgment); *Tull*, 481 U. S., at 418, n. 4; *Northern Pipeline Constr. Co.*, 458 U. S., at 67, n. 18, 69, n. 23, 70, 73, 77 (plurality opinion).

Following this Court's precedents and the recommendation of the Administrative Conference of the United States, Congress has enacted countless new statutes in the past 50 years that have empowered federal agencies to impose civil penalties for statutory violations. See 2 P. Verkuilm, D. Gifford, C. Koch, R. Pierce, & J. Lubbers, Administrative Conference of the United States, Recommendations and Reports, The Federal Administrative Judiciary 861, and nn. 350–351 (1992). These statutes are sometimes enacted in addition to, but often instead of, "the traditional civil enforcement statutes that permitted agencies to collect civil penalties only after federal district court trials." *Id.*, at 861. "By 1986, there were over 200 such statutes" and "[t]he trend has, if anything, accelerated" since then. *Id.*, at 861, and n. 351.

Similarly, there are, at the very least, more than two dozen agencies that can impose civil penalties in administrative proceedings. See Tr. of Oral Arg. 78–79 (Principal Deputy Solicitor General) (recognizing two dozen agencies with administrative civil-penalty authorities); see also, *e.g.*, 5 U. S. C. §1215(a)(3)(A)(ii) (Merit Systems Protection Board); 7 U. S. C. §§9(10)(C), 13a (Commodity Futures Trading Commission); §§499c(a), 586, 2279e(a) (Department of Agriculture); 8 U. S. C. §§1324c, 1324d (Department of Justice); 12 U. S. C. §§5563(a)(2), (c), (Consumer Financial Protection Bureau); 16 U. S. C. §823b(c) (Federal Energy Regulatory Commission); 20 U. S. C. §1082(g) (Department of Education); 21 U. S. C. §335b (Department of Health and Human Services/Food and Drug Administration); 29 U. S. C. §666(j) (Occupational Safety and Health Review Commission); 30 U. S. C. §§820(a) and (b) (Federal Mine Safety and Health Review Commission); 31 U. S. C. §5321(a)(2) (Department of the Treasury); 33 U. S. C. §§1319(d) and (g) (Environmental Protection Agency); 39 U. S. C. §3018(c) (Postal Service); 42 U. S. C. §3545(f) (Department of Housing and Urban Development); 46 U. S. C.

§41107(a) (Federal Maritime Commission); 47 U. S. C. §503(b)(3) (Federal Communications Commission); 49 U. S. C. §521 (Federal Railroad Administration); §46301 (Department of Transportation).

Some agencies, like the Consumer Financial Protection Bureau, the Environmental Protection Agency, and the SEC, can pursue civil penalties in both administrative proceedings and federal court. See, *e.g.*, 12 U. S. C. §§5563(a), 5564(a), 5565(a)(1), (2)(H), and (c) (Consumer Financial Protection Bureau); 33 U. S. C. §§1319(a), (b), and (g) (Environmental Protection Agency); *supra,* at 2 (SEC). Others do not have that choice. As the above-cited statutes confirm, the Occupational Safety and Health Review Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, the Department of Agriculture, and many others, can pursue civil penalties only in agency enforcement proceedings. For those and countless other agencies, all the majority can say is tough luck; get a new statute from Congress.

Against this backdrop, our coequal branches will be surprised to learn that the rule they thought long settled, and which remained unchallenged for half a century, is one that, according to the majority and the concurrence, my dissent just announced today. Unfortunately, that mistaken view means that the constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress. Rather than acknowledge the earthshattering nature of its holding, the majority has tried to disguise it. The majority claims that its ruling is limited to "civil penalty suits for fraud" pursuant to a statute that is "barely over a decade old," *ante,* at 18, n. 2, 22, an assurance that is in significant tension with other parts of its reasoning. That incredible assertion should fool no one. Today's decision is a massive sea change. Litigants seeking further dismantling of the "administrative state" have reason to rejoice in their win

today, but those of us who cherish the rule of law have nothing to celebrate.

* * *

Today's ruling is part of a disconcerting trend: When it comes to the separation of powers, this Court tells the American public and its coordinate branches that it knows best. See, *e.g.*, *Collins* v. *Yellen*, 594 U. S. 220, 227 (2021) (concluding that the Federal Housing Finance Agency's "structure violates the separation of powers" because the Agency was led by a single Director removable by the President only "'for cause'"); *United States* v. *Arthrex, Inc.*, 594 U. S. 1, 6, 23 (2021) (holding that "authority wielded by [Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to an inferior office"); *Seila Law*, 591 U. S., at 202–205 (holding that "the structure of the [Consumer Financial Protection Bureau] violates the separation of powers" because it was led by a single Director removable by the President only "for cause"); *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 483–484, 492 (2010) (holding "that the dual for-cause limitations on the removal of [Public Company Accounting Oversight] Board members contravene the Constitution's separation of powers"). The Court tells Congress how best to structure agencies, vindicate harms to the public at large, and even provide for the enforcement of rights created for the Government. It does all of this despite the fact that, compared to its political counterparts, "the Judiciary possesses an inferior understanding of the realities of administration" and how "political power . . . operates." *Free Enterprise Fund*, 561 U. S., at 523 (Breyer, J., dissenting).

There are good reasons for Congress to set up a scheme like the SEC's. It may yield important benefits over jury trials in federal court, such as greater efficiency and expertise, transparency and reasoned decisionmaking, as well as

uniformity, predictability, and greater political accountability. See, *e.g.*, Brief for Administrative Law Scholars as *Amici Curiae* 30–32. Others may believe those benefits are overstated, and that a federal jury is a better check on government overreach. See, *e.g.*, Brief for Cato Institute as *Amicus Curiae* 11–25. Those arguments take place against the backdrop of a philosophical (and perhaps ideological) debate on whether the number of agencies and authorities properly corresponds to the ever-increasing and evolving problems faced by our society.

This Court's job is not to decide who wins this debate. These are policy considerations for Congress in exercising its legislative judgment and constitutional authority to decide how to tackle today's problems. It is the electorate, and the Executive to some degree, not this Court, that can and should provide a check on the wisdom of those judgments.

Make no mistake: Today's decision is a power grab. Once again, "the majority arrogates Congress's policymaking role to itself." *Garland* v. *Cargill*, 602 U. S. 406, 442 (2024) (SOTOMAYOR, J., dissenting). It prescribes artificial constraints on what modern-day adaptable governance must look like. In telling Congress that it cannot entrust certain public-rights matters to the Executive because it must bring them first into the Judiciary's province, the majority oversteps its role and encroaches on Congress's constitutional authority. Its decision offends the Framers' constitutional design so critical to the preservation of individual liberty: the division of our Government into three coordinate branches to avoid the concentration of power in the same hands. The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison). Judicial aggrandizement is as pernicious to the separation of powers as any aggrandizing action from either of the political branches.

Deeply entrenched in today's ruling is the erroneous belief that any "mistaken or wrongful exertion by the legislative department of its authority" can lead to "grave abuses"

and "it behooves the judiciary to apply a corrective by exceeding its own authority" through requiring civil-penalty claims to proceed before a federal jury. *Stranahan*, 214 U. S., at 340. As this Court said over a century ago in this public-rights context, that belief "mistakenly assumes that the courts can alone be safely intrusted with power, and that hence it is their duty to unlawfully exercise prerogatives which they have no right to exert, upon the assumption that wrong must be done to prevent wrong being accomplished." *Ibid.*

By giving respondents a jury trial, even one that the Constitution does not require, the majority may think that it is protecting liberty. That belief, too, is deeply misguided. The American People should not mistake judicial hubris with the protection of individual rights. Our first President understood this well. In his parting words to the Nation, he reminded us that a branch of Government arrogating for itself the power of another based on perceptions of what, "in one instance, may be the instrument of good . . . is the customary weapon by which free governments are destroyed." Farewell Address (1796), in 35 The Writings of George Washington 229 (J. Fitzpatrick ed. 1940) (footnote omitted). The majority today ignores that wisdom.

Because the Court disregards its own precedent and its coequal partners in our tripartite system of Government, I respectfully dissent.