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IN THE SUPREME COURT OF THE UNITED STATES

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RELENTLESS, INC., ET AL., )

Petitioners, )

v. ) No. 22-1219

DEPARTMENT OF COMMERCE, ET AL., )

Respondents. )

- - - - -

Washington, D.C.

Wednesday, January 17, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

ROMAN MARTINEZ, ESQUIRE, Washington, D.C.; on behalf of the Petitioners.

GEN. ELIZABETH B. PRELOGAR, Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-1219, Relentless versus the Department of Commerce.

Mr. Martinez.

ORAL ARGUMENT OF ROMAN MARTINEZ

ON BEHALF OF THE PETITIONERS

MR. MARTINEZ: Mr. Chief Justice, and may it please the Court:

For too long, Chevron has distorted the judicial process and undermined statutory interpretation. It should be overruled for three reasons.

First, Chevron violates the Constitution. Article III empowers judges to say what the law is. It requires them to interpret federal statutes using their best and independent judgment.

Chevron undermines that duty. It reallocates interpretive authority from courts to agencies, and it forces courts to adopt inferior agency constructions that are issued for political or policy reasons. In doing so, Chevron blocks judges from serving as faithful

1 agents of Congress. It mandates judicial bias  
2 and encourages agency overreach. And by  
3 removing key checks on executive power, it  
4 threatens individual liberty.

5 Chevron also violates the APA. The  
6 most straightforward reading of Section 706  
7 requires de novo review of legal questions.  
8 Congress put constitutional and statutory  
9 interpretation on equal footing, and it required  
10 independent legal judgment as to both. As  
11 Justice Scalia wrote, the APA's text  
12 contemplates that courts, not agencies, will  
13 authoritatively resolve ambiguities in statutes.

14 And, third, this Court's only  
15 justification for Chevron is the implied  
16 delegation theory, but that theory is a fiction.  
17 There's no reason to think that Congress intends  
18 every ambiguity in every agency statute to give  
19 agencies an ongoing power to interpret and  
20 reinterpret federal law in ways that override  
21 its best meaning.

22 In this case, the agency  
23 misinterpreted the MSA to force struggling  
24 fishermen to pay up to 20 percent of their  
25 annual profits to federal agents. The

1 government says that even if all nine of you  
2 agree with us that the agency's construction is  
3 worse than ours, you should nonetheless defer to  
4 that construction and uphold their program under  
5 Chevron. That's not consistent with the rule of  
6 law. If we have the best view of the statute,  
7 we should win this case.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Mr. Martinez, how  
10 much deference is in tension with the judicial  
11 role?

12 MR. MARTINEZ: I think it's very much  
13 in tension, Your Honor.

14 JUSTICE THOMAS: No. How much would  
15 it require? I mean, your argument is that  
16 Chevron deference is problematic. But how do we  
17 determine how much deference is too much  
18 deference?

19 MR. MARTINEZ: I think you've  
20 certainly crossed the line when you have a rule  
21 that says that we're going to allocate the  
22 interpretive authority from -- from Article III  
23 courts to an agency. And so, when -- when  
24 you've got deference that amounts to that, which  
25 is what Chevron deference is, then I think

1 you've -- you've crossed the line because what  
2 you've really done is --

3 JUSTICE THOMAS: I think what I'm  
4 trying -- what I'm asking is, how do we know  
5 where the line is? We show deference. You --  
6 there's Skidmore deference.

7 MR. MARTINEZ: Sure.

8 JUSTICE THOMAS: We are deferential in  
9 fact finding, et cetera. So I'm just trying to  
10 determine whether you're saying that we -- if  
11 it's not de novo review --

12 MR. MARTINEZ: Right.

13 JUSTICE THOMAS: -- without any  
14 presumptions or deference, then it's  
15 problematic.

16 MR. MARTINEZ: I -- I think deference  
17 becomes problematic when it requires a judge to  
18 say that the law means X when, really, the judge  
19 thinks the law means Y. I think Skidmore  
20 deference is not problematic because it doesn't  
21 require that. Skidmore deference essentially  
22 says -- and we would be very comfortable with  
23 Skidmore -- that because the agency has a -- has  
24 an important role to play in the process, often  
25 the agency has helped draft the statute, the

1 agency has knowledge of the policy context  
2 surrounding the statute and its implementation.

3 Of course, courts should pay special  
4 attention to what agencies say, but the agency  
5 ultimately has to bring its expertise to bear in  
6 a way that's persuasive. And if the -- the  
7 court isn't persuasive, if the court thinks that  
8 the law means X even though the agency thinks  
9 the law means Y, then the court needs to go with  
10 the best interpretation of the statute, just  
11 like it does in every other --

12 CHIEF JUSTICE ROBERTS: Well --

13 MR. MARTINEZ: -- area of statutory or  
14 constitutional --

15 CHIEF JUSTICE ROBERTS: -- let's --

16 MR. MARTINEZ: -- interpretation.

17 CHIEF JUSTICE ROBERTS: -- let's  
18 suppose the statute says the Department of  
19 Transportation will set length limits for trucks  
20 that are reasonable.

21 MR. MARTINEZ: Right.

22 CHIEF JUSTICE ROBERTS: Is that a  
23 legal question for the court, or is that a  
24 policy question for the agency?

25 MR. MARTINEZ: I think that --



1 CHIEF JUSTICE ROBERTS: It's a -- the  
2 -- the legal authority says they've got to be  
3 reasonable. That's a term that courts apply in  
4 many situations.

5 MR. MARTINEZ: I -- I think that a  
6 court looking at that statute would try to  
7 determine the best meaning of the statute, and  
8 the best meaning of the statute there would be  
9 that -- that the use of the term real --  
10 "reasonable" confers upon the agency discretion  
11 to choose among certain policy options.

12 Now that doesn't mean that the agency  
13 can just do whatever it wants because there are  
14 limits, and the court has to police that limits.  
15 Michigan versus EPA is a good example. Congress  
16 used a broad term like "appropriate" and the  
17 question was -- which is similar to  
18 "reasonable," in giving the agency a -- a range  
19 of discretion. But, at the same time, when the  
20 agency said, well, we don't have to consider  
21 costs in figuring out whether something is  
22 appropriate, the court said no, that, as a legal  
23 matter, the best interpretation of the word  
24 "appropriate" in the context of this statute  
25 requires the agency to consider costs.

1 CHIEF JUSTICE ROBERTS: Well, what if  
2 the statute says that the agency can regulate  
3 truck -- truck length for vehicles that travel  
4 in interstate commerce and there's a question  
5 whether or not interstate commerce -- the -- the  
6 delegation for interstate commerce is satisfied  
7 when particular --

8 MR. MARTINEZ: Right.

9 CHIEF JUSTICE ROBERTS: --  
10 circumstances are present.

11 MR. MARTINEZ: I -- I think that that  
12 would be a case if you're -- if the court were  
13 called upon to interpret what inter -- if the  
14 dispute was about whether -- what interstate  
15 commerce means, I think that would be a classic  
16 legal question that would be a legal question  
17 for the court. And I think it actually  
18 highlights -- because interstate commerce is  
19 probably there because of the constitutional  
20 limitations, it highlights the fact that,  
21 really, the same rules should apply to  
22 interpreting constitutional --

23 CHIEF JUSTICE ROBERTS: Well, I mean  
24 --

25 MR. MARTINEZ: -- provisions as

1 statutes.

2 CHIEF JUSTICE ROBERTS: -- you could  
3 imagine -- you could imagine situations where  
4 the interstate commerce determination is  
5 peculiarly fact-bound, you know, trucks  
6 transferring loads and -- at transfer points on  
7 the border. Is that in interstate commerce for  
8 each one or not? And isn't the policy judgment  
9 of the agency pertinent in that situation?

10 MR. MARTINEZ: I think, certainly, the  
11 policy judgment of the agency is -- is pertinent  
12 in determining sort of the facts because the  
13 agency might be on the ground and understand the  
14 factual scenario.

15 But I think there's a -- an important  
16 legal component to that question, that in any  
17 other context, like, for example, if you were  
18 interpreting the Constitution, I think the court  
19 would -- would quite reasonably think it's its  
20 own job to interpret the constitutional  
21 requirement of interstate commerce and would --  
22 would say -- would give it its best meaning.  
23 And I think --

24 JUSTICE KAGAN: Well, let me give you  
25 a --

1 MR. MARTINEZ: -- the same approach --

2 JUSTICE KAGAN: -- a few more examples  
3 along the same lines, Mr. Martinez.

4 Is a new product designed to promote  
5 healthy cholesterol levels a dietary supplement  
6 or a drug?

7 MR. MARTINEZ: Sorry. Can you give  
8 that one more time?

9 JUSTICE KAGAN: A new product designed  
10 to promote healthy cholesterol levels, is it a  
11 dietary supplement -- that's a statutory term --

12 MR. MARTINEZ: Okay.

13 JUSTICE KAGAN: -- or a drug?

14 MR. MARTINEZ: I -- I think it would  
15 depend on -- on the -- the original  
16 understanding of the text of that statute in --  
17 read in context.

18 JUSTICE KAGAN: You -- you want the --

19 MR. MARTINEZ: And I think that's a --  
20 a legal question for a court.

21 JUSTICE KAGAN: -- you think that the  
22 court should determine whether this new product  
23 is a dietary supplement or a drug without giving  
24 deference to the agency, where it is not clear  
25 from the text of the statute or from using any

1 traditional methods of statutory interpretation  
2 whether, in fact, the new product is a dietary  
3 supplement or a drug?

4 MR. MARTINEZ: I --

5 JUSTICE KAGAN: You want the courts to  
6 decide that?

7 MR. MARTINEZ: Justice Kagan, I think,  
8 with respect to that question or any other of  
9 the -- a legal question, I think what the court  
10 would do, there -- there are going to be hard  
11 questions, but I think the court would bring all  
12 the traditional tools of construction to bear --

13 JUSTICE KAGAN: They do that --

14 MR. MARTINEZ: -- and would --

15 JUSTICE KAGAN: -- under Chevron.  
16 They -- you know, we have made clear all the  
17 traditional tools, if you can find an answer,  
18 that is the answer. So the court is very rarely  
19 in the situation in which you're talking where  
20 it thinks the law means X and instead it says Y.

21 If it thinks it means X, under  
22 Chevron, as we've understood it and made clear  
23 and reined it in a little bit over these last  
24 few years, it's supposed to say X.

25 But sometimes law runs out. Sometimes

1 there's a gap. Sometimes there's a genuine  
2 ambiguity. And I -- I don't know. In that  
3 case, I would rather have people at HHS telling  
4 me whether this new product was a dietary  
5 supplement or a drug.

6 MR. MARTINEZ: So, Your Honor, I think  
7 a couple things.

8 First of all, I don't think Chevron is  
9 a doctrine that only applies to tie-breaker  
10 50/50 scenarios. It's never been understood  
11 that way. You know, Justice Scalia in his  
12 famous article in 1989 --

13 JUSTICE KAGAN: It's not a  
14 tie-breaker. There are just some times where  
15 you look at a statute and the most honest  
16 reading is that there's -- there's -- there's a  
17 gap there --

18 MR. MARTINEZ: But --

19 JUSTICE KAGAN: -- because of the  
20 limits of language, because of the limits of our  
21 ability to predict the future.

22 And so who fills that gap?

23 MR. MARTINEZ: But I -- I guess what I  
24 would sort of push back on is I don't think  
25 there's a gap if the court looks at the statute

1 and thinks, hey, this is a really hard case,  
2 it's a really close statute. Fifty-two percent  
3 likely, I think -- you know, I have 52 percent  
4 confidence that X is right --

5 JUSTICE KAGAN: I'll give you --

6 MR. MARTINEZ: -- 48 percent likely --

7 JUSTICE KAGAN: -- I'll give you  
8 another one, Mr. Martinez. Does the term "power  
9 production" -- I'm just -- these are real cases.

10 MR. MARTINEZ: Right.

11 JUSTICE KAGAN: These are -- these are  
12 prototypical Chevron cases.

13 MR. MARTINEZ: But --

14 JUSTICE KAGAN: Does the term "power  
15 production capacity" refer to AC power that is  
16 sent out to the electric grid or DC power that's  
17 produced by a solar panel?

18 MR. MARTINEZ: I think same answer as  
19 the first hypothetical. But let me try to --  
20 let me try to sort of give you a different  
21 framework for thinking about this problem.

22 Let's imagine that that statute came  
23 to a court before an agency had even acted in  
24 the first place. What would a court do? Would  
25 a court look at the statute -- a statutory term

1 like that that's a hard -- presents a hard  
2 interpretive question and say: Well, this is  
3 hard, it's sort of 52/48, it's kind of close. I  
4 think the law has run out and I'm just not going  
5 to be able to decide this. I think the court  
6 would go with the best interpretation.

7 JUSTICE KAGAN: The -- the -- the --  
8 the court might -- the court in that case would  
9 have to make a choice. But, you see, here, the  
10 court can say, you know, the best option is to  
11 listen carefully and to defer if it's reasonable  
12 and if it's consistent with everything that we  
13 know that Congress has said, to defer to people  
14 who actually know things about these things --

15 MR. MARTINEZ: But --

16 JUSTICE KAGAN: -- to -- you know, to  
17 people who understand the way particular  
18 questions fit within a broader statutory and  
19 regulatory scheme, to people who have  
20 understanding of the policies and of the facts  
21 that led to this.

22 I'll give you a third example.

23 MR. MARTINEZ: Can I respond?

24 JUSTICE KAGAN: And this will be my  
25 last one, Mr. Martinez, and it's going to be my



1     fairest one because it's going to be one you  
2     know about, which is Chevron. Is a stationary  
3     source in the Clean Air Act -- does it refer to  
4     whole plants or to each pollution-emitting  
5     device within the plant?

6                   MR. MARTINEZ: We think that the  
7     decision in Chevron was -- reflected the best  
8     interpretation, with much respect to Justice  
9     Gorsuch's mother's EPA. We think that that was  
10    the best interpretation.

11                   But -- but can I just go back and I  
12    think what you described earlier about listening  
13    to the agency and taking into account all those  
14    things, our -- our rule would allow that.  
15    That's Skidmore.

16                   I think the only difference between  
17    our rule and -- and the Skid- -- what -- the  
18    Skidmore sort of approach and the Chevron  
19    approach is that after listening to the agency's  
20    explanation of all the things that you said, if  
21    the court isn't persuaded by the agency that the  
22    agency's interpretation is correct, Chevron  
23    would say you still have to go with the agency.  
24    And that's just like a dramatic thing.

25                   JUSTICE SOTOMAYOR: But why not?

1 Meaning I -- I think all of the play and  
2 disagreement is around the word "ambiguity." I  
3 know that there have been some earlier cases  
4 that suggested, if there were two plausible  
5 meanings, you went with the agency meaning.

6 I think we've gone far beyond that.  
7 It has to be two reasonable meanings. Assuming  
8 -- you -- you make an assumption that there is a  
9 best answer. I don't know how you can say  
10 there's a best answer when Justices of this  
11 Court routinely disagree and we routinely  
12 disagree at 5-4.

13 Is the best answer simply a majority  
14 answer? I don't think so.

15 MR. MARTINEZ: But, Your Honor, if --

16 JUSTICE SOTOMAYOR: I happen, when I  
17 dissent, to think the others got it wrong.

18 (Laughter.)

19 JUSTICE SOTOMAYOR: And they often do.

20 (Laughter.)

21 JUSTICE SOTOMAYOR: But putting that  
22 aside -- but putting that aside, in those  
23 situations, there are two plausible -- not  
24 nearly plausible. There are two best answers,  
25 and the question is who makes the choice or

1 helps you make the choice.

2           And if the Court can -- can disagree  
3 reasonably and comes to that tie-breaker point,  
4 and it could be 51/49, it could be 52/53, if  
5 it's that close, why shouldn't the person with  
6 all of the qualities you spoke about, the entity  
7 with all of the qualities, expertise,  
8 experience, on-the-ground execution, knowledge  
9 of consequences, why shouldn't deference be  
10 given to that entity?

11           MR. MARTINEZ: Justice Sotomayor, I  
12 think your explanation of ambiguity just now  
13 just proves the problem with Chevron because I  
14 think what you said is that whenever there's a  
15 case, a statutory case in which the members of  
16 the Court disagree with one another, that that's  
17 essentially saying the statute's ambiguous  
18 because reasonable people can disagree.

19           JUSTICE KAGAN: That's what nobody  
20 believes --

21           MR. MARTINEZ: Well --

22           JUSTICE KAGAN: -- about Chevron, Mr.  
23 Martinez. As we've described it is you -- you  
24 work hard to figure out a statutory problem.  
25 You don't say, oh, it's difficult. Oh, there

1 are two interpretations. Oh, you know, not  
2 everybody agrees with this in three seconds  
3 flat.

4           You don't say that. You do everything  
5 you do, look at the text, look at legislative  
6 history if you believe in legislative history,  
7 look at context, look at every tool you can, and  
8 still there are places where we don't know  
9 whether this drug is a -- is a -- is a --  
10 whether this product is a drug or a dietary  
11 supplement, and it's best to defer to people who  
12 do know, who have had long experience on the  
13 ground, who have seen a thousand of these kinds  
14 of situations.

15           And, you know, judges should know what  
16 they don't know.

17           MR. MARTINEZ: I -- I agree with that,  
18 Justice Kagan. But, with -- with all due  
19 respect, I -- I think I understood Justice  
20 Sotomayor to be saying that whenever judge --  
21 Justices of this Court disagree about the best  
22 meaning of the statute, because, obviously,  
23 everyone on the Court is reasonable, that shows  
24 that there's an ambiguity.

25           If that's the test, which I think was

1 the implication of the question, then that can't  
2 be wrong. That's much broader than --

3 JUSTICE SOTOMAYOR: That wasn't --

4 MR. MARTINEZ: -- step one.

5 JUSTICE SOTOMAYOR: -- my implication.

6 My implication was that using all the statutory  
7 tools, you can still come up, using them in good  
8 faith, using them, you can still come up with no  
9 answer --

10 MR. MARTINEZ: Well, I think --

11 JUSTICE SOTOMAYOR: -- with no clear  
12 answer.

13 MR. MARTINEZ: -- I -- I think you can  
14 can come up with no clear answer because some --

15 JUSTICE SOTOMAYOR: Or no best answer.

16 MR. MARTINEZ: -- because some  
17 statutes are hard. But I think you can come up  
18 with a best answer, and -- and the reason I  
19 think that is because --

20 JUSTICE SOTOMAYOR: Best only because  
21 a majority agrees?

22 JUSTICE JACKSON: But --

23 MR. MARTINEZ: No, no, because --  
24 because, if you had the same statute with the  
25 same interpretive question posed to you without

1 the agency having acted, I don't think you would  
2 say there's no answer here. I think you would  
3 choose the best answer.

4 JUSTICE GORSUCH: I mean, Mr. Martinez  
5 --

6 JUSTICE JACKSON: But, Mr. Martinez --

7 JUSTICE GORSUCH: -- I guess I'm  
8 struggling to understand what -- what -- what's  
9 at stake here given the questions because, as I  
10 understand Justice Kagan's hypotheticals, which  
11 are -- are hard ones, that one option would be  
12 to say it's ambiguous and, therefore, the agency  
13 always wins. That -- that's what I understood  
14 Chevron to mean at least coming in here today.

15 Another would be to listen carefully  
16 to both sides and provide special weight under  
17 Skidmore to a coequal branch of government's  
18 views about the law, which one would think we  
19 would do anyway, and that they would have --  
20 have -- be considered great weight in arriving  
21 at the best answer and that that's what a court  
22 would do if -- if there were no interpretive  
23 principles advanced by the executive branch, if  
24 there hadn't been some sort of rule or  
25 adjudication.

1                   Is that -- is that correct?

2                   MR. MARTINEZ: I -- I think that's  
3 correct. And I think the difference between the  
4 Skidmore approach that you just laid out and the  
5 Chevron approach is just, at the end of the day,  
6 once you've considered all the expertise and all  
7 the information the agency has to bear --

8                   JUSTICE GORSUCH: Who decides?

9                   MR. MARTINEZ: Who decides? Who -- is  
10 the judge persuaded or not persuaded?

11                   JUSTICE GORSUCH: Is the judge  
12 persuaded at the end of the day, with proper  
13 deference given to a coequal branch of  
14 government, or does the judge abdicate that  
15 responsibility and say automatically whatever  
16 the agency says wins?

17                   MR. MARTINEZ: Right, even -- even if  
18 the judge is not persuaded.

19                   JUSTICE JACKSON: But, Mr. Martinez --

20                   JUSTICE GORSUCH: And then -- and then  
21 --

22                   JUSTICE JACKSON: -- doesn't that --

23                   JUSTICE GORSUCH: -- and then, if I  
24 might just -- just finish up, what -- what's the  
25 effective difference of that? It seems to me

1 that in the first case, when -- when a judge  
2 says here's the law, it's settled, we're done,  
3 right? It can be appealed, but at the end of  
4 the day, if the Supreme Court of the United  
5 States upholds that interpretation, we're  
6 finished.

7                   Whereas, under the Chevron approach,  
8 are we finished?

9                   MR. MARTINEZ: No.

10                   JUSTICE GORSUCH: What happens?

11                   MR. MARTINEZ: I think the agency can  
12 overrule what the court said. The agency can  
13 overrule what itself said. I think that's a  
14 very strange thing, that in every other area of  
15 statutory interpretation, we understand the law  
16 to have one fixed meaning and the goal is to try  
17 to figure out that fixed meaning, but Chevron by  
18 design creates this world in which the agency is  
19 -- is -- because there's this zone of  
20 discretion, the -- the agency -- and ambiguity,  
21 the agency can kind of flip-flop and then force  
22 courts to flip-flop with them.

23                   JUSTICE GORSUCH: And I'm struck on  
24 that score by the Brand X case, which involved  
25 broadband, in which this Court said, okay,



1 agency, you automatically win with respect to  
2 one interpretation of the Bush administration, I  
3 believe it was, and then, of course, the next  
4 administration came back and proposed an  
5 opposite rule.

6 MR. MARTINEZ: Right.

7 JUSTICE GORSUCH: And then the next  
8 administration came back and flipped it back  
9 closer to the first. And as I understand it,  
10 the present Administration is thinking about  
11 going back to where --

12 MR. MARTINEZ: That's -- that --  
13 that's exactly right.

14 JUSTICE GORSUCH: -- where we started.

15 MR. MARTINEZ: That's exactly right,  
16 Justice Gorsuch, and I think it -- it plays up  
17 the real problem. Chevron really is a  
18 reliance-destroying doctrine. Imagine if you're  
19 a person or a regulated entity and you're trying  
20 to figure out what the law is. You should be  
21 able to rely on the best interpretation of the  
22 law and not have to, you know, check the -- the  
23 C.F.R. every couple years to see if the law has  
24 somehow changed even though Congress hasn't  
25 acted.

1 JUSTICE GORSUCH: And that's the delta  
2 between Skidmore and Chevron?

3 MR. MARTINEZ: I think -- I think  
4 that's right. I mean, Skidmore, I think, would  
5 allow for -- for courts to give meaningful  
6 weight and consideration to -- to persuasive  
7 opinions by agencies. The only thing Skidmore  
8 doesn't do is require a court to give up its --  
9 its interpretive -- ultimate interpretive say  
10 and defer to an interpretation that is not  
11 persuasive.

12 JUSTICE GORSUCH: Thank you.

13 JUSTICE JACKSON: Mr. Martinez, what  
14 -- what I'm stuck on is what seems to be an  
15 assumption in your argument that every question  
16 posed with respect to interpreting --  
17 interpreting a statute is a legal one.

18 I see Chevron as doing the very  
19 important work of helping courts stay away from  
20 policymaking, and so I -- I'd like for you to  
21 sort of think of it through that lens and help  
22 me understand why, if we do away with Chevron's  
23 framework, we won't have a problem of courts  
24 actually making a policy decision.

25 So Justice Kagan gave you a number of

1 examples, and I think the reason why those  
2 examples are hard or why they're ambiguous or  
3 whatever is because, at bottom, they're not  
4 asking legal questions; they're asking policy  
5 questions. How is it that, you know,  
6 "stationary source" is to be defined? That's  
7 not really a legal question. I mean, there  
8 could be several reasonable ways of interpreting  
9 that. And at the end of the day, I think the  
10 way I've been thinking about Chevron is Congress  
11 has given that policy choice to the agency.

12           And my concern is that if we take away  
13 something like Chevron, the court will then  
14 suddenly become a policymaker, by majority rule  
15 or not, making policy determinations. So how  
16 can we avoid that?

17           MR. MARTINEZ: So we agree, obviously,  
18 that -- that courts should not be in the  
19 business of policymaking. And I think the whole  
20 enterprise of statutory interpretation, when  
21 properly understood, is -- is designed to take  
22 courts out of policymaking because what the  
23 court is trying to do is -- is act as a faithful  
24 agent of what Congress has done and find the  
25 best --

1 JUSTICE JACKSON: But isn't that --

2 MR. MARTINEZ: -- interpretation.

3 JUSTICE JACKSON: -- isn't that what  
4 Chevron does? I mean, isn't Chevron, step one,  
5 even in this very case, asking the question,  
6 one, has Congress made that policy  
7 determination? So, for example, here, the  
8 question is whether or not monitors on the boats  
9 have to be paid for by the owner of the boat.

10 I see that as a policy question.  
11 Congress could have said yes or no. There's  
12 nothing about law really inherently in the  
13 question of should the monitors on the boats be  
14 paid for by the owners or the government. So  
15 step one is has Congress in the statute answered  
16 that question.

17 When we say no, everybody agrees  
18 that's not in the statute, then we say the  
19 agency can make that determination so long as  
20 they do so in a reasonable way. And the -- and  
21 courts sort of police the boundaries of  
22 reasonableness. But whether or not the monitors  
23 are paid for is not really a legal question.

24 MR. MARTINEZ: I think the question of  
25 whether or not the law allows the agency to --

1 to force the monitors to be paid for by private  
2 industry is absolutely a legal question. I  
3 agree with you that when Congress --

4 JUSTICE JACKSON: But isn't that the  
5 same question as to whether or not -- isn't that  
6 just another way of saying, can this policy  
7 determination be made by the agency?

8 MR. MARTINEZ: No, I don't think so.  
9 I think the difference is, when the -- when the  
10 -- when the policymaker, whether it's Congress  
11 or the agency, is sitting there and trying to  
12 figure out, like, what the best policy is, would  
13 the world be a better place if industry has to  
14 pay for these monitors or not, that's absolutely  
15 a policy question.

16 JUSTICE JACKSON: Okay. So that's the  
17 question --

18 MR. MARTINEZ: But -- but --

19 JUSTICE JACKSON: -- right?

20 MR. MARTINEZ: No, because, when it  
21 comes to a court, the court is not figuring out  
22 what the best thing for the world is. The court  
23 is figuring out, well, what did Congress  
24 actually want here. It's --

25 JUSTICE JACKSON: But I guess I'm

1       afraid that the court really is figuring out  
2       what the best thing in the world is if we --

3                   MR. MARTINEZ:   But -- but --

4                   JUSTICE JACKSON:  -- look at it  
5       through your lens, right, because, if the answer  
6       to the question is, you know, should -- should  
7       they pay for it or not, the agency has a view,  
8       and unless we're deferring to that view, I don't  
9       see why we aren't overriding the -- the agency's  
10      policy prerogative.

11                  MR. MARTINEZ:   But the -- the question  
12      that the court should be answering is not should  
13      agency -- should industry pay for the monitors.  
14      The question that the court should be answering  
15      is, did Congress require or allow agent --  
16      industry to be forced to pay for the monitors?  
17      And that's a very different question.  That's  
18      the difference between law and policymaking.

19                  And I think the whole assumption and  
20      the whole understanding of statutory  
21      interpretation under this Court's cases is  
22      there's a difference between law and  
23      policymaking.  Judges are there not to exercise  
24      force or will.  They're there to exercise  
25      judgment.  They're -- they're serving as neutral

1 umpires. They're not players on the field.

2 JUSTICE JACKSON: All right. So how  
3 does that --

4 JUSTICE BARRETT: Mr. Martinez --

5 JUSTICE JACKSON: -- play out under  
6 your interpretation -- so, here, what -- what is  
7 the question we're supposed to be answering?

8 MR. MARTINEZ: The question you're  
9 supposed to be answering is, did -- does this  
10 statute require -- has Congress required --  
11 either required the -- the monitors to be paid  
12 for by industry, or has it given the agency the  
13 authority to make that decision? And I don't  
14 think -- I think that is a legal -- both of  
15 those versions of that question are legal  
16 questions, and the answer is no.

17 JUSTICE BARRETT: Mr. Martinez, can I  
18 ask you a question about the line between law  
19 and policy? And I want to ask you in the  
20 context of one of Justice Kagan's examples, the  
21 dietary supplement or drug.

22 Where is the line between something  
23 that would be then subject to arbitrary and  
24 capricious review and something that's a  
25 question of law? Because I'm just wondering

1 whether we could say that the definition of  
2 dietary supplement or drug might be something  
3 that's a question of statutory interpretation in  
4 the context of the statute, but which category  
5 any one thing fell in might be a question of  
6 policy for the agency.

7 MR. MARTINEZ: Right. I --

8 JUSTICE BARRETT: Is that possible?

9 MR. MARTINEZ: -- I -- I think that's  
10 right. I think that would be more of a -- of a,  
11 you know, application of law to fact or a  
12 factual question. But I think the core question  
13 of, like, you know, what is the meaning of  
14 dietary supplement, and I forget what the other  
15 alternative was, those are legal questions.

16 JUSTICE BARRETT: But whether the  
17 particular cholesterol-reducing drug fell --

18 MR. MARTINEZ: Right.

19 JUSTICE BARRETT: -- in one category  
20 or the other, I mean, you know --

21 MR. MARTINEZ: That -- that would be a  
22 --

23 JUSTICE BARRETT: -- presumably, that  
24 depends on how does this function? What is the  
25 mechanism by which it decreases cholesterol?



1                   MR. MARTINEZ: I -- I think that's  
2 right. But I think it's -- I do think it is  
3 important to make -- retain the sort of legal  
4 component of that question and -- and make sure  
5 that the courts have authority over that legal  
6 component.

7                   JUSTICE BARRETT: I want to ask you  
8 something about your Article III argument too.  
9 You know, Justice Thomas asked you what the line  
10 is. And, you know, courts all of the time make  
11 judgments about whether things are reasonable.  
12 But I -- I don't understand you to be  
13 disagreeing that things like whether  
14 something -- that an agency could be tasked with  
15 deciding what was the most feasible, most  
16 useful, most reasonable.

17                   Well, courts could do that too. So is  
18 that a delegation of judicial power that would  
19 offend Article III in your view, to give those  
20 kinds of --

21                   MR. MARTINEZ: No, I think --

22                   JUSTICE BARRETT: -- decisions to an  
23 agency?

24                   MR. MARTINEZ: -- I think the way to  
25 think about those kinds of -- of statutory

1 provisions would be that the best interpretation  
2 of the statute, given the nature of the word  
3 "reasonable" in context, is to confer a range of  
4 discretion on the agency.

5           And so I think a court in that case --  
6 if -- if the agency is operating within the  
7 range of discretion, that's arbitrary and  
8 capricious review. If the agency is sort of  
9 operating at the edges, you have to figure out  
10 where the guardrails are. That's the legal  
11 question.

12           So, if the -- if the statute says, you  
13 know, the agency can pick red, blue, or green,  
14 then the choice among those three options is for  
15 the agency. But, if you have a legal question  
16 like, oh, does pink count as red, that's a legal  
17 question.

18           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
19 Martinez.

20           How much of an actual question on the  
21 ground is this? I saw some study that said we  
22 haven't relied on Chevron for 14 years. And  
23 Judge Kethledge has written -- he's been a judge  
24 for 10 years. He's never invoked Chevron step  
25 two.

1           You know, judges are used to deciding  
2 things, and when they get around to doing it,  
3 they tend to think what they've come up with is  
4 not only the best answer, but it's the only  
5 answer.

6           (Laughter.)

7           CHIEF JUSTICE ROBERTS: And -- and I  
8 just wonder how often this comes up?

9           MR. MARTINEZ: I think it comes up a  
10 lot, Your Honor. And this Court hasn't relied  
11 on Chevron since 2016, but the lower courts  
12 still have to apply it. And I think these two  
13 cases, the -- the two that you're going to hear  
14 this morning, sort of show what happens when --  
15 when courts are applying this doctrine because  
16 they're -- they're essentially getting to a  
17 point where they don't really have to figure out  
18 the best answer and they can just -- you know,  
19 instead of asking what does the statute mean,  
20 they can ask a different threshold question,  
21 which is, is this statute ambiguous enough that  
22 -- that we should just, you know, let the agency  
23 do the work for us.

24           CHIEF JUSTICE ROBERTS: Thank you.

25           Justice Thomas?

1 Justice Alito?

2 JUSTICE ALITO: Mr. Martinez, would  
3 you agree that one of the reasons why Chevron  
4 was originally so popular was concern that  
5 judges were allowing their policy views,  
6 consciously or unconsciously, to -- to -- to  
7 influence their interpretation of the statutes  
8 in question?

9 MR. MARTINEZ: Yes.

10 JUSTICE ALITO: Why was that fear  
11 unfounded? Why do you think now that the fear  
12 was unfounded?

13 MR. MARTINEZ: Well, I think three  
14 things. First of all, I think the fear has --  
15 it's reasonable to think the fear has diminished  
16 over time, regardless of what it was then, in  
17 large part due to the very salutary developments  
18 in the way that this Court and the lower courts  
19 generally now think about statutory  
20 construction.

21 In the old days, there was a lot of  
22 reliance on legislative history and on sort of  
23 more free-form analysis that I think made it  
24 easier for policy considerations to infect the  
25 judicial decision-making process. But this

1 Court has now made clear that, you know, really,  
2 we should be text-focused, we should be focused  
3 on faithful agency to Congress. So I think that  
4 is one difference.

5 I think another difference is courts  
6 now have become more appreciative of the fact  
7 that we're not just talking about, you know,  
8 judicial -- rules of, like, judicially made  
9 common law about how to interpret statutes. We  
10 have the APA here.

11 Justice Scalia was a big defender of  
12 Chevron in its original incarnation but, over  
13 time, came to realize that the APA had text that  
14 actually bore on this question.

15 And I think, when you're enforcing  
16 that text, you come to the same place as our  
17 Article III argument, which is that courts have  
18 to exercise independent judgment.

19 JUSTICE ALITO: Do you think that the  
20 canons of interpretation that we have now and  
21 all of the other tools that we have in our  
22 statutory interpretation toolkit are like the  
23 Enigma machine and so we have these statutes and  
24 they're sort of written in code and we run them  
25 through the Enigma machine and, abracadabra, we

1 have the best interpretation? Do you really  
2 think that's how it works?

3 MR. MARTINEZ: I -- I think that what  
4 this Court does with respect to the normal  
5 canons of construction is it's used the -- it's  
6 -- it's generated those canons as rough rules of  
7 thumb to help guide the interpretive process  
8 because, if the Court believes that the canons  
9 best approximate the best original meaning of  
10 the statute, especially -- and then there's some  
11 canons that -- that sort of are not purely  
12 textual canons but that sort of are informed by  
13 constitutional -- foundational constitutional  
14 values.

15 I think Chevron's very different from  
16 that because, with Chevron, you're doing  
17 something -- you're not trying to find the best  
18 interpretation anymore. You're, in fact,  
19 agreeing that you have to impose the not-best  
20 interpretation because you have to defer.

21 And so, unlike all the other canons,  
22 Chevron is the only one that says to courts, you  
23 can stop doing your normal interpretive function  
24 and we're going to allocate that interpretive  
25 function outside of Article III.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Sotomayor?

4 JUSTICE SOTOMAYOR: I counted over, I  
5 think -- not I -- the Solicitor General or  
6 someone has given us a list of 77 cases in which  
7 the Court has used the Chevron approach and  
8 interpreted what the law was.

9 Your overruling Chevron puts a  
10 question to all those 77 cases.

11 MR. MARTINEZ: No, Your Honor, I  
12 think --

13 JUSTICE SOTOMAYOR: No, your out is  
14 it's stare decisis now?

15 MR. MARTINEZ: Right. So --

16 JUSTICE SOTOMAYOR: Until the agency  
17 does something else? And then people can come  
18 back because it's not stare decisis anymore?

19 MR. MARTINEZ: So I think, with  
20 respect to the effects of -- of applying normal  
21 rules of construction here instead of Chevron,  
22 I'd say two things.

23 First of all, the 70 holdings or  
24 whatever, the bottom-line holdings in those  
25 cases would get stare decisis, so they would not

1 be undermined. So there's no convulsive change  
2 of the law with respect to that.

3 JUSTICE SOTOMAYOR: I don't understand  
4 how that happens. Once you have a new approach,  
5 I'm not sure.

6 MR. MARTINEZ: I --

7 JUSTICE SOTOMAYOR: But let me move on  
8 to the second part of my question, which is the  
9 cases that come to the Court are usually the  
10 hard cases. So you say, in the last 14 years,  
11 we've barely referenced Chevron.

12 And do you know what the breakup is?  
13 How often have we consistently upheld the agency  
14 in those cases?

15 MR. MARTINEZ: In -- in the cases  
16 since 2016?

17 JUSTICE SOTOMAYOR: Yes.

18 MR. MARTINEZ: I -- I don't know the  
19 track record on it, Your Honor.

20 JUSTICE SOTOMAYOR: I know, it's  
21 interesting.

22 MR. MARTINEZ: But I will say, I mean,  
23 there -- there's some prominent --

24 JUSTICE SOTOMAYOR: But -- but putting  
25 that aside where we disagree, do you suggest



1 that our disagreement was based on ignoring of  
2 Chevron or us doing exactly what you say we  
3 should be doing, which is to say this is outside  
4 the bounds of reasonableness or around the  
5 guardrails because you're going outside of  
6 plausible --

7 MR. MARTINEZ: I --

8 JUSTICE SOTOMAYOR: -- of reasonable  
9 interpretation?

10 MR. MARTINEZ: -- I think the Court in  
11 cases like the American Hospital case or the  
12 Digital Realty case, which I think are two  
13 really good recent examples, the Court  
14 unanimously overturns the lower court decision  
15 because it does exactly the right thing. It  
16 does all the canons at step one and it -- and it  
17 essentially says, like, the statute is clear.

18 But I think what those 9-0 decisions  
19 show is how confusing and unworkable Chevron is  
20 because the lower courts, you know, purported to  
21 do or didn't really do what they were supposed  
22 to do and they came to the opposite conclusion,  
23 not necessarily because they thought that --  
24 that your interpretation wasn't the best but  
25 rather because it thought that the statute was

1       ambiguous enough that it required deference.

2                       And so this, like, threshold --

3                       JUSTICE SOTOMAYOR: Counsel, that  
4       judgment is inherent in every question. I mean,  
5       that -- that kind of problem is just a part not  
6       just of judging but of decision-making, period,  
7       of life. And so it's not clear to me that the  
8       fact that there may be some ambiguity about  
9       what -- how much ambiguity, the question that  
10      Justice Thomas asked, it doesn't take away from  
11      the basic premise of Chevron, which is a  
12      reasonable interpretation within the bounds  
13      of -- of common statutory interpretation should  
14      be given deference.

15                      MR. MARTINEZ: Right. But I do think  
16      the ambiguity trigger introduces a whole kind of  
17      threshold question that's very hard to apply  
18      neutrally. I mean, you have great judges.  
19      Judge Kethledge, I think, was referenced. He  
20      doesn't -- he never found a case that required  
21      him to go past step one.

22                      Judge Silberman, another great judge,  
23      said that in most cases he thought the statute  
24      was ambiguous. And if there's that much  
25      disagreement, then I think that's a sign that

1 Chevron really isn't workable.

2 And this Court has tried to rein in  
3 Chevron in numerous ways, but I think that what  
4 all of those efforts show is that you kind of  
5 need a secret decoder ring to figure out what  
6 the law means under this Court's approach.

7 You have to do step zero. You have to  
8 apply Mead. Then you have to do a robust step  
9 one inquiry taking into account Footnote 9 and  
10 taking into account, you know, how much  
11 ambiguity is needed.

12 In this -- in the D.C. Circuit, you  
13 have to do step one and a half, where you have  
14 to figure out whether the agency recognized that  
15 the statute was ambiguous.

16 Under Kisor, there's maybe a step  
17 three that says you turn off deference when the  
18 agency's operating outside of its area of  
19 expertise. And then overlying all that you've  
20 got the Major Questions Doctrine.

21 And so I think, if -- if -- if that's  
22 kind of what --

23 JUSTICE SOTOMAYOR: Well, that's the  
24 Court's creation.

25 MR. MARTINEZ: Right. But it's the

1 Court's creation because it's trying to solve  
2 the fundamental problem, which is that Chevron  
3 is doing something very weird. It's taking  
4 interpretive authority that belongs to courts  
5 and it's giving it to agencies.

6 So all of these bells and whistles are  
7 efforts to kind of claw it back to address the  
8 symptoms, but I think it's time for the Court to  
9 address the disease, the underlying problem,  
10 which is Chevron itself.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: Mr. Martinez, I want  
13 you to think of this from Congress's  
14 perspective. So I was thinking what is the next  
15 big piece of legislation on the horizon and who  
16 knows, don't have a crystal ball, but I'm going  
17 to say -- I'm going to guess that it's  
18 artificial intelligence.

19 So let's imagine Congress enacts an  
20 artificial intelligence bill and it has all  
21 kinds of delegations, maybe it creates an agency  
22 for the purpose or maybe it uses existing  
23 agencies and it has all kinds of delegations to  
24 that agency or agencies about how to regulate  
25 artificial intelligence so that this nation can

1 capture the -- the -- the opportunities but also  
2 meet the challenges of that.

3 And then, just by the nature of things  
4 and especially the nature of the subject, there  
5 are going to be all kinds of places where,  
6 although there's not an explicit delegation,  
7 Congress has, in effect, left a gap. It has  
8 created an ambiguity. And what Congress is  
9 thinking is, do we want courts to fill that gap,  
10 or do we want an agency to fill that gap?

11 When the normal techniques of legal  
12 interpretation have run out, on the matter of  
13 artificial intelligence, what does Congress  
14 want, Mr. Martinez?

15 MR. MARTINEZ: I think Congress wants  
16 courts to interpret the best interpretation of  
17 their --

18 JUSTICE KAGAN: Congress doesn't know  
19 --

20 MR. KAGAN: -- apply the best  
21 interpretation --

22 JUSTICE KAGAN: -- what that answer  
23 means. Congress knows that there are going to  
24 be gaps because Congress can hardly see a week  
25 in the future with respect to this subject, let

1 alone a year or a decade in the future.

2           And Congress knows that there are  
3 going to be things that it writes that it's just  
4 not going to be clear how this will apply or  
5 what it will mean with respect to countless  
6 factual situations that this country will have  
7 to address.

8           Does the Congress want this Court to  
9 decide those questions, policy-laden questions,  
10 of artificial intelligence?

11           MR. MARTINEZ: I -- I don't think  
12 Congress wants the Court to do policy. I think  
13 Congress wants the Court to do its ordinary  
14 function, which is interpret the law and figure  
15 -- and apply the best understanding of the law.

16           And I think that the implication of  
17 your question is that this is some sort of  
18 intentional delegation by Congress, that Chevron  
19 deference is -- is this implicit delegation.  
20 But I -- I don't think that's right. I think  
21 many people, including a very insightful article  
22 that -- that you wrote 20 years ago, make clear  
23 that this is fictional. This delegation is  
24 fictional.

25           JUSTICE KAGAN: Fictional just

1 means -- is like academic speak for presumed.  
2 We are indeed presuming congressional intent.  
3 The congressional intent, you know, the -- the  
4 delegation is not explicit on the face of this  
5 statute, but what we're thinking is Congress  
6 knows things about different institutions, about  
7 what they know, about what they're competent  
8 with respect to, and Congress knows that this  
9 Court and lower courts are not competent with  
10 respect to deciding all the questions about AI  
11 that are going to come up in the future.

12           And what Congress wants, we presume,  
13 is for people who actually know about AI to  
14 decide those questions. And also, those same  
15 people who know about AI are people who, to some  
16 degree in some way, are accountable to the  
17 political process. They have constituencies.  
18 They have fact-finding abilities. They are  
19 obligated to go consult with people. They  
20 report to a president, who needs to be elected.

21           In all kinds of ways, both with --  
22 with respect to expertise and with respect to  
23 their connections to the public and to other  
24 policymaking entities, those are the people  
25 Congress wants to decide questions about AI. We

1 don't even know what the questions are about AI,  
2 let alone the answers to them, "we" being the  
3 Court.

4 MR. MARTINEZ: Justice Kagan, I think,  
5 if we're trying to figure out what the -- what  
6 the reasonable thing to infer that Congress has  
7 presumed, I think the far more reasonable  
8 presumption and the one that's most consistent  
9 with our constitutional structure is that  
10 Congress is going to presume that courts are  
11 going to do law, not policy, they're going to  
12 pick the best interpretation and enforce the  
13 best interpretation as to this statute in the  
14 exact same way that they would do it with  
15 respect to any other -- any other statute.

16 And I think this case actually -- you  
17 know, AI is a trickier example --

18 JUSTICE KAGAN: I mean, but it's --

19 MR. MARTINEZ: -- but talk about this  
20 case. Does anyone --

21 JUSTICE KAGAN: -- it's a real  
22 example. I mean, this case, you know, whether  
23 it's -- it -- it was a correct interpretation or  
24 not a correct interpretation of Chevron is  
25 really not the issue that we're deciding here.



1           The issue we're deciding here is more  
2     like that, is more like the countless policy  
3     issues that are going to confront this country  
4     in the years and decades ahead. Will courts be  
5     able to decide these issues as to things they  
6     know nothing about, courts that are completely  
7     disconnected from the policy process, from the  
8     political process, and, you know, that just  
9     don't have any expertise and -- and experience  
10    in an area, or are people in agencies going to  
11    do that?

12           MR. MARTINEZ: I --

13           JUSTICE KAGAN: That's what this case  
14    is about.

15           MR. MARTINEZ: -- I think the  
16    constitutional answer is that Congress needs to  
17    set the rules with respect to AI. It can  
18    delegate some policymaking discretion to  
19    agencies. But, once the law is written and the  
20    interpretive function has begun, then that job  
21    is -- is for the courts.

22           And I think this case actually really  
23    is a good example because I think the problem  
24    with Chevron is that, like, no one really -- I  
25    mean, I'm curious to see what the Solicitor

1 General will say about this, but does anyone  
2 really think that Congress was presuming that  
3 the agency would get to decide the question of  
4 who pays for the monitors?

5 JUSTICE KAGAN: Okay. I have one last  
6 question. Do you think that Congress could  
7 codify -- codify Chevron?

8 MR. MARTINEZ: I -- I don't think so  
9 because I think that -- that a statute that  
10 codifies Chevron would say, essentially, that  
11 the interpretive authority has been reallocated  
12 from the court to the agency. I think that --

13 JUSTICE KAGAN: Congress --

14 MR. MARTINEZ: -- interpretive  
15 authority --

16 JUSTICE KAGAN: -- cannot decide that  
17 in cases -- after all the statutory tools have  
18 been used and there remains a gap or an  
19 ambiguity, Congress could not decide that it  
20 wants people who know something about something  
21 to decide the questions that will be left over.

22 MR. MARTINEZ: I -- I think that gives  
23 away and -- and would -- would take away from  
24 courts and give to agencies core judicial  
25 interpretive authority. I don't think Congress

1 could do that. In the same way that Congress  
2 couldn't tell the president how to exercise the  
3 veto power or the pardon power, it can't tell  
4 courts how to do interpretation and to defer to  
5 someone else.

6 JUSTICE KAGAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Gorsuch?

9 JUSTICE GORSUCH: Do we have to decide  
10 that constitutional question?

11 MR. MARTINEZ: I think it makes sense  
12 to decide the constitutional question. I think  
13 you could --

14 JUSTICE GORSUCH: That wasn't -- do we  
15 have to?

16 MR. MARTINEZ: I think you could  
17 resolve this case under the APA, and we would  
18 certainly welcome an -- an interpretation of the  
19 APA that comes out our way, especially if it's  
20 informed by constitutional avoidance principles  
21 that I think have a lot of salience here.

22 JUSTICE GORSUCH: Are -- does anything  
23 in your argument suggest or depend upon the idea  
24 that judges should make or decide policy  
25 questions about AI or anything else?

1           MR. MARTINEZ: No. We -- we a hundred  
2 percent agree that judges should not do policy.  
3 We just think that they should do law. And  
4 that's in -- Chevron is about legal questions.

5           JUSTICE GORSUCH: Then there was some  
6 question about past decisions, and as you  
7 pointed out, this Court's moved away from using  
8 legislative history to some degree in favor of  
9 text, and we've made other changes in our  
10 interpretive approaches too without Congress's  
11 intervention, for example, in sovereign immunity  
12 contexts, returning to the clear statement rule  
13 that had preexisted this Court's jurisprudence  
14 for 200 years, and then we wandered off into  
15 legislative history and circled back around and  
16 corrected our own mistake.

17           We had to deal with the question of  
18 what to do with those precedents, and our answer  
19 was to leave them alone from -- from those  
20 ancient regimes, as we --

21           MR. MARTINEZ: Right.

22           JUSTICE GORSUCH: -- called them. Are  
23 you asking us to -- to do anything different  
24 when it comes to Chevron?

25           MR. MARTINEZ: No, and if I could just

1 explain what -- how I think the world would look  
2 with respect to the old cases. I think stare  
3 decisis would apply to the holdings of those old  
4 cases. I don't think that -- that anything  
5 would change. You know, "stationary source"  
6 would still mean what it meant when -- when the  
7 Court issued that bottom-line interpretation.  
8 And so I don't think that this would -- a ruling  
9 in favor of our side would -- would require or  
10 entail overturning any of those old cases.

11 I think what we really care about is  
12 prospectively, both with respect to the fishing  
13 regulation here but also with respect to other  
14 cases that come forward to the courts, making  
15 sure that courts are the ones doing the  
16 interpreting and not agencies.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh?

20 JUSTICE KAVANAUGH: Several questions.  
21 First of all, on Skidmore, there was reference  
22 to Skidmore deference, and I guess I don't think  
23 that's the right term, that it's respect or pay  
24 attention to, but I think, if we throw the term  
25 "deference" into Skidmore deference, we're going

1 to walk into another problem --

2 MR. MARTINEZ: Some --

3 JUSTICE KAVANAUGH: -- like the one we  
4 have with Chevron deference.

5 MR. MARTINEZ: Some might say  
6 "deference" is ambiguous. I think that --

7 (Laughter.)

8 MR. MARTINEZ: -- that it's imprecise.  
9 I think the better way -- I think oftentimes,  
10 when people say "deference," what they mean is  
11 that if you think the answer is X, you should  
12 defer to someone else's answer, which is  
13 different. I don't think -- I think absolutely  
14 that that would be inappropriate. So I would  
15 not use "Skidmore deference" because I think it  
16 -- it runs the risk of -- of giving that  
17 implication.

18 I think that, really, we're talking  
19 about very serious consideration of the points  
20 that the agency makes, but, ultimately, you have  
21 to be persuaded. And if you're persuaded, then  
22 that means that you've concluded that the agency  
23 has the best interpretation and then you just  
24 apply the normal rules.

25 JUSTICE KAVANAUGH: Right. I thought

1 Skidmore was about the power to persuade, not  
2 the power to control.

3 MR. MARTINEZ: Exactly.

4 JUSTICE KAVANAUGH: Yeah.

5 MR. MARTINEZ: We -- I agree with  
6 that.

7 JUSTICE KAVANAUGH: Okay. On the  
8 constitutional issue that Justice Gorsuch and  
9 Justice Kagan were raising, you have lots of  
10 arguments here, and Mr. Clement does too, for  
11 overruling Chevron without reaching the  
12 constitutional issue.

13 So I guess why -- why would we reach  
14 it? If -- if we agreed with you on overruling  
15 Chevron on other grounds, I don't see the need  
16 to address the hypothetical that Justice Kagan  
17 raised about Congress passing a Chevron-type  
18 regime.

19 MR. MARTINEZ: I think three things on  
20 that. Like I said earlier, we would certainly  
21 welcome overruling Chevron, especially under the  
22 APA and especially if informed by constitutional  
23 avoidance principles.

24 But I think there are three reasons  
25 why you should consider going beyond that to the

1 constitutional holding. There are going to be  
2 some cases that, as a technical matter,  
3 Section 706 of the APA wouldn't -- doesn't  
4 apply. And so, if it's an APA holding, it may  
5 be that in those cases there might be lingering  
6 uncertainty about whether deference should --  
7 should apply to cases that aren't technically  
8 under Section 706.

9 I think the second thing is that a lot  
10 of the analysis in figuring out what the duty  
11 under the APA to interpret the law, I think a  
12 lot of that analysis really overlaps with the  
13 constitutional points. And I think, if you --  
14 if you get to a place where you agree with us on  
15 the APA, it's not that far, not that different  
16 to ultimately agree with us on the Constitution  
17 as well.

18 And then, finally, I would just say  
19 that although, of course, this Court often  
20 prefers to rule on non-constitutional grounds, I  
21 think it's also recognized in cases like Pearson  
22 versus Callahan that there's going to be a value  
23 and a benefit to the judicial system to  
24 providing clarity about what the Constitution  
25 means. I think -- I would respectfully submit



1 this is one of those situations.

2 JUSTICE KAVANAUGH: On the question of  
3 how much does Chevron matter on the ground, I  
4 think you addressed this a little bit by citing  
5 Judge Silberman, but do you want to elaborate on  
6 that? I mean, are -- there are cases, I assume,  
7 that get to Chevron step two pretty regularly.

8 MR. MARTINEZ: Very regularly, Your  
9 Honor. It happens all the time. And I think,  
10 if a case like this one or two cases like these  
11 two can get to Chevron step two, I think that  
12 suggests that it's really hard to figure out how  
13 Chevron step one is supposed to work.

14 I mean, the Digital Realty case is  
15 another great example. That's a case where  
16 there was a statutory definition of the term  
17 "whistleblower" that required the person to have  
18 gone to the SEC and -- and, you know, submitted  
19 a -- a complaint, and the government and the  
20 lower court concluded that that was ambiguous  
21 and that it might actually apply, it was  
22 reasonable to read the statute to not require a  
23 report to the SEC.

24 So I think there are cases, there are  
25 examples like these that come up all the time,

1 and, you know, thankfully, this Court doesn't  
2 have to intervene every single time, but the  
3 reason that the problem is there is because  
4 you've told lower courts how to do their  
5 interpretation. And as long as that instruction  
6 is out there, there are going to be a lot of  
7 cases that get it wrong, and you're not going to  
8 want to be in the business of sort of error  
9 correction on each one.

10 JUSTICE KAVANAUGH: On the question of  
11 how Congress can operate without Chevron, I just  
12 want to elaborate on -- have you elaborate on  
13 that a little more.

14 My understanding is Congress  
15 oftentimes will use terms like "the agency can  
16 regulate reasonable limits" or "appropriate  
17 limits," and that gives, under State Farm, a lot  
18 of discretion to the agency to make choices to  
19 do what Justice Kagan was talking about, to  
20 think about the world as it exists five years  
21 from now or 10 years from now and not have to  
22 worry about going back to Congress.

23 So the question really is for Congress  
24 and its drafting choices, I think, what kinds of  
25 broad, capacious terms it uses, as opposed to

1 using more defined terms or statutory terms --  
2 usual kinds of statutory language. Yes, it  
3 can't rewrite that. At least that's how I  
4 thought Congress could operate in a world where  
5 Chevron does not exist.

6 MR. MARTINEZ: I -- I think that's  
7 exactly right, Justice Kavanaugh. And I think  
8 that, like I said earlier, in -- in those  
9 situations, the Court's job is basically  
10 figuring out what the best interpretation of  
11 that word is. And in many cases, maybe most  
12 cases, those types of capacious words are  
13 basically -- the best understanding of those  
14 words is that Congress is, in fact, conferring  
15 the discretion on the agency.

16 That's very different from Chevron,  
17 where, instead of having any sort of language  
18 like that or express language conferring a  
19 delegation, you're -- you're basically applying  
20 this fictional implied delegation that -- that  
21 is triggered by ambiguity, which is like -- you  
22 know, frankly, it's -- it's -- it's not -- it's  
23 fictional, it's made up.

24 And so I think a world in which  
25 Congress, when it wants to delegate to agencies,

1 needs to be express and use language like that  
2 or other language, I think is a better world  
3 from the perspective of -- of Article I and from  
4 Article III.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett?

8 JUSTICE BARRETT: Mr. Martinez, I want  
9 to return to the question that Justice Sotomayor  
10 raised about stare decisis.

11 So you said that overruling Chevron  
12 wouldn't have an effect on the many cases that  
13 have gotten to Chevron step two and then  
14 deferred to the agency. You said -- am I -- did  
15 I understand you correctly?

16 MR. MARTINEZ: Those bottom-line  
17 holdings would be right, yeah, would be.

18 JUSTICE BARRETT: Okay. But the  
19 bottom-line holdings in those cases, if the  
20 Court did defer at step two, are simply that the  
21 agency's interpretation was reasonable. And  
22 maybe sometimes, like in Brand X, they might  
23 even be like, well, we would reach a different  
24 interpretation if it were our call -- our call,  
25 but it's ambiguous, so the agency can decide.

1                   So maybe nothing happens immediately  
2 to those cases, but isn't the door then open for  
3 litigants to come back and say: Well,  
4 "stationary source" really means X or, you know,  
5 "broadband" or whatever the specific term was in  
6 -- in Brand X?

7                   So isn't it inviting a flood of  
8 litigation even if for the moment those holdings  
9 stay intact?

10                  MR. MARTINEZ: So I would say the  
11 bottom-line holdings in those cases, I would  
12 just quibble slightly, I would -- I would  
13 describe the bottom-line holding as being that  
14 the agency's action was lawful. And so that's  
15 the bottom line.

16                  I think it's true that people could  
17 come and say, look, the interpretive methods  
18 have changed since this bottom-line holding was  
19 issued and we think that -- that, you know, a  
20 different result now should apply. And -- and  
21 that's why courts consider requests to overturn  
22 precedent. But I just think that they would  
23 apply the same standards that they would apply  
24 to other stare decisis inquiries, and I think it  
25 would be the rare case that would require --

1 that -- where a court would say this -- this  
2 decision not only isn't the best interpretation,  
3 but it's, like, so bad and so practically  
4 important that we're going to overturn our own  
5 precedent.

6 So I think that would be the  
7 safeguard.

8 JUSTICE BARRETT: So, when you say  
9 that the bottom-line holdings, you -- you've  
10 kind of changed the level of generality, right?  
11 If you say the bottom-line holding is that the  
12 agency's interpretation is lawful, you think  
13 it's not open to people to come back then and  
14 say, well, it's actually not lawful, this is  
15 wrong, the Court got it wrong because the best  
16 interpretation isn't the agency's?

17 MR. MARTINEZ: I -- I think litigants  
18 could make that argument, but I think they would  
19 have to overcome the normal stare decisis test,  
20 which is very hard to overcome, and so they  
21 would probably have to show that it's really  
22 wrong and really practically important.

23 And I think most courts, and I imagine  
24 this Court, is -- is going to find that that  
25 threshold is -- is met, like, almost -- very

1 rarely, maybe almost never. And so, as a  
2 practical matter, you're not going to be  
3 upending, you know, those -- those bottom-line  
4 decisions --

5 JUSTICE BARRETT: Okay.

6 MR. MARTINEZ: -- even if you let  
7 people in theory come and challenge them, which  
8 they can do now.

9 JUSTICE BARRETT: So let me ask you --  
10 you -- you just referred to the, you know,  
11 serious stare decisis threshold, you know, that  
12 would have to be overcome.

13 MR. MARTINEZ: Yeah.

14 JUSTICE BARRETT: So let's talk about  
15 the stare decisis threshold here. Why is it  
16 different here than it was in Kisor? You know,  
17 in Kisor, the Court declined to overrule Auer  
18 and the part -- the opinion that was for a  
19 majority of the Court was largely -- it was on  
20 stare decisis grounds.

21 So why would a different result obtain  
22 here?

23 MR. MARTINEZ: I think my first answer  
24 is that the Chief Justice's opinion suggested it  
25 might be different and I think the reasons why

1 it's -- it's reason -- it's -- it's -- it really  
2 is different is because there are important  
3 differences between Chevron and Auer.

4 The most important that I think plays  
5 on the reliance question is this idea that  
6 Chevron allows and -- and almost like a feature  
7 of Chevron, not a bug, is that it encourages and  
8 allows agencies to flip-flop.

9 And so the reliance consideration with  
10 respect to Chevron is -- is much, you know,  
11 weaker for -- for -- for the government's side  
12 because the agency is allowed to flip-flop all  
13 at once, whereas, with Auer deference, the idea  
14 is that the agency -- it's going to be very hard  
15 for the agency to flip-flop. So I think it's  
16 more important to correct Chevron because  
17 it's -- it has that mistake that Auer doesn't.

18 There are other differences. You  
19 know, Chevron is problematic because it lets  
20 agencies say what Congress intended or what  
21 Congress's meaning was, as opposed to just  
22 saying what they themselves meant with the  
23 regulation that they themselves enacted.

24 So I think the -- the kind of -- you  
25 know, the deference makes more sense when you're



1 deferring to the entity that actually created  
2 the provision in question, as opposed to  
3 deferring to their interpretation of -- of a  
4 provision that was created by Congress.

5 I think, in addition, you know,  
6 Chevron is not limited to agency expertise.  
7 Auer is limited to agency expertise. So Auer  
8 is -- is narrower.

9 And then, finally, I do think there's  
10 a difference even with respect to the APA, where  
11 I think the APA more clearly puts constitutional  
12 interpretation and statutory interpretation on  
13 equal footing, and that might play into the  
14 analysis.

15 You know, this Court, the plurality  
16 in -- in Kisor sort of emphasized that -- that  
17 the APA was enacted after Seminole -- a year  
18 after Seminole Rock, and so maybe that was a  
19 basis to think that -- that Congress was okay  
20 with something that looked like Auer deference.  
21 But that's not true here. Chevron came many  
22 years after the APA.

23 So I think there are a lot of  
24 differences that really flesh out, I think, the  
25 important point that the Chief Justice was

1 making, which was that the analysis there  
2 doesn't automatically transfer over to Chevron.

3 JUSTICE BARRETT: Thanks.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Jackson?

6 JUSTICE JACKSON: So I've heard you  
7 say several times that you agree that judges  
8 should not be doing policy, they should be doing  
9 law. And I guess I too agree with that, and my  
10 concern is that it's actually not as easy as it  
11 seems to distinguish between the two and -- and  
12 that it appears in a lot of your answers that  
13 you sort of say, well, you come up with the best  
14 answer, it's a legal question. But I'm not so  
15 sure it's a legal question, as opposed to is it  
16 the best under the sort of policy regime.

17 And I think that there's a real  
18 separation-of-powers danger here to the extent  
19 that you're saying that the judges are deciding  
20 whether or not this is something the agency  
21 should do or not, whether this is a legal  
22 question or not.

23 You know, there's the old saying that  
24 when you're a hammer, everything looks like a  
25 nail, and I'm concerned that judges are going to

1 look at all of the questions related to a  
2 statute and call them legal if we don't have  
3 something like Chevron that requires judges to  
4 be actually thinking about their proper role  
5 relative to this issue.

6 So how can you assuage my concern in  
7 that regard?

8 MR. MARTINEZ: So I think two points.  
9 I think the first point I would make on the  
10 distinction between law and policy and how they  
11 kind of maybe seem like they blur together, I  
12 think that -- that there are just so many  
13 instances in which a court can get a question  
14 that comes before it that maybe it involves an  
15 agency regime, but the agency hasn't acted yet.

16 And I think the court in that  
17 circumstance just does its best. It doesn't  
18 have guidance, it doesn't have instructions from  
19 the agency. It does its best. And I think,  
20 when it does its best --

21 JUSTICE JACKSON: But does it have to,  
22 Mr. Martinez? I mean, there are -- there are  
23 other regimes in which a court is presented with  
24 a question and it identifies it as a policy  
25 question that it cannot answer.

1           So what I'm saying is that it's not  
2 necessarily true that just because the court  
3 gets an issue, it automatically says, oh, this  
4 must be legal, I have to act.

5           MR. MARTINEZ: But, if -- if the court  
6 got -- just to go back to Justice Kagan's  
7 hypothetical, the question of what -- what is a  
8 dietary supplement and the agency hadn't acted,  
9 I think the court would absolutely give meaning  
10 to that, and I don't think the court would think  
11 that what it's doing is making policy.

12           JUSTICE JACKSON: Well, let me give  
13 you a -- a particular example, all right? In  
14 the Food and Drug and Cosmetic Act situation,  
15 new drugs can be approved only if an adequate --  
16 "adequate and well-controlled investigation"  
17 shows that the drug will have its attend --  
18 intended effect.

19           This term, what is an "adequate and  
20 well-controlled investigation," is it your view  
21 that Congress wanted the courts to decide what  
22 it means for a study to be adequate or  
23 well-controlled?

24           I mean, how would a court go about  
25 determining whether that's something it's

1 supposed to be doing or the agency is supposed  
2 to be doing?

3 MR. MARTINEZ: I think that the -- the  
4 court would -- would do exactly the kind of  
5 analysis there that it would do if it had that  
6 exact same statute without the agency acting.  
7 And I think what that means is the court would  
8 go in and it would do everything that -- that we  
9 all agree happen -- should happen under step  
10 one.

11 I think the only difference is that  
12 if, after doing that step one analysis, the  
13 court concludes that there's a better view and a  
14 less better view, then the court should just go  
15 with the better view.

16 JUSTICE JACKSON: But when -- when  
17 does the court decide that this is not my call?

18 MR. MARTINEZ: Well, I think at the --

19 JUSTICE JACKSON: I guess that's the  
20 part that's dropping out for me in your  
21 analysis. You just say, you know, we do a step  
22 one analysis and then the court makes the  
23 interpretive decision about what this means.

24 And I guess --

25 MR. MARTINEZ: I -- I -- I don't think

1 the court ever says that it's not my call if the  
2 question in front of it is a question of  
3 statutory interpretation, because I think that's  
4 their core job --

5 JUSTICE JACKSON: So every statutory  
6 interpretation question is one of law that a  
7 court can decide, you're saying?

8 MR. MARTINEZ: Yes, and that --

9 JUSTICE JACKSON: There's never a  
10 statutory interpretation question that is one of  
11 policy that you see Congress may have been  
12 intending the agency to answer?

13 MR. MARTINEZ: I think, by definition,  
14 if we're talking about interpreting a statute,  
15 then you're talking about a legal question in  
16 the same way that if you're talking about  
17 interpreting the Constitution, then you have a  
18 constitutional question. No one would say that  
19 you would apply deference there.

20 JUSTICE JACKSON: So there's never a  
21 world you -- I -- maybe we just differ on this.  
22 I'm worried about the courts becoming  
23 uber-legislators, that when we have a policy --  
24 so one way that some of the experts have looked  
25 at this, some of the legal -- legal scholars

1 have looked at this, is that they say, when  
2 there's an ambiguity, there are actually  
3 different kinds of ambiguities.

4           So you might have a situation in which  
5 there's a statutory term and it's ambiguous in  
6 the sense that there are several reasonable  
7 meanings of what "stationary source" might mean,  
8 for example, several different ways that you  
9 could define that. When you get down to that  
10 level of analysis, the question is, who's going  
11 to make the choice as between what those  
12 meanings are?

13           And I hear you saying there might be a  
14 best choice, but I guess, if we're talking about  
15 a policy question, there are several reasonable  
16 meanings, why should the court be the one to  
17 make that determination?

18           MR. MARTINEZ: I --

19           JUSTICE JACKSON: And -- and couldn't  
20 we be in a world where Congress intended for the  
21 agency to actually decide which choice is best?

22           MR. MARTINEZ: I think where I --  
23 where I would just sort of disagree is what you  
24 said at the end where you sort of assumed that  
25 it was a policy question. I would just say that

1 if it's -- if the question is the meaning of a  
2 statutory term, that's an interpretive question  
3 that's a legal question and would be treated as  
4 a legal question if you got that exact same  
5 question before the agency had acted.

6 JUSTICE JACKSON: All right. Let me  
7 ask you one more thing about practical  
8 implications. So let's say it is, you know, a  
9 legal question, as you have analyzed, "adequate  
10 and controlled investigations." If I'm an  
11 agency and I'm trying to be responsible, how is  
12 this going to work as a practical matter? Is  
13 the agency going to go to court every time it  
14 gets one of these undefined terms in a statute  
15 and seek, you know, a declaratory judgment as to  
16 the meaning of "adequate and controlled" -- and  
17 "well-controlled investigations" before it goes  
18 forward with its policy?

19 MR. MARTINEZ: No.

20 JUSTICE JACKSON: All right. So the  
21 agency can come up with its own definition and  
22 implement it and then wait to be sued with  
23 respect to that, and -- and every term undefined  
24 in a statute we're going to have litigation  
25 about?



1           MR. MARTINEZ: No. No, Your Honor. I  
2 think what the agency has to do is what everyone  
3 else has to do, which is try to figure out what  
4 the -- what the law means and then act  
5 accordingly, and if someone challenges that,  
6 then that'll get sorted out. If there's a -- a  
7 stat -- a legal question, a statutory  
8 interpretation question, then that'll get sorted  
9 out by the courts. But the agency isn't, like,  
10 paralyzed --

11           JUSTICE JACKSON: What do we do about  
12 the -- the chaos that we talked about in -- in  
13 the City of Arlington case that comes from  
14 perhaps having different courts, right? We have  
15 11 different, you know, jurisdictions that have  
16 legal authority. So something like the  
17 definition of "adequate and well-controlled  
18 investigations," you say the courts will sort it  
19 out.

20           Well, first of all, it will take years  
21 perhaps for the courts to sort it out. What is  
22 the agency supposed to be doing in the meantime?  
23 And different courts from all of these different  
24 jurisdictions could actually have a different  
25 view, as Justice Sotomayor pointed out, of what

1 "adequate and well-controlled investigations"  
2 are supposed to do, so -- means.

3 So isn't it sort of impractical and  
4 chaotic to have a world in which every undefined  
5 term in a statute is subject to litigation if  
6 you're trying to govern?

7 MR. MARTINEZ: Well, I -- I don't  
8 think it's impractical. I think that to the  
9 extent that Justice Kagan's questions sort of  
10 indicate that there's actually a relatively  
11 small set of cases in which Chevron's going to  
12 make a difference, you're going to have that  
13 same problem with respect to the cases that  
14 maybe 20 years ago under a looser approach to  
15 Chevron wouldn't have gotten deference.

16 JUSTICE JACKSON: Wouldn't you have  
17 more of a problem in a world in which we've  
18 gotten rid of Chevron because it's going to give  
19 incentives to parties to raise legal issues that  
20 they wouldn't have raised before?

21 MR. MARTINEZ: I -- I don't think it's  
22 a problem to -- to have parties, if they think  
23 an agency is overstepping the boundaries and if  
24 they're right that --

25 JUSTICE JACKSON: No, I understand,

1 but, under a Chevron regime, right, if that's  
2 the background rule, then you're going to have  
3 parties thinking twice before going down a  
4 litigation road with respect to a term because  
5 they're going to say, at the end of the day --

6 MR. MARTINEZ: Right.

7 JUSTICE JACKSON: -- the agency has a  
8 reasonable interpretation, that's what the  
9 court's going to find, so it's not any --

10 MR. MARTINEZ: Right. You're --  
11 you're going to have parties being less likely  
12 to challenge agency action that is unlawful  
13 under the best interpretation of the statute  
14 because they know that when they go into court,  
15 the judge is not going to apply its independent  
16 neutral judgment and instead is going to tilt  
17 the scales and defer to the agency.

18 JUSTICE JACKSON: Thank you.

19 MR. MARTINEZ: And --

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 General Prelogar.

23 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

24 ON BEHALF OF THE RESPONDENTS

25 GENERAL PRELOGAR: Mr. Chief Justice,

1 and may it please the Court:

2           The Chevron framework is a bedrock  
3 principle of administrative law with deep roots  
4 in this Court's jurisprudence. Overruling a  
5 precedent is never a small matter, but  
6 overruling a precedent as foundational as  
7 Chevron should require a truly extraordinary  
8 justification, and Petitioners don't have one.

9           They say that Article III requires de  
10 novo review of all statutory interpretation  
11 questions. But that's flatly inconsistent with  
12 precedent going back to the Marshall Court and  
13 with the traditional limits on mandamus  
14 jurisdiction, which governed most judicial  
15 review of executive action in the early  
16 republic.

17           They've said that Chevron violates due  
18 process. But the application of deferential  
19 standards of review doesn't constitute  
20 impermissible bias. And they contend that the  
21 APA requires de novo review. But that theory is  
22 inconsistent with the statute's history and the  
23 way it's been understood ever since its  
24 enactment, including in the more than 70 cases  
25 in which this Court has relied on Chevron to

1 sustain an agency's interpretation.

2           On top of all that, reliance interests  
3 in this context are at their apex. Congress,  
4 agencies, states, regulated parties, and the  
5 American public have all relied on Chevron and  
6 the regulations upheld under it to make  
7 important decisions that could be upended by  
8 overruling that framework.

9           Thousands of judicial decisions  
10 sustaining an agency's rulemaking or  
11 adjudication as reasonable would be open to  
12 challenge, and that profound disruption is  
13 especially unwarranted because Congress could  
14 modify or overrule the Chevron framework at any  
15 time. Congress has many times considered  
16 proposals to do so, but it's never taken that  
17 step.

18           Instead, Congress has legislated for  
19 decades with Chevron as the background rule  
20 informing the degree of discretion that Congress  
21 has chosen to confer on federal agencies.

22           Just five years ago in *Kisor*, this  
23 Court declined similar calls to overrule the  
24 Auer deference doctrine based on many of the  
25 same flawed arguments that Petitioners are

1 making here. The Court observed that it would  
2 be the rare overruling that would introduce so  
3 much instability into so many areas of the law,  
4 all in one blow. Overruling Chevron would be an  
5 even greater and unwarranted shock to the legal  
6 system.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: General, Section 706  
9 of the APA was not mentioned in Chevron. How  
10 would you reconcile the requirements of -- on  
11 this -- on federal courts under 706 with your  
12 view of Chevron?

13 GENERAL PRELOGAR: Section 706 says  
14 that courts should decide all relevant questions  
15 of law and interpret statutes, but none of that  
16 is inconsistent with the Chevron framework  
17 because 706 doesn't prescribe a universal  
18 standard of review to govern those kinds of  
19 statutory interpretation questions. And the  
20 courts are interpreting statutes when they walk  
21 through the Chevron framework.

22 First, there's all the work that the  
23 Court does at step one of Chevron. That is  
24 using the tools of interpretation to identify  
25 whether Congress has spoken to the issue in the

1 case and, if so, Chevron said that's the end of  
2 the matter. So, in that sense, in a step one  
3 case, the Court has, of course, interpreted the  
4 statute.

5 But, in a situation where, at the end  
6 of that interpretive process, the Court is left  
7 with no conclusion that it's actually able to  
8 ascertain that Congress has spoken, then, in  
9 that circumstance, I think the right  
10 interpretation of the statute is that Congress  
11 left a gap or maybe created an ambiguity and  
12 simultaneously vested the agency with the  
13 important responsibility, pursuant to an express  
14 delegation, to administer that statute with the  
15 regulations that have the force of law.

16 And that's what then tells the Court  
17 what the relevant question of law that's left  
18 over to resolve is. It's whether the agency  
19 acted within the bounds that Congress itself  
20 prescribed.

21 So I don't think there's any  
22 fundamental incompatibility with Section 706 and  
23 what Chevron dictates about how to think about  
24 Congress's delegations.

25 JUSTICE SOTOMAYOR: Can I say,

1 counsel -- General, I know plenty of statutes  
2 where Congress uses the word "de novo." It  
3 didn't here, correct, in 706?

4 GENERAL PRELOGAR: That's correct.

5 JUSTICE SOTOMAYOR: I thought it, and  
6 I do think it, would be revolutionary to say  
7 that Congress can't limit judicial review.  
8 AEDPA is the quintessential question where we  
9 not only give deference to state court  
10 decisions, we say even if it got it wrong, if it  
11 didn't get it unreasonably wrong, we are  
12 superseding the court's ability to declare a  
13 violation of the Constitution and give relief.

14 So I -- I -- I think it would be  
15 radical to say that Congress couldn't implement  
16 Chevron. In fact, there is legislation to  
17 overrule Chevron, requiring de novo review, that  
18 hasn't passed. There are statutes that  
19 basically don't -- say apply de novo review,  
20 correct?

21 GENERAL PRELOGAR: Yes.

22 JUSTICE SOTOMAYOR: And there are  
23 statutes that require deferential review  
24 explicitly to legal questions, correct?

25 GENERAL PRELOGAR: Yes.



1 JUSTICE SOTOMAYOR: Besides Chevron?

2 GENERAL PRELOGAR: Yes.

3 JUSTICE SOTOMAYOR: All right. So now  
4 we have -- we're now at 706. And my -- your  
5 adversary, your opposing counsel, said that he  
6 didn't see that much disruption from overruling  
7 Chevron, that nobody would really bring up those  
8 old cases.

9 Do you have a view on that?

10 GENERAL PRELOGAR: I think that my  
11 friend -- it -- it might be easy for him to say  
12 that because he is not going to be involved in  
13 the endless litigation that I think would result  
14 if this Court were to overrule Chevron.

15 I understand his point to be that all  
16 of the holdings in those cases will be secure  
17 because stare decisis will apply in those  
18 contexts. But the important thing to realize is  
19 that in those cases, as Justice Barrett's  
20 questions emphasized, the Court has decided that  
21 what the agency did was reasonable. The statute  
22 has essentially been interpreted to vest the  
23 agency with discretion such that the agency's  
24 regulation is being held lawful or valid on the  
25 basis of reasonableness, and I think that that

1 means that litigants will come out of the  
2 woodwork seeking to open those decisions and  
3 contending that they didn't actually address  
4 what they now say is the relevant question, not  
5 whether the agency's interpretation is  
6 reasonable or whether the regulation can be  
7 upheld on that basis, but how the statute should  
8 be interpreted without granting any deference to  
9 the agency's interpretation.

10 CHIEF JUSTICE ROBERTS: Counsel, I'll  
11 ask you the same question I asked your friend.  
12 You began by saying Chevron is foundational.

13 We get a lot of statutory  
14 interpretations from agencies, and I don't know  
15 whether it was 14 or 16 years, we haven't relied  
16 on Chevron over that time. I -- I mean, have we  
17 overruled it in practice even if we've let the  
18 -- had to leave the lower courts to continue to  
19 grapple with it?

20 GENERAL PRELOGAR: No, I don't think  
21 so, Mr. Chief Justice. It's been eight years  
22 since this Court relied on Chevron at step two,  
23 but there's no case that my friends have been  
24 able to point to where the Court has said that a  
25 statute was ambiguous or left a gap and Chevron

1 would otherwise apply, but the Court is not  
2 going to defer in that circumstance. I think  
3 that that --

4 CHIEF JUSTICE ROBERTS: No. But, I  
5 mean, that's simply a function of the fact,  
6 when -- when we go through the work of trying to  
7 interpret what a statute means, when we get to  
8 the end, that seems to be the right  
9 interpretation, and --

10 GENERAL PRELOGAR: I agree. Those are  
11 step one holdings. So I -- so I think that they  
12 are consistent with the Chevron framework. And  
13 the fact that this Court hasn't had a step two  
14 case in recent years in no way indicates that in  
15 those cases where Congress is, in fact, leaving  
16 ambiguities or gaps, Chevron no longer sets the  
17 right ground rule for understanding the scope of  
18 the delegation.

19 JUSTICE KAVANAUGH: Can I ask you  
20 about what I see as an internal inconsistency in  
21 Chevron itself? It relates to Footnote 9, which  
22 is -- instructs that a court should look -- use  
23 all the traditional tools of statutory  
24 interpretation before getting to step two.

25 My concern about that or my confusion

1 about that is, if you use all the traditional  
2 tools of statutory interpretation, you'll get an  
3 answer, and we know that because, in cases where  
4 we don't have an agency involved and we use  
5 those same traditional tools, we get an answer.

6 So how do we deal with Footnote 9,  
7 which seems to suggest that you'll never get to  
8 step two if you follow Footnote 9 by what it  
9 says?

10 GENERAL PRELOGAR: So what the Court  
11 said in Footnote 9 is that the Court should use  
12 all of the traditional tools to ascertain  
13 whether Congress had an intent on the issue.

14 And that, of course, is an important  
15 part of this framework because, if Congress  
16 actually spoke to the issue, then the agency  
17 doesn't have any discretion to act in a way  
18 that's contrary to Congress's express direction.

19 JUSTICE KAVANAUGH: Do you think  
20 that's different from ascertaining what the  
21 statute means?

22 GENERAL PRELOGAR: I think that there  
23 can be a relevant difference and it touches on  
24 exactly what you were asking about in the  
25 context where a court has to do it without an

1 agency.

2 In that circumstance, I think it's  
3 absolutely right that the Court is ultimately  
4 going to keep working and decide how it thinks  
5 the statute should best be administered, even in  
6 the circumstance where there might be an  
7 ambiguity or a gap to fill.

8 But what Chevron recognizes is that  
9 there is a third option available. It's not  
10 just Congress spoke to the issue and it  
11 necessarily authorized what the agency did or  
12 Congress spoke to the issue and it prohibited  
13 what the agency did.

14 There is a category of cases and  
15 statutes out there where, really, using all of  
16 the tools, the best interpretation of the  
17 statute is that Congress didn't resolve it. It  
18 left that gap or ambiguity and coupled it with  
19 this express authorization to the agency to  
20 carry that statute into effect. This is  
21 Congress and the agencies working together hand  
22 in hand to put into effect this --

23 JUSTICE KAVANAUGH: How would you  
24 define "ambiguity" or how would you, if you were  
25 a judge, say, yes, this is ambiguous or no,

1 that's not ambiguous?

2 GENERAL PRELOGAR: So I would draw on  
3 what the Court said recently in Kisor where it  
4 said a statute is ambiguous when the Court has  
5 exhausted the tools of interpretation and hasn't  
6 found a single right answer.

7 And I recognize, Justice Kavanaugh,  
8 and you have expressed these concerns that there  
9 are some limits of language here and it's not  
10 subject to precise mathematical quantification,  
11 but that's because I think it's a standard that  
12 inherently requires the application of judgment.

13 And at the end of the day, what the  
14 Court should be looking for and asking itself  
15 is, did Congress resolve this one? Do I have  
16 confidence that actually I've got it, I -- I  
17 understand what Congress meant to say in this  
18 statute and it meant to prescribe a -- a uniform  
19 approach to "stationary source," that it has to  
20 be plant-wide or it has to be a particular piece  
21 of equipment?

22 But, in a circumstance like Chevron  
23 itself with "stationary source" or some of the  
24 examples that the Justices have been talking  
25 about with "reasonable" or "feasible," I think

1 you can get to the end of that process and a  
2 judge could say: I think, actually, the way --  
3 the right way to understand this statute is that  
4 it's conferring discretion on the agency to take  
5 a range of permissible approaches.

6 JUSTICE KAVANAUGH: Do you -- do you  
7 think it's possible for a judge to say, the best  
8 reading of the statute is X, but I think it is  
9 ambiguous, and, therefore, I'm going to defer to  
10 the agency, which has offered Y?

11 GENERAL PRELOGAR: No, I think that  
12 that would probably --

13 JUSTICE KAVANAUGH: That can't happen?  
14 I think that happens all the time.

15 GENERAL PRELOGAR: Well, I think that  
16 there are two different ways in which courts use  
17 the term "best interpretation of the statute."  
18 So, if what you're asking me is, is there a  
19 world in which a judge could go through the  
20 rigorous step one inquiry, apply all of the  
21 tools, and say, I think there's a best  
22 interpretation insofar as I think Congress spoke  
23 to the issue, but the agency's interpretation is  
24 it could be permissible, I recognize there's  
25 some doubt here, the answer is no.

1           Chevron does not require a court to  
2 ignore what is ascertained doing the step one  
3 inquiry. At that point, that is the -- the  
4 judge's conclusion that Congress actually spoke  
5 to the issue and Chevron is totally clear about  
6 this, give effect to it.

7           But, if what you're asking me is, is  
8 there a world in which the Court could get to  
9 the end of the step one inquiry, decide that  
10 Congress hasn't spoken to the issue, and then  
11 say, if, in fact, the courts had been given the  
12 role of filling the gap, I would have done it  
13 differently, I would have exercised whatever  
14 discretion that Congress left open in this  
15 statute in a different way, even looking to  
16 things like the overall objectives in the  
17 statutory program as a whole, then yes, of  
18 course, in that circumstance, it's -- it's  
19 implementing Congress's directives --

20           JUSTICE GORSUCH: I mean, General --

21           GENERAL PRELOGAR: -- for the court to  
22 not --

23           JUSTICE GORSUCH: -- I'm sorry to  
24 interrupt, but those are two different -- very  
25 different views about what qualifies as an



1 ambiguity you've just given us. One is there is  
2 a better interpretation. I provide it as a  
3 court. The other is: Well, yeah, but I'm going  
4 to defer anyway given whatever considerations  
5 you want to throw into the ambiguity bucket.

6 And that's exactly the problem that  
7 your friends on the other side suggest have  
8 persisted in the lower courts for 40 years and  
9 why some judges claim never to have found an  
10 ambiguity and other equally excellent circuit  
11 judges have said they find them all the time.

12 And it's also why, I don't know, maybe  
13 a dozen or more circuit judges have written  
14 asking us to overrule Chevron. And -- and --  
15 and -- and -- and it also may be why one of your  
16 colleagues last year said, I don't know what  
17 "ambiguity" means at this lectern.

18 And should that be a clue that  
19 something needs to be fixed here, that even the  
20 federal government at the podium can't answer  
21 the question what triggers ambiguity?

22 You've given us two different  
23 alternatives today, and so many lower court  
24 judges who just want to follow whatever we tell  
25 them to do faithfully can't figure it out.

1           GENERAL PRELOGAR:  So there's a lot  
2 packed in there, Justice Gorsuch, and I want to  
3 respond to each of your concerns.

4           First, I would draw from Chevron and  
5 Kisor in defining what is an ambiguity.  It is  
6 when a court has applied the tools of  
7 construction and can't ascertain that Congress  
8 had an intent on the matter.  So I think that  
9 that is the core question for a court at step  
10 one of Chevron, and if that's the circumstance,  
11 that would only ever move a court to applying  
12 deference at step two.

13           Now I understand the concern you  
14 expressed that maybe lower courts are too  
15 reflexively finding that there's ambiguity at --

16           JUSTICE GORSUCH:  Well, you gave us a  
17 second definition just a moment ago, and --

18           GENERAL PRELOGAR:  I was trying to --  
19 to explain how I thought that sometimes --

20           JUSTICE GORSUCH:  Some -- yeah.

21           GENERAL PRELOGAR:  -- in the case law  
22 "best interpretation" --

23           JUSTICE GORSUCH:  Yes.

24           GENERAL PRELOGAR:  -- is used in two  
25 different --

1 JUSTICE GORSUCH: Right.

2 GENERAL PRELOGAR: I don't think  
3 that's a different understanding of Chevron.

4 JUSTICE GORSUCH: Well --

5 GENERAL PRELOGAR: I think that's  
6 really a difference --

7 JUSTICE GORSUCH: -- your -- your  
8 friend --

9 GENERAL PRELOGAR: -- between step one  
10 and step two.

11 JUSTICE GORSUCH: -- your friend a  
12 year ago thought so and -- and -- and lower  
13 court judges think so.

14 GENERAL PRELOGAR: So let me respond  
15 to the concern --

16 JUSTICE GORSUCH: So you agree --

17 GENERAL PRELOGAR: -- about lower  
18 court judges. If you think that they are too  
19 readily finding ambiguity, I think the Court  
20 could do in this case exactly what it did in  
21 Kisor --

22 JUSTICE GORSUCH: Haven't -- haven't  
23 --

24 GENERAL PRELOGAR: -- issue a course  
25 correction --

1                   JUSTICE GORSUCH: -- we done that,  
2     like -- like, 15 times over the last eight or 10  
3     years, say, really, really, really, go look at  
4     all the statutory tools? And yet, here, we have  
5     a case, two cases, one in which one court found  
6     ambiguity and went to step two and another one  
7     which -- well, I can't tell what it did, but  
8     there's a pretty good argument it -- it tried to  
9     resolve it at step one.

10                   So, even in a case involving herring  
11     fishermen and the question whether they have to  
12     pay for government officials to be onboard their  
13     boats, which may call for some expertise, but it  
14     doesn't have much to do with fishing or  
15     fisheries, it has to do with payments of --  
16     of -- of government costs, we -- we -- lower  
17     court judges even here in this rather prosaic  
18     case can't figure out what Chevron means.

19                   GENERAL PRELOGAR: Well, I do think  
20     that issuing a reminder to courts about the  
21     thoroughness --

22                   JUSTICE GORSUCH: Another one?

23                   GENERAL PRELOGAR: -- that's necessary  
24     at step one could make a difference in this  
25     context. And I can just share anecdotally on

1     behalf of the government that we have canvassed  
2     the litigating components and looked at the  
3     lower court case law, and after Kisor, lower  
4     courts granted Auer deference far less  
5     frequently, so I think it can matter and that  
6     lower courts can get that kind of message if  
7     you're worried about it.

8             But, Justice Gorsuch, the other point  
9     to add here is that if you are concerned that  
10    lower courts have different reactions in trying  
11    to implement Chevron at step one, I think it's  
12    important to think about the alternative as  
13    well. It's not as though, if this Court  
14    overrules Chevron, that's going to get rid of  
15    statutory gaps or ambiguities.

16            JUSTICE GORSUCH: No, it takes --

17            GENERAL PRELOGAR: They will persist.

18            JUSTICE GORSUCH: -- us back to  
19    Skidmore, which Justice Jackson, the most ardent  
20    of New Dealers, wrote and that persisted in this  
21    Court for 40 years, more or less, after the APA.  
22    And the world seemed to continue on its axis  
23    just fine.

24            GENERAL PRELOGAR: But it's not going  
25    to create greater predictability or stability or

1 consistency across judges.

2 JUSTICE GORSUCH: That's -- that's --

3 GENERAL PRELOGAR: If anything, I  
4 think that --

5 JUSTICE GORSUCH: -- an interesting  
6 thing to suggest, that Chevron predicts  
7 stability, when the whole point -- I didn't see  
8 you mention Brand X much in your brief. But I  
9 -- I'm sorry to go back there, but -- my good  
10 friend, but Brand X is a recipe for instability,  
11 isn't it, because each new administration can  
12 come in and undo the work of a prior one.  
13 They're all reasonable. I mean, my goodness,  
14 the American people elect them. Of course,  
15 they're reasonable people.

16 (Laughter.)

17 JUSTICE GORSUCH: And -- and --

18 JUSTICE SOTOMAYOR: That may be the  
19 first --

20 (Laughter.)

21 JUSTICE GORSUCH: And -- and there we  
22 are. And so you never have stability in the  
23 law. I mean, if reliance and stability count, I  
24 would have thought that Chevron, at least as  
25 this Court's understood it, is a recipe for

1 anti-reliance.

2 GENERAL PRELOGAR: So I disagree with  
3 that characterization about Brand X, and I think  
4 my friends have created -- kicked up some dust  
5 about exactly what Brand X does --

6 JUSTICE GORSUCH: So you do --

7 GENERAL PRELOGAR: -- and doesn't do.

8 JUSTICE GORSUCH: -- you do endorse  
9 Brand X, the government does?

10 GENERAL PRELOGAR: Yes. I think it is  
11 a logical follow-on of Chevron, and here is why.  
12 As Brand X itself recognizes, if the court has  
13 found at step one that Congress spoke to the  
14 issue, there's no room under Brand X for the  
15 agency to reverse the court or somehow change  
16 the underlying meaning of the statute. Instead,  
17 the statute has been interpreted at step one and  
18 what Congress says goes.

19 It's only in the category of step two  
20 cases where Brand X comes into play, and in that  
21 circumstance, it's because the court in the  
22 prior case has understood the statute to leave a  
23 gap or an ambiguity for the agency to fill,  
24 considering a range of regulatory approaches.  
25 So, in that circumstance too, the meaning of the

1 statute doesn't change. It remains a gap for  
2 the agency to fill at time two, and if the  
3 agency is running through all of the procedural  
4 hoops, which can be quite burdensome in this  
5 context, to change its regulatory approach, it  
6 is still acting consistently with the --

7 JUSTICE GORSUCH: Or not.

8 GENERAL PRELOGAR: -- with the  
9 discretion.

10 JUSTICE GORSUCH: Or not if it -- if  
11 it issues an interpretive rule without  
12 notice-and-comment or issues an adjudication.  
13 It may or may not be that burdensome, right?

14 So Brand X also says that an agency  
15 can overturn a prior judicial interpretation.  
16 And I saw that as a circuit judge with respect  
17 to an alien who was allowed into the country  
18 under the Tenth Circuit's understanding of the  
19 law. And the government come back and says, no,  
20 you have to overturn your precedent, Tenth  
21 Circuit, and he's not allowed in the country.  
22 And we had to overrule our judicial precedent.

23 Do you think that's an appropriate  
24 understanding of the law too, that judicial  
25 precedents, maybe even precedents of this Court,



1 can be overturned by agencies?

2 GENERAL PRELOGAR: It depends on what  
3 the judicial precedent held. If it held at step  
4 one that that statute was clear, then of course  
5 not. But Brand X doesn't require that result.

6 If the prior precedent held that  
7 Congress didn't resolve the issue and it  
8 delegated to the agency the responsibility and  
9 role in administering it and filling the gap,  
10 including with the possibility of changing  
11 regulatory approaches based on things like  
12 change --

13 JUSTICE KAVANAUGH: But the reality --  
14 just to pick up on that, the reality is -- you  
15 -- you say don't overrule Chevron because it  
16 would be a shock to the system, but the reality  
17 of how this works is Chevron itself ushers in  
18 shocks to the system every four or eight years  
19 when a new administration comes in, whether it's  
20 communications law or securities law or  
21 competition law or environmental law, and goes  
22 from pillar to post, like Professor Pierce  
23 wrote, and he had been a fan of Chevron. Now  
24 he's not because he says it's a source of  
25 extreme instability in the law. That's his --

1 his phrase.

2           And it just seems like you just pay  
3 attention to what happens when a new  
4 administration comes in at EPA, at SEC, at FTC,  
5 you name it. It's just massive change. That is  
6 at war with reliance. That is not stability.  
7 And so I think to hold up stability and reliance  
8 is a little tough given just watching how it  
9 operates every four years.

10           GENERAL PRELOGAR: Well, let me give  
11 you a couple of different reactions to that. I  
12 think that that is a small sliver of cases or  
13 circumstances. And in the mine run case  
14 involving agency regulations, agencies  
15 themselves build on those regulations as a  
16 foundation. There's no evidence that agencies  
17 are out there flip-flopping left and right or  
18 doing so on a whim.

19           And it brings me to the important  
20 point that to do --

21           JUSTICE KAVANAUGH: I don't think  
22 they're -- I'm sorry to interrupt --

23           GENERAL PRELOGAR: No.

24           JUSTICE KAVANAUGH: -- and I'll let  
25 you finish. But I don't think they're doing it

1 on a whim. I think they're doing it because  
2 they have disagreement with the policy of the  
3 prior administration and they're using what  
4 Chevron gives them and what they can't get  
5 through Congress to do it themselves, self-help,  
6 and to do it themselves unilaterally, which is  
7 completely inconsistent with bicameralism and  
8 presentment to get your policy objectives  
9 enacted into law.

10 GENERAL PRELOGAR: But, Justice  
11 Kavanaugh, the premise I think that's embedded  
12 in that question is the idea that Congress had  
13 spoken to that issue. And in a circumstance  
14 where Congress didn't resolve it and, in fact,  
15 wanted the agency to have flexibility and a  
16 range of options, there's nothing inherently  
17 problematic or incompatible with our system of  
18 government to recognize that agencies can carry  
19 out those directives.

20 And just look at "stationary source."  
21 You know, that was a circumstance where the  
22 Court said, applying all of the tools, Congress  
23 didn't have a view on it. It didn't want to  
24 foreclose a plant-wide definition. It didn't  
25 want to foreclose an equipment-specific

1 definition. And I think it was entirely  
2 permissible for the expert agency to come in,  
3 take stock of the entire situation, and, yes,  
4 take account of the policy goals of an incoming  
5 administration to better account for the  
6 interests of the regulated parties and give them  
7 flexibility. That's just part of Congress's  
8 design.

9 JUSTICE JACKSON: After all, you know,  
10 taking into account the policy goals of the new  
11 administration reflects a democratic structure  
12 where we have the new administration being  
13 elected by the people on the basis of certain  
14 policy determinations.

15 I guess my concern is I suppose  
16 judicial policymaking is very stable but  
17 precisely because we are not accountable to the  
18 people and have lifetime appointments. So, if  
19 we have gaps and ambiguities in statutes and the  
20 judiciary is coming in to fill them, I suppose  
21 we would have a -- something of a separation of  
22 powers or policy -- excuse me -- separation-of-  
23 powers concern related to judicial policymaking.

24 Am I wrong to be worried about that?

25 GENERAL PRELOGAR: No. I think that

1 that concern is valid, and I think it's valid  
2 along two separate dimensions, and one is to  
3 recognize that in these scenarios where we're at  
4 Chevron step two, by definition, it's because  
5 the statute itself doesn't supply an answer and  
6 the court can't ascertain that Congress actually  
7 meant to resolve it. And in that circumstance,  
8 it's entirely sensible for Congress to give the  
9 issue to an agency when it is charged with  
10 administering the statute and, of necessity, is  
11 going to have to fill the gap along the way.  
12 And Congress could quite legitimately want the  
13 agency to draw on its policymaking expertise in  
14 figuring out the right way to fill the gap.

15 JUSTICE JACKSON: What do you -- what  
16 do you say to Mr. Martinez, who says we've  
17 already characterized that as a question of law  
18 because the court was involved at step one in  
19 making the determination, and so it seems a  
20 little odd -- I think I took this away from his  
21 presentation -- to suddenly say, when we're in a  
22 step two gap-filling world, now we're going to  
23 call it a policy question as opposed to a legal  
24 one?

25 GENERAL PRELOGAR: So I think you can

1 still characterize it as a legal question while  
2 recognizing that in a circumstance, to borrow  
3 Justice Kagan's words, where the law has run out  
4 and Congress hasn't actually spoken to the  
5 issue, the court, if it resolves that issue, is  
6 -- is going to have to draw on a set of  
7 considerations to inform its judgment.

8           And I wouldn't call it policymaking,  
9 but I do think it means that the court can't  
10 suggest that the answer it is giving is  
11 absolutely dictated on that precise issue by  
12 Congress because, by definition, we're in a  
13 world where Congress didn't speak to it. So the  
14 court will have to take account of a narrower  
15 range of circumstances, things like the  
16 overarching statutory objectives, to try to fill  
17 in the gap.

18           But the point is that when Congress  
19 has left that gap and charged the expert agency  
20 with the administration role, Congress could  
21 have every expectation, and Chevron says  
22 Congress has the expectation, that the agency  
23 will fill the gap and that the courts will  
24 respect it within the bounds of reasonableness  
25 that always apply in this context.

1                   JUSTICE BARRETT:  General Prelogar,  
2   most scholars of statutory interpretation  
3   consider Chevron to be an interpretive canon,  
4   much like clear statement rules, rule of lenity,  
5   judicially created.  Do you see Chevron that  
6   way?  And, if so, do you see it as different in  
7   kind from any of the other canons of  
8   interpretation that we apply?

9                   GENERAL PRELOGAR:  I do think it is  
10  different.  I don't conceive of it as a canon.  
11  Instead, I think that it is fundamentally rooted  
12  in -- in kind of setting the ground rules for  
13  how all three branches of the government are  
14  operating together.

15                   And what I understand the Court to  
16  have been doing in Chevron is recognizing that  
17  there are legitimate reasons why Congress cannot  
18  answer every question itself and why it will  
19  want to go hand in hand with an agency by  
20  charging that agency with administering the  
21  statute.  And in that circumstance, it's the  
22  role of the court to give effect to that.

23                   So I think it's not just kind of an  
24  interpretive canon, but, rather, it really is  
25  grounded in the separation of powers.

1 JUSTICE BARRETT: So is it dependent  
2 on a judgment about what Congress would want,  
3 one that would have to be empirically tested?

4 GENERAL PRELOGAR: So I don't think  
5 that it's getting into Congress's subjective  
6 intent, although, certainly, I think the primary  
7 rationale that Chevron gave was its appraisal  
8 that this is, as an overarching matter, what  
9 Congress would have intended when it comes to  
10 gaps.

11 And I don't mean to suggest that this  
12 means that Congress thinks about each and every  
13 gap it's creating in the moment. Sometimes I  
14 think it does and it's clear when it says set  
15 reasonable rates. It knows that it's not itself  
16 prescribing what those rates will be in concrete  
17 circumstances. It's leaving gaps and the agency  
18 has to fill it.

19 But I think, even in the circumstance  
20 where Congress doesn't know it's creating it at  
21 the time, someone's going to have to come in  
22 after the fact and fill it in, and it's either  
23 going to be the agency or it's going to be the  
24 court without deference. And in that  
25 circumstance, I think the court appropriately



1 recognized Congress would want for the agency to  
2 do it.

3 JUSTICE BARRETT: And how do we know  
4 -- this is -- goes back to that question of what  
5 is the trigger of ambiguity that Justice Gorsuch  
6 was asking you.

7 So think about a concrete example like  
8 Pulsifer, which the United States is on the  
9 other side, pending before the Court, turning on  
10 what "and" joins together.

11 GENERAL PRELOGAR: We think that one's  
12 clear. I'll just put it out there.

13 (Laughter.)

14 JUSTICE BARRETT: So let's -- let's  
15 put aside the question of whether, you know, the  
16 Department of Justice and the Executive can get  
17 to deference in interpreting criminal statutes.  
18 Just erase that issue from the picture.

19 Is that the kind of question -- you  
20 know, judges below, very smart, very reasonable  
21 judges reached different conclusions about what  
22 that word in the statute meant. Is that the  
23 kind of question then, you know, thinking about  
24 Brand X saying, well, it doesn't have to be the  
25 best, it just has to be, you know, a plausible,

1 reasonable one, is that the kind of statutory  
2 question that would trigger ambiguity and step  
3 two deference?

4 GENERAL PRELOGAR: So I think it's  
5 hard to speak in generalities about this. And I  
6 am struggling because, of course, the Court has  
7 recognized that the -- the Department of Justice  
8 does not get deference in the criminal context.

9 JUSTICE BARRETT: Right.

10 GENERAL PRELOGAR: So, with respect to  
11 that particular issue --

12 JUSTICE BARRETT: And it's that  
13 statutory structure in a -- in a communication  
14 --

15 GENERAL PRELOGAR: Right.

16 JUSTICE BARRETT: -- communication  
17 sense.

18 GENERAL PRELOGAR: But I guess what I  
19 would say to just try to address the overarching  
20 question is that, you know, I think that it's  
21 going to be kind of a specific exercise in every  
22 case, and I can't say here is the formula I can  
23 give you to know when the statutory  
24 interpretation exercise at step one runs out and  
25 the court should feel like, I don't have an

1 answer, Congress didn't supply one, and when  
2 not. I think it's going to vary based on the  
3 statutory scheme.

4 But, in each case, the court should  
5 conduct that inquiry, make it a thorough inquiry  
6 and take account of all of the relevant aspects  
7 of interpretation that can bear on meaning and  
8 show that Congress, in fact, did resolve it.

9 That is the role of the court, and  
10 it's the role of the court likewise to enforce  
11 Congress's directions when --

12 JUSTICE BARRETT: So that kind of  
13 question, putting aside the government's  
14 position in *Pulsifer*, so maybe --

15 GENERAL PRELOGAR: Yeah.

16 JUSTICE BARRETT: -- that's an unfair  
17 question to ask you, but that kind of question  
18 you think would be the kind of question that  
19 could -- you know, let -- let's take it outside  
20 of what does the word "and" mean.

21 You know, a question of statutory  
22 structure, the placement of a comma, you know,  
23 that kind of a thing, that is the kind of  
24 question that, depending on the circumstance,  
25 could trigger step two deference?

1           GENERAL PRELOGAR: I think it  
2 conceivably could. Now I want to hold open and  
3 acknowledge that the Court has said there are  
4 certain types of statutory questions that don't  
5 fit within the Chevron framework because there  
6 are kind of statute-specific reasons to think  
7 Congress wasn't giving this question to the  
8 agency.

9           JUSTICE BARRETT: Sure.

10          GENERAL PRELOGAR: I think the Major  
11 Questions Doctrine is a species of that. I'd  
12 point to the Adams Fruit case as well, where it  
13 was a judicial review provision, and the Court  
14 said this wasn't something for the agency to do.

15                 But I think, in the mine run case,  
16 yes, and -- and to the extent you're saying,  
17 well, it feels odd for it to depend on a comma  
18 or to turn on the meaning of the word "and,"  
19 still I think the inference holds because, in  
20 that context, Congress, if it, in fact, has left  
21 the ambiguity or the gap, recognizes that the  
22 agency is going to have to come up with an  
23 answer as part of implementing the --

24          JUSTICE BARRETT: Except a lot of  
25 times Congress doesn't intentionally leave the

1 ambiguity or the gap, right? It's just limits  
2 of language, limits of foresight.

3 GENERAL PRELOGAR: Yes. And I think a  
4 -- so I think a court ultimately, if it's able  
5 to ascertain that, although it's not perfectly  
6 clear in the statute, you can figure out what  
7 Congress intended, give effect to that, that's  
8 step one.

9 At least Congress knows that if it's  
10 going to unintentionally create ambiguities or  
11 gaps, Chevron is the stable background rule.  
12 It's been the rule for 40 years. This Court  
13 acknowledged in City of Arlington that Congress,  
14 in fact, legislates against the background of  
15 that rule, and so it knows that with anything  
16 it's doing that's unintentional, that will  
17 trigger --

18 JUSTICE KAVANAUGH: Can I --

19 GENERAL PRELOGAR: -- deference --

20 JUSTICE KAVANAUGH: -- can I ask you  
21 about your --

22 GENERAL PRELOGAR: -- if the  
23 predicates are satisfied.

24 JUSTICE KAVANAUGH: I'm sorry. Can I  
25 ask you about the phrase "law runs out." One

1 way to think about that would be if you had the  
2 same statutory interpretation --

3 CHIEF JUSTICE ROBERTS: Go ahead and  
4 finish, sure.

5 JUSTICE KAVANAUGH: Same statutory  
6 interpretation issue in a non-agency case, could  
7 the Court decide it?

8 And if the answer is yes, the Court  
9 could decide it, then the law hasn't run out,  
10 so, therefore, you could ask yourself that  
11 question in an agency case. If this were a  
12 non-agency case, would we come to an answer on  
13 this case? And if so, you don't go to step two.

14 What's wrong with that? And if that's  
15 not correct, because I don't think you're going  
16 to agree with that --

17 (Laughter.)

18 JUSTICE KAVANAUGH: -- how -- how  
19 would you define when the law runs out short of  
20 that, which I think is a problem, as you said,  
21 hard to speak in generalities about this.  
22 That's the problem.

23 GENERAL PRELOGAR: Yes. So you  
24 predicted my answer. I don't agree that it's  
25 only in a circumstance where the statute would

1 be incapable of the Court issuing a decision at  
2 the end of day. Of course, if a case comes to  
3 the Court and it has to resolve it, it's going  
4 to have to do its level best.

5 But what I meant by the law running  
6 out is that if the Court has walked through all  
7 of the tools of construction and interpretation  
8 and doesn't think that Congress actually  
9 directly spoke to this issue, Congress itself  
10 didn't resolve it, then the kinds of tools the  
11 Court is going to have to use will be ones that  
12 sound in things like the overarching statutory  
13 objectives that Congress revealed as part of its  
14 plan.

15 And I think that in a -- a Chevron  
16 circumstance, the insight of the Court's opinion  
17 there was that the Court doesn't have to go on  
18 and itself supply the answer when, actually, the  
19 best way to understand Congress having not  
20 resolved it itself was to make the primary  
21 decision-maker or the person with the primary  
22 role in the first instance to be the agency.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Justice Thomas, anything further?

2 JUSTICE THOMAS: Just a -- a couple  
3 questions. You said that -- in an exchange with  
4 Justice Sotomayor and me that Congress could  
5 require some deference when it came to questions  
6 of statutory interpretation.

7 And in 706, it -- it -- the reviewing  
8 court shall decide all relevant questions of  
9 law, interpret constitutional and statutory  
10 provisions, et cetera. Could Congress also  
11 require deference on the part of the court with  
12 respect to constitutional issues?

13 GENERAL PRELOGAR: So I think that  
14 that would raise distinct issues in light of the  
15 different history that would be in play in that  
16 kind of hypothetical. There has not been a  
17 longstanding history of courts deferring to  
18 agencies when it comes to interpreting the  
19 Constitution, so I think there could be a unique  
20 Article III interest at stake there.

21 But the -- the history runs in  
22 precisely the opposite direction when it comes  
23 to statutory interpretation, where agencies  
24 themselves are charged with administering it  
25 because, as we've tried to explain, Chevron was



1 not an innovation, it was not something new.

2           These principles of deference go all  
3 the way back to the -- the very founding years  
4 of the republic. They're reflected in things  
5 like mandamus practice, where virtually all  
6 executive action for the first hundred years of  
7 our nation's history was reviewed deferentially,  
8 and then it was continued in a long line of  
9 cases from this Court recognizing specifically  
10 that in a circumstance when you have the  
11 Executive administering the statute, Congress  
12 could delegate and could expect for those  
13 delegations to be respected.

14           JUSTICE THOMAS: I think mandamus is a  
15 little bit different and the other extraordinary  
16 writs in that they -- that you had quite a high  
17 hurdle before they became applicable, but back  
18 to -- we normally say that this Court reviews  
19 questions of law de novo, and that includes  
20 statutory and constitutional.

21           How would you distinguish that normal  
22 practice from what you're saying?

23           GENERAL PRELOGAR: Well, I think it is  
24 more nuanced than that. I certainly take the  
25 point that the Court reviews many legal

1 questions de novo, but that's not invariably the  
2 case. There can be issues that arise under  
3 distinct statutes that set forth more  
4 deferential standards of review. AEDPA is a  
5 good example of that.

6           It -- there can be circumstances like  
7 mandamus, where the nature of the action itself  
8 dictates a more deferential standard of review.  
9 And I just don't think it would be accurate to  
10 say, as a uniform, across-the-board matter, de  
11 novo is the standard that always and invariably  
12 applies. That's inconsistent with cases from  
13 this Court that were cited in Chevron, going  
14 back to the early 1800s, things like Edwards'  
15 Lessee versus Darby, where the Court itself was  
16 recognizing that in a variety of contexts where  
17 you have ambiguity in particular and you have an  
18 expert agency charged with administering the  
19 statute, deference can be warranted.

20           JUSTICE THOMAS: Thank you.

21           CHIEF JUSTICE ROBERTS: Justice Alito?

22           JUSTICE ALITO: Can you provide a  
23 concise definition of what "ambiguity" means in  
24 this context?

25           GENERAL PRELOGAR: Ambiguity exists

1 when the court has exhausted the tools of  
2 interpretation and hasn't been able to arrive at  
3 confidence that there is a right answer that  
4 Congress spoke to the issue.

5 JUSTICE ALITO: Well, as Justice  
6 Kavanaugh's recent question presented, in cases  
7 that don't involve an agency, we never say we  
8 have exhausted all of our tools of  
9 interpretation and we just can't figure out what  
10 this means. So that would seem to suggest you  
11 never get to step two.

12 GENERAL PRELOGAR: But the relevant  
13 question at step one is whether Congress is, in  
14 fact, resolving it or delegating it to the  
15 agency. So I agree that in a circumstance where  
16 you don't have an agency, the Court can't give  
17 effect to any delegation and, instead, the  
18 backup option in a situation where an agency  
19 would otherwise be available is the Court has to  
20 do it, but I don't think that that undermines  
21 the very real on-the-ground possibility that  
22 Congress is legislating and meaning to give the  
23 agency the gap.

24 JUSTICE ALITO: Well, I come back to  
25 --

1                   GENERAL PRELOGAR:  And think about a  
2                   term like "reasonable."

3                   JUSTICE ALITO:  -- I come back to the  
4                   question of your definition of "ambiguity."  And  
5                   what I heard you say the first time was it's  
6                   when we've used up all our tools and we can't  
7                   figure out what it means, then it's ambiguous.  
8                   So do you want to provide an alternative  
9                   definition?

10                  GENERAL PRELOGAR:  So I think maybe  
11                  the best way to try to clarify what the  
12                  definition I'm trying to give is to use an  
13                  example of something like a statutory term --

14                  JUSTICE ALITO:  No, I --

15                  GENERAL PRELOGAR:  -- like  
16                  "reasonable."

17                  JUSTICE ALITO:  -- really would just  
18                  like a definition so that all the courts that  
19                  have to apply the regime that you're advocating  
20                  will be able to apply it in the many different  
21                  cases that come before them.

22                  GENERAL PRELOGAR:  The Court gave this  
23                  definition in *Kisor* five years ago with respect  
24                  to Auer deference, and I think it's the right  
25                  definition to use --

1 JUSTICE ALITO: And what is it?

2 GENERAL PRELOGAR: -- here as well.

3 JUSTICE ALITO: What is it?

4 GENERAL PRELOGAR: When a court has  
5 used or exhausted the tools of interpretation  
6 and doesn't believe that it reveals a right  
7 answer. In that circumstance, Chevron said the  
8 right way to think about that statute --

9 JUSTICE ALITO: Well, I -- I think, if  
10 you --

11 GENERAL PRELOGAR: -- the real right  
12 answer there is a delegation.

13 JUSTICE ALITO: But, again, I think  
14 you -- you're running into the problem that we  
15 never do that in cases that don't involve an  
16 agency.

17 GENERAL PRELOGAR: Because, in those  
18 cases --

19 JUSTICE ALITO: So I think you've got  
20 to provide a different -- a different  
21 definition. Now what I heard you say at a  
22 couple of times -- a couple of times during your  
23 argument was it's when we can't figure out --  
24 when we don't -- when we can't figure out what  
25 Congress intended. Is -- is that what you mean

1 to say?

2 GENERAL PRELOGAR: That is the inquiry  
3 that Chevron prescribes that you should be --  
4 and this is drawn from Footnote 9, which is  
5 another formulation of this, use the tools of  
6 interpretation to see if they reveal  
7 Congress's --

8 JUSTICE ALITO: What do you mean by  
9 what Congress intended? Do you mean -- you mean  
10 to say that you get to step two whenever we  
11 don't think that a majority of the House and a  
12 majority of the Senate had an intent on the  
13 specific question that is before the court?  
14 Then you'd always get to step two.

15 GENERAL PRELOGAR: No. So I don't  
16 think it's about individual legislators' intent.  
17 I think the Court in Chevron used the word  
18 "Congress," but you're really looking at the  
19 statute and what the statute reveals about  
20 whether it's resolving an issue or not.

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Sotomayor?

24 JUSTICE SOTOMAYOR: There hasn't been  
25 much discussion on why this is entitled to

1 statutory -- to stare decisis consideration.  
2 There's been an argument by opposing --  
3 Petitioners that it's not because -- it's not  
4 really a holding of a case, it's a method only,  
5 and we have said in the past that a method that  
6 lower courts have to use is subject to change  
7 in -- change we can make without considering  
8 stare decisis.

9 So could you address that argument?

10 GENERAL PRELOGAR: Yes. And I think  
11 that Petitioners have pointed to two relevant  
12 types of cases that they suggest just mean stare  
13 decisis doesn't apply here or it applies in  
14 particularly weakened form.

15 First, they say the Court has  
16 sometimes changed the interpretive tools it  
17 consults. Things like legislative history might  
18 have been in greater favor at least with some  
19 Justices before and maybe have fallen out of  
20 favor later.

21 But I don't think that those provide a  
22 parallel at all because the Court has never  
23 distilled those kinds of interpretive tools into  
24 a governing framework. It's never, for example,  
25 dictated to lower courts you should be applying

1 legislative history in all cases. And so I  
2 don't think that it has the same kind of roots  
3 in the type of binding governing framework that  
4 Chevron has, which really has functioned in  
5 quite a different way with respect to how you  
6 understand and implement Congress's directives.

7           The second case they pointed to is  
8 Pearson, which held, in the context of the  
9 Saucier rule, that that was entitled to weakened  
10 stare decisis. But, there, the Court said that  
11 is entirely a rule of internal judicial  
12 management about how courts decide issues and  
13 sequence their decision-making process. It  
14 doesn't have outward-looking consequences, and  
15 it would be foolish to require Congress to step  
16 in to fix it.

17           There too, I think that the  
18 considerations run in precisely the opposite  
19 direction here because Chevron is not just a --  
20 a -- a -- a binding framework about how courts  
21 conduct their business; it also gives notice to  
22 the legislature about how its statutes will be  
23 construed. And if the Court got this wrong when  
24 Chevron was decided and was wrong about  
25 legislative intent, Congress is there at the



1 ready and is perhaps the best part or  
2 institution in government to be able to correct  
3 it and actually say going forward what it wants  
4 the ground rules to be.

5           And the final thing I would say,  
6 Justice Sotomayor, is that these were precisely  
7 the kinds of considerations that the Court took  
8 into account in Kisor in applying the strongest  
9 form of stare decisis to Auer deference.

10           My friends have largely ignored  
11 Kisor's analysis on this. This was the majority  
12 of the Court where the Court said Congress can  
13 step in, these deference decisions are balls  
14 that are lobbed into Congress's courts, and  
15 there are big reliance interests at stake here  
16 because there are dozens in that case, here  
17 thousands, of decisions that could stand to be  
18 displaced and create chaos if Chevron is  
19 overruled. So I think that from a stare decisis  
20 perspective, that precedent counts as precedent  
21 too.

22           JUSTICE SOTOMAYOR: There -- and you  
23 answered the reliance question, because one of  
24 the arguments on the other side is no one has --  
25 well, the first argument, that the Court hasn't

1 applied Chevron in how many years and so nobody  
2 should have a legitimate reliance interest. And  
3 the second argument against reliance is that no  
4 one should have reliance on a wrong  
5 interpretation basically.

6 GENERAL PRELOGAR: Yes. And I think  
7 that those kinds of arguments are inconsistent  
8 with Kisor and also inconsistent with what we  
9 know about what happens in the real world. You  
10 know, there are agency regulations out there  
11 that have been on the books for decades. People  
12 have made investment decisions on the basis of  
13 that. People have decided what contracts to  
14 enter into on the basis of that. States in  
15 cooperative federalism programs have designed  
16 and invested their resources into their share of  
17 that program.

18 And all of that could be thrown into  
19 disarray if now it can be subject to renewed  
20 challenge on the basis that that regulation was  
21 upheld using the wrong -- answering the wrong  
22 question, not looking at whether it conflicts  
23 with some purportedly better interpretation of  
24 the statute.

25 JUSTICE SOTOMAYOR: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: There's been a fair  
3 bit of talk, General, about how, because you  
4 don't have a formula for saying when there's a  
5 gap or ambiguity so that you go to step two or  
6 because judges may have different tendencies,  
7 you know, which might be temperamental as much  
8 as anything else to find ambiguity, because of  
9 that, there's going to be some variability. And  
10 it's hard to argue that will be -- there will be  
11 some variability, but could you talk about the  
12 variability in the alternative scenario?

13 GENERAL PRELOGAR: Yes. And -- and I  
14 think that this is a really important point to  
15 focus on because, as I was trying to say  
16 earlier, in a world without Chevron, it's not as  
17 though Congress is always going to speak clearly  
18 and it won't leave gaps or ambiguities in  
19 statutes, genuine ambiguities where you apply  
20 the tools and, at the end, you are left with no  
21 certainty about what Congress was trying to do.

22 And in that circumstance in a world  
23 without Chevron, what we'll see is what Justice  
24 Alito was suggesting, the courts will have to go  
25 on and try to answer the question. But there

1 are 800 district court judges around the nation,  
2 and I think it's fair to say they will likely  
3 have different takes about what to do in that  
4 circumstance and what to give greater weight to  
5 and how to ultimately fill the gap in  
6 administering the statute, and that's going to  
7 create problems for a couple of different  
8 reasons.

9 JUSTICE KAGAN: And those differences,  
10 to go back to Justice Alito's earlier question,  
11 I mean, those differences were part of the  
12 impetus for Chevron because those differences  
13 were looking awfully ideological in nature,  
14 awfully partisan in nature, and Chevron, all the  
15 empirical evidence suggests, dampens that kind  
16 of ideological division between courts.

17 GENERAL PRELOGAR: That's right.  
18 There is good empirical evidence to support that  
19 judges have an easier time reaching common  
20 ground under the Chevron framework and at least  
21 identifying when they can agree that Congress  
22 did not itself resolve an issue than they do  
23 when they have to ultimately go on and try to  
24 figure out what they are going to say is the  
25 bottom line of the best way to put the statute

1 into operation.

2           So I think that that is rooted in  
3 Chevron, and it just reflects as well this  
4 uniformity concern, one of the basic  
5 justifications for Chevron and one of the  
6 reasons why this inference of legislative intent  
7 is sound, because agencies can provide that kind  
8 of uniform rule for the nation, subject to the  
9 ground rules, of course, of judicial review  
10 under Chevron. But I think that the alternative  
11 world where there's no Chevron is that there  
12 will open up wide disputes among the lower  
13 courts, maybe on these mine-run statutory  
14 interpretation questions in complex programs,  
15 things like Medicare and Medicaid, and I think  
16 that it could mean that regulated parties are  
17 subject to different rules in different parts of  
18 the country. You lose the uniformity value, and  
19 it diminishes the force of the political  
20 accountability value.

21           So I think Congress would have very  
22 good reason to think that agencies should do  
23 this and that courts should respect it within  
24 the bounds of reasonableness.

25           JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Gorsuch?

3 JUSTICE GORSUCH: You agree that  
4 courts under the APA have to review questions of  
5 law involving the Constitution de novo?

6 GENERAL PRELOGAR: Yes. I think there  
7 might be certain circumstances with respect to  
8 certain provisions where more deferential  
9 standards apply, but I --

10 JUSTICE GORSUCH: But, as a general  
11 rule --

12 GENERAL PRELOGAR: -- I certainly  
13 agree they don't defer to agencies.

14 JUSTICE GORSUCH: Okay. And -- and  
15 you agree that, elsewhere in the law, when posed  
16 with questions of law, courts review those de  
17 novo, generally speaking?

18 GENERAL PRELOGAR: I think that, in  
19 many contexts, it's de novo. Certainly not in  
20 all contexts.

21 JUSTICE GORSUCH: The examples you  
22 gave, I think, were AEDPA and mandamus, right?

23 GENERAL PRELOGAR: Yes. I think those  
24 are two good examples of situations where there  
25 are specifications of a standard of review

1 that's more deferential.

2 JUSTICE GORSUCH: I wonder whether,  
3 though, those have more to do with remedies,  
4 right? In a mandamus case, a court should say  
5 or can say what the law is. It just can't  
6 provide relief unless its conviction about the  
7 statute meaning is sufficiently clear. Same  
8 thing in AEDPA, that we require a heightened  
9 standard before relief is granted. Same thing  
10 in sovereign immunity contexts. We may think  
11 the statute says the government's liable, but we  
12 impose a higher standard before we grant access  
13 to the fisc.

14 GENERAL PRELOGAR: So I acknowledge  
15 that I think that many of those doctrines do  
16 turn on limitations built into the writ or  
17 limitations on remedies. I don't think it would  
18 be right, Justice Gorsuch, to say that in the  
19 mandamus cases, what courts were traditionally  
20 doing is saying let me put aside what the  
21 executive officer did and just interpret the  
22 statute de novo and say what I think the right  
23 answer is.

24 And the right answer is the executive  
25 was violating the law, but not clearly outside

1 the scope of the executive's authority.

2 JUSTICE GORSUCH: But he could do so,  
3 as -- just as we do in the qualified immunity  
4 context. There are two steps to that analysis.

5 GENERAL PRELOGAR: But --

6 JUSTICE GORSUCH: You can just go to  
7 the second one and resolve it and say, ah, it's  
8 not clear, so I can't provide a remedy.

9 GENERAL PRELOGAR: But I think, for  
10 Petitioners to succeed on their Article III  
11 argument, they have to show not just that you  
12 can --

13 JUSTICE GORSUCH: I'm not asking about  
14 Article --

15 GENERAL PRELOGAR: -- review de novo,  
16 but you have to.

17 JUSTICE GORSUCH: -- I'm not asking  
18 about Article III. I'm just asking about the  
19 APA and what it means.

20 GENERAL PRELOGAR: Yeah. Okay. So  
21 sorry if I misunderstood. I -- I do think,  
22 though, that what the history shows at the very  
23 least is there has been no fundamental rule in  
24 this country leading up to the APA's enactment  
25 that you have to review all questions de novo.



1 And that's where the history of the APA really  
2 matters.

3 This Court has several times  
4 recognized the APA was a restatement of existing  
5 judicial practice when it came to review of  
6 agency statutory interpretations. And as we've  
7 explained, there are really deep roots here, a  
8 long line of precedent and history showing that  
9 courts will sometimes defer.

10 JUSTICE GORSUCH: Yeah. On -- on  
11 those --

12 GENERAL PRELOGAR: So I think to say  
13 that --

14 JUSTICE GORSUCH: -- on those, it's --  
15 it's absolutely true, you -- you -- you do point  
16 out cases like Edwards' Lessee and others where  
17 this Court gave respect to the federal  
18 government's contemporaneous and uniform  
19 interpretation of the statute.

20 And that's exactly what Skidmore does.  
21 It gives respect to contemporaneous and uniform  
22 interpretations. But Chevron, it doesn't matter  
23 whether it's contemporaneous and uniform. It  
24 could be novel and out of the blue and  
25 inconsistent with everything that came before,

1 and it still gets deference, right?

2 GENERAL PRELOGAR: So I -- I disagree  
3 with the idea that those cases stand for the  
4 more limited principle that's -- that --

5 JUSTICE GORSUCH: Well, I'm -- I'm  
6 reading from them, but okay. All right. So  
7 let's let --

8 GENERAL PRELOGAR: Well, there are --  
9 there are dozens of them.

10 JUSTICE GORSUCH: -- let's let --

11 GENERAL PRELOGAR: So I acknowledge  
12 that they use varying formulations, and maybe  
13 you can find some that look a little more like  
14 Skidmore. I think I have a lot that look a  
15 whole lot like Chevron --

16 JUSTICE GORSUCH: Let's say you don't.  
17 Then what?

18 GENERAL PRELOGAR: Well, I think I --  
19 I just have to dispute the premise because --

20 JUSTICE GORSUCH: No. No, fair  
21 enough.

22 GENERAL PRELOGAR: -- look at Gray  
23 versus Powell, look at NLRB versus --

24 JUSTICE GORSUCH: Yeah.

25 GENERAL PRELOGAR: -- First

1 Publications.

2 JUSTICE GORSUCH: Yeah.

3 GENERAL PRELOGAR: You know, I think  
4 that these are -- these are cases in the 1940s  
5 that were leading cases in administrative law.

6 JUSTICE GORSUCH: Oh, I -- I wasn't --  
7 I was -- put aside what happened in the '40s  
8 because it went back and forth and wound up in  
9 Skidmore.

10 GENERAL PRELOGAR: But, at the very  
11 least --

12 JUSTICE GORSUCH: But -- but -- but --

13 GENERAL PRELOGAR: -- Justice Gorsuch  
14 --

15 JUSTICE GORSUCH: -- but you wanted --

16 GENERAL PRELOGAR: -- where there's no  
17 --

18 JUSTICE GORSUCH: -- you wanted to say  
19 it's a very old thing. And the old cases don't  
20 look anything like Chevron. They look a lot  
21 like Skidmore.

22 GENERAL PRELOGAR: I -- I disagree  
23 with that. Some of them --

24 JUSTICE GORSUCH: Okay.

25 GENERAL PRELOGAR: -- say you should

1 give it controlling weight, it should tip the  
2 balance. They're not saying just pay attention  
3 to it if maybe it has the chance of persuading  
4 you.

5 JUSTICE GORSUCH: If it -- if it's  
6 contemporaneous and if it's uniform, right?

7 GENERAL PRELOGAR: No, not all of the  
8 cases --

9 JUSTICE GORSUCH: Okay.

10 GENERAL PRELOGAR: -- pay attention to  
11 that fact.

12 JUSTICE GORSUCH: Okay.

13 GENERAL PRELOGAR: Some of them recite  
14 that, but others don't.

15 JUSTICE GORSUCH: All right. I'll --  
16 I'll go look again. That's fine.

17 GENERAL PRELOGAR: And I just want to  
18 add as well --

19 JUSTICE GORSUCH: I -- I have another  
20 question, though. Chevron, you emphasize, is --  
21 is value-neutral and it'll sometimes favor  
22 industries that are regulated and sometimes  
23 favor the government.

24 And I can certainly see that in -- in  
25 scenarios where we talk about the flip-flop of

1 administrations and new people leave -- come in  
2 and replace others and -- and there's a lot of  
3 movement from industry in and out of those  
4 agencies. I think George Stigler talked about  
5 regulatory capture.

6           And I -- I don't worry in a Chevron  
7 regime about those people. They can take care  
8 of themselves, okay? There is political  
9 account, fine.

10           The cases I saw routinely on the  
11 courts of appeals -- and I think this is what  
12 niggles at so many of the lower court judges --  
13 are the immigrant, the veteran seeking his  
14 benefits, the Social Security Disability  
15 applicant, who have no power to influence  
16 agencies, who will never capture them, and whose  
17 interests are not the sorts of things on which  
18 people vote, generally speaking.

19           And, there, Chevron is almost always  
20 and, in fact, I -- I didn't see a case cited,  
21 and perhaps I missed one, where Chevron wound up  
22 benefitting those kinds of peoples. And it  
23 seems to me that it's arguable, and, certainly,  
24 the other side makes this argument powerfully,  
25 that Chevron has this disparate impact on

1 different classes of persons, and I wanted to  
2 give you a chance to respond to that.

3           GENERAL PRELOGAR: Sure, and I have a  
4 couple of different reactions to that. You  
5 know, one is to say that I, of course,  
6 acknowledge that the way that Chevron operates,  
7 it gives effect to agency interpretations even  
8 in circumstances where that might be  
9 oppositional, some of the categories of  
10 individuals that you're identifying.

11           But, if it does that, it does that in  
12 accordance with Congress's intent and wishes  
13 because even my friend agrees that there are  
14 certain delegations that Congress can make to  
15 agencies and -- and certain gap-filling that  
16 agencies can do at least with the broad and  
17 capacious terms, and at that point, it's just  
18 putting into effect what Congress decided.

19           So I don't think that there is any  
20 kind of fundamental flaw in giving effect to  
21 Congress's statutes in that regard.

22           JUSTICE GORSUCH: But you've left open  
23 the possibility that a judge, if left to his own  
24 devices, would say the fairest ruling is in  
25 favor of the immigrant, it's in favor of the

1 veteran, and it's in favor of the Social  
2 Security Disability applicant, but because of a  
3 fictionalized statement about what Congress  
4 wanted when it didn't think about the problem,  
5 the government always wins.

6 GENERAL PRELOGAR: Well, I think there  
7 are a couple of different ways to come at that  
8 concern. One is to emphasize again that if it's  
9 not just that in the exercise of discretion the  
10 Court would think something is fairer and fill  
11 the gap that way, but, rather, the Court thinks  
12 actually the reason it's fairer is because I  
13 have a -- a -- a sense that Congress spoke to  
14 this, I can determine it based on all of the  
15 tools, you can --

16 JUSTICE GORSUCH: Well, but we --

17 GENERAL PRELOGAR: -- resolve that at  
18 step one.

19 JUSTICE GORSUCH: But -- but that  
20 doesn't work, though, because you've said that  
21 it doesn't matter whether Congress actually  
22 thought about it and that --

23 GENERAL PRELOGAR: Yes. So --

24 JUSTICE GORSUCH: -- and that there  
25 are many instances where Congress didn't think

1 about it. And in every one of those, Chevron is  
2 exploited against the individual and in favor of  
3 the government.

4 GENERAL PRELOGAR: I don't think it's  
5 fair to treat that as an exploitation. Congress  
6 has been aware of the rules here. It could  
7 change Chevron at any time. It could displace  
8 it if it thinks that it's being used --

9 JUSTICE GORSUCH: All right.

10 GENERAL PRELOGAR: -- in these  
11 circumstances where it's not warranted.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Kavanaugh?

14 JUSTICE KAVANAUGH: A few questions.  
15 I think the other side's argument suggests that  
16 the basic analytical concern at the heart of  
17 Chevron is that it treats law as policy and that  
18 that's antithetical to our constitutional  
19 structure and the rule of law.

20 And that's why the Footnote 9 question  
21 is so important, I think, because, if you use  
22 the traditional tools in a non-agency case and  
23 got an answer, that suggests it's a statutory  
24 interpretation question.

25 And you're saying no, you can stop



1 short of that in an agency case at some  
2 difficult-to-define point and then treat the  
3 rest of the case as a -- as a policy call for  
4 the executive branch.

5           And that's treating what was a law  
6 question in a non-agency case as a policy  
7 question in an agency case, and it's the same  
8 question. So it's transforming law into policy.  
9 And that's very difficult, I think, to accept if  
10 you accept the idea that a premise of the rule  
11 of law is that the executive and the judiciary  
12 can't just treat the laws passed by Congress as  
13 mere expressions of policy that they can change.

14           Respond to that.

15           GENERAL PRELOGAR: So I hear that  
16 concern, and I think the way to address that  
17 concern is to reinforce the principle in  
18 Footnote 9.

19           We agree that that's an important  
20 principle. And to the extent that there are  
21 agencies out there or lower courts out there  
22 that are effectively not giving the -- the  
23 effect to Congress's own enactments, then a  
24 court can police that and it can put into effect  
25 the Footnote 9 principle in a robust way with a

1 rigorous analysis. That's the kind of  
2 instruction the Court gave in Kisor.

3           And, Justice Kavanaugh, I think it's  
4 not a -- a different question in the agency  
5 context and in the non-agency context. What I  
6 understand Chevron to be doing is telling the  
7 court in the first instance figure out if  
8 Congress spoke to this issue and, if so,  
9 implement it, but hold open the possibility that  
10 Congress didn't speak to the issue.

11           And in that context, if Congress has  
12 given the agency this primary critically  
13 important role to administer the statute, that  
14 should merit deference if the agency still stays  
15 within the bounds that Congress set.

16           In a non-agency case, you don't have  
17 the agency to rely on, but you might still end  
18 up at the end of the interpretive process  
19 thinking Congress didn't precisely speak to this  
20 issue, but what is the best I can do to figure  
21 out how Congress would have resolved it or what  
22 is the interpretation most consistent with the  
23 overall statutory scheme here?

24           The right way to resolve this case,  
25 Congress, in fact, would know that courts are

1 going to have to do that in a context without an  
2 agency, and so it's still following the terms of  
3 the statute, but I think it would be a fiction  
4 to suggest that what the Court is doing there is  
5 just following Congress's explicit directions on  
6 the matter --

7 JUSTICE KAVANAUGH: Well, can I ask --

8 GENERAL PRELOGAR: -- because that's  
9 at war with the idea that there is genuine  
10 ambiguity sometimes.

11 JUSTICE KAVANAUGH: Yeah. I think  
12 it's important to distinguish, and I think you  
13 would distinguish, statutes that involve legal  
14 questions of statutory interpretation and then  
15 there are tons of statutes, to go back to the AI  
16 example, that explicitly confer broad policy  
17 discretion on agencies.

18 GENERAL PRELOGAR: Yes.

19 JUSTICE KAVANAUGH: And that's where  
20 State Farm kicks in, and that's where we've  
21 always been deferential.

22 GENERAL PRELOGAR: Yes, correct.

23 JUSTICE KAVANAUGH: And you  
24 acknowledge those are two different kinds of  
25 statutes, a statute that says -- for example,

1 one statute might say no -- no one can catch  
2 more than 50 fish today, the next statute may  
3 say the agency can define what a reasonable  
4 number of fish that can be caught in a  
5 particular day. That second statute's  
6 conferring broad policy discretion to define the  
7 limit on the agency.

8 You agree those are distinct?

9 GENERAL PRELOGAR: Well, I -- I think  
10 that one is obviously a clearer bestowal of  
11 discretion on the agency, but I think it just  
12 shows that Congress can legislate in a variety  
13 of ways.

14 And if you think about some of these  
15 examples, note --

16 JUSTICE KAVANAUGH: Can I just stop  
17 you right there? And so you agree Congress can  
18 legislate broad policy discretion to an agency,  
19 can -- can grant broad policy discretion  
20 explicitly through words like "reasonable,"  
21 "appropriate" --

22 GENERAL PRELOGAR: Yes.

23 JUSTICE KAVANAUGH: -- "public  
24 interest"?

25 GENERAL PRELOGAR: Absolutely.

1 JUSTICE KAVANAUGH: Okay.

2 GENERAL PRELOGAR: And I think that  
3 the same question of what does the court do  
4 without the agency can sometimes come up in  
5 those contexts. If Congress has said, to -- to  
6 borrow from the Chief Justice's example,  
7 reasonable truck lengths and, you know, there  
8 isn't an agency interpretation of that, the  
9 court's going to have to do its best.

10 JUSTICE KAVANAUGH: Right.

11 GENERAL PRELOGAR: But I understood my  
12 friend to concede that is actually meaning to  
13 create a zone of discretion --

14 JUSTICE KAVANAUGH: Yes. That's a --

15 GENERAL PRELOGAR: -- for the agency  
16 to operate in.

17 JUSTICE KAVANAUGH: -- that's a State  
18 Farm question as I would see it.

19 Okay. Two more questions because I  
20 want to make sure the concerns of the other side  
21 get aired and you have a chance to respond.

22 So there's some discussion of this  
23 would be taking power from the executive and  
24 granting it to the judiciary. I guess a  
25 different conception of this, of Chevron, is

1 that it's taken power from Congress and shifted  
2 it to the executive and allowed the executive,  
3 in essence, to unilaterally make policy without  
4 Congress.

5           And one of the concerns historically  
6 from the beginning of this country was unchecked  
7 executive power, and you hear presidents  
8 criticized all the time, whether it's -- you  
9 know, Roosevelt or Reagan or Bush or Obama are  
10 criticized for exercising unchecked power. So  
11 the concern is, about Chevron, in essence  
12 ushering in aggressive assertions of unilateral  
13 executive power, and that's the concern that I  
14 think the other side has, not about the  
15 judiciary taking power but the judiciary having  
16 taken it from Congress and shifted it to the  
17 executive, contrary to our usual concerns.

18           GENERAL PRELOGAR: So I disagree with  
19 their characterization that Chevron permits the  
20 executive to claim power away from Congress and  
21 Congress is powerless to do anything about that.  
22 You know, in the first instance, of course,  
23 Congress has to make the delegation to the  
24 agency, and the Court can enforce that. And so  
25 Congress knows, as this Court has said in City

1 of Arlington, to speak capaciously when it wants  
2 to bestow discretion, to speak plainly when it  
3 wants to rein an agency in and resolve an issue  
4 itself, and also Congress can change the rules  
5 of deference that apply in any context.

6           There have been particular statutory  
7 schemes where Congress has said deference  
8 doesn't exist in this context, don't apply it,  
9 or defer to this agency and not this other  
10 agency. So -- so Congress is really in the  
11 driver's seat here.

12           JUSTICE KAVANAUGH: Well, most -- this  
13 is a technical point. Most presidents would  
14 veto a bill getting rid of Chevron deference and  
15 so -- but that's a technical point. But last --

16           (Laughter.)

17           JUSTICE KAVANAUGH: -- last -- last  
18 question, which is there was talk about  
19 democratically elected political branches, but I  
20 just want to get your agreement on something  
21 that I think you'll agree on, which it's the  
22 role of the judiciary historically under the  
23 Constitution to police the line between the  
24 legislature and the executive to make sure that  
25 the executive is not operating as a king, not

1 operating outside the bounds of the authority  
2 granted to them by the legislature.

3 Do you agree that's a proper judicial  
4 role, I would assume?

5 GENERAL PRELOGAR: I, of course, agree  
6 with that, but I think Chevron is consistent  
7 with that. The court polices the executive at  
8 step one by ensuring that Congress's own choices  
9 are put into operation, and it further polices  
10 the executive at step two. As the Court said in  
11 *Kisor*, reasonableness is a test that agencies  
12 can fail. And so there's work to be done --  
13 done there too to make sure the agency doesn't  
14 transgress some outer bound or line that  
15 Congress set.

16 JUSTICE KAVANAUGH: Thank you very  
17 much.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Barrett?

20 Justice Jackson?

21 JUSTICE JACKSON: So just picking up  
22 where Justice Kavanaugh left off, doesn't the  
23 Court have to not only police the other branches  
24 but itself as well? And by that, I mean, to the  
25 extent that the other side raises the concern



1 that, you know, they're treating law as policy,  
2 isn't there a concern that policy questions  
3 might be treated as law and that what Chevron is  
4 doing is also helping the Court to police its  
5 own determinations in that regard?

6 GENERAL PRELOGAR: Yes. And I think a  
7 way to illustrate this is to think about a  
8 delegation like the deceptive practices as  
9 defined by the Secretary. If there were a  
10 statute that said that, of course, a court  
11 couldn't come in and say, well, the Secretary  
12 has said what's a deceptive practice, but I -- I  
13 think that actually there's a better way to  
14 think about the concept of what is deceptive  
15 and, therefore, I'm going to override what the  
16 agency has done or not give any weight to it.

17 Congress has directed there that what  
18 you should do as a court is pay attention to  
19 what the Secretary did because the Secretary was  
20 given that role in administration. Obviously,  
21 Chevron applies to circumstances where that  
22 delegation is not quite as explicit, but it's  
23 meant to identify the same basic idea where I  
24 think the courts' role then is to give effect to  
25 what Congress has done.

1                   JUSTICE JACKSON: But why isn't the  
2 answer what -- what the other side says, which  
3 is, really, make Congress say that? In other  
4 words, you know, it seems to me their argument  
5 is, when we're policing this line between what  
6 is law and what is policy, we should require  
7 Congress to say the Secretary gets to make this  
8 decision, and when it doesn't, then I guess we  
9 look at it as a legal question that the courts  
10 can decide.

11                   GENERAL PRELOGAR: So I think that  
12 that argument would have more merit if there  
13 weren't so much water under the bridge and the  
14 fact that the Court explained when it would  
15 identify this kind of delegation 40 years ago.  
16 And, you know, Petitioners talked about the  
17 reliance interests here and tried to diminish  
18 them. They didn't talk about Congress's own  
19 reliance interests in enacting statutes against  
20 the backdrop of Chevron.

21                   So I think, at this juncture, to say  
22 we're actually going to switch the default and  
23 make Congress say discretion is conferred would  
24 be really to run to the detriment of Congress's  
25 own reasonable expectations with respect to

1 drafting.

2           And I think it also doesn't account  
3 for the category of cases where the language  
4 that Congress is using is infused with  
5 discretion. They agree to terms like  
6 "reasonable," "appropriate," "necessary." Those  
7 are terms that require greater application to  
8 concrete factual settings to fill in the  
9 details, and you can't just interpret those  
10 terms in a vacuum. So I don't understand how  
11 this idea of just making Congress say it could  
12 function in that kind of world.

13           And then the final thing is Congress  
14 has said something very important here, which is  
15 the agency shall administer the statute with  
16 regulations or adjudications that have the force  
17 of law. That is part of the statute as well.  
18 And I think --

19           JUSTICE JACKSON: And you think that  
20 that really carries a lot? I've heard you use  
21 that and focus on that many times when you're  
22 talking about a situation in which deference is  
23 or should be required.

24           GENERAL PRELOGAR: Exactly. So  
25 Congress, in each and every statute where this

1 is going to be applicable, where Chevron  
2 deference will even be available, is going to  
3 have to have made that judgment in the statute  
4 to give the agency that responsibility and role  
5 in implementing the statute.

6 JUSTICE JACKSON: And let me just ask  
7 you about whether or not -- going to the issue  
8 of ambiguity, which has come up many times,  
9 whether or not the court could clarify when  
10 there is a gap or ambiguity that allows for or  
11 requires the court to -- to -- to go to step  
12 two. And what I'm thinking about is what I  
13 mentioned previously with your friend on the  
14 other side, which is that some scholars have  
15 actually identified different kinds of  
16 ambiguity.

17 So, in one scenario, we have a statute  
18 that uses a broad term, and that term  
19 encompasses a range of reasonable meanings.  
20 There are three or four different ways that  
21 could be reasonably -- you know, the meaning of  
22 "stationary source," for example.

23 But then there's also the kind of  
24 ambiguity in which a statute can mean only one  
25 thing, either A or B, perhaps because of the way

1 the -- the -- the language, you know, is put  
2 forward in the statute. It's just unclear  
3 whether it means A or B.

4 I take these scholars to mean that,  
5 really, in -- the former scenario is the one in  
6 which we have a situation, you know, where  
7 Chevron deference would be required. And could  
8 the Court say something like that?

9 And let me just clarify. I mean,  
10 Chevron, I look at it as that's reducing to a  
11 policy choice, that once we are in the world of  
12 finding the kind of ambiguity where there are a  
13 number of reasonable alternatives in terms of  
14 making this determination, then, you know, it's  
15 just going to be a policy choice as to which  
16 one, you know, Congress -- Congress wanted in  
17 some sense or which entity Congress wanted to  
18 make that decision.

19 GENERAL PRELOGAR: So I -- I think  
20 that there -- certainly, this Court could  
21 provide more guidance to lower courts and, in  
22 particular, identify the types of statutory  
23 issues that might clearly connote discretion,  
24 there are going to be some easy calls on this,  
25 and the types of situations where there might be

1 multiple, possible ways to implement and play  
2 that will signal that there really is a zone of  
3 discretion and the agency should have some  
4 flexibility.

5 My only concern with going down the  
6 road of saying there's some fundamental  
7 difference with respect to particular terms that  
8 might be subject to only two possible ways to be  
9 implemented is that, you know, there are kind of  
10 an endless number of statutes out there and all  
11 kinds of varieties, and I worry that it might  
12 lose sight of certain contexts where Congress  
13 actually was comfortable with either way of  
14 implementing that particular term, even if there  
15 are only two possibilities, and did, in fact,  
16 delegate that issue to the agency.

17 So I wouldn't want some kind of, you  
18 know, bright-line rule to diminish the courts'  
19 ability to recognize and implement that kind of  
20 delegation.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 General.

24 Mr. Martinez, rebuttal?

25

1 REBUTTAL ARGUMENT OF ROMAN MARTINEZ

2 ON BEHALF OF THE PETITIONERS

3 MR. MARTINEZ: Thank you, Your Honor.

4 Just a few points in rebuttal.

5 First of all, I think it's really  
6 important to be very clear about what Chevron  
7 does. It takes the power to say that the law --  
8 what the law means, to say that the law means X,  
9 and it takes that power away from courts and it  
10 gives it to agencies, and it then forces  
11 agencies -- forces courts to adjudicate the  
12 rights of individual litigants that are in front  
13 of them based on a version of the law that the  
14 courts themselves do not believe is correct, do  
15 not believe is the best interpretation.

16 Neither Congress nor this Court can  
17 create a doctrine or legislate a statute that --  
18 that effectuates that reallocation of  
19 interpretive authority. My friend on the other  
20 side said that the purpose of Chevron is to set  
21 the ground rules on how the -- the different  
22 branches of government should operate.

23 With respect, I think the Constitution  
24 sets those ground rules, and the Constitution  
25 makes clear that the judicial power, the power

1 to say what the law is, the power to interpret  
2 the law, rests with courts, not with agencies,  
3 and -- and certainly not with Congress either.  
4 And I think the APA reinforces that.

5           The Solicitor General tries to -- to  
6 rescue or reconceptualize Chevron by I think  
7 taking issue with our argument that under  
8 Chevron, if the court thinks the best  
9 interpretation is X, it sometimes is going to  
10 have to apply Y because the agency told it too.

11           I think, if you look at Footnote 11 of  
12 Chevron, that is exactly what Chevron itself  
13 says. It tells the agency -- the court that it  
14 has to apply an interpretation that the court  
15 itself would not choose, in other words, an  
16 interpretation that the court itself does not  
17 think is best.

18           The Solicitor General also describes  
19 Chevron as applying, and the formulation that I  
20 heard a lot today is it applies if the agency  
21 didn't resolve the question, which is a kind of  
22 innocuous phrasing, but what is really meant by  
23 that is that Chevron applies in cases of  
24 ambiguity. And ambiguity has always been  
25 understood as a situation where reasonable



1 people can disagree about what the law means.

2           And that just broadens the scope of  
3 deference. Ambiguities are all over the place.  
4 Courts resolve ambiguities all the time. That's  
5 core to the interpretive function. And so  
6 there's no reason to think that just because  
7 Congress has accidentally left an ambiguity in a  
8 statute, that what it's really trying to do is  
9 have that ambiguity resolved by policy decisions  
10 made by an agency.

11           Justice Barrett asked about the -- the  
12 justification for Chevron and whether the intent  
13 justification is really valid. And I took my  
14 friend to -- to essentially concede that the  
15 delegation is fictional but nonetheless to say  
16 that we should apply it anyway as a presumption.

17           I -- I -- I don't think that you can  
18 get the mileage that you need to get out of the  
19 intentional delegation theory after you've  
20 conceded it's fictional because the only reason  
21 that intentional delegation theory has weight is  
22 if it's actually what Congress wanted to do, and  
23 if Congress didn't actually want to delegate it,  
24 then we shouldn't be, you know, basing our  
25 doctrine and reconceptualizing how we think

1 about statutory interpretation based on this  
2 fictional premise.

3           Here, there's really no reason to  
4 think that Congress actually wanted to delegate  
5 policymaking authority to agencies to resolve  
6 ambiguity -- any ambiguity that arises in -- in  
7 any statute administered by the agency.

8           I think the government's sort of  
9 solution to that problem is to propose a clear  
10 statement requirement on Congress. Hey, you can  
11 just legislate more clearly. But ambiguities  
12 are -- are -- are accidental; they're  
13 unintentional. And so I don't think that works.  
14 I think that would impose a massive clarity tax  
15 on Congress that's unjustified.

16           With respect to the history, Your  
17 Honor, I think the mandamus precedents make very  
18 clear themselves that they're talking about  
19 remedies, and those cases like Decatur and  
20 Dunlap expressly say that if we were  
21 interpreting these -- these legal issues in a  
22 different context, where we weren't limited by  
23 the limits on mandamus remedies, we would apply  
24 our -- our best and independent judgment.

25           With respect to the APA, the Solicitor

1 General is looking at text that -- that requires  
2 courts to interpret statutory provisions and --  
3 and is saying that that rule, interpret  
4 statutory provisions, is consistent with  
5 Chevron, which she describes in her brief as  
6 allocating interpretive authority to agencies.

7 So the statute says courts do the  
8 interpretation. Chevron says agencies get  
9 interpretive authority, not courts. These are  
10 inconsistent. Chevron's not consistent with the  
11 APA.

12 Finally, with respect to the -- the  
13 course correction idea or the amend it, don't  
14 end it approach, I would just respectfully  
15 suggest that you've tried to amend this. You've  
16 tried to course correct over and over again over  
17 the years. That's why we have a Chevron  
18 doctrine. It's overladen with a lot of bells  
19 and whistles. It's very hard to apply in  
20 practice.

21 I think, in -- in -- in the real  
22 world, if you try to amend it without ending it,  
23 what's going to happen is you're going to put a  
24 lot of pressure on the Major Questions Doctrine.  
25 People are going to be coming to this Court

1 every three or four years asking you to adopt a  
2 new limitation, a new caveat, a new threshold  
3 test.

4 We would respectfully suggest that the  
5 solution here is to recognize that the  
6 fundamental problem is Chevron itself.  
7 Interpretive authority belongs to the courts.

8 If we have the best view of the  
9 statute, we should win this case. Thank you,  
10 Your Honors.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 The case is submitted.

14 (Whereupon, at 12:17 p.m., the case  
15 was submitted.)

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<b>1</b>	<b>absolutely</b> <sup>[8]</sup> 28:2,14 53:13 67:9 84:3 101:11 128:15 139:25 <b>AC</b> <sup>[1]</sup> 14:15 <b>academic</b> <sup>[1]</sup> 46:1 <b>accept</b> <sup>[2]</sup> 136:9,10 <b>access</b> <sup>[1]</sup> 126:12 <b>accidental</b> <sup>[1]</sup> 153:12 <b>accidentally</b> <sup>[1]</sup> 152:7 <b>accordance</b> <sup>[1]</sup> 133:12 <b>accordingly</b> <sup>[1]</sup> 72:5 <b>account</b> <sup>[11]</sup> 16:13 42:9,10 99:4,5,10 101:14 106:6 120:8 132:9 146:2 <b>accountability</b> <sup>[1]</sup> 124:20 <b>accountable</b> <sup>[2]</sup> 46:16 99:17 <b>accurate</b> <sup>[1]</sup> 113:9 <b>acknowledge</b> <sup>[5]</sup> 107:3 126:14 129:11 133:6 138:24 <b>acknowledged</b> <sup>[1]</sup> 108:13 <b>across</b> <sup>[1]</sup> 93:1 <b>across-the-board</b> <sup>[1]</sup> 113:10 <b>Act</b> <sup>[6]</sup> 16:3 26:23 67:4,14 72:4 83:17 <b>acted</b> <sup>[7]</sup> 14:23 21:1 24:25 66:15 67:8 71:5 78:19 <b>acting</b> <sup>[2]</sup> 68:6 95:6 <b>action</b> <sup>[5]</sup> 60:14 74:12 75:15 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