No. 22-451

IN THE

Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL.,

Petitioners,

v.

GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Since its founding in 1970, Natural Resources Defense Council, Inc. (NRDC), has litigated hundreds of cases that concern the meaning of statutes administered by federal agencies. One such case led to this Court's decision in *Chevron v. NRDC*, 467 U.S. 837 (1984). Although NRDC lost that case, and has lost many subsequent cases that applied its judicial review framework as well, we nonetheless respect that framework and recognize the important values that it serves. Because the Court is now considering whether to overrule or narrow *Chevron*, NRDC submits this brief as amicus curiae to revisit the history of the case and remind the Court of the problem that its opinion there sought to address—namely, the propensity of some lower court judges to resolve interpretive disputes based on their personal policy preferences. That history should give the Court reason to hesitate before overruling *Chevron* or abandoning its framework now.

INTRODUCTION AND SUMMARY OF ARGUMENT

We are the party that lost *Chevron*. The following Term, we lost the next case in which the Court applied *Chevron*, too. *Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985). In those cases, the Court deferred to Environmental Protection Agency (EPA) interpretations of the Clean Air Act and Clean Water Act that weakened regulatory burdens on industry. NRDC disagreed with the outcomes in these cases; and we continue to believe that EPA's interpretations of the relevant provisions were contrary to the statutory text.

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[1] This brief was not authored in whole or in part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief.

But we respect the principles of deference on which the Court based its decisions, and we urge the Court to exercise caution before abandoning them.

The Court emphasized deference in *Chevron* to address a particular problem. In the trio of D.C. Circuit decisions that led to *Chevron*, different panels of that court reached disparate conclusions about whether the Clean Air Act permitted EPA to adopt a regulatory interpretation and approach in three different statutory programs. The panels justified their disparate conclusions not based on statutory text, but on their own views of whether each program's policy was to enhance or merely to maintain air quality. In the third of those cases, the court's policy view precluded a more industry-friendly interpretation adopted by EPA under the Reagan administration. *NRDC v. Gorsuch*, 685 F.2d 718, 720 (D.C. Cir. 1982).

According to one prominent observer, the disparate D.C. Circuit opinions improperly construed the statute based on the judges' "views of appropriate policy," and revealed that at least some judges on that court were "prone to substitute their own preferences for those of EPA." Thomas Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 Admin. L. Rev. 253, 266 (2014). That is why the Court's opinion in *Chevron* stressed that the D.C. Circuit had "misconceived the nature of its role in reviewing the regulations at issue," 467 U.S. at 845, and admonished that a court should not interpret a statute "on the basis of the judges' personal policy preferences," *id.* at 865.

Instead, the Court instructed, a court reviewing an agency's interpretation of a statute it administers must "[f]irst, always," determine whether Congress has spoken to the question at issue. *Id.* at 842. If so, "that is the end of the matter"; Congress's expressed

intent "is the law and must be given effect." *Id.* at 842-43 & n.9.

If the statute's meaning is unclear, however, the court should not impose its own preferred construction on the statute, but rather should defer to a reasonable interpretation adopted by the agency. *Id.* at 843-45. That is so for at least a couple of reasons. For one thing, Congress tasked the agency with implementing the statute, and thus intended the agency to bring its knowledge and expertise to bear on the interpretive questions that inevitably arise when carrying out a "technical and complex" statute. *Id.* at 843-44, 864-65. Further, because resolving such questions often entails at least some consideration of policy, deference helps restrain judges from substituting their policy judgments for those of the more accountable political branches. *Id.* at 865-66. In this way, deference also promotes legal uniformity by preventing courts from reaching disparate conclusions based on their own preferred constructions of a statute.

These judicial review principles articulated in *Chevron* were not new. Citing dozens of cases dating back decades, the Court noted that the principle of deferring to an agency's reasonable construction of a statute it administers was "long recognized" and "well-settled." *Id.* at 844-45 & nn.11-14 (citations omitted).

Another NRDC case, decided almost a decade before *Chevron*, proves the point. *Train v. NRDC*, 421 U.S. 60 (1975). In that case, five circuits had adopted three different positions on whether a specific Clean Air Act provision allowed EPA and states to reduce regulatory burdens on polluters. *Id.* at 72-73. This Court held that EPA's interpretation of the provision was "sufficiently reasonable" that it should have been accepted by the lower courts. *Id.* at 75. Citing even earlier cases that applied the same principles, the

Court faulted the lower courts for substituting their judgment for the agency's, instead. *Id.* at 87.

These cases provide some insight into what could result if the judicial review framework articulated in *Chevron* were now abandoned. If lower court judges were instructed to determine what they believe to be the best interpretation of a statute, it might invite those judges to resume resolving interpretive disputes based on their personal policy preferences. Judicial outcomes would tend to become less uniform and less predictable, even within a single circuit, as the trio of cases that led to *Chevron* shows.

We are somewhat reluctant to make these points, given that groups like ours may win more cases if *Chevron* were overruled. As the above cases illustrate, reviewing courts frequently defer to agency interpretations that reduce regulatory burdens and weaken environmental and public health protections. *See also NRDC v. EPA*, 749 F.3d 1055, 1060 (D.C. Cir. 2014) (Kavanaugh, J.). NRDC has accordingly lost many cases under *Chevron*, based on agency deference.

We nonetheless recognize the broader values that *Chevron*'s judicial review framework serves, and what could be lost without it. Whatever one thinks of *Chevron*, and the above-mentioned cases that preceded it, its framework has provided a background rule on which courts, Congress, agencies, and litigants like us have relied for decades. Resp. Br. 27-35. We urge the Court to exercise caution before abandoning it.

ARGUMENT

The basic facts and holding of the *Chevron* decision are well known. But courts and scholars are generally less familiar with the particular history of the case that prompted the Court's emphasis on deference in its

opinion. That history may provide a window into what overruling or abandoning *Chevron* could portend.

I. The History of the *Chevron* Case Reveals Why the Court Emphasized Deference

A. President Reagan's EPA Administrator Adopts a Regulation that Relieves Regulatory Burdens on Industry

President Reagan's election in 1980 effected a "major shift in executive branch policy toward environmental and safety regulation." Merrill, *The Story of Chevron*, 66 Admin. L. Rev. at 264. The incoming administration prioritized regulatory reform and deregulation. *See* Merrick Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 508 (1985); Thomas McGarity, *Regulatory Reform in the Reagan Era*, 45 Md. L. Rev. 253, 261 (1986). Soon after taking office, the administration initiated a "Government-wide reexamination of regulatory burdens and complexities." *Chevron*, 467 U.S. at 857 (quoting 46 Fed. Reg. 16,280, 16,281 (1981)).

One early result of this reexamination was a 1981 Clean Air Act regulation issued by President Reagan's first EPA Administrator, Anne Gorsuch, that relieved pollution control requirements on new industrial facilities. 46 Fed. Reg. 50,766 (1981). The 1977 Clean Air Act Amendments required large new stationary sources located in the nation's most polluted areas to meet several pollution-reducing requirements, including using the most stringent emission controls and offsetting their remaining emissions. Pub. L. No. 95-95, § 129(b), 91 Stat. 685, 745-51 (1977). In 1980, EPA had issued a regulation that applied these requirements whenever a large new industrial unit (such as a boiler or blast furnace) was built. 45 Fed. Reg. 52,676 (1980). The 1981 regulation reversed course, however,

and allowed states to avoid these requirements by redefining "source" as an entire industrial plant. 46 Fed. Reg. at 50,767. That meant a plant could install new units without using the most stringent emission controls, so long as the plant did not increase its overall emissions. Because this definition treated a plant's various components as if they were encased within a bubble, it was often described as implementing a "bubble concept." *Chevron*, 467 U.S. at 840-42.

EPA asserted that neither the statute nor its legislative history resolved whether the bubble concept was a proper understanding of the term "source," and that the question therefore "involve[d] a judgment as to how to best carry out the Act." 46 Fed. Reg. at 16,281. The agency adopted the plant-wide definition expressly to "reduce the regulatory burden" and "shrink the coverage" of the statutory review program and related provisions. 46 Fed. Reg. at 50,766. The effect of the plant-wide definition was to exempt most large new industrial projects from the 1977 law's pollution-reducing requirements.

B. NRDC Successfully Challenges the Rule Under D.C. Circuit Caselaw that Reached Disparate Conclusions on the Question

NRDC challenged the regulation in the D.C. Circuit. Industry groups—including Chevron, American Petroleum Institute, and Chemical Manufacturers Association—intervened to defend EPA's rule. *Chevron*, 467 U.S. at 841 n.4. The court, in an opinion by then-Judge Ruth Bader Ginsburg, ruled in NRDC's favor and vacated the regulation. *NRDC v. Gorsuch*, 685 F.2d at 720.

A lesser-known part of the *Chevron* story is that the D.C. Circuit's review of the 1981 regulation was "controlled" by two earlier cases in which the court had

considered the bubble concept. *Id.* at 725-26. Those two cases reached opposite conclusions about the permissibility of the bubble concept in different Clean Air Act programs, based largely on the panels' differing judgments about appropriate policy. *See* Merrill, *The Story of Chevron*, 66 Admin. L. Rev. at 261-66.

First, in *ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), a panel of the court rejected EPA's adoption of the bubble concept in a regulation implementing "new source performance standards" under Section 111 of the Act. In an opinion by Judge Skelly Wright, the court held that EPA's plant-wide definition of "source" was inconsistent both with statutory language and Section 111's purpose to improve air quality, not merely to maintain the status quo. *Id.* at 326-29. Judge George MacKinnon dissented, arguing that the majority construed the statute too narrowly and "inadequately appreciated" the discretion Congress afforded EPA to balance competing policy interests in administering the Act. *Id.* at 331-35 (MacKinnon, J., dissenting in part). After *ASARCO*, EPA dropped the bubble concept from the Section 111 program.

Second, in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), a different panel considered EPA's implementation of a new "prevention of significant deterioration" program created by the Clean Air Act Amendments of 1977. That program, which applied only in regions where air quality was better than national health-based standards, was designed to limit how much the construction of new sources could degrade those regions' air quality. *Id.* at 349-50. EPA again adopted a plant-wide definition of "source" to implement the bubble concept in this program. 43 Fed. Reg. 26,380, 26,403 (1978).

In a portion of the *Alabama Power* opinion authored by Judge Malcolm Wilkey, the court concluded

that the bubble concept was *required* in the context of the new prevention of significant deterioration program. 636 F.2d at 401-03. This panel justified its conclusion primarily on policy grounds: it noted that prohibiting the bubble concept would impose "extremely burdensome" regulation on industry, and that the new program was designed merely to prevent deterioration of air quality, not to enhance it. *Id.* at 401.

When EPA later adopted the regulation at issue in *Chevron*, it did so in the shadow of these two earlier cases. As noted above, EPA promulgated a regulation in 1980 that excluded the bubble concept from the Act's "nonattainment" program, which was designed to enhance air quality in regions that do not meet the federal health-based standards. The agency reversed course under the Reagan administration, however, and adopted a new regulation in 1981 that embraced the plant-wide bubble concept for this program.

The D.C. Circuit's consideration of the 1981 regulation turned largely on its attempt to reconcile the earlier decisions in *ASARCO* and *Alabama Power*. Judge Ginsburg derived from those cases a "bright line test" as the "law of this Circuit": she read them to hold that the bubble concept was "mandatory" for Clean Air Act programs designed to maintain air quality, but "inappropriate" for programs designed to improve air quality. *NRDC v. Gorsuch*, 685 F.2d at 720, 726. Because EPA's 1981 regulation extended the bubble concept to a program designed to improve air quality in "nonattainment" regions, the court held that, under the "*Alabama Power-ASARCO* test," it "must conclude that the bubble concept may not be employed in that scheme." *Id.* at 726.

Chevron filed a cert petition, followed by a petition from EPA. Merrill, *The Story of Chevron*, 66 Admin. L. Rev. at 267. This Court granted review.

C. This Court Reverses and Chastises the D.C. Circuit for Construing the Statute Based on Judges' Policy Preferences

After this Court held oral argument in *Chevron*, the vote at conference was closely divided: four justices voted to reverse and three to affirm. Merrill, *The Story of Chevron*, 66 Admin. L. Rev. at 270. According to Justice Blackmun's papers, each of the justices voting to reverse was tentative or doubtful about the disposition. *Id.*; *see also* Robert Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 Env't L. Rep. 10,637, 10,644 (2005).

Ultimately, however, the Court unanimously reversed the D.C. Circuit and held—in an opinion by Justice Stevens—that EPA's plant-wide definition of the term "source" was a "permissible construction of the statute." *Chevron*, 467 U.S. at 866. NRDC disagreed (and still disagrees) with that bottom-line conclusion: we believed the Act's language precluded EPA's bubble interpretation. *Id.* at 859. But more important for present purposes is what the Court emphasized in its opinion about the "principle of deference to administrative interpretations." *Id.* at 844.

The *Chevron* opinion explained that a court, when reviewing an agency's construction of a statute it administers, should first employ traditional tools of statutory construction to determine whether Congress expressed a clear intent on the matter. *Id.* at 842-43 & n.9. If so, "that intention is the law and must be given effect." *Id.* at 843 n.9. The reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 843.

If the traditional tools of statutory interpretation do not resolve the question, however, a reviewing court should not "simply impose its own construction on the

statute." *Id.* Instead, the court should determine whether the agency's proffered interpretation is a "permissible construction of the statute." *Id.* Citing dozens of cases dating back decades, the Court noted that this principle of deference to an agency's reasonable interpretation was "long recognized," "well-settled," and "consistently followed." *Id.* at 844-45 & nn.11-14 (citations omitted).

Beyond merely applying those existing principles to the case at hand, *id.* at 859-65, the Court also explained *why* a reviewing court should not substitute its preferred construction for a reasonable interpretation adopted by the agency, *id.* at 844-45, 865-66. That discussion was plainly a response to the trio of D.C. Circuit decisions that led to *Chevron*. According to one prominent observer, the *ASARCO* and *Alabama Power* decisions "reflected transparent attempts to reach ends consistent with the author[ing judge]'s views of appropriate policy," and showed that at least some D.C. Circuit judges were "prone to substitute their own preferences for those of EPA." Merrill, *The Story of Chevron*, 66 Admin. L. Rev. at 266. Other D.C. Circuit judges interpreted the *Chevron* opinion as "chastising" the court for its approach to reviewing agency interpretations. Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. 283, 287 (1986).[2]

That history reveals why the Court stressed that the D.C. Circuit had "misconceived the nature of its role in reviewing the regulations at issue." *Chevron*,

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[2] Then-Judge Starr and others have noted that *Chevron* followed by just a few years another NRDC case in which this Court harshly criticized the D.C. Circuit's approach to judicial review of agency decision-making procedures. Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. at 306-07 (discussing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978)).

467 U.S. at 845. Once the D.C. Circuit determined that the Act itself did provide a clear answer on the bubble concept, the proper inquiry for that court was "not whether in *its view* the concept is 'inappropriate'" in the context of a particular regulatory program, but rather "whether the *Administrator's view* that it is appropriate" is a reasonable one. *Id.* (emphasis added). The Court admonished in *Chevron* that a reviewing court should not reconcile competing interests or resolve a question such as this "on the basis of the judges' personal policy preferences." *Id.* at 865.

NRDC, notably, did "not defend the legal reasoning of the Court of Appeals" in *Chevron*. *Id.* at 842 & n.7. In fact, we "expressly reject[ed]" the D.C. Circuit's policy-based rationale and argued instead that the "text of the Act" precluded the bubble concept in all its programs. *Id.* at 859-60. Although we lost that argument, we respect the principles of judicial review on which the Court ruled against us. Those principles serve important values, as the Court explained and we discuss in the next Part. And the D.C. Circuit cases that led to *Chevron* provide a cautionary tale of what might result from overruling it.

II. The Judicial Review Principles in *Chevron* Serve Important Values

The judicial review principles articulated in *Chevron* were not new; they stem from decades of prior decisions. Those principles have a solid foundation and serve important values. They command that a reviewing court must exhaust all traditional tools of statutory constructions before any deference to an agency is warranted. They also recognize that judges should not resolve remaining interpretive disputes based on their own personal policy preferences. Such restraint helps preserve political accountability for the policy decisions that arise when implementing a technical and

complex statute; it also helps promote the uniformity and predictability of judicial decisions. The Court should hesitate before abandoning these principles.

A. Courts Have Long Deferred to Agencies' Reasonable Interpretations

As the government's brief explains, the judicial review principles articulated in *Chevron* followed a "long tradition" in which this Court has deferred to an agency's reasonable interpretation of a statute it administers. Resp. Br. 22-26; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 512-13 (1989). While that tradition dates back decades, an NRDC case from the 1970s is illustrative.

In *Train v. NRDC*, five circuits had adopted three different positions about whether a Clean Air Act provision allowed EPA and states to approve state clean air plans on terms that relaxed certain regulatory obligations for industrial polluters. 421 U.S. at 72-73. Several of the circuits had adopted a "Solomonesque" interpretation—"not tied to any specific provision of the Clean Air Act"—that was "quite candidly a judicial creation." *Id.* at 73. This Court noted that the disparity among the circuits demonstrated that the statutory question did not have an easy answer. *Id.* at 75.

The Court, in an opinion by then-Justice Rehnquist, held that EPA's reading of the Act was "sufficiently reasonable" that it "should have been accepted by the reviewing courts." *Id.* The Court did not conclude that EPA's construction of the Act was the only one it could have adopted, *id.*; in fact, the Court noted the difficulty of ever having "complete assurance" that a particular interpretation of a "complex statute" like the Clean Air Act is the "correct" one, *id.* at 87. But—citing earlier cases that discussed the

"great deference" due to an administering agency's interpretation, *Udall v. Tallman*, 380 U.S. 1, 16 (1965)—the Court ultimately expressed "no doubt" that EPA's reading was "sufficiently reasonable" to preclude the courts of appeals from "substituting [their] judgment" for the agency's. *Train*, 421 U.S. at 87.

The Court in *Chevron* relied on *Train*, among dozens of other cases, when it described the "well-settled" principle that a reviewing court should not "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U.S. at 843-45 & nn.11-14.

B. *Chevron* Commands That Courts Give Effect to Congress's Expressed Intent

Critics of the *Chevron* framework contend that deferring to an agency's reasonable interpretation of a statute it administers is inconsistent with the judiciary's duty to decide legal questions. But that overlooks *Chevron*'s own emphasis on the judiciary's role as the "final authority" on issues of statutory construction. 467 U.S. at 843 n.9.

"First, *always*," the Court made clear in *Chevron*, a court must determine whether Congress has spoken to the question at issue. *Id.* at 842 (emphasis added). If so, "that is the end of the matter." *Id.* Both the reviewing court and the administering agency "must give effect" to the "expressed intent of Congress." *Id.* at 842-43. The Court reiterated that reviewing courts "must reject" agency interpretations that are "contrary to clear congressional intent." *Id.* at 843 n.9.

The *Chevron* Court also instructed that reviewing courts should determine congressional intent by employing all the "traditional tools of statutory construction." *Id.* Only once those tools are exhausted could a court conclude that any deference to an agency is

warranted. And even then, those tools still set the "bounds of reasonable interpretation" by which the court then judges the agency's construction. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013); *see also id.* at 317 (Roberts, C.J., dissenting) ("We do not ignore" the command to decide all "questions of law," 5 U.S.C. § 706, "when we afford an agency's statutory interpretation *Chevron* deference; we respect it.").

Properly applied, then, *Chevron* does not abdicate the judiciary's role in interpreting statutes or make judicial review a "dead letter." Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. at 298. On the contrary, it "vindicates" the "traditional function of judicial review" and "confirms the judiciary's historic role of declaring what the law is." *Id.* at 309. Courts can, and do, retain this fundamental role under *Chevron*. NRDC, for example, has won cases by demonstrating that an agency's interpretation contravened a statute at *Chevron*'s first step.[3] And we have also won cases at the second step by demonstrating that an agency's construction lay outside the bounds of reasonable interpretation.[4]

That said, we agree that a reviewing court's inquiry using the traditional interpretive tools must be robust, and that some judges are too quick to deem a statute ambiguous. A court should not grant "reflexive deference" or engage in only a "cursory analysis" of the statute. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). We would therefore

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[3] *See, e.g.*, *NRDC v. EPA*, 755 F.3d 1010, 1018 (D.C. Cir. 2014); *NRDC v. EPA*, 643 F.3d 311, 322-23 (D.C. Cir. 2011); *NRDC v. EPA*, 489 F.3d 1250, 1257 (D.C. Cir. 2007).

[4] *See, e.g.*, *NRDC v. EPA*, 777 F.3d 456, 465-69 (D.C. Cir. 2014); *NRDC v. Daley*, 209 F.3d 747, 753-54 (D.C. Cir. 2000); *NRDC v. Herrington*, 768 F.2d 1355, 1372-73 (D.C. Cir. 1985).

support this Court clarifying, as it did recently in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-15 (2019), that a reviewing court must rigorously apply and exhaust the traditional tools of construction before determining that an agency interpretation deserves any deference.

C. Deference Helps Restrain Judges from Resolving Interpretive Disputes Based on Their Personal Policy Preferences

No matter how robust a court's inquiry at *Chevron*'s first step, some questions will inevitably remain to which Congress has not provided a clear answer. That is especially so when Congress tasks agencies with implementing regulatory programs in a "technical and complex arena." *Chevron*, 467 U.S. at 863.

The question then becomes which institution—the administering agency, or the reviewing court—should provide an answer in the first instance. *Chevron* recognizes (with commendable judicial humility) that agencies have several "comparative institutional advantage[s]" over courts in interpreting the statutes they are charged with administering. Laurence Silberman, *Chevron—the Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 823 (1990).

First, Congress tasked the agencies—not courts—with administering the statutes; and it did so knowing that agencies possessed or would develop special expertise in implementing the statute. "Judges," by contrast, "are not experts in the field." *Chevron*, 467 U.S. at 865. It is therefore reasonable to presume that Congress intended the agency to bring that expertise to bear on the questions that inevitably arise when implementing a "technical and complex" statute. *Id.* at 865; *see also Chem. Mfrs. Ass'n*, 470 U.S. at 124 (deferring to EPA's understanding of the "very 'complex statute'" it is "charged with administering"). "An agency

obviously enjoys a more thorough understanding than the generalist judiciary of how a statute's various provisions interrelate and how different interpretations of a particular provision affect relevant parties." Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. at 309. Congress reasonably recognized that "those with great expertise and … responsibility for administering" a statute would be in a "better position" to "strike the [right] balance" when implementing it. *Chevron*, 467 U.S. at 865.[5]

Second, because the interpretive questions that arise when implementing a statute often entail at least some consideration of policy, deference helps restrain judges from resolving such disputes based on their personal policy preferences. *Id.* at 865-66; *Pauley v. Beth-Energy Mines, Inc.*, 501 U.S. 680, 696 (1991); *see also* Barnett & Walker Amicus Br. 29-31 (discussing empirical evidence supporting this point). As recounted above (at 10-11), it was this concern that prompted the Court to emphasize deference in its *Chevron* opinion.

The Court in *Chevron* explained that federal judges "are not part of either political branch of the Government," and thus must not decide cases "on the basis of the judges' personal policy preferences." 467

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[5] An alternative judicial review scheme that only deferred to agency interpretations that were "contemporaneous" with a statute's enactment, *Baldwin v. United States*, 140 S. Ct. 690, 693 (2020) (Thomas, J., dissenting from denial of certiorari), would ignore the valuable expertise that an agency develops from implementing a statute over the course of decades. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996) (Scalia, J.) ("We accord deference to agencies … not because of a presumption that they drafted the provisions in question … ; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency ….").

U.S. at 865. By contrast, "an agency to which Congress has delegated policy-making responsibilities" may "properly rely upon the incumbent administration's views of wise policy to inform its judgments." *Id.* (Recall that the 1981 regulation at issue in *Chevron* was adopted by EPA to carry out the Reagan administration's focus on deregulation. *See supra* 5-6.)

To be sure, agency officials themselves are not "directly accountable" to the public. *Chevron*, 467 U.S. at 865. But those officials generally serve at the pleasure of the President—the most "politically accountable official in Government," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020)—and it is "entirely appropriate" for the Executive Branch to make policy choices when addressing interpretive questions that arise in implementing a complex statute. *Chevron*, 467 U.S. at 865. Deference principles properly recognize that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Id.* at 866.

By restraining judges from imposing their policy preferences on an agency, deference also promotes legal uniformity by preventing courts from reaching disparate conclusions based on their own preferred constructions of a statute. Silberman, *Chevron—the Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. at 824; *see also* Barnett & Walker Amicus Br. 27-29 (discussing empirical evidence supporting this point). The *Train* case, discussed above, again is illustrative. There, five circuits had adopted three different constructions of a Clean Air Act provision; at least one of those constructions was "quite candidly a judicial creation." 421 U.S. at 72-74. This Court highlighted the "disparity among the Courts of Appeals" as one of the reasons why the courts should have deferred to EPA's reasonable interpretation, instead. *Id.* at 75. Indeed,

the D.C. Circuit cases that led to *Chevron* show that even different panels within a single circuit can reach disparate constructions of a statute, *see supra* 7-8—an undesirable outcome that deference to reasonable agency interpretations can help avoid.

These cases provide some insight into what could result if the deference principles articulated in *Chevron* were now abandoned. If the Court were to instruct that federal judges should determine de novo what they believe to be the "best" reading of a statute, Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2121 (2016), that instruction could invite judges to resolve interpretive disputes based on their policy preferences. Such a result would disserve our democratic system, where policy choices are "not the natural province of courts." Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. at 312. Judicial outcomes also might become less uniform and less predictable. *Cf. Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 546 (1978) (if a court reviews agency decisions based on "what the court perceives to be the 'best' or 'correct' result, judicial review would be totally unpredictable"); Merrill Amicus Br. 28-29.

We say this even though NRDC could well win more cases if *Chevron* is overruled. After all, NRDC challenges more agency actions than we defend, and agency interpretations generally fare better under *Chevron* than they do without it. Barnett & Walker Amicus Br. 28. Such interpretations include, of course, not only those that might strengthen regulatory obligations, *see EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 512-13 (2014), but also—as *Chevron*, *Chemical Manufacturers*, and *Train* all make clear—those that reduce regulatory burdens and weaken protections for public health and the

environment, *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217-18 (2009).[6]

Putting that aside, we recognize and respect the broader values served by the judicial review principles articulated in *Chevron*. And we do not wish for an alternative where federal judges feel free to substitute their policy judgment for an agency's. Whatever one thinks of *Chevron*, its principles have provided a "background rule," *City of Arlington*, 569 U.S. at 296, on which courts, Congress, agencies, and litigants like us have relied for decades. *See* Resp. Br. 27-35; Barnett & Walker Amicus Br. 8-17. We urge the Court to exercise caution before abandoning them.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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[6] *See also, e.g.*, *NRDC v. EPA*, 896 F.3d 459, 465-66 (D.C. Cir. 2018); *NRDC v. EPA*, 529 F.3d 1077, 1083 (D.C. Cir. 2008); *NRDC v. EPA*, 937 F.2d 641, 645 (D.C. Cir. 1991).