

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

RELENTLESS, INC., ET AL.,)
) Petitioners,)
))
) v.) No. 22-1219
DEPARTMENT OF COMMERCE, ET AL.,)
) Respondents.)

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v.) No. 22-1219

DEPARTMENT OF COMMERCE, ET AL.,)

Respondents.)

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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
14 statutes."

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

23 In this case, the agency
24 misinterpreted the MSA to force struggling
25 fishermen to pay up to 20 percent of their

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

9 I welcome the Court's questions.

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

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

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

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

1 is what Chevron deference is, then I think
2 you've -- you've crossed the line because what
3 you've really done is --

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

8 MR. MARTINEZ: Sure.

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

13 MR. MARTINEZ: Right.

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

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

1 often the agency has helped draft the statute,
2 the agency has knowledge of the policy context
3 surrounding the statute and its implementation.

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

13 CHIEF JUSTICE ROBERTS: Well --

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

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

17 MR. MARTINEZ: -- interpretation.

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

22 MR. MARTINEZ: Right.

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

1 MR. MARTINEZ: I think that --

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

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

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

1 statute requires the agency to consider costs.

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

9 MR. MARTINEZ: Right.

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

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

24 CHIEF JUSTICE ROBERTS: Well, I mean
25 --

1 MR. MARTINEZ: -- provisions as
2 statutes.

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

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

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

25 JUSTICE KAGAN: Well, let me give you

1 a --

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

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

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

8 MR. MARTINEZ: I -- sorry. Can you
9 give that one more time?

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

13 MR. MARTINEZ: Okay.

14 JUSTICE KAGAN: -- or a drug?

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

19 JUSTICE KAGAN: You -- you -- you want
20 the --

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

23 JUSTICE KAGAN: -- you think that the
24 court should determine whether this new product
25 is a dietary supplement or a drug without giving

1 deference to the agency, where it is not clear
2 from the text of the statute or from using any
3 traditional methods of statutory interpretation
4 whether, in fact, the new product is a dietary
5 supplement or a drug?

6 MR. MARTINEZ: I --

7 JUSTICE KAGAN: You want the courts to
8 decide that?

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

15 JUSTICE KAGAN: They do that --

16 MR. MARTINEZ: -- and would --

17 JUSTICE KAGAN: -- under Chevron.

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

23 If it thinks it means X, under
24 Chevron, as we've understood it --

25 MR. MARTINEZ: But --

1 JUSTICE KAGAN: -- and made clear and
2 reined it in a little bit over these last few
3 years, it's supposed to say X.

4 But sometimes law runs out. Sometimes
5 there's a gap. Sometimes there's a genuine
6 ambiguity. And I -- I don't know. In that
7 case, I would rather have people at HHS telling
8 me whether this new product was a dietary
9 supplement or a drug.

10 MR. MARTINEZ: So, Your Honor, I think
11 a couple things.

12 First of all, I don't think Chevron is
13 a doctrine that only applies to tie-breaker
14 50/50 scenarios. It's never been understood
15 that way. You know, Justice Scalia in his
16 famous article in 1989 --

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

22 MR. MARTINEZ: But --

23 JUSTICE KAGAN: -- because of the
24 limits of language, because of the limits of our
25 ability to predict the future.

1 And so who fills that gap?

2 MR. MARTINEZ: But I -- I guess what I
3 would sort of push back on is I don't think
4 there's a gap if the court looks at the statute
5 and thinks, hey, this is a really hard case,
6 it's a really close statute. Fifty-two percent
7 likely, I think -- you know, I have 52 percent
8 confidence that X is right --

9 JUSTICE KAGAN: I'll give you --

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

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

14 MR. MARTINEZ: Right.

15 JUSTICE KAGAN: These are -- these are
16 prototypical Chevron cases.

17 MR. MARTINEZ: But --

18 JUSTICE KAGAN: Does the term "power
19 production capacity" refer to AC power that is
20 sent out to the electric grid or DC power that's
21 produced by a solar panel?

22 MR. MARTINEZ: I think I -- same
23 answer as the first hypothetical. But let me
24 try to -- let me try to sort of give you a
25 different framework for thinking about this

1 problem.

2 Let's imagine that that statute came
3 to a court before an agency had even acted in
4 the first place. What would a court do? Would
5 a court look at the statute -- a statutory term
6 like that that's a hard -- presents a hard
7 interpretive question and say: Well, this is
8 hard, it's sort of 52/48, it's kind of close. I
9 think the law has run out and I'm just not going
10 to be able to decide this. I think the court
11 would go with the best interpretation.

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

20 MR. MARTINEZ: But --

21 JUSTICE KAGAN: -- to -- you know, to
22 people who understand the way particular
23 questions fit within a broader statutory and
24 regulatory scheme, to people who have
25 understanding of the policies and of the facts

1 that led to this.

2 I'll give you a third example.

3 MR. MARTINEZ: Can -- can I respond?

4 JUSTICE KAGAN: And this will be my
5 last one, Mr. Martinez, and it's going to be my
6 fairest one because it's going to be one you
7 know about, which is Chevron. Is a stationary
8 source in the Clean Air Act -- does it refer to
9 whole plants or to each pollution-emitting
10 device within the plant?

11 MR. MARTINEZ: We think that the
12 decision in Chevron was -- reflected the best
13 interpretation, with much respect to Justice
14 Gorsuch's mother's EPA. We -- we think that
15 that was the best interpretation.

16 But -- but can I just go back and I
17 think what you described earlier about listening
18 to the agency and taking into account all those
19 things, our -- our rule would allow that.
20 That's Skidmore.

21 I think the only difference between
22 our rule and -- and the Skid- -- what -- the
23 Skidmore sort of approach and the Chevron
24 approach is that after listening to the agency's
25 explanation of all the things that you said, if

1 the court isn't persuaded by the agency that the
2 agency's interpretation is correct, Chevron
3 would say you still have to go with the agency.
4 And that's just like a dramatic thing.

5 JUSTICE SOTOMAYOR: But why not?
6 Meaning I -- I think all of the play and
7 disagreement is around the word "ambiguity." I
8 know that there have been some earlier cases
9 that suggested, if there were two plausible
10 meanings, you went with the agency meaning.

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

18 Is the best answer simply a majority
19 answer? I don't think so.

20 MR. MARTINEZ: But -- but, Your Honor,
21 if --

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

24 (Laughter.)

25 JUSTICE SOTOMAYOR: And they often do.

1 (Laughter.)

2 JUSTICE SOTOMAYOR: But putting that
3 aside -- but putting that aside, in those
4 situations, there are two plausible -- not
5 nearly plausible. There are two best answers,
6 and the question is who makes the choice or
7 helps you make the choice.

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

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

25 JUSTICE KAGAN: But that's what nobody

1 believes --

2 MR. MARTINEZ: Well --

3 JUSTICE KAGAN: -- about Chevron, Mr.
4 Martinez. As we've described it is you -- you
5 work hard to figure out a statutory problem.
6 You don't say, oh, it's difficult. Oh, there
7 are two interpretations. Oh, you know, not
8 everybody agrees with this in three seconds
9 flat.

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

21 And, you know, judges should know what
22 they don't know.

23 MR. MARTINEZ: I -- I agree with that,
24 I -- Justice Kagan. But, with -- with all due
25 respect, I -- I think I understood Justice

1 Sotomayor to be saying that whenever judge --
2 Justices of this Court disagree about the best
3 meaning of the statute, because, obviously,
4 everyone on the Court is reasonable, that shows
5 that there's an ambiguity.

6 If that's the test, which I think was
7 the implication of the question, then that can't
8 be wrong. That's much broader than --

9 JUSTICE SOTOMAYOR: That wasn't --

10 MR. MARTINEZ: -- step one.

11 JUSTICE SOTOMAYOR: -- my implication.
12 My implication was that using all the statutory
13 tools, you can still come up, using them in good
14 faith, using them, you can still come up with no
15 answer --

16 MR. MARTINEZ: Well, I think --

17 JUSTICE SOTOMAYOR: -- with no clear
18 answer.

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

21 JUSTICE SOTOMAYOR: Or no best answer.

22 MR. MARTINEZ: -- because some
23 statutes are hard. But I think you can come up
24 with a best answer, and -- and the reason I
25 think that is because --

1 JUSTICE SOTOMAYOR: Best only because
2 a majority agrees?

3 JUSTICE JACKSON: But --

4 MR. MARTINEZ: No, no, because --
5 because, if you had the same statute with the
6 same interpretive question posed to you without
7 the agency having acted, I don't think you would
8 say there's no answer here. I think you would
9 choose the best answer.

10 JUSTICE GORSUCH: I mean, Mr. Martinez
11 --

12 JUSTICE JACKSON: But, Mr. Martinez --

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

21 Another would be to listen carefully
22 to both sides and provide special weight under
23 Skidmore to a coequal branch of government's
24 views about the law, which one would think we
25 would do anyway, and that they would have --

1 have -- be considered great weight in arriving
2 at the best answer and that that's what a court
3 would do if -- if there were no interpretive
4 principles advanced by the executive branch, if
5 there hadn't been some sort of rule or
6 adjudication.

7 Is -- is that -- is -- is that
8 correct?

9 MR. MARTINEZ: I -- I think that's
10 correct. And I think the difference between the
11 Skidmore approach that you just laid out and the
12 Chevron approach is just, at the end of the day,
13 once you've considered all the expertise and all
14 the information the agency has to bear --

15 JUSTICE GORSUCH: Who decides?

16 MR. MARTINEZ: Who decides? Who -- is
17 the judge persuaded or not persuaded?

18 JUSTICE GORSUCH: Is the judge
19 persuaded at the end of the day, with proper
20 deference given to a coequal branch of
21 government, or does the judge abdicate that
22 responsibility and say automatically whatever
23 the agency says wins?

24 MR. MARTINEZ: Right, even -- even if
25 the judge is not persuaded.

1 JUSTICE JACKSON: But, Mr. Martinez --

2 JUSTICE BARRETT: Mr. Martinez --

3 JUSTICE GORSUCH: And then -- and then

4 --

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

6 JUSTICE GORSUCH: -- and then, if I
7 might just -- just finish up, what -- what's the
8 effective difference of that? It seems to me
9 that in the first case, when -- when a judge
10 says here's the law, it's settled, we're done,
11 right? It can be appealed, but at the end of
12 the day, if the Supreme Court of the United
13 States upholds that interpretation, we're
14 finished.

15 Whereas, under the Chevron approach,
16 are we finished?

17 MR. MARTINEZ: No.

18 JUSTICE GORSUCH: What happens?

19 MR. MARTINEZ: I think the agency can
20 overrule what the court said. The agency can
21 overrule what itself said. I think that's a
22 very strange thing, that in every other area of
23 statutory interpretation, we understand the law
24 to have one fixed meaning and the goal is to try
25 to figure out that fixed meaning, but Chevron by

1 design creates this world in which the agency is
2 -- is -- because there's this zone of
3 discretion, the -- the agency -- and ambiguity,
4 the agency can kind of flip-flop and then force
5 courts to flip-flop with them.

6 JUSTICE GORSUCH: And I'm struck on
7 that score by the Brand X case, which involved
8 broadband, in which this Court said, okay,
9 agency, you automatically win with respect to
10 one interpretation of the Bush administration, I
11 believe it was, and then, of course, the next
12 administration came back and proposed an
13 opposite rule.

14 MR. MARTINEZ: Right.

15 JUSTICE GORSUCH: And then the next
16 administration came back and flipped it back
17 closer to the first. And as I understand it,
18 the present Administration is thinking about
19 going back to where --

20 MR. MARTINEZ: That's -- that --
21 that's exactly right.

22 JUSTICE GORSUCH: -- where we started.

23 MR. MARTINEZ: That's exactly right,
24 Justice Gorsuch, and I think it -- it plays up
25 the real problem. Chevron really is a

1 reliance-destroying doctrine. Imagine if you're
2 a person or a regulated entity and you're trying
3 to figure out what the law is. You should be
4 able to rely on the best interpretation of the
5 law and not have to, you know, check the -- the
6 C.F.R. every couple years to see if the law has
7 somehow changed even though Congress hasn't
8 acted.

9 JUSTICE GORSUCH: And that's the delta
10 between Skidmore and Chevron?

11 MR. MARTINEZ: I think -- I think
12 that's right. I mean, Skidmore, I think, would
13 allow for -- for courts to give meaningful
14 weight and consideration to -- to persuasive
15 opinions by agencies. The only thing Skidmore
16 doesn't do is require a court to give up its --
17 its interpretive -- ultimate interpretive say
18 and defer to an interpretation that is not
19 persuasive.

20 JUSTICE JACKSON: Mr. Martinez, what
21 -- what I'm stuck on is what seems to be an
22 assumption in your argument that every question
23 posed with respect to interpreting --
24 interpreting a statute is a legal one.

25 I see Chevron as doing the very

1 important work of helping courts stay away from
2 policymaking, and so I -- I'd like for you to
3 sort of think of it through that lens and help
4 me understand why, if we do away with Chevron's
5 framework, we won't have a problem of courts
6 actually making a policy decision.

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

19 And my concern is that if we take away
20 something like Chevron, the court will then
21 suddenly become a policymaker, by majority rule
22 or not, making policy determinations. So how
23 can we avoid that?

24 MR. MARTINEZ: So we agree, obviously,
25 that -- that courts should not be in the

1 business of policymaking. And I think the whole
2 enterprise of statutory interpretation, when
3 properly understood, is -- is designed to take
4 courts out of policymaking because what -- what
5 the court is trying to do is -- is act as a
6 faithful agent of what Congress has done and
7 find the best --

8 JUSTICE JACKSON: But isn't that --

9 MR. MARTINEZ: -- interpretation.

10 JUSTICE JACKSON: -- isn't that what
11 Chevron does? I mean, isn't Chevron, step one,
12 even in this very case, asking the question,
13 one, has Congress made that policy
14 determination? So, for example, here, the
15 question is whether or not monitors on the boats
16 have to be paid for by the owner of the boat.

17 I see that as a policy question.
18 Congress could have said yes or no. There's
19 nothing about law really inherently in the
20 question of should the monitors on the boats be
21 paid for by the owners or the government. So
22 step one is has Congress in the statute answered
23 that question.

24 When we say no, everybody agrees
25 that's not in the statute, then we say the

1 agency can make that determination so long as
2 they do so in a reasonable way. And the -- and
3 the courts sort of police the boundaries of
4 reasonableness. But whether or not the monitors
5 are paid for is not really a legal question.

6 MR. MARTINEZ: I -- I think the
7 question of whether or not the law allows the
8 agency to -- to force the monitors to be paid
9 for by private industry is absolutely a legal
10 question. I -- I agree with you that when
11 Congress --

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

16 MR. MARTINEZ: No, I -- I don't think
17 so. I think the difference is, when the -- when
18 the -- when the policymaker, whether it's
19 Congress or the agency, is sitting there and
20 trying to figure out, like, what the best policy
21 is, would the world be a better place if
22 industry has to pay for these monitors or not,
23 that's absolutely a policy question.

24 JUSTICE JACKSON: Okay. So that's the
25 question --

1 MR. MARTINEZ: But -- but --

2 JUSTICE JACKSON: -- right?

3 MR. MARTINEZ: No, because, when it
4 comes to a court, the court is not figuring out
5 what the best thing for the world is. The court
6 is figuring out, well, what did Congress
7 actually want here. It's --

8 JUSTICE JACKSON: But I guess I'm
9 afraid that the court really is figuring out
10 what the best thing in the world is if we --

11 MR. MARTINEZ: But -- but --

12 JUSTICE JACKSON: -- look at it
13 through your lens, right, because, if the answer
14 to the question is, you know, should -- should
15 they pay for it or not, the agency has a view,
16 and unless we're deferring to that view, I don't
17 see why we aren't overriding the -- the agency's
18 policy prerogative.

19 MR. MARTINEZ: But the -- the -- the
20 question that the court should be answering is
21 not should agency -- should industry pay for the
22 monitors. The question that the court should be
23 answering is, did Congress require or allow
24 agent -- industry to be forced to pay for the
25 monitors? And that's a very different question.

1 That's the difference between law and
2 policymaking.

3 And I think the whole assumption and
4 the whole understanding of statutory
5 interpretation under this Court's cases is
6 there's a difference between law and
7 policymaking. Judges are there not to exercise
8 force or will. They're there to exercise
9 judgment. They're -- they're serving as neutral
10 umpires. They're not players on the field.

11 JUSTICE JACKSON: All right. So how
12 does that --

13 JUSTICE BARRETT: Mr. Martinez --

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

17 MR. MARTINEZ: The question you're
18 supposed to be answering is, did -- does this
19 statute require -- has Congress required --
20 either required the -- the monitors to be paid
21 for by industry, or has it given the agency the
22 authority to make that decision? And I don't
23 think -- I think that is a legal -- both of
24 those versions of that question are legal
25 questions, and the answer is no.

1 JUSTICE BARRETT: Mr. Martinez, can I
2 ask you a question about this line between law
3 and policy? And I want to ask you in the
4 context of one of Justice Kagan's examples, the
5 dietary supplement or drug.

6 Where is the line between something
7 that would be then subject to arbitrary and
8 capricious review and something that's a
9 question of law? Because I'm just wondering
10 whether we could say that the definition of
11 dietary supplement or drug might be something
12 that's a question of statutory interpretation in
13 the context of the statute, but which category
14 any one thing fell in might be a question of
15 policy for the agency.

16 MR. MARTINEZ: Right. I --

17 JUSTICE BARRETT: Is that possible?

18 MR. MARTINEZ: -- I -- I think that's
19 right. I think that would be more of a -- of a,
20 you know, application of law to fact or a
21 factual question. But I think the core question
22 of, like, you know, what is the meaning of
23 dietary supplement, and I forget what the other
24 alternative was, those are legal questions.

25 JUSTICE BARRETT: But whether the

1 particular cholesterol-reducing drug fell --

2 MR. MARTINEZ: Right.

3 JUSTICE BARRETT: -- in one category
4 or the other, I mean, you know --

5 MR. MARTINEZ: That -- that would be a
6 --

7 JUSTICE BARRETT: -- presumably, that
8 depends on how does this function? What is the
9 mechanism by which it decreases cholesterol?

10 MR. MARTINEZ: I -- I think that's
11 right. But I think it's -- I do think it is
12 important to make -- retain the sort of legal
13 component of that question and -- and make sure
14 that the courts have authority over that legal
15 component.

16 JUSTICE BARRETT: I want to ask you
17 something about your Article III argument too.
18 You know, Justice Thomas asked you what the line
19 is. And, you know, courts all of the time make
20 judgments about whether things are reasonable.
21 But I -- I don't understand you to be
22 disagreeing that things like whether
23 something -- that an agency could be tasked with
24 deciding what was the most feasible, most
25 useful, most reasonable.

1 Well, courts could do that too. So is
2 that a delegation of judicial power that would
3 offend Article III in your view, to give those
4 kinds of --

5 MR. MARTINEZ: No, I think --

6 JUSTICE BARRETT: -- decisions to an
7 agency?

8 MR. MARTINEZ: -- I think the way to
9 think about those kinds of -- of statutory
10 provisions would be that the best interpretation
11 of the statute, given the nature of the word
12 "reasonable" in context, is to confer a range of
13 discretion on the agency.

14 And so I think a court in that case --
15 if -- if the agency is operating within the
16 range of discretion, that's arbitrary and
17 capricious review. If the agency is sort of
18 operating at the edges, you have to figure out
19 where the guardrails are. That's the legal
20 question.

21 So, if the -- if the statute says, you
22 know, the agency can pick red, blue, or green,
23 then the choice among those three options is for
24 the agency. But, if you have a legal question
25 like, oh, does pink count as red, that's a legal

1 question.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr.
3 Martinez.

4 How much of an actual question on the
5 ground is this? I saw some study that said we
6 haven't relied on Chevron for 14 years. And
7 Judge Kethledge has written -- he's been a judge
8 for 10 years. He's never invoked Chevron step
9 two.

10 You know, judges are used to deciding
11 things, and when they get around to doing it,
12 they tend to think what they've come up with is
13 not only the best answer, but it's the only
14 answer.

15 (Laughter.)

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

18 MR. MARTINEZ: I think it comes up a
19 lot, Your Honor. And this Court hasn't relied
20 on Chevron since 2016, but the lower courts
21 still have to apply it. And I think these two
22 cases, the -- the two that you're going to hear
23 this morning, sort of show what happens when --
24 when courts are applying this doctrine because
25 they're -- they're essentially getting to a

1 point where they don't really have to figure out
2 the best answer and they can just -- you know,
3 instead of asking what -- what does the statute
4 mean, they can ask a different threshold
5 question, which is, is this statute ambiguous
6 enough that -- that we should just, you know,
7 let the agency do the work for us.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas?

11 Justice Alito?

12 JUSTICE ALITO: Mr. Martinez, would
13 you agree that one of the reasons why Chevron
14 was originally so popular was concern that
15 judges were allowing their policy views,
16 consciously or unconsciously, to -- to -- to
17 influence their interpretation of the statutes
18 in question?

19 MR. MARTINEZ: Yes.

20 JUSTICE ALITO: Why was that fear
21 unfounded? Why do you think now that the fear
22 was unfounded?

23 MR. MARTINEZ: Well, I think three
24 things. First of all, I think the fear has --
25 it's reasonable to think the fear has diminished

1 over time, regardless of what it was then, in
2 large part due to the very salutary developments
3 in the way that this Court and the lower courts
4 generally now think about statutory
5 construction.

6 In the old days, there was a lot of
7 reliance on legislative history and on sort of
8 more free-form analysis that I think made it
9 easier for policy considerations to infect the
10 judicial decision-making process. But this
11 Court has now made clear that, you know, really,
12 we should be text-focused, we should be focused
13 on faithful agency to Congress. So I think that
14 is one difference.

15 I think another difference is courts
16 now have become more appreciative of the fact
17 that we're not just talking about, you know,
18 judicial -- rules of, like, judicially made
19 common law about how to interpret statutes. We
20 have the APA here.

21 Justice Scalia was a big defender of
22 Chevron in its original incarnation but, over
23 time, came to realize that the APA had text that
24 actually bore on this question.

25 And I think, when you're enforcing

1 that text, you come to the same place as our
2 Article III argument, which is that courts have
3 to exercise independent judgment.

4 JUSTICE ALITO: Do you think that the
5 canons of interpretation that we have now and
6 all of the other tools that we have in our
7 statutory interpretation toolkit are like the
8 Enigma machine and so we have these statutes and
9 they're sort of written in code and we run them
10 through the Enigma machine and, abracadabra, we
11 have the best interpretation? Do you really
12 think that's how it works?

13 MR. MARTINEZ: I -- I think that what
14 this Court does with respect to the normal
15 canons of construction is it's used the -- it's
16 -- it's generated those canons as rough rules of
17 thumb to help guide the interpretive process
18 because, if the Court believes that the canons
19 best approximate the best original meaning of
20 the statute, especially -- and then there's some
21 canons that -- that sort of are not purely
22 textual canons but that sort of are informed by
23 constitutional -- foundational constitutional
24 values.

25 I think Chevron's very different from

1 that because, with Chevron, you're doing
2 something -- you're not trying to find the best
3 interpretation anymore. You're, in fact,
4 agreeing that you have to impose the not-best
5 interpretation because you have to defer.

6 And so, unlike all the other canons,
7 Chevron is the only one that says to courts, you
8 can stop doing your normal interpretive function
9 and we're going to allocate that interpretive
10 function outside of Article III.

11 JUSTICE ALITO: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor?

14 JUSTICE SOTOMAYOR: I counted over, I
15 think -- not I -- the Solicitor General or
16 someone has given us a list of 77 cases in which
17 the Court has used the Chevron approach and
18 interpreted what the law was.

19 Your overruling Chevron puts a
20 question to all those 77 cases.

21 MR. MARTINEZ: No, Your Honor, I
22 think --

23 JUSTICE SOTOMAYOR: No, your out is
24 it's stare decisis now?

25 MR. MARTINEZ: Right. So --

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

4 MR. MARTINEZ: So I think, with
5 respect to the effects of -- of applying normal
6 rules of construction here instead of Chevron,
7 I'd say two things.

8 First of all, the 70 holdings or
9 whatever, the bottom-line holdings in those
10 cases would get stare decisis, so they would not
11 be undermined. So there's no convulsive change
12 of the law with respect to that.

13 JUSTICE SOTOMAYOR: I don't understand
14 how that happens. Once you have a new approach,
15 I'm not sure.

16 MR. MARTINEZ: I --

17 JUSTICE SOTOMAYOR: But let me move on
18 to the second part of my question, which is the
19 cases that come to the Court are usually the
20 hard cases. So you say, in the last 14 years,
21 we've barely referenced Chevron.

22 And do you know what the breakup is?
23 How often have we been -- consistently upheld
24 the agency in those cases?

25 MR. MARTINEZ: In -- in the cases

1 since 2016?

2 JUSTICE SOTOMAYOR: Yes.

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

5 JUSTICE SOTOMAYOR: I know, it's
6 interesting.

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

9 JUSTICE SOTOMAYOR: But -- but putting
10 that aside where we've disagreed, do you suggest
11 that our disagreement was based on ignoring of
12 Chevron or us doing exactly what you say we
13 should be doing, which is to say this is outside
14 the bounds of reasonableness or about -- around
15 the guardrails because you're going outside of
16 plausible --

17 MR. MARTINEZ: I --

18 JUSTICE SOTOMAYOR: -- of reasonable
19 interpretation?

20 MR. MARTINEZ: -- I think the Court in
21 cases like the American Hospital case or the
22 Digital Realty case, which I think are two
23 really good recent examples, the Court
24 unanimously overturns the lower court decision
25 because it does exactly the right thing. It

1 does all the canons at step one and it -- and it
2 essentially says, like, the statute is clear.

3 But I think what those 9-0 decisions
4 show is how confusing and unworkable Chevron is
5 because the lower courts, you know, purported to
6 do or didn't really do what they were supposed
7 to do and they came to the opposite conclusion,
8 not necessarily because they thought that --
9 that your interpretation wasn't the best but
10 rather because it thought that the statute was
11 ambiguous enough that it required deference.

12 And so this, like, threshold --

13 JUSTICE SOTOMAYOR: Counsel, that
14 judgment is inherent in every question. I mean,
15 that -- that kind of problem is just a part not
16 just of judging but of decision-making, period,
17 of life. And so it's not clear to me that the
18 fact that there may be some ambiguity about
19 what -- how much ambiguity, the question that
20 Justice Thomas asked, it doesn't take away from
21 the basic premise of Chevron, which is a
22 reasonable interpretation within the bounds
23 of -- of common statutory interpretation should
24 be given deference.

25 MR. MARTINEZ: Right. But I -- I do

1 think the ambiguity trigger introduces a whole
2 kind of threshold question that's very hard to
3 apply neutrally. I mean, you have great judges.
4 Judge Kethledge, I think, was referenced. He
5 doesn't -- he never found a case that required
6 him to go past step one.

7 Judge Silberman, another great judge,
8 said that in most cases he thought the statute
9 was ambiguous. And if there's that much
10 disagreement, then I think that's a sign that
11 Chevron really isn't workable.

12 And this Court has tried to rein in
13 Chevron in numerous ways, but I think that what
14 all of those efforts show is that you -- you
15 kind of need a secret decoder ring to figure out
16 what the law means under this Court's approach.

17 You have to do step zero. You have to
18 apply Mead. Then you have to do a robust step
19 one inquiry taking into account Footnote 9 and
20 taking into account, you know, how much
21 ambiguity is needed.

22 In this -- in the D.C. Circuit, you
23 have to do step one and a half, where you have
24 to figure out whether the agency recognized that
25 the statute was ambiguous.

1 Under Kisor, there's maybe a step
2 three that says you turn off deference when the
3 agency's operating outside of its area of
4 expertise. And then overlying all of that
5 you've got the Major Questions Doctrine.

6 And so I think, if -- if -- if that's
7 kind of what --

8 JUSTICE SOTOMAYOR: Well, that's the
9 Court's creation.

10 MR. MARTINEZ: Right. But it's the
11 Court's creation because it's trying to solve
12 the fundamental problem, which is that Chevron
13 is doing something very weird. It's taking
14 interpretive authority that belongs to courts
15 and it's giving it to agencies.

16 So all of these bells and whistles are
17 efforts to kind of claw it back to address the
18 symptoms, but I think it's time for the Court to
19 address the disease, the underlying problem,
20 which is Chevron itself.

21 CHIEF JUSTICE ROBERTS: Justice --
22 Justice Kagan?

23 JUSTICE KAGAN: Mr. Martinez, I want
24 you to think of this from Congress's
25 perspective. So I was thinking what is the next

1 big piece of legislation on the horizon and who
2 knows, don't have a crystal ball, but I'm going
3 to say -- I'm going to guess that it's
4 artificial intelligence.

5 So let's imagine Congress enacts an
6 artificial intelligence bill and it has all
7 kinds of delegations, maybe it creates an agency
8 for the purpose or maybe it uses existing
9 agencies and it has all kinds of delegations to
10 that agency or agencies about how to regulate
11 artificial intelligence so that this nation can
12 capture the -- the -- the opportunities but also
13 meet the challenges of that.

14 And then, just by the nature of things
15 and especially the nature of the subject, there
16 are going to be all kinds of places where,
17 although there's not an explicit delegation,
18 Congress has, in effect, left a gap. It has
19 created an ambiguity. And what Congress is
20 thinking is, do we want courts to fill that gap,
21 or do we want an agency to fill that gap?

22 When the normal techniques of legal
23 interpretation have run out, on the matter of
24 artificial intelligence, what does Congress
25 want, Mr. Martinez?

1 MR. MARTINEZ: I think Congress wants
2 courts to interpret the best interpretation of
3 their --

4 JUSTICE KAGAN: Congress doesn't know
5 --

6 MR. KAGAN: -- apply the best
7 interpretation --

8 JUSTICE KAGAN: -- what that answer
9 means. Congress knows that there are going to
10 be gaps because Congress can hardly see a week
11 in the future with respect to this subject, let
12 alone a year or a decade in the future.

13 And Congress knows that there are
14 going to be things that it writes that it's just
15 not going to be clear how this will apply or
16 what it will mean with respect to countless
17 factual situations that this country will have
18 to address.

19 Does the Congress want this Court to
20 decide those questions, policy-laden questions,
21 of artificial intelligence?

22 MR. MARTINEZ: I -- I don't think
23 Congress wants the Court to do policy. I think
24 Congress wants the Court to do its ordinary
25 function, which is interpret the law and figure

1 -- and apply the best understanding of the law.

2 And I think that the implication of
3 your question is that this is some sort of
4 intentional delegation by Congress, that Chevron
5 deference is -- is this implicit delegation.
6 But I -- I don't think that's right. I think
7 many people, including a very insightful article
8 that -- that you wrote 20 years ago, make clear
9 that this is fictional. This delegation is
10 fictional.

11 JUSTICE KAGAN: Fictional just
12 means -- is like academic speak for presumed.
13 We are indeed presuming congressional intent.
14 The congressional intent, it -- you know, the --
15 the delegation is not explicit on the face of
16 this statute, but what we're thinking is
17 Congress knows things about different
18 institutions, about what they know, about what
19 they're competent with respect to, and Congress
20 knows that this Court and lower courts are not
21 competent with respect to deciding all the
22 questions about AI that are going to come up in
23 the future.

24 And what Congress wants, we presume,
25 is for people who actually know about AI to

1 decide those questions. And also, those same
2 people who know about AI are people who, to some
3 degree in some way, are accountable to the
4 political process. They have constituencies.
5 They have fact-finding abilities. They are
6 obligated to go consult with people. They
7 report to a president, who needs to be elected.

8 In all kinds of ways, both with --
9 with respect to expertise and with respect to
10 their connections to the public and to other
11 policymaking entities, those are the people
12 Congress wants to decide questions about AI. We
13 don't even know what the questions are about AI,
14 let alone the answers to them, "we" being the
15 Court.

16 MR. MARTINEZ: Justice Kagan, I think,
17 if we're trying to figure out what the -- what
18 the reasonable thing to infer that Congress has
19 presumed, I think the far more reasonable
20 presumption and the one that's most consistent
21 with our constitutional structure is that
22 Congress is going to presume that courts are
23 going to do law, not policy, they're going to
24 pick the best interpretation and enforce the
25 best interpretation as to this statute in the

1 exact same way that they would do it with
2 respect to any other -- any other statute.

3 And I think this case actually -- you
4 know, AI is a trickier example --

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

6 MR. MARTINEZ: -- but talk about this
7 case. Does anyone --

8 JUSTICE KAGAN: -- it's a real
9 example. I mean, this case, you know, whether
10 it's -- it -- it was a correct interpretation or
11 not a correct interpretation of Chevron is
12 really not the issue that we're deciding here.

13 The issue we're deciding here is more
14 like that, is more like the countless policy
15 issues that are going to confront this country
16 in the years and decades again -- ahead. Will
17 courts be able to decide these issues as to
18 things they know nothing about, courts that are
19 completely disconnected from the policy process,
20 from the political process, and, you know, that
21 just don't have any expertise and -- and
22 experience in an area, or are people in agencies
23 going to do that?

24 MR. MARTINEZ: I --

25 JUSTICE KAGAN: That's what this case

1 is about.

2 MR. MARTINEZ: -- I think the
3 constitutional answer is that Congress needs to
4 set the rules with respect to AI. It can
5 delegate some policymaking discretion to
6 agencies. But, once the law is written and the
7 interpretive function has begun, then that job
8 is -- is for the courts.

9 And I think this case actually really
10 is a good example because I think the problem
11 with Chevron is that, like, no one really -- I
12 mean, I'm curious to see what the Solicitor
13 General will say about this, but does anyone
14 really think that Congress was presuming that
15 the agency would get to decide the question of
16 who pays for the monitors?

17 JUSTICE KAGAN: Okay. I have one last
18 question. Do you think that Congress could
19 codify -- codify Chevron?

20 MR. MARTINEZ: I -- I don't think so
21 because I think that -- that a statute that
22 codifies Chevron would say, essentially, that
23 the interpretive authority has been reallocated
24 from the court to the agency. I think that --

25 JUSTICE KAGAN: Congress --

1 MR. MARTINEZ: -- interpretive
2 authority --

3 JUSTICE KAGAN: -- cannot decide that
4 in cases -- after all the statutory tools have
5 been used and there remains a gap or an
6 ambiguity, Congress could not decide that it
7 wants people who know something about something
8 to decide the questions that will be left over.

9 MR. MARTINEZ: I -- I think that gives
10 away and -- and would -- would take away from
11 courts and give to agencies core judicial
12 interpretive authority. I don't think Congress
13 could do that. In the same way that Congress
14 couldn't tell the president how to exercise the
15 veto power or the pardon power, it can't tell
16 courts how to do interpretation and to defer to
17 someone else.

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 JUSTICE GORSUCH: Do we have to decide
22 that constitutional question?

23 MR. MARTINEZ: I think it makes sense
24 to decide the constitutional question. I think
25 you could --

1 JUSTICE GORSUCH: That wasn't -- do we
2 have to?

3 MR. MARTINEZ: I think you could
4 resolve this case under the APA, and we would
5 certainly welcome an -- an interpretation of the
6 APA that comes out our way, especially if it's
7 informed by constitutional avoidance principles
8 that I think have a lot of salience here.

9 JUSTICE GORSUCH: Are -- does anything
10 in your argument suggest or depend upon the idea
11 that judges should make or decide policy
12 questions about AI or anything else?

13 MR. MARTINEZ: Of -- no. We -- we a
14 hundred percent agree that judges should not do
15 policy. We just think that they should do law.
16 And that's in -- Chevron is about legal
17 questions.

18 JUSTICE GORSUCH: Then there was some
19 question about past decisions, and as you
20 pointed out, this Court's moved away from using
21 legislative history to some degree in favor of
22 text, and we've made other changes in our
23 interpretive approaches too without Congress's
24 intervention, for example, in sovereign immunity
25 contexts, returning to the clear statement rule

1 that had preexisted this Court's jurisprudence
2 for 200 years, and then we wandered off into
3 legislative history and circled back around and
4 corrected our own mistake.

5 We had to deal with the question of
6 what to do with those precedents, and our answer
7 was to leave them alone from -- from those
8 ancient regimes, as we --

9 MR. MARTINEZ: Right.

10 JUSTICE GORSUCH: -- called them. Are
11 you asking us to -- to do anything different
12 when it comes to Chevron?

13 MR. MARTINEZ: No, and if I could just
14 explain what -- how I think the world would look
15 with respect to the old cases. I think stare
16 decisis would apply to the holdings of those old
17 cases. I don't think that -- that anything
18 would change. You know, "stationary source"
19 would still mean what it meant when -- when the
20 Court issued that bottom-line interpretation.
21 And -- and so I don't think that this would -- a
22 ruling in favor of our side would -- would
23 require or entail overturning any of those old
24 cases.

25 I think what we really care about is

1 prospectively, both with respect to the fishing
2 regulation here but also with respect to other
3 cases that come forward to the courts, making
4 sure that courts are the ones doing the
5 interpreting and not agencies.

6 JUSTICE GORSUCH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 JUSTICE KAVANAUGH: Several questions.
10 First of all, on Skidmore, there was reference
11 to Skidmore deference, and I guess I don't think
12 that's the right term, that it's respect or pay
13 attention to, but I think, if we throw the term
14 "deference" into Skidmore deference, we're going
15 to walk into another problem --

16 MR. MARTINEZ: Some --

17 JUSTICE KAVANAUGH: -- like the one we
18 have with Chevron deference.

19 MR. MARTINEZ: Some -- some might say
20 "deference" is ambiguous. I think that --

21 (Laughter.)

22 MR. MARTINEZ: -- that it's imprecise.
23 I think the better way -- I think oftentimes,
24 when people say "deference," what they mean is
25 that if you think the answer is X, you should

1 defer to someone else's answer, which is
2 different. I don't think -- I think absolutely
3 that that would be inappropriate. So I would
4 not use "Skidmore deference" because I think it
5 -- it runs the risk of -- of giving that
6 implication.

7 I think that, really, we're talking
8 about very serious consideration of the points
9 that the agency makes, but, ultimately, you have
10 to be persuaded. And if you're persuaded, then
11 that means that you've concluded that the agency
12 has the best interpretation and then you just
13 apply the normal rules.

14 JUSTICE KAVANAUGH: Right. I thought
15 Skidmore was about the power to persuade, not
16 the power to control.

17 MR. MARTINEZ: Exactly.

18 JUSTICE KAVANAUGH: Yeah.

19 MR. MARTINEZ: We -- I agree with
20 that.

21 JUSTICE KAVANAUGH: Okay. On the
22 constitutional issue that Justice Gorsuch and
23 Justice Kagan were raising, you have lots of
24 arguments here, and Mr. Clement does too, for
25 overruling Chevron without reaching the

1 constitutional issue.

2 So I guess why -- why would we reach
3 it? If -- if we agreed with you on overruling
4 Chevron on other grounds, I don't see the need
5 to address the hypothetical that Justice Kagan
6 raised --

7 MR. MARTINEZ: Yeah.

8 JUSTICE KAVANAUGH: -- about Congress
9 passing a Chevron-type regime.

10 MR. MARTINEZ: I think three things on
11 that. Like I said earlier, we would certainly
12 welcome overruling Chevron, especially under the
13 APA and especially if informed by constitutional
14 avoidance principles.

15 But I think there are three reasons
16 why you should consider going beyond that to the
17 constitutional holding. There are going to be
18 some cases that, as a technical matter,
19 Section 706 of the APA wouldn't -- doesn't
20 apply. And so, if it's an APA holding, it may
21 be that in those cases there might be lingering
22 uncertainty about whether deference should --
23 should apply to cases that aren't technically
24 under Section 706.

25 I think the second thing is that a lot

1 of the analysis in figuring out what the duty
2 under the APA to interpret the law, I think a
3 lot of that analysis really overlaps with the
4 constitutional points. And I think, if you --
5 if you get to a place where you agree with us on
6 the APA, it's not that far, not that different
7 to ultimately agree with us on the Constitution
8 as well.

9 And then, finally, I would just say
10 that although, of course, this Court often
11 prefers to rule on non-constitutional grounds, I
12 think it's also recognized in cases like Pearson
13 versus Callahan that there's going to be a value
14 and a benefit to the judicial system to
15 providing clarity about what the Constitution
16 means. I think -- I would respectfully submit
17 this is one of those situations.

18 JUSTICE KAVANAUGH: On the question of
19 how much does Chevron matter on the ground, I
20 think you addressed this a little bit by citing
21 Judge Silberman, but do you want to elaborate on
22 that? I mean, are -- there are cases, I assume,
23 that get to Chevron step two pretty regularly.

24 MR. MARTINEZ: Very regularly, Your
25 Honor. It -- it happens all the time. And I

1 think, if a case like this one or two cases like
2 these two can get to Chevron step two, I think
3 that suggests that it's really hard to figure
4 out how Chevron step one is supposed to work.

5 I mean, the Digital Realty case is
6 another great example. That's a case where
7 there was a statutory definition of the term
8 "whistleblower" that required the person to have
9 gone to the SEC and -- and, you know, submitted
10 a -- a complaint, and the government and the
11 lower court concluded that that was ambiguous
12 and that it might actually apply, it was
13 reasonable to read the statute to not require a
14 report to the SEC.

15 So I think there are cases, there are
16 examples like these that come up all the time,
17 and, you know, thankfully, this Court doesn't
18 have to intervene every single time, but the
19 reason that the problem is there is because
20 you've told lower courts how to do their
21 interpretation. And as long as that instruction
22 is out there, there are going to be a lot of
23 cases that get it wrong, and you're not going to
24 want to be in the business of sort of error
25 correction on each one.

1 JUSTICE KAVANAUGH: On the question of
2 how Congress can operate without Chevron, I just
3 want to elaborate on -- have you elaborate on
4 that a little more.

5 My understanding is Congress
6 oftentimes will use terms like "the agency can
7 regulate reasonable limits" or "appropriate
8 limits," and that gives, under State Farm, a lot
9 of discretion to the agency to make choices to
10 do what Justice Kagan was talking about, to
11 think about the world as it exists five years
12 from now or 10 years from now and not have to
13 worry about going back to Congress.

14 So the question really is for Congress
15 and its drafting choices, I think, what kinds of
16 broad, capacious terms it uses, as opposed to
17 using more defined terms or statutory terms --
18 usual kinds of statutory language. Yes, it
19 can't rewrite that. At least that's how I
20 thought Congress could operate in a world where
21 Chevron does not exist.

22 MR. MARTINEZ: I -- I think that's
23 exactly right, Justice Kavanaugh. And I think
24 that, like I said earlier, in -- in those
25 situations, the Court's job is basically

1 figuring out what the best interpretation of
2 that word is. And in -- in many cases, maybe
3 most cases, those types of capacious words are
4 basically -- the best understanding of those
5 words is that Congress is, in fact, conferring
6 the discretion on the agency.

7 That's very different from Chevron,
8 where, instead of having any sort of language
9 like that or express language conferring a
10 delegation, you're -- you're basically applying
11 this fictional implied delegation that -- that
12 is triggered by ambiguity, which is like -- you
13 know, it -- frankly, it's -- it's -- it's not --
14 it's fictional, it's made up.

15 And so I think a world in which
16 Congress, when it wants to delegate to agencies,
17 needs to be express and use language like that
18 or other language, I think is a better world
19 from the perspective of -- of Article I and from
20 Article III.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: Mr. Martinez, I want
25 to return to the question that Justice Sotomayor

1 raised about stare decisis.

2 So you said that overruling Chevron
3 wouldn't have an effect on the many cases that
4 have gotten to Chevron step two and then
5 deferred to the agency. You said -- am I -- did
6 I understand you correctly?

7 MR. MARTINEZ: Those bottom-line
8 holdings would be right, yeah, would be.

9 JUSTICE BARRETT: Okay. But the
10 bottom-line holdings in those cases, if the
11 Court did defer at step two, are simply that the
12 agency's interpretation was reasonable. And
13 maybe sometimes, like in Brand X, they might
14 even be like, well, we would reach a different
15 interpretation if it were our call -- our call,
16 but it's ambiguous, so the agency can decide.

17 So maybe nothing happens immediately
18 to those cases, but isn't the door then open for
19 litigants to come back and say: Well,
20 "stationary source" really means X or, you know,
21 "broadband" or whatever the specific term was in
22 -- in Brand X?

23 So isn't it inviting a flood of
24 litigation even if for the moment those holdings
25 stay intact?

1 MR. MARTINEZ: So I would say the
2 bottom-line holdings in those cases, I would
3 just quibble slightly --

4 JUSTICE BARRETT: Sure.

5 MR. MARTINEZ: -- I would -- I would
6 describe the bottom-line holding as being that
7 the agency's action was lawful. And so that's
8 the bottom line.

9 I think it's true that people could
10 come and say, look, the interpretive methods
11 have changed since this bottom-line holding was
12 issued and we think that -- that, you know, a
13 different result now should apply. And -- and
14 that's why courts consider requests to overturn
15 precedent. But I just think that they would
16 apply the same standards that they would apply
17 to other stare decisis inquiries, and I think it
18 would be the rare case that would require --
19 that -- where a court would say this -- this
20 decision not only isn't the best interpretation,
21 but it's, like, so bad and so practically
22 important that we're going to overturn our own
23 precedent.

24 So I think that would be the
25 safeguard.

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

11 MR. MARTINEZ: I -- I think litigants
12 could make that argument, but I think they would
13 have to overcome the normal stare decisis test,
14 which is very hard to overcome, and so they
15 would probably have to show that it's really
16 wrong and really practically important.

17 And I think most courts, and I imagine
18 this Court, is -- is going to find that that
19 threshold is -- is met, like, almost -- very
20 rarely, maybe almost never. And so, as a
21 practical matter, you're not going to be
22 upending, you know, those -- those bottom-line
23 decisions --

24 JUSTICE BARRETT: Okay.

25 MR. MARTINEZ: -- even if you let

1 people in theory come and challenge them, which
2 they can do now.

3 JUSTICE BARRETT: So let me ask you --
4 you -- you just referred to the, you know,
5 serious stare decisis threshold, you know, that
6 would have to be overcome.

7 MR. MARTINEZ: Yeah.

8 JUSTICE BARRETT: So let's talk about
9 the stare decisis threshold here. Why is it
10 different here than it was in Kisor? You know,
11 in Kisor, the Court declined to overrule Auer
12 and the part -- the opinion that was for a
13 majority of the Court was largely -- it was on
14 stare decisis grounds.

15 So why would a different result obtain
16 here?

17 MR. MARTINEZ: I think my first answer
18 is that the Chief Justice's opinion suggested it
19 might be different and I think the reasons why
20 it's -- it's reason -- it's -- it's -- it really
21 is different is because there are important
22 differences between Chevron and Auer.

23 The most important that I think plays
24 on the reliance question is this idea that
25 Chevron allows and -- and almost like a feature

1 of Chevron, not a bug, is that it encourages and
2 allows agencies to flip-flop.

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

12 There are other differences. I -- you
13 know, Chevron is problematic because it lets
14 agencies say what Congress intended or what
15 Congress's meaning was, as opposed to just
16 saying what they themselves meant with the
17 regulation that they themselves enacted.

18 So I think the -- the kind of -- you
19 know, the deference makes more sense when you're
20 deferring to the entity that actually created
21 the provision in question, as opposed to
22 deferring to their interpretation of -- of a
23 provision that was created by Congress.

24 I think, in addition, you know,
25 Chevron is not limited to agency expertise.

1 Auer is limited to agency expertise. So Auer
2 is -- is narrower.

3 And then, finally, I do think there's
4 a difference even with respect to the APA, where
5 I think the APA more clearly puts constitutional
6 interpretation and statutory interpretation on
7 equal footing, and that might play into the
8 analysis.

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

17 So I think there are a lot of
18 differences that really flesh out, I think, the
19 important point that the Chief Justice was
20 making, which was that the analysis there
21 doesn't automatically transfer over to Chevron.

22 JUSTICE BARRETT: Thanks.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So I've heard you

1 say several times that you agree that judges
2 should not be doing policy, they should be doing
3 law. And I guess I too agree with that, and my
4 concern is that it's actually not as easy as it
5 seems to distinguish between the two and -- and
6 that it appears in a lot of your answers that
7 you sort of say, well, you come up with the best
8 answer, it's a legal question. But I'm not so
9 sure it's a legal question, as opposed to is it
10 the best under the sort of policy regime.

11 And I think that there's a real
12 separation-of-powers danger here to the extent
13 that you're saying that the judges are deciding
14 whether or not this is something the agency
15 should do or not, whether this is a legal
16 question or not.

17 You know, there's the old saying that
18 when you're a hammer, everything looks like a
19 nail, and I'm concerned that judges are going to
20 look at all of the questions related to a
21 statute and call them legal if we don't have
22 something like Chevron that requires judges to
23 be actually thinking about their proper role
24 relative to this issue.

25 So how can you assuage my concern in

1 that regard?

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

11 And I think the court in that
12 circumstance just does its best. It doesn't
13 have guidance, it doesn't have instructions from
14 the agency. It does its best. And I think,
15 when it does its best --

16 JUSTICE JACKSON: But does it have to,
17 Mr. Martinez? I mean, there are -- there are
18 other regimes in which a court is presented with
19 a question and it identifies it as a policy
20 question that it cannot answer.

21 MR. MARTINEZ: But --

22 JUSTICE JACKSON: So what I'm saying
23 is that it's not necessarily true that just
24 because the court gets an issue, it
25 automatically says, oh, this must be legal, I

1 have to act.

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

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

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

21 I mean, how would a court go about
22 determining whether that's something it's
23 supposed to be doing or the agency is supposed
24 to be doing?

25 MR. MARTINEZ: I -- I think that

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

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

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

15 MR. MARTINEZ: Well, I think if the --

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

21 And I guess --

22 MR. MARTINEZ: I -- I -- I don't think
23 the court ever says that it's not my call if the
24 question in front of it is a question of
25 statutory interpretation, because I think that's

1 their core job --

2 JUSTICE JACKSON: So every statutory
3 interpretation question is one of law that a
4 court can decide, you're saying?

5 MR. MARTINEZ: Yes, and that --

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

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

17 JUSTICE JACKSON: So there's never a
18 world you -- I -- maybe we just differ on this.
19 I'm worried about the courts becoming
20 uber-legislators, that when we have a policy --
21 so one way that some of the experts have looked
22 at this, some of the legal -- legal scholars
23 have looked at this, is that they say, when
24 there's an ambiguity, there are actually
25 different kinds of ambiguities.

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

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

15 MR. MARTINEZ: I --

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

19 MR. MARTINEZ: I think where I --
20 where I would just sort of disagree is what you
21 said at the end where you sort of assumed that
22 it was a policy question. I would just say that
23 if it's -- if the question is the meaning of a
24 statutory term, that's an interpretive question
25 that's a legal question and would be treated as

1 a legal question if you got that exact same
2 question before the agency had acted.

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

16 MR. MARTINEZ: No.

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

23 MR. MARTINEZ: No. No, Your Honor. I
24 think what the agency has to do is what everyone
25 else has to do, which is try to figure out what

1 the -- what the law means and then act
2 accordingly, and if someone challenges that,
3 then that'll get sorted out. If there's a -- a
4 stat -- a legal question, a statutory
5 interpretation question, then that'll get sorted
6 out by the courts. But the agency isn't, like,
7 paralyzed --

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

17 Well, first of all, it will take years
18 perhaps for the courts to sort it out. What is
19 the agency supposed to be doing in the meantime?
20 And different courts from all of these different
21 jurisdictions could actually have a different
22 view, as Justice Sotomayor pointed out, of what
23 "adequate and well-controlled investigations"
24 are supposed to do, so -- means.

25 So isn't it sort of impractical and

1 chaotic to have a world in which every undefined
2 term in a statute is subject to litigation if
3 you're trying to govern?

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

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

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

22 JUSTICE JACKSON: No, I understand,
23 but, under a Chevron regime, right, if that's
24 the background rule, then you're going to have
25 parties thinking twice before going down a

1 litigation road with respect to a term because
2 they're going to say, at the end of the day --

3 MR. MARTINEZ: Right.

4 JUSTICE JACKSON: -- the agency has a
5 reasonable interpretation, that's what the
6 court's going to find, so it's not any --

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

15 JUSTICE JACKSON: Thank you.

16 MR. MARTINEZ: And --

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 General Prelogar.

20 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

21 ON BEHALF OF THE RESPONDENTS

22 GENERAL PRELOGAR: Mr. Chief Justice,
23 and may it please the Court:

24 The Chevron framework is a bedrock
25 principle of administrative law with deep roots

1 in this Court's jurisprudence. Overruling a
2 precedent is never a small matter, but
3 overruling a precedent as foundational as
4 Chevron should require a truly extraordinary
5 justification, and Petitioners don't have one.

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

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

24 On top of all that, reliance interests
25 in this context are at their apex. Congress,

1 agencies, states, regulated parties, and the
2 American public have all relied on Chevron and
3 the regulations upheld under it to make
4 important decisions that could be upended by
5 overruling that framework.

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

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

19 Just five years ago in *Kisor*, this
20 Court declined similar calls to overrule the
21 Auer deference doctrine based on many of the
22 same flawed arguments that Petitioners are
23 making here. The Court observed that it would
24 be the rare overruling that would introduce so
25 much instability into so many areas of the law,

1 all in one blow. Overruling Chevron would be an
2 even greater and unwarranted shock to the legal
3 system.

4 I welcome the Court's questions.

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

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

19 First, there's all the work that the
20 Court does at step one of Chevron. That is
21 using the tools of interpretation to identify
22 whether Congress has spoken to the issue in the
23 case and, if so, Chevron said that's the end of
24 the matter. So, in that sense, in a step one
25 case, the Court has, of course, interpreted the

1 statute.

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

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

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

22 JUSTICE SOTOMAYOR: Can I say,
23 counsel -- General, I know plenty of statutes
24 where Congress uses the word "de novo." It
25 didn't here, correct, in 706?

1 GENERAL PRELOGAR: That's correct.

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

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

18 GENERAL PRELOGAR: Yes.

19 JUSTICE SOTOMAYOR: And there are
20 statutes that require deferential review
21 explicitly to legal questions, correct?

22 GENERAL PRELOGAR: Yes.

23 JUSTICE SOTOMAYOR: Besides Chevron?

24 GENERAL PRELOGAR: Yes.

25 JUSTICE SOTOMAYOR: All right. So now

1 we have -- we're now at 706. And my -- your
2 adversary, your opposing counsel, said that he
3 didn't see that much disruption from overruling
4 Chevron, that nobody would really bring up those
5 old cases.

6 Do you have a view on that?

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

12 I understand his point to be that all
13 of the holdings in those cases will be secure
14 because stare decisis will apply in those
15 contexts. But the important thing to realize is
16 that in those cases, as Justice Barrett's
17 questions emphasized, the Court has decided that
18 what the agency did was reasonable. The statute
19 has essentially been interpreted to vest the
20 agency with discretion such that the agency's
21 regulation is being held lawful or valid on the
22 basis of reasonableness, and I think that that
23 means that litigants will come out of the
24 woodwork seeking to open those decisions and
25 contending that they didn't actually address

1 what they now say is the relevant question, not
2 whether the agency's interpretation is
3 reasonable or whether the regulation can be
4 upheld on that basis, but how the statute should
5 be interpreted without granting any deference to
6 the agency's interpretation.

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

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

17 GENERAL PRELOGAR: No, I don't think
18 so, Mr. Chief Justice. It's been eight years
19 since this Court relied on Chevron at step two,
20 but there's no case that my friends have been
21 able to point to where the Court has said that a
22 statute was ambiguous or left a gap and Chevron
23 would otherwise apply, but the Court is not
24 going to defer in that circumstance. So the
25 fact that --

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

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

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

22 My concern about that or my confusion
23 about that is, if you use all the traditional
24 tools of statutory interpretation, you'll get an
25 answer, and we know that because, in cases where

1 we don't have an agency involved and we use
2 those same traditional tools, we get an answer.

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

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

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

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

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

25 In that circumstance, I think it's

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

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

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

21 JUSTICE KAVANAUGH: How would you
22 define "ambiguity" or how would you, if you were
23 a judge, say, yes, this is ambiguous or no,
24 that's not ambiguous?

25 GENERAL PRELOGAR: So I would draw on

1 what the Court said recently in Kisor where it
2 said a statute is ambiguous when the Court has
3 exhausted the tools of interpretation and hasn't
4 found a single right answer.

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

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

21 But, in a circumstance like Chevron
22 itself with "stationary source" or some of the
23 examples that the Justices have been talking
24 about with "reasonable" or "feasible," I think
25 you can get to the end of that process and the

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

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

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

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

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

25 Chevron does not require a court to

1 ignore what is ascertained doing the step one
2 inquiry. At that point, that is the -- the
3 judge's conclusion that Congress actually spoke
4 to the issue and Chevron is totally clear about
5 this, give effect to it.

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

19 JUSTICE GORSUCH: I mean, General --

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

22 JUSTICE GORSUCH: -- I'm sorry to
23 interrupt, but those are two different -- very
24 different views about what qualifies as an
25 ambiguity you've just given us. One is there is

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

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

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

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

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

25 GENERAL PRELOGAR: So there's a lot

1 packed in there, Justice Gorsuch, and I want to
2 respond to each of your concerns.

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

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

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 -- it takes
17 --

18 GENERAL PRELOGAR: They will persist.

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

25 GENERAL PRELOGAR: But it's not going

1 to create greater predictability or stability or
2 consistency across judges.

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

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

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

17 (Laughter.)

18 JUSTICE GORSUCH: And -- and --

19 JUSTICE SOTOMAYOR: That may be the
20 first falsehood.

21 (Laughter.)

22 JUSTICE GORSUCH: And -- and there we
23 are. And so you never have stability in the
24 law. I mean, if reliance and stability count, I
25 would have thought that Chevron, at least as

1 this Court's understood it, is a recipe for
2 anti-reliance.

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

7 JUSTICE GORSUCH: So you do --

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

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

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

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

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

8 JUSTICE GORSUCH: Or not.

9 GENERAL PRELOGAR: -- with the
10 discretion.

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

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

25 Do you think that's an appropriate

1 understanding of the law too, that judicial
2 precedents, maybe even precedents of this Court,
3 can be overturned by agencies?

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

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

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

1 he's not because he says it's a source of
2 extreme instability in the law. That's his --
3 his phrase.

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

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

21 And it brings me to the important
22 point that to do --

23 JUSTICE KAVANAUGH: I don't think
24 they're -- I'm sorry to interrupt --

25 GENERAL PRELOGAR: No.

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

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

22 And just look at "stationary source."
23 You know, that was a circumstance where the
24 Court said, applying all of the tools, Congress
25 didn't have a view on it. It didn't want to

1 foreclose a plant-wide definition. It didn't
2 want to foreclose an equipment-specific
3 definition. And I think it was entirely
4 permissible for the expert agency to come in,
5 take stock of the entire situation, and, yes,
6 take account of the policy goals of an incoming
7 administration to better account for the
8 interests of the regulated parties and give them
9 flexibility. That's just part of Congress's
10 design.

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

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

1 Am I wrong to be worried about that?

2 GENERAL PRELOGAR: No. I think that
3 that concern is valid, and I think it's valid
4 along two separate dimensions, and one is to
5 recognize that in these scenarios where we're at
6 Chevron step two, by definition, it's because
7 the statute itself doesn't supply an answer and
8 the court can't ascertain that Congress actually
9 meant to resolve it. And in that circumstance,
10 it's entirely sensible for Congress to give the
11 issue to an agency when it is charged with
12 administering the statute and, of necessity, is
13 going to have to fill the gap along the way.
14 And Congress could quite legitimately want the
15 agency to draw on its policymaking expertise in
16 figuring out the right way to fill the gap.

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

1 one?

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

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

20 But the point is that when Congress
21 has left that gap and charged the expert agency
22 with the administration role, Congress could
23 have every expectation, and Chevron says
24 Congress has the expectation, that the agency
25 will fill the gap and that the courts will

1 respect it within the bounds of reasonableness
2 that always apply in this context.

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

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

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

25 So I think it's not just kind of an

1 interpretive canon, but, rather, it really is
2 grounded in the separation of powers.

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

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

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

21 But I think, even in the circumstance
22 where Congress doesn't know it's creating it at
23 the time, someone's going to have to come in
24 after the fact and fill it in, and it's either
25 going to be the agency or it's going to be the

1 court without deference. And in that
2 circumstance, I think the court appropriately
3 recognized Congress would want for the agency to
4 do it.

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

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

13 GENERAL PRELOGAR: We think that one's
14 clear. Put it out there.

15 (Laughter.)

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

22 Is that the kind of question -- you
23 know, judges below, very smart, very reasonable
24 judges reached different conclusions about what
25 that word in the statute meant. Is that the

1 kind of question then, you know, thinking about
2 Brand X saying, well, it doesn't have to be the
3 best, it just has to be, you know, a plausible,
4 reasonable one, is that the kind of statutory
5 question that would trigger ambiguity and step
6 two deference?

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

13 JUSTICE BARRETT: Right.

14 GENERAL PRELOGAR: So, with respect to
15 that particular issue --

16 JUSTICE BARRETT: And it's that --
17 statutory structure in a -- in a communication
18 --

19 GENERAL PRELOGAR: Right.

20 JUSTICE BARRETT: -- communication
21 sense.

22 GENERAL PRELOGAR: But I guess what I
23 would say to just try to address the overarching
24 question is that, you know, I think that it's
25 going to be kind of a specific exercise in every

1 case, and I can't say here is the formula I can
2 give you to know when the statutory
3 interpretation exercise at step one runs out and
4 the court should feel like, I don't have an
5 answer, Congress didn't supply one, and when
6 not. I think it's going to vary based on the
7 statutory scheme.

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

13 That is the role of the court, and
14 it's the role of the court likewise to enforce
15 Congress's directions when --

16 JUSTICE BARRETT: So that kind of
17 question, putting aside the government's
18 position in *Pulsifer*, so maybe --

19 GENERAL PRELOGAR: Yeah.

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

25 You know, a question of statutory

1 structure, the placement of a comma, you know,
2 that kind of a thing, that is the kind of
3 question that, depending on the circumstance,
4 could trigger step two deference?

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

13 JUSTICE BARRETT: Sure.

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

19 But I think, in the mine run case,
20 yes, and -- and to the extent you're saying,
21 well, it feels odd for it to depend on a comma
22 or to turn on the meaning of the word "and,"
23 still I think the inference holds because, in
24 that context, Congress, if -- if it, in fact,
25 has left the ambiguity or the gap, recognizes

1 that the agency is going to have to come up with
2 an answer as part of implementing the --

3 JUSTICE BARRETT: Except a lot of
4 times Congress doesn't intentionally leave the
5 ambiguity or the gap, right? It's just limits
6 of language, limits of foresight.

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

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

22 JUSTICE KAVANAUGH: Can I --

23 GENERAL PRELOGAR: -- deference --

24 JUSTICE KAVANAUGH: -- can I ask you
25 about your --

1 GENERAL PRELOGAR: -- if the
2 predicates are satisfied.

3 JUSTICE KAVANAUGH: I'm sorry. Can I
4 ask you about the phrase "law runs out." One
5 way to think about that would be if you had the
6 same statutory interpretation --

7 CHIEF JUSTICE ROBERTS: Go ahead and
8 finish, sure.

9 JUSTICE KAVANAUGH: Same statutory
10 interpretation issue in a non-agency case, could
11 the Court decide it?

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

18 What's wrong with that? And if that's
19 not correct, because I don't think you're going
20 to agree with that --

21 (Laughter.)

22 JUSTICE KAVANAUGH: -- how -- how
23 would you define when the law runs out short of
24 that, which I think is a problem, as you said,
25 hard to speak in generalities about this.

1 That's the problem.

2 GENERAL PRELOGAR: Yes. So you
3 predicted my answer. I don't agree that it's
4 only in a circumstance where the statute would
5 be incapable of the Court issuing a decision at
6 the end of day. Of course, if a case comes to
7 the Court and it has to resolve it, it's going
8 to have to do its level best.

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

19 And I think that in a -- a Chevron
20 circumstance, the insight of the Court's opinion
21 there was that the Court doesn't have to go on
22 and itself supply the answer when, actually, the
23 best way to understand Congress having not
24 resolved it itself was to make the primary
25 decision-maker or the -- the person with the

1 primary role in the first instance to be the
2 agency.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas, anything further?

7 JUSTICE THOMAS: Just a -- a couple of
8 questions. You said that -- in an exchange with
9 Justice Sotomayor and me that Congress could
10 require some deference when it came to questions
11 of statutory interpretation.

12 And in 706, it -- it -- the reviewing
13 court shall decide all relevant questions of
14 law, interpret constitutional and statutory
15 provisions, et cetera. Could Congress also
16 require deference on the part of the court with
17 respect to constitutional issues?

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

1 But the -- the history runs in
2 precisely the opposite direction when it comes
3 to statutory interpretation, where agencies
4 themselves are charged with administering it
5 because, as we've tried to explain, Chevron was
6 not an innovation, it was not something new.

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

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

1 How would you distinguish that normal
2 practice from what you're saying?

3 GENERAL PRELOGAR: Well, I think it is
4 more nuanced than that. I certainly take the
5 point that the Court reviews many legal
6 questions de novo, but that's not invariably the
7 case. There can be issues that arise under
8 distinct statutes that set forth more
9 deferential standards of review. AEDPA is a
10 good example of that.

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

25 JUSTICE THOMAS: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Alito?

2 JUSTICE ALITO: Can you provide a
3 concise definition of what "ambiguity" means in
4 this context?

5 GENERAL PRELOGAR: Ambiguity exists
6 when the court has exhausted the tools of
7 interpretation and hasn't been able to arrive at
8 confidence that there is a right answer that
9 Congress spoke to the issue.

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

17 GENERAL PRELOGAR: But the relevant
18 question at step one is whether Congress is, in
19 fact, resolving it or delegating it to the
20 agency. So I agree that in a circumstance where
21 you don't have an agency, the Court can't give
22 effect to any delegation and, instead, the
23 backup option in a situation where an agency
24 would otherwise be available is the Court has to
25 do it, but I don't think that that undermines

1 the very real on-the-ground possibility that
2 Congress is legislating and meaning to give the
3 agency the gap.

4 JUSTICE ALITO: Well, I come back to
5 --

6 GENERAL PRELOGAR: And think about a
7 term like "reasonable."

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

15 GENERAL PRELOGAR: So I think maybe
16 the best way to try to clarify what the
17 definition I'm trying to give is to use an
18 example of something like a statutory term --

19 JUSTICE ALITO: No, I --

20 GENERAL PRELOGAR: -- like
21 "reasonable."

22 JUSTICE ALITO: -- really would just
23 like a definition so that all the courts that
24 have to apply the regime that you're advocating
25 will be able to apply it in the many different

1 cases that come before them.

2 GENERAL PRELOGAR: The Court gave this
3 definition in Kisor five years ago with respect
4 to Auer deference, and I think it's the right
5 definition to use --

6 JUSTICE ALITO: And -- and what is it?

7 GENERAL PRELOGAR: -- here as well.

8 JUSTICE ALITO: What is it?

9 GENERAL PRELOGAR: When a court has
10 used or exhausted the tools of interpretation
11 and doesn't believe that it reveals a right
12 answer. In that circumstance, Chevron said the
13 right way to think about that statute --

14 JUSTICE ALITO: Well, I -- I think, if
15 you --

16 GENERAL PRELOGAR: -- the real right
17 answer there is a delegation.

18 JUSTICE ALITO: But, again, I think
19 you've -- you're running into the problem that
20 we never do that in cases that don't involve an
21 agency.

22 GENERAL PRELOGAR: Because, in those
23 cases --

24 JUSTICE ALITO: So I think you've got
25 to provide a different -- a different

1 definition. Now what I heard you say at a
2 couple of times -- a couple of times during your
3 argument was it's when we can't figure out --
4 when -- when we don't -- when we can't figure
5 out what Congress intended. Is -- is that what
6 you mean to say?

7 GENERAL PRELOGAR: That is the inquiry
8 that Chevron prescribes that you should be
9 looking -- and this is drawn from Footnote 9,
10 which is another formulation of this, use the
11 tools of interpretation to see if they reveal
12 Congress's --

13 JUSTICE ALITO: Well, what do you mean
14 by what Congress intended? Do you mean -- do
15 you mean to say that you get to step two
16 whenever we don't think that a majority of the
17 House and a majority of the Senate had an intent
18 on the specific question that is before the
19 court? Then you'd always get to step two.

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

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 JUSTICE SOTOMAYOR: There hasn't been
5 much discussion on why this is entitled to
6 statutory -- to stare decisis consideration.
7 There's been an argument by opposing --
8 Petitioners that it's not because -- it's not
9 really a holding of a case, it's a method only,
10 and we have said in the past that a method that
11 lower courts have to use is subject to change
12 in -- change we can make without considering
13 stare decisis.

14 So could you address that argument?

15 GENERAL PRELOGAR: Yes. And I think
16 that Petitioners have pointed to two relevant
17 types of cases that they suggest just mean stare
18 decisis doesn't apply here or it applies in
19 particularly weakened form.

20 First, they say the Court has
21 sometimes changed the interpretive tools it
22 consults. Things like legislative history might
23 have been in greater favor at least with some
24 Justices before and maybe have fallen out of
25 favor later.

1 But I don't think that those provide a
2 parallel at all because the Court has never
3 distilled those kinds of interpretive tools into
4 a governing framework. It's never, for example,
5 dictated to lower courts you should be applying
6 legislative history in all cases. And so I
7 don't think that it has the same kind of roots
8 in the type of binding governing framework that
9 Chevron has, which really has functioned in
10 quite a different way with respect to how you
11 understand and implement Congress's directives.

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

22 There too, I think that the
23 considerations run in precisely the opposite
24 direction here because Chevron is not just a --
25 a -- a -- a binding framework about how courts

1 conduct their business; it also gives notice to
2 the legislature about how its statutes will be
3 construed. And if the Court got this wrong when
4 Chevron was decided and was wrong about
5 legislative intent, Congress is there at the
6 ready and is perhaps the best part or
7 institution in government to be able to correct
8 it and actually say going forward what it wants
9 the ground rules to be.

10 And the final thing I would say,
11 Justice Sotomayor, is that these were precisely
12 the kinds of considerations that the Court took
13 into account in Kisor in applying the strongest
14 form of stare decisis to Auer deference.

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

1 too.

2 JUSTICE SOTOMAYOR: There -- and you
3 answered the reliance question, because one of
4 the arguments on the other side is no one has --
5 well, the first argument, that the Court hasn't
6 applied Chevron in how many years and so nobody
7 should have a legitimate reliance interest. And
8 the second argument against reliance is that no
9 one should have reliance on a wrong
10 interpretation basically.

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

23 And all of that could be thrown into
24 disarray if now it can be subject to renewed
25 challenge on the basis that that regulation was

1 upheld using the wrong -- answering the wrong
2 question, not looking at whether it conflicts
3 with some purportedly better interpretation of
4 the statute.

5 JUSTICE SOTOMAYOR: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

1 certainty about what Congress was trying to do.

2 And in that circumstance in a world
3 without Chevron, what we'll see is what Justice
4 Alito was suggesting, the courts will have to go
5 on and try to answer the question. But there
6 are 800 district court judges around the nation,
7 and I think it's fair to say they will likely
8 have different takes about what to do in that
9 circumstance and what to give greater weight to
10 and how to ultimately fill the gap in
11 administering the statute, and that's going to
12 create problems for a couple of different
13 reasons.

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

22 GENERAL PRELOGAR: That's right.
23 There is good empirical evidence to support that
24 judges have an easier time reaching common
25 ground under the Chevron framework and at least

1 identifying when they can agree that Congress
2 did not itself resolve an issue than they do
3 when they have to ultimately go on and try to
4 figure out what they are going to say is the
5 bottom line of the best way to put the statute
6 into operation.

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

1 So I think Congress would have very
2 good reason to think that agencies should do
3 this and that courts should respect it within
4 the bounds of reasonableness.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: You agree that
9 courts under the APA have to review questions of
10 law involving the Constitution de novo?

11 GENERAL PRELOGAR: Yes. I think there
12 might be certain circumstances with respect to
13 certain provisions where more deferential
14 standards apply, but I --

15 JUSTICE GORSUCH: But, as a general
16 rule, 706.

17 GENERAL PRELOGAR: -- I certainly
18 agree they don't defer to agencies.

19 JUSTICE GORSUCH: Okay. And -- and
20 you agree that, elsewhere in the law, when posed
21 with questions of law, courts review those de
22 novo, generally speaking?

23 GENERAL PRELOGAR: I think that, in
24 many contexts, it's de novo. Certainly not in
25 all contexts.

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

3 GENERAL PRELOGAR: Yes. I think those
4 are two good examples --

5 JUSTICE GORSUCH: Okay.

6 GENERAL PRELOGAR: -- of situations
7 where there are specifications of a standard of
8 review that's more deferential.

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

21 GENERAL PRELOGAR: So I acknowledge
22 that I think that many of those doctrines do
23 turn on limitations built into the writ or
24 limitations on remedies. I don't think it would
25 be right, Justice Gorsuch, to say that in the

1 mandamus cases, what courts were traditionally
2 doing is saying let me put aside what the
3 executive officer did and just interpret the
4 statute de novo and say what I think the right
5 answer is.

6 And the right answer is the executive
7 was violating the law, but not clearly outside
8 the scope of the executive's authority.

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

12 GENERAL PRELOGAR: But --

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

16 GENERAL PRELOGAR: But I think, for
17 Petitioners to succeed on their Article III
18 argument, they have to show not just that you
19 can --

20 JUSTICE GORSUCH: I'm not asking about
21 Article --

22 GENERAL PRELOGAR: -- review de novo,
23 but you have to.

24 JUSTICE GORSUCH: -- I'm not asking
25 about Article III. I'm just asking about the

1 APA and what it means, and --

2 GENERAL PRELOGAR: Yeah. Okay. So
3 sorry if I misunderstood. I -- I do think,
4 though, that what the history shows at the very
5 least is there has been no fundamental rule in
6 this country leading up to the APA's enactment
7 that you have to review all questions de novo.
8 And that's where the history of the APA really
9 matters.

10 This Court has several times
11 recognized the APA was a restatement of existing
12 judicial practice when it came to review of
13 agency statutory interpretations. And as we've
14 explained, there are really deep roots here, a
15 long line of precedent and history showing that
16 courts will sometimes defer.

17 JUSTICE GORSUCH: Yeah. On -- on
18 those --

19 GENERAL PRELOGAR: So I think to say
20 that --

21 JUSTICE GORSUCH: -- on those, it's --
22 it's absolutely true, you -- you -- you do point
23 out cases like Edwards' Lessee and others where
24 this Court gave respect to the federal
25 government's contemporaneous and uniform

1 interpretation of the statute.

2 And that's exactly what Skidmore does.
3 It gives respect to contemporaneous and uniform
4 interpretations. But Chevron, it doesn't matter
5 whether it's contemporaneous and uniform. It
6 could be novel and out of the blue and
7 inconsistent with everything that came before,
8 and it still gets deference, right?

9 GENERAL PRELOGAR: So I -- I disagree
10 with the idea that those cases stand for the
11 more limited principle that's -- that's --

12 JUSTICE GORSUCH: Well, I'm -- I'm
13 reading from them, but okay. All right. So
14 let's let --

15 GENERAL PRELOGAR: Well, there are --
16 there are dozens of them.

17 JUSTICE GORSUCH: -- let's -- let's --

18 GENERAL PRELOGAR: So I acknowledge
19 that they use varying formulations, and maybe
20 you can find some that look a little more like
21 Skidmore. I think I have a lot that look a
22 whole lot like Chevron --

23 JUSTICE GORSUCH: Let's say you don't.
24 Then what?

25 GENERAL PRELOGAR: Well, I -- I think

1 I -- I just have to dispute the premise because

2 --

3 JUSTICE GORSUCH: No. No, fair
4 enough.

5 GENERAL PRELOGAR: -- look at Gray
6 versus Powell, look at NLRB versus --

7 JUSTICE GORSUCH: Yeah.

8 GENERAL PRELOGAR: -- First
9 Publications.

10 JUSTICE GORSUCH: Yeah.

11 GENERAL PRELOGAR: You know, I think
12 that these are -- these are cases in the 1940s
13 that were leading cases in administrative law.

14 JUSTICE GORSUCH: Oh, I -- I wasn't --
15 I was -- I -- I -- put aside what happened in
16 the '40s because it went back and forth and
17 wound up in Skidmore.

18 GENERAL PRELOGAR: But, at the very
19 least --

20 JUSTICE GORSUCH: But -- but -- but --

21 GENERAL PRELOGAR: -- Justice Gorsuch
22 --

23 JUSTICE GORSUCH: -- but you wanted --

24 GENERAL PRELOGAR: -- where there's no
25 --

1 JUSTICE GORSUCH: -- you wanted to say
2 it's a very old thing. And the old cases don't
3 look anything like Chevron. They look a lot
4 like Skidmore.

5 GENERAL PRELOGAR: I -- I disagree
6 with that. Some of them --

7 JUSTICE GORSUCH: Okay.

8 GENERAL PRELOGAR: -- say you should
9 give it controlling weight, it should tip the
10 balance. They're not saying just pay attention
11 to it if maybe it has the chance of persuading
12 you.

13 JUSTICE GORSUCH: It -- if it -- if
14 it's contemporaneous and if it's uniform, right?

15 GENERAL PRELOGAR: No, not all of the
16 cases --

17 JUSTICE GORSUCH: Okay.

18 GENERAL PRELOGAR: -- pay attention to
19 that fact.

20 JUSTICE GORSUCH: Okay.

21 GENERAL PRELOGAR: Some of them recite
22 that, but others don't.

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

25 GENERAL PRELOGAR: And I just want to

1 add as well --

2 JUSTICE GORSUCH: I -- I have another
3 question, though. Chevron, you emphasize, is --
4 is value-neutral and it'll sometimes favor
5 industries that are regulated and sometimes
6 favor the government.

7 And I can certainly see that in -- in
8 scenarios where we talk about the flip-flop of
9 administrations and new people leave -- come in
10 and replace others and -- and there's a lot of
11 movement from industry in and out of those
12 agencies. I -- I think George Stigler talked
13 about regulatory capture.

14 And I -- I don't worry in a Chevron
15 regime about those people. They can take care
16 of themselves, okay? There is political
17 account, fine.

18 The cases I saw routinely on the
19 courts of appeals -- and I think this is what
20 niggles at so many of the lower court judges --
21 are the immigrant, the veteran seeking his
22 benefits, the Social Security Disability
23 applicant, who have no power to influence
24 agencies, who will never capture them, and whose
25 interests are not the sorts of things on which

1 people vote, generally speaking.

2 And, there, Chevron is almost always
3 and, in fact, I -- I didn't see a case cited,
4 and perhaps I missed one, where Chevron wound up
5 benefitting those kinds of peoples. And it
6 seems to me that it's arguable, and, certainly,
7 the other side makes this argument powerfully,
8 that Chevron has this disparate impact on
9 different classes of persons, and I wanted to
10 give you a chance to respond to that.

11 GENERAL PRELOGAR: Sure, and I have a
12 couple of different reactions to that. You
13 know, one is to say that I, of course,
14 acknowledge that the way that Chevron operates,
15 it gives effect to agency interpretations even
16 in circumstances where that might be
17 oppositional, some of the categories of
18 individuals that you're identifying.

19 But, if it does that, it does that in
20 accordance with Congress's intent and wishes
21 because even my friend agrees that there are
22 certain delegations that Congress can make to
23 agencies and -- and certain gap-filling that
24 agencies can do at least with the broad and
25 capacious terms, and at that point, it's just

1 putting into effect what Congress decided.

2 So I don't think that there is any
3 kind of fundamental flaw in giving effect to
4 Congress's statutes in that regard.

5 JUSTICE GORSUCH: But you've left open
6 the possibility that a judge, if left to his own
7 devices, would say the fairest ruling is in
8 favor of the immigrant, it's in favor of the
9 veteran, and it's in favor of the Social
10 Security Disability applicant, but because of a
11 fictionalized statement about what Congress
12 wanted when it didn't think about the problem,
13 the government always wins.

14 GENERAL PRELOGAR: Well, I think there
15 are a couple of different ways to come at that
16 concern. One is to emphasize again that if it's
17 not just that in the exercise of discretion the
18 Court would think something is fairer and fill
19 the gap that way, but, rather, the Court thinks
20 actually the reason it's fairer is because I
21 have a -- a -- a sense that Congress spoke to
22 this, I can determine it based on all of the
23 tools, you can --

24 JUSTICE GORSUCH: Well, but we --

25 GENERAL PRELOGAR: -- resolve that at

1 step one.

2 JUSTICE GORSUCH: But -- but that
3 doesn't work, though, because you've said that
4 it doesn't matter whether Congress actually
5 thought about it and that --

6 GENERAL PRELOGAR: Yes. So --

7 JUSTICE GORSUCH: -- and that there
8 are many instances where Congress didn't think
9 about it. And in every one of those, Chevron is
10 exploited against the individual and in favor of
11 the government.

12 GENERAL PRELOGAR: I don't think it's
13 fair to treat that as an exploitation. Congress
14 has been aware of the rules here. It could
15 change Chevron at any time. It could displace
16 it --

17 JUSTICE GORSUCH: Yes.

18 GENERAL PRELOGAR: -- if it thinks
19 that it's being used --

20 JUSTICE GORSUCH: All right.

21 GENERAL PRELOGAR: -- in these
22 circumstances where it's not warranted.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh?

25 JUSTICE KAVANAUGH: A few questions.

1 I think the other side's argument suggests that
2 the basic analytical concern at the heart of
3 Chevron is that it treats law as policy and that
4 that's antithetical to our constitutional
5 structure and the rule of law.

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

11 And you're saying no, you can stop
12 short of that in an agency case at some
13 difficult-to-define point and then treat the
14 rest of the case as a -- as a policy call for
15 the executive branch.

16 And that's treating what was a law
17 question in a non-agency case as a policy
18 question in an agency case, and it's the same
19 question. So it's transforming law into policy.
20 And that's very difficult, I think, to accept if
21 you accept the idea that a premise of the rule
22 of law is that the executive and the judiciary
23 can't just treat the laws passed by Congress as
24 mere expressions of policy that they can change.

25 Respond to that.

1 GENERAL PRELOGAR: So I hear that
2 concern, and I think the way to address that
3 concern is to reinforce the principle in
4 Footnote 9.

5 We agree that that's an important
6 principle. And to the extent that there are
7 agencies out there or lower courts out there
8 that are effectively not giving the -- the
9 effect to Congress's own enactments, then a
10 court can police that and it can put into effect
11 the Footnote 9 principle in a robust way with a
12 rigorous analysis. That's the kind of
13 instruction the Court gave in *Kisor*.

14 And, Justice Kavanaugh, I think it's
15 not a -- a different question in the agency
16 context and in the non-agency context. What I
17 understand *Chevron* to be doing is telling the
18 court in the first instance figure out if
19 Congress spoke to this issue and, if so,
20 implement it, but hold open the possibility that
21 Congress didn't speak to the issue.

22 And in that context, if Congress has
23 given the agency this primary critically
24 important role to administer the statute, that
25 should merit deference if the agency still stays

1 within the bounds that Congress set.

2 In a non-agency case, you don't have
3 the agency to rely on, but you might still end
4 up at the end of the interpretive process
5 thinking Congress didn't precisely speak to this
6 issue, but what is the best I can do to figure
7 out how Congress would have resolved it or what
8 is the interpretation most consistent with the
9 overall statutory scheme here?

10 The right way to resolve this case,
11 Congress, in fact, would know that courts are
12 going to have to do that in a context without an
13 agency, and so it's still following the terms of
14 the statute, but I think it would be a fiction
15 to suggest that what the Court is doing there is
16 just following Congress's explicit directions on
17 the matter --

18 JUSTICE KAVANAUGH: Well, can I ask --

19 GENERAL PRELOGAR: -- because that's
20 at war with the idea that there is genuine
21 ambiguity sometimes.

22 JUSTICE KAVANAUGH: Yeah. And I think
23 it's important to distinguish, and I think you
24 would distinguish, statutes that involve legal
25 questions of statutory interpretation and then

1 there are tons of statutes, to go back to the AI
2 example, that explicitly confer broad policy
3 discretion on agencies.

4 GENERAL PRELOGAR: Yes. Yes.

5 JUSTICE KAVANAUGH: And that's where
6 State Farm kicks in, and that's where we've
7 always been deferential.

8 GENERAL PRELOGAR: Yes, correct.

9 JUSTICE KAVANAUGH: And you
10 acknowledge those are two different kinds of
11 statutes, a statute that says -- for example,
12 one statute might say no -- no one can catch
13 more than 50 fish today, the next statute may
14 say the agency can define what a reasonable
15 number of fish that can be caught in a
16 particular day. That second statute's
17 conferring broad policy discretion to define the
18 limit on the agency.

19 You agree those are distinct?

20 GENERAL PRELOGAR: Well, I -- I think
21 that one is obviously a clearer bestowal of
22 discretion on the agency, but I think it just
23 shows that Congress can legislate in a variety
24 of ways.

25 And if you think about some of these

1 examples, note --

2 JUSTICE KAVANAUGH: Can I just stop
3 you right there? And -- and so you agree
4 Congress can legislate broad policy discretion
5 to an agency, can -- can grant broad policy
6 discretion explicitly through words like
7 "reasonable," "appropriate" --

8 GENERAL PRELOGAR: Yes.

9 JUSTICE KAVANAUGH: -- "public
10 interest"?

11 GENERAL PRELOGAR: Absolutely.

12 JUSTICE KAVANAUGH: Okay.

13 GENERAL PRELOGAR: And I think that
14 the same question of what does the court do
15 without the agency can sometimes come up in
16 those contexts. If Congress has said, to -- to
17 borrow from the Chief Justice's example,
18 reasonable truck lengths and, you know, there
19 isn't an agency interpretation of that, the
20 court's going to have to do its best.

21 JUSTICE KAVANAUGH: Right.

22 GENERAL PRELOGAR: But I understood my
23 friend to concede that is actually meaning to
24 create a zone of discretion --

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

1 GENERAL PRELOGAR: -- for the agency
2 to operate in.

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

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

8 So there's some discussion of this
9 would be taking power from the executive and
10 granting it to the judiciary. I guess a
11 different conception of this, of Chevron, is
12 that it's taken power from Congress and shifted
13 it to the executive and allowed the executive,
14 in essence, to unilaterally make policy without
15 Congress.

16 And one of the concerns historically
17 from the beginning of this country was unchecked
18 executive power, and you hear presidents
19 criticized all the time, whether it's -- you
20 know, Roosevelt or Reagan or Bush or Obama are
21 criticized for exercising unchecked power. So
22 the concern is, about Chevron, in essence
23 ushering in aggressive assertions of unilateral
24 executive power, and that's the concern that I
25 think the other side has, not about the

1 judiciary taking power but the judiciary having
2 taken it from Congress and shifted it to the
3 executive, contrary to our usual concerns.

4 GENERAL PRELOGAR: So I disagree with
5 their characterization that Chevron permits the
6 executive to claim power away from Congress and
7 Congress is powerless to do anything about that.
8 You know, in the first instance, of course,
9 Congress has to make the delegation to the
10 agency, and the Court can enforce that. And so
11 Congress knows, as this Court has said in *City*
12 of *Arlington*, to speak capaciously when it wants
13 to bestow discretion, to speak plainly when it
14 wants to rein an agency in and resolve an issue
15 itself, and also Congress can change the rules
16 of deference that apply in any context.

17 There have been particular statutory
18 schemes where Congress has said deference
19 doesn't exist in this context, don't apply it,
20 or defer to this agency and not this other
21 agency. So -- so Congress is really in the
22 driver's seat here.

23 JUSTICE KAVANAUGH: Well, most -- this
24 is a technical point. Most presidents would
25 veto a bill getting rid of Chevron deference and

1 so -- but that's a technical point. But last --

2 (Laughter.)

3 JUSTICE KAVANAUGH: -- last -- last
4 question, which is there was talk about
5 democratically elected political branches, but I
6 just want to get your agreement on something
7 that I think you'll agree on, which it's the
8 role of the judiciary historically under the
9 Constitution to police the line between the
10 legislature and the executive to make sure that
11 the executive is not operating as a king, not
12 operating outside the bounds of the authority
13 granted to them by the legislature.

14 Do you agree that's a proper judicial
15 role, I would assume?

16 GENERAL PRELOGAR: I, of course, agree
17 with that, but I think Chevron is consistent
18 with that. The court polices the executive at
19 step one by ensuring that Congress's own choices
20 are put into operation, and it further polices
21 the executive at step two. As the Court said in
22 *Kisor*, reasonableness is a test that agencies
23 can fail. And so there's work to be done --
24 done there too to make sure the agency doesn't
25 transgress some outer bound or line that

1 Congress set.

2 JUSTICE KAVANAUGH: Thank you very
3 much.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 Justice Jackson?

7 JUSTICE JACKSON: So just picking up
8 where Justice Kavanaugh left off, doesn't the
9 Court have to not only police the other branches
10 but itself as well? And by that, I mean, to the
11 extent that the other side raises the concern
12 that, you know, they're treating law as policy,
13 isn't there a concern that policy questions
14 might be treated as law and that what Chevron is
15 doing is also helping the Court to police its
16 own determinations in that regard?

17 GENERAL PRELOGAR: Yes. And I think a
18 way to illustrate this is to think about a
19 delegation like the deceptive practices as
20 defined by the Secretary. If there were a
21 statute that said that, of course, a court
22 couldn't come in and say, well, the Secretary
23 has said what's a deceptive practice, but I -- I
24 think that actually there's a better way to
25 think about the concept of what is deceptive

1 and, therefore, I'm going to override what the
2 agency has done or not give any weight to it.

3 Congress has directed there that what
4 you should do as a court is pay attention to
5 what the Secretary did because the Secretary was
6 given that role in administration. Obviously,
7 Chevron applies to circumstances where that
8 delegation is not quite as explicit, but it's
9 meant to identify the same basic idea where I
10 think the courts' role then is to give effect to
11 what Congress has done.

12 JUSTICE JACKSON: But why isn't the
13 answer what -- what the other side says, which
14 is, really, make Congress say that? In other
15 words, you know, it seems to me their argument
16 is, when we're policing this line between what
17 is law and what is policy, we should require
18 Congress to say the Secretary gets to make this
19 decision, and when it doesn't, then I guess we
20 look at it as a legal question that the courts
21 can decide.

22 GENERAL PRELOGAR: So I think that
23 that argument would have more merit if there
24 weren't so much water under the bridge and the
25 fact that the Court explained when it would

1 identify this kind of delegation 40 years ago.
2 And, you know, Petitioners talked about the
3 reliance interests here and tried to diminish
4 them. They didn't talk about Congress's own
5 reliance interests in enacting statutes against
6 the backdrop of Chevron.

7 So I think, at this juncture, to say
8 we're actually going to switch the default and
9 make Congress say discretion is conferred would
10 be really to run to the detriment of Congress's
11 own reasonable expectations with respect to
12 drafting.

13 And I think it also doesn't account
14 for the category of cases where the language
15 that Congress is using is infused with
16 discretion. They agree to terms like
17 "reasonable," "appropriate," "necessary." Those
18 are terms that require greater application to
19 concrete factual settings to fill in the
20 details, and you can't just interpret those
21 terms in a vacuum. So I don't understand how
22 this idea of just making Congress say it could
23 function in that kind of world.

24 And then the final thing is Congress
25 has said something very important here, which is

1 the agency shall administer the statute with
2 regulations or adjudications that have the force
3 of law. That is part of the statute as well.
4 And I think --

5 JUSTICE JACKSON: And you think that
6 that really carries a lot? I've heard you use
7 that and focus on that many times when you're
8 talking about a situation in which deference is
9 or should be required.

10 GENERAL PRELOGAR: Exactly. So
11 Congress, in each and every statute where this
12 is going to be applicable, where Chevron
13 deference will even be available, is going to
14 have to have made that judgment in the statute
15 to give the agency that responsibility and role
16 in implementing the statute.

17 JUSTICE JACKSON: And let me just ask
18 you about whether or not -- going to the issue
19 of ambiguity, which has come up many times,
20 whether or not the court could clarify when
21 there is a gap or ambiguity that allows for or
22 requires the court to -- to -- to go to step
23 two. And what I'm thinking about is what I
24 mentioned previously with your friend on the
25 other side, which is that some scholars have

1 actually identified different kinds of
2 ambiguity.

3 So, in one scenario, we have a statute
4 that uses a broad term, and that term
5 encompasses a range of reasonable meanings.
6 There are three or four different ways that
7 could be reasonably -- you know, the meaning of
8 "stationary source," for example.

9 But then there's also the kind of
10 ambiguity in which a statute can mean only one
11 thing, either A or B, perhaps because of the way
12 the -- the -- the language, you know, is put
13 forward in the statute. It's just unclear
14 whether it means A or B.

15 I take these scholars to mean that,
16 really, in -- the former scenario is the one in
17 which we have a situation, in -- you know, where
18 Chevron deference would be required. And could
19 the Court say something like that?

20 And let me just clarify. I mean,
21 Chevron, I -- I look at it as that's reducing to
22 a policy choice, that once we are in the world
23 of finding the kind of ambiguity where there are
24 a number of reasonable alternatives in terms of
25 making this determination, then, you know, it's

1 just going to be a policy choice as to which
2 one, you know, Congress -- Congress wanted in
3 some sense or which entity Congress wanted to
4 make that decision.

5 GENERAL PRELOGAR: So I -- I think
6 that there -- certainly, this Court could
7 provide more guidance to lower courts and, in
8 particular, identify the types of statutory
9 issues that might clearly connote discretion,
10 there are going to be some easy calls on this,
11 and the types of situations where there might be
12 multiple, possible ways to implement and play
13 that will signal that there really is a zone of
14 discretion and the agency should have some
15 flexibility.

16 My only concern with going down the
17 road of saying there's some fundamental
18 difference with respect to particular terms that
19 might be subject to only two possible ways to be
20 implemented is that, you know, there are kind of
21 an endless number of statutes out there and all
22 kinds of varieties, and I worry that it might
23 lose sight of certain contexts where Congress
24 actually was comfortable with either way of
25 implementing that particular term, even if there

1 are only two possibilities, and did, in fact,
2 delegate that issue to the agency.

3 So I wouldn't want some kind of, you
4 know, bright-line rule to diminish the courts'
5 ability to recognize and implement that kind of
6 delegation.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 General.

10 Mr. Martinez, rebuttal?

11 REBUTTAL ARGUMENT OF ROMAN MARTINEZ
12 ON BEHALF OF THE PETITIONERS

13 MR. MARTINEZ: Thank you, Your Honor.
14 Just a few points in rebuttal.

15 First of all, I think it's really
16 important to be very clear about what Chevron
17 does. It takes the power to say that the law --
18 what the law means, to say that the law means X,
19 and it takes that power away from courts and it
20 gives it to agencies, and it then forces
21 agencies -- forces courts to adjudicate the
22 rights of individual litigants that are in front
23 of them based on a version of the law that the
24 courts themselves do not believe is correct, do
25 not believe is the best interpretation.

1 Neither Congress nor this Court can
2 create a doctrine or legislate a statute that --
3 that effectuates that reallocation of
4 interpretive authority. My friend on the other
5 side said that the purpose of Chevron is to set
6 the ground rules on -- on how the -- the
7 different branches of government should operate.

8 With respect, I think the Constitution
9 sets those ground rules, and the Constitution
10 makes clear that the judicial power, the power
11 to say what the law is, the power to interpret
12 the law, rests with courts, not with agencies,
13 and -- and certainly not with Congress either.
14 And I think the APA reinforces that.

15 The Solicitor General tries to -- to
16 rescue or reconceptualize Chevron by I think
17 taking issue with our argument that under
18 Chevron, if the court thinks the best
19 interpretation is X, it sometimes is going to
20 have to apply Y because the agency told it to.

21 I think, if you look at Footnote 11 of
22 Chevron, that is exactly what Chevron itself
23 says. It -- it tells the agency -- the court
24 that it has to apply -- apply an interpretation
25 that the court itself would not choose, in other

1 words, an interpretation that the court itself
2 does not think is best.

3 The Solicitor General also describes
4 Chevron as applying, and -- and the formulation
5 that I heard a lot today is it applies if the
6 agency didn't resolve the question, which is a
7 kind of innocuous phrasing, but what is really
8 meant by that is that Chevron applies in cases
9 of ambiguity. And ambiguity has always been
10 understood as a situation where reasonable
11 people can disagree about what the law means.

12 And that just broadens the scope of
13 deference. Ambiguities are all over the place.
14 Courts resolve ambiguities all the time. That's
15 core to the interpretive function. And so
16 there's no reason to think that just because
17 Congress has accidentally left an ambiguity in a
18 statute, that what it's really trying to do is
19 have that ambiguity resolved by policy decisions
20 made by an agency.

21 Justice Barrett asked about the -- the
22 justification for Chevron and whether the intent
23 justification is really valid. And I took my
24 friend to -- to essentially concede that the
25 delegation is fictional but nonetheless to say

1 that we should apply it anyway as a presumption.

2 I -- I -- I don't think that you can
3 get the mileage that you need to get out of the
4 intentional delegation theory after you've
5 conceded it's fictional because the only reason
6 that intentional delegation theory has weight is
7 if it's actually what Congress wanted to do, and
8 if Congress didn't actually want to delegate it,
9 then we shouldn't be, you know, basing our
10 doctrine reconceptualizing how we think about
11 statutory interpretation based on this fictional
12 premise.

13 Here, there's really no reason to
14 think that Congress actually wanted to delegate
15 policymaking authority to agencies to resolve
16 ambiguity -- any ambiguity that arises in -- in
17 any statute administered by the agency.

18 I think the government's sort of
19 solution to that problem is to propose a clear
20 statement requirement on Congress. Hey, you can
21 just legislate more clearly. But ambiguities
22 are -- are -- are accidental; they're
23 unintentional. And so I don't think that works.
24 I think that would impose a massive clarity tax
25 on Congress that's unjustified.

1 With respect to the history, Your
2 Honor, I think the mandamus precedents make very
3 clear themselves that they're talking about
4 remedies, and those cases like Decatur and
5 Dunlap expressly say that if we were
6 interpreting these -- these legal issues in a
7 different context, where we weren't limited by
8 the limits on mandamus remedies, we would apply
9 our -- our best and independent judgment.

10 With respect to the APA, the Solicitor
11 General is looking at text that -- that requires
12 courts to interpret statutory provisions and --
13 and is saying that that rule, interpret
14 statutory provisions, is consistent with
15 Chevron, which she describes in her brief as
16 allocating interpretive authority to agencies.

17 So the statute says courts do the
18 interpretation. Chevron says agencies get
19 interpretive authority, not courts. These are
20 inconsistent. Chevron's not consistent with the
21 APA.

22 Finally, with respect to the -- the
23 course correction idea or the amend it, don't
24 end it approach, I would just respectfully
25 suggest that you've tried to amend this. You've

1 tried to course correct over and over again over
2 the years. That's why we have a Chevron
3 doctrine. It's overladen with a lot of bells
4 and whistles. It's very hard to apply in
5 practice.

6 I think, in -- in -- in the real
7 world, if you try to amend it without ending it,
8 what's going to happen is you're going to put a
9 lot of pressure on the Major Questions Doctrine.
10 People are going to be coming to this Court
11 every three or four years asking you to adopt a
12 new limitation, a new caveat, a new threshold
13 test.

14 We would respectfully suggest that the
15 solution here is to recognize that the
16 fundamental problem is Chevron itself.
17 Interpretive authority belongs to the courts.

18 If we have the best view of the
19 statute, we should win this case. Thank you,
20 Your Honors.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 The case is submitted.

24 (Whereupon, at 12:17 p.m., the case
25 was submitted.)

Official

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