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IN THE SUPREME COURT OF THE UNITED STATES

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LOPER BRIGHT ENTERPRISES, ET AL.,)

Petitioners,)

v.) No. 22-451

GINA RAIMONDO, SECRETARY)

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 12:20 p.m.

APPEARANCES:

PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; 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

(12:20 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 20 -- Case 22-451, Loper Bright Enterprises versus Raimondo.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

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

This case well illustrates the real-world costs of Chevron, which do not fall exclusively on the Chevrons of the world but injure small businesses and individuals as well.

Commercial fishing is hard. Space onboard vehicle -- vessels is tight, and margins are tighter still. Therefore, for the -- for the -- for my clients, having to carry federal observers on board is a burden, but having to pay their salaries is a crippling blow.

Congress recognized as much by strictly limiting the circumstances in which domestic fishing vessels could be saddled with monitoring costs and capping them at 2 to 3 percent of the value of the catch. But the

1 agency here showed no such restraint, requiring
2 monitoring on 50 percent of the trips at a cost
3 of up to 20 percent of their annual returns.
4 Nonetheless, the court below deferred to the
5 agency because it viewed the statute as silent
6 on the "who pays" question.

7 There is no justification for giving
8 the tie to the government or conjuring agency
9 authority from silence. Both the APA and
10 constitutional avoidance principles call for de
11 novo review, asking only what's the best reading
12 of the statute. Asking, instead, is the statute
13 ambiguous is fundamentally misguided. The whole
14 point of statutory construction is to bring
15 clarity, not to identify ambiguity.

16 The government defends this practice
17 not as the best reading of the APA but by
18 invoking stare decisis. That is doubly
19 problematic. First, at issue here is only
20 Chevron's methodology, which is entitled to
21 reduced stare decisis effect. We have no beef
22 with Chevron's Clean Air Act holding, and we
23 could not take issue with its APA holding
24 because it failed to mention that statute.

25 But, second, all the traditional stare

1 decisis factors point in favor of overruling
2 Chevron's methodology. The doctrine is
3 unworkable as its critical threshold question of
4 ambiguity is hopelessly ambiguous. It is also a
5 -- a reliance-destroying doctrine because it
6 facilitates agency flip-flopping.

7 So the reality here is the Chevron
8 two-step has to go and should be replaced with
9 only one question: What is the best reading of
10 the statute?

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Mr. Clement, you
13 heard the government's, the General -- General's
14 arguments with respect -- the use of mandamus as
15 a basis for sort of deference.

16 Could you comment on that? Because my
17 understanding of mandamus is that a duty has to
18 be clear before it actually lies, but I'd like
19 your comment on that.

20 MR. CLEMENT: Absolutely, Justice
21 Thomas. So I think mandamus is a critical
22 recognition of the fact that, of course,
23 Congress can limit the remedies available in
24 particular circumstances, and that's the right
25 way to understand the mandamus standard.

1 But that's quite different from
2 telling the courts that they're to engage in
3 statutory construction, as Congress clearly did
4 in Section 706 of the APA, but then say there's
5 a point at which you can't actually give us your
6 best answer because you're deferring.

7 And I think it's important from a
8 separation of powers to under -- purpose to
9 understand that it's not just remedies are
10 different. There's an accountability
11 difference, because I suppose Congress tomorrow
12 could decide that we're going to go back to a
13 world where the only review of executive branch
14 action is mandamus. But then Congress would be
15 fully responsible for that highly unpopular
16 decision.

17 But -- so that's the difference, I
18 think, the fundamental difference from a
19 separation-of-powers standpoint, between a
20 limitation on remedies, where Congress does it
21 specifically, and essentially telling the courts
22 in the APA specifically you have the
23 interpretive authority over statutes no less
24 than constitutional issues but then overlaying a
25 doctrine that says what we're doing is

1 interpretation.

2 And that's the critical thing about
3 the interchange between Footnote 9 and Footnote
4 11. Footnote 9 tells you as clearly as you can
5 what you're doing in a Chevron case is statutory
6 interpretation. But then, in Footnote 11, it
7 says, at a certain point, you stop doing
8 statutory interpretation, even though you think
9 there's a better answer, and you defer to a
10 different branch of government. And it's not
11 the branch of government the Framers gave the
12 interpretive authority to. It's the branch of
13 government that the Framers gave the
14 implementing authority.

15 So I think, from that standpoint,
16 Chevron is a fundamental egregiously wrong
17 decision that just gets it wrong --

18 JUSTICE SOTOMAYOR: There's -- this is
19 --

20 MR. CLEMENT: -- on the basis of
21 separation of powers.

22 JUSTICE SOTOMAYOR: There's such a
23 tension in this. Interpretive authority,
24 everybody seems to concede, means discretion.
25 It means there's multiple meanings that you can

1 take from something, and someone has to choose
2 among those meanings.

3 It seems like most people agree, if
4 the court -- if the statute uses "reasonable,"
5 that Congress is delegating the definition of
6 "reasonable" to the agency, and the agency is
7 deciding what is reasonable within some outer
8 limit either set within the statute or -- or
9 within the law.

10 But the point is that I don't -- it --
11 it -- it -- it's great rhetoric, Mr. Clement,
12 but we do delegate, we have recognized
13 delegations to agencies from the beginning of
14 the founding of interpretation. And so I -- I
15 -- I'm --- I'm at a loss to understand where the
16 argument comes from.

17 MR. CLEMENT: Well, let me try to
18 clarify. I think there is a difference between
19 recognizing discretion and recognizing
20 delegation. There are certain statutory terms,
21 as you yourself point out, that have -- that --
22 that, properly construed by the courts
23 definitively, would give the agency a realm of
24 discretion in which to operate.

25 But there are other terms in which it

1 is really a binary question. And the problem,
2 the fundamental failing of Chevron is it doesn't
3 do a good job of distinguishing between the two.

4 And the best example is Brand X.
5 Broadband communications are either an
6 information service or they are a
7 telecommunication service. It might be hard to
8 figure out which one, but they can't be one on a
9 Tuesday and the next on a Thursday.

10 JUSTICE SOTOMAYOR: Well, wait a
11 minute. That's -- that's --

12 MR. CLEMENT: It's a binary question.

13 JUSTICE SOTOMAYOR: -- that -- it may
14 be binary to you, but I do know that with the
15 development of technology and with the
16 development of how that is implemented in terms
17 of transmission and the Internet, that over time
18 that's going to change.

19 MR. CLEMENT: But, Justice Sotomayor
20 --

21 JUSTICE SOTOMAYOR: And just the same
22 issue even in the case that we're in right now,
23 there were two areas that Congress looked at and
24 knew that monitors were critical, okay, foreign
25 sea travel for obvious reasons because there's

1 very little that, outside, once those ships
2 leave, that people -- that the U.S. Government
3 can do to them, and the other was the -- I think
4 it was the North Pacific area, but the point is
5 that that doesn't mean that similar problems
6 didn't arise later and that the broad words
7 giving the Secretary the power to monitor and
8 implement measures to ensure that its
9 conservation goals were being followed wasn't
10 given to the agency.

11 Those are the facts of what we should
12 be looking at, in my judgment, is, is -- is this
13 measure commensurate with what drove the similar
14 measure, not identical, in the other two
15 examples and the agency should have first crack
16 at that.

17 MR. CLEMENT: So I disagree --

18 JUSTICE SOTOMAYOR: If they're not
19 similar, the Court will look at it and say your
20 decision was arbitrary and capricious. If they
21 are similar, we might say, okay, this is all
22 right. I don't know the answer to that because
23 we really haven't dug into that, but it's just a
24 point I'm making --

25 MR. CLEMENT: So --

1 JUSTICE SOTOMAYOR: -- which is that
2 things change on the ground --

3 MR. CLEMENT: So --

4 JUSTICE SOTOMAYOR: -- and a
5 definition you give today may not hold up to new
6 facts.

7 MR. CLEMENT: So facts do change on
8 the ground. That is part of the problem with
9 Chevron and Brand X. If there's a difficulty in
10 classifying broadband today, the difficulty is
11 that the statute was last passed in 1996, so
12 figuring out whether 2023 broadband is a 1996
13 information service or a 1996 telecommunication
14 service is a granddaddy of a problem, but it
15 does have a binary answer. It's one or the
16 other.

17 Now, bringing it home to this statute,
18 what I would say is, if you do the Chevron
19 ambiguity test, you find a word like
20 "appropriate" in the statute or maybe for some
21 people "carry," though I think that one's pretty
22 clear, and you say that word is ambiguous, so
23 I'm going to go to step two. That's what the
24 court below did.

25 But, if you look at the statute as a

1 whole and if you looked at it the way you would
2 in any other context, I think what you would see
3 is this is a classic case for
4 exclusius/inclusius -- I forget the exact Latin
5 phrase -- but the point is you have a situation
6 where, in the most commercially well-heeled
7 fishery in the country, Congress did two things.
8 It said you may, not must, have monitors paid
9 for by the industry. But you must, if you do
10 that, cap the fees at 2 to 3 percent of the
11 value of the catch.

12 Now a Congress that did that with the
13 most well-heeled fishery in the nation I do not
14 think possibly conveyed the authority to the
15 agency to say with a much different fishery in
16 the Atlantic, where it's small businesspeople,
17 we're going to let you do effectively the same
18 thing, but we are going to let you do it to the
19 tune of 20 percent of their annual returns.

20 I think, if you strip away Chevron,
21 this is a fairly easy case where you just say,
22 wow, Congress had this question in mind in one
23 place or, actually, three places to be specific,
24 and with every domestic fishery, they only gave
25 it in two instances, and in both instances, they

1 said it can be no more than 2 or 3 percent of
2 the value of the catch.

3 CHIEF JUSTICE ROBERTS: You're just --
4 you're just -- you're just arguing that the
5 statute's not ambiguous on that question.

6 MR. CLEMENT: I am arguing that the
7 best reading of the statute is that my client
8 wins. Now, if I have to, I will go through --

9 CHIEF JUSTICE ROBERTS: Well, but it
10 seems -- it seems to me that you're not
11 contemplating the possibility of another reason,
12 and -- another result. And that may be right.
13 What you're saying is that this is not a case
14 where there can be a number of different
15 interpretations. But I don't think that's
16 coming to grips with the Chevron question.

17 MR. CLEMENT: Well, I hope it is, Your
18 Honor, because what I would say is exactly what
19 I heard Justice Kavanaugh saying, which is I
20 don't think there is a different rule of
21 statutory construction in cases where agency is
22 a party, in cases when agency is not a party.

23 In both cases, you just can't get to a
24 certain point and say: Gosh, this is hard. I
25 think the law has run out. In both cases, you

1 are supposed to take it all the way to coming up
2 with your best answer.

3 Now, if you do --

4 CHIEF JUSTICE ROBERTS: Well, you were
5 just saying, I mean, that the principle of
6 exclusio unius answers the question. And if it
7 answers the question, I -- I guess I don't
8 understand how you even get to the Chevron
9 issue, because Chevron, step one, you would give
10 the same answer.

11 MR. CLEMENT: Maybe you would, Your
12 Honor, but nobody knows where step two ends and
13 step two begins. And, you know, for -- I -- I
14 mean, I suppose now taking the hints from Kisor,
15 which is about Auer, not Chevron, you would say:
16 Well, of course, you apply all the canons of
17 statutory construction before you get to step
18 two.

19 But -- but the point is, in every
20 other case, you apply all those canons, and if
21 you're not sure about the answer, you dust off
22 the back of Scalia and Garner and you see if
23 there aren't some other canons.

24 JUSTICE KAGAN: Well, because you have
25 no other option. I mean, what -- what Chevron

1 is is it's a recognition that in certain cases
2 you apply all those tools and the conclusion you
3 come up with is Congress hasn't spoken to this
4 issue. And if you had no other option, you're a
5 court, there's a case before you, you try as
6 hard as you can, even though you know you're
7 basically on your own.

8 But, with -- when Chevron comes in,
9 when there is an agency, what Chevron says is
10 now there are two possible decision-makers,
11 there's the agency and there's the court, and
12 what we think is that Congress would have
13 preferred the agency to resolve this question
14 when congressional direction has -- cannot be
15 found because of the agency's expertise, because
16 of the agency's experience, because the agency
17 understands how this question fits within the
18 statutory scheme.

19 So it's not a question of the court
20 couldn't do it. It's a question of, once
21 congressional direction can't be found, who does
22 Congress want to do it.

23 MR. CLEMENT: So, Justice Kagan, I
24 don't agree with you that the law runs out in
25 those circumstances, even -- even though there's

1 an agency there, but I will give you this: If I
2 did believe it, I would say at that point let's
3 give the tie to the citizen. Let's not give the
4 tie to the agency.

5 And I think it's important --

6 JUSTICE KAGAN: See, I don't think
7 it's like what we would do; you would give the
8 tie to the citizen and I would give the tie to
9 the agency. Chevron is about what Congress
10 wants.

11 And you can call it fictional all you
12 want, but we have lots of presumptions that
13 operate with respect to statutory
14 interpretation, and this is just one of them.
15 It's just saying Congress understands as well as
16 anybody different institutional's comparative
17 attributes and comparative virtues, and it does
18 not want courts making -- you can -- I mean,
19 it's law, but it's policy-laden judgments
20 once -- once Congress's direction can't be
21 found.

22 MR. CLEMENT: So, Justice Kagan, if
23 we're going to talk about what Congress wants,
24 we probably should at least avert to the fact
25 that we do have an amicus brief in this case

1 from the House in its institutional capacity,
2 and it doesn't want Chevron. It's on our side
3 of the case, and it certainly --

4 JUSTICE KAGAN: If it doesn't want
5 Chevron, it has total control over Chevron. It
6 can reverse Chevron tomorrow with respect to any
7 particular statute and with respect to statutes
8 generally, and it hasn't. For 40 years, it has
9 acceded to Chevron. Except in super-rare cases,
10 it has basically said this is the background
11 rule, it gives us a stable default rule from
12 which to write statutes, and we've accepted
13 that.

14 MR. CLEMENT: So let me say three
15 things about that.

16 First of all, I'm not sure everybody
17 in Congress wants to overrule Chevron because
18 it's really -- it's --

19 JUSTICE KAGAN: Well, everybody in
20 Congress doesn't want to do everything --
21 anything.

22 MR. CLEMENT: But my point is it's
23 really convenient for some members of Congress
24 not to have to tackle the hard questions and to
25 rely on their friends in the executive branch to

1 get them everything they want.

2 I also think Justice Kavanaugh is
3 right that even if Congress did it, the
4 President would veto it.

5 And I think the third problem is, and
6 -- and fundamentally even more problematic, is
7 if you get back to that fundamental premise of
8 Chevron that when there's silence or ambiguity,
9 we know the agency wanted to delegate to the
10 agency.

11 That is just fictional, and it's
12 fictional in a particular way, which is it
13 assumes that ambiguity is always a delegation.
14 But ambiguity is not always a delegation. And
15 more often, what ambiguity is, I don't have
16 enough votes in Congress to make it clear, so
17 I'm going to leave it ambiguous, that's how
18 we're going to get over the bicameralism and
19 presentment hurdle, and then we'll give it to my
20 friends in the agency and they'll take it from
21 here.

22 And that ends up with a phenomenon
23 where we have major problems in society that
24 aren't being solved because, instead of actually
25 doing the hard work of legislation where you

1 have to compromise with the other side at the
2 risk of maybe drawing a primary challenger, you
3 rely on an executive branch friend to do what
4 you want. And it's not hypothetical.

5 When I hear you talk about --

6 JUSTICE SOTOMAYOR: You said you end
7 up in gridlock, which we have now.

8 MR. CLEMENT: No. What I'm saying is
9 Chevron is a big factor in contributing to
10 gridlock. And let me give you a concrete
11 example.

12 I would think that the uniquely 21st
13 Century phenomenon of cryptocurrency would have
14 been addressed by Congress, and I certainly
15 would have thought that would have been true in
16 the wake of the FTX debacle. But it hasn't
17 happened. Why hasn't it happened? Because
18 there's an agency head out there that thinks
19 that he already has the authority to address
20 this uniquely 21st Century problem with a couple
21 of statutes passed in the 1930s.

22 And he's going to wave his wand and
23 he's going to say the words "investment
24 contract" are ambiguous, and that's going to
25 suck all of this into my regulatory ambit, even

1 though that same person, when he was a
2 professor, said this is probably a job for the
3 CFTC.

4 JUSTICE BARRETT: Mr. Clement?

5 MR. CLEMENT: That's --

6 JUSTICE BARRETT: Oh, sorry. I -- I
7 was just going to ask you to address stare
8 decisis. Let's say -- let's -- let's assume for
9 the sake of argument that I agree with you that
10 in 706 Congress has spoken to the problem, that
11 we're not applying a fictional presumption but
12 that Congress has told us, you know, we want
13 courts to decide questions of law.

14 The -- the Solicitor General in the
15 last argument talked about how litigants will be
16 lining up for cases that were decided under step
17 two to seek to reopen challenges to the agency's
18 interpretation.

19 What do you have to say about the
20 disruptive consequences of overruling?

21 MR. CLEMENT: So I think the Solicitor
22 General, with all due respect, will be saying
23 the exact opposite if this Court overrules the
24 decision and will be saying, no, you've got to
25 look at it at the right level of generality.

1 What I would say is this Court has
2 moved away dramatically from certain methods of
3 interpretation, more dramatically than just we
4 look at legislative history less now than we
5 used to. Implied causes of action, as far as I
6 can tell, are dead. But that didn't mean that
7 every decision that was decided in the bad old
8 days was overruled ipso facto.

9 JUSTICE BARRETT: But that's a little
10 bit different because those implied causes of
11 action, the Court was saying this is what the
12 statute means, like Title IX implies a cause of
13 action or whatever.

14 This would be different because the
15 Court would just be saying may not be the best,
16 but the agency's interpretation is reasonable.
17 So it doesn't settle it in the same way that
18 maybe some of those old implied cause-of-action
19 cases did.

20 MR. CLEMENT: If you don't want there
21 to be disruption, all you have to do is make the
22 precise level-of-generality move that you
23 alluded to, which is I would think in every one
24 of these Chevron cases, the question is, is the
25 agency's interpretation of the statute lawful?

1 And if the court has already held yes, it is
2 lawful, I would think that would settle the
3 matter.

4 And as I say, in our brief, the only
5 reason I have any doubt about that is because of
6 Brand X. And Brand X is a huge embarrassment
7 for the government and the government's friend.
8 I looked through the bottom side amicus. I
9 counted 13 amicus briefs on the bottom side,
10 only two of them cited Brand X, because, gosh,
11 it would be nice for that decision to just go
12 away, wouldn't it? Wouldn't it?

13 JUSTICE BARRETT: Sorry, Justice
14 Thomas.

15 (Laughter.)

16 MR. CLEMENT: But that absolutely
17 makes clear that, you know, this is a
18 reliance-destroying doctrine. And, frankly, if
19 you said that Chevron is over and all of those
20 step two cases that were decided are going to
21 have stare decisis effect because of the level
22 of generality point I made, you would be giving
23 new stability to the law. It would be improving
24 stability.

25 And that's an important distinction

1 from Kisor. In Kisor -- you know, the Kisor
2 doctrine -- the Auer doctrine, rather, never had
3 its Brand X moment where this Court made clear
4 that the agency could flip 180 degrees. And,
5 indeed, in Kisor itself, it suggested the
6 opposite. But, here, with Chevron, we know this
7 is a -- a reliance-destroying doctrine.

8 Here's another thing to think about in
9 terms of Kisor. As I read the Court's decision,
10 in addition to the fact that we know it doesn't
11 directly speak to Chevron thanks to the Chief
12 Justice, I also read it as all -- all it says is
13 you need a special justification. Well, I think
14 we've offered you special justifications in
15 droves and special justification beyond the
16 decision being wrong. And I don't know of a
17 case where you would defer on stare decisis
18 grounds when the relevant decision didn't cite
19 the relevant statute at all.

20 I mean, look, this would be a
21 different world if Chevron went in and wrestled
22 with Section 706 and said, despite all contrary
23 textual indications, that it forecloses de novo
24 review of statutes. I suppose I'd have to be
25 here making every single stare decisis argument.

1 But that is not what Chevron did. It didn't
2 even mention the relevant statute.

3 Now, of course, I don't want to be
4 seen as running away from the stare decisis
5 factors because I'm happy to walk through all of
6 them because I think all of them cut in our
7 favor. The decision is tremendously unworkable.
8 Nobody knows what ambiguity is. Even my learned
9 friend on the other side says there's no formula
10 for it. And that's an elaboration on what the
11 government said the last time up here, which is
12 that nobody knows what "ambiguity" means. But
13 that's just workability.

14 Let's talk about reliance. I talked
15 about the Brand X problems, which are very
16 serious problems. And, like, I love the Brand X
17 case because broadband regulation provides a
18 perfect example of the flip-flop that can
19 happen, but it's not my only example. There are
20 amicus briefs that talk about the National Labor
21 Relations Board flip-flopping on everything.
22 Ask the Little Sisters about stability and
23 reliance interests as their fate changes from
24 administration to administration. It is a -- it
25 is a disaster. And then you get to the

1 real-world effects on citizens that Justice
2 Gorsuch alluded to.

3 But I'd like to emphasize its effect
4 on Congress because, honestly, I think, when the
5 Court was originally doing Chevron, it was
6 looking only at a comparison between Article II
7 and Article III and who's better at resolving
8 these hard questions. I think it got even that
9 question wrong, but it failed to think about the
10 -- the incentives it was giving the Article I
11 branch.

12 And that's what 40 years of experience
13 has shown us, and 40 years of experience has
14 shown us that it's virtually impossible to
15 legislate on meaningful issues, major questions,
16 if you will, because right -- because, right
17 now, roughly half of the people in Congress at
18 any given point are going to have their friends
19 in the executive branch. So their choice on a
20 controversial issue is compromise and forge a
21 long-term solution at the cost of maybe getting
22 a primary challenger or, instead, just call up
23 your buddy, who used to be your co-staffer, in
24 the executive branch now and have him give
25 everything on your wish list based on a broad

1 statutory term.

2 And my friends asked for empirical
3 evidence. I think you just have to look at this
4 Court's docket. It's been one major rule after
5 another. It hasn't been one major statute after
6 another. I would have thought Congress might
7 have addressed student loan forgiveness if that
8 were really such an important issue to one party
9 in the -- in -- in -- in Congress. I would have
10 thought maybe they would have fixed the -- the
11 eviction moratorium. I could go on and on on
12 these issues. They don't get addressed because
13 Chevron makes it so easy for them not to tackle
14 the hard issues and forge a permanent solution.

15 My friends on the other side also talk
16 about, you know, this is -- this is great
17 because it leads to uniformity in the law.
18 Well, I don't think that's an end in itself.
19 Again, if it were up to me, if we -- if we think
20 uniformity is so great, let's have uniformity
21 and let's have the thumb on the scale on the
22 side of the citizen.

23 But the reality is the kind of
24 uniformity that you get under Chevron is
25 something only the government could love because

1 every court in the country has to agree on the
2 current administration's view of a debatable
3 statute. You don't get the kind of uniformity
4 that you actually want, which is a stable
5 decision that says this is what the statute
6 means.

7 JUSTICE ALITO: Mr. Clement, can I ask
8 you the same question I asked Mr. Martinez about
9 why Chevron was initially popular? People who
10 were very sophisticated and had a deep
11 understanding of how judges decide what a
12 statute means and a deep understanding of how
13 administrative agencies work thought that
14 Chevron would be an improvement because it would
15 take judges out of the business of making what
16 were essentially policy decisions.

17 Now were they wrong then? And if they
18 weren't wrong then, what, if anything, has
19 changed since then?

20 MR. CLEMENT: So, Justice Alito, I
21 think they were partially right then. So let me
22 say what's changed and what hasn't changed,
23 i.e., what the Court missed back in Chevron.

24 What has changed is we've come a long
25 way in statutory interpretation. And, the --

1 you know, if Chevron was a response to some of
2 the excesses of the D.C. Circuit in the
3 freewheeling days of the late '70s and the use
4 of legislative history and, oh, by the way, the
5 text of the statute appears in the margin of my
6 opinion, and I'm not going to talk about it
7 again because I'm off to the races, we now, I
8 think, are all textualists. The focus is much
9 greater on the text of the statute.

10 And once you recognize that, you
11 recognize the problem with deferring at a
12 certain point to the agencies. And let's look
13 at the track record of the agencies before this
14 Court. If they are so expert, they should be
15 able to persuade you in case after case that
16 they're getting these statutes right. By my
17 count and by the Cato Institute in their -- in
18 their amicus brief, since the Court last cited
19 Chevron, the administration is batting about 300
20 in these cases.

21 So expertise is not all what it's
22 cracked up to be. And that's true even in the
23 most complicated cases. Look at the American
24 Hospital Association's case. I don't think
25 you're going to find a statute that's more

1 complicated than that one. But yet, this Court
2 had no trouble unanimously saying that you can't
3 have hospital chain-specific pricing without
4 first doing a survey.

5 JUSTICE ALITO: Well, I don't know
6 whether you can say we had no trouble.

7 (Laughter.)

8 JUSTICE KAVANAUGH: I -- I was going
9 to say that, but yeah.

10 CHIEF JUSTICE ROBERTS: So was I.

11 (Laughter.)

12 MR. CLEMENT: No one was troubled to
13 write a dissent.

14 (Laughter.)

15 MR. CLEMENT: Let me -- let me put it
16 that way. But -- and I can use other examples.
17 Encino, a case where this Court said that
18 Chevron wasn't applicable because of a
19 procedural defect. Now it split the Court 5 to
20 4, but how did it decide the case? It decided
21 the case with the distributive canon. Do you
22 think the Labor Department Wage and Hour
23 Division is the experts on the distributive
24 canon, or do you think the courts are?

25 CHIEF JUSTICE ROBERTS: Thank -- thank

1 you, Mr. Clement.

2 The answer from Mr. Martinez on
3 several questions about what happens when you,
4 you know, get rid of Chevron in this case was
5 Skidmore. And if Skidmore is going to occupy a
6 more prominent role going forward, I -- I'd like
7 to know exactly what your understanding of that
8 principle is.

9 MR. CLEMENT: So my understanding of
10 Skidmore, consistent with Justice Kavanaugh's,
11 is it's not actually a deference doctrine. Call
12 it a -- a doctrine of weight or persuasiveness.

13 And then the beauty of -- of Skidmore,
14 as I understand it -- I suppose the defect as
15 well, Justice Scalia called it the totality of
16 the circumstances -- but I think the Skidmore
17 test allows you to consider the weight of the
18 agency's views but then consider is it something
19 they came up with like right after the statute
20 was passed, so it actually sheds light on the
21 original public meaning of the statute, or is it
22 something that they didn't adopt for 20 years
23 later, or did they adopt one policy right after
24 the statute was passed and actually flip it over
25 20 years later?

1 All of that is something that Skidmore
2 can account for that Chevron has never been
3 caused to account for. Now you can modify it,
4 you know, à la Kisor and try to add all of that
5 to it, but I do think that the Chevron --
6 experiment has failed.

7 CHIEF JUSTICE ROBERTS: Well, it's
8 usually described as a deference doctrine.
9 People talk about Skidmore deference.

10 MR. CLEMENT: Yes, they do, Mr. Chief
11 Justice, and that puzzled me a little bit. And
12 I went to the dictionary and I looked up
13 "deference" and the most common definition is
14 "yielding to the will of another."

15 And I think, if that's the definition
16 of -- of "deference," then you shouldn't apply
17 Chevron -- Skidmore, rather -- in a way where
18 you actually say: All right, this is super
19 close, and I think I have the right answer, but
20 I'm going to yield to the position of the
21 executive branch.

22 JUSTICE GORSUCH: That's never what
23 Skidmore has been understood to mean or said.
24 It -- it said that the persuasiveness of the
25 government's interpretation depends upon the

1 circumstances. And some of those you
2 enumerated.

3 MR. CLEMENT: Absolutely.

4 JUSTICE GORSUCH: Call it what you
5 will, that's what it is, right?

6 MR. CLEMENT: Look, I don't mean to be
7 pedantic, but I do think that calling it
8 deference --

9 JUSTICE GORSUCH: I -- I -- I --

10 MR. CLEMENT: -- sort of gets you to
11 Footnote 11 land in a junior varsity way, and I
12 think that would be unfortunate.

13 JUSTICE GORSUCH: Yeah.

14 MR. CLEMENT: And the other great
15 thing about Skidmore is it --

16 JUSTICE KAGAN: We're out of order.

17 MR. CLEMENT: Oh. Sorry.

18 JUSTICE KAGAN: Skidmore, I mean, what
19 does Skidmore mean? Skidmore means, if we think
20 you're right, we'll tell you you're right. So
21 the idea that Skidmore is going to be a backup,
22 at -- once you get rid of Chevron, that Skidmore
23 means anything other than nothing, Skidmore has
24 always meant nothing.

25 MR. CLEMENT: I -- I -- Justice

1 Jackson, the earlier one, would beg to differ
2 with you on that score. He thought it was quite
3 important. And I think, you know, if you look
4 at the Skidmore case itself, I mean, it took
5 into account the Wage and Hour Division's view
6 of waiting time and, ironically enough in that
7 case, said, you know, we can't have a
8 bright-line test one way or another because the
9 agency has looked at this and thought a lot of
10 time, and it's really going to be more
11 fact-dependent than that and we can take that
12 into account.

13 I think, in some of these situations,
14 you are going to be able to look at the agency's
15 expertise and make a judgment that this is in
16 their bailiwick. They've really made some
17 pretty good points. But, in other contexts,
18 you're going to see that what the agency wants
19 you to defer to is its own view that lands it in
20 this case, we ran out of money and it sure would
21 be nice if we could just impose this fine and
22 continue to monitor these people at a 50 percent
23 rate by making them pay for it instead of us
24 having to pay for it.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 MR. CLEMENT: I mean, that's --
2 there's no expertise there.

3 CHIEF JUSTICE ROBERTS: Thank you.
4 Justice Thomas?
5 Justice Alito?
6 Justice Sotomayor?
7 Justice Kagan?

8 JUSTICE KAGAN: I guess what I'm
9 struck by, Mr. Clement, and -- and -- and this
10 follows from this Skidmore thing, because
11 Skidmore is not a doctrine of humility, but
12 Chevron is.

13 Chevron is a doctrine that says, you
14 know, we recognize that there are some places
15 where congressional direction has run out, and
16 we think Congress would have wanted the agency
17 to do something rather than the courts.

18 We accept that because that's the best
19 reading of Congress and also because we know in
20 our heart of hearts that Congress -- that
21 agencies know things that courts do not. And
22 that's the basis of Chevron.

23 And then you take that doctrine of
24 humility and you put on top of it stare decisis,
25 another doctrine of humility, which is to

1 suggest we don't willy-nilly reverse things
2 unless there's an -- a special justification.
3 Here, Kisor said it's even more than that,
4 there's even more reason not to reverse
5 something because there have been 70 Supreme
6 Court decisions relying on Chevron, because
7 there have been 17,000 lower court decisions
8 relying on Chevron.

9 And you're saying blow up one doctrine
10 of humility, blow up another doctrine of
11 humility, and then expect anybody to think that
12 the courts are acting like courts.

13 MR. CLEMENT: With respect, Your
14 Honor, this Court has on multiple occasions
15 corrected its own errors when it comes to
16 statutory interpretation, how to deal with
17 qualified immunity, implied causes of action.

18 In the Encino Motor cases -- Motor
19 case, there was a canon of construction that
20 said exemptions to FLSA provisions should be
21 construed narrowly. This Court overruled that
22 and said that should have no role to play in
23 interpreting the FLSA. It didn't run through
24 the stare decisis factors.

25 So I think there is, I don't know

1 whether you call it humility or just clarity,
2 but when the question is judicial methodology, I
3 think it's very weird to ask Congress to fix
4 your problems for you. I don't think you
5 actually want to invite, in all candor, that
6 particular fox into your hen -- henhouse and
7 tell you how to go about interpreting statutes
8 or how to go about dealing with qualified
9 immunity defenses.

10 JUSTICE KAGAN: But Kisor, five
11 Justices, a majority of this Court, made clear
12 that Auer deference was subject to normal
13 judicial -- normal principles of stare decisis.
14 And to the extent that there was a ratchet up or
15 a ratchet down, it ratcheted them up because it
16 understood that that deference decision
17 supported, was the basis for tens, hundreds,
18 thousands of other decisions.

19 MR. CLEMENT: So I'm going to be at a
20 disadvantage in debating what exactly Kisor
21 held, but the way I read Kisor is it said that
22 you need a special justification beyond the
23 decision being wrong. I think we've given you
24 that in spades.

25 Kisor did not, with all due respect,

1 wrestle with Saucier against Katz. It didn't --
2 it didn't wrestle with Gaudin in the opinion.
3 So I think I can -- I can reconcile all your law
4 by saying: All right, when it's a procedural
5 rule or a court-made rule of interpretation,
6 maybe we look to some of the same factors, but
7 they don't apply with the same weight as they
8 would if it were a substantive result.

9 And that does make sense because, at
10 least under our view of the world, when you move
11 on from a bad methodology, you don't overturn
12 all those decisions, those substantive
13 decisions. They still stay there.

14 So Section 1982 still has an implied
15 cause of action. Section 1981 still has a cause
16 of action. I could go on and on. Those cases
17 don't get overturned.

18 JUSTICE KAGAN: Thank you, Mr.
19 Clement.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 JUSTICE GORSUCH: One lesson of
23 humility is admit when you're wrong. Justice
24 Scalia, who took Chevron, which nobody
25 understood to include this two-step move as

1 originally written, and turned it into what we
2 now know, and late in life, he came to regret
3 that decision.

4 What do we make of that lesson about
5 humility?

6 MR. CLEMENT: No. I -- look, I -- I
7 do think that, you know, reconsidering
8 particularly a methodological error is part of
9 judicial humility. And I do think, if you look
10 at Justice Scalia's Perez opinion, the mortgage
11 banker cases, one of the things he said there
12 most clearly but he said all along was our
13 decision in Chevron was completely heedless of
14 Section 706 of the APA.

15 And if you're looking for a special
16 justification to overturn an opinion, I think
17 whiffing on the underlying statute entirely has
18 got to be at the top of the list.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: A couple
23 questions. First, on Skidmore, I just want to
24 say how I've thought about it, and you can tell
25 me whether this is wrong, that it respects

1 contemporaneous and consistent interpretations
2 as evidence of the proper original meaning of
3 the statute because that's kind of common sense
4 in statutory interpretation more generally, that
5 if an interpretation was contemporaneous and
6 consistent, it's more likely to be correct.

7 So that's respect, but the word
8 "deference" I wouldn't have -- wouldn't have
9 used there.

10 MR. CLEMENT: I -- I think you have
11 that exactly right. And one of the virtues of
12 looking at Skidmore that way is it is consistent
13 with a principle that this Court articulated in
14 the Christopher against SmithKline Beecham case,
15 which is sometimes the industry is the one with
16 a consistent, long-term understanding of the
17 statute that goes all the way back and sheds
18 light on the original public meaning.

19 And it seems to me Skidmore allows you
20 to say, if the industry says -- has taken a
21 position that's consistent from the beginning
22 and the agency flips 25 years into the
23 enterprise, Skidmore gives you the tools for
24 saying, all right, agency, you're going to lose
25 that case, Chevron doesn't.

1 JUSTICE KAVANAUGH: Right. A big
2 difference between Skidmore and Chevron -- there
3 are others -- is, when the agency changes
4 position every four years, that's going to still
5 get Chevron deference, but Skidmore, with the
6 respect to that interpretation, would drop out
7 because it's not been a consistent and
8 contemporaneous -- consistent from the
9 contemporaneous understanding of the statute.

10 MR. CLEMENT: Absolutely.
11 Flip-flopping is a huge Skidmore minus and it's
12 a matter of indifference -- or, actually, if you
13 look at some of the things that Justice Scalia
14 said in the beginning, when he was enthusiastic
15 about the doctrine, the fact -- he viewed the
16 fact that agencies could flip-flop under Chevron
17 as being an affirmative virtue.

18 JUSTICE KAVANAUGH: Then Justice Kagan
19 raises an important point about judicial
20 restraint or humility in terms of Chevron, and
21 that -- that's an important concern for any
22 judge.

23 I think the flip side, why this is
24 hard, the other concern for any judge is
25 abdication to the executive branch running

1 roughshod over limits established in the
2 Constitution or, in this case, by Congress.

3 So I think we've got to find the --
4 that's -- that's why it's hard, find the right
5 balance between restraint and letting the
6 executive get away with too much.

7 On that front, do you -- there was
8 questions earlier, do judges really rely on
9 Chevron? You want to speak to that?

10 MR. CLEMENT: No, I'd love to speak to
11 that, because I think that's an important
12 consideration. I mean, one of the premises of
13 one of Justice Kagan's questions in the first
14 argument was that, you know, you rarely get to
15 Chevron step two, but there are statistics on
16 this.

17 There is a -- you know, the most
18 exhaustive survey of over a thousand cases by
19 Barnett and Walker we cited on page 33 of the
20 blue brief. It found that courts were reaching
21 70 -- were reaching step two in 70 percent of
22 the cases, 70 percent of the cases.

23 The Cato Institute brief -- you might
24 think, well, things have gotten better because
25 that was a longitudinal study over a number of

1 years. You might think, well, things are
2 getting a lot better because we've signaled that
3 Chevron is on sort of life support. But the
4 Cato ran the numbers for, like, 20 -- 2020 and
5 2021, and it's down to 60 percent. But it's
6 still well over half the time your average judge
7 in the court of appeals is getting to step two,
8 and Judge Kethledge, you know, he hasn't updated
9 that speech, but, as far as I know, Judge
10 Kethledge still hasn't gotten to step two once.

11 And, you know, that's an -- that's --
12 that's an unsettlement in the law, that's a
13 disconnect in the law that is very hard to get
14 your fingers around. Like, at least if, you
15 know, one circuit says the statute means X and
16 another circuit says Y, everybody can see that,
17 cert can be granted, this Court can resolve the
18 case.

19 But, if courts are deciding some cases
20 step one, some cases step two, in ways that are
21 radically different, I don't even know how you
22 really unearth that. So I think that's another
23 huge problem with this.

24 JUSTICE KAVANAUGH: One last question.
25 If Chevron were overruled, I think your brief

1 says, we should go ahead and decide the issue,
2 the statutory issue in this case. Can you just
3 speak very briefly to why?

4 MR. CLEMENT: Very briefly, because I
5 think it would give a great illustration of how
6 to do plain old-fashioned statutory
7 construction. It would also be a useful object
8 lesson in how far very good judges get astray by
9 applying Chevron, because another problem with
10 Chevron -- I'll still try to be brief -- it
11 tends to focus on one or two terms and asks
12 whether they're ambiguous, and you lose the
13 context of the statute.

14 I think, if you have the context of
15 the statute and the fact that the only other
16 places they put these kind of fees on domestic
17 fisheries, they put a -- a serious cap, and then
18 they did it only for the most well-heeled
19 fisheries or in special circumstances, this is
20 an easy case doing good old-fashioned --

21 JUSTICE KAVANAUGH: Thank you.

22 MR. CLEMENT: -- statutory
23 construction.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: So we have a host of
3 canons, clear statement rules, some of which are
4 constitutionally inspired, and when I asked the
5 Solicitor General in the last argument about
6 whether Chevron should be thought -- thought of
7 as part of that package, she said that Chevron
8 kind of stood distinct, that Chevron was unique.

9 Can you address that?

10 MR. CLEMENT: I think she's right
11 about that. I think it -- it sits out there
12 like an island, and that's part of the reason to
13 overrule it. And I think all the other canons
14 --

15 (Laughter.)

16 MR. CLEMENT: -- I think all the other
17 canons that I can think of are fully consistent
18 with de novo statutory interpretation. I might
19 be missing one, but the ones I think of is, when
20 you're doing de novo statutory construction, you
21 take into account all of those canons.
22 Chevron's the only one I know that says that at
23 a certain point you just stop the de novo stuff
24 and you sort of surrender, even under
25 circumstances where, if the agency weren't a

1 litigant, you would keep going. I -- only
2 Chevron does that.

3 JUSTICE BARRETT: One last question.
4 You said -- you know, you pointed out that on
5 our docket we've had multiple cases in which the
6 Major Questions Doctrine has come up. Do you
7 think that overruling Chevron is going to solve
8 that problem? Because, in a lot of those cases,
9 the agency has hung its hat on words like
10 "appropriate," you know, on the kind of language
11 which I think -- and you can tell me if you
12 disagree about this -- I think you agree that
13 when a statute uses a word that leaves room for
14 discretion, like "appropriate," "feasible,"
15 "reasonable," that that is a delegation of
16 authority to the agency.

17 So don't you think agencies will still
18 continue to rely on words like that in ways that
19 might not, you know, limit our emergency docket?

20 MR. CLEMENT: I -- I'm not so naive to
21 say that overruling Chevron is going to solve
22 all the problems with the emergency docket, but
23 it is going to make it a lot better because,
24 sure, there are some places where they use
25 "appropriate" or they try to use "modify," which

1 was bold in light of AT&T, but whatever, they
2 picked some of these words that are more
3 capacious.

4 But that broadband case has come in
5 here. That's a case that shouldn't be
6 Chevronized. You know, the -- some -- someday,
7 somebody's going to litigate whether crypto is
8 an investment contract. Justice Kagan's
9 confident that, you know, AI is going to get
10 here because of a statute. I think it's more
11 likely that Congress is going to say, well,
12 there's some scientific officer in Commerce,
13 we'll let them fix the problem.

14 But -- so -- so my -- my own view of
15 this is it's not going to -- it's not a
16 cure-all, but it's going to move things very
17 much in the right direction.

18 JUSTICE BARRETT: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you.

20 General Prelogar, welcome back.

21 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

22 ON BEHALF OF THE RESPONDENTS

23 GENERAL PRELOGAR: Thank you, Mr.

24 Chief Justice, and may it please the Court:

25 Throughout this litigation and at

1 times this morning, Petitioners have sought to
2 characterize this case as presenting a
3 fundamental question of the separation of powers
4 and a test of Article III: Will courts continue
5 to say what the law is?

6 But I think, stepping back, I want to
7 make sure that what doesn't get lost in the
8 shuffle is that Petitioners have made an
9 important concession that I think illustrates
10 that the issue here is actually far narrower and
11 that their attacks on Chevron lack merit and are
12 unnecessary.

13 The concession is this: Petitioners
14 acknowledge that Congress can expressly delegate
15 to agencies the authority to define statutory
16 terms and fill gaps. Imagine, for example, if
17 the statute said, in Chevron, "stationary
18 source" as defined by the Administrator. I take
19 both Petitioners to give that up and recognize
20 that is a delegation and courts should respect
21 that.

22 The role of the court in that
23 circumstance is to make sure that the agency has
24 followed the proper procedures and stayed what
25 -- within whatever outer bounds Congress itself

1 has set. And all of that complies with the
2 Constitution, of course, because Congress has
3 Article I authority to delegate gap-filling
4 authority to agencies, and the executive has
5 core Article II authority to fill in those gaps.
6 That's a core exercise of the executive power.
7 And then the Article III courts are just
8 fulfilling their judicial role when they give
9 effect to what Congress has done in its choice
10 to rely on the agency in that regard.

11 But I think what all of this shows is
12 that the constitutional attacks on Chevron and
13 the suggestion that it's egregiously wrong in
14 that regard lack merit because there is no
15 constitutional distinction between that kind of
16 express delegation and the delegations
17 recognized in Chevron.

18 If Congress can expressly vest an
19 agency with authority to interpret the law
20 through an express delegation, then it can do
21 the same thing implicitly, especially in a world
22 where Congress has to provide the agency with
23 the express authority to carry the statute into
24 operation with the force and effect of law.

25 Now we can debate, of course, whether

1 Chevron drew the right line in identifying
2 exactly when these delegations have occurred. I
3 think the Court got that right for all of the
4 reasons I've tried to explain this morning. But
5 I -- I think it's important to recognize that
6 that debate doesn't have a constitutional
7 dimension to it that falls out of the equation.
8 Instead, it's just a question of whether the
9 Court drew the right line in identifying when a
10 delegation has occurred.

11 And if you recognize that, then I
12 think what's left over are the practical
13 concerns that have been raised about Chevron.
14 And I don't want to diminish the force of the
15 concerns that some members of the Court have
16 articulated, but I also think that those
17 concerns are manageable. The Court could do in
18 this case what it did in *Kisor*. It could
19 clarify and articulate the limits of Chevron
20 deference without taking the drastic step of
21 upending decades of settled precedent.

22 And I think that's the right thing to
23 do here. You know, my -- my friends in their
24 briefs both said judges should aspire to be like
25 umpires, calling balls and strikes. But stare

1 decisis is part of the rules of the game here
2 too. And in this case, I think all of the stare
3 decisis factors counsel in favor of retaining
4 Chevron.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: How do you -- how do
7 we discern statutory -- delegation from
8 statutory silence?

9 GENERAL PRELOGAR: So, Justice Thomas,
10 I think that it would be wrong to suggest that
11 you can neatly categorize cases as those
12 involving silence and those involving ambiguity.
13 And -- and the reason for that -- I recognize
14 that -- that Chevron itself used both of those
15 terms, but I think that the Court was just
16 trying to be comprehensive about those kinds of
17 circumstance where Congress hasn't itself
18 directly resolved an issue.

19 There's never going to be total
20 silence in a statute. At the very least, the
21 agency is going to have to be able to point to
22 the express delegation of rulemaking authority,
23 the directive from Congress to put the statute
24 into effect with the force of law. So that will
25 always be at least a baseline in this context.

1 And then, in the mine-run case, you'll be able
2 to point to any number of additional features of
3 a statute that help to signal the agency's
4 authority.

5 And, actually, this case is the
6 perfect example because my friend said that the
7 Magnuson-Stevens Act here is silent on the issue
8 of whether the industry can be required to pay
9 for monitors. But we have four different
10 provisions of the Act that we've pointed to that
11 undergird the agency's authority.

12 There's the provision that expressly
13 says that the agency can require the vessels to
14 carry the monitors. Then there's the -- the
15 definition of what a monitor is under the
16 statute. It can include a private third party.
17 Then there's the penalty provision that says, in
18 a circumstance where the vessel owner has
19 contracted with a private third party and not
20 paid, the agency can penalize. And, finally,
21 there's the residual authority to enact
22 necessary and appropriate terms in these Fishery
23 Management Plans. So we don't think that this
24 is a case about silence at all.

25 JUSTICE GORSUCH: General, yeah,

1 that's really good -- again, we're back to the
2 same question the Chief had of -- of Mr.
3 Clement. That's a really good statutory
4 interpretation argument, sounds like exactly the
5 bread and butter of what we do every single day.
6 And we can resolve that, right?

7 GENERAL PRELOGAR: We think that you
8 could find that the statute is clear, but I
9 think that --

10 JUSTICE GORSUCH: The fact that you
11 think it's clear and Mr. Clement thinks it's
12 clear but a court below thought it was ambiguous
13 should tell us something, shouldn't it?

14 GENERAL PRELOGAR: No, I disagree with
15 that, and I should say that I think, actually,
16 if you look at both what the D.C. Circuit and
17 the First Circuit were doing in these cases,
18 they recognized the force of the arguments. The
19 D.C. Circuit, it's true, in *Loper Bright*
20 acknowledged that, ultimately, it couldn't
21 conclude with confidence that the statute
22 definitely authorized the agency explicitly --

23 JUSTICE GORSUCH: But you think it
24 does.

25 GENERAL PRELOGAR: We think that there

1 is a lot in the statute to -- yes --

2 JUSTICE GORSUCH: You think yes --

3 GENERAL PRELOGAR: -- to support the
4 agency's interpretation.

5 JUSTICE GORSUCH: -- yes, you think
6 you win under step one, and so does Mr. Clement.
7 And yet here we are.

8 GENERAL PRELOGAR: I don't think it's
9 at all unusual to find a case where the
10 government thinks it has both the -- the -- the
11 clear interpretation of the statute on its side
12 and that the agency has acted reasonably.

13 JUSTICE GORSUCH: Yeah, because --
14 because we have this ambiguous ambiguity trigger
15 that nobody knows what it means.

16 GENERAL PRELOGAR: Well, Justice --

17 JUSTICE GORSUCH: Now let me just ask
18 you about the delegation, your -- your -- your
19 example in -- in the opening, which is
20 interesting.

21 GENERAL PRELOGAR: Yeah.

22 JUSTICE GORSUCH: I -- I totally
23 understand a statute that does delegate, you
24 know, you make up what rate you think, and --
25 and -- and that might pose a delegation problem,

1 might not, fine, but we know Congress delegated
2 it. That's one thing.

3 What you're asking us to do is infer
4 from a linguistic ambiguity that may not be the
5 product of any intent at all, Pulsifer, "and"
6 might mean "or" in some circumstances and infer
7 from that not that we should go to look at
8 statutory context and other clues within the --
9 the statute itself to determine who has the
10 better reading, but the government should always
11 win that case.

12 GENERAL PRELOGAR: No, not at all. Of
13 course, you should look at context.

14 JUSTICE GORSUCH: That seems to me
15 very different --

16 GENERAL PRELOGAR: That's part of the
17 tools of --

18 JUSTICE GORSUCH: Just to -- sorry,
19 just to finish up. I -- I understand the
20 delegation in one context, but I struggle to see
21 that we should infer the fiction of delegation
22 in the second always and necessarily. All
23 right. I'm sorry. Have at it.

24 GENERAL PRELOGAR: So I -- I disagree
25 that there is a fiction of delegation in the

1 circumstances that trigger Chevron. At the
2 outset, I want to make perfectly clear that, of
3 course, the statutory context and structure is
4 one of the important tools of interpretation
5 that a court should use at step one.

6 So, if we are in a world where the
7 Court can walk through those factors and
8 ascertain that Congress spoke to the issue, let
9 me just be very clear, we recognize the Court
10 then should give effect to what Congress is
11 saying.

12 And if what you're suggesting then is
13 that in a world where Congress hasn't actually
14 spoken to the issue the Court should give no
15 respect at all to the agency's interpretation, I
16 disagree that that is faithfully implementing
17 Congress's intent, because what Chevron
18 recognized is, in a circumstance where Congress
19 hasn't spoken to the issue, given the express
20 grant of -- of adjudicatory or rulemaking
21 authority to the agency, and necessarily
22 recognize that the agency is going to have to
23 fill the gap along the way, it is perfectly
24 sensible to presume that Congress would want the
25 agency to do it.

1 JUSTICE GORSUCH: Let me just ask you
2 about Michigan versus EPA too, because that --
3 that had a very broad -- it was somewhere
4 between the example you gave of agency, go forth
5 and come up with rules and a linguistic
6 ambiguity about the meaning of the word "and,"
7 and it said essentially appropriate, necessary.

8 Yet the Court found there were outer
9 boundaries even there that -- that can be
10 exceeded, right?

11 GENERAL PRELOGAR: Yes, absolutely.
12 And we're not suggesting that in a world where
13 you're at --

14 JUSTICE GORSUCH: So courts can -- can
15 do that, right?

16 GENERAL PRELOGAR: But what I'm
17 disputing is the idea that there is always a
18 binary answer either way rather than a vesting
19 of discretion to take up an issue.

20 JUSTICE GORSUCH: There was a binary
21 answer in Michigan versus EPA, right?

22 GENERAL PRELOGAR: There was a
23 particular agency regulation that was under
24 review, but if I understood my friend correctly
25 today, he seems to suggest that in all statutory

1 contexts, you can look and say, Congress
2 dictated it, there is a binary answer with
3 respect to broadband or there's a binary answer
4 with respect to how to define "stationary
5 source."

6 And what Chevron recognized and what I
7 think is just absolutely true as a matter of the
8 on-the-ground realities and how Congress
9 legislates is that Congress doesn't actually
10 decide all of these issues.

11 What Chevron recognizes is that when
12 Congress hasn't decided it and some follow-on
13 person is going to have to fill in the gap and
14 it's a question of whether it should be the
15 courts or the agency, there is a presumption
16 here that Congress intended it to be the agency
17 but always subject to those guardrails about
18 making sure the agency's construction is
19 reasonable.

20 JUSTICE SOTOMAYOR: Mr. Clement --

21 JUSTICE BARRETT: General --

22 JUSTICE SOTOMAYOR: -- Mr. Clement
23 suggested that we should ignore Chevron because
24 it didn't deal with 706.

25 Do you have a theory as to why it

1 didn't address 706 and -- and how do you respond
2 to that part of his argument?

3 GENERAL PRELOGAR: Yes. So my theory
4 for why Chevron didn't address 706 is because
5 706 has never been understood at any time, at
6 the time it was enacted or in any of the eight
7 decades since, to have dictated a de novo
8 standard of review for all statutory
9 interpretation questions.

10 So there was no inherent tension
11 between Section 706 and Chevron. I think it's
12 actually just further confirmation of what the
13 APA's own history shows.

14 As I was trying to explain in the
15 first argument, you know, this is a situation
16 where the Court has recognized that the APA
17 wasn't meant to create dramatic changes, and it
18 would have been a dramatic change, going from
19 all of the deference principles that had been
20 deployed, particularly in cases of ambiguity in
21 the case law, including immediately leading up
22 to the APA, to a de novo standard on a
23 prospective basis going forward would have been
24 a big change in the relationship of how judicial
25 review occurs for agency action.

1 But no one mentioned that. No one
2 suggested at the time that that was the right
3 way to interpret the APA. It's never how this
4 Court has interpreted it.

5 And I think this is an important
6 point, Justice Barrett, in response to your
7 questions about the APA. You know, it -- it's
8 not as though this has just been a one-off
9 decision. The Court has had any number of
10 decisions, over 70, applying Chevron, and I
11 think, in each and every one of those, it's
12 important to recognize that there hasn't been
13 this kind of inherent tension between the APA
14 and Chevron itself, which just I think further
15 shows the Court's own understanding of
16 Section 706 is entitled to some weight here.

17 JUSTICE BARRETT: So I have a question
18 about the relationship between Brand X and your
19 suggestion that we "Kisorize" Chevron
20 essentially.

21 So I understand Brand X to say that a
22 court must let go of its best interpretation of
23 a statute if an agency advances an inferior but
24 plausible one. But you told us that one way to
25 handle this would be to emphasize Footnote 9 and

1 say what we said in the Kisor context -- context
2 that, no, you know, use all the tools in the
3 toolkit and come up with your best
4 interpretation.

5 So why wouldn't adopting your approach
6 require us to essentially repudiate Brand X?

7 GENERAL PRELOGAR: So, if you
8 understand Brand X to hold that the Court can
9 think it has a best interpretation, it has
10 figured out what Congress was saying about this
11 issue and Congress spoke and nevertheless has to
12 adopt some inferior agency interpretation, then
13 that is inconsistent with our approach.

14 We -- we don't read Brand X that way.
15 I understand Brand X to be distinguishing
16 between step one and step two holdings. So, if
17 there is a step one holding where, in fact, you
18 know, the -- the Court has got it at the end of
19 the day and recognizes that Congress spoke to
20 the issue, there's no room under Brand X to let
21 an agency come along after the fact and say the
22 statute should be understood some different way.

23 It's only in the circumstance where
24 there was Chevron deference granted under step
25 two, and part and parcel of that is recognizing

1 that that's because the statute was interpreted
2 at the first time to not actually supply an
3 answer dictated by Congress and instead to give
4 the agency direction -- I'm sorry, discretion.

5 JUSTICE BARRETT: But could the Court
6 have a best answer if it's a step two question?
7 I mean, it seems to me that having a best answer
8 suggests that you engaged in a question of
9 statutory interpretation, came up with your best
10 answer, and it might just be really hard.

11 So sometimes, if a court outside of
12 the agency context confronts a difficult
13 question of statutory interpretation, it might
14 say, look, I'm 90 percent confident or I'm
15 95 percent confident, but, I mean, I -- I -- I
16 think your reading of Brand X might depend on
17 what the trigger for ambiguity is, right?

18 GENERAL PRELOGAR: Well, I -- I do
19 think that it's kind of clearly demarcating the
20 lines between step one and step two holdings.
21 And so at least the -- the rules of the road are
22 clear with respect to when an agency might have
23 been granted discretion to revisit its prior
24 conclusions.

25 You know, if you're suggesting that

1 there's a way to read Brand X to say that even
2 in a circumstance factoring into the equation
3 the possibility that Congress meant to delegate
4 to the agency that there is a better
5 interpretation, a best interpretation that
6 Congress actually resolved it, I just don't
7 think you would ever get into the Brand X
8 scenario because that sounds to me like a step
9 one ruling.

10 And I take the point that there is
11 some inherent, you know, lack of precision in a
12 term like "ambiguity." That's not something
13 that's uniquely created by Chevron. Of course,
14 there are ambiguity triggers in the laws and in
15 all kinds of contexts.

16 But it's also that kind of
17 indeterminacy that might be worrying you is not
18 anything that's cured by overruling Chevron
19 because, as I was saying to Justice Kagan in the
20 first argument, I think it will just open up a
21 world where there is a lot of indeterminacy and
22 inconsistency in how judges are applying the
23 principles in a case of ambiguity.

24 JUSTICE KAVANAUGH: On that -- on that
25 point, some of the amicus briefs and the briefs

1 point out the experience of some of the states
2 with Chevron. Some states don't have Chevron,
3 and other states have had something like Chevron
4 but have eliminated it in recent years and
5 decades, and their experience, they say, has
6 shown that it's plenty workable in such a
7 regime.

8 So I just want to make -- make sure
9 you can respond to that.

10 GENERAL PRELOGAR: Yes. So my
11 understanding is about half the states still
12 have something akin to a principle of deference.
13 There might be some variance with respect to how
14 much it looks like Chevron. But I acknowledge
15 that some states have abolished any form of
16 deference to administrative agencies.

17 I do think that there is a lot less
18 concern at the state level about the lack of
19 uniformity or consistency, so one of the values
20 that Chevron implements and recognizes for why
21 Congress would prefer for an agency to be able
22 to set these rules and for the courts to respect
23 that is the value in ensuring that there are
24 uniform rules throughout the country. And I
25 don't think that that same experience exists at

1 the state level.

2 And I would just add as well, in a lot
3 of states, I think the political accountability
4 rationales could differ as well because many
5 state court judges are elected.

6 CHIEF JUSTICE ROBERTS: Did -- did I
7 understand you in response to a question from
8 Justice Thomas to say that Chevron doesn't apply
9 to constitutional questions?

10 GENERAL PRELOGAR: Yes. It's only a
11 doctrine that applies in the context of
12 statutory interpretation.

13 CHIEF JUSTICE ROBERTS: Well, I know.
14 But how you interpret statutes certainly can
15 have an effect in raising particular First
16 Amendment questions or otherwise.

17 Does it apply in that situation?
18 Department of Education has some rule. This
19 applies to, you know, all -- all schools, you
20 know, and it doesn't -- it can apply to
21 religious schools because this is how we
22 interpret, you know, whatever the impact of the
23 rule is, and when we interpret it that way, we
24 don't think it raises any free exercise
25 problems.

1 So is there Chevron deference there?

2 GENERAL PRELOGAR: So I think that if
3 the -- a particular interpretation would create
4 serious constitutional problems, then the
5 doctrine of constitutional avoidance is one of
6 the traditional tools that the Court can consult
7 in order to understand whether Congress spoke to
8 the issue.

9 CHIEF JUSTICE ROBERTS: Yeah, and the
10 agency says we don't think this causes
11 particular constitutional problems. That's our
12 expertise about how we apply this provision, and
13 given that, we think there's no free exercise
14 problem.

15 GENERAL PRELOGAR: No, a court would
16 not defer to that because this is all happening
17 at step one. I think that this is part of the
18 process of the court determining whether
19 Congress spoke to the issue. And the court has
20 been very clear that deference doesn't come in
21 at all until you get to step two.

22 So, for example, the agency's view
23 that it deserves Chevron deference or, you know,
24 its kind of take on one of those step one
25 issues, it's not itself meritorious of getting

1 any deference at that stage of the case.

2 CHIEF JUSTICE ROBERTS: Okay.

3 GENERAL PRELOGAR: I do want to take
4 another shot at trying to explain why I believe
5 Petitioners are wrong to have characterized
6 Chevron as resting on a fiction. And I think
7 what they have tried to say is that this doesn't
8 really reflect what Congress is intending. But
9 I see three principal problems with that.

10 The first is that I think that,
11 actually, looking at it from a -- a matter of
12 first principles, there is a lot of merit and
13 weight to the recognition that in a situation of
14 genuine ambiguity, there are good reasons for
15 Congress to want to vest the expert agency with
16 this kind of authority.

17 It's the recognition that agencies, of
18 necessity, are going to have to fill in the
19 gaps, and many of these programs are complex,
20 they're technical, they're going to require the
21 agency to draw on its longstanding experience
22 with a program and the expertise it's
23 accumulated in working within that regulated
24 industry in order to make a sensible regulation
25 that also will encompass, I think, inherently

1 some policy considerations.

2 Congress would know that the agency
3 can run a centralized decision-making process in
4 doing this. Chevron only applies in
5 circumstances where there is a sufficient level
6 of formality in the agency's decision-making.
7 That's usually notice-and-comment rulemaking,
8 and that's a process where all comers can come
9 in and tell the agency here are our views,
10 here's what you should think about in terms of
11 regulating --

12 JUSTICE GORSUCH: Well, that -- that
13 -- that notice point is a -- very important, it
14 seems to me, to your argument because the -- the
15 rationality of a supposition that Congress would
16 want to favor the government, rather than a
17 supposition, equally rational, that it would
18 want to favor individual liberty is made a
19 little more weighty if you assume that the
20 government's provided everybody a notice and
21 opportunity to be heard.

22 But often the government seeks
23 deference for adjudications between individual
24 parties and then apply that to everybody without
25 notice to them, or deference for interpretive

1 rules for which no notice-and-comment, let alone
2 formal rulemaking or adjudicatory proceedings,
3 is required.

4 And so there are many circumstances in
5 which the government does seek deference for a
6 view of the law that affected parties had no
7 chance to be heard about.

8 What do we do with that?

9 GENERAL PRELOGAR: So I think, with
10 respect to the category of interpretive rules,
11 it's -- it's true that the Court hasn't ruled
12 out that those can receive deference in
13 appropriate circumstances, but in --

14 JUSTICE GORSUCH: So you'd have us
15 Kisorize that?

16 GENERAL PRELOGAR: Well, I -- I would
17 just have the Court reiterate what it said in
18 Mead, which is it's not as though any agency
19 pronouncement is necessarily going to warrant
20 deference --

21 JUSTICE GORSUCH: Well, nobody knows
22 what Mead means. I mean, it's got seven factors
23 to it, and the lower courts complain about that
24 too. So I'm not -- I don't -- I don't know
25 about that. I mean, you know, is that another

1 factor we're going to add to Mead?

2 GENERAL PRELOGAR: I think that Mead
3 is an important check on ensuring not only that
4 there's been a delegation here but that the
5 agency has used the appropriate process and
6 procedures and articulated --

7 JUSTICE GORSUCH: Okay. So --

8 GENERAL PRELOGAR: -- its
9 interpretation.

10 JUSTICE GORSUCH: -- so interpretive
11 rules would be out under your new --

12 GENERAL PRELOGAR: So I think they
13 raise a much harder question and this Court
14 itself has said that --

15 JUSTICE GORSUCH: A harder question,
16 but do -- are they ruled in or out on your
17 theory?

18 GENERAL PRELOGAR: I think the Court
19 has not ruled them out under Mead. If you
20 thought that this was a --

21 JUSTICE GORSUCH: What would you have
22 us do?

23 GENERAL PRELOGAR: I would have you
24 retain Mead, which recognizes that --

25 JUSTICE GORSUCH: What would you have

1 us do with interpretive rules, is my question,
2 not Mead. I mean, I don't know what to do with
3 Mead, but --

4 GENERAL PRELOGAR: Well, I don't think
5 that you can treat them as a class. I think
6 it's going to depend --

7 JUSTICE GORSUCH: Some -- some --

8 GENERAL PRELOGAR: -- on the nature of
9 the particular interpretive rule. And
10 oftentimes --

11 JUSTICE GORSUCH: -- sometimes notice
12 is required and sometimes it isn't. How about
13 -- how about adjudications? You keep those in,
14 I'm sure.

15 GENERAL PRELOGAR: Yes.

16 JUSTICE GORSUCH: Yeah.

17 GENERAL PRELOGAR: We certainly think
18 that Chevron has core application to
19 adjudications, and I agree that in that
20 circumstance, there's not the same ability to
21 take the input from all comers. But the Court
22 has emphasized that in the mine-run case where
23 it has been applying Chevron deference, there is
24 this possibility at least of a centralized
25 decision-making process in order to ensure that

1 the agency at least is gathering the facts and
2 has the tools at its disposal.

3 And the alternative to each of these,
4 Justice Gorsuch, is to have the courts do it
5 through piecemeal litigation. At the very
6 least, I think that it's easy to see why
7 Congress might think that that is not as good of
8 an alternative in a circumstance where the
9 Court's pronouncements could come out of nowhere
10 with respect to a particular party. You know,
11 we have an amicus brief from the Small Business
12 Association --

13 JUSTICE GORSUCH: Except for everybody
14 gets to litigate their case, everybody --

15 GENERAL PRELOGAR: But -- but I think
16 that it's important to recognize that --

17 JUSTICE GORSUCH: -- until there's a
18 final decision by this Court.

19 GENERAL PRELOGAR: -- particular
20 decisions can have impacts on parties who are
21 outside --

22 JUSTICE GORSUCH: As a matter of
23 precedent possibly within that jurisdiction, but
24 even that person who's bound by the precedent
25 can appeal it all the way to the Supreme Court.

1 Everybody gets their day in court.

2 GENERAL PRELOGAR: Absolutely.

3 JUSTICE GORSUCH: Versus, under --
4 under your view, many people without notice, any
5 notice or any chance to be heard, are bound.

6 GENERAL PRELOGAR: No. I -- so my
7 concern and what I was focusing on with respect
8 to the prospect of disrupting expectations with
9 respect to litigation is that it's not as though
10 every party who might stand to be affected by a
11 case is necessarily going to know about it.
12 Look at the amicus brief that was filed by the
13 Small Business Association. They say they can't
14 track it --

15 JUSTICE GORSUCH: No, of course,
16 they're not going to have notice about somebody
17 else's case, but when the government comes for
18 them, they get to take their case to court.
19 They get a neutral judge.

20 GENERAL PRELOGAR: Obviously, when
21 they are a party, they have an opportunity --

22 GENERAL GORSUCH: They get to -- they
23 get to appeal.

24 GENERAL PRELOGAR: -- to participate.

25 JUSTICE GORSUCH: Okay.

1 GENERAL PRELOGAR: But Congress has
2 often expressed a preference for not having
3 these kinds of issues resolved piece by piece in
4 different courts around the country with the
5 prospect of the disuniformity that that would
6 create.

7 JUSTICE GORSUCH: Yes. It has
8 provided for notice and -- it provided for
9 formal and informal -- formal rulemaking and
10 adjudications, and it anticipated most rules
11 would be resolved that way. In fact, they
12 aren't. For a long time, the -- those processes
13 haven't been used, and -- and agencies rely on
14 informal adjudications and informal rulemakings.
15 And really now today, perhaps as a product of
16 Chevron at two, agencies have -- have abdicated
17 that and are moving more and more toward
18 interpretive rules where they don't have to
19 provide notice-and-comment.

20 GENERAL PRELOGAR: But I think that
21 does circle us back to the fact that the Court
22 has not suggested that interpretive rules are
23 necessarily going to trigger deference. And so
24 I think, at least in the mine-run case that this
25 Court has looked at, it's the product of --

1 JUSTICE GORSUCH: Okay. Thank you.

2 GENERAL PRELOGAR: -- a formal process
3 from the agency, and I think it's an important
4 process.

5 JUSTICE KAVANAUGH: On -- on the
6 adjudications front, and I think one of the
7 amicus briefs talks specifically about the NLRB
8 in particular and kind of how that agency moves
9 from pillar to post fairly often and the concern
10 raised there because that is a situation you --
11 you can't adjust your behavior ahead of time
12 necessarily based on a new rule, a new changed
13 interpretation, when it's done in the particular
14 case and affects the people who didn't have
15 notice. Do you have any response to that brief
16 or that scenario, or want to tell me why that's
17 wrong?

18 GENERAL PRELOGAR: Well, I guess my
19 overarching response to that set of concerns is
20 that the agency has to justify its
21 decision-making with respect to whatever tool
22 it's using to implement the statute in the way
23 that Congress directed. So, if Congress is
24 telling the agency you should adjudicate or you
25 should conduct notice-and-comment rulemaking or

1 giving in its authority to choose between those
2 tools, the agency in either context is going to
3 have to justify what it's doing.

4 And, in particular, my friends have
5 focused a lot on the idea of agencies changing
6 their minds. You know, there are burdens in
7 this context. The agency has to take account of
8 reliance interests. A lot of this gets put into
9 State Farm, of course. But I think also, at
10 Chevron step two, with respect to
11 reasonableness, a court can permissibly take
12 those kinds of considerations into account.

13 JUSTICE KAVANAUGH: Thank you.

14 JUSTICE KAGAN: Did you want to finish
15 your answer about what you would say to your
16 friend's view of fictionalized intent?

17 GENERAL PRELOGAR: Yes. So I was
18 trying to defend Chevron as a matter of first
19 principles, and that was kind of the first-order
20 answer on this, that there are often really good
21 reasons why Congress would want an expert agency
22 to take the first crack at filling in the law.

23 And there's no way around it, if the
24 agency is administering the statute, the agency
25 has got to do it. And this Court has said that

1 a core feature of executing the law is
2 interpreting statutes along the way,
3 understanding, for the agency, what the law
4 means.

5 The second point I wanted to make is
6 that even in the situation where you think
7 there's more room for doubt about exactly what
8 was happening in 1984 and what Congress would
9 have expected, this is a really foundational
10 precedent from the Court. It's not like Chevron
11 has flown under the radar and Congress is
12 unaware of it and doesn't realize it's out there
13 and kind of setting the ground rules for how
14 this Court and lower courts are going to
15 understand what Congress is doing.

16 This is one of the most frequently
17 cited decisions from the Court, and in that
18 context in particular, I would think that the
19 inference of legislative intent becomes all the
20 more sound because Congress has not chosen to
21 displace it and, as well, it triggers, I think,
22 that critical strong form of stare decisis that
23 the Court applied in *Kisor* when it recognized
24 that in a situation where Congress is actually
25 the best institutional actor to do something

1 about it, it matters. It matters that Congress
2 hasn't sought to change Chevron in any kind of
3 fundamental way.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 JUSTICE SOTOMAYOR: It's okay.

7 CHIEF JUSTICE ROBERTS: Okay.

8 Anything further?

9 JUSTICE KAGAN: I do have one more.
10 I'm sorry.

11 JUSTICE SOTOMAYOR: Hold on. I -- I
12 -- I did. I was waiting.

13 JUSTICE KAGAN: I'm sorry. Sorry.
14 Sorry. Sorry.

15 (Laughter.)

16 JUSTICE SOTOMAYOR: I was waiting for
17 us to go around.

18 I know this is not in the heady
19 intellectual question, but how do you respond to
20 Mr. Clement's point about the interpretation of
21 this particular statute and his reliance on the
22 theory that this Congress definitely, when it
23 capped big industry paying 2 or 3 percent,
24 whatever the number is, would not have wanted
25 small fishermen to pay 20 percent?

1 GENERAL PRELOGAR: So I have a range
2 of reactions to that. My first is, as I was
3 suggesting to Justice Gorsuch, we think -- and
4 to Justice Thomas, we think that there is a lot
5 in this statute to support the agency's exercise
6 of regulatory authority here, and I want to
7 point in particular to the penalty provision,
8 which specifically contemplates that the -- the
9 regulated vessels might have a contractual
10 relationship with third-party monitors and,
11 therefore, might be in a situation where they
12 haven't paid, and it says the Secretary can
13 sanction in that circumstance.

14 So it's premised on the idea that
15 there will be certain circumstances when there
16 is that direct relationship. And --

17 JUSTICE SOTOMAYOR: Just as a footnote
18 in the schedule, in the way that Congress did
19 the other two monitors, they were always
20 government monitors, not independent monitors,
21 correct?

22 GENERAL PRELOGAR: Yes. So, in the --
23 the -- so there are three fee-based programs
24 that my -- my friends have relied on to try to
25 support this idea that there's a negative

1 inference you should draw from the statute.

2 Two of those apply in the domestic
3 context and those operate as pure fee-based
4 programs, so it's very different. Ultimately,
5 they pay fees to the government. The government
6 provides a range of services, including
7 providing the monitors, entering into the
8 contractual relationship, and having those
9 monitors be government -- contractors.

10 And those programs also pay for
11 particular administrative expenses that would
12 not be a part of this program. The -- the
13 foreign vessel program, likewise, operates in
14 this fee-based way. There is a residual part of
15 that program which contemplates that in a
16 circumstance where there aren't sufficient
17 funds, it might be possible that the regulated
18 vessel will then, through a supplementary
19 authority, be required to contract with the
20 monitors directly.

21 And I think my friends would say:
22 Well, that's the whole explanation for the
23 penalty provision. But it doesn't work because
24 Congress put that penalty provision in an
25 overarching section of the Act that applies to

1 domestic vessels too.

2 If this was really just meant to be a
3 tendril to tack on to the foreign vessel
4 program, that would be completely inexplicable.
5 So I think that they don't have a persuasive
6 response to the penalty provisions here.

7 Now they say, to -- to wrap this up,
8 that, you know, the -- it's -- it's unheard of
9 to charge 20 percent. I do want to be really
10 clear, they are latching on to a part of the
11 rule that acknowledged that earlier versions or
12 studies had suggested that costs could go
13 potentially up to 20 percent. But then the
14 agency acted in response to that. It created
15 waivers. It created exemptions.

16 And with respect to some of the types
17 of fishing at issue in these cases, the
18 estimated costs were more in the range of 2 to
19 3 percent. So it's -- this is all, you know,
20 something that courts can look at and review.
21 They, in fact, pressed arguments that this rule
22 was arbitrary and capricious for neglecting to
23 give full attention to the costs. The lower
24 courts rejected those arguments and I think
25 rightly so.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: Justice Barrett asked
3 before about Kisorizing Chevron, and I just
4 wanted to ask, what would that mean? I mean,
5 would it mean doing exactly what Kisor did to
6 Auer deference, to Chevron deference? Would
7 there be adjustments that would be necessary?
8 Would one want to go further in any respect?
9 What -- what does it mean to Kisorize Chevron?

10 GENERAL PRELOGAR: So I think that the
11 Court in this case, if it has some concerns
12 about the implementation issues, could do four
13 critical things, which draw heavily on Kisor but
14 I think look a little different in their
15 particulars.

16 The first thing the Court could do
17 would be to reemphasize the rigor of the step
18 one analysis. Now this is drawn directly from
19 Kisor. As I mentioned before, we've seen
20 results in the lower courts where they are now
21 following this Court's direction with respect to
22 that.

23 So, in this regard, what the Court
24 would be saying is don't wave the ambiguity flag
25 too readily. Don't give up just because the

1 statute is dense or hard to parse. Instead,
2 there are a lot of hard questions out there that
3 can be solved and reveal Congress's intent if
4 the court applies all of the tools and really
5 exhausts them. So that would take care of a
6 whole category of cases.

7 Then, at step two, I think the Court
8 could again do what it did in *Kisor*, which was
9 to reinforce that reasonableness is not just
10 anything goes. You know, Justice Gorsuch, I
11 think, at times has said it just means the
12 government wins. But that is not actually the
13 standard.

14 Even at that step two stage, it's
15 obviously deferential, but the Court should be
16 enforcing any outer bounds in the statute and
17 making sure that the agency hasn't transgressed
18 those.

19 I think the third thing the Court
20 could do is emphasize that this whole enterprise
21 only gets off the ground in a *me-type* situation
22 where you have the agency being directly
23 empowered by Congress to speak with the force of
24 law and then exercising appropriately a formal
25 level of authority in implementing the statute.

1 And so I think that that is an
2 important principle as well, that there are
3 certain contexts in which the agency is not
4 actually speaking with the force of law or in a
5 way that would be fitting with the delegation
6 Congress has provided.

7 And then, finally, the fourth thing
8 that the Court could do, and I think this is a
9 little bit different from *Kisor*, would be to
10 emphasize that it's always important to look at
11 any other statutory indication that Chevron
12 deference was not meant to apply.

13 And what I'm thinking here of are --
14 are things like situations where the nature of
15 the statutory question as the Court has said in
16 other cases isn't one where you would expect
17 Congress to give that to the agency. There's a
18 flavor of this in the Major Questions Doctrine
19 case, and I don't want to rule out other
20 scenarios that could come up because part of our
21 -- our central argument here is Congress can
22 adjust, Congress can react, Congress can take
23 statute-specific steps, and so courts should pay
24 attention to that. And there is nothing in
25 Chevron that dictates that this presumption is

1 irrevocable. Instead, it's fully rebuttable.

2 JUSTICE KAGAN: And is there anything
3 you would say about the matter of changed
4 interpretations?

5 GENERAL PRELOGAR: So I think that
6 changed interpretations already are an area
7 where the agency is under additional burdens to
8 justify its decision-making. I think they get a
9 harder look.

10 And the Court has made clear that in a
11 circumstance where an agency is changing its
12 regulatory approach, one of the things it has to
13 do is take full account of the reliance
14 interests and explain why those shouldn't alter
15 what it's doing in -- in -- in the kind of
16 revised approach.

17 The agency also frequently, if it's
18 come from a notice-and-comment rulemaking, has
19 to run that process all over again. That's a
20 time-intensive process. It takes a substantial
21 investment of agency resources. So I think, in
22 that context too, the Court could police the
23 bounds of that and make sure that the agency is
24 following the procedural requirements to ensure
25 that it's informed decision-making.

1 But, at the end of the day, if the
2 agency can run the gauntlet and survive those
3 hurdles, then the fact that it has some
4 discretion under the statute to change its
5 approach, I think, is not something to say is --
6 is, you know, kind of a bug in the statute.
7 Instead, it's a feature because there are all
8 kinds of circumstances where Congress would want
9 to give the agency the ability to adapt to
10 changing circumstances, to new factual
11 information, or to the experience it's
12 accumulated under the prior program.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 Justice Kavanaugh?

17 Justice Barrett?

18 Thank you, counsel.

19 Rebuttal, Mr. Clement?

20 REBUTTAL ARGUMENT PAUL D. CLEMENT

21 ON BEHALF OF THE PETITIONERS

22 MR. CLEMENT: Just a few points in
23 rebuttal, Your Honor.

24 First, my friend started with express
25 delegations. I think express delegations show

1 all the problems with this fictional implied
2 delegation because the great thing about an
3 express delegation is you have some text.

4 What an express delegation generally
5 does textually is delegate implementing or
6 executing authority. It doesn't do what Chevron
7 purports to do, which is to delegate
8 interpretive authority.

9 But, better yet, once you have text,
10 you can put limits on the text. And Michigan
11 against EPA is a perfect example of that. And,
12 of course, all of these delegations do raise
13 Article I non-delegation concerns. And if you
14 have text, you can check for that as well. But
15 I can't think of anything that's more
16 antithetical to an intelligible principle than
17 ambiguity and silence.

18 And I will say in terms of the -- the
19 -- you know, this premise, I think it's entirely
20 fictional. I think in most cases a statute is
21 ambiguous because the proponent did not have
22 enough votes to make it any clearer.

23 My friend at one point said that I
24 view the whole world as every statute has a
25 binary answer. To be clear, my position was the

1 opposite. There are statutes like that,
2 reasonableness, appropriateness. There are also
3 things like information services,
4 telecommunication services, a service advisor.
5 Is it a salesperson who is involved in the
6 servicing of cars? I'd say yes, but you could
7 say no, but it's binary.

8 The terrible thing about Chevron is it
9 can't tell the two apart because, at a certain
10 point, they both look ambiguous. But if you --
11 what -- you know what can tell the two apart?
12 Good old-fashioned statutory construction. Find
13 out as the courts what the words mean.
14 "Reasonable" is a term of capaciousness and
15 elasticity. "Telecommunication service" is not.
16 Good old-fashioned statutory interpretation can
17 do the job.

18 Now let me say the -- one thing about
19 the mystery of why Section 706 did not appear in
20 the Chevron decision. There's a really easy
21 answer. It was a Clean Air Act case.

22 The Court sort of stumbled into these
23 pronouncements about how as a meta matter you
24 should go about statutory consideration. It was
25 a mistake. It didn't wrestle with the relevant

1 statute at all.

2 That is a special justification to
3 revisit the decision and to get the decision
4 right.

5 Let me say one word about expertise.
6 Expertise and deference do not have to go hand
7 in hand in a way that precludes de novo review.
8 We have things called tax courts. We have
9 things called bankruptcy courts. We have the
10 Court of International Trade. They all deal
11 with technical specialized issues. Every one of
12 them, the legal questions are reviewed de novo.
13 That's the basic understanding with a statute
14 like 77 -- Section 706.

15 Lastly, let me say this. You cannot
16 Kisorize the Chevron doctrine without overruling
17 Brand X. The fact that you could take into
18 account if the agency had flip-flopped was part
19 of the rationale of Kisor, many factors before
20 you applied Auer.

21 That is a feature, my friend correctly
22 admits, that is a feature of the Chevron
23 doctrine, and you really can't Kisorize it
24 without overruling Brand X. And if you're
25 overruling Brand X, well, then stare decisis

1 just went out the window and we might as well
2 get this right.

3 Chevron imposed a two-step rubric that
4 was fundamentally flawed. The right answer here
5 is a one-step rubric that simply asks how is the
6 statute best read. Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel, General.

9 The case is submitted.

10 (Whereupon, at 1:37 p.m., the case was
11 submitted.)

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