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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 to the use of mandamus as  
15      a basis for sort of deference. Could you  
16      comment on that? Because my understanding of  
17      mandamus is that a duty has to be clear before  
18      it actually lies, but I'd like your comment on  
19      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's  
11 great rhetoric, Mr. Clement, but we do delegate,  
12 we have recognized delegations to agencies from  
13 the beginning of the founding of interpretation.  
14 And so I -- I -- I --- I'm at a loss to  
15 understand where the argument comes from.

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

24 But there are other terms in which it  
25 is really a binary question. And the problem,

1 the fundamental failing of Chevron is it doesn't  
2 do a good job of distinguishing between the two.

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

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

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

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

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

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

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

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

16 MR. CLEMENT: So I disagree --

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

24 MR. CLEMENT: So --

25 JUSTICE SOTOMAYOR: -- which is that

1 things change on the ground --

2 MR. CLEMENT: So --

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

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

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

24 But, if you look at the statute as a  
25 whole and if you looked at it the way you would

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

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

19 I think, if you strip away Chevron,  
20 this is a fairly easy case where you just say,  
21 wow, Congress had this question in mind in one  
22 place or actually three places to be specific,  
23 and with every domestic fishery, they only gave  
24 it in two instances, and in both instances, they  
25 said it can be no more than 2 or 3 percent of

1 the value of the catch.

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

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

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

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

22 In both cases, you just can't get to a  
23 certain point and say: Gosh, this is hard. I  
24 think the law has run out. In both cases, you  
25 are supposed to take it all the way to coming up

1 with your best answer.

2 Now, if you --

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

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

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

23 JUSTICE KAGAN: Well, because you have  
24 no other option. I mean, what -- what Chevron  
25 is it's a recognition that in certain cases you

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

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

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

22 MR. CLEMENT: So, Justice Kagan, I  
23 don't agree with you that the law runs out in  
24 those circumstances, even -- even though there's  
25 an agency there, but I will give you this: If I

1 did believe it, I would say at that point let's  
2 give the tie to the citizen. Let's not give the  
3 tie to the agency.

4 And I think it's important --

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

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

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

1 and it doesn't want Chevron. It's on our side  
2 of the case and it certainly --

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

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

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

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

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

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

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

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

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

1 risk of maybe drawing a primary challenger, you  
2 rely on an executive branch friend to do what  
3 you want. And it's not hypothetical.

4 When I hear you talk about --

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

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

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

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

1 professor, said this is probably a job for the  
2 CFTC. That's --

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

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

16 What do you have to say about the  
17 disruptive consequences of overruling?

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

23 What I would say is this Court has  
24 moved away dramatically from certain methods of  
25 interpretation, more dramatically than just we

1 look at legislative history less now than we  
2 used to. Implied causes of action, as far as I  
3 can tell, are dead. But that didn't mean that  
4 every decision that was decided in the bad old  
5 days was overruled ipso facto.

6 JUSTICE BARRETT: That's a little bit  
7 different because those implied causes of  
8 action, the Court was saying this is what the  
9 statute means, like Title IX implies a cause of  
10 action or whatever.

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

17 MR. CLEMENT: If you don't want there  
18 to be disruption, all you have to do is make the  
19 precise level of generality move that you  
20 alluded to, which is I would think in every one  
21 of these Chevron cases, the question is, is the  
22 agency's interpretation of the statute lawful?  
23 And if the court has already held yes, it is  
24 lawful, I would think that would settle the  
25 matter.

1           And as I say, in our brief, the only  
2     reason I have any doubt about that is because of  
3     Brand X. And Brand X is a huge embarrassment  
4     for the government and the government's friend.  
5     I looked through the bottom side amicus. I  
6     counted 13 amicus briefs on the bottom side,  
7     only 2 of them cited Brand X. Because, gosh, it  
8     would be nice for that decision to just go away,  
9     wouldn't it?

10           JUSTICE BARRETT: Sorry, Justice  
11     Thomas.

12           (Laughter.)

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

22           And that's an important distinction  
23     from Kisor. In Kisor -- you know, the Kisor  
24     doctrine -- the Auer doctrine, rather, never had  
25     its Brand X moment where this Court made clear

1 that the agency could flip 180 degrees. And,  
2 indeed, in Kisor itself, it suggested the  
3 opposite. But here with Chevron, we know this  
4 is a -- a reliance-destroying doctrine.

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

17 I mean, look, this would be a  
18 different world if Chevron went in and wrestled  
19 with Section 706 and said, despite all contrary  
20 textual indications, that it forecloses de novo  
21 review of statutes. I suppose I'd have to be  
22 here making every single stare decisis argument.  
23 But that is not what Chevron did. It didn't  
24 even mention the relevant statute.

25 Now, of course I don't want to be seen

1 as running away from the stare decisis factors,  
2 because I'm happy to talk walk through all of  
3 them because I think all of them cut in our  
4 favor. The decision is tremendously unworkable.  
5 Nobody knows what ambiguity is. Even my learned  
6 friend on the other side says there's no formula  
7 for it. And that's an elaboration on what the  
8 government said the last time up here, which is  
9 that nobody knows what ambiguity means. But  
10 that's just workability.

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

25 But I'd like to emphasize it's effect

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

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

24           And my friends asked for empirical  
25 evidence. I think you just have to look at this

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

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

20 But the reality is the kind of  
21 uniformity that you get under Chevron is  
22 something only the government could love because  
23 every court in the country has to agree on the  
24 current administration's view of a debatable  
25 statue. You don't get the kind of uniformity

1 that you actually want, which is a stable  
2 decision that says this is what the statute  
3 means.

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

14 Now, were they wrong then, and if they  
15 weren't wrong then, what if anything has changed  
16 since then?

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

21 What has changed is we've come a long  
22 way in statutory interpretation. And, you know,  
23 if Chevron was a response to some of the  
24 excesses of the D.C. Circuit in the freewheeling  
25 days of the late '70s and the use of legislative

1 history and, oh, by the way, the text of the  
2 statute appears in the margin of my opinion, and  
3 I'm not going to talk about it again because I'm  
4 off to the races, we now I think are all  
5 textualists. The focus is much greater on the  
6 text of the statute.

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

18           So expertise is not all what it's  
19 cracked up to be. And that's true even in the  
20 most complicated cases. Look at the American  
21 Hospital Association's case. I don't think  
22 you're going to find a statute that's more  
23 complicated than that one. But yet, this Court  
24 had no trouble unanimously saying that you can't  
25 have hospital chains' specific pricing without

1 first doing a survey.

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

4 (Laughter.)

5 JUSTICE KAVANAUGH: I -- I was going  
6 to say that, but yeah.

7 CHIEF JUSTICE ROBERTS: So was I.

8 (Laughter.)

9 MR. CLEMENT: No one was troubled to  
10 write a dissent.

11 (Laughter.)

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

22 CHIEF JUSTICE ROBERTS: Thank -- thank  
23 you, Mr. Clement.

24 The answer from Mr. Martinez on  
25 several questions about what happens when you,

1 you know, get rid of Chevron in this case was  
2 Skidmore.

3 And if Skidmore is going to occupy a  
4 more prominent role going forward, I -- I'd like  
5 to know exactly what your understanding of that  
6 principle is.

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

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

24 All of that is something that Skidmore  
25 can account for that Chevron has never been

1 caused to account for. Now you can modify it,  
2 you know, à la Kisor and sort of add all of that  
3 to it, but I do think that the Chevron  
4 experiment has failed.

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

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

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

20 JUSTICE GORSUCH: That's never what  
21 Skidmore has been understood to mean or said.  
22 It said that the persuasiveness of the  
23 government's interpretation depends upon the  
24 circumstances. And some of those you  
25 enumerated.

1 MR. CLEMENT: Absolutely.

2 JUSTICE GORSUCH: Call it what you  
3 will, that's what it is, right?

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

7 JUSTICE GORSUCH: I -- I -- I --

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

11 JUSTICE GORSUCH: Yeah.

12 MR. CLEMENT: And the other great  
13 thing about Skidmore is it --

14 JUSTICE KAGAN: We're out of order.

15 MR. CLEMENT: Oh. Sorry.

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

23 MR. CLEMENT: Justice Jackson, the  
24 earlier one, would beg to differ with you on  
25 that score. He thought it was quite important.

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

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

22 CHIEF JUSTICE ROBERTS: Thank you.

23 MR. CLEMENT: I mean, that's --  
24 there's no expertise there.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 Justice Thomas?

2 Justice Alito?

3 Justice Sotomayor?

4 Justice Kagan?

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

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

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

20 And then you take that doctrine of  
21 humility and you put on top of it stare decisis,  
22 another doctrine of humility, which is to  
23 suggest we don't willy-nilly reverse things  
24 unless there's a special justification. Here,  
25 Kisor said it's even more than that, there's

1 even more reason not to reverse something  
2 because there have been 70 Supreme Court  
3 decisions relying on Chevron, because there have  
4 been 17,000 lower court decisions relying on  
5 Chevron.

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

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

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

22 So I think there is, I don't know  
23 whether you call it humility or just clarity,  
24 but when the question is judicial methodology, I  
25 think it's very weird to ask Congress to fix

1 your problems for you. I don't think you  
2 actually want to invite, in all candor, that  
3 particular fox into your hen -- henhouse and  
4 tell you how to go about interpreting statutes  
5 or how to go about dealing with qualified  
6 immunity defenses.

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

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

22 Kisor did not, with all due respect,  
23 wrestle with Saucier against Katz. It didn't --  
24 it didn't wrestle with Gaudin in the opinion.  
25 So I think I can -- I can reconcile all your law

1 by saying: All right, when it's a procedural  
2 rule or a court-made rule of interpretation,  
3 maybe we look to some of the same factors, but  
4 they don't apply with the same weight as they  
5 would if it were a substantive result.

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

11 So Section 1982 still has an implied  
12 cause of action. Section 1981 still has a cause  
13 of action. I can go on and on. Those cases  
14 don't get overturned.

15 JUSTICE KAGAN: Thank you, Mr.  
16 Clement.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Gorsuch?

19 JUSTICE GORSUCH: One lesson of  
20 humility is admit when you're wrong. Justice  
21 Scalia, who took Chevron, which nobody  
22 understood to include this two-step move as  
23 originally written, turned it into what we now  
24 know, and late in life, he came to regret that  
25 decision.

1                   What do we make of that lesson about  
2                   humility?

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

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

16                  JUSTICE GORSUCH: Thank you.

17                  CHIEF JUSTICE ROBERTS: Justice  
18                  Kavanaugh?

19                  JUSTICE KAVANAUGH: A couple  
20                  questions. First, on Skidmore, I just want to  
21                  say how I've thought about it, and you can tell  
22                  me whether this is wrong, that it respects  
23                  contemporaneous and consistent interpretations  
24                  as evidence of the proper original meaning of  
25                  the statute because that's kind of common sense

1 in statutory interpretation more generally, that  
2 if an interpretation was contemporaneous and  
3 consistent, it's more likely to be correct.

4 So that's respect, but the word  
5 "deference" I wouldn't have -- wouldn't have  
6 used there.

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

16 And it seems to me Skidmore allows you  
17 to say, if the industry says -- has taken a  
18 position that's consistent from the beginning  
19 and the agency flips 25 years into the  
20 enterprise, Skidmore gives you the tools for  
21 saying, all right, agency, you're going to lose  
22 that case, Chevron does.

23 JUSTICE KAVANAUGH: Right. A big  
24 difference between Skidmore and Chevron -- there  
25 are others -- is, when the agency changes

1 position every four years, that's going to still  
2 get Chevron deference, but Skidmore, with  
3 respect to that interpretation, would drop out  
4 because it's not been a consistent and  
5 contemporaneous -- consistent from the  
6 contemporaneous understanding of the statute.

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

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

20 I think the flip side, why this is  
21 hard, the other concern for any judge is  
22 abdication to the executive branch running  
23 roughshod over limits established in the  
24 Constitution or, in this case, by Congress.

25 So I think we've got to find the --

1 that's -- that's why it's hard, find the right  
2 balance between restraint and letting the  
3 executive get away with too much.

4 On that front, do you -- there was  
5 questions earlier, do judges really rely on  
6 Chevron? You want to speak to that?

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

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

20 The Cato Institute brief -- you might  
21 think, well, things have gotten better because  
22 that was a longitudinal study over a number of  
23 years. You might think, well, things are  
24 getting a lot better because we've signaled that  
25 Chevron is on sort of life support. But the

1 Cato ran the numbers for, like, 2020 and 2021,  
2 and it's down to 60 percent. But it's still  
3 well over half the time your average judge in  
4 the court of appeals is getting to step two, and  
5 Judge Kethledge, you know, he has hasn't updated  
6 that speech, but as far as I know, Judge  
7 Kethledge still hasn't gotten to step two once.

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

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

21 JUSTICE KAVANAUGH: One last question.  
22 If Chevron were overruled, I think your brief  
23 says, we should go ahead and decide the issue,  
24 the statutory issue in this case. Can you speak  
25 very briefly to why?

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

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

18           JUSTICE KAVANAUGH: Thank you.

19           MR. CLEMENT: -- statutory  
20 construction.

21           JUSTICE KAVANAUGH: Thank you.

22           CHIEF JUSTICE ROBERTS: Justice  
23 Barrett?

24           JUSTICE BARRETT: So we have a host of  
25 canons, clear statement rules, some of which are

1 constitutionally inspired, and when I asked the  
2 Solicitor General in the last argument about  
3 whether Chevron should be thought -- thought of  
4 as part of that package, she said that Chevron  
5 kind of stood distinct, that Chevron was unique.

6 Can you address that?

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

12 (Laughter.)

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

25 JUSTICE BARRETT: One last question.

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

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

17 MR. CLEMENT: I -- I'm not so naive to  
18 say that overruling Chevron is going to solve  
19 all the problems with the emergency docket, but  
20 it is going to make it a lot better because,  
21 sure, there's some places where they use  
22 "appropriate" or they try to use "modify," which  
23 was bold in light of AT&T, but whatever, they  
24 picked some of these words that are more  
25 capacious.

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

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

15                   JUSTICE BARRETT: Thank you.

16                   CHIEF JUSTICE ROBERTS: Thank you.

17                   General Prelogar, welcome back.

18                   ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

19                   ON BEHALF OF THE RESPONDENTS

20                   GENERAL PRELOGAR: Thank you, Mr.

21 Chief Justice, and may it please the Court:

22                   Throughout this litigation and at  
23 times this morning, Petitioners have sought to  
24 characterize this case as presenting a  
25 fundamental question of the separation of powers

1 and a test of Article III: Will courts continue  
2 to say what the law is?

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

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

18 The role of the court in that  
19 circumstance is to make sure that the agency has  
20 followed the proper procedures and stayed what  
21 -- within whatever outer bounds Congress itself  
22 has set. And all of that complies with the  
23 Constitution, of course, because Congress has  
24 Article I authority to delegate gap-filling  
25 authority to agencies, and the executive has

1 core Article II authority to fill in those gaps.  
2 That's a core exercise of the executive power.  
3 And then the Article III courts are just  
4 fulfilling their judicial role when they give  
5 effect to what Congress has done in its choice  
6 to rely on the agency in that regard.

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

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

21 Now, we can debate, of course, whether  
22 Chevron drew the right line in identifying  
23 exactly when these delegations have occurred. I  
24 think the Court got that right for all of the  
25 reasons I've tried to explain this morning. But

1 I -- I think it's important to recognize that  
2 that debate doesn't have a constitutional  
3 dimension to it that falls out of the equation.  
4 Instead, it's just a question of whether the  
5 Court drew the right line in identifying when a  
6 delegation has occurred.

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

18           And I think that's the right thing to  
19 do here. You know, my -- my friends in their  
20 briefs both said judges should aspire to be like  
21 umpires, calling balls and strikes. But *stare*  
22 *decisis* is part of the rules of the game here  
23 too. And in this case, I think all of the *stare*  
24 *decisis* factors counsel in favor of retaining  
25 Chevron.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: How do you -- how do  
3 we discern statutory -- delegation from  
4 statutory silence?

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

15 There's never going to be total  
16 silence in a statute. At the very least, the  
17 agency is going to have to be able to point to  
18 the express delegation of rule-making authority,  
19 the directive from Congress to put the statute  
20 into effect with the force of law. So that will  
21 always be at least a baseline in this context.  
22 And then in the mine-run case, you'll be able to  
23 point to any number of additional features of a  
24 statute that help to signal the agency's  
25 authority.

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

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

21           JUSTICE GORSUCH: General, yeah,  
22 that's really good -- again we're back to the  
23 same question the Chief had of -- of Mr.  
24 Clement. That's a really good statutory  
25 interpretation argument, sounds like exactly the

1 bread and butter of what we do every single day.

2 And we can resolve that, right?

3 GENERAL PRELOGAR: We think that you  
4 could find that the statute is clear, but I  
5 think that --

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

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

20 JUSTICE GORSUCH: But you think it  
21 does.

22 GENERAL PRELOGAR: We think that there  
23 is a lot in the statute to -- yes --

24 JUSTICE GORSUCH: You think yes --

25 GENERAL PRELOGAR: -- to support the

1 agency's interpretation.

2 JUSTICE GORSUCH: -- yes, you think  
3 you win under step one, and so does Mr. Clement.  
4 And yet, here we are.

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

10 JUSTICE GORSUCH: Yeah, because we  
11 have this ambiguous ambiguity trigger that  
12 nobody knows what it means.

13 GENERAL PRELOGAR: Well, Justice --

14 JUSTICE GORSUCH: Now, let me just ask  
15 you about the delegation, your -- your example  
16 in -- in the opening, which is interesting.

17 GENERAL PRELOGAR: Yeah.

18 JUSTICE GORSUCH: I -- I totally  
19 understand a statute that does delegate, you  
20 know, you make up what rate you think, and --  
21 and -- and that might pose a delegation problem,  
22 might not, fine, but we know Congress delegated  
23 it. That's one thing.

24 What you're asking us to do is infer  
25 from a linguistic ambiguity that may not be the

1 product of any intent at all, Pulsifer, "and"  
2 might mean "or" in some circumstances and infer  
3 from that not that we should go to look at  
4 statutory context and other clues within the --  
5 the statute itself to determine who has the  
6 better reading, but the government should always  
7 win that case.

8 GENERAL PRELOGAR: No, not at all. Of  
9 course, you should look at context.

10 JUSTICE GORSUCH: That seems to me  
11 very different --

12 GENERAL PRELOGAR: That's part of the  
13 tools of --

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

20 GENERAL PRELOGAR: So I -- I disagree  
21 that there is a fiction of delegation in the  
22 circumstances that trigger Chevron. At the  
23 outset, I want to make perfectly clear that of  
24 course the statutory context and structure is  
25 one of the important tools of interpretation

1 that a court should use at step one.

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

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

22 JUSTICE GORSUCH: Let me just ask you  
23 about Michigan versus EPA too, because that had  
24 a very broad -- it was somewhere between the  
25 example you gave of agency, go forth and come up

1 with rules and a linguistic ambiguity about the  
2 meaning of the word "and," and it said  
3 essentially appropriate, necessary.

4 Yet the Court found there were outer  
5 boundaries even there that -- that can be  
6 exceeded, right?

7 GENERAL PRELOGAR: Yes, absolutely.  
8 And we're not suggesting that in a world where  
9 you're at --

10 JUSTICE GORSUCH: So courts can -- can  
11 do that, right?

12 GENERAL PRELOGAR: But what I'm  
13 disputing is the idea that there is always a  
14 binary answer either way rather than a vesting  
15 of discretion to take up an issue.

16 JUSTICE GORSUCH: There was a binary  
17 answer in Michigan versus EPA, right?

18 JUSTICE GORSUCH: There was a  
19 particular agency regulation that was under  
20 review, but if I understood my friend correctly  
21 today, he seems to suggest that in all statutory  
22 contexts, you can look and say, Congress  
23 dictated it, there is a binary answer with  
24 respect to broadband or there's a binary answer  
25 with respect to how to define "stationary

1 source."

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

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

16           JUSTICE SOTOMAYOR: Mr. Clement --

17           JUSTICE BARRETT: General --

18           JUSTICE SOTOMAYOR: -- Mr. Clement  
19 suggested that we should ignore Chevron because  
20 it didn't deal with 706.

21           Do you have a theory as to why it  
22 didn't address 706 and -- and how do you respond  
23 to that part of his argument?

24           GENERAL PRELOGAR: Yes. So my theory  
25 for why Chevron didn't address 706 is because

1 706 has never been understood at any time, at  
2 the time it was enacted or in any of the eight  
3 decades since, to have dictated a de novo  
4 standard of review for all statutory  
5 interpretation questions.

6 So there was no inherent tension  
7 between Section 706 and Chevron. I think it's  
8 actually just further confirmation of what the  
9 APA's own history shows.

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

22 But no one mentioned that. No one  
23 suggested at the time that that was the right  
24 way to interpret the APA. It's never how this  
25 Court has interpreted it.

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

13           JUSTICE BARRETT: So I have a question  
14 about the relationship between Brand X and your  
15 suggestion that we "Kisorize" Chevron  
16 essentially.

17           So I understand Brand X to say that a  
18 court must let go of its best interpretation of  
19 a statute if an agency advances an inferior but  
20 plausible one. But you told us that one way to  
21 handle this would be to emphasize Footnote 9 and  
22 say what we said in the Kisor context that, no,  
23 you know, use all the tools in the toolkit and  
24 come up with your best interpretation.

25           So why wouldn't adopting your approach

1 require us to essentially repudiate Brand X?

2 GENERAL PRELOGAR: So, if you  
3 understand Brand X to hold that the Court can  
4 think it has a best interpretation, it has  
5 figured out what Congress was saying about this  
6 issue and Congress spoke and nevertheless has to  
7 adopt some inferior agency interpretation, then  
8 that is inconsistent with our approach. We --  
9 we don't read Brand X that way.

10 I understand Brand X to be  
11 distinguishing between step one and step two  
12 holdings. So, if there is a step one holding  
13 where, in fact, you know, the -- the Court has  
14 got it at the end of the day and recognizes that  
15 Congress spoke to the issue, there's no room  
16 under Brand X to let an agency come along after  
17 the fact and say the statute should be  
18 understood some different way.

19 It's only in the circumstance where  
20 there was Chevron deference granted under step  
21 two, and part and parcel of that is recognizing  
22 that that's because the statute was interpreted  
23 at the first time to not actually supply an  
24 answer dictated by Congress and instead to give  
25 the agency direction -- I'm sorry, discretion.

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

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

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

21                  You know, if you're suggesting that  
22 there's a way to read Brand X to say that even  
23 in a circumstance factoring into the equation  
24 the possibility that Congress meant to delegate  
25 to the agency that there is a better

1 interpretation, a best interpretation that  
2 Congress actually resolved it, I just don't  
3 think you would ever get into the Brand X  
4 scenario because that sounds to me like a step  
5 one ruling.

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

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

20           JUSTICE KAVANAUGH: On that -- on that  
21 point, some of the amicus briefs and the briefs  
22 point out the experience of some of the states  
23 with Chevron. Some states don't have Chevron  
24 and other states have had something like Chevron  
25 but have eliminated it in recent years and

1 decades and their experience, they say, has  
2 shown that it's plenty workable in such a  
3 regime.

4           So I just want to make sure you can  
5 respond respond to that.

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

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

23           And I will just add as well, in a lot  
24 of states, I think the political accountability  
25 rationales could differ as well because many

1 state court judges are elected.

2 CHIEF JUSTICE ROBERTS: Did I  
3 understand you in response to a question from  
4 Justice Thomas to say that Chevron doesn't apply  
5 to constitutional questions?

6 GENERAL PRELOGAR: Yes, it's only a  
7 doctrine that applies in the context of  
8 statutory interpretation.

9 CHIEF JUSTICE ROBERTS: Well, I know.  
10 But how you interpret statutes certainly can  
11 have an effect in raising particular First  
12 Amendment questions or otherwise.

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

22 So is there Chevron deference there?

23 GENERAL PRELOGAR: So I think that if  
24 the -- a particular interpretation would create  
25 serious constitutional problems, then the

1 doctrine of constitutional avoidance is one of  
2 the traditional tools that the Court can consult  
3 in order to understand whether Congress spoke to  
4 the issue.

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

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

18 So, for example, the agency's view  
19 that it deserves Chevron deference or, you know,  
20 its kind of take on one of those step one  
21 issues, ^ Check: it's not itself meritorious of  
22 getting any deference at that stage of the case.

23 CHIEF JUSTICE ROBERTS: Okay.

24 GENERAL PRELOGAR: I do want to take  
25 another shot at trying to explain why I believe

1     Petitioners are wrong to have characterized  
2     Chevron as resting on a fiction.  And I think  
3     what they have tried to say is that this doesn't  
4     really reflect what Congress is intending.  But  
5     I think see three principal problems with that.

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

13            It's the recognition that agencies, of  
14    necessity, are going to have to fill in the  
15    gaps, and many of these programs are complex,  
16    they're technical, they're going to require the  
17    agency to draw on its long-standing experience  
18    with a program and the expertise it's  
19    accumulated in working within the regulated  
20    industry in order to make a sensible regulation  
21    that also will encompass, I think, inherently  
22    some policy considerations.

23            Congress would know that the agency  
24    can run a centralized decision-making process in  
25    doing this.  Chevron only applies in

1 circumstances where there is a sufficient level  
2 of formality in the agency's decision-making  
3 that's usually notice-and-comment rulemaking.  
4 And that's a process where all comers can come  
5 in and tell the agency here are our views,  
6 here's what you should think about in terms of  
7 regulation --

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

17 But often the government seeks  
18 deference for adjudications between individual  
19 parties and then apply that to everybody without  
20 notice to them, or deference for interpretive  
21 rules for which no notice and comment, let alone  
22 formal rulemaking or adjudicatory proceedings,  
23 is required.

24 And so there are many circumstances in  
25 which the government does seek deference for a

1 view of the law that affected parties had no  
2 chance to be heard about. What do we do with  
3 that?

4 GENERAL PRELOGAR: So I think with  
5 respect to the category of interpretive rules,  
6 it's -- it's true that the Court hasn't ruled  
7 out that those can receive deference in  
8 appropriate circumstances, but in --

9 JUSTICE GORSUCH: So you would have us  
10 Kisorize that?

11 GENERAL PRELOGAR: Well, I -- I would  
12 just have the Court reiterate what it said in  
13 Mead, which is it's not as though any agency  
14 pronouncement is necessarily going to warrant  
15 deference --

16 JUSTICE GORSUCH: Well, nobody knows  
17 what Mead means. I mean, it's got seven factors  
18 to it, and the lower courts complain about that  
19 too. So I'm not -- I don't -- I don't know  
20 about that. You know, is that another factor  
21 we're going to add to Mead?

22 GENERAL PRELOGAR: I think that Mead  
23 is an important check on ensuring not only that  
24 there has been a delegation here but that the  
25 agency has used the appropriate process and

1 procedures and articulated --

2 JUSTICE GORSUCH: Okay. So --

3 GENERAL PRELOGAR: -- intention of --

4 JUSTICE GORSUCH: -- so interpretive  
5 rules would be out under your new --

6 GENERAL PRELOGAR: So I think they  
7 raise a much harder question and this Court  
8 itself has said --

9 JUSTICE GORSUCH: A harder question,  
10 but do -- are they ruled in or out on your  
11 theory?

12 GENERAL PRELOGAR: I think the Court  
13 has not ruled them out under Mead. If you  
14 thought that this was a --

15 JUSTICE GORSUCH: What would you have  
16 us do?

17 GENERAL PRELOGAR: I would have you  
18 retain Mead, which recognizes that --

19 JUSTICE GORSUCH: What would you have  
20 us to do with interpretive rules, is my  
21 question, not Mead. I mean, I don't know what  
22 to do with Mead, but --

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

1 JUSTICE GORSUCH: Some --

2 GENERAL PRELOGAR: -- on the nature of  
3 the particular interpretive rule. And  
4 oftentimes --

5 JUSTICE GORSUCH: Sometimes notice is  
6 required and sometimes it isn't. How about --  
7 how about adjudications? You keep those in, I'm  
8 sure.

9 GENERAL PRELOGAR: Yes.

10 JUSTICE GORSUCH: Yeah.

11 GENERAL PRELOGAR: We certainly think  
12 that Chevron has core application to  
13 adjudications, and I agree that in that  
14 circumstance, there's not the same ability to  
15 take the input from all comers. But the Court  
16 has emphasized that in the mine-run case where  
17 it has been applying Chevron deference, there is  
18 this possibility, at least, of a centralized  
19 decision-making process in order to ensure that  
20 the agency at least is gathering the facts and  
21 has the tools at its disposal.

22 And the alternative to each of these,  
23 Justice Gorsuch, is to have the courts do it  
24 through piecemeal litigation. At the very  
25 least, I think that it's easy to see why

1 Congress might think that that is not as good of  
2 an alternative in a circumstance where the  
3 Court's pronouncements could come out of nowhere  
4 with respect to a particular party. You know,  
5 we have an amicus brief from the Small Business  
6 Association --

7 JUSTICE GORSUCH: Except for everybody  
8 gets to litigate their case. Everybody.

9 GENERAL PRELOGAR: But -- but I think  
10 that it's important to recognized that --

11 JUSTICE GORSUCH: Until there's a  
12 final decision by this Court.

13 GENERAL PRELOGAR: -- particular  
14 decisions can have impacts on parties who are  
15 outside --

16 JUSTICE GORSUCH: As a matter of  
17 precedent possibly within that jurisdiction, but  
18 even that person who's bound by the precedent  
19 can appeal it all the way to the Supreme Court.  
20 Everybody gets their day in court.

21 GENERAL PRELOGAR: Absolutely.

22 JUSTICE GORSUCH: Versus under --  
23 under your view, many people without notice, any  
24 notice or any chance to be heard, are bound.

25 GENERAL PRELOGAR: No. So my concern

1 and what I was focusing on with respect to the  
2 prospect of disrupting expectations with respect  
3 to litigation is that it's not as though every  
4 party who might stand to be affected by a case  
5 is necessarily going to know about it. Look at  
6 the amicus brief that was filed by the Small  
7 Business Association. They think --

8 JUSTICE GORSUCH: Well, of course,  
9 they're not going to have notice about somebody  
10 else's case, but when the government comes for  
11 them, they get to take their case to court.  
12 They get a neutral judge.

13 GENERAL PRELOGAR: Obviously, when  
14 they are a party, they have an opportunity --

15 GENERAL GORSUCH: They get to -- they  
16 get to appeal.

17 GENERAL PRELOGAR: -- to participate.

18 JUSTICE GORSUCH: Okay.

19 GENERAL PRELOGAR: But Congress has  
20 often expressed a preference for not having  
21 these kinds of issues resolved piece by piece in  
22 different courts around the country with the  
23 prospect of the disuniformity that that would  
24 create.

25 JUSTICE GORSUCH: Yes. It has

1 provided for notice and -- it provided for  
2 formal and informal -- formal rulemaking and  
3 adjudications. And it anticipated most rules  
4 would be resolved that way. In fact, they  
5 aren't. For a long time, the -- those processes  
6 haven't been used. And -- and agencies rely on  
7 informal adjudications and informal rulemakings.  
8 And really now today, perhaps as a product of  
9 Chevron step two, agencies have abdicated that  
10 and are moving more and more toward interpretive  
11 rules where they don't have to provide notice  
12 and comment.

13           GENERAL PRELOGAR: But I think that  
14 does circle us back to the fact that the Court  
15 has not suggested that interpretive rules are  
16 necessarily going to trigger deference. And so  
17 I think, at least in the mine-run case that this  
18 Court has looked at, it's the product of --

19           JUSTICE GORSUCH: Okay. Thank you.

20           GENERAL PRELOGAR: -- a formal process  
21 from the agency, and I think it's an important  
22 process.

23           JUSTICE KAVANAUGH: On the  
24 adjudications front, I think one of the amicus  
25 briefs talks specifically about the NLRB in

1 particular and kind of how that agency moves  
2 from pillar to post fairly often and the concern  
3 raised there because that is a situation you --  
4 you can't adjust your behavior ahead of time  
5 necessarily based on a new rule, a new changed  
6 interpretation, what it's done in the particular  
7 case and affects the people who didn't have  
8 notice. Do you have any response to that brief  
9 or that scenario, or want to tell me why that's  
10 wrong?

11 GENERAL PRELOGAR: Well, I guess my  
12 overarching response to that set of concerns is  
13 that the agency has to justify its  
14 decision-making with respect to whatever tool  
15 it's using to implement the statute in the way  
16 that Congress directed. So if Congress is  
17 telling the agency you should adjudicate or you  
18 should conduct notice-and-comment rulemaking or  
19 giving it its authority to choose between those  
20 tools, the agency in either context is going to  
21 have to justify what it's doing.

22 And, in particular, my friends have  
23 focused a lot on the idea of agencies changing  
24 their minds. You know, there are burdens in  
25 this context. The agency has to take account of

1 reliance interests. A lot of this gets put into  
2 State Farm, of course. But I think also, at  
3 Chevron step two with respect to reasonableness,  
4 a court can permissibly take those kinds of  
5 considerations into account.

6 JUSTICE KAVANAUGH: Thank you.

7 JUSTICE KAGAN: Did you want to finish  
8 your answer about what you would say to your  
9 friend's view of fictionalized intent?

10 GENERAL PRELOGAR: Yes. So I was  
11 trying to defend Chevron as a matter of first  
12 principles, and that was kind of the first order  
13 answer on this, that there are often really good  
14 reasons why Congress would want an expert agency  
15 to take the first crack at filling in the law.

16 And there's no way around it, if the  
17 agency is administering the statute, the agency  
18 has got to do it. And this Court has said that  
19 a core feature of executing the law is  
20 interpreting statutes along the way,  
21 understanding, for the agency, what the law  
22 means.

23 The second point I wanted to make is  
24 that even in the situation where you think  
25 there's more room for doubt about exactly what

1 was happening in 1984 and what Congress would  
2 have expected, this is a really foundational  
3 precedent from the Court. It's not like Chevron  
4 has flown under the radar and Congress is  
5 unaware of it and doesn't realize it's out there  
6 and kind of setting the ground rules for how  
7 this Court and lower courts are going to  
8 understand what Congress is doing.

9           This is one of the most frequently  
10 cited decisions from the Court. And in that  
11 context in particular, I would think that the  
12 inference of legislative intent becomes all the  
13 more sound because Congress has not chosen to  
14 displace it. And, as well, it triggers, I  
15 think, that critical strong form of stare  
16 decisis that the Court applied in *Kisor* when it  
17 recognized that in a situation where Congress is  
18 actually the best institutional actor to do  
19 something about it, it matters. It matters that  
20 Congress hasn't sought to change Chevron in any  
21 kind of fundamental way.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24           JUSTICE SOTOMAYOR: It's okay.

25           CHIEF JUSTICE ROBERTS: All right.

1 Anything further?

2 JUSTICE KAGAN: I do have one more.

3 I'm sorry.

4 JUSTICE SOTOMAYOR: Hold on. I -- I

5 did --

6 JUSTICE KAGAN: I'm sorry. Sorry.

7 Sorry. Sorry.

8 (Laughter.)

9 JUSTICE SOTOMAYOR: I was waiting for

10 us to go around.

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

19 GENERAL PRELOGAR: So I have a range  
20 of reactions to that. My first is, as I was  
21 suggesting to Justice Gorsuch, we think -- and  
22 to Justice Thomas, we think that there is a lot  
23 in this statute to support the agency's exercise  
24 of regulatory authority here. And I want to  
25 point in particular to the penalty provision,

1 which specifically contemplates that the -- the  
2 regulated vessels might have a contractual  
3 relationship with third-party monitors and,  
4 therefore, might be in a situation where they  
5 haven't paid. And it says the Secretary can  
6 sanction in that circumstance.

7 So it's premised on the idea that  
8 there will be certain circumstances when there  
9 is that direct relationship.

10 JUSTICE SOTOMAYOR: Just as a footnote  
11 in the schedule, in the way that Congress did  
12 the other two monitors, they were always  
13 government monitors, not independent monitors,  
14 correct?

15 GENERAL PRELOGAR: Yes. So in the --  
16 the -- so there are three fee-based programs  
17 that my friends have relied on to try to support  
18 this idea that there is a negative inference you  
19 should draw from the statute.

20 Two of those apply in the domestic  
21 context and those operate as pure fee-based  
22 programs, so it's very different. Ultimately  
23 they pay fees to the government. The government  
24 provides a range of services, including  
25 providing the monitors, entering into the

1 contractual relationship, and having those  
2 monitors be government contractors.

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

14           And I think my friends would say:  
15 Well, that's the whole explanation for the  
16 penalty provision, but it doesn't work because  
17 Congress put that penalty provision in an  
18 overarching section of the Act that applies to  
19 domestic vessels too.

20           If this was really just meant to be a  
21 tendril to tack on to the foreign vessel  
22 program, that would be completely inexplicable.  
23 So I think that they don't have a persuasive  
24 response to the penalty provisions here.

25           Now, they say, to wrap this up, that,

1 you know, it's unheard of to charge 20 percent.  
2 I do want to be really clear, they are latching  
3 on to a part of the rule that acknowledged that  
4 earlier versions or studies had suggested that  
5 costs could go potentially up to 20 percent.  
6 But then the agency acted in response to that.  
7 It created waivers. It created exemptions.

8           And with respect to some of the types  
9 of fishing at issue in these cases, the  
10 estimated costs were more in the range of 2 to  
11 3 percent. So it's -- this is all, you know,  
12 something the courts can look at and review.  
13 They, in fact, pressed arguments that this rule  
14 was arbitrary and capricious for neglecting to  
15 give full attention to the costs. The lower  
16 courts rejected those arguments, and I think  
17 rightly so.

18           CHIEF JUSTICE ROBERTS: Justice Kagan?

19           JUSTICE KAGAN: Justice Barrett asked  
20 before about Kisorizing Chevron. And I just  
21 wanted to ask, what would that mean? I mean,  
22 would it mean doing exactly what Kisor did to  
23 our deference, to Chevron deference? Would  
24 there be adjustments that would be necessary?  
25 Would one want to go further in any respect?

1 What -- what does it mean to Kisorize Chevron?

2 GENERAL PRELOGAR: So I think that the  
3 Court in this case, if it has some concerns  
4 about the implementation issues, could do four  
5 critical things, which draw heavily on Kisor,  
6 but I think look a little different in their  
7 particulars.

8 The first thing the Court could do  
9 would be to reemphasize the rigor of the step 1  
10 analysis. Now, this is drawn directly from  
11 Kisor. As I mentioned before, we've seen  
12 results in the lower courts where they are now  
13 following this Court's direction with respect to  
14 that.

15 So in this regard, what the Court  
16 would be saying is don't wave the ambiguity flag  
17 too readily. Don't give up just because the  
18 statute is dense or hard to parse. Instead  
19 there are a lot of hard questions out there that  
20 can be solved and reveal Congress's intent, if  
21 the court applies all of the tools and really  
22 exhausts them. So that would take care of a  
23 whole category of cases.

24 Then at step 2, I think the Court  
25 could again do what it did in Kisor, which was

1 to reinforce that reasonableness is not just  
2 anything goes. And, Justice Gorsuch, I think at  
3 times has said it just means the government  
4 wins, but that is not actually the standard.

5 Even at that step 2 stage, it's  
6 obviously deferential, but the Court should be  
7 enforcing any outer bounds in the statute and  
8 making sure that the agency hasn't transgressed  
9 those.

10 I think the third thing the Court  
11 could do is emphasize that this whole enterprise  
12 only gets off the ground in a me-type situation  
13 where you have the agency being directly  
14 empowered by Congress to speak with the force of  
15 law and then exercising appropriately a formal  
16 level of authority in implementing the statute.

17 And so I think that that is an  
18 important principle as well, that there are  
19 certain contexts in which the agency is not  
20 actually speaking with the force of law or in a  
21 way that would be fitting with the delegation  
22 Congress has provided.

23 And then, finally, the fourth thing  
24 that the Court could do, and I think this is a  
25 little bit different from *Kisor*, would be to

1 emphasize that it's always important to look at  
2 any other statutory indication that Chevron  
3 deference was not meant to apply.

4           And what I'm thinking here of are  
5 things like situations where the nature of the  
6 statutory question as the Court has said in  
7 other cases isn't one where you would expect  
8 Congress to give that to the agency. There's a  
9 flavor of this in the major questions doctrine  
10 case, and I don't want to rule out other  
11 scenarios that could come up, because part of  
12 our -- our central argument here is Congress can  
13 adjust, Congress can react, Congress can take  
14 statute-specific steps, and so courts should pay  
15 attention to that.

16           And there is nothing in Chevron that  
17 dictates that this presumption is irrevocable.  
18 Instead, it's fully rebuttable.

19           JUSTICE KAGAN: And is there anything  
20 you would say about the matter of changed  
21 interpretations?

22           GENERAL PRELOGAR: So I think that  
23 changed interpretations already are an area  
24 where the agency is under additional burdens to  
25 justify its decisionmaking. I think they get a

1 harder look.

2           And the Court has made clear that in a  
3 circumstance where an agency is changing its  
4 regulatory approach, one of the things that it  
5 has to do is take full account of the reliance  
6 interests and explain why those shouldn't alter  
7 what it's doing in -- in -- in the kind of  
8 revised approach.

9           The agency also frequently, if it has  
10 come from a notice and comment rule-making, has  
11 to run that process all over again. That's a  
12 time-intensive process. It takes a substantial  
13 investment of agency resources. So I think in  
14 that context too, the Court could police the  
15 bounds of that and make sure that the agency is  
16 following the procedural requirements to ensure  
17 that it's informed decisionmaking.

18           But at the end of the day, if the  
19 agency can run the gauntlet and survive those  
20 hurdles, then the fact that it has some  
21 discretion under the statute to change its  
22 approach, I think, is not something to say is --  
23 is, you know, kind of a bug in the statute.  
24 Instead, it's a feature because there are all  
25 kinds of circumstances where Congress would want

1 to give the agency the ability to adapt to  
2 changing circumstances, to new factual  
3 information, or to the experience it's  
4 accumulated under the prior program.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Gorsuch?

8 Justice Kavanaugh?

9 Justice Barrett?

10 Thank you, counsel.

11 Rebuttal, Mr. Clement?

12 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

13 ON BEHALF OF THE PETITIONERS

14 MR. CLEMENT: Just a few points in  
15 rebuttal, Your Honor.

16 First, my friend started with express  
17 delegations. I think express delegations show  
18 all the problems with this fictional implied  
19 delegation because the great thing about an  
20 express delegation is you have some text.

21 What an express delegation generally  
22 does textually is delegate implementing or  
23 executing authority. It doesn't do what Chevron  
24 purports to do, which is to delegate  
25 interpretive authority.

1           But better yet, once you have text,  
2 you can put limits on the text. And Michigan  
3 against EPA is a perfect example of that. And,  
4 of course, all of these delegations do raise  
5 Article I non-delegation concerns. And if you  
6 have text, you can check for that as well, but I  
7 can't think of anything that's more antithetical  
8 to an intelligible principle than ambiguity and  
9 silence.

10           And I will say in terms of the, you  
11 know, this premise, I think it's entirely  
12 fictional. I think in most cases a statute is  
13 ambiguous because the proponent did not have  
14 enough votes to make it any clearer.

15           My friend at one point said that I  
16 viewed the whole world as every statute has a  
17 binary answer. To be clear, my position was the  
18 opposite.

19           There are statutes like that,  
20 reasonableness, appropriateness. There are also  
21 things like information services,  
22 telecommunications services, a service advisor.  
23 Is it a salesperson who is involved in the  
24 servicing of cars? I'd say yes, but you could  
25 say no, but it's binary.

1           The terrible thing about Chevron is it  
2     can't tell the two apart, because at a certain  
3     point they both look ambiguous. But if you --  
4     you know what can tell the two apart? Good  
5     old-fashioned statutory construction. Find out  
6     as the courts what the words mean. "Reasonable"  
7     is a term of capaciousness and elasticity.  
8     "Telecommunications service" is not. Good  
9     old-fashioned statutory interpretation can do  
10    the job.

11           Now, let me say the -- one thing about  
12    the mystery of why Section 706 did not appear in  
13    the Chevron decision. There's a really easy  
14    answer. It was a Clean Air Act case.

15           The court sort of stumbled into these  
16    pronouncements about how as a meta matter you  
17    should go about statutory consideration. It was  
18    a mistake. It didn't wrestle with the relevant  
19    statute at all.

20           That is a special justification to  
21    revisit the decision and to get the decision  
22    right.

23           Let me say one word about expertise.  
24    Expertise in deference do not have to go  
25    hand-in-hand in a way that precludes de novo

1 review. We have things called tax courts. We  
2 have things called bankruptcy courts. We have  
3 the Court of International Trade. They all deal  
4 with technical specialized issues.

5 Every one of them, the legal questions  
6 are reviewed de novo. That's the basic  
7 understanding with a statute, like 77 --  
8 Section 706.

9 Lastly, let me say this, you cannot  
10 Kisorize the Chevron doctrine without overruling  
11 Brand X. The fact that you could take into  
12 account if the agency had flip-flopped was part  
13 of the rationale of Kisor, many factors before  
14 you applied Auer.

15 That is a feature, my friend correctly  
16 admits, that is a feature of the Chevron  
17 doctrine and you really can't Kisorize it  
18 without overruling Brand X. And if you're  
19 overruling Brand X, well then stare decisis just  
20 went out the window and we might as well get  
21 this right.

22 Chevron imposed a two-step rubric that  
23 was fundamentally flawed. The right answer here  
24 is a one-step rubric that simply asks how is the  
25 statute best read? Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel, General, the case is submitted.

3 (Whereupon, at 1:37 p.m., the case was  
4 submitted.)

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