No. 22-451

IN THE

Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL.,

Petitioners,

v.

GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL.,

Respondents.

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

BRIEF OF SCHOLARS OF ADMINISTRATIVE LAW AND THE ADMINISTRATIVE PROCEDURE ACT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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September 22, 2023

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors of law who study and teach in the fields of administrative law and statutory interpretation.[2] They have written extensively about judicial review against the backdrop of the Administrative Procedure Act, and thus have a strong interest in the outcome of this case. *Amici* are:

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[1] Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The principle of judicial deference to agency interpretations of law has been a pillar of this Court's administrative law doctrine for more than a century. This Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), formalized one version of that principle, creating the two-step framework that is now subject to a multifaceted attack. Among other things, *Chevron*'s opponents argue that the doctrine is at odds with the original public meaning of the Administrative Procedure Act. This is wrong, and the text and history of that landmark statute provide no basis for overruling the *Chevron* doctrine.

The story of the APA begins with its text—specifically, the first sentence of Section 706, which instructs that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Though for many years this Court barely even mentioned this provision when reciting the standard of review for questions of law, Petitioners purport to discern in its text a clear command that judicial review of such issues be *de novo*.

The fundamental problem with this argument is that it hinges on the assumption that there is only one way for courts to "decide" a question of law or "interpret . . . a statutory provision." There is simply no support for that assumption in the text, context, or history of the APA. Just as a court might "decide" a question of law starting from a blank slate, a court equally fulfills that duty by looking to an agency's interpretation of the law and adopting it if it deems it reasonable. This is not a matter of semantics—it is a matter of an ambiguous statutory provision that three generations of judges and justices have construed as permitting just such an approach.

Nor is there any support for that assumption in the statute's history—the doctrinal backdrop against which it was enacted, the legislative record leading up to its enactment, and the immediate reaction of this Court and other authoritative interpreters to the statute. All point to the conclusion that the APA permits some degree of deference to agencies on questions of law in the face of statutory ambiguity.

In the early 1940s before the APA was passed, this Court repeatedly deferred to agency constructions of law in a manner remarkably similar to what *Chevron* prescribes. Marking the beginning of this era was *Gray v. Powell*, 314 U.S. 402 (1941), in which this Court deferred to the Director of the Bituminous Coal Division's interpretation of a statutory term because Congress had "delegate[d] that function [of construing the term] to those whose experience in [the] field gave promise of a better informed, more equitable" interpretation. *Id.* at 412. Two years later in *Dobson v. Commissioner of Internal Revenue*, 320 U.S. 489 (1943), this Court again upheld an agency's legal determination, explaining that "the judicial function is exhausted when there is found to be a rational basis for

the conclusions approved by the administrative body." *Id.* at 501 (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 146 (1939)). And in perhaps the best-known decision of the period, *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), this Court declared that the Board's construction of the term "employee" was "to be accepted if it ha[d] warrant in the record and a reasonable basis in law." *Id.* at 131 (quotation marks omitted). While not always perfectly consistent in their rationales, decisions like *Gray*, *Dobson*, *Hearst*, and others during this period were united by their explicit invocation of deference to agencies' legal interpretations that this Court deemed reasonable.

It is safe to "assume" that Congress was "aware of [this] existing law" when it began drafting the APA. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Certainly if Congress intended the APA to overrule or repudiate half a dozen of this Court's then-recent decisions, one would expect there to be some evidence in the voluminous legislative record. Yet there is nothing.

Instead, the record is replete with statements that Section 706 "declares the *existing law* concerning the scope of judicial review" with respect to questions of law. S. Comm. on the Judiciary, Administrative Procedure Act, S. Rep. No. 79-752, at 44 (1945), *reprinted in* S. Doc. No. 79-248, at 230 (1946) (emphasis added). To the extent that Congress, any of its members, or even any of the more conservative American Bar Association attorneys who fueled the behind-the-scenes effort to pass administrative procedure legislation intended that Section 706 do anything more than "merely . . . restate the several categories of questions of law subject to judicial review," S. Comm. on the Judiciary, 79th Cong., Rep. on the Admin. Procedure Act

(Comm. Print 1945) [hereinafter "Senate Judiciary Committee Print"], *reprinted in* S. Doc. No. 79-248, at 39, there is simply no evidence of it. This is especially notable given that there is extensive historical evidence that the APA *did* alter judicial practice with respect to "substantial evidence" review of agencies' factual determinations. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

If that history were not enough, the Court's decisions following passage of the APA further demonstrate that Section 706 did not substantively change the state of the law regarding deference on legal issues. Indeed, this Court continued to cite pre-APA cases like *Gray* and *Hearst*, sometimes even using more explicitly deferential language than in the past. *See, e.g.*, *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 478 (1947) ("Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the [agency's] choice has substantial roots in the evidence and is not forbidden by the law."). Of course, agencies did not always win during this period, but when they lost, it was not because of some perceived sea change compelled by Section 706—tellingly, rulings against the government did not cite Section 706's "decide all relevant questions of law" language at all.

Administrative law commentators also overwhelmingly perceived no change to the standard of review for questions of law in the wake of the APA. Most notably, the *Attorney General's Manual on the APA,* an explanatory document published almost immediately after the APA's enactment, stated that Section 706 "restates the present law as to the scope of judicial review." *Attorney General's Manual on the Administrative Procedure Act*, U.S. Dep't of Just. 108 (1947). And with just one notable exception, *see* John Dickinson,

Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A.B.A. J. 434 (1947), leading administrative law scholars continued to emphasize the importance of cases like *Gray* and *Hearst* for understanding the scope of judicial review.

In sum, nothing in the text, context, or history of the APA suggests that deference to administrative agencies on questions of law is impermissible, and this Court should reject Petitioners' argument to the contrary.

ARGUMENT

I. Deference to Agencies on Interpretations of Law Is Consistent with the Text of the APA.

The opening sentence of Section 706 of the APA provides that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Contrary to Petitioners' assertion, Br. 28, there is nothing "straightforward[]" about this instruction. *See, e.g.*, Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 207-08 (2006) (the APA is "generally indeterminate on the crucial question" of whether deference to agencies on questions of law should be permitted). Four years ago, five members of this Court failed to agree on any one meaning. *Compare Kisor v. Wilkie*, 139 S. Ct. 2400, 2419-20 (2019) (plurality), *with id.* at 2432-33 (Gorsuch, J., concurring in the judgment). And in the seventy-plus years since the APA was enacted, "three generations of judges" have applied its methodology while believing, "or at least assum[ing], that they were 'deciding' questions of law and 'determining' the meaning of agency actions in a manner that the APA allowed." Ronald M. Levin, *The APA and*

the Assault on Deference, 106 Minn. L. Rev. 125, 140 (2021). As one scholar has put it, "[t]he view that the command [in the first sentence of Section 706] is clear is not exactly a form of fraud. But it is a mistake." Cass R. Sunstein, Chevron *as Law*, 107 Geo. L.J. 1613, 1643 (2019).

At bottom, the ambiguity of Section 706's first sentence derives from the fact that the terms "decide" and "interpret" on their own do not specify the standard of review a court should use for "deciding" or "interpreting." Dictionaries from around the time of the APA's enactment illustrate this ambiguity. They define "decide" as "[t]o come to a conclusion," *Webster's Collegiate Dictionary* 260 (5th ed. 1937), or "[t]o determine (a question, controversy, or cause)," 3 *Oxford English Dictionary* 93 (James A. Murray ed., 1933), and provide similarly vague definitions for "interpret," *see, e.g.*, 5 *id.* at 415 ("[t]o expound the meaning of (something abstruse or mysterious); to render (words, writings, an author, etc.) clear or explicit; to elucidate; to explain"); *Webster's Collegiate Dictionary* 527 (5th ed. 1937) ("[t]o explain or tell the meaning of").

Consistent with these definitions, courts might "decide" a question of law by reviewing the issue *de novo*, as Petitioners urge. But it is equally plausible that the proper way to "decide" such a question is to consider the agency's view and adopt it if it is reasonable. *See Kisor*, 139 S. Ct. at 2419 (plurality) (one might "decide all relevant questions of law" by "review[ing] the agency's reading for reasonableness"); Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 26 (1983) (arguing that a court can "decide[]" that the law is what the agency says it is). Under this view, courts do not ignore the APA's command to "decide" a "question of law" by "afford[ing] an agency's statutory interpretation *Chevron* deference;

[they] respect it." *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting).

The surrounding provisions of Section 706 do not clarify the ambiguity in the first sentence. Indeed, when one reads the entire section from beginning to end, the first sentence sounds more like "a sort of warmup introduction" that "merely identifies some of the *kinds* of questions that would fall within a court's domain" than a substantive command. Levin, *supra*, at 137. The six categories listed in § 706(2) appear to do the more important work of describing the "*grounds for review* of such questions," *id.*, rather than elaborating upon some implied standard set forth in the first sentence. In fact, this Court has previously referred to those six latter provisions as providing the substantive standards for review of agency action while treating the first sentence of Section 706 as largely irrelevant. *See, e.g.*, *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 377 (1998) ("Substantive review of an agency's interpretation of its regulations is governed *only* by that general provision of the Administrative Procedure Act which requires courts to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (emphasis added)); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971) (referring only to § 706(2)'s six sub-categories for determining the standard of review).

As Petitioners point out, Congress did use language that arguably prescribes deference in two of § 706(2)'s categories which do not address judicial review of questions of law. *See* 5 U.S.C. § 706(2)(A) (agency action should be set aside if it is "arbitrary, capricious, [or] an abuse of discretion"); *id.* § 706(2)(E) (same, if "unsupported by substantial evidence"). But the pres-

ence of deference-conferring language in certain provisions of § 706(2) does not automatically mean that Congress meant to foreclose deference by using different language to describe courts' roles with respect to "relevant questions of law." That is especially true because even those deference-conferring terms that appear in § 706(2)(A) and (E) do not inherently convey that special weight should be given to the agency's view. *See, e.g.*, Kristin E. Hickman & R. David Hahn, *Categorizing* Chevron, 81 Ohio St. L.J. 611, 656 (2020) (describing the terms "arbitrary [and] capricious," 5 U.S.C. § 706(2)(A), and "unsupported by substantial evidence," *id.* § 706(2)(E), as "hardly self-defining").

Finally, Petitioners claim to derive support for their preferred standard of review from the fact that Section 706 instructs courts to "interpret constitutional and statutory provisions," lumping together those two sources of law in a single clause. This choice, according to Petitioners, suggests an equivalence between constitutional and statutory review, and because it is widely accepted that courts do not defer to agencies on constitutional issues, *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995), so it goes for statutory issues as well.

But again, there is simply no textual support for this argument. The fact that Congress instructed courts to interpret both constitutional and statutory provisions says nothing about the standard of review that they should use in doing so. Myriad provisions of the APA contain unrelated terms strung together, evidently for drafting convenience, yet no one assumes they require identical treatment. *See, e.g.*, 5 U.S.C. § 553(a)(2) (rulemaking provisions do not apply to "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or con-

tracts"); *id.* § 553(b)(A) (notice and comment requirements do not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice"); *id.* § 558(c) (providing an exemption from standard license revocation proceedings "in cases of willfulness or those in which public health, interest, or safety requires otherwise"). In fact, the *very next sentence* of Section 706 provides for separate treatment of constitutional and statutory issues in § 706(2)(B) and § 706(2)(C) respectively. *See* Levin, *supra*, at 146.

The bottom line is that there is nothing in the text of Section 706 prohibiting courts from deferring to agency interpretations of ambiguous statutory provisions. Nor is there any evidence of such a prohibition in the context and history of the APA's enactment, as the next two sections discuss.

II. Controlling Law in the Period Immediately Preceding the APA's Enactment Embraced Deference to Agencies' Interpretations of Ambiguous Statutory Terms, and the APA Did Not Overrule that Body of Law.

"It is a commonplace of statutory interpretation that 'Congress legislates against the backdrop of existing law.'" *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013)). Thus, when interpreting a statutory provision that is ambiguous on its face, this Court will attempt to discern the meaning that is "most compatible with the surrounding body of law into which the provision must be integrated." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment). This means that the state of the law of deference in the 1940s when the APA was enacted provides

important context clues for understanding Section 706's original public meaning.

The history of judicial deference to the executive is long, *see, e.g.*, *United States v. Vowell & McLean*, 9 U.S. (5 Cranch) 368 (1809), and by the early 1940s, the common thread of deference running through this Court's cases was remarkably pervasive, even if not always articulated in precisely the same fashion. This suggests that, at a minimum, Congress was aware of this state of affairs when it enacted the APA. And critically, there is simply no evidence in the legislative record suggesting that the APA repudiated that body of law. Indeed, the "relative silence" in that regard could be described as "deafening." Sunstein, *supra*, at 1651.

A. In the wake of President Roosevelt's New Deal, the federal government had significantly expanded, with Congress creating multiple new agencies staffed with "ardent New Dealers" who undertook ambitious new federal programs. Thomas W. Merrill, *The* Chevron *Doctrine: Its Rise and Fall, and the Future of the Administrative State* 37 (2022). These new agencies and programs forced this Court to grapple extensively with the issue of deference to agency decision-making, and the result was a body of case law that largely adopted a theory of deference to administrative agencies.

One of the first in this line of cases was *Gray v. Powell*, in which this Court reviewed a determination by the Director of the Bituminous Coal Division that a railroad company was not a "producer" of certain coal that it used within the meaning of the Bituminous Coal Act of 1937. 314 U.S. at 403-06. In upholding the agency's decision, this Court reasoned that "[w]here, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched." *Id.* at 412.

Critically, this Court made clear that deference to an agency was not limited to factual issues: "[i]t is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action." *Id.* This was not just a matter of respect for the agency but also of respect for the Congress which had delegated interpretive authority to the agency, whether explicitly or implicitly. *Id.*

Soon after *Gray* came *Dobson v. Commissioner of Internal Revenue*, where this Court was asked to review a decision of the Tax Court (then a part of the executive branch) to determine if it merited modification or reversal as "not in accordance with law" pursuant to the Revenue Act. In a unanimous opinion penned by Justice Robert H. Jackson, the Court announced that it would uphold the Tax Court's decision because it had "'warrant in the record' and a reasonable basis in the law." *Dobson*, 320 U.S. at 501 (quoting *Rochester Tel. Corp.*, 307 U.S. at 146). Chiding lower courts for not having consistently "paid the scrupulous deference to the [Tax Court]" due under the Revenue Act, *id.* at 494, this Court held that "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body," *id.* at 501 (quoting *Rochester Tel. Corp.*, 307 U.S. at 146).

In justifying this standard of review, *Dobson* seemed to eschew the analytical distinction between questions of law and those of fact, instead taking a more practical approach to deference that recognized the technical expertise of the Tax Court. Broadly speaking, the Court explained that "[i]n deciding law questions," it is "proper[]" to "attach weight to the de-

cision of points of law by an administrative body having special competence to deal with the subject matter." *Id.* at 502. Applying that principle to the case at hand, *Dobson* described what was "analytically in all respects a clear-cut question of law," Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 Colum. L. Rev. 559, 569 (1950), as a "proper tax accounting" question meriting deference to the Tax Court's expertise in that arena, *Dobson*, 320 U.S. at 507.

Although Congress overturned *Dobson*'s precise holding for review of Tax Court decisions five years later, Act of June 25, 1948, § 36, 62 Stat. 869, 991, the case enjoyed "credibility as a leading precedent" for "several years prior to its demise," Levin, *supra*, at 162. As Professor Davis put it just a few years after the APA's enactment, "[t]hat Congress has legislatively repudiated the specific rule of that case does not vitiate Mr. Justice Jackson's essay." Davis, *supra*, at 567-68 (footnote omitted); *cf.* Br. of Professor Aditya Bamzai at 22-23 (arguing that *Dobson* was flawed, but conceding that many Supreme Court cases from the early 1940s "echoed *Dobson*'s reasoning").

Indeed, on the heels of *Dobson* came this Court's landmark decision in *National Labor Relations Board v. Hearst Publications, Inc.*, which similarly upheld an agency's legal determination after finding that it had "'warrant in the record' and a reasonable basis in law." 322 U.S. at 131 (quoting *Rochester Tel. Corp.*, 307 U.S. at 146). The question in *Hearst* was whether newsboys qualified as "employees" within the meaning of the National Labor Relations Act, making them eligible to engage in collective bargaining with newspaper management. This Court rejected the newspapers' argument that the term "employee" should be defined in accord-

ance with the common law and upheld the NLRB's determination that the newsboys were "employees." In so holding, the Court explained that while "[u]ndoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve," "appropriate weight [must be given] to the judgment of those whose special duty is to administer the questioned statute." *Id.* at 130-31 (internal citations omitted). The Court then went on: "But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." *Id.*

If given a minimalist reading, *Hearst* stands for the proposition that mixed questions of law and fact were, in the early 1940s, subject to deferential *Chevron*-like review. *See, e.g.*, Merrill, *supra*, at 39; *cf.* Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 Cornell L. Rev. 1465, 1486 (2020) (characterizing *Hearst* as involving deference to the agency's "implementing principles"). Under this view of the decision, the Court engaged in *de novo* review of the pure question of law regarding the definition of "employee," but deferred to the agency on the mixed question of whether the newsboys themselves *constituted* "employees."

But another view of the decision recognizes that the "de novo review portion of the opinion reached only a negative conclusion: that 'employee' should not be defined as having a common-law meaning." Merrill, *supra*, at 39. Notably absent from the opinion is any affirmative definition of the term "employee" by the Court; rather, "the Court construed the statute as delegating authority to the agency to give content to the otherwise undefined term." *Id.*

Under either reading of *Hearst*, the decision is indisputably of a piece with *Gray* and *Dobson* in the sense that it unequivocally set forth a formula for deferring to agencies' legal interpretations under certain circumstances. And these three major cases were not alone—a series of lesser-known decisions in the early 1940s took a similar approach. For instance, in *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946), this Court upheld an order of the Interstate Commerce Commission (ICC) under *Hearst*'s rationale that "[t]he function of the reviewing court is . . . limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done." *Id.* at 536. In *ICC v. Parker*, 326 U.S. 60 (1945), this Court cited *Gray* for its decision to defer to the ICC's definition of the undefined statutory term "public convenience and necessity." *Id.* at 65. In *Billings v. Truesdell*, 321 U.S. 542 (1944), this Court upheld as reasonable the Army's interpretation of a provision of the Selective Service and Training Act, reasoning that "the interpretations of an Act of Congress by those charged with its administration are entitled to persuasive weight." *Id.* at 552-53.

Of course, also decided in this era was *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which—unlike *Hearst*, *Gray*, and the like—held that deference to an agency was appropriate only if the court deemed the agency's view persuasive on its own terms. *See id.* at 140 ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). Yet critical to that conclusion was the fact that—again, unlike in *Hearst*, *Gray*,

and similar cases—the Court had determined in *Skidmore* that Congress had *not* authorized the agency to adjudicate the type of claim at issue in the case. *Id.* Thus, *Skidmore* was completely consistent with the other cases of the era. It did not preclude deference of the kind in *Hearst*; rather, it dealt with the distinct context in which no statute gave interpretive authority to the agency, and in that context, it offered a justification for why deference might be appropriate, even if not required. *See generally* Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 Colum. L. Rev. 1143 (2012).

In sum, what emerged from these cases immediately preceding the APA was a complex body of law that was united by a professed reluctance to overturn reasonable interpretations of statutory terms by administrative agencies tasked with construing and applying those statutes. It was against this backdrop that Congress proceeded with its drafting of the APA.

B. The question then is whether the APA altered this state of affairs. Nothing in the text suggests that it did, *see supra* Section I, and absolutely nothing in the history of the law suggests that Congress sought to do so. Significantly, the legislative history of the APA spans 458 pages, and not once does it even mention *Gray* or *Hearst*. *See* Sunstein, *supra*, at 1651. Instead, it is replete with statements that Congress did not seek to change the law with respect to judicial review of legal questions.

For example, consider the Attorney General's letter sent in 1945 to both the Senate and House, appended to the Senate Judiciary Committee's Report, and cited repeatedly in the debates. It described Section 706 as "declar[ing] the *existing law* concerning the scope of judicial review" with respect to questions of

law. S. Rep. No. 79-752, at 44, *reprinted in* S. Doc. No. 79-248, at 230 (emphasis added).

Next, take the Senate Judiciary Committee print published in 1945. It stated that "[a] restatement of the scope of [judicial] review, as set forth in subsection (e) [now § 706], is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review." Senate Judiciary Committee Print, *reprinted in* S. Doc. No. 79-248, at 39. If that were not enough, the committee added that the purpose of the section was "merely to restate the several categories of questions of law subject to judicial review." *Id.*

The significance of the repeated usage of the term "restatement" cannot be brushed aside. Perhaps the APA meant to "codify[] existing practice" under "*Gray*, *Hearst*, and related holdings." Sunstein, *supra*, at 1650. Or perhaps the term "restatement" "implies a congressional acknowledgment that the courts had been, and could remain, the traditional norm-definers in this area." Levin, *supra*, at 151; *see generally* Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 Chi.-Kent L. Rev. 7 (2022) (arguing that the APA was designed to give courts leeway to respond to evolving needs of government). Either way, the language plainly forecloses the idea that the APA was designed to overrule contemporaneous precedents with respect to judicial review of questions of law. Congress simply "could not have launched [an] attack on New Deal jurisprudence with the bland and unexplained noun 'restatement.'" Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 G.W. L. Rev. 654, 689 (2020).

Lest there be any question that Congress fully comprehended the state of the law on this topic when it adopted the language of the APA, the same Senate

Committee print also cited the *Final Report of the Attorney General's Committee on Administrative Procedure* for the proposition that the "several categories of questions of law subject to judicial review" have been "constantly repeated by courts in the course of judicial decisions or opinions." Senate Judiciary Committee Print, *reprinted in* S. Doc. No. 79-248, at 39 (citing *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 77-8 (1941) [hereinafter "Final Report"]). That report, prepared by a committee appointed by President Roosevelt to build a record for Congress to use in drafting administrative procedure legislation, had outlined the complexities of the case law with respect to judicial review of questions of law, while highlighting the fact that courts frequently deferred to agencies on those questions, as the following passage illustrates:

> Even on questions of law [independent] judgment [by the court] seems not to be compelled. The question of statutory interpretation might be approached by the court de novo and given the answer which the court thinks to be the "right interpretation." Or the court might approach it, somewhat as a question of fact, to ascertain, not the "right interpretation," but only whether the administrative interpretation has substantial support. Certain standards of interpretation guide in that direction. Thus, where the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body.

Final Report, at 90-91 (footnote omitted).

Critically, this excerpt reflects the principle that although questions of law "are subject to full review" by courts, *id.* at 88, that review might not involve choosing the "right interpretation," *id.* at 90; rather, it

might be limited to ascertaining whether the agency's interpretation has "substantial support," *id.* This approach, according to the Attorney General's committee, was especially important in areas involving "complex matters calling for expert knowledge and judgment." *Id.* at 91. And the committee made clear that "the administrative interpretation is to be given weight—not merely as the opinion of some men or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it." *Id.* In other words, courts should be especially solicitous of agency viewpoints on legal questions that pertain to their fields of administration.

This characterization of judicial review sounds quite a bit like *Chevron*. At the very least, it makes clear that the Attorney General's committee, and members of Congress relying on its report, discerned from the contemporaneous, binding caselaw the principle that some degree of deference to agencies on questions of law was often appropriate. It also strongly suggests that the Congress, being thus advised, concluded that it should neither attempt to repudiate nor codify "the subtle and elusive doctrines in this area." Levin, *Assault on Deference*, *supra*, at 152.

Notably, despite the utter absence of any evidence that Congress sought to alter prevailing judicial norms regarding questions of *law*, there is significant evidence that Section 706 sought to reform previous judicial practice regarding judicial review of questions of *fact*. For instance, in discussing Section 706's instruction to "review the whole record," the Senate Report pointedly noted that "courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." S. Rep. No. 79-752, at 28, *reprinted in* S. Doc. No. 79-248,

at 214. This Court famously echoed this congressional "mood," as Justice Frankfurter described it, in *Universal Camera*, explaining that "[w]hether or not it was ever permissible for courts to determine the substantiality of evidence supporting [an agency] decision merely on the basis of evidence which in and of itself justified it, . . . the new legislation definitively precludes such a theory of review." 340 U.S. at 487-88.

Even if the comments of members of Congress with respect to the review of factual determinations are better characterized as "an admonition to apply prior doctrine more conscientiously" rather than an alteration of that doctrine itself, *see* Levin, *Assault on Deference*, *supra*, at 153 n.127, they certainly stand in marked contrast to the utter absence of any attempt to push back against existing doctrine regarding judicial review of questions of law. The "noisy debate" regarding the substantial-evidence test is exactly "what one would expect to observe when Congress sets out to rectify a problem—or at least perceived problem—with a substantial body of Supreme Court case law," so the "absence of similar fireworks" in the legislative record on review of questions of law is especially telling. *Id.* at 173-74.

Perhaps even more telling is the absence of evidence that those very advocates in the American Bar Association who had pushed hardest for administrative law reform in the first place sought to alter the standard of review for questions of law through the APA. The first attempt at legislation by those individuals, born out of their frustration with New Deal agencies like the NLRB and SEC, was vetoed by President Roosevelt as too deregulatory and extremist, Merrill, *supra*, at 45-46, yet notably, even that bill had little to say about judicial review of agency rulings on questions of law. *See* Walter-Logan Bill, H.R. 6324, 76th

Cong. § 5(a) (1940) ("Any decision of any agency or independent agency shall be set aside if . . . the decision is beyond the jurisdiction of the agency or independent agency.").

After the collective war effort prompted a reduction in partisan politics, the relative extremists on the ABA's Committee on Administrative Procedure were largely replaced by moderates who were explicit about their lack of desire to alter the status quo with respect to judicial review of questions of law, at least so far as their views are reflected in the legislative record. Indeed, the Committee's Chairman, Carl McFarland, remarked during the congressional hearings on the APA that "we do not believe the principle of review or the extent of review can or should be greatly altered." S. Doc. 79-248, at 84 (1946). He later added that "the scope of review should be as it now is." *Id.*

Perhaps the choice not to tinker with judicial review of questions of law was part of that carefully constructed compromise that resulted in the House and Senate passing the APA with no recorded dissents. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1643-57 (1996). In any event, it would certainly be odd to infer that legislators sought to significantly tighten judicial review of questions of law "if that move lacked support from the ABA committee, the entity that had principally spearheaded the movement to curb the agencies' power through legislation." Levin, *Assault on Deference*, *supra*, at 172.[3]

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[3] Professor Aditya Bamzai attempts to make that inference in his noteworthy work, *The Origins of Judicial Deference to Execu-*

III. In the Wake of the APA's Enactment, Authoritative Interpreters of the Statute Did Not View It as Bringing About Any Change with Respect to Judicial Review of Questions of Law.

There is also no evidence from the period immediately following the APA's enactment that this Court viewed it as altering pre-APA standards for judicial review of questions of law, as set forth in cases like *Gray*, *Dobson*, and *Hearst*. The phrase "decide all relevant questions of law" was used just four times by this Court in the ten years after the APA was enacted, and never once to suggest that courts should not defer to agency interpretations of law. *See Fed. Power Comm'n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 499 n.5 (1955); *Heikkila v. Barber*, 345 U.S. 229, 231 n.3 (1953); *Universal Camera*, 340 U.S. at 482 n.15; *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 138 n.13 (1947). Instead, this Court steadfastly continued

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tive Interpretation, 126 Yale L.J. 908 (2017). Although he concedes that "the Supreme Court in the early 1940s steadily expanded the zone of interpretive discretion given to administrative agencies" on questions of law, *id.* at 976, he argues that the APA implicitly repealed that case law and returned to a "traditional interpretive methodology," centered on deferring to agency interpretations of law *only* when those interpretations were made contemporaneously with the passage of the interpreted statute or were consistently followed for a long period of time, *id.* at 987.

Even assuming his characterization of the earlier case law is accurate, *but see, e.g.*, Green, *supra*, at 681-86; Levin, *Assault on Deference*, *supra*, at 168-70, Professor Bamzai points to no explicit evidence that Congress meant to restore the pre-1940s state of the law through the APA. In any event, in his brief to this Court, Professor Bamzai appears to retreat from his characterization of the APA as restoring those interpretive canons, instead urging this Court to adopt them as a prudential matter. Bamzai Br. 28-30.

to defer to agency constructions of ambiguous statutory terms, often citing pre-APA cases like *Hearst* and *Gray*. As Professor Bamzai has put it, "[f]or better or worse, the enactment of the APA did not seem to have any noticeable impact on how courts reviewed agency interpretations of statutes." Bamzai, *supra*, at 995 (quoting John F. Manning & Matthew C. Stephenson, *Legislation and Regulation* 747 (2d ed. 2013)).

For instance, in *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143 (1946), a unanimous decision issued six months after the APA's enactment, this Court invoked its earlier decision in *Hearst* when considering the "specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially." *Id.* at 153-54 (quoting *Hearst*, 322 U.S. at 131). In affirming the Commission's order denying the respondents' claims for compensation, the Court explained that "[t]o sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Id.* at 153-54. If that were not a clear enough endorsement of the deferential pre-APA standard of review, this Court reiterated—again, citing *Hearst*—that "the 'reviewing court's function is limited'" to confirming that the agency's interpretation "has 'warrant in the record' and a 'reasonable basis in law.'" *Id.* (quoting *Hearst*, 322 U.S. at 131).

In *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946), decided the same day as *Aragon*, this Court (again unanimously) upheld an FCC order denying a radio station's license renewal application. This Court chided the court below for substituting its construction of the

term "public interest" within the meaning of the Communications Act for that of the agency, asserting that "it is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license." *Id.* at 229.

The following year brought more of the same. In *National Labor Relations Board v. E.C. Atkins & Co.*, 331 U.S. 398 (1947), this Court deferred to the agency's interpretation of the term "employee" in the NLRA, just as it had done in *Hearst*, calling it "elementary that the Board has the duty of determining in the first instance who is an employee for purposes of the [NLRA] and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law." *Id.* at 403 (citing *Hearst*, 322 U.S. at 131).

In *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), this Court deferred to an agency's inference that an employee was fatally injured "in the course of employment" on his drive home from work. *Id.* at 477. Again citing *Hearst*, *Cardillo* explained that "[e]ven if such an inference be considered *more legal than factual in nature*, the reviewing court's function is exhausted when it becomes evident that the [agency's] choice has substantial roots in the evidence and is not forbidden by the law." *Id.* at 478 (emphasis added).

Of course, agencies did not always win during this period. But the government's losses did not result from a perceived change to the standard of review for questions of law ushered in by Section 706's first sentence. Rather, this Court rejected agency interpretations primarily when it determined that the statute in question had a plain meaning at odds with the agency's construction—akin to losing at *Chevron* step one. *See, e.g.*, *Brannan v. Stark*, 342 U.S. 451, 465

(1952) ("Without support in the words of the statute the challenged provisions must fall."). Dissenters in these cases often accused the majority of abandoning *Gray* and *Hearst*, but notably, no one on either side of the debate suggested that either a rejection or doubling-down on those precedents was compelled by the text of Section 706. *See, e.g.*, *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 677 (1954); *id.* at 689 (Douglas, J., dissenting); *Stark*, 342 U.S. at 464-65; *id.* at 484 (Douglas, J., dissenting); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 325 (1951); *id.* at 327-28 (Douglas, J., dissenting). In fact, no one cited Section 706 at all.

Not only did this Court fail to discern any change wrought by Section 706 to the pre-APA standard of review for questions of law, *see* Sunstein, *supra*, at 1654 ("[f]rom 1946 to 1960, [this] Court never indicated that section 706 rejected the idea that courts might defer to agency interpretations of law"), but the Department of Justice also did not note such a change. The *Attorney General's Manual on the APA,* an explanatory document published almost immediately after the APA's enactment, states that Section 706 "restates the present law as to the scope of judicial review," *Attorney General's Manual on the Administrative Procedure Act*, U.S. Dep't of Just. 108 (1947). In another place, much like the 1945 Senate Judiciary Committee Print, the Manual refers to Section 706 as "a general restatement of the principles of judicial review embodied in many statutes and judicial decisions." *Id.* at 93.

To be sure, some have argued that the Attorney General's Manual should be taken with a grain of salt: it "reflected the interests of the executive branch," which presumably would have favored a continuation of the deferential standard of review espoused in the early-1940s cases. *Kisor*, 139 S. Ct. at 2436 (Gorsuch, J., concurring in the judgment). Nevertheless, this

Court has repeatedly treated the Manual with heightened respect in light of "the role played by the Department of Justice in drafting the legislation," *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978), and thus its firsthand perspective on the meaning of the text, *see Norton v. S. Utah Wilderness All.,* 542 U.S. 55, 63-64 (2004); Bamzai, *supra*, at 990 (describing the Manual as the "most influential[] of the contemporaneous commentaries" about the APA (footnote omitted)).

Finally, the contemporaneous views of leading administrative law commentators mirrored those of this Court and the executive branch. In the wake of the APA's enactment, almost none of those scholars argued, or even grappled with, the idea that Section 706 had altered the pre-APA standard of review for questions of law. Merrill, *supra*, at 48. Instead, they continued to emphasize the importance of cases like *Gray* and *Hearst* for understanding the scope of review for questions of law. *Id.* Kenneth Culp Davis declared that "the doctrine of *Gray v. Powell* has survived the APA." Kenneth Culp Davis, *Administrative Law* 885 (1951). Bernard Schwartz reached the same conclusion, invoking this Court's decision in *Cardillo* to demonstrate the point. Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 Fordham L. Rev. 73, 84 (1950). Louis Jaffe wrote that "[a] court must . . . decide as a 'question of law' whether there is 'discretion' in the premises, and once the discretion is established, its exercise if 'reasonable' is free of control." Louis L. Jaffe, *Judicial Control of Administrative Action* 570 (1965).

To *amici*'s knowledge, there was only one administrative law scholar of the 1940s who took the position that Section 706 called for *de novo* review of legal de-

terminations: John Dickinson. Although Dickinson argued forcefully for that view in the well-respected *American Bar Association Journal*, *see* Dickinson, *supra*, at 516-17, he failed to muster any explicit or contextual evidence for it, in marked contrast to his discussion of the changes brought by the APA to judicial review of questions of fact. In any event, it would be a stretch to characterize his account as representative of the scholarly community, given its near-complete isolation. *See* Levin, *Assault on Deference*, *supra*, at 181-83 (stating that "[t]he main problem with putting weight on Dickinson's article is that his view was almost completely isolated," and citing a dozen commentators with contrary views); Sunstein, *supra*, at 1653 n.206 ("[A]s far as I am aware, Dickinson was the only prominent contemporaneous voice on behalf of the specific view that section 706 had changed the law with respect to judicial review of agency judgments of law."); Merrill, *supra*, at 48-49 (discussing the reaction to the APA in the scholarly community without even mentioning Dickinson).

Thus, "[t]he dominant perspective of governmental officials, judges, and 'sages of the law' in the 1940s indicates that the APA did not silently renounce federal courts' broad and growing deference toward administrative agencies on questions of statutory interpretation." Green, *supra*, at 692.

* * *

No doubt the APA's history is complicated. It is a story of debate and compromise against the backdrop of a post-war nation and rapidly expanding government. But the question of whether that statute permits deference to agencies on questions of law is not complicated. Nothing in the text of the statute pre-

cludes such deference. And the historical context overwhelmingly demonstrates that Congress did not intend to upset the state of the law on that issue, which had grown increasingly solicitous of agencies' legal interpretations in the years leading up to the APA's enactment, culminating in a series of early 1940s cases that sounded an awful lot like *Chevron*.

CONCLUSION

For the foregoing reasons, this Court should reject Petitioners' argument that the *Chevron* doctrine is inconsistent with the APA.

Respectfully submitted,

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