No. 22-1219

In the Supreme Court of the United States

RELENTLESS, INC., ET AL.,
Petitioners,

v.

DEPARTMENT OF COMMERCE, ET AL.,
Respondents,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* HISTORIANS GAUTHAM RAO, RICHARD R. JOHN, AND JANE MANNERS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are Professor Gautham Rao, Professor Richard R. John, and Professor Jane Manners.[1]

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person aside from *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. *Amici*'s institutional affiliations are for identification purposes only. This brief does not purport to convey the position of the New York University School of Law.

Amici have devoted their academic careers to the study of American legal and political history, including the historical development of American administrative law and practice. *Amici* respectfully submit that the views they express here will assist the Court by identifying material factual errors in the historical accounts Petitioners offer the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over two-and-a-half centuries, the federal government has evolved to respond to the changing needs of our modern society. This evolution has produced a robust administrative state that has created regulations to support and protect our economy, businesses, environment, and communities. In seeking to curb these regulations and shrink the administrative state, Petitioners and their *amici* urge this Court to reject *Chevron* deference.[2] They claim that doing so would simply revert the federal government to the early American norm, when powers were categorically separated among the three branches—as the Framers purportedly commanded—and the federal courts were a strong and pervasive check on administrative action.

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[2] This Court has noted that *amicus curiae* briefs filed in *Loper Bright Enterprises v. Raimondo*, No. 22-451, will be considered in *Relentless, Inc. v. Department of Commerce*, No. 22-1219 (*Relentless* Dkt. Entry of Oct. 27, 2023). And the *Relentless* Petitioners have endorsed in full the arguments of the *Loper Bright* Petitioners. *See Relentless* Pet'rs' Br. 2. *Amici* thus address arguments raised by both sets of Petitioners and their respective *amici*.

Petitioners' account of early American history is riddled with errors and omissions that obscure a fundamental point: The system of government they present in their briefs simply did not exist. Nineteenth-century federal courts subjected federal agencies to minimal oversight. This fact—combined with the comparatively large volume of early agency action—produced recurrent judicial deference to agency legal interpretations as a matter of course. Meanwhile, the Framers and early Congresses were aware of, contemplated, and even blessed mixing powers across the branches.

Of course, as this Court made clear in *Smiley* and *Noel Canning*, history did not stop in 1787. The Constitution should be interpreted "in light of its text, purposes, and our whole experience as a Nation," and informed by "the actual practice of Government." *NLRB v. Noel Canning,* 573 U.S. 513, 557 (2014) (cleaned up) (looking to historical practices to help interpret the Recess Appointments Clause); *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (explaining that "long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning."). According to this analysis, the Court "put[s] significant weight upon historical practice" when considering "the allocation of power between two elected branches of Government." *Noel Canning*, 573 U.S. at 524; *see also Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions."). This principle "is neither new nor controversial." *Noel Canning*, 573 U.S. at 525. The Court reminded us that it extends back to *Stuart v. Laird*, 5 U.S. (1 Cranch)

299 (1803). *See id.* (collecting cases from *Laird* to *Mistretta v. United States*, 488 U.S. 361 (1989)).

Critically, in taking the full sweep of our nation's history into account, the Court need not—and should not—treat that history as dispositive. Instead, the Court can draw on historical practice to illuminate the Constitution's values and guide application of its principles, particularly on "doubtful question[s] … on which human reason may pause." *Noel Canning*, 573 U.S. at 524 (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819)); *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 814-20 (2015). Historical practice is also "an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era." *Noel Canning*, 573 U.S. at 525.

A complete search of the historical record shows an enduring practice of federal courts deferring to agencies. Deference dominated the nineteenth-century. Constitutional review of agency action was rare and sporadic throughout that period, even as the federal government stood up departments administering agriculture, labor, justice, education, and interstate commerce. And the existing vehicles for judicial review of agency action were limited in their reach and largely ineffectual. As the administrative state grew and evolved in the early- to mid-twentieth century, the federal judiciary made attempts to review agency action more intrusively, but ultimately fell back upon long-standing deference doctrines. These doctrines continued up to, and through, this Court's decision in *Chevron*. And they reflect strong continuities with early judicial practice—the actual

historical practice, that is, not the mythical past Petitioners and their *amici* offer the Court. Judicial micromanagement of federal agencies is simply not the norm.

Because Petitioners get the facts wrong and are seemingly blind to context, they also get the consequences of their argument wrong. Turning the clock back to the nineteenth century would not just shrink the administrative state, but also practically obliterate the federal judiciary as a control on it. Petitioners suggest—however unintentionally—that we return to a time when the federal courts were positively anemic and federal agencies worked largely without judicial checks.

As noted above, *amici* do not believe that history should be dispositive of this dispute, or contemporary legal disputes more generally. But, if the Court chooses to rely on history here as a probative or illuminating factor for reaching the right solution in these cases, the Court should have a longer view of history, a full and correct record, and deeper insight into the consequences of regressing our legal system to a nineteenth-century model. To that end, *amici* offer the Court two major observations.

First, judicial deference to agency decision-making—either as a matter of doctrine or as a matter of practice—is a long-running characteristic of American law. Federal judicial deference to agency decision-making was the norm in the nineteenth century because of the young federal judiciary's limited reach and the comparatively larger volume of early agency action. The federal courts continued to deploy deference even after Congress's 1875 grant of general federal question jurisdiction, the 1946

enactment of the Administrative Procedure Act, and the 1984 publication of *Chevron*. Petitioners' arguments to the contrary are anachronistic and rely on a view of the relevant history that is indefensibly narrow, troublingly selective, and impracticably proscriptive. *See infra*, Section I.

Second, agencies making policy and engaging in legal interpretation did not violate early understandings of separated powers. The Framers anticipated meaningful overlap among the three branches' respective spheres of authority and constructed a constitutional system that permitted it. In keeping with this more fluid understanding of separated powers, early Congresses empowered agencies to routinely perform duties that Petitioners insist were exclusively "legislative" or "judicial." Petitioners and *amici* urge a more rigid and categorical separation of powers than the Framers provided us. *See infra*, Section II.

The Court may well choose to rescind *Chevron* after hearing all the arguments presented in this case. But the Court will not find a warrant to do so in American history.

ARGUMENT

I. Judicial Deference to Agency Action is an Enduring Feature of American Law.

Petitioners claim that *Chevron* deference violates judicial practice prior to Congress's 1875 grant of general federal-question jurisdiction. *Loper* Pet'rs' Br. 29-30; *Relentless* Pet'rs' Br. 20-23. Under the *Loper Bright* Petitioners' account, "in non-mandamus cases, no comparable interpretive deference existed—only *de*

novo review." *Loper* Pet'rs' Br. 30 (internal quotation marks omitted). This statement suggests incorrectly that once the early courts exited the unique realm of mandamus, they exercised broad, *de novo* review over agency action. The *Relentless* Petitioners' account of nineteenth-century legal norms is somewhat less sweeping. *See Relentless* Pet'rs' Br. 23 ("Beyond mandamus, in tort or contract cases where courts were called upon to determine the meaning of a statute, no deference was conferred on agency legal interpretations." (internal quotation marks omitted)). But, in the absence of additional context, it is also misleading.

Indeed, both these arguments overlook a critical piece of context: Judicial oversight of the early federal administrative state was extremely limited—"anemic by modern standards." Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 6, 245 (2012). The federal administrative law of the nineteenth century was largely "an internal administrative law of guidelines and practices," rather than judicial doctrine. Indeed, courts played only a "small role" in shaping agency action, regardless of the standard they applied. Jed Handelsman Shugerman, *The Legitimacy of Administrative Law*, 50 Tulsa L. Rev. 301, 302 (2015). The contemporary paradigm of judicial review—where agency action is presumptively reviewable (Mashaw, *Creating the Administrative Constitution*, at 25) and "Article III courts [assume] ... the familiar role of reviewing records made by other tribunals and resolving questions of law" (Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of*

Administrative Law, 111 Colum. L. Rev. 939, 944 (2011))—is very different from early historical practice and thought.

In the nineteenth century, the vehicles for judicial review of agency action were limited in number. They also tightly circumscribed the legal inquiries they authorized courts to undertake and the remedies they could offer. And agency action was too geographically diffuse and voluminous to permit close superintendence from the courts. This historical configuration produced a combination of *de jure* and *de facto* deference to an administrative state that was acting at volume on highly consequential matters. And even after a modern appellate-style paradigm was installed in the twentieth century, the federal courts continued to rely on a complex body of historically rooted deference doctrines that survived even *Chevron*.

Petitioners do not meaningfully grapple with this broader context. Nor do they grapple with the problems with reinstituting a historical jurisprudence based on fundamentally different judicial attitudes toward federal administration.

A. Constitutional review of agency action was sporadic and unusual throughout the nineteenth century.

In the early Republic, federal courts generally did not exercise general constitutional review over agency action. Constitutional controls typically came from Congress or the Executive. Even then, the law routinely "left key questions of constitutional structure and rights to agencies to determine." Sophia Z. Lee, *Our Administered Constitution:*

Administrative Constitutionalism from the Founding to the Present, 167 U. Pa. L. Rev. 1699, 1715 (2019).

Agencies themselves elaborated "details currently understood as part of due process's bundle of procedural sticks such as whether witness testimony could be in writing or legal representation would be allowed." *Id.* at 1716-17. The Pension Office instructed its examiners that they should not favor the claimants or government, but instead review the facts and issue an independent decision—laying the foundation for the "three-hat" role of Social Security disability adjudicators that this Court approved over 100 years later. Mashaw, *Creating the Administrative Constitution*, at 259-60. "The Postmasters General also directed [their] subordinates on the scope of First Amendment protections." Lee, *supra*, at 1716.

Meanwhile, territorial officials operating under the Northwest Ordinance determined the contours of military jurisdiction over civilians and civilian jurisdiction over the military. Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. Pa. L. Rev. 1631, 1638, 1649-52 (2019); *see generally* Gregory Ablavsky, *Federal Ground: Governing Property and Violence in the First U.S. Territories* (2021) (detailing the extent to which territorial officials established mechanisms for, and exercised significant authority over, territorial administration, including land claim adjudications, criminal justice policy, and compensation to both Native Americans and non-Natives for certain crimes). And the Washington Administration—primarily through the Secretary of War—"gave concrete meaning to the Constitution's spare framework" governing Indian affairs through "a

constant flow of letters, instructions, and intelligence to and from Indian agents, officials, and informants on the frontier." Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1019 (2015); *see also id.* at 1042; Stephen J. Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* 71 (2010).[3]

Constitutional review of agency action remained rare until the end of the nineteenth century, even though the federal government added whole new departments administering agriculture, labor, justice, education, and interstate commerce. Lee, *supra*, at 1719-23. In 1868, Thomas Cooley assessed that "[g]reat deference has been paid in all cases to the action of the executive departments, where ... it is to be presumed they have ... endeavored to keep within the letter and the spirit of the Constitution." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 83-84 (7th ed. 1903). As historian Sophia Lee explained, "[T]he Court remained disinterested if not hostile to constitutional challenges to administrative action." Lee, *supra*, at 1723.

By contrast, agencies regularly adjudicated constitutional disputes. In the 1880s and 1890s, for example, agencies weighed in on presidential powers (including appointments, treaties, inherent powers,

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[3] Even though these jurisdictional policies were often set through exchanges with territorial judges, "the oddity of territorial government ... made territorial judges into legislators and administrators," and "almost none of [these exchanges] resulted in an actual civil proceeding." Ablavsky, *Administrative Constitutionalism*, at 1649.

and the Take Care Clause), congressional powers (including legislative and contract), the Supremacy Clause, the Ex Post Facto Clause, the Full Faith and Credit Clause, and the Fourth Amendment, "often with little or no guidance from the courts." *Id.* at 1726-27.

B. Judicial relief from agency decision-making during the nineteenth century was confined to a few narrowly circumscribed causes of action with limited reach.

The judicial oversight of administrative action that *did* occur in the nineteenth-century followed a "bipolar" model: Plaintiffs could obtain judicial review either by seeking a prerogative writ, or by lodging a common law damages action against agency officers in their personal capacities. Mashaw, *Creating the Administrative Constitution*, at 24-25. Beyond these two modes of judicial review, no review existed. And, combined, they did not place significant limits on agency action over time.

Mandamus Actions. The most commonly invoked prerogative writ—mandamus—offered minimal relief. The writ could issue only against federal officers working in Washington, D.C., and thus did not apply to officials in distant governmental outposts. Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 Harv. L. Rev. 1285, 1296 (2014). While "[m]any litigants made their way to the capital to seek mandamus ... [t]hey generally had an unhappy time." Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 Yale L.J. 1362, 1400 (2010). Mandamus actions limited judges to determining whether the agency had jurisdiction to

undertake the challenged action. "This, in turn, tended to restrict judicial intervention to executive action lacking any legal authority and discouraged judicial micromanagement of matters clearly falling within the scope of agency jurisdiction." Merrill, *Article III,* at 944. The object of this review was to determine whether federal officials had failed to perform non-discretionary action mandated by statute. *Cf.* Mashaw, *Creating the Administrative Constitution*, at 302. Relief, in turn, would consist only in compelling an agency to do something it was legally required to do. Mandamus did not permit courts to second-guess policy determinations that federal officials made within the scope of their authority. Merrill, *Article III*, at 1001.

Moreover, mandamus actions rarely succeeded. This Court's ruling in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) is not to the contrary. *Contra Relentless* Pet'rs' Br. 2, 12; *Loper* Pet'rs' Br. 24. As legal scholar Nicholas Bagley has explained, "Far from calling for presumptive judicial oversight of agency discretion, [Chief Justice] Marshall's opinion affirmed the primacy of a ministerial-discretionary distinction that, for the next century, would limit almost to the point of vanishing the availability of mandamus relief." Bagley, *supra*, at 1302.

Common Law Actions. Common law actions against federal officials in their personal capacities also offered avenues of relief. Mashaw, *Creating the Administrative Constitution*, at 76, 84. While they "provided significant remedial scope in the face of very early actions of the federal government, as those actions broadened to include benefits provision,

regulation, and licensing, judicial remedies failed to keep pace." *Id.* at 24.

These common law actions poorly approximated contemporary judicial review and remedies. First, and perhaps most critically, federal courts rarely adjudicated them. Lee, *supra*, at 1711-13. Second, as in mandamus, the federal law questions the courts addressed were generally limited to questions of jurisdiction. Actors exercising discretion committed to them by law had an absolute defense. Bagley, *supra*, at 1299; *see also* Mashaw, *Creating the Administrative Constitution*, at 76.[4] Third, successful plaintiffs were generally only entitled to money damages from the official himself. They could not obtain vacatur of the policy that might have directed the official's action. Bagley, *supra*, at 1299; Mashaw, *Creating the Administrative Constitution*, at 76, 84. And fourth, large swaths of government action—such as a failure to act—were not wrongs at common law and so could not be addressed. Bagley, *supra*, at 1299.

Doctrine of Non-Reviewability. Linking these two types of legal action was a common reluctance on behalf of courts to adjudicate questions of federal law on the merits. Instead, judges confined themselves to jurisdictional questions. This summed up to a

[4] To the extent that officials' actions were reviewed based on a "reasonableness" standard, it was Congress—not courts—that did so. Officers held liable in common law actions could petition Congress for reimbursement of their expenses. In assessing those petitions, Congress investigated whether the officers' actions were reasonable. *See generally* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1866-70, 1889-93 (2010).

"doctrine of non-reviewability of administrative discretion." *Id.* at 1300 (internal quotation marks omitted).

Critically, these two avenues of redress were not islands floating in a broader doctrinal sea of *de novo* review. Instead, they were the complete universe of judicial redress. *See* Winston Bowman, *The Indefinite Article: Historicizing the Judicial Branch*, *in Approaches to Federal Judicial History* 9, 24 (Gautham Rao et al. eds., 2020). If plaintiffs could not fit their claims into one of the two vehicles, they did not have access to review.

In minimizing the significance of mandamus (*Loper* Pet'rs' Br. 29-30; Cato Inst. *Loper* Br. 8-9), the *Loper Bright* Petitioners and their *amici* may believe they have distinguished away the narrow exceptions to a background rule that favors them. But they have only confirmed the existence of a background norm that is affirmatively hostile to their position. Meanwhile, the *Relentless* Petitioners (Pet'rs' Br. 23) have failed to acknowledge the minimal share of agency action covered by nineteenth-century mandamus, tort, and contracts cases.

C. Early federal administrators routinely exercised discretion on a large volume of critical matters with minimal judicial oversight.

The anemia of judicial review in the nineteenth-century might be less problematic for Petitioners' position if the early federal administrative state were also anemic, its actions inconsequential, and its conduct comprehensively directed by statute. But federal officials throughout the nineteenth century

exercised substantial discretion on a large volume of critical matters, largely unchecked by the judiciary. This totaled up to substantial judicial deference to federal administrators as a matter of course.

Undoubtedly, the early state was not nearly as large as its contemporary counterpart: There were only 11,491 federal civil servants in 1831, for example. Gautham Rao, *National Duties: Custom Houses and the Making of the American State* 6 (2016). And it did not administer nearly the range of subject matter at nearly the same depth as the modern administrative state. But early Congresses delegated "vast powers" to the executive branch and the burgeoning ranks of administrators. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 332 (2021). These delegations "consolidated prescriptive and enforcement authority within sometimes-sprawling bureaucratic apparatuses." *Id.* at 333.

Chief among these mission-critical authorities and duties was revenue-raising. The Treasury and its network of customs houses run largely by federal appointees administered "the most important federal tax of the nineteenth century." Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940*, 40 (2013). "[C]ustoms revenue almost singlehandedly funded the federal government. Between 1789 and 1836 the federal government collected about $830 million in revenue. Approximately $682 million of that sum"—or 82 percent—"came from the customs houses." Rao, *National Duties*, at 6 (cleaned up). Meanwhile, Congress's sweeping 1798 direct tax on real estate was collected through a system that reached "every house

and farm in every state" and deployed "more federal officials than any nonmilitary operation … before about 1810." Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288, 1304, 1330 (2021). Congress likewise chartered several national banks, the second of which was authorized to operate in a manner similar to a modern central bank or the Federal Reserve system. Mashaw, *Creating the Administrative Constitution*, at 166.

The federal government also regulated commerce among the states and with foreigners, policed the young nation's borders, conducted international diplomacy, waged war, administered a large and growing war pensions system, acquired and administered additional territory—often through military violence against Native Americans—subsidized the country's westward expansion, and built and maintained transportation and communication infrastructure, including the postal service. Rao, *National Duties*, at 13; Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth Century America* 220-31 (2009); Lee, *supra*, at 1719-1720; Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* 25 (1995); William J. Novak, *The Myth of the "Weak" American State*, 113 Am. Hist. Rev. 752, 758 (2008); Rockwell, *supra*, at 77-78.

Federal statutes were rarely sufficient to guide official action. So, federal officials had to exercise significant discretion. As historian Nicholas Parrillo explained, one might assume that as Congress issued

"ever more specific regulation through more elaborate written rules," "official behavior became ever more exact and rule bound." "The truth," however, "is nearer the opposite":

> [T]he proliferation of elaborate restrictions on conduct required those who administered such restrictions to exercise ever-greater subjective judgment, discretion, and forbearance in imposing—or, more accurately, refraining from imposing—the sanctions for such conduct ... [L]awmakers commonly wrote an overly broad rule whose sharp edges could be 'sanded off' through selective nonenforcement.

Parrillo, *Against the Profit Motive*, at 39-40.

Examples of this kind of deference abounded throughout the nineteenth century, although one would never gather as much from Petitioners' briefing on the period.

For example, an elaborate body of statutory law defined many of the details of customs work. But the system could not—and did not—function without substantial gap-filling and innovation by the officers manning the ports of entry—134 of whom attended to 39 ports during the Washington administration. Rao, *National Duties*, at 64-69. Customs officials also challenged the guidance they received from the Treasury. To resolve a clash with his customs officials over the proper interpretation of the Enrollment Act of 1789, Hamilton allowed them to interpret statutes and guidance more broadly, removed high-ranking Treasury officials from close superintendence of the ports, and limited their power to coerce compliance from merchants. *Id.* at 92-93, 131. The push and pull

between Washington, D.C., and the localities continued as late as 1874, when Congress eliminated moieties for customs officers to encourage them to exercise more strategic forbearance in seizing shipments that violated customs laws. Parrillo, *Against the Profit Motive*, at 42.

Discretion factored heavily into the application of federal law elsewhere, too. Early tax assessors and their supervisory boards had substantial discretion over methods for valuing real estate and calculating assessments. Parrillo*, Critical Assessment,* at 1319, 1334-36. The Second Bank of the United States's authorizing statute left to the Bank's directors all decisions concerning how the Bank would carry out its fiscal and monetary functions, including full power to regulate its own affairs by bylaws, ordinances, or regulations and decide where it should open and operate branches. Mashaw, *Creating the Administrative Constitution*, at 166. Marine hospitals early on vested customs officials and local physicians with substantial discretion in determining who should receive the medical care guaranteed by congressional statute. *See* Gautham Rao, *Administering Entitlement: Governance, Public Health Care, and the Early American State*, 37 Law & Soc. Inquiry 627, 635-636 (2012).

Following the Civil War, the Pension Office afforded examiners significant discretion to review medical evidence and make recommendations as to whether claimants were entitled to military pensions. Mashaw, *Creating the Administrative Constitution*, at 257-61. Discretion likewise heavily influenced adjudications of naturalization requests and land claims in the West. Parrillo, *Against the Profit Motive*,

at 19; Mashaw, *Creating the Administrative Constitution*, at 129.

By the latter half of the nineteenth century, federal administrators were generating a massive amount of action. In 1856 alone, steamboat inspectors reported inspecting 1,122 steamers, along with 2,500 pilots and nearly 3,000 engineers. In the years immediately following the Civil War, the Bureau of Prisons decided "hundreds of thousands" of cases of pension eligibility. Dispositions by the Land Office, the Patent Office, the Court of Claims, the Controller's Office of the Treasury, and the Post Office summed up to "tens of thousands more." Mashaw, *Creating the Administrative Constitution*, at 205, 252. But "virtually none of those adjudicatory actions was subject to judicial review." *Id.* at 252.

This legal state of affairs totaled up to "an immense amount of administrative action [being] shielded from judicial scrutiny." Bagley, *supra*, at 1300. The "bipolar" review that the federal judiciary undertook during this period was simply outpaced by the activity of the growing agencies. The result was a system of government characterized by judicial deference to agency action as a matter of course.

D. Judicial deference to agency decision-making persisted into the twentieth century, continuing even past *Chevron*.

The *Loper Bright* Petitioners' historical account ends in 1875. But history did not stop there. The *Relentless* Petitioners attempt to remedy the gap with argumentation that extends up to the passage of the APA in 1946. *See Relentless* Pet'rs' Br. 23-24. But, again, the history they offer is materially incomplete,

eliding a tradition of deference that not only survived the APA, but *Chevron*, too.

As the traditional bipolar model began to break down in the latter years of the nineteenth century and the modern administrative state and judiciary took form, courts began to experiment with more invasive review of agency action, including more *de novo* review of agency determinations of law. This occurred in fits and starts, though became particularly obvious with the Supreme Court's aggressive superintendence of the Interstate Commerce Commission circa 1907-10.[5] Such invasive review continued through the 1940s. Merrill, *Article III*, at 943, 953, 964-65; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 994 (1992). But this approach was "short lived" and "prevailed" only "fleetingly." Merrill, *Judicial Deference*, at 994, 1013. Concerns that this approach unduly aggrandized the federal courts led the Court to abandon it "soon after the [APA] was enacted." *Id.* at 994-95.

In its place, the Court fleshed out a "multifactored contextual approach" to deploying deference on questions of law, which "dominated the pre-*Chevron* era." Merrill, *Judicial Deference*, at 995. This approach was "pragmatic," calling the Court to consider a number of factors and providing for varying levels of deference on a "sliding scale." *Id.* at 972. "Some factors—such as the importance of longstanding and consistent or contemporaneous

[5] For example, the Supreme Court began to make "limited inroads on the dominant bipolar model of judicial review" in the 1860s, though only in cases between private parties involving determinations made by the Land Office. *See* Mashaw, *Creating the Administrative Constitution*, at 248.

administrative constructions—have been invoked as reasons for deferring to executive interpretations for over 150 years," in, for example, cases adjudicated in the Court of Claims. *Id.* at 975 (citing, *inter alia*, *United States v. Vowell*, 9 U.S. (5 Cranch) 368, 371 (1809)); *accord* OSG *Loper* Br. 22-26; OSG *Relentless* Br. 21-25. And the Court continued to invoke these factors in a considerable number of cases post-*Chevron*. Merrill, *Judicial Deference*, at 984-85 (examining case law through 1990).

Thus, while federal courts oscillated over time in the amount of deference they paid to agency determinations of law and on what grounds, the wide sweep of history reveals a remarkably persistent tradition of deference that had both practical and doctrinal dimensions.

E. Reverting to nineteenth-century judicial practice would introduce a host of problems—including for Petitioners' appeals.

Perhaps because they have fundamentally miscast nineteenth-century judicial practice, Petitioners are remarkably silent on the practical implications of reverting contemporary practice to the (actual) norms of that period.

Turning the clock back several centuries would not just shrink the administrative state, but also effectively eliminate the federal courts' role in superintending it. Petitioners would revert the contemporary courts to the practices of a long-gone judiciary that was relatively underdeveloped and positively anemic. Doing so would diminish the Court's own status *vis-à-vis* federal agencies. And it

would undermine the substantial law the federal courts have developed to ensure that agencies respect the constitutional rights of the people they serve.

A return to nineteenth-century norms would also require a dramatic reframing of the way we understand separation of powers disputes involving courts and agencies. Throughout the nineteenth century, the federal courts worried about judges contaminating executive decision-making by revising executive officers' discretionary decisions. Bagley, *supra*, at 1295; Merrill, *Article III*, at 944. "As Professor Bruce Wyman explained in his 1903 treatise on administrative law, [judicial second-guessing of those kinds of decisions] was thought to violate 'the life principle in the rule of the separation of powers' that 'the judiciary should have no business in the action of the administration.'" Bagley, *supra*, at 1295; see also Mashaw, *Creating the Administrative Constitution*, at 252-54. This concern persisted well into the first decades of the twentieth century. See Merrill, *Article III*, at 944.

In harking back to the nineteenth century, Petitioners—however unwittingly—are urging the Court to revert to a system of judicial review that could not give them the relief they want. Indeed, neither a mandamus action, nor a common law damages suit would have permitted the practical relief the Petitioners ultimately seek—setting aside the National Marine Fisheries Service's final rule. *See Relentless* Pet'rs' Br. 47-52; *cf. Loper* Pet'rs' Br. 47-51.

II. The Founding Generation Licensed Mixing Powers among the Three Branches of the Federal Government.

Petitioners and their *amici* frequently raise separation of powers concerns from the purported perspective of the Founding Generation. As they would have it, the Founders would never permit a mixing of legislative, executive, and judicial functions. *Chevron* deference, in turn, violates these principles because it permits agencies to exercise the judicial power to say what the law is. *See, e.g.*, *Relentless* Pet'rs' Br. 15-20; *Loper* Pet'rs' Br. 23-27; Sen. Ted Cruz et al. *Loper* Br. 6-9; U.S. Chamber of Commerce *Loper* Br. 8-14.

We have already explained why a broader sweep of history is necessary to make sense of this case. But even assuming that Founding Era history is probative, Petitioners' accounts of it are flawed. Their accounts lack the context necessary to make sense of the old documents they and their *amici* quote or to gauge how Founding Era Americans actually thought about the issues that concern Petitioners. These accounts, too, are deeply anachronistic, imposing on the Framers' ways of thinking that they simply did not have. The result are briefs that read the Framers against the grain of the larger body of historical evidence in a misguided attempt to extract hard-and-fast decision rules that the Framers did not provide us.

In reality, the Founding Generation understood power to be more fluid and shareable among the branches than Petitioners contend, as demonstrated by the text and design of the early state constitutions, the Articles of Confederation, and the Constitution

itself, as well as post-ratification practice. The Framers and early Congresses expected and allowed for substantial mixing of legislative, executive, and judicial authority across branches. Under these circumstances, *Chevron* deference cannot plausibly be criticized as an affront to early understandings of separated powers.

Early State Constitutions. The earliest state constitutions followed an equation of "legislative supremacy, radical representation, and magisterial impotence." Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1760-61 (1996). They concentrated power in legislative assemblies (particularly the lower houses) and included few, if any, checks on the legislature from the other branches of government. Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, 163 (1969). Over time, it became clear that the legislative supremacy model did not work as intended. Legislatures abused their authority to confiscate property, tamper with contracts, and undermine trial rights. Flaherty, *supra*, at 1763; *see also* Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 Tex. L. Rev. 89, 126 (2022). Frustrated Americans turned toward new solutions, a search that led them to rethink the then "relatively minor eighteenth-century maxim" of separation of powers. Wood, *supra*, at 449.

Although already familiar with the doctrine through the works of Locke and its chief architect, Montesquieu, most early Americans had only a "hazy" conception of it. Flaherty, *supra*, at 1764, 1766. Those who invoked the doctrine generally agreed that it involved three types of governmental power: legislative (enacting, amending, or abrogating laws),

executive (making peace or war and ensuring public security), and judicial (punishing crimes and resolving disputes). *Id.* at 1765 (citing Baron de Montesquieu, *The Spirit of the Laws* 151 (Thomas Nugent trans., 1949)); *see also* Wood, *supra*, at 152. But even these basic definitions generated disagreement. *See* Wood, *supra*, at 152-53. Indeed, a wealth of scholarship has recognized the difficulty inherent in distilling the doctrine into a fixed, unambiguous concept throughout the Revolutionary and post-Revolutionary period. *See, e.g.*, Wood, *supra*, at 161; Flaherty, *supra*, at 1755-56; John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1944-45 (2011); *see also* M.J.C. Vile, *Constitutionalism and the Separation of Powers* 2 (1967). More often than not, those who drew upon separation of powers principles in the early Republic simply assumed them without explanation. *See* Wood, *supra*, at 153-54.

Critics of legislative supremacy advocated for a more balanced division of powers and responsibilities among the branches of state government so that no branch would become as powerful as the early state legislatures once had. Manning, *supra*, at 1998. A series of new state constitutions—including New York's 1777 constitution and Massachusetts' 1780 constitution—put this evolving principle of balance into practice, giving governors and courts greater authority vis-à-vis the legislatures. Vile, *supra*, at 162-63.

The Articles of Confederation. Under the Articles of Confederation, the Continental Congress undertook a mix of legislative, executive, and judicial functions. Flaherty, *supra*, at 1771-72. The Congress

regulated financial matters, established post offices, made war, and appointed and commissioned all military offices. Articles of Confederation of 1781, art. IX. The Congress also had the authority to "manag[e] the general affairs of the united states" and even acted as an appellate court for interstate and certain admiralty disputes. *Id.*; *see also* Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States 1775-1787,* 10 (1983). In short, the Articles' distribution of powers "would not have been a plausible baseline for the separation of powers." Manning, *supra*, at 1997 n.293.

One of the Congress' most significant actions during this period—the Northwest Ordinance—demonstrates just how far the early Republic was from segregating powers. 32 *Journals of the Continental Congress 1774-1789*, 334-43 (Roscoe R. Hill, ed., 1936). The Ordinance delegated a sweeping mix of executive, legislative, and judicial power and discretion over the new Northwest Territory to a legislature comprised of five presidentially-selected and congressionally-confirmed officials: a governor, a secretary, and three judges. *Id.*; *see also* Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, at 1632-33. The Ordinance favored the executive, granting him an absolute veto over legislation and authority to convene, prorogue, and dissolve the legislature whenever expedient. 32 *Journals of the Continental Congress 1774-1789*, at 339.

The Constitution. Perhaps unsurprisingly, the Constitutional Convention did not miraculously distill separation of powers into clear decision rules. The delegates to the Convention agreed only at the most

general level "that there must be an executive branch, independent of the legislative and judicial branches." Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 240 (1985); *see also* Manning, *supra*, at 1999. But beyond that, the Convention left the bulk of the most critical issues implicating separation of powers—including presidential selection, the veto, legislative involvement in executive appointments, and war powers—either unsettled or tentatively settled throughout most of the summer of 1787. Flaherty, *supra*, at 1779. And when they did settle them, the resulting text "only attempted to define the powers and relationships of each branch mainly at their respective pinnacles." *Id.* at 1783; *cf.* Vile, *supra*, at 171-72.

Even at this high level, the text of the Constitution itself demonstrates a functional commitment to balance that mixes many powers. Vile, *supra*, at 172; Macey & Richardson, *supra*, at 118-19; Manning, *supra*, at 1999-2005. Most significantly the Constitution granted the President a qualified veto over legislation. U.S. Const. art. I, § 7, cl. 2. With respect to the judiciary, the Constitution sought to strengthen its authority by creating the Supreme Court and authorizing Congress to create an entirely new federal judiciary complete with broad potential jurisdiction. *Id.* at art. III, §§ 1-2.

In distributing these powers among the branches, the Framers left many more questions than answers. Flaherty, *supra*, at 1787; *see also* Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* 4 (2018) ("The Constitution was born without many of its defining

attributes; these had to be provided through acts of imagination."). The omissions reflect the difficulty inherent in attempting to classify government action in the abstract. Macey & Richardson, *supra*, at 123; Mortenson & Bagley, *supra*, at 315. To the Founders, "the boundaries between the Executive, Legislative and Judiciary powers, though in general so strongly marked in themselves, consist[ed] in many instances of mere shades of difference." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 12 *The Papers of Thomas Jefferson: August 1787 to March 1788*, 270, 275 (Julian P. Boyd ed., 1955); *see also* Mortenson & Bagley, *supra*, at 315. The Founders intended that "answers would come mainly through the enumerated political processes as informed by the fundamental constitutional values that give rise to them." Flaherty, *supra*, at 1787.

The Ratification Debates. The records of the ratification debates "yield nothing approaching a consensus either as to what separation of powers entailed or what the powers themselves included beyond the basic values the doctrine was to serve." *Id.* at 1807.

What is clear, however, is that those debating the Constitution—whether they disagreed or agreed with the ultimate division of powers—acknowledged that it violated a strict interpretation of the doctrine. Vile, *supra*, at 172. The Anti-Federalists criticized the Constitution, arguing that the legislative and executive powers were "not kept separate as every one of the American constitutions declares they ought to be," but instead "mixed in a manner entirely novel and unknown, even to the constitution of Great Britain." Letter by An Officer of the Late Continental Army,

(Philadelphia) Independent Gazetteer (Nov. 6, 1787), *reprinted in* 3 *The Complete Anti-Federalist* 91, 93 (Herbert J. Storing ed., 1998); *see also* Macey & Richardson, *supra*, at 120-22.

At first, the Federalists went on the defensive. They argued that the Constitution's blended boundaries did not go as far as Britain—that "[t]he king of England has legislative power, while our president can only use it when the other servants of the people are divided." "An American Citizen" [Tench Coxe] I, (Philadelphia) Independent Gazetteer (Sept. 26, 1787), *reprinted in* 1 *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification* 20, 23 (Bernard Bailyn ed., 1993). But over time, the Federalists came to champion the document's functional division of powers as the best means of achieving the balance and accountability that separation of powers was intended to produce. As Hamilton explained to the New York Convention:

> The legislative authority is lodged in three distinct branches, properly *balanced*; the executive is divided between two branches; and the judicial is still reserved for an independent body, who hold their office during good behavior. This organization is so complex, so skillfully contrived, that it is next to impossible that an impolitic or wicked measure should pass the scrutiny with success.

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 329, 348 (Jonathan Elliot ed., 1881).

The Federalists' functional approach to separation makes Petitioners' reliance on Federalist No. 47 all the more perplexing. They selectively quote Madison to argue that *Chevron* violates the Founding Generation's recognition that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." *Loper* Pet'rs' Br. 23-24 (quoting The Federalist No. 47, at 298 (James Madison)).

But a complete reading of Federalist No. 47 demonstrates that Madison, like Hamilton, sought not to advocate for a rigid interpretation of separation of powers, but instead to alleviate the Anti-Federalist concerns that the Constitution did not separate the legislative, executive, and judiciary departments enough. In addressing their concerns, Madison explained that separation of powers principles did not require that each branch be "totally separate and distinct from each other." The Federalist No. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961). In fact, he argued that such an inflexible interpretation of separation of powers misunderstood the writings of Montesquieu, the British Constitution he studied, and the early state constitutions. *Id.* at 302-08; *see also* Flaherty, *supra*, at 1809; Manning, *supra*, at 2004.

According to Madison, a correct interpretation of Montesquieu's work simply meant that "the *whole* power of one department" could not be "exercised by the same hands which possess the *whole* power of another department." The Federalist No. 47, *supra*, at 302-03 (Madison). In other words, the king, as the sole executive magistrate, could not also possess "complete legislative power" or "the supreme administration of justice," just as the "entire legislative body" could not

"possess[ ] the supreme judiciary, or the supreme executive authority." *Id.* at 303; *see also* Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 275 (Rita & Robert Kimber trans., 1980). ("Montesquieu, the authority used by the critics, had not advocated a separation of powers pure and simple.") And lest there be any confusion, Madison provided several examples from state constitutions that had mixed authority among their branches to demonstrate that "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." The Federalist No. 47, *supra*, at 300-03 (Madison).

Post-Ratification Practice. The actual functioning of the early American state further underscores the Founding Generation's mixed approach to allocating power. As early as the First Congress, federal lawmakers instituted governance mechanisms that mixed lawmaking, executive, and adjudication functions. *See* Shugerman, *supra*, at 303; *see also* Mashaw, *Creating the Administrative Constitution*, at 44.

Case in point is what Mashaw has called the early Republic's "largest and most difficult administrative tasks": surveying and selling the early nation's public lands. Mashaw, *Creating the Administrative Constitution*, at 119; *see also* Malcolm J. Rohrbough, *The Land Office Business: The Settlement and Administration of American Public Lands, 1789-1837*, 12 (1968). Competing private claims to public lands—based on complicated questions of law concerning previous land grants from Spain, France, and Britain, grants from former colonies, and transfers from

Native American tribes—were far too numerous for the country's territorial courts. Mashaw, *Creating the Administrative Constitution*, at 127-28. Congress responded by creating a system of commissioners to adjudicate these claims, and in doing so granted them a broad mix of authority to compel attendance at hearings, administer oaths, examine witnesses, and decide cases "according to justice and equity." *Id.* at 129; *see also* Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 Stan. L. Rev. 277, 284 (2022) (exploring the "sprawling jurisprudence" created by early federal administrative adjudications of private land claims). And when federal legislation did not answer certain questions about the adjudication process, such as the formal requirements for stating a claim or what type of evidence commissioners could consider, treasury secretaries and later the General Land Office developed those policies themselves. Mashaw, *Creating the Administrative Constitution*, at 132.

Congress provided for a similar blend of federal powers when addressing the pressing issue of steamboat safety. In 1852, Congress passed a revised Steamboat Inspection Act that charged a Board of Supervising Inspectors with implementing federal safety standards. *Id.* at 192. Each supervising inspector oversaw local inspectors, who physically examined and certified steamboats, and also licensed steamboat engineers. To ensure uniformity across these local inspectors' actions, Congress gave the supervising inspectors both adjudicatory and rulemaking functions. For example, if a steamboat owner or rejected engineer did not agree with local inspectors' reasoning for denying or revoking

inspection certificates or licenses, they could file a *de novo* appeal to the supervising instructor of their district. *Id.* at 192-3.

This practice of blending powers—including judicial and executive powers—occurred frequently throughout the late-nineteenth century. Federal examining surgeons adjudicated veterans' claims for disability benefits. *Id.* at 263. Congress gave federal registrars and receivers increasing authority to adjudicate Western settlers' claims for land under federal legislation such as the Homestead Act. Parrillo, *Against the Profit Motive*, at 19; *see also* Mashaw, *Creating the Administrative Constitution*, at 255-56. Meanwhile, state judges and court clerks adjudicated naturalization applications—a function now performed by the executive. Mashaw, *Creating the Administrative Constitution*, at 298-99; Parrillo, *Against the Profit Motive*, at 128-45; 12 U.S. Citizenship and Immigr. Servs., *Policy Manual*, pt. B, ch. 3, https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-3.

Ultimately, Petitioners and their *amici* are far more concerned with sorting federal governmental powers into boxes than the Founders ever were. When it came time to put the Constitution's commitments into practice and build an effective state, the nation's early leaders allowed those powers to be shared across the branches. In insisting that the Framers offered hard-and-fast decision rules that can place a given power solely in one branch or another, Petitioners attempt to read out of the Framers conclusions they never reached.

CONCLUSION

The judgment of the First Circuit should be affirmed.

Respectfully submitted,

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