
WAIVING *CHEVRON* DEFERENCE

In a challenge to an agency action, what happens when the agency does not claim *Chevron*¹ deference? Perhaps the agency has failed to realize that the statute is ambiguous.² Or perhaps the agency fears political blowback from its policy choice and strategically takes the position that the statute unambiguously compelled its policy.³ Irrespective of the reason, what result? The Supreme Court has never squarely addressed the question. But the circuit courts have almost uniformly suggested that the answer is waiver. That is, when an agency fails to invoke *Chevron* deference during litigation, the reviewing court will assume that *Chevron* does not apply.⁴ This Note argues that such a regime is contrary to both law and sensible policy.

This question has substantial stakes. Consider, for example, the Trump Administration's ongoing effort to replace the Obama-era Clean Power Plan.⁵ Because the Obama Administration promulgated the Clean Power Plan via notice-and-comment rulemaking, the process to replace it involves several important procedural and substantive hurdles under the Administrative Procedure Act⁶ (APA).⁷ Most importantly, a replacement plan must also be promulgated via notice-and-comment rulemaking,⁸ which will likely take years.⁹ The Trump EPA's volte-face

¹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

² *See, e.g., Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1353–54 (D.C. Cir. 2006) (“The text of the [agency’s] decision . . . makes clear that the Agency construed [the statute] as an unambiguous expression of the Congress’s intent . . . [But] we cannot say that [the agency’s interpretation] reflects the Congress’s unambiguously expressed intent.”).

³ *See, e.g., Daniel J. Hemel & Aaron L. Nielson, Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 809 (2017) (“[A]n agency’s assertion that the relevant statute is unambiguous may serve an accountability-deflecting function. . . . [W]hen the stakes are high and many people are watching, an agency may be happy for any blame it can avoid, even if it cannot avoid all of it.”).

⁴ *See, e.g., Neustar, Inc. v. FCC*, 857 F.3d 886, 893–94 (D.C. Cir. 2017). Correspondingly, when a nonagency litigant fails to object to *Chevron* deference during litigation, the reviewing court will assume that *Chevron* applies. *See, e.g., Lubow v. U.S. Dep’t of State*, 783 F.3d 877, 884 (D.C. Cir. 2015).

⁵ *See* Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 83 Fed. Reg. 44,746 (proposed Aug. 31, 2018) (to be codified at 40 C.F.R. pts. 51, 52, 60).

⁶ Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706 (2012)).

⁷ *See, e.g., Cass R. Sunstein, Changing Climate Change, 2009–2016*, 42 HARV. ENVTL. L. REV. 231, 272 (2018); *see also* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 89 (2018) (“[N]early everyone agrees that the procedures that give rise to ossification make it harder for agencies to regulate, at least at the margins.”).

⁸ *See* 5 U.S.C. § 551(5) (defining “rule making” to include “amending” or “repealing a rule”); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015) (“[A]gencies [must] use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.”).

⁹ *See, e.g., Anne Joseph O’Connell, Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 480 (2011) (“Once proposed, a regulation undergoing traditional notice and comment

will also be reviewed for arbitrariness,¹⁰ which poses a problem under modern administrative law because the original plan was grounded in “a very elaborate set of findings in the record.”¹¹ These hurdles are a feature, not a bug, of administrative law. They exist to ensure that the administrative state charts a relatively steady course in the face of fickle political winds.¹² Because of these hurdles, regime change does not inexorably lead to policy change — an outcome that rightly protects reliance interests,¹³ promotes agency accountability,¹⁴ and discourages irrational decisionmaking.¹⁵ Such is the bargain struck by current doctrine between bureaucratic administration and presidential administration.

By waiving *Chevron* deference, however, the EPA can potentially evade the APA’s hurdles altogether — while simultaneously disclaiming any responsibility. Instead of mounting an effort to administratively replace the Clean Power Plan (which would surely incur political cost), the EPA can simply disavow any entitlement to *Chevron* deference in the ongoing litigation over the Clean Power Plan’s legality.¹⁶ If the D.C. Circuit accordingly denies *Chevron* deference and proceeds to interpret the Clean Air Act de novo, it is likely that the court would reject that

will not go into effect, on average, for 1.3 years.”); *id.* at 513 (finding that the EPA spent 602.34 days on average between a Notice of Proposed Rulemaking and a final rule).

¹⁰ See 5 U.S.C. § 706(2)(A).

¹¹ Keith Goldberg, *Trump’s Clean Power Plan Repeal Will Face Legal Gantlet*, LAW360 (Oct. 10, 2017, 9:13 PM), <https://www.law360.com/articles/972687> [<https://perma.cc/T9EP-8UH4>]; see *Perez*, 135 S. Ct. at 1209 (noting that “the APA requires an agency to provide more substantial justification when ‘its new policy rests upon factual findings that contradict those which underlay its prior policy’” (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))); *Fox*, 556 U.S. at 515 (“It would be arbitrary or capricious to ignore such matters.”).

¹² See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2270–71 (2001) (arguing that “by requiring that agency action bear the indicia of essentially apolitical, ‘expert’ process and judgment,” *id.* at 2270, modern administrative law “aim[s] to subject other, more political influences on administration to the disciplining effect of expert judgment,” *id.* at 2271); Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1951 (2018) (endorsing the Supreme Court’s position in *Perez* that administrative law discourages “inconsistent agency behavior” in response to “real concerns, principally reliance”).

¹³ See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (finding agency explanation inadequate “in particular because of decades of industry reliance on the [agency’s] prior policy”); *Fox*, 556 U.S. at 515 (imposing additional hurdles for an agency reversing “prior policy” when it “has engendered serious reliance interests that must be taken into account”).

¹⁴ See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1778–79 (2007) (noting that one justification for the reasoned decisionmaking requirement is that it “induces agencies to be transparent about their rationales, facilitating not only judicial review but public and political oversight as well,” *id.* at 1779).

¹⁵ See *id.* (“The standard legal justification for the reasoned decisionmaking requirement is that it promotes rationality, deliberation, and accountability. It encourages agencies to perform a thorough and logical analysis, which includes consideration of relevant factors, important aspects, and alternative solutions.”).

¹⁶ See *Order, West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017) (en banc) (holding case in abeyance).

the EPA's reading of the relevant provision was the "best reading."¹⁷ The proper remedy would then be vacatur of the rule.¹⁸ Thus, by waiving *Chevron*, the EPA can conceivably secure the reversal of an agency policy without complying with any of the APA's strictures. And it can plausibly evade political responsibility for deregulation by pointing the finger at the judicial branch.

Modern administrative law blanches at the possibility.¹⁹ And yet this regime is ours. The Trump Administration has already attempted to waive *Chevron* deference in at least one case. In *Global Tel*Link v. FCC*,²⁰ the Trump Administration's FCC refused to defend an Obama-era rule that capped the rates telephone companies could charge prison inmates for phone calls.²¹ Attributing its shift in policy only to "significant changes in [agency] composition,"²² the FCC abandoned the rule in court and disclaimed any entitlement to *Chevron* deference.²³ What's worse, the D.C. Circuit endorsed the FCC's gambit — on its initial review, the court refused to apply *Chevron*, held that the FCC's interpretation was not the "best reading" of the statute,²⁴ and vacated the rule.²⁵ This case study casts *Chevron* waiver in an even more sinister light — as a potential weapon of deregulation.

This Note attempts to construct a more sensible doctrine of waiver. Unlike waiver in other contexts, an agency's failure to invoke *Chevron* deference implicates none of the traditional reasons for applying the doctrine of waiver. And *Chevron* waiver by agencies creates policy problems significantly worse than those created by ordinary waiver. Thus, both doctrine and policy are clear: *Chevron* deference cannot be waived.

¹⁷ *Global Tel*Link v. FCC*, 859 F.3d 39, 50 (D.C. Cir.), amended by 866 F.3d 397 (D.C. Cir. 2017); see Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 531 & n.46 (2018) ("With, for example, the Paris Climate Agreement at stake, one might (might!) forgive courts for attending to text less carefully than normal." *Id.* at 531.); see also Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 30–32 (2017) (concluding that, in the circuit courts, agencies win 77.4% of the time under *Chevron*, 56% under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and 38.5% under de novo review).

¹⁸ See, e.g., *Global Tel*Link*, 859 F.3d at 45.

¹⁹ See Sunstein & Vermeule, *supra* note 12, at 1947–48 (noting that "administrative law has long been concerned with the consistency, over time, of agency decisionmaking, both in rulemaking and in adjudication," *id.* at 1947, in part because "a measure of consistency in the carrying out of plans over time is arguably constitutive of rationality," *id.* at 1948).

²⁰ 859 F.3d 39.

²¹ *Id.* at 48–50.

²² *Id.* at 48.

²³ See *id.* at 48–49.

²⁴ *Id.* at 50.

²⁵ *Id.* at 50–51, 59. After intervenors filed a vigorous petition for rehearing en banc, the panel amended its original opinion to make clear that the agency's interpretation would fail under *Chevron* Step Two as well. See *Global Tel*Link v. FCC*, 866 F.3d 397, 417 (D.C. Cir. 2017).

Part I provides an overview of general principles of waiver and describes how they have been applied to *Chevron* arguments. Part II challenges this regime on the grounds of doctrine and policy. Part III outlines the implications for current waiver doctrine. Part IV concludes.

I. THE CURRENT REGIME

Waiver (and forfeiture) are doctrines that find their motivation in a concern for the orderly administration of justice. These doctrines have been applied, almost without exception, to litigants who fail to raise claims for or against *Chevron* deference. There is almost no record of dissent.

A. General Principles of Waiver and Forfeiture

Waiver and forfeiture are principles that limit the scope of judicial review. “[A]s a general matter, a litigant must raise all issues and objections” in the initial proceeding before a trial court or administrative agency.²⁶ Further, on appeal, a litigant must preserve her claims for review by raising them in her opening appellate brief. Under the Federal Rules of Appellate Procedure, an opening brief “must contain” the litigant’s “contentions and the reasons for them, with citations to the authorities and parts of the record on which the [litigant] relies.”²⁷ If a litigant fails to comply, the reviewing court will ordinarily refuse to entertain her claim because it has been waived or forfeited.²⁸

First, a quick note on nomenclature. “Waiver” and “forfeiture” are not synonymous, although the Supreme Court “ha[s] so often used them interchangeably that it may be too late to introduce precision.”²⁹ Waiver is the “*intentional* relinquishment or abandonment of a known right or privilege.”³⁰ Forfeiture is “the [*unintentional*] failure to make the timely assertion of a right.”³¹ This is a distinction with several differences. First, the consequences of waiver are more serious. “[A] federal court

²⁶ *Freytag v. Comm’r*, 501 U.S. 868, 879 (1991).

²⁷ FED. R. APP. P. 28(a)(8) (regulating appellant’s brief); *id.* 28(b) (imposing same requirement on appellee’s brief); *see* *United States v. Powers*, 885 F.3d 728, 732 (D.C. Cir. 2018) (“[A]ppellants ordinarily must raise any issues ripe for our consideration in their opening briefs.”); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

²⁸ *See, e.g., McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1210 (D.C. Cir. 1986) (“We generally will not entertain arguments omitted from an appellant’s opening brief . . .”).

²⁹ *Freytag*, 501 U.S. at 894 n.2 (Scalia, J., concurring in part and concurring in the judgment); *see also* *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 n.1 (2017).

³⁰ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added).

³¹ *United States v. Olano*, 507 U.S. 725, 733 (1993) (emphasis added); *see also* *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1203 (10th Cir. 2014) (“Waiver is accomplished by intent, but forfeiture comes about through neglect.” (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011))).

has the authority to resurrect only forfeited defenses,³² whereas waived claims are irretrievably lost.³³ Second, the domain of waiver is broader than the domain of forfeiture. “A right that cannot be waived [also] cannot be forfeited”³⁴ This observation applies, of course, with full force in the *Chevron* context. If *Chevron* deference is a claim that cannot be waived, it cannot be forfeited either. This Note will limit its discussion accordingly. Because any argument against the possibility of waiving *Chevron* deference will also apply a fortiori to the possibility of forfeiting *Chevron* deference, this Note will use “waiver” as shorthand for “waiver or forfeiture” when it is logically permitted.

Principles of waiver are “essential to the orderly administration of civil justice.”³⁵ Most obviously, they guard against unfair surprise. If courts considered all of a litigant’s claims, even those raised for the first time in reply briefs or at oral argument, they would deprive the other party of “a full and fair opportunity to adequately respond to [the litigant’s] later arguments.”³⁶ But in addition to being substantively unfair, a system without waiver would also threaten the judicial function by depriving the court of full briefing on the relevant issues.³⁷ “The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”³⁸ Reaching the merits of a claim without the benefit of full and thorough briefing “entails the risk of an improvident or ill-advised opinion on the legal issues tendered.”³⁹

³² *Wood v. Milyard*, 566 U.S. 463, 471 n.5 (2012). The authority to revive forfeited claims is rarely used absent “exceptional circumstances” like “cases involving uncertainty in the law; novel, important, and recurring questions of federal law; intervening change in the law; and extraordinary situations with the potential for miscarriages of justice.” *Flynn v. Comm’r*, 269 F.3d 1064, 1069 (D.C. Cir. 2001) (citing *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992)).

³³ See *United States v. Jimenez*, 512 F.3d 1, 7 (1st Cir. 2007) (“A waiver is unlike a forfeiture, for the consequence of a waiver is that the objection in question is unreviewable.”).

³⁴ *Freytag*, 501 U.S. at 894 n.2 (Scalia, J., concurring in part and concurring in the judgment).

³⁵ 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2472 (3d ed. 2008).

³⁶ *Env’tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 n.32 (D.C. Cir. 1981).

³⁷ See, e.g., *United States v. Haldeman*, 559 F.2d 31, 78 n.113 (D.C. Cir. 1976) (en banc) (per curiam) (refusing to reach an issue because a party’s “handling of the point ha[d] deprived [the court] of the benefit of a response by the [opposing party]”).

³⁸ *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

³⁹ *McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986).

B. Chevron Waiver in the Circuit Courts

The Supreme Court has never addressed whether *Chevron* deference can be waived.⁴⁰ But the circuit courts have spoken with virtual unanimity that it can. Most notably, in *Neustar, Inc. v. FCC*,⁴¹ the D.C. Circuit held for the first time that an agency's failure to invoke *Chevron* meant that it had forfeited any claim to *Chevron* deference.⁴² There, the FCC had promulgated an order interpreting the Telecommunications Act of 1996 to permit the appointment of an agency administrator without undertaking a notice-and-comment rulemaking.⁴³ The court refused to extend deference to the FCC's interpretation because its brief "did not invoke [the *Chevron*] standard with respect to rulemaking."⁴⁴ Proceeding to interpret the statute de novo, the court nonetheless affirmed the FCC's interpretation as the best reading of the statute.⁴⁵

Neustar is perhaps the most notable example, but it is by no means the only case where courts have recognized the possibility of waiver. As mentioned above, the D.C. Circuit also suggested the possibility of *Chevron* waiver in *Global Tel*Link*, a case where the court initially refused to extend *Chevron* deference to an FCC order because the agency reversed course during litigation and "no longer s[ought] deference" for its interpretation during litigation.⁴⁶ The other circuits have unanimously concurred that agencies can waive a claim to *Chevron* deference.⁴⁷

⁴⁰ Notably, some scholars have suggested that the Supreme Court routinely fails to apply *Chevron* in cases where it should apply. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1125 (2008) ("[T]he Court does *not* apply the *Chevron* framework in nearly three-quarters of the cases where it would appear applicable under [United States v. Mead Corp., 533 U.S. 218 (2001)]."). One explanation, of course, is that the litigating parties have waived their claim to *Chevron* deference by failing to invoke it in their briefing.

⁴¹ 857 F.3d 886 (D.C. Cir. 2017).

⁴² See *id.* at 893–94.

⁴³ See *id.* at 889.

⁴⁴ *Id.* at 894.

⁴⁵ See *id.*

⁴⁶ 866 F.3d 397, 407 (D.C. Cir. 2017). The D.C. Circuit has also recognized that litigants can waive or forfeit their objections to *Chevron* deference. See, e.g., *Lubow v. U.S. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015) ("Because the plaintiffs affirm the applicability of the *Chevron* framework, we need not consider potential arguments they might have made (but did not make) against our deferring to the agency under *Chevron* . . .").

⁴⁷ See, e.g., *Commodity Futures Trading Comm'n v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) ("[T]he CFTC waived any reliance on *Chevron* deference by failing to raise it to the district court."); *Help Alert W. Ky., Inc. v. Tenn. Valley Auth.*, 191 F.3d 452 (6th Cir. 1999) (unpublished table decision), 1999 WL 775931, at *3 ("[P]laintiffs advance their *Chevron* argument for the first time on appeal — and issues not raised before the district court generally may not be raised on appeal.").

The circuits are more equivocal on whether private litigants can waive an objection to *Chevron*'s applicability. Compare *Albanil v. Coast 2 Coast, Inc.*, 444 F. App'x 788, 796 (5th Cir. 2011) ("Plaintiffs did not raise their *Chevron* argument in the district court . . . Thus, they have waived this argument."), and *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 319 n.2 (5th Cir. 2003)

As these cases suggest, *Chevron* waiver is a relatively recent phenomenon. This innovation dovetails with perhaps the most notable development in modern administrative law: for two decades now, *Chevron* has increasingly become the target of political,⁴⁸ academic,⁴⁹ and doctrinal⁵⁰ attack. Given *Chevron*'s newfound political salience, one would expect there to be hints of dissent from a waiver regime. But any hints are few and far between. In *Global Tel*Link*, for example, Judge Pillard wrote a separate opinion noting that the majority's suggestion of waiver, even if "only in *dicta*," "unnecessarily suggest[ed] limitations on *Chevron* deference."⁵¹ More recently, in *SoundExchange, Inc. v. Copyright Royalty Board*,⁵² the D.C. Circuit refused to permit an agency to forfeit *Chevron* deference — despite its failure to invoke it in its briefing — because the underlying agency determination "amply manifest[ed] the requisite engagement in an exercise of interpretive authority."⁵³ But the *SoundExchange* court still purported to apply *Neustar* and expressly acknowledged that "an agency can forfeit its ability to obtain deferential review under *Chevron*."⁵⁴

In sum, the weight of the precedent points almost uniformly in one direction: *Chevron* deference is a claim that can be waived. The rest of this Note attempts to explain why this cannot be correct.

II. CHEVRON WAIVER AND ITS PROBLEMS

There are two problems with permitting *Chevron* waiver. The first is doctrinal: *Chevron* is an uneasy fit for both principles of waiver and principles of administrative law. The second is prudential: an agency with the power to waive *Chevron* deference possesses a tool that can be

("Defendants also argue that, if the regulation [applies] here, it is invalid under [*Chevron*]. This argument was not presented to nor passed on by the district court, and therefore may not be considered on appeal."), with *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018) ("The parties seem to assume, without any analysis, that NPS's interpretation of the relevant statutes is eligible for *Chevron* review. . . . [W]e conclude that the agency's statutory interpretation is not entitled to *Chevron* deference. . . ."), and *Humane Soc'y v. Locke*, 626 F.3d 1040, 1054 n.8 (9th Cir. 2010) ("[A]ll parties agree that *Chevron* deference applies to [the agency's interpretation] in this case. We therefore assume without deciding that *Chevron* deference applies.").

⁴⁸ See Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 15 (2017) ("Once Republican mainstays, *Chevron* deference and presidential administrative control quickly became the *bêtes noires* of conservatives.").

⁴⁹ See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 316 (2014) ("[D]eference to interpretation is an abandonment of judicial office.").

⁵⁰ See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) ("These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference.").

⁵¹ 866 F.3d 397, 425 (Pillard, J., concurring in part and dissenting in part).

⁵² 904 F.3d 41 (D.C. Cir. 2018).

⁵³ *Id.* at 54.

⁵⁴ *Id.*

used to circumvent the carefully fashioned procedural requirements of the APA.

A. *The Problem of Doctrine: Waiver's Domain*

The domain of waiver has its limits. It is axiomatic, for instance, that subject matter jurisdiction cannot be waived.⁵⁵ Jurisdiction is an “unwaivable *sine qua non* for the exercise of federal judicial power.”⁵⁶ A reviewing court can therefore inquire into subject matter jurisdiction *sua sponte* at any point during the litigation, irrespective of waiver.⁵⁷ This is perhaps the most firmly established exception to waiver. But case law suggests others. For example, as the Supreme Court has repeatedly instructed, waiver is “ordinarily an intentional relinquishment or abandonment of a known *right* or *privilege*.”⁵⁸ This implies, of course, that claims are waivable only if they relate to the “rights” or “privileges” of the litigant.

What, then, is a claim that is *not* a “right” or “privilege”? One example is a standard of review. Imagine a Title VII case where the defendant company claims that the plaintiff was not an employee and therefore falls outside the ambit of Title VII’s protections. The district court concludes that the plaintiff was an employee. On appeal, the defendant company challenges the district court’s factfinding and argues that the correct standard of review is *de novo* — an argument that the plaintiff fails to contest. Must the appellate court engage in *de novo* review of the district court’s factfinding? Sensibly, the answer is no.⁵⁹ “[T]he court, not the parties, must determine the standard of review, and therefore, it cannot be waived.”⁶⁰ Or, in other words, a standard of

⁵⁵ See *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 756 (D.C. Cir. 2009) (per curiam).

⁵⁶ *Curley v. Brignoli, Curley & Roberts Assocs.*, 915 F.2d 81, 83 (2d Cir. 1990).

⁵⁷ See, e.g., *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17–18 (1951) (“The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties.”); see also *Freitag v. Comm’r*, 501 U.S. 868, 896–97 (1991) (Scalia, J., concurring in part and concurring in the judgment) (“Since . . . a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, *i.e.*, the effect of approving, *ex ante*, unlawful action by the appellate court itself.”).

⁵⁸ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphases added). This definition of waiver has been quoted repeatedly. See, e.g., *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 n.1 (2017); *United States v. Olano*, 507 U.S. 725, 733 (1993); *Freitag*, 501 U.S. at 894 n.2 (Scalia, J., concurring in part and concurring in the judgment).

⁵⁹ See, e.g., *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001).

⁶⁰ *Id.*; see also *Winfield v. Dorethy*, 871 F.3d 555, 560 (7th Cir. 2017) (“[W]aiver does not apply to arguments regarding the applicable standard of review.”); cf. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848–51 (1986) (“[A]s a personal right, Article III’s guarantee of an impartial and independent federal adjudication is subject to waiver . . . [But when the] structural principle [of separation of powers] is implicated in a given case, . . . notions of consent and waiver

review is not a “right” or “privilege” belonging to the parties. Rather, it is an “unavoidable legal question [the court] must ask, and answer, in every case.”⁶¹ It therefore falls outside waiver’s domain.⁶²

Chevron deference also fits the bill. After all, it is not a right or privilege belonging to the agency. It is a doctrine about statutory meaning, and it therefore “belongs to courts as well as to litigants.”⁶³ When a statute contains ambiguity, *Chevron* commands courts to construe that ambiguity as “an implicit delegation from Congress to the agency to fill in the statutory gaps.”⁶⁴ The meaning of the statute *becomes* whatever the agency decides to fill the gaps with — even if the agency’s (reasonable) interpretations depart from the best reading of the statute. Where *Chevron* applies, the agency’s interpretations “speak with the force of law.”⁶⁵ In an important sense, *Chevron* bears more than a passing resemblance to so-called “semantic” canons of statutory interpretation like the *expressio unius* canon or the presumption against superfluity, which also address themselves to statutory meaning. Such canons are “generalizations about how the English language is conventionally used and understood” by Congress, as well as by ordinary people.⁶⁶ Likewise, *Chevron* is a doctrine about how ambiguities in statutory language are to be interpreted by the courts.

There is something irreducibly odd, then, to speak of arguments about the semantic meaning of a statute as subject to waiver. Here’s the intuition: Consider appellate review of a case where the meaning of a statutory provision is contested. If the government brief fails to cite, say, the presumption against superfluity, what result? Surely the court is not barred from applying — and, indeed, ought to apply — the presumption (so long as it is relevant).⁶⁷ The alternative would permit the

cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.”)

⁶¹ *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009); *cf. Eze v. Senkowski*, 321 F.3d 110, 121 (2d Cir. 2003) (“AEDPA’s standard of review . . . is not a procedural defense, but a standard of general applicability . . .”).

⁶² *See Gardner*, 568 F.3d at 879 (“It is one thing to allow parties to forfeit claims, defenses, or lines of argument; it would be quite another to allow parties to stipulate or bind us to application of an incorrect legal standard . . .”).

⁶³ *Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 77 (D.C. Cir. 1997); *cf. id.* (“As *res judicata* belongs to courts as well as to litigants, even a *party*’s forfeiture of the right to assert it . . . does not destroy a *court*’s ability to consider the issue *sua sponte*.”); *SBC Commc’ns Inc. v. FCC*, 407 F.3d 1223, 1230 (D.C. Cir. 2005) (same).

⁶⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

⁶⁵ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

⁶⁶ JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 272 (3d ed. 2017).

⁶⁷ *Cf., e.g., B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1314 n.4 (2015) (Thomas, J., dissenting) (“I would not treat tools of statutory interpretation as claims that can be forfeited. If, for example, one party peppered its brief with legislative history, and the opposing party did not challenge the propriety of using legislative history, I still would not consider myself bound to rely

meaning of the statute to be varied by the litigating position the government happens to take after the regulation is promulgated. But that approach would entirely obviate the court's independent obligation to construe the law.⁶⁸ "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the *independent power* to identify and apply the proper construction of governing law."⁶⁹ That is, "[f]ederal courts are *entitled* to apply the right body of law, whether the parties name it or not."⁷⁰ If so, then an approach that permits waiver is untenable for tools of statutory interpretation. So too for the *Chevron* two-step.⁷¹

Administrative law in particular provides further reason to doubt the possibility of waiver. *First*, the specific predicates for *Chevron* deference mitigate the prudential concerns that ground the doctrines of waiver and forfeiture. As the Supreme Court observed in *Hormel v. Helvering*,⁷² the doctrines of waiver and forfeiture are "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."⁷³ It follows that a court is "less inclined to find a waiver when the parties have had the opportunity to offer all the relevant evidence and when they are not surprised by issues on appeal."⁷⁴ Both are true when *Chevron* applies. The only "relevant evidence" is the contemporaneous administrative record, which will always be available to the reviewing court. In fact, the reviewing court is usually *prohibited* from looking at anything else.⁷⁵ "[P]ost hoc' rationalizations [for agency action] . . . have traditionally

upon it."). *B & B* did not involve the forfeiture of a tool of statutory interpretation. *See id.* at 1305 n.2 (majority opinion).

⁶⁸ *Cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Some scholars argue that *Chevron* itself is inconsistent with *Marbury*. *See, e.g.*, Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189 (2006) (describing *Chevron* as a "counter-*Marbury* for the administrative state"). But others, of course, argue that *Chevron* is perfectly consistent with *Marbury*. *See, e.g.*, Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 27–28 (1983) ("[T]he court is not abdication its constitutional duty to 'say what the law is' by deferring to agency interpretations of law: it is simply applying the law as 'made' by the authorized law-making entity. Indeed, it would be violating legislative supremacy by failing to defer . . . to the extent that the agency had been delegated law-making authority.>").

⁶⁹ *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (emphasis added).

⁷⁰ *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 551 (7th Cir. 2001) (emphasis added).

⁷¹ It bears emphasizing that this argument does not excuse the forfeiture of all claims — only those that implicate concerns other than the substantive rights of the parties.

⁷² 312 U.S. 552 (1941).

⁷³ *Id.* at 556.

⁷⁴ *Huber v. Taylor*, 469 F.3d 67, 75 (3d Cir. 2006).

⁷⁵ *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

been found to be an inadequate basis for review.”⁷⁶ As for the possibility of “surprise,” recall that an agency interpretation cannot receive *Chevron* deference if the agency advances it for the first time in litigation. Instead, the interpretation must be evident from the underlying “regulations, rulings, or administrative practice.”⁷⁷ Thus, in a case about the validity of an agency’s interpretation of a statute, the parties will *always* be on notice about the possibility of *Chevron* deference because *Chevron* applies only when the underlying agency action “manifests its engagement in the kind of interpretive exercise to which review under *Chevron* generally applies — that is, interpreting a statute [the agency] is charged with administering in a manner (and through a process) evincing an exercise of its lawmaking authority.”⁷⁸ Given this longstanding rule of administrative law, it is difficult to say that parties would be “unduly surprised by [a court’s] consideration of the issue in this context.”⁷⁹

Second, permitting the waiver of *Chevron* also sits in some tension with cases that have drawn a sharp distinction between the reasoning of the agency that initially advanced the interpretation and the position of the agency’s lawyers during ensuing litigation. This distinction originates with *Chenery*⁸⁰ — that old chestnut⁸¹ — and its admonition that a reviewing court must confine review of agency action to “the grounds upon which the [agency] itself based its action.”⁸² Subsequent cases have imported that principle into the *Chevron* context.⁸³ In cases like *Bowen v. Georgetown University Hospital*,⁸⁴ for instance, the Court has refused to give *Chevron* deference “to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.”⁸⁵ The logic of these cases extends to waiver. If *Chevron*’s domain is defined not by the agency’s litigating position, but by the content

⁷⁶ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (emphasis omitted) (citation omitted) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

⁷⁷ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

⁷⁸ *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54 (D.C. Cir. 2018).

⁷⁹ *Barna v. Bd. of Sch. Dirs.*, 877 F.3d 136, 149 (3d Cir. 2017).

⁸⁰ *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

⁸¹ See *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 683–84 (2007) (Stevens, J., dissenting); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *YALE L.J.* 952, 956 (2007) (“The *Chenery* principle has been taken as settled since it was announced, and administrative law has grown up around it, incorporating the principle into new structures.”).

⁸² *Chenery*, 318 U.S. at 88; see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (“It is well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.”).

⁸³ See, e.g., *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985) (denying deference because “the teachings of *Chenery* are plainly implicated in this case”); Hemel & Nielson, *supra* note 3, at 779 (“On one view, *Chevron* Step One-and-a-Half is simply an application of *Chenery I.*”).

⁸⁴ 488 U.S. 204 (1988).

⁸⁵ *Id.* at 212.

of the underlying rulemaking or adjudication, then the domains of *Chevron* and waiver share no overlap.⁸⁶

Some courts have grappled with this logic, although none have fully embraced it. In *PDK Laboratories Inc. v. DEA*,⁸⁷ the D.C. Circuit denied *Chevron* deference to the DEA's interpretation of the Controlled Substances Act because the DEA did not realize the Act was ambiguous.⁸⁸ During litigation, the DEA did not "invoke[]" *Chevron* or "ask[] [the court] to give any special deference to the [DEA's] judgment about the meaning of the provision."⁸⁹ In a concurrence, however, then-Judge Roberts observed that the agency's failure to ask for *Chevron* deference "would seem to be without consequence" because the "DEA is clearly entitled to *Chevron* deference."⁹⁰ The logic of Judge Roberts's concurrence was subsequently echoed in *Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Administration*.⁹¹ There too, the D.C. Circuit denied *Chevron* deference to an agency's interpretation of a statute because the agency failed to recognize it was ambiguous.⁹² In a footnote, the court refused to afford any importance to the agency's request during litigation for *Chevron* deference: "In this case, unlike *PDK*, the Agency expressly requested *Chevron* deference. We find this distinction of no significance because it is '[t]he expertise of the agency, not its lawyers,' that 'must be brought to bear on this issue in the first instance.'"⁹³ For that proposition, the court cited *Chenery*.⁹⁴ These statements are breadcrumbs — albeit located in the footnotes and dicta of the D.C. Circuit — that can guide a careful reader to the conclusion that the logic of *Chenery* militates against the waiver of *Chevron*.

In sum, ordinary principles of waiver find no purchase in the *Chevron* context. Irrespective of a party's failure to make an argument for or against *Chevron* deference, a court retains the power to reach the issue.

⁸⁶ See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 900 (2001) ("The logic of implied delegation . . . also yields a straightforward set of propositions regarding what kinds of interpretations are entitled to *Chevron* deference . . .").

⁸⁷ 362 F.3d 786 (D.C. Cir. 2004).

⁸⁸ See *id.* at 794–96.

⁸⁹ *Id.* at 794.

⁹⁰ *Id.* at 803 n.3 (Roberts, J., concurring in part and concurring in the judgment).

⁹¹ 471 F.3d 1350 (D.C. Cir. 2006).

⁹² *Id.* at 1354.

⁹³ *Id.* at 1354 n.3 (alteration in original) (citations omitted) (quoting *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1218 (D.C. Cir. 2004) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943))).

⁹⁴ *Id.*

B. The Problem of Policy: Evasion of the APA

It seems that *Chevron* waiver has its doctrinal problems. But its policy problems are even worse. In effect, it would provide agencies a new tool for rescinding regulations without complying with the APA's procedural requirements.

It is first useful to consider when the waiver of *Chevron* matters at all. When the agency's original proceedings are insufficient to sustain the agency action under *Chevron*, the action cannot be affirmed — irrespective of waiver.⁹⁵ That much is trivial. More importantly, however, agencies cannot invoke *Chevron* deference for interpretations enunciated through informal actions that lack the force of law.⁹⁶ Generally, then, *Chevron* waiver matters only when the challenged agency action is a rulemaking or formal adjudication.⁹⁷ It follows that we are talking principally about cases where the agency would otherwise have to undergo relatively onerous procedures under the APA to reverse course.⁹⁸ For example, in order to reverse a rulemaking under the APA, agencies must “use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.”⁹⁹

It is also useful to consider why an agency would waive *Chevron* deference in the first place. Because *Chevron* is a deference doctrine, an agency would waive it only when it would like to reverse the agency action being challenged. There are various situations in which this circumstance could arise — for example, a new administration is voted in, or the agency changes its mind in response to political pressure or new evidence. But in all such cases, the agency is seeking to rescind a policy it no longer favors.¹⁰⁰

In those cases, then, the agency faces a choice: (1) undertake the burdensome task of promulgating a new rule, or (2) waive *Chevron* deference in an (inevitable) challenge to the initial rulemaking. Crucially, (2)

⁹⁵ See, e.g., *id.* at 1354 (holding that where an agency does not “bring its experience and expertise to bear in light of competing interests at stake,” its interpretation is not “entitled to deference” (quoting *PDK*, 362 F.3d at 797–98)).

⁹⁶ See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

⁹⁷ See *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (“[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”).

⁹⁸ See, e.g., Nielson, *supra* note 7, at 88 (“[A] large body of scholarship has grown up around the idea that when it comes to modern administrative law, the playing field is too heavily tilted in favor of procedure. . . . The thrust is that in today's world, it takes too much time and too many resources for agencies to act — particularly for notice-and-comment rulemaking.”).

⁹⁹ *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1109, 1206 (2015).

¹⁰⁰ In *Global Tel*Link v. FCC*, 866 F.3d 397 (D.C. Cir. 2017), for example, the FCC “abandoned” an interpretation advanced in a prior order and no longer sought *Chevron* deference for its interpretation. *Id.* at 408; see *id.* at 407–08. The change in the FCC's litigating position was triggered by “recent personnel changes at the FCC,” *id.* at 425 (Pillard, J., concurring in part and dissenting in part), after the election of President Trump, see *id.*

will almost always be less onerous than (1).¹⁰¹ To be sure, (2) does not guarantee success. A reviewing court might find that the agency's course of action was indeed the best reading of the statute and uphold it,¹⁰² or the reviewing court might be persuaded of the merit of the agency's original position under *Skidmore v. Swift & Co.*¹⁰³ But in many instances, the court will reverse the agency action, permitting the agency to obtain rescission of a policy it would not have been able to reverse itself absent compliance with the APA's exacting procedural requirements.¹⁰⁴ In short, *Chevron* waiver is a blueprint for an end run around the APA.

An illustrative case that hints at the troubling implications of these observations is the D.C. Circuit's aforementioned decision in *Global Tel*Link*. Under President Obama, the FCC had promulgated a rule that capped rates on calls placed by prison inmates.¹⁰⁵ After the election of President Trump, the FCC declined to defend its own rule and did not seek *Chevron* deference in court.¹⁰⁶ Notably, however, the FCC did not revoke, withdraw, or suspend its rule.¹⁰⁷ On review, the D.C. Circuit found that the agency had waived *Chevron* because "the agency no longer s[ought] deference."¹⁰⁸ After all, "it would make no sense for th[e]

¹⁰¹ See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–88 (1992) ("The Occupational Safety and Health Administration (OSHA) in 1972 spent about six months from inception to publication of the final rule on its first occupational health standard for asbestos. Two of its next three health standards, a generic rule for fourteen carcinogens and a standard for vinyl chloride, took about one year, and nine months, respectively. The next three standards, for cotton dust, acrylonitrile, and arsenic, each took over three-and-one-half years. These last three standards were promulgated during the relatively activist Carter Administration when OSHA was anxious to write new rules to protect workers. Today, OSHA health standards rarely take less than five years to promulgate."). Although waiving *Chevron* surely comes with its own costs, it will always be less burdensome than the notice-and-comment rulemaking process.

¹⁰² Cf., e.g., *Miller v. Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012) ("With *Chevron* inapplicable, we proceed to determine the meaning of the [statute] the old-fashioned way: 'we must decide for ourselves the best reading.'" (quoting *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1136 (D.C. Cir. 2001))).

¹⁰³ 323 U.S. 134 (1944); cf., e.g., *Miller*, 687 F.3d at 1342 n.11 ("We do, of course, give the [agency's] views 'the weight derived from their power to persuade.'" (quoting *Landmark*, 267 F.3d at 1136 (internal quotation marks omitted))).

¹⁰⁴ See *Global Tel*Link*, 866 F.3d at 425 (Pillard, J., concurring in part and dissenting in part) ("By suggesting that agencies can relinquish judicial deference through such limited and belated maneuvers as refusing to defend portions of their briefs during oral argument, the majority risks enabling agencies to end-run the principle that they must 'use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.'" (quoting *Perez*, 135 S. Ct. at 1206)); see also Barnett & Walker, *supra* note 17, at 30–32 (concluding that, in the circuit courts, agencies win 77.4% of the time under *Chevron*, 56.0% under *Skidmore*, and 38.5% under de novo review).

¹⁰⁵ See *Global Tel*Link v. FCC*, 859 F.3d 39, 44 (D.C. Cir. 2017), amended by 866 F.3d 397.

¹⁰⁶ See *id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 50.

court to determine whether the disputed agency positions advanced in the [rule] warrant *Chevron* deference when the agency has abandoned those positions.”¹⁰⁹ The court went on to decide for itself the “best reading” of the statutory provision¹¹⁰ and concluded that the rule was contrary to the statute’s “best reading.”¹¹¹ Thus, the court vacated the FCC rule.¹¹²

Defenders of the FCC rule filed a petition for rehearing en banc, in which they argued that the court had “creat[ed] a dangerous loophole to evade judicial review when agencies are unable or unwilling to justify changed positions.”¹¹³ But the court did not grant en banc review. Instead, the D.C. Circuit panel issued an amendment to the original opinion that modified the grounds for its decision. The panel stated that it had not intended to decide whether *Chevron* could apply “even though the agency declined to defend its position before the court.”¹¹⁴ Rather, the court had intended to base its opinion on a finding that the FCC rule was “manifestly contrary to the statute,” a conclusion that would have required vacatur whether or not *Chevron* applied.¹¹⁵

Setting aside the dubious provenance of the “clarification” provided by the amended opinion, the original panel opinion in *Global Tel*Link* demonstrates the distinct problem with allowing an agency to waive *Chevron* deference. Without court-ordered vacatur, the FCC could have obtained rescission of its rule only by embarking on a new rulemaking.¹¹⁶ Further, the FCC’s bouleversement would have been subject to arbitrariness review under § 706 of the APA.¹¹⁷ Both of these procedural requirements, however, were successfully sidestepped by the FCC when it took a litigating position consistent with its deregulatory agenda. A sensible doctrine of waiver would foreclose such an end run of the APA.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (quoting *Miller v. Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012)).

¹¹¹ *See id.* at 55.

¹¹² *Id.*

¹¹³ *Global Tel*Link v. FCC*, 866 F.3d 397, 417 (D.C. Cir. 2017).

¹¹⁴ *Id.*

¹¹⁵ *Id.* (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

¹¹⁶ *See* 5 U.S.C. § 553 (2012); *see also* *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015) (holding that agencies must “use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance”).

¹¹⁷ *See* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (noting that all agency action, whether “initial agency action [or] subsequent agency action undoing or revising that action,” is subject to arbitrariness review under § 706 of the APA); *see also* *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an agency must “examine the relevant data and articulate a satisfactory explanation for its action” to survive arbitrariness review).

III. RECUPERATING *CHEVRON* WAIVER

There is obvious tension between this Note's view of *Chevron* waiver and the current regime. But two relatively mild interventions would bring current doctrine in line with this Note's prescriptions: First, *agency* litigants should never be able to waive claims to *Chevron* deference. Any precedents suggesting the contrary are better understood to be applications of *Chevron* Step 1.5 — a different administrative law doctrine that serves different goals. Second, *private* litigants should generally be able to waive objections to *Chevron* deference. But courts should feel free to reach the issue *sua sponte*.

A. Agency Waivers as *Chevron* Step 1.5

Most, if not all, instances where courts have found that an agency has waived *Chevron* deference are more properly understood as applications of *Chevron* Step 1.5.¹¹⁸ *Chevron* Step 1.5 — a longstanding but oft-overlooked addition to *Chevron*'s two-step choreography¹¹⁹ — is a doctrine of administrative law that requires an agency to realize first that a statute is ambiguous before a court affords its interpretation of that statute *Chevron* deference.¹²⁰ In other words, under the *Chevron* two-step, we stop the music after Step 1 if the agency erroneously believes its interpretation is compelled by prior precedent¹²¹ or the statutory text.¹²² This doctrine first appeared in *Prill v. NLRB*,¹²³ a case where the D.C. Circuit refused to grant deference to the National Labor Relations Board's interpretation of the National Labor Relations Act because the agency "clearly . . . considered its [interpretation] . . . to be mandated by the NLRA itself."¹²⁴ The underlying logic is simple:

¹¹⁸ See generally Hemel & Nielson, *supra* note 3.

¹¹⁹ *Id.* at 761 (observing that "*Chevron* Step One-and-a-Half has up until now been a doctrine without a name").

¹²⁰ *Id.* at 760 ("After deciding that the statute is ambiguous but before deciding whether the agency's construction is permissible, these courts ask a separate question: whether the agency itself recognized that it was dealing with an ambiguous statute. In these courts, a misstep at this intermediate stage can be fatal to an agency's cause: the court will remand — sometimes with vacatur — if the agency claimed that the statute is clear but the court concludes it is not. In other words, the agency will lose if it mistakenly says that the issue can be resolved at *Chevron* Step One while the court determines that it should be resolved at *Chevron* Step Two.")

¹²¹ See, e.g., *Teva Pharm. USA, Inc. v. FDA*, 441 F.3d 1, 5 (D.C. Cir. 2006) (refusing to apply *Chevron* to an agency interpretation because the agency "mistakenly thought itself bound by [prior] decisions" of the court).

¹²² See, e.g., *United States v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017) ("Where a statute grants an agency discretion but the agency erroneously believes it is bound to a specific decision, we can't uphold the result as an exercise of the discretion that the agency disavows.")

¹²³ 755 F.2d 941 (D.C. Cir. 1985).

¹²⁴ *Id.* at 948.

Chevron deference applies only when the agency has brought “its experience and expertise to bear in light of competing interests at stake.”¹²⁵ But if the agency failed to realize the statute was ambiguous, it had no opportunity to exercise its policy discretion. In such circumstances there is no “interpretation” to which a court can permissibly defer.¹²⁶ Since *Prill*, the D.C. Circuit has applied the doctrine on dozens of occasions.¹²⁷ And the Supreme Court has tentatively concurred.¹²⁸

It is unsurprising that the doctrines of *Chevron* Step 1.5 and waiver often coincide. If an agency failed to realize that a statute was ambiguous during the course of its rulemaking, the agency is more likely to omit *Chevron* from its subsequent briefing. All else equal, agencies tend to make sensible litigating choices, and it is generally irrational for an agency to waste valuable pages of its brief on a deference argument that it already knows is foreclosed by *Chevron* Step 1.5.¹²⁹ We see this relationship at play in *Neustar*, a case that at first glance might appear to have nothing to do with *Chevron* Step 1.5. There, in a challenge to an FCC regulation, the D.C. Circuit held that the FCC had “forfeited” any claim to *Chevron* deference in part because its brief “did not invoke [*Chevron*’s] standard with respect to rulemaking.”¹³⁰ But the court went further: “Similarly, review of the relevant agency orders shows no invocation of *Chevron* deference for this matter.”¹³¹ In other words, the underlying agency action did not “manifest[] its engagement in the kind of interpretive exercise to which review under *Chevron* generally applies — that is, interpreting a statute.”¹³² *Neustar*, then, is a case where the agency *both* failed to realize it was interpreting an ambiguous statute in its original rulemaking *and* failed to invoke *Chevron* in its subsequent briefing.

¹²⁵ *PKD Labs. Inc. v. DEA*, 362 F.3d 786, 797–98 (D.C. Cir. 2004) (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984)).

¹²⁶ *See id.* at 798 (“[Without an initial interpretation from the agency], it is not for the court ‘to choose between competing meanings.’” (quoting *Alarm Indus. Commc’ns Comm. v. FCC*, 131 F.3d 1066, 1072 (D.C. Cir. 1997))).

¹²⁷ *See* Hemel & Nielson, *supra* note 3, at 765 n.29 (listing cases).

¹²⁸ *See* *Negusie v. Holder*, 555 U.S. 511, 521 (2009) (“Whether such an interpretation would be reasonable, and thus owed *Chevron* deference, is a legitimate question; but it is not now before us. The [agency] deemed its interpretation to be mandated by [precedent], and that error prevented it from a full consideration of the statutory question here presented.”); *see also* Hemel & Nielson, *supra* note 3, at 786 (noting that the Supreme Court “arguably” endorsed the doctrine in *Negusie*).

¹²⁹ *Cf. Lawson v. FMR LLC*, 670 F.3d 61, 82 (1st Cir. 2012) (noting that the agency “does not seek *Chevron* deference” because the challenged regulations “[we]re not intended to provide interpretations of the Act” (quoting *Procedures for the Handling of Discrimination Complaints Under Title VIII of the Sarbanes-Oxley Act of 2002*, 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004))).

¹³⁰ *Neustar, Inc. v. FCC*, 857 F.3d 886, 894 (D.C. Cir. 2017).

¹³¹ *Id.*

¹³² *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54 (D.C. Cir. 2018) (discussing *Neustar*).

For another example, consider *PDK*. There, the D.C. Circuit denied *Chevron* deference to the DEA's interpretation of the Controlled Substances Act for two reasons — *first*, because the agency did not realize the statute was ambiguous; *second*, because the agency “neither invoke[d] *Chevron v. NRDC* nor ask[ed] [the court] to give any special deference to the [agency's] judgment about the meaning of the provision.”¹³³ The former is a *Chevron* Step 1.5 argument. The latter is a waiver argument. Which was dispositive? In a concurrence, then-Judge Roberts suggested that only the former should do any work: “[T]he fact that DEA did not, as the majority notes, request ‘any special deference . . .’ would seem to be without consequence.”¹³⁴

We are now equipped to reconcile this Note's prescription with the current case law. At first glance, cases like *Neustar* and *PDK* appear to endorse the possibility of *Chevron* waiver — an obvious difficulty. But a more careful reading reveals that these cases *also* rest their holdings on *Chevron* Step 1.5. This is crucial. In such cases, the agency should have been straightforwardly denied deference under *Chevron* Step 1.5. Waiver, however, should have been *entirely beside the point*.

Promisingly, the D.C. Circuit has tentatively adopted this reading of the relevant precedents, albeit without fanfare. In *SoundExchange*, the court grappled at length with the meaning of cases like *Neustar* and *PDK*. The court ultimately concluded that these precedents did not compel *Chevron* waiver so long as the underlying agency action revealed that the agency recognized the statute was ambiguous: “[I]f an agency manifests its engagement in the kind of interpretive exercise to which review under *Chevron* generally applies . . . we can apply *Chevron* deference to the agency's interpretation even if there is no invocation of *Chevron* in the briefing in our court.”¹³⁵ In other words, *SoundExchange* implicitly recharacterized prior *Chevron* waiver cases as *Chevron* Step 1.5 cases. The court went on to afford *Chevron* deference to an agency that had failed to mention *Chevron* in its brief.¹³⁶

SoundExchange was a quiet insurrection — there, the court purported to apply *Neustar* faithfully¹³⁷ — but it promises a way out of the thicket. Its takeaway is clear: it is doctrinally irrelevant whether an agency fails to invoke *Chevron* during the course of litigation. When an agency interpretation comports with *Chevron* Step 1.5, the court should afford it *Chevron* deference, irrespective of waiver. But because an

¹³³ *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 794 (D.C. Cir. 2004) (citation omitted).

¹³⁴ *Id.* at 803 n.3 (Roberts, J., concurring in part and concurring in the judgment) (citation omitted) (quoting *id.* at 794 (majority opinion)).

¹³⁵ *SoundExchange*, 904 F.3d at 54. The court then cited to *Peter Pan Bus Lines*, a *Chevron* Step 1.5 case. *See id.*

¹³⁶ *See id.* at 54–55.

¹³⁷ *Id.* at 54.

agency that has waived *Chevron* will often flunk *Chevron* Step 1.5 as well,¹³⁸ it will sometimes be proper for a court to deny *Chevron* deference to an agency that has failed to invoke *Chevron* in its briefs.

To be clear, it is insufficient to merely relabel all prior “*Chevron* waiver” cases as “*Chevron* Step 1.5” cases. Doctrine also demands a different remedy: remand without vacatur. Under *Chevron* Step 1.5, once a reviewing court has determined that the agency has wrongly believed its interpretation was compelled by Congress or prior precedent, the proper disposition is to remand back to the agency to interpret the statutory language anew.¹³⁹ Where there is statutory ambiguity but no corresponding agency interpretation, “it is not for the court ‘to choose between competing meanings.’”¹⁴⁰ By contrast, when an agency has waived *Chevron* deference, the correct disposition is to decide the statutory question de novo. As the D.C. Circuit has observed, “[w]ith *Chevron* inapplicable, . . . ‘we must decide for ourselves the best reading’” of the statute.¹⁴¹ Accordingly, whenever the court has previously found waiver of *Chevron* deference, it has proceeded to interpret the statute for itself.¹⁴² Under *Chevron* Step 1.5, those cases were wrongly decided.

In sum, for those “*Chevron* waiver” cases where the agency proceedings comport with *Chevron* Step 1.5, the correct disposition is to apply *Chevron* deference, whether it be waived or not. For those “*Chevron* waiver” cases where the agency in its proceedings failed to recognize statutory ambiguity, the correct disposition under *Chevron* Step 1.5 is to remand back to the agency for an initial interpretation. But in no doctrinal universe is the correct disposition for the court to decide for itself the “best meaning” of the statute.¹⁴³

B. Nonagency Waivers as Discretionary

This is all well and good for agencies. But what about private litigants? Recall that under current doctrine, private litigants can waive objections to the applicability of *Chevron* by failing to raise them in their

¹³⁸ See, e.g., *Neustar, Inc. v. FCC*, 857 F.3d 886, 894 (D.C. Cir. 2017); *PDK*, 362 F.3d at 794.

¹³⁹ See, e.g., *PDK*, 362 F.3d at 797–98 (recognizing that when an agency interpretation fails *Chevron* Step 1.5, courts “withhold *Chevron* deference and remand to the agency so that it can fill in the gap,” *id.* at 798).

¹⁴⁰ *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (quoting *PDK*, 362 F.3d at 798).

¹⁴¹ *Miller v. Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012) (quoting *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1136 (D.C. Cir. 2001)).

¹⁴² See, e.g., *Global Tel*Link v. FCC*, 859 F.3d 39, 50 (D.C. Cir. 2017) (deciding for itself “the best reading” of the statute because of *Chevron* waiver (quoting *Miller*, 687 F.3d at 1342)), *amended by* 866 F.3d 397 (D.C. Cir. 2017); *Neustar*, 857 F.3d at 894 (embarking on its own “review of the statute” because of *Chevron* forfeiture).

¹⁴³ *Contra Neustar*, 857 F.3d at 894.

initial challenge or on appeal. That is, if a private litigant challenges the validity of an EPA rulemaking but concedes that *Chevron* provides the governing framework, a reviewing court will assume that *Chevron* governs.¹⁴⁴ These waivers are qualitatively different from agency waivers, and they merit separate consideration. This Note concludes that when a private litigant waives its objection to *Chevron* deference, a reviewing court retains the *power*, but not the *obligation*, to raise the issue *sua sponte*.

It is true that *Chevron* is a doctrine about statutory meaning and not a “right” or “privilege”¹⁴⁵ belonging to the litigants. So long as the federal courts retain an interest — independent of the litigating parties — in applying the right body of law, they “retain[] the independent *power* to identify and apply the proper construction of governing law.”¹⁴⁶ The question, then, is when the courts should exercise this power. For agency waivers, the calculus is clear. Grave policy implications accompany a wavier doctrine that permits agencies to circumvent the APA by binding the courts to a relaxed legal standard of review — so grave, in fact, that they all but compel the conclusion that courts in such circumstances should use their independent power to apply *Chevron*.

But waivers by private litigants are a different kettle of fish. As a general rule, the reasons for adhering to ordinary waiver principles grow increasingly compelling as any potential policy problems wane.¹⁴⁷ And waivers by private litigants raise none of the policy issues that waivers by agencies do. After all, private litigants are not bound by the APA’s strictures.¹⁴⁸ And there is no *Chenery* issue whatsoever because *Chenery* concerns itself only with agency action.¹⁴⁹ The case against waivers by private litigants, then, lacks bite.¹⁵⁰ Given these considerations, it seems

¹⁴⁴ See, e.g., *Lubow v. U.S. Dep’t of State*, 783 F.3d 877, 884 (D.C. Cir. 2015) (“Because the plaintiffs affirm the applicability of the *Chevron* framework, we need not consider potential arguments they might have made (but did not make) against our deferring to the agency under *Chevron* . . .”).

¹⁴⁵ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹⁴⁶ *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (emphasis added).

¹⁴⁷ See *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (“Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt or where ‘injustice might otherwise result.’” (citation omitted) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941))).

¹⁴⁸ See 5 U.S.C. § 551(1) (2012) (defining “agency” to mean “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,” then listing exceptions).

¹⁴⁹ See *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (confining review to “the validity of the grounds upon which the *Commission* itself based its action” (emphasis added)).

¹⁵⁰ Cf. *Global Tel*Link v. FCC*, 866 F.3d 397, 425 (D.C. Cir. 2017) (Pillard, J., concurring in part and dissenting in part) (“By suggesting that agencies can relinquish judicial deference through such limited and belated maneuvers as refusing to defend portions of their briefs during oral argument,

plausible that a court should apply ordinary waiver principles when private litigants fail to raise an objection to the applicability of *Chevron* deference.

This conclusion partially coheres with the current case law. Courts have generally recognized that a litigant can waive an argument against *Chevron* deference by failing to raise it.¹⁵¹ But courts appear to apply an ordinary waiver regime. In other words, there is no indication that courts *ever* depart from ordinary principles of waiver in the private-litigant context. For instance, in *Lubow v. U.S. Department of State*,¹⁵² the D.C. Circuit held that it need not consider any arguments against the applicability of *Chevron* — including a seemingly meritorious objection under *Chevron* Step 1.5¹⁵³ — because the nonagency litigant assumed that *Chevron* applied.¹⁵⁴ It seems, then, that the current regime is a whit too favorable to waiver: unlike in ordinary cases, a reviewing court should hesitate before giving effect to a private litigant's failure to challenge the applicability of *Chevron*. After all, the interests that ground *Chevron* suggest that a court should *always* be more hesitant to permit waiver of *Chevron* claims than it should for other, more quotidian claims. Recall that the “[f]ederal courts are *entitled* to apply the right body of law, whether the parties name it or not.”¹⁵⁵ *Chevron* belongs to the courts as well as to litigants. Thus, courts should be encouraged to exercise their “independent power”¹⁵⁶ to determine whether *Chevron* applies or not, irrespective of waiver.

the majority risks enabling agencies to end-run the principle that they must ‘use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.’” (quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015)).

¹⁵¹ See, e.g., *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54 (D.C. Cir. 2018) (recognizing that “a party challenging an agency’s interpretation of a statute [can] forfeit an objection to *Chevron* deference”); *Lubow v. U.S. Dep’t of State*, 783 F.3d 877, 884 (D.C. Cir. 2015) (“Because the plaintiffs affirm the applicability of the *Chevron* framework, we need not consider potential arguments they might have made (but did not make) against our deferring to the agency under *Chevron*”); *Albanil v. Coast 2 Coast, Inc.*, 444 F. App’x 788, 796 (5th Cir. 2011) (“Plaintiffs did not raise their *Chevron* argument in the district court Thus, they have waived this argument.”); *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 319 n.2 (5th Cir. 2003) (“Defendants also argue that [the regulation] is invalid under [*Chevron*]. This argument was not presented to nor passed on by the district court, and therefore may not be considered on appeal.” (citation omitted)).

¹⁵² 783 F.3d 877.

¹⁵³ See *id.* at 889 (Sentelle, J., concurring) (noting that the agency “deemed itself not to have” discretion under the statute).

¹⁵⁴ *Id.* at 884 (majority opinion).

¹⁵⁵ *ISI Int’l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 551 (7th Cir. 2001) (emphasis added).

¹⁵⁶ *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

IV. CONCLUSION

As a concept, *Chevron* waiver unites two disparate strands of doctrine that usually serve distinct purposes. The doctrine of waiver exists to protect against prejudice and surprise of private litigants and to promote the institutional prerogatives of the courts. For ordinary claims, these interests point in the same direction and counsel against reaching the merits of an argument that a litigant has failed to raise. It is unsurprising and uncontroversial, then, that most kinds of claims are considered waivable. But the calculus changes when principles of waiver are applied to the doctrine of *Chevron*. *Chevron* deference, after all, serves largely *public* interests. It absolves the courts — when presented with an agency interpretation of an ambiguous statute — of the “responsibilit[y] for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest.”¹⁵⁷ Such responsibilities “are not judicial ones,”¹⁵⁸ and it would ask too much of courts to allow *Chevron* waiver if the resulting regime would overtax the judicial capacity without cause. Further, the private interests that usually ground the doctrine of waiver have little purchase in the *Chevron* context. And, most importantly, if courts allow agencies to waive *Chevron* deference, agencies can weaponize waiver in order to shirk the demanding procedural and substantive requirements imposed by the APA.

These side effects of *Chevron* waiver are deeply unpleasant. This Note prescribes relatively mild medicine: When an *agency* waives *Chevron* deference, the waiver is ineffective, and a reviewing court should apply deference anyway. When a *private litigant* waives an objection to *Chevron* deference, the waiver is potentially effective, but a reviewing court may apply deference anyway. Unlike current doctrine, this suggested approach disables tactical maneuvering from agency litigants aiming to end run the APA’s constraints on agency deregulation. In short, this approach defuses *Chevron* waiver. And, in doing so, it gives full measure to both principles of waiver and principles of modern administrative law.

¹⁵⁷ Kagan, *supra* note 12, at 2373 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984)).

¹⁵⁸ *Id.*; see *Chevron*, 467 U.S. at 866 (“Our Constitution vests such responsibilities in the political branches.” (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978))).