Judicial Deference Revisited —

"And you may ask yourself, 'Well, how did I get here?'"

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Deference?

- What are you talking about? And why do I care?
- Classic example:
  - 1972 Clean Water Act Amendments
    - EPA to regulate "navigable waters"
    - Defined as: "waters of the United States"
- Who decides what that means? And how?

Starting at the Source

U.S. Constitution, Article 1, Section 1

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Delegation — How Far Is Too Far?

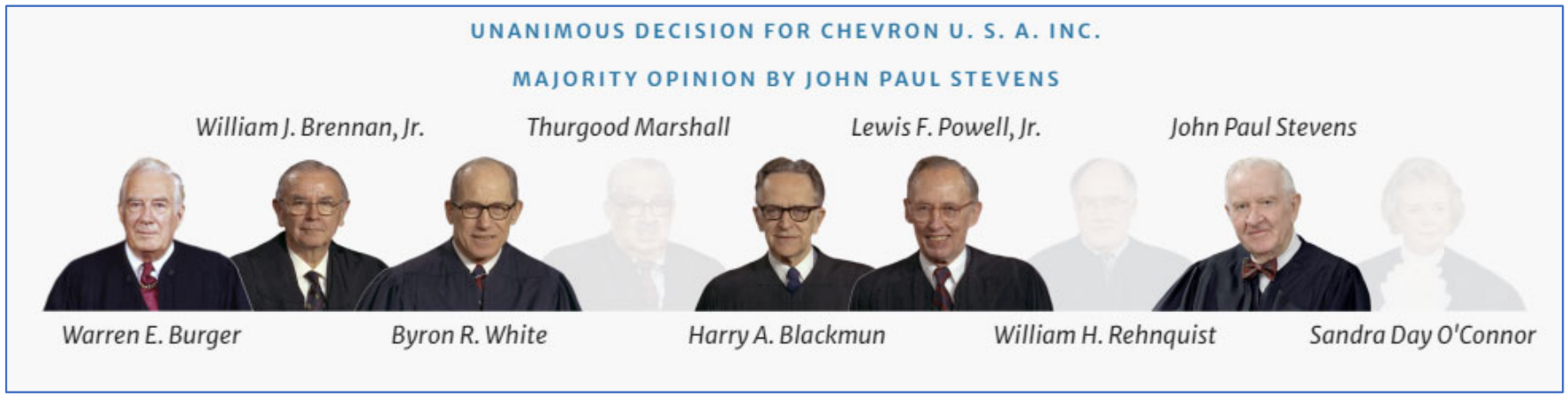
- Constitution does not say
- 19th Century "Non-Delegation Doctrine"
  - ➢ "Intelligible principle"
- Steady expansion of administrative state

Enter *Chevron v. NRDC* (1984)

- Clean Air Act — what is a "stationary source"
- "Bubble" rule
  - ➢ De-regulation decision
- Environmental groups challenge — and lose

The *Chevron* Two-Step

- **Question**:
  - How to evaluate EPA's statutory interpretation?
- **Two steps**:
  - Is statute silent or ambiguous?
  - If so, is agency's view reasonable?



Rise of Deference...

Duke Law Journal

VOLUME 1989 JUNE NUMBER 3

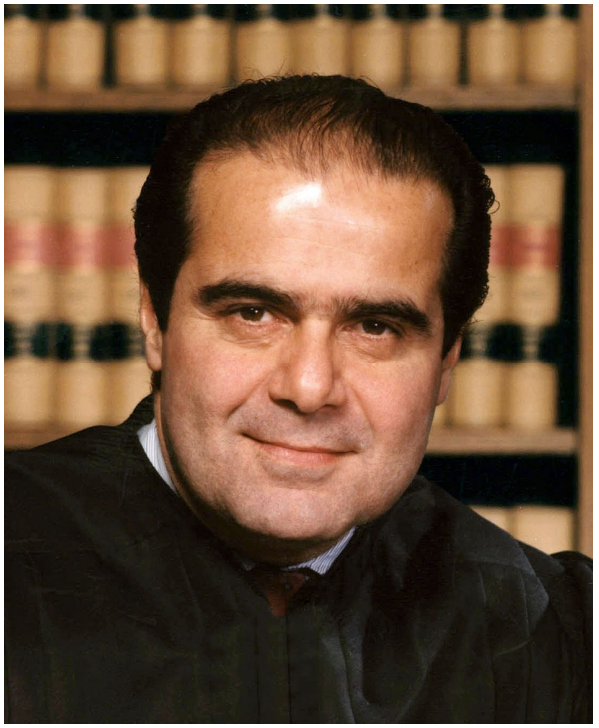
JUDICIAL DEFERENCE TO ADMINISTRATIVE INTERPRETATIONS OF LAW†

THE HONORABLE ANTONIN SCALIA**

When I was invited to speak here at Duke Law School, I had originally intended to give a talk that reflected upon the relationship among the Bork confirmation hearings, the proposed federal salary increase, capital punishment, *Roe v. Wade,* and Law and Astrology. I was advised, however, that the subject of this lecture series is administrative law, and so have had to limit myself accordingly. Administrative law is not for sissies—so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture. There will be a quiz afterwards.

Five Terms ago, the Supreme Court issued its opinion in the case of *Chevron, U.S.A., Inc. v. NRDC,*[1] which announced the principle that the courts will accept an agency's reasonable interpretation of the ambiguous terms of a statute that the agency administers. Dealing with the question whether the Environmental Protection Agency could permissibly adopt the "bubble concept"—that is, a plantwide definition of "stationary source"—under the Clean Air Act, Justice Stevens for a unanimous Court adopted an analytical approach that deals with the problem of judicial deference to agency interpretations of law in two st

First, always, is the question whether Congress has directly
the precise question at issue. If the intent of Congress is cl
the end of the matter; for the court, as well as the agency,
effect to the unambiguously expressed intent of Congress.[2]



way. Indeed, it may be that, for a time at least, fidelity to the old formulations will unnaturally constrict *Chevron,* or even produce a retreat from its basic perception. I tend to think, however, that in the long run *Chevron* will endure and be given its full scope—not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs.

...Fall of Deference

"I don't want to say that* Chevron *is responsible for all the ills of the modern administrative state, just most of them."

— Paul Clement

Deference on the Run

"And you may ask yourself, 'Am I right? Am I wrong?'"

Beginning of the End?

Loper Bright Enterprises v. Raimondo

- Agency rule challenged
- D.C. Circuit upholds (2-1)
- Cert granted — narrowly
- Argument January 17, 2024
- Decision June 2024?

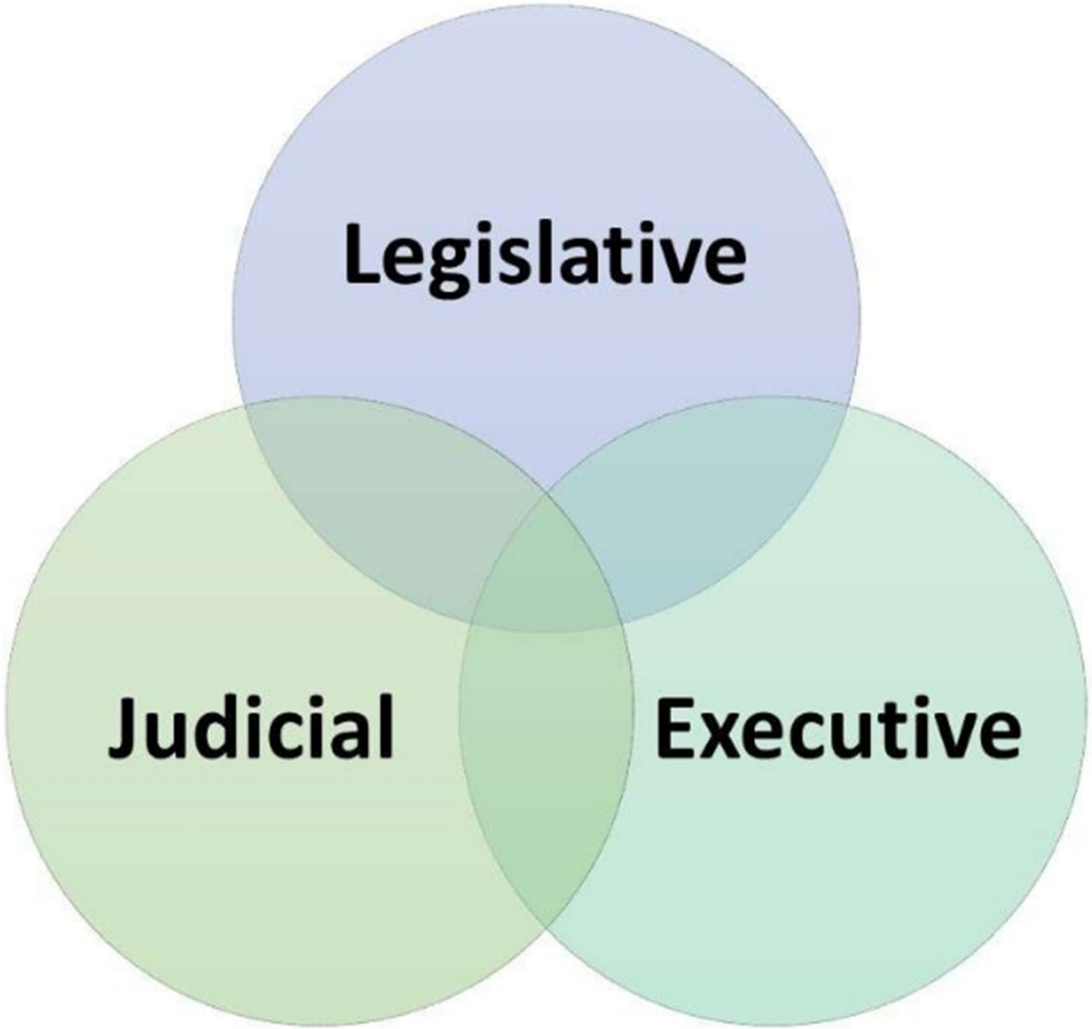
Potential Outcomes

1. Reinvigorated Step One
2. Silence and “Major Questions”
3. “A tombstone no one can miss.”

A Post-*Chevron* World

- **What happens to *Chevron*'s little brother — *Auer*?**
  - *Auer* is to agency regulations what *Chevron* is to agency statutes
  - Reaffirmed in *Kisor v. Wilkie* (2019), 5-4 decision joined by Chief Justice Roberts
- **What happens to the thousands of prior *Chevron* cases?**
  - Any second bites at the apple?
- **How clear, how explicit, must Congress be?**

“[Not] the Same as It Ever Was”



What about Georgia?

295 Ga. 495

COOK et al.

v.

GLOVER.

No. S13G1127.

Supreme Court of Georgia.

July 11, 2014.

Background: Medicaid applicants whose spouses had purchased annuities petitioned for judicial review of determination by Office of State Administrative Hearings (OSAH) that they were not eligible for benefits. The Superior Court, Union County and the Superior Court, Towns County,

tuted the disposal of an asset). Moreover, the level of deference this Court gives state administrative agency decisions interpreting ambiguous statutes is in accord with that identified by the United States Supreme Court in *Chevron* as appropriate for the judicial review of a federal administrative agency's statutory interpretation. See *Chevron*,

But for How Long?

315 Ga. 587

Amy N. CAZIER et al.

v.

GEORGIA POWER COMPANY.

Case No. S22C0513

Supreme Court of Georgia.

January 27, 2023

Reconsideration Denied February 16, 2023

Roy E. Barnes, John Frank Salter Jr., The Barnes Law Group, LLC, 31 Atlanta Street, Marietta Georgia 30060, James Glenn Richardson, Talley, Richardson & Cable, 367 West Memorial Drive, Dallas Georgia 30132, for Appellant.

But our history of deference is messy; our precedent is all over the place, and has been for nearly the entire existence of our Court. Eight years ago, we announced for the first time in our state's history that our precedent on judicial deference to executive branch legal interpretations is best understood through the federal lens of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). That recency poses a problem. If — as it appears to me — our post-1983 decisions pronounced deference principles without proper grounding in our cases interpreting the *earlier* versions of the Constitution, then those post-1983 decisions do not shed light on the original public meaning of the current Separation of Powers Provision. And as I explain below, our pre-1983 precedent does not appear to support a *Chevron*-style regime. So, in an appropriate case, I think we should reconsider the matter.

Implications Going Forward

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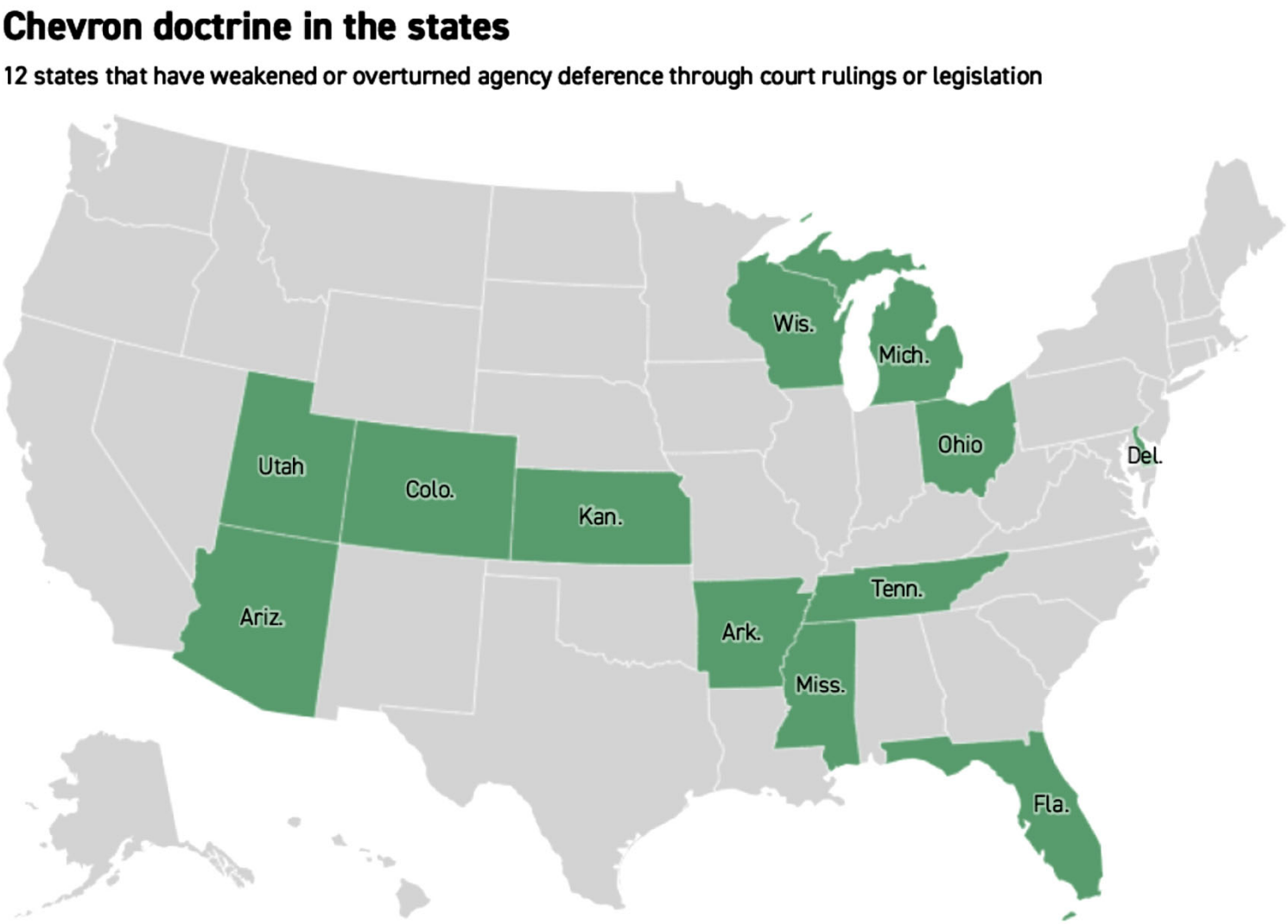

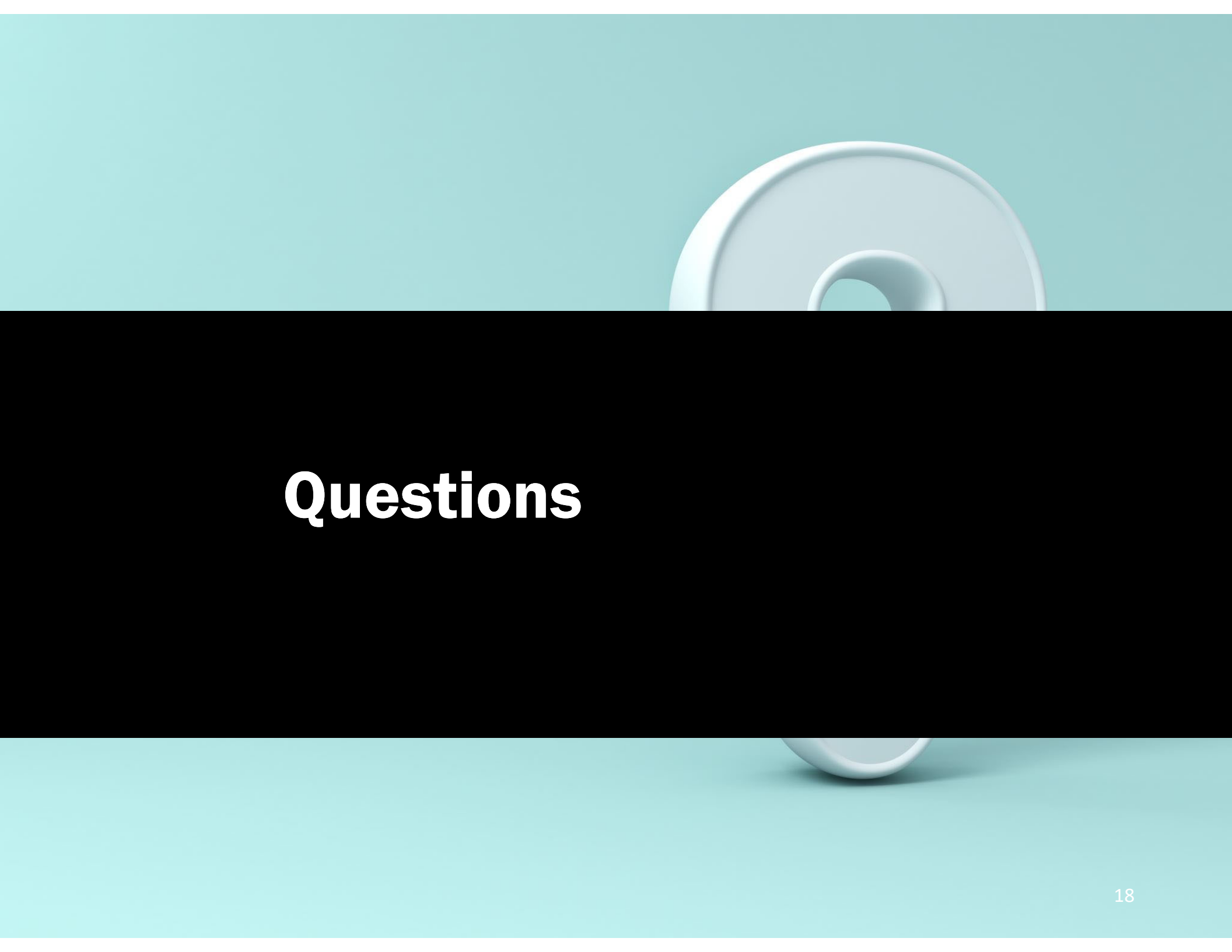
Questions