No. 22-451

IN THE
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES; *ET AL.*,

PETITIONERS,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce; *ET AL.*,

RESPONDENTS.

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

BRIEF OF *AMICUS CURIAE* NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Magnuson-Stevens Act (MSA) governs fishery management in federal waters and provides that the National Marine Fisheries Service (NMFS) may require vessels to "carry" federal observers onboard to enforce the agency's myriad regulations. Given that space onboard a fishing vessel is limited and valuable, that alone is an extraordinary imposition. But in three narrow circumstances not applicable here, the MSA goes further and requires vessels to pay the salaries of the federal observers who oversee their operations —although, with the exception of foreign vessels that enjoy the privilege of fishing in our waters, the MSA caps the costs of those salaries at 2-3% of the value of the vessel's haul. The statutory question underlying this petition is whether the agency can also force a wide variety of domestic vessels to foot the bill for the salaries of the monitors they must carry to the tune of 20% of their revenues. Under well-established principles of statutory construction, the answer would appear to be no, as the express grant of such a controversial power in limited circumstances forecloses a broad implied grant that would render the express grant superfluous. But a divided panel of the D.C. Circuit answered yes under *Chevron* on the theory that statutory silence produced an ambiguity that justified deferring to the agency.

The questions presented are:

1. Whether, under a proper application of *Chevron*, the MSA implicitly grants NMFS the power to force domestic vessels to pay the salaries of the monitors they must carry.

2. Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

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INTEREST OF THE *AMICUS CURIAE*

Since 1968, the National Right to Work Legal Defense Foundation, Inc.,[1] has been the nation's leading litigation advocate for employee free choice concerning unions. Foundation staff attorneys have represented workers in almost all of the compulsory union fee cases considered by this Court, most recently in *Janus v. AFSCME Council 31,* 138 S. Ct. 2448 (2018), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), and *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012).[2]

The Foundation's particular interest in this case arises because its staff attorneys frequently represent, and are currently representing, private-sector employees whose free choice to refrain from forced union association and monopoly bargaining depends upon the National Labor Relations Board's ("NLRB" or "Board") proper implementation of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 *et seq.* In several cases involving the rights of employees subject to the NLRA, U.S. Circuit Courts of Appeals have applied the deference mandated by *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984),

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[1] Supreme Court Rule 37 statement: Petitioner's counsel has lodged with the Clerk a letter granting blanket consent to the submission of *amicus* briefs. Respondents' counsel was timely notified and consented to the filing of this brief. *Amicus* certifies that no party's counsel authored this brief in whole or part, and *amicus* alone funded its preparation and submission.

[2] *See Foundation Supreme Court Cases*, http://www.nrtw.org/en/foundation-cases.htm (last visited 12 Dec. 2022).

in reviewing NLRB decisions on appeal.[3] For that reason, the fate of the *Chevron* doctrine is important to the Foundation's mission and those it serves.

The Foundation submits this brief to urge this Court to grant the Petition to consider whether the *Chevron* doctrine should be overruled or limited. The Foundation takes no position on the First Question Presented, except to note that narrowly considering only the first Question would perpetuate the deficiencies in the *Chevron* doctrine's constitutional underpinnings and application discussed herein.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court need not decide here whether administrative agencies are entitled to judicial deference under *Chevron*. As Petitioners forcefully argue, MSA's plain meaning unambiguously bars NMFS's statutory construction. Thus, this Court should reverse the D.C. Circuit's decision. *See* Petition ("Pet.") 16-28. But if this Court determines *Chevron* deference grants NMFS the massive power to alter a federal statute based upon "ambiguity" divined from silence to shift enforcement costs to the regulated, then the Court should confront whether *Chevron* "is overdue for ... a reboot or an overruling." *Id.* at 29-33.

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[3] *See*, *e.g.*, *Pirlott v. NLRB*, 522 F.3d 423, 433-34 (D.C. Cir. 2008) ("The general chargeability issue is a matter for the Board to decide in the first instance."); *UFCW, Local 1036 v. NLRB*, 307 F.3d 760, 766 (9th Cir. 2002) (*en banc*) ("Courts are required to defer to the NLRB on statutory interpretation under *Chevron*"); *IAM v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998).

The second Question Presented explicitly asks the Court to reconsider *Chevron*. *Id.* *Amicus* agrees that it should. *Chevron* requires courts to uphold an agency's interpretation of a statute—even if not the best interpretation—so long as that interpretation is reasonable. This approach forces courts to defer to agencies on legal questions, thus requiring the judiciary to shirk its duty to say what the law is. Time and again, *Chevron* forces judges to uphold inter pretations that they believe are wrong. Indeed, "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). This approach significantly shifts power from the judiciary to administrative agencies and violates the separation of powers.

Chevron also violates basic due process principles because it gives the federal government an improper advantage by requiring deference to an agency's "reasonable" interpretation, in effect tipping the scales of justice.

Worse still, this Court and the lower courts are misaligned on *Chevron*'s application. This Court has carved away at *Chevron*'s reach, providing an ever-expanding list of exceptions to its application. The Court has also applied other deference doctrines when *Chevron* would seemingly apply. And scholarly studies demonstrate that this Court often ignores *Chevron*, while the lower courts routinely apply it.

This has generated confusion among the lower courts about *Chevron*'s application, confusion that

warrants review. Ultimately, "[i]f *Chevron* matters, we should consider whether it is functioning properly." Kent Barnett & Christopher J. Walker, *Chevron* in the Circuit Courts, 116 Mich. L. Rev. 1, 71 (2017). But there is no reason *Chevron* should continue to govern lower courts while this Court shuns it. The Court should grant the petition, reconsider *Chevron*, and reverse the decision below.

ARGUMENT

I. *Chevron* violates the separation of powers and basic due process principles, and should be overruled.

The Framers constructed the Constitution to safeguard the people's liberty by separating governmental powers.[4] This design emerged from "centuries of political thought and experiences," *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 116 (2015) (Thomas, J., concurring) (citation omitted), that taught the Framers that delegating to separate federal branches limited, specified, and distinct powers would protect the republic and its citizens better than any enumeration of rights ever could.[5] Hamilton

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[4] *See The Federalist* No. 51 at 283 (Michael L. Chadwick ed. 1987) (J. Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people").

[5] *NLRB v. Noel Canning*, 573 U.S. 513, 570-71 (2014) (continued...)

recognized from the outset that the separation of powers was the primary weapon to protect individual liberty against a tyrannical federal government: "[T]he Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." *The Federalist* No. 84 at 466 (A. Hamilton). Indeed, abandonment of separation of powers, the Framers knew, would lead directly to the "loss of due process and individual rights."[6] *Chevron* deference is anathema to this design and undermines individual liberty. Thus, this Court should abandon it.

1. When the people ratified the Constitution, they delegated "[a]ll" legislative power to Congress, not some. "All."[7] Ideally, Article I's plain meaning would prevent the legislative branch from sub-delegating its

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[5] (...continued)
(Scalia, J., concurring) ("[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights. Indeed, so convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary") (cleaned up).

[6] Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1538 (1991); *see also The Federalist* No. 47 at 260-61 (J. Madison) ("No political truth is... stamped with the authority of more enlightened patrons of liberty" than dividing the powers of government because "[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands ... may justly be pronounced the very definition of tyranny.").

[7] *See* U.S. Const. art. I, § 1; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("Article I, § 1... permits no delegation of those powers") (citations omitted).

legislative power to another branch.[8] Even so, this Court has rarely policed that line. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 84 (2015) (Thomas, J., concurring).

Chevron is the inevitable consequence of abandoning Article I's text. This Court created *Chevron* deference based on a legal fiction, assuming Congress implicitly delegates legislative power through ambiguous or nonexistent statutory language so that an administrative agency can make legislative rules.[9] The effect is that a law's meaning is never fixed but becomes a malleable standard that the executive branch can change on a dime.

The *Chevron* regime undercuts the Framers' design to prevent excessive lawmaking, which the Framers thought was one of the "diseases to which our governments are most liable." *Gundy*, 139 S.Ct. at 2134 (footnote omitted). Article I requires a law to "win the approval of two Houses of Congress— elected at different times, by different constituencies, and for different terms in office—and either secure the President's approval or obtain enough support to

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[8] *See Gundy v. United States*, 139 S.Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); *see also* Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 336-37 (2002).

[9] *See Chevron*, 467 U.S. at 844; *see also Michigan v. EPA*, 135 S.Ct. 2699, 2713 (2015) (Thomas, J., concurring) ("Statutory ambiguity ... becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress").

override his veto." This gauntlet, the Framers thought, was a "bulwark[ ] of liberty." *Id.*[10]

When the judicial branch no longer enforces this framework, and makes lawmaking easy through congressional delegation, the regulated public is susceptible to having life, liberty, or property taken without fair notice. A fundamental tenet of due process requires that laws "which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citations omitted). A punishment will thus violate due process when a "regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* (cleaned up). Yet *Chevron* upends this fundamental principle, because an executive agency can decide what an ambiguous law means after a person has acted and hail that person into court.

2. *Chevron* likewise violates Article III and creates serious due process problems. Judicial review is essential to the broader "liberal tradition, which is the dominant tradition in American constitutional law, 'emphasiz[ing] limited government, checks and balances, and strong protection of individual rights.'" Douglas H. Ginsburg & Steven Menashi, Our Illiberal

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[10] Indeed, it is a feature and not a bug of our constitutional structure that laws are hard to enact. *See* John F. Manning, Lawmaking Made Easy, 10 Green Bag 2d 191, 202 (2007); *see also Ass'n of Am. R.Rs.*, 575 U.S. at 60-61 (Alito, J., concurring).

Administrative Law, 10 N.Y.U.J.L. & Liberty 475, 477 (2016) (cleaned up).

The Framers thus entrusted judges with judicial power under Article III. Thus, the familiar words of the Great Chief Justice, John Marshall, echo to this day: "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This power, in turn, came with a judicial duty to "exercise its independent judgment in interpreting and expounding upon the laws." *Perez*, 575 U.S. at 118-19 (Thomas, J., concurring); *see also* Philip Hamburger, *Law and Judicial Duty* 316-26 (2008).

Yet *Chevron*—which often requires judges to defer to an agency's judgment on questions of law—forces judges to shirk this duty. Unsurprisingly, scholars have described *Chevron* deference as "counter-*Marbury*." Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2074-75 (1990). Under *Chevron*, judges do not and are not permitted to "say what the law is." Instead, this duty is abdicated to administrative agencies, violating the separation of powers.[11] The Federal judiciary has virtually abandoned its duty to check the legislative and executive branches. Federal courts reflexively defer to agencies under *Chevron* and give one party an advantage over the other in litigation. *See Pereira v. Sessions*, 138 S.Ct. 2105, 2120-21 (2018) (Kennedy, J.,

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[11] *See, e.g.*, *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087 (9th Cir. 2013) ("If the [agency's] construction is reasonable, we must accept that construction under *Chevron*, even if we believe the agency's reading is not the best statutory interpretation").

concurring); *see also* Philip Hamburger, *Chevron* Bias, 84 Geo. Wash. L. Rev. 1187, 1209-10 (2016).

This abandonment of judicial duty has real effects. For one, it undermines our legal system's political legitimacy.[12] Frequently, *Chevron* forces judges to uphold interpretations they believe to be wrong.[13] And sometimes courts are required to uphold interpretations previously rejected.[14] In fact, "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Brand X Internet Servs.*, 545 U.S. at 983.

Chevron thus significantly shifts power from the judiciary to administrative agencies. When agencies interpret the law, they exercise "[t]he judicial Power of the United States." Art. III, § 1. But Article III vests "[t]he judicial Power of the United States" in the Federal courts alone. That division of power was

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[12] *See* Hamburger, *Chevron* Bias, *id.* at 1236 ("[I]ndependent judgment of unbiased judges is the basis of the government's political legitimacy ... especially [in] those [cases] concerning the power of government or the rights of the people, it is essential that the people have confidence that the judges are not biased toward government, but are exercising independent judgment") (footnote omitted).

[13] *See*, *e.g.*, *Kennedy v. Butler Fin. Sols., LLC*, 2009 WL 290471 *4 (N.D. Ill. Feb. 4, 2009) ("The FTC's regulation strikes the Court as reasonable, though perhaps not the best interpretation of the law").

[14] *See*, *e.g.*, *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1147-52 (10th Cir. 2011) (holding that under *Chevron*, the court is obligated to discard its earlier statutory interpretation and defer to the agency's).

intentional. The Framers believed that "the general liberty of the people can never be endangered ... so long as the judiciary remains truly distinct from both the legislature and Executive." *The Federalist* No. 78 at 421 (A. Hamilton). *Chevron* warps this scheme and invites executive agencies to take on the role of independent judges. Yet neither Congress nor the courts have constitutional authority to transfer judicial power to agencies. *See* Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 128 Yale L. J. 908 (2017). Indeed, the Constitution does not contemplate such "undifferentiated governmental power." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. at 67 (Thomas, J., concurring in judgment) (internal quotation marks omitted).

In addition to violating the separation of powers, *Chevron* violates basic due process principles. As then-Judge Gorsuch observed, "[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the [F]ramers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).[15]

Chevron gives the federal government an unfair advantage by tipping the scales in its favor. Any interpretation—even if not the best, most likely, or most sensible interpretation—will be upheld by courts

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[15] *See also* Hamburger, *Chevron* Bias, 84 Geo. Wash. L. Rev. at 1239 ("Precedents such as *Chevron* ... require judges to give up their role as judges and ... violate the due process of law").

so long as it is "reasonable." And reasonable is defined very generously. This arrangement gives the federal government a clear advantage in nearly every case. *See* Hamburger, *supra* at 1250 ("[J]udges defer to administrative interpretation, thus often engaging in systematic bias for the government and against other parties"). *Chevron* requires courts to defer to an agency's interpretation even when the agency itself is a litigant in the case at hand. In no other context does a court simply defer to one of the parties.

At bottom, *Chevron* is incompatible with the Constitution's most fundamental structural safeguards. It is "contrary to the roles assigned to the separate branches of government" and "require[s] [judges] at times to lay aside fairness and [their] own best judgment and instead bow to the nation's most powerful litigant, the government, for no reason other than that it is the government." *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment). The Court should grant the petition, revisit *Chevron*, and reverse the decision below.

II. This Court's application of *Chevron* creates inconsistencies among the lower courts.

In *King v. Burwell*, 576 U.S. 473 (2015), this Court stated that "[w]hen analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*." *Id.* at 485. "Often," however, appears to overstate this Court's use of *Chevron*. *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, 1124-25 (2008). A study of cases reveals that this Court applied the *Chevron* framework in barely more than a quarter of the cases in which *Chevron* (by its own terms) appears applicable. *Id.* Rather than applying *Chevron* in those many cases, the Court has announced an ever-expanding list of exceptions to *Chevron* and employed many substitute deference doctrines in its place.

Meanwhile, the circuit courts are nearly the opposite in their application. Based on a similar study, they apply the *Chevron* framework more than three-quarters of the time in which *Chevron* theoretically should apply. Barnett & Walker, *supra* at 5-6. Put simply, the Court's *Chevron* jurisprudence has generated confusion among the lower courts. This confusion makes one thing clear: this Court should revisit *Chevron*.

A. This Court and the lower courts are at odds over *Chevron*'s application.

Generally, this Court applies *Chevron* far less frequently than the circuit courts. As Petitioners aptly explain, "This Court has shied away from giving agencies deference under *Chevron* in recent years for good reason." Pet. 15. As one treatise explains, the Court sometimes "gives *Chevron* powerful effect," sometimes "ignores *Chevron*," and sometimes

"characterizes the *Chevron* test in strange and inconsistent ways."[16]

In another study, scholars analyzed this Court's deference cases from *Chevron* to *Hamdan*. They identified 267 cases in which "the agency interpretation was pursuant to a congressional delegation of lawmaking authority," cases where "the *Chevron* two-step inquiry would theoretically govern." Eskridge & Baer, *supra* at 1124. Out of those 267 cases, the Court applied the *Chevron* framework in 76. *Id.* That meant that the Court did "not apply the *Chevron* framework in nearly three-quarters of the cases where it would appear applicable." *Id.* at 1125.

Indeed, this Court routinely overturns lower court *Chevron* decisions without applying the *Chevron* framework at all. In *Loos v. BNSF Ry. Co.*, 139 S.Ct. 893 (2019), for example, this Court never mentioned *Chevron* or its two-step process, even though the Eighth Circuit applied it below. The Eighth Circuit stopped at step one after concluding that the agency's interpretation deserved "no deference under *Chevron*, because 'the agency must give effect to the unambiguously expressed intent of Congress.'" *Loos v. BNSF Ry. Co.*, 865 F.3d 1106, 1119 (8th Cir. 2017). It is unclear, however, whether this Court agreed with the Eighth Circuit's *Chevron* analysis or something

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[16] Kristin Hickman & Richard Pierce, Jr., *Administrative Law Treatise* §§ 3.5.6, 3.6.10 (6th ed. updated Nov. 1, 2021) (surveying how the Court has treated *Chevron* in seemingly eligible cases over the last decade); *see also Pereira v. Sessions*, 138 S.Ct. at 2121 (Alito, J., dissenting) ("I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*").

else entirely because the Court did not discuss *Chevron* and simply analyzed the statute without identifying any deference doctrine.

Similarly, in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, the D.C. Circuit had held, without hesitation, that *Chevron* applied when the Bureau had reinterpreted a statute to define a bump stock as a machine gun for purposes of criminal prosecution. Justice Gorsuch, however, declared *Chevron* out of bounds while agreeing that the case's interlocutory posture did not merit the Court's immediate review: "But at least one thing should be clear. Contrary to the court of appeals' decision in this case, *Chevron* [ ] has nothing to say about the proper interpretation of the law before us." 140 S.Ct. 789 (2020) (Gorsuch, J., respecting the denial of *certiorari*).

In recent years, this Court has narrowed the *Chevron* doctrine after reflexive applications of the framework in circuit courts. For example, in *Encino Motorcars, LLC v. Navarro*, the Court declined to apply *Chevron* deference "where the regulation is 'procedurally defective.'" 579 U.S. 211, 220 (2016) (citing *U.S. v. Mead Corp.*, 533 U.S. 218, 227 (2001)). Below, however, the Ninth Circuit had "conduct[ed] the familiar two-step inquiry to determine whether to defer to the agency's interpretation." *Encino Motorcars, LLC v. Navarro*, 780 F.3d 1267, 1271 (9th Cir. 2015).

And in *Burwell*, this Court invoked the major questions doctrine, explaining that "'[i]n extraordinary cases, ... there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.'" 576 U.S. at 485 (quoting *FDA v. Brown &*

Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)). It thus declined to apply the *Chevron* framework. The Fourth Circuit, however, had not prepared for this *Chevron* carveout. Instead, it "viewed the Act as 'ambiguous and subject to at least two different interpretations.'" *Id.* at 484 (*citing King v. Burwell*, 759 F.3d 358, 372 (4th Cir. 2014)). "The court [had] therefore deferred to the IRS's interpretation under *Chevron*." *Id.*

Still other decisions of this Court have ignored a lower court's *Chevron* application for unspecified forms of deference. *See New York v. FERC*, 535 U.S. 1, 28 (2002) ("[W]e nevertheless conclude that the agency had discretion to decline to assert such jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues"); *U.S. v. LaBonte*, 520 U.S. 751, 757 (1997). The Second Circuit, before the Court's ruling in *New York v. FERC*, stated that "the deferential standard of *Chevron* ... governs our review of FERC's interpretation of [the statute]." *Transmission Access Pol'y Study Grp. v. FERC*, 225 F.3d 667, 687 (D.C. Cir. 2000).

While this Court has disregarded or narrowed the *Chevron* doctrine, lower courts apply *Chevron* regularly and expansively. Indeed, a 2017 study surveying *Chevron* in the circuit courts analyzed 1,558 agency interpretation cases. Of those, the circuit courts applied the *Chevron* framework in 1,166 cases, or nearly three-quarters. Barnett & Walker, *supra* at 32. "Consistent with prior studies, the vast majority of agency interpretations (817 interpretations, or 70.0%) made it to step two. And an even greater percentage of

interpretations that made it to step two (766 interpretations, or 93.8%) were upheld." *Id.* at 33.

Because of this dichotomy, while "the choice to apply *Chevron* deference may not matter that much at the Supreme Court, it seems to matter in the circuit courts." *Id.* at 6. Such a scheme leaves this Court and the lower courts at odds, as well as leaving the lower courts at odds with each other. Furthermore, the 2017 study found that the circuit courts "varied considerably as to ... [the] application of *Chevron*. *Id.* at 7.

This Court's application—or rather, its non-application—of *Chevron* leaves the lower courts with uncertain guidance. In the end, "[i]f *Chevron* matters, we should consider whether it is functioning properly." Barnett & Walker, *supra*, 71. However, that *Chevron* continues to be crucial in lower courts while this Court shuns it is a serious conflict.

B. This Court applies other forms of deference where *Chevron* would appear to apply by its terms.

This Court often applies other deference doctrines in many cases where *Chevron* appears to apply. And it is often unclear why. The Court has explicitly applied other deference standards in the context of labor, immigration, treaties, sentencing, energy, securities, communications, and other regulated industries.

Labor law cases, for example, often employ "*Beth Israel*" deference, a "pre-*Chevron* test permitting reasonable interpretations that are consistent with the statute." Eskridge & Baer, *supra* at 1090. While somewhat similar to the *Chevron* framework, the Court

applied *Beth Israel* deference nearly 50 times after *Chevron* was decided. *Id.* at 1107. And in most of those cases, application of "*Chevron* would have been appropriate." *Id.* at 1108. This Court has repeatedly employed *Beth Israel* to defer to the NLRB's statutory interpretations.[17] Nowhere do those cases indicate why they chose not to apply the *Chevron* framework. Nor have scholars identified a principled explanation. Some speculate that "[p]erhaps the most likely reason" the Court applies *Beth Israel* deference is simply because "specialized practices—such as labor ... —prefer their particular deference precedents and continue to cite them...." Eskridge & Baer, *supra* at 1108. But that provides little guidance to the lower courts.

Immigration law also operates with a *Chevron* alternative, employing a "reasonable foundation"

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[17] *See*, *e.g.*, *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001) (citing *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 402-403 (1983)) ("We find that the Board's rule for allocating the burden of proof is reasonable and consistent with the Act, and we therefore defer to it"); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364 (1998) (citations omitted) ("Courts must defer to the requirements imposed by the Board if they are 'rational and consistent with the Act,' [ ] and if the Board's 'explication is not inadequate, irrational or arbitrary'"); *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 787-88 (1996) (citations omitted) ("To affirm its rule of decision in this case, indeed, there is no need to invoke the full measure of the 'considerable deference' that the Board is due [ ] by virtue of its charge to develop national labor policy, [ ] through interstitial rulemaking that is 'rational and consistent with the Act'").

deference rule. *Id.*[18] Treaty law instructs judges to give "great weight" and "respect" to the executive branch.[19] Sentencing law, too, has its own "significant discretion" deference regime.[20] This Court has even applied "an unspecified but deferential mode of review to the Sentencing Commission's interpretation of its Guidelines." Eskridge & Baer, *supra* at 1108 (citing *Melendez v. United States*, 518 U.S. 120, 129-30 (1996)).

Different deference standards apply in other regulated industries as well. Those include energy, *see New York v. FERC*, 535 U.S. at 28; securities law, *see Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.16 (1988)

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[18] *See Reno v. Flores*, 507 U.S. 292 (1993) (citing *Carlson v. Landon*, 342 U.S. 524, 541 (1952)) ("Respondents contend that the regulation goes beyond the scope of the Attorney General's discretion ... under 8 U.S.C. § 1252(a)(1). That contention must be rejected if the regulation has a 'reasonable foundation' that is, if it rationally pursues a purpose that it is lawful for the INS to seek").

[19] *See*, *e.g.*, *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006) ("In addition, 'while courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight'") (citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty") (citing *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982)).

[20] *See*, *e.g.*, *LaBonte*, 520 U.S. at 757 (*quoting Mistretta v. U.S.*, 488 U.S. 361, 377 (1989) ("Congress has delegated to the [Sentencing] Commission 'significant discretion in formulating guidelines' for sentencing convicted federal offenders").

(*citing TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)) ("[t]he SEC's insights are helpful, and we accord them due deference"); communications law, *see City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("it has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies"); and other regulated industries.

These legal fields all have unique deference doctrines where *Chevron* should have fit the definitional bill. Yet none delivers an instructive formulation nor explains why *Chevron* was neither applied nor addressed. But these cases are just the tip of the iceberg. The Court has applied numerous other deference regimes in a variety of circumstances. *See*, *e.g.*, Eskridge & Baer, *supra* at 1100 (collecting cases applying *Skidmore*, *Seminole Rock*, and *Curtiss-Wright* deference regimes as well as "consultative deference" regimes in which the Court "relies on some input from the agency" like an *amicus* brief "without invoking a named deference regime," and anti-deference regimes like the rule of lenity). Such a disjointed scheme offers little guidance to the lower courts.

C. Deference to administrative agencies like the NLRB is particularly unjustified.

Chevron deference has allowed administrative agencies like the NLRB to make federal law— sometimes retroactively— for years based on political considerations. One of the primary rationales for *Chevron* deference is that agency "experts" are better equipped than courts to determine the nation's evolving policy. *See Chevron*, 467 U.S. at 865. But the

lawmaking in which administrative agencies like the NLRB engage is often not based on "expertise." Indeed, the definitions of labor law terms are frequently legal rather than scientific questions. What the NLRB engages in is not "expertise" so much as political will. This puts the law's status in constant flux without going through the constitutionally-prescribed law-making process.

As two federal judges have highlighted, in many cases, "the [agency's] claim to expertise is entirely fraudulent." Ginsburg & Menashi, Our Illiberal Administrative Law, 10 N.Y.U. J.L. & Liberty at 482 (footnote omitted). The NLRB is notorious for this, where "the partisan majority ... routinely displaces the previous majority's psychological assertions about what employer tactics do or do not coerce workers when they are deciding whether to vote for union representation." Yet that claim to expertise is often "a euphemism for policy judgments." Although some agency staff might have varying levels of technical expertise, agency heads are political actors. Indeed, "the agency's ultimate decisions are made by the experts' political masters, who have sufficient discretion that they can make decisions based upon their own policy preferences, fearing neither that the expert staff will not support them nor that a court will undo their handiwork." *Id.* at 482-83.

Take *UC Health v. NLRB*, 803 F.3d 669 (D.C. Cir. 2015), in which the D.C. Circuit upheld a Regional Director's authority to direct and certify a union election although the NLRB itself did not have the statutorily required quorum. Citing *Chevron*'s second step, the majority found the term "quorum" was

ambiguous because the statute neither defined the term nor spoke to the case's exact and unlikely circumstances. But instead of using traditional tools of statutory analysis and construction, the majority deferred to one litigant's view of the law, even though "the structure of the statute supports the [NLRB's] interpretation just as well as it might support UC Health's construction." *Id.* at 675. Tie goes to the home team.

Judge Silberman, dissenting, recognized the NLRB's statutory interpretation was "flatly" unreasonable and incompatible with the statute. *See id.* at 687. In finding the NLRB's construction unreasonable, the dissent cautioned, "[w]e must bear in mind that even if we are following *Chevron*'s second step, we are construing a Congressional act—the second step is not open sesame for the Agency." *Id.* Yet, often, that is exactly how courts treat agency interpretations.

To be sure, granting agencies like the NLRB deference may prevent "ossification of large portions of our statutory law." *U.S. v. Mead Corp.*, 533 U.S. 218, 247-48 (2001) (Scalia, J., dissenting). However, the cost is not worth the reward. Besides imperiling our constitutional structure, agency discretion (granted deference by the courts) lends itself to temptations that threaten individual liberty and legislative prerogative. Simply put, agency deference undermines statutory law; it does not protect it. Statutes mean little when (government) litigants may alter them at will to fit their interests.

Regulatory capture in particular genuinely threatens the rule of law and undermines justifications for agency deference. Regulatory capture occurs when commercial, ideological, or political interests—be it by an industry, profession, geographic area, or political group—conscript a regulatory agency to implement a preferred policy outcome.[21] Agency capture permits special interests outsized influence in the regulatory process, or to borrow from Madison, regulation becomes subject to the "mischiefs of faction."[22] Though regulatory capture does not explain every incident of agency action, the possibility of undue and undemocratic influence predicted by this economic theory warns against the deferential attitude *Chevron* condones.

Deferring to special interests or factions violates the first principle of neutrality Article III requires as part of the exercise of judicial power. Hamburger, *Law and Judicial Duty* 316-26 (2008). One early observer noted the simplest definition of constitutional government is "comprised in three words, government by law." *State Necessity Considered as a Question of*

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[21] Ernesto Dal Bo, *Regulatory Capture: A Review*, 22 Oxford Rev. Econ. Pol'y 203 (2006); George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3, 13-17 (1971); Richard A. Posner, Theories of Economic Regulation, 5 Bell J. Econ. & Mgmt. Sci. 335, *passim* (1974).

[22] *See The Federalist* No. 10 (J. Madison) at 46 (explaining faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community").

Law, 6 (London: 1766). In contrast, the exercise of arbitrary, lawless power is the "erroneous will of one man, or a few men, in whom the executive power resides" which "is substituted instead of law." *Id.*

Government by law protects against arbitrary conduct benefitting the few able to leverage government in their favor. Hamilton stressed the importance of the judiciary in maintaining the law. He explained "that inflexible and uniform adherence to the rights of the Constitution, and of individuals, [i]s indispensable in the courts of justice," *i.e.*, "a reliance that nothing would be consulted but the constitution and the laws." See *The Federalist* No. 78 (A. Hamilton) at 425. Deference to administrative agencies like the NLRB via *Chevron* violates these principles and prevents courts from serving as "an intermediate body" that interprets the law as their "proper and peculiar province." *Id.* The regulated public bears the cost of this to the benefit of the few.

At bottom, *Chevron* deference allows agencies throughout the federal government—like the NLRB—to change abruptly legal and policy positions on major issues affecting the regulated public's liberty. Agencies have done so not by using the statute Congress passed, but by using supposedly ambiguous statutory language to instill and affectuate their political preferences, enacted without going through the inconvenience of the democratic processes prescribed by the Constitution. This undermines a fundamental underpinning of the rule of law and the Constitution's separation of powers, which requires that only Congress, acting through Article I, change the law.

As Petitioner explains at greater length,"Nearly four decades of judicial experience with *Chevron* have demonstrated that courts are incapable of applying its two-step *Chevron* framework in a consistent manner." Pet. 32. *Chevron* violates the separation of powers and due process and continues to sow confusion in the lower courts. Accordingly, the Court should revisit the *Chevron* doctrine and put an end to this "atextual invention by courts." Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150 (2016). As Justice Gorsuch has colorfully observed,"No measure of silence (on this Court's part) and no number of separate writings (on my part and so many others) will protect [Americans]. At this late hour, the whole [*Chevron*] project deserves a tombstone no one can miss." *Buffington v. McDonough*, 143 S.Ct. 14, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

CONCLUSION

For the reasons stated above, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

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