No. 19-402

IN THE

Supreme Court of the United States

HOWARD L. BALDWIN, ET UX.,
Petitioners,
v.
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* AMERICANS FOR PROSPERITY AND CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONERS

JOHN J. VECCHIONE
Counsel of Record
Michael Pepson
Cynthia Fleming Crawford
CAUSE OF ACTION INSTITUTE
1875 Eye Street, NW, Suite 800
Washington, DC 20006
(202) 499-2421
john.vecchione@causeofaction.org

Counsel for Amici Curiae

October 24, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitution

Statutes

Other Authorities

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute and Americans for Prosperity respectfully submit this *amici curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICI CURIAE*

Amicus curiae Cause of Action Institute ("CoA") is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public about how government accountability, transparency, the rule of law, and principled enforcement of the separation of powers protect liberty and economic opportunity. As part of this mission, CoA works to expose and prevent government and agency misuse of power by appearing as an *amicus curiae* before federal courts. *See, e.g.*, *McCutcheon v. Fed. Elections Comm'n*, 134 S. Ct. 1434, 1460 (2014).

Amicus curiae Americans for Prosperity ("AFP") is a 501(c)(4) social welfare organization that drives long-term solutions to the country's biggest problems. AFP and its activists engage friends and neighbors on key issues and encourage them to take an active role

---

[1] All parties have consented to the filing of this brief after receiving timely ten-day notice per Rule 37.2(a). Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

in building a culture of mutual benefit where people succeed by helping one another.

SUMMARY OF ARGUMENT

As Benjamin Franklin famously wrote: "[I]n this world nothing can be said to be certain, except death and taxes."[2] The Internal Revenue Service ("IRS"), as America's tax collector, holds great power over every American. For many Americans, the IRS is the only federal administrative agency they must interact with annually. Taxpayers assume that if a dispute with the IRS arises, a federal court has the authority to independently, and definitively, say what the law is, without placing a thumb on the scale in favor of the IRS. Taxpayers should be able to rely on binding federal judicial precedent interpreting tax law to guide their tax preparations. At the very least, it should be a safe bet to assume the IRS is not allowed to retroactively change judicial interpretations of tax law and then claim a taxpayer's filing—which met all legal requirements when it was made—suddenly didn't. Not so, as the Baldwins learned to their sorrow.

When the Baldwins mailed their tax return, it was timely under binding precedent and the common law. Months later, the IRS changed the rules to require something different, retroactively applying their regulation to deny the Baldwins their tax refund. It appears to have done this as a "test case," seeking not only to overrule, by regulatory fiat, well-established Ninth Circuit precedent holding that the centuries-old common-law "mailbox rule" applied, but also to establish new "precedent" that statutory "silence"

[2] Letter to Jean Baptiste LeRoy (Nov. 13, 1789).

grants the IRS *carte blanche* to retroactively rewrite the federal tax code. The practical implication of the IRS's power grab is that millions of taxpayers risk adverse consequences for relying on what they reasonably believe to be binding judicial precedent.

How did this happen? Under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) [hereinafter *Brand X*], and other related cases, "there are indeed some occasions when a federal bureaucracy can effectively overrule a judicial decision." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167 (10th Cir. 2015) (Gorsuch, J.). *Brand X* obligates courts to defer to "reasonable" agency interpretations of ambiguous statutes supposedly reflecting quasi-legislative agency policy choices, "even when doing so means . . . [courts] must overrule [their] . . . own preexisting and governing statutory interpretation" precedent. *Id.*

This strange new agency power is not limited to the IRS. The Board of Immigration Appeals ("BIA") frequently uses *Brand X* in the immigration context "to penalize persons in ways that can destroy their livelihoods and intrude on their liberty even when exercising only purely civil powers." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring). Likewise, the Department of Labor ("DOL") has deployed *Brand X* to overrule judicial precedent governing permissible tipping practices, affecting the day-to-day operations of countless restaurants. *See Or. Rest. & Lodging Ass'n v. Perez,* 843 F.3d 355 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing *en banc*). There are myriad other examples of federal

agencies weaponizing *Brand X* to override federal court precedent.

That is unconstitutional. Under the separation of powers, Congress legislates, the Executive Branch enforces the law, and the Judiciary says, once and for all, "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *Brand X* flips the separation of powers on its head, granting federal administrative agencies the power to overrule judicial precedent established by Article III courts, often retroactively, using supposedly delegated "legislative" powers.

This error of administrative law has profoundly negative real-world consequences. As Justice Scalia put it: "It is indeed a wonderful new world that the [*Brand X*] Court creates, one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators." *Brand X*, 545 U.S. at 1019 (Scalia, J., dissenting). But the general public should be able to order their affairs around binding federal court precedent saying what the law is. *Brand X* allows agencies to change the rules in the middle of the game and, like other judicially created deference regimes, wrongly places a thumb on the scales of justice in favor of the government.

ARGUMENT

I. *BRAND X* SHOULD BE REVERSED.

A. *Brand X* Threatens the Separation of Powers.

"There's an elephant in the room" and "the time has come to face the behemoth." *Gutierrez-Brizuela*,

834 F.3d at 1149 (Gorsuch, J., concurring). "[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Id.*; *see Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 743 (5th Cir. 2018) ("*Brand X* . . . requires this court . . . to determine whether the . . . [agency's] construction of . . . [its] authorizing statute must govern and, if that construction must govern, it requires the court to disregard our precedent to the extent it conflicts."); Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 Fordham L. Rev. 607, 625 (2014) (describing *Brand X* as a "decision with enormous repercussions for the allocation of power between courts and agencies"). That is because the Framers did not intend to grant unelected, unaccountable federal bureaucrats these powers—quite the contrary. Instead, "the framers anticipated an Executive charged with enforcing the decisions of the other branches—not with exercising delegated legislative authority, let alone exercising that authority in a quasi-judicial tribunal empowered to overrule judicial decisions." *De Niz Robles*, 803 F.3d at 1171. For as James Madison famously wrote, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47.

1. The Constitutional System of Checks and Balances Is a Safeguard Against the Abuse of Executive Power.

To guard against such "tyranny," the Framers created our system of checks and balances, dividing legislative, judicial, and executive power among three distinct branches of government, each of which performed different functions. And "[e]ach branch of government was meant to act as a check on the other so that power is not exercised without accountability." *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring). *But see City of Arlington v. Fed. Commc'ns Comm'n,* 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) ("It would be a bit much to describe the result [of *Chevron*] as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed.").

The federal Constitution tasks Congress with enacting legislation, subject to bicameralism and presentment; Article I vests "[a]ll legislative Powers herein granted" in Congress, U.S. Const. art. I, §1, not the courts and not the Executive branch. *Gundy v. United States,* 139 S. Ct. 2116, 2123 (2019) (confirming "that assignment of power to Congress is a bar on its further delegation."); *Loving v. United States*, 517 U.S. 748, 758, (1996) ("[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."). Article II tasks the Executive Branch with faithfully executing the law. U.S. Const. art. II, § 3. Article III "vests the judicial power exclusively in Article III courts, not administrative agencies." *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J.,

concurring). Under Article III, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury,* 5 U.S. (1 Cranch) at 177.

When federal courts are called upon to interpret federal statutes, they are tasked with using traditional tools of statutory construction to ascertain Congress's intent by examining statutory text, structure, and purpose. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). The "proper role of the judiciary in that process . . . [is] to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017); *see Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002) ("Our role is to interpret the language of the statute enacted by Congress.").

If Congress disagrees with Article III courts' statutory interpretations, "the Constitution prescribes the appropriate remedial process. It's called legislation." *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring); *see Barnhart*, 534 U.S. at 462 ("These are battles that should be fought among the political branches and the industry.").

A perfect example of this proper remedial approach is *United States v. Home Concrete & Supply*, LLC, 566 U.S. 478 (2012). There, the IRS claimed to possess the power, under *Brand X*, to overrule this Court by issuing regulations. But, as the Chief Justice noted during oral argument, this Court has "never said an agency can change what we've said the law means." Oral Arg. Tr. at 55:8–9, *United States v. Home Concrete & Supply, LLC*, No. 11-139 (U.S. Jan. 17, 2012). The Court then rejected the IRS's

overreach. *Home Concrete*, 566 U.S. at 485–87. Justice Scalia rightly noted that "[r]ather than making our judicial-review jurisprudence curiouser and curiouser, the Court should abandon the opinion that produces these contortions, *Brand X*." *Id.* at 496 (Scalia, J., concurring in part and concurring in the judgment).

In response, the sky did not fall. Congress simply exercised its Article I legislative power and changed the law via legislation. *See* Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. 114-41, § 2005, 129 Stat. 443, 456 (2015) (amending Section 6501(e)(1)(B) after *Home Concrete*'s interpretation of I.R.C. § 6501(e)(1)(A)); *see also* Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988) (reacting to *Grove City College v. Bell*, 465 U.S. 555 (1984)).

Congressional legislation responding to judicial precedent interpreting statutes reflects healthy operation of the separation of powers. The ongoing dialogue between Congress (which writes the laws) and the courts (which interpret them) is a central feature of our system of checks and balances. As then-Judge Gorsuch explained:

> [T]he legislative process can be an arduous one. But that's no bug in the constitutional design: it is the very point of the design. *The framers sought to ensure that the people may rely on judicial precedent about the meaning of existing law until and unless that precedent is overruled or the purposefully*

> *painful process of bicameralism and presentment can be cleared.*

Gutierrez-Brizuela, 834 F.3d at 1151 (Gorsuch, J., concurring) (emphasis added).

Executive branch attempts to override judicial precedent, however, should be a different matter: the text of Article I's vesting clause "permits no delegation of [legislative] powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *see Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government."). It is one thing for Congress—constitutionally tasked with legislating—to respond to a court decision interpreting a statute by amending the statute. "If Congress enacted into law something different from what it intended, then it should amend the statute . . . . This allows both of our branches to adhere to our respected, and respective, constitutional roles." *Lamie v. U.S. Tr.,* 540 U.S. 526, 542 (2004). Congress' ability to supersede federal court statutory interpretation decisions, subject to constitutional constraints, is not only permissible but indeed the constitutionally designed method of doing so. Allowing administrative agencies, like the IRS, to override Article III court decisions is another matter.

2. Judicially Created Deference Doctrines Fundamentally Alter the Balance of Power Among the Branches of Government and Between the Government and the Citizen.

Judicially developed doctrines of administrative law have fundamentally altered the constitutionally required balance of powers among the branches of government. Sundry deference doctrines, including *Brand X* (operating in tandem with *Chevron* step two), transfer judicial and legislative powers to unelected, unaccountable federal bureaucrats.[3] This is a problem because "[l]iberty requires accountability. When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning

---

[3] One district court summarized these deference regimes this way:

> Over time, courts have come to trust the administrative branch more and more. Rather than 'trust,' of course, we call it 'deference.' When agencies interpret an ambiguous statute, courts generally must defer [under *Chevron*]. When agencies interpret their own regulations, courts almost always must defer [under *Auer*]. Agencies now can determine their own jurisdiction, *i.e.*, whether they even have the authority to interpret a statute in the first place [under *City of Arlington*]. And an agency's reading of a statute can now overturn a *court's* interpretation of that statute [under *Brand X*]. For good reason, jurists have begun to ask whether this state of affairs violates the separation of powers.

Hicks v. Colvin, No. 16-154, 2016 WL 7436050, at *4 (E.D. Ky. Dec. 21, 2016) (internal citations omitted).

up to the consequences." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring). As a leading scholar of statutory interpretation put it: "*Brand X* is arguably the capstone of the Court's *Chevron* evolution: it works a wholesale transfer of statutory interpretation authority from federal courts to agencies. Not since the famous *Erie Railroad Co. v. Tompkins* case have we seen the Court giving away so much of its power to a different institutional legal actor." Gluck, 83 Fordham L. Rev. at 625. "Many court watchers read *Brand X* in shock. Would the United States Supreme Court really allow a federal agency to overrule one of its own opinions?" *Id.* at 627.

This state of affairs creates a serious fox-in-the-henhouse problem. *Compare City of Arlington,* 569 U.S. at 307 ("The fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority."), *with* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2151 (2016) ("We must recognize how much *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope[.]"). And as with *Chevron*, agencies have weaponized and exploited their new legislative and judicial powers granted by *Brand X* to "go to war" with the courts.[4] "In the wake of *Brand X*, some agencies have settled into an offensive posture, determined to override adverse court opinions and vindicate their readings of statutes. The Board of Immigration Appeals

[4] *See, e.g.*, *Grace v. Whitaker*, 344 F. Supp. 3d 96, 137 (D.D.C. 2018), *appeal docketed sub nom. Grace v. Barr*, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

(determined to deport) and the Internal Revenue Service (determined to collect) have gone to war against the Ninth Circuit[.]" James Dawson, Note, *Retroactivity Analysis After Brand X*, 31 Yale J. on Reg. 219, 222 (2014).[5]

Brand X "wrests from Courts the ultimate interpretative authority to 'say what the law is,' . . . and hands it over to the Executive." *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177); *see Brand X*, 545 U.S. at 1016 (Scalia, J., dissenting) (describing *Brand X* as "inventing yet another breathtaking novelty: judicial decisions subject to reversal by executive officers."). "[I]f an agency can not only control the court's initial decision but also revoke that decision at any time, how can anyone honestly say the court, rather than the agency, ever really determines what the regulation means?" *Kisor v. Wilkie,* 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., concurring in the judgment) (cleaned up). "[A]n agency decision under *Chevron* step two and *Brand X* . . . [is] a form of administrative activity about as legislative as they come." *De Niz Robles*, 803 F.3d at 1174.

Under these circumstances, the *executive* agency, in essence, steps into Congress's constitutionally prescribed shoes to use delegated *legislative* power to overrule a *judicial* decision. This is inappropriate

---

[5] Scholarship suggests that agencies interpret statutes using a different, more outcome-oriented approach than federal courts. *See* Gluck, 83 Fordham L. Rev. at 631 ("Numerous scholars have documented how agency statutory interpretation is far more purposive, expert, aggressive, and political than judicial interpretation.").

because in "our constitutional history, . . . judicial declarations of what the law is haven't often been thought subject to revision by the executive, let alone by an executive endowed with delegated legislative authority." *Gutierrez-Brizuela,* 834 F.3d at 1143. *Brand X* thus allows the executive to make itself the legislature and the judiciary, which is flatly unconstitutional.

Brand X's constitutionally dangerous rationale should be reversed.[6] *See Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991). As Petitioners explain, *see* Pet. at 13–25, any presumption in favor of *stare decisis* cannot stand up to a blatantly unconstitutional doctrine.[7]

B. *Brand X* Undermines Liberty.

By ceding to federal agencies not only "delegated" legislative power but also authority to overrule binding judicial precedent, *Brand X* amplifies *Chevron*'s threat to the separation of powers that safeguards individual liberty. "To the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1216 (2015) (Thomas, J., concurring in the

---

[6] The *Brand X* court reached the correct result in that particular case but for the wrong reasons.

[7] *See generally* Michael D. Pepson & John N. Sharifi, Lego v. Twomey*: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 Am. Crim. L. Rev. 1185, 1245–49 (2010) (discussing *stare decisis* factors).

judgment). "[T]he founders considered the separation of powers a vital guard against governmental encroachment on the people's liberties[.]" *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). Those liberties are "best secured by dividing governmental power into distinct, structurally separate components." *Egan,* 851 F.3d at 278 (Jordan, J., concurring). As Justice Frankfurter wrote, "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions" imposed by the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring). So too here.

C. *Brand* X Undermines Due Process.

Brand X's application is not limited to agency regulations, which are generally supposed to operate prospectively. Because *Brand X*'s domain is coextensive with that of *Chevron*, its reach extends to administrative adjudications. In both contexts it undermines due process values, unfairly prejudicing private litigants.

1. *Brand X* Exacerbates *Chevron*'s Fair-Notice Problems.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fed. Commc'ns Comm'n v. Fox TV Stations, Inc.,* 567 U.S. 239, 253 (2012). And "[r]etroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988). Deference doctrines like *Chevron* and *Brand X* undermine this fundamental

principle. *See Gutierrez-Brizuela,* 834 F.3d at 1152 (Gorsuch, J., concurring) (explaining why). "The retroactivity of *Chevron* deference adds another paradox. An agency's authoritative interpretation of a statute attracts deference even in cases about transactions that occurred before the issuance of the interpretation. But how would this rule work in a criminal setting given the Ex Post Facto Clause?" *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring).

Brand X goes further, creating serious due process fair-notice problems by authorizing federal agencies to retroactively overrule federal court decisions, which, under *Brand X*, can no longer be relied on as definitively saying what the law is. *See, e.g., Betansos v. Barr*, 928 F.3d 1133, 1144 (9th Cir. 2019) (retroactively applying agency decision overruling controlling on-point circuit authority). "To suggest that even when you find a controlling judicial decision on point you can't rely on it because an agency . . . could someday act to revise it would be to create a trap for the unwary and paradoxically encourage those who bother to consult the law to disregard what they find." *De Niz Robles*, 803 F.3d at 1178–79.

Scholarship suggests that *Brand X* has harmed ordinary people, who reasonably (albeit mistakenly) thought they could rely on judicial precedent to know what the law is. *See generally* Dawson, 31 Yale J. on Reg. at 221–23 (discussing how aggressive use of *Brand X* by the IRS, BIA, and EEOC concretely harms thousands of people). For example, because of *Brand X*, "[t]housands of taxpayers have relied on federal courts' interpretations of the Internal Revenue Code, only to find several months later that the IRS has

overridden that interpretation and now seeks to apply tax obligations retroactively." *Id.* at 222; *see* Andrew Pruitt, *Judicial Deference to Retroactive Interpretative Treasury Regulations*, 79 Geo. Wash. L. Rev. 1558, 1591, 1169–70 (2011) (discussing the IRS's tactical abuse of *Chevron* and *Brand X*).

That is exactly what happened here to the Baldwins and it is fundamentally unfair. Agencies like the IRS should not be able to use *Brand X* to undermine the core due process values of fair notice and justifiable reliance.

2. Deference Doctrines Rig the Game.

"Umpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules." *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment). Yet that is exactly what *Brand X* requires Article III courts to do: not only is the manager allowed to change the rules in the middle of the game and also call his own pitcher's balls and strikes, but he is free to reverse the umpire's prior calls. "We would never allow a private litigant . . . to authoritatively reinterpret the rules applicable to a dispute, yet we routinely allow the nation's most prolific and powerful litigant, the government, to do exactly that. Agencies can make the ground rules and change them in the middle of the game." *Egan*, 851 F.3d at 281 (Jordan, J., concurring).

"[J]udges owe the people who come before them nothing less than a fair contest, where every party has an equal chance to persuade the court of its interpretation of the law's demands." *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment). "A

fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Yet, deference doctrines, like *Chevron* and *Brand X*, unfairly put a thumb on the scale in favor of the agency, rigging the game against the American People, in favor of the most powerful litigant: the Government. Recent empirical research has found that circuit courts of appeals engaging in *Chevron* analyses were 70% likely to conclude that a statute was ambiguous at step one. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 33–34 (2017). And when circuit courts reached step two, agency win rates were over 93%. *Id.*

Such systemic bias in favor of the government violates due process and should not be allowed to continue. "As Professor Phillip Hamburger observed, 'when judges defer to the executive's view of the law, they display systematic bias toward one of the parties.' . . . *Chevron* deference[] 'is an institutionally declared and thus systematic precommitment in favor of the government.' This systematic favor deprives the non-governmental party of an independent and impartial tribunal." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue,* 914 N.W.2d 21, 49–50 (Wisc. 2018) (quoting Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1212 (2016)).

"Another problem with judicial deference is that when judges defer to the government as party and interpreter, [they] may be violating [their] judicial canons." *United States v. Havis*, 907 F.3d 439, 451 n.1 (6th Cir. 2018) (Thapar, J., concurring), *vacated*, 921 F.3d 628 (6th Cir. 2019). As Judge Thapar observed:

"How is it fair in a court of justice for judges to defer to one of the litigants?" *Id.* at 451. It isn't.

II. THE NINTH CIRCUIT SHOULD NOT HAVE GIVEN "REFLEXIVE" DEFERENCE TO THE IRS'S CLAIM THAT "STATUTORY SILENCE" GRANTS IT POWER TO DISPLACE THE COMMON LAW.

A. *Chevron* Step One Requires Exhaustion of the Statutory Interpretation Toolbox.

Under *Chevron*, a court must employ all the "traditional tools" of construction before concluding that a statute is ambiguous. *Chevron,* 467 U.S. at 843 n.9; *Kisor*, 139 S. Ct. at 2415. "[O]nly when that legal toolkit is empty, and the interpretive question still has no single right answer can a judge conclude that it is more one of policy than of law." *Kisor*, 139 S. Ct. at 2415 (cleaned up). "Threshold questions like ambiguity under *Chevron* are not just perfunctory speedbumps. . . . Finding ambiguity where it does not exist—granting deference where it is not warranted—does not simply result in a nominal misallocation of power between different branches of government. It means that policymaking is no longer undertaken where it is most accountable to the people." *Voices for Int'l Bus. & Educ., Inc. v. Nat'l Labor Relations Bd.*, 905 F.3d 770, 780 (5th Cir. 2018) (Ho, J., concurring).

"[T]he *Brand X* inquiry stems from *Chevron* step one and requires the reviewing court to apply 'traditional tools of statutory interpretation'—like the canons and legislative history—to determine whether Congress has spoken to the precise issue." *Texas v. Ala.-Coushatta Tribe of Tex.*, 918 F.3d 440, 449 (5th

Cir. 2019), *petition for cert. filed*, No. 19-403 (U.S. Sept. 23, 2019). Canons of construction are quintessential "traditional tools of statutory construction" required at *Chevron* step one, which must be exhausted before concluding that a statute is ambiguous and moving on to *Chevron* step two. *Chevron*, 467 U.S. at 843 n.9; *see City of Arlington*, 133 S. Ct. at 1876 (Breyer, J., concurring in part and concurring in the judgment). "Where . . . the canons supply an answer, '*Chevron* leaves the stage.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (citation omitted).

A searching inquiry at *Chevron* step one that exhausts all traditional tools of statutory interpretation is critical in the *Brand X* context. Under *Brand X*, once *Chevron* step two comes into play, courts must defer to administrative agencies and overrule prior inconsistent precedent. When courts fail to rigorously apply *Chevron* step one, they cede primary interpretative authority to the agency, thus transferring more power to the agency (at the expense of the judiciary) than the Constitution permits, disrupting the separation of powers.

B. The Ninth Circuit Should Not Have "Reflexively" Deferred to The IRS's Overreach: Statutory "Silence" Does Not Confer Untrammeled Regulatory Power.

Here, the IRS took the position that because "the statute is silent on whether the common-law mailbox rule is foreclosed" it therefore "contains a gap that the Treasury Department was entitled to fill with a reasonable regulation[.]" Br. for the Appellant at 16, *Baldwin v. United States*, Nos. 17-55115 & 17-55354

(9th Cir. filed Oct. 10, 2017). The IRS reasoned that "[t]he statute neither explicitly displaces the common-law mailbox rule, nor adopts it as an alternate method of proving delivery," and thus, by this silence, granted the IRS power to "supplant[] the common law mailbox rule." *Id.* The court below also "conclude[d] that IRC § 7502 is silent as to whether the statute displaces the common-law mailbox rule," noting that "as to documents sent by regular mail, the statute is conspicuously silent." Pet. App.11a. Based on this "silence" alone—and without even applying traditional tools of statutory interpretation such as canons of construction—the Ninth Circuit found the statute to be ambiguous and moved on to *Chevron* step two. *See* Pet. App.11a. Such "reflexive" deference in the face of statutory silence was error. "In too many cases, courts . . . [defer to agencies] almost reflexively, as if doing so were somehow a virtue, or an act of judicial restraint—as if [courts'] duty were to facilitate violations of the separation of powers rather than prevent them." *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting), *petition for cert. filed*, No. 19-221 (U.S. Aug. 16, 2019).

It was the IRS's burden to affirmatively show that it had regulatory authority. The IRS "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986); *Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress."). Congress need not expressly negate an agency's claimed administrative powers, as the IRS appears to assume; "[w]ere courts to *presume* a delegation of

power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc). "Silence . . . does not necessarily connote ambiguity, nor does it automatically mean that a court can proceed to *Chevron* step two . . . . The common-law presumption canon is at issue here." *Arangure v. Whitaker*, 911 F.3d 333, 338–39 (6th Cir. 2018). "[I]f congressional silence is a sufficient basis upon which an agency may build a rulemaking authority, the relationship between the executive and legislative branches would undergo a fundamental change[.]" *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013).

There is no evidence, textual or otherwise,[8] that Congress delegated to the IRS power to displace the common-law mailbox rule. Quite the contrary, in Section 7502 Congress expressly gave the IRS power to establish regulations in *other* areas, but did not do so here, as the district court properly found.[9] *See* Pet. App.38a–39a. This, alone, should have been sufficient to foreclose the IRS's *ultra vires* reach, since agencies are not legislative bodies unto themselves. Yet, the

---

[8] Even Section 7502's legislative history cuts against the IRS's regulation. *See* S. Rep. No. 90-1014, at 19 (1968); H.R. Rep. No. 90-1104, at 14 (1968).

[9] The district court noted: "As evidenced by other sections of the statute, it is clear that Congress knows how to explicitly authorize agency interpretations when it intends to do so. . . . Accordingly, the Court finds its silence instructive." Pet. App.39a (citing 26 U.S.C. § 7502(b)).

Ninth Circuit deferred to the IRS's expansive claims without first analyzing at *Chevron* step one the statutory basis for those claims using all the traditional tools of construction. In so doing, it wrongly ceded core judicial and legislative power to the IRS based on Congress' purported "silence,"[10] ignoring the common-law presumption canon and reversing "the longstanding canon of construction" that ambiguities in tax statutes "must be resolved against the government and in favor of the taxpayer[.]" *Borenstein v. Comm'r*, 919 F.3d 746, 752 (2d Cir. 2019) (cleaned up).

Such "cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned" is indeed "troubling," as this type of analysis "suggests an abdication of the Judiciary's proper role in interpreting federal statutes." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). "[W]henever a federal court declares a statute ambiguous and then hands over to an executive agency the power to say what the statute means, the Executive exercises a power that the Constitution has assigned to a different branch." *Valent*, 918 F.3d at 525 (Kethledge, J., dissenting). At the least, then,

---

[10] Judge O'Scannlain, joined by nine other Ninth Circuit judges, has described the circuit's *Brand X* statutory "silence" jurisprudence as embracing an "extravagant theory of executive lawmaking," stating that the Circuit has "spun out of the known legal universe and . . . [is] now orbiting alone in some cold, dark corner of a far-off galaxy, where no one can hear the scream 'separation of powers.'" *Or. Rest. & Lodging Ass'n*, 843 F.3d at 363 & n.4 (O'Scannlain, J., dissenting from denial of rehearing *en banc*).

Article III courts should not transfer core judicial powers to federal bureaucrats lightly, "[f]or just as the separation of powers safeguards individual liberty, so too the consolidation of power in the Executive plainly threatens it." *Id.*

This case provides an ideal opportunity to clarify that, at a minimum, "an Article III court should not defer to an executive agency's pronouncement of 'what the law is' unless the court has exhaustively demonstrated—and not just recited—that every judicial tool has failed." *Id.* As Justice Gorsuch has explained, "the footnote 9 principle, taken seriously, means that courts will have no reason or basis to put a thumb on the scale in favor of an agency[.]" *Kisor*, 139 S. Ct. at 2448 (Gorsuch, J., concurring).

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

JOHN J. VECCHIONE
Counsel of Record
Michael Pepson
Cynthia Fleming Crawford
CAUSE OF ACTION INSTITUTE
1875 Eye Street, NW, Suite 800
Washington, DC 20006
(202) 499-2421
john.vecchione@causeofaction.org

Counsel for Amici Curiae

October 24, 2019