No. 18-11479

In the United States Court of Appeals for the Fifth Circuit

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; ALTAGARCIA SOCORRO HERNANDEZ; JASON CLIFFORD; DANIELLE CLIFFORD; FRANK NICHOLAS LIBRETTI; HEATHER LYNN LIBRETTI; STATE OF TEXAS; STATE OF INDIANA; STATE OF LOUISIANA, *Plaintiffs-Appellees*

v.

DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; TARA SWEENEY, IN HER OFFICIAL CAPACITY AS ACTING ASSISTANT SECRETARY OF INDIAN AFFAIRS; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Defendants-Appellants*,

and

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS, *Intervenor-Defendants-Appellants*,

and

NAVAJO NATION, *Intervenor*

Appeal from the United States District Court
for the Northern District of Texas,
Case No. 4:17-cv-00868-O, Hon. Reed O'Connor

Brief of *Amicus Curiae* New Civil Liberties Alliance in Support of the Plaintiffs-Appellees on Rehearing *En Banc*

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Case No.: 18-11479
Case Style: Chad Everet Brackeen; Jennifer Kay Brackeen; Altagarcia Socorro Hernandez; Jason Clifford; Danielle Clifford; Frank Nicholas Libretti; Heather Lynn Libretti; State of Texas; State of Indiana; State of Louisiana, Plaintiffs-Appellees v. David Bernhardt, Secretary, U.S. Department of the Interior; Tara Sweeney, in her official capacity as Acting Assistant Secretary of Indian Affairs; Bureau of Indian Affairs; United States Department of Interior; United States of America; Alex Azar, in his official capacity as Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services, Defendants-Appellants, and Cherokee Nation; Oneida Nation; Quinault Indian Nation; Morongo Band of Mission Indians, Intervenor-Defendants-Appellants, and Navajo Nation, Intervenor.

Plaintiffs-Appellees have set forth the interested parties in this case in their Petition for Rehearing *En Banc*. Pursuant to Fifth Circuit Rule 29.2, which requires a "supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief," undersigned counsel of record certifies that, in addition to the persons listed in Plaintiffs-Appellees' petition, the following have an interest in this brief, but no financial interest in this litigation. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1. *amicus curiae* New Civil Liberties Alliance states that it is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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Amicus Curiae the New Civil Liberties Alliance is a nonprofit organization devoted to defending civil liberties. As a public-interest law firm, NCLA was founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means of advocacy.

This case is particularly important to NCLA. It is disappointed that three judges on the Fifth Circuit would eschew their fundamental duty "to say what the law is" and defer to agency interpretations of statutes under the *Chevron* doctrine. In doing so, NCLA believes they departed from their duty as judges, denied the due process of law, and undermined the confidence of the people in the courts.

No party opposes the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to finance the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Constitution requires federal judges to exercise independent judgment and to refrain from exhibiting bias when interpreting the law. These are the most foundational constitutional requirements of an independent judiciary. Article III gives federal judges life tenure and salary protection to ensure that judicial pronouncements will reflect a court's independent judgment rather than the desires of the political branches. Additionally, the Due Process Clause forbids judges to display any type of bias for or against a litigant when resolving disputes. These statements of judicial duty are so axiomatic that they are seldom if ever mentioned or relied upon in legal argument—because to even suggest that a court might depart from its duty of independent judgment or display bias toward a litigant would be a scandalous insinuation.

Yet the judiciary has been flouting these foundational constitutional commands by "deferring" to agency interpretations of federal statutes. This regime of judicial "deference" is commanded in part by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) .[1] *Chevron* is the most cited administrative-law case of all time,[2] and some regard it as a canonical precedent. Unfortunately, repeated citations and incantations of any legal precedent run the danger of producing uncritical and unthinking

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[1] *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 512 ("It should not be thought that the *Chevron* doctrine—except in the clarity and the seemingly categorical nature of its expression—is entirely new law."); *Mitchell v. Budd*, 350 U.S. 473, 480 (1956) (deferring to the Secretary of Labor's definition of "area of production" in the Fair Labor standards Act); *Gray v. Powell*, 314 U.S. 402, 412 (1941) (deferring to Department of Interior definition of coal "producer" under Bituminous Coal Act).

[2] *See* Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 Fordham L. Rev. 475, 475 (2014).

acceptance. The constitutional problems with the court-created *Chevron* regime discussed in this brief remain as acute as ever.

Affording *Chevron* deference in this case is particularly egregious because of the statute at issue—which predates *Chevron*. Congress's enactment specifically stated that the Interior Secretary "shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter" "[w]ithin *one hundred and eighty days after November 8, 1978*." 25 U.S.C. § 1952 (emphasis added) (enacted in 1978). Basic arithmetic should reveal that the Bureau of Indian Affairs' (BIA) issuance of regulations almost *four decades later* does not fall within the 180 days it had under the Congressional mandate. *See* Indian Child Welfare Act (ICWA) Proceedings, 81 Fed. Reg. 38778–38876 (2016) (final rule published Jun 14, 2016, effective date Dec 12, 2016).[3] Deferring to the agency's regulations under *Chevron* at a time after which Congress expressly *deauthorized* their issuance thoroughly debases judicial independence and respect for the separation of powers.

[3] *See* 81 Fed. Reg. at 38785 ("The Department's *primary* authority for this rule is 25 U.S.C. § 1952. … [T]he Department determines that the rulemaking grant in § 1952 encompasses jurisdiction to issue rules at this time.") (emphasis added).

ARGUMENT

"*Chevron* deference" violates the Constitution for two separate and independent reasons. First, *Chevron* requires judges to abandon their duty of independent judgment, in violation of Article III and the judicial oath. Second, *Chevron* violates the Due Process Clause by commanding judicial bias toward a litigant.

I. *CHEVRON* VIOLATES ARTICLE III BY REQUIRING JUDGES TO ABANDON THEIR DUTY OF INDEPENDENT JUDGMENT

Chevron compels judges to abandon their duty of independent judgment. Pursuant to the Constitution, the federal judiciary was established as a separate and independent branch of the federal government, and its judges were protected in their tenure and salary to shield their independent judgment from the influence of the political branches.

Despite these extraordinary measures, *Chevron* commands Article III judges to abandon their independence by giving controlling weight to an agency's opinion of what a statute means—not because of the agency's persuasiveness, but rather based solely on the brute fact that this administrative entity has addressed the interpretive question before the Court. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (""The judicial power … requires a court to exercise its independent judgment in interpreting and expounding upon the laws,' … *Chevron* deference precludes judges from exercising that judgment.") (quoting *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring)).

This abandonment of judicial responsibility has not been tolerated in any other context—and it should never be accepted by a truly independent judiciary. The Constitution's mandate of judicial independence cannot be so facilely displaced. Yet *Chevron*

allows a non-judicial entity to usurp the judiciary's power of interpretation, and then commands judges to "defer" to the legal pronouncements of a supposed "expert" body entirely external to the judiciary.

Defenders of *Chevron* have tried to avoid this problem by pretending that the underlying statute authorizes the agency to choose from among a menu of "reasonable" options, thereby creating an "implied delegation" of lawmaking authority that binds subsequent judicial decision-making. *See Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). *See also* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 Yale J. on Reg. 283, 308–09 (1986).

From this perspective, a court that applies "*Chevron* deference" is not actually deferring to an agency's interpretation of a statute. Instead, the court interprets the statute broadly to vest the agency with discretion to choose among multiple different policies, which makes the agency's choice conclusive and binding on the courts. This notion supposedly enables "*Chevron* deference" to co-exist with the judicial duty of independent judgment, and it is often invoked to reconcile *Chevron* with § 706 of the Administrative Procedure Act and *Marbury v. Madison*'s pronouncement that "it is emphatically

the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803).[4]

This theory might make some sense if a statute were to say that an administrative official is vested with discretion in carrying out his statutory duties. Many statutes authorize the executive to choose among various policies and forbid the courts to second-guess those determinations. *See, e.g.*, 8 U.S.C. § 1182(f) ("Whenever the President finds [a particular fact], and for such period as he shall deem necessary, [perform a specified action].").

In these situations, there is no need to invoke *Chevron*; a court simply reads the statute and sees that it empowers the executive (8 U.S.C. § 1182(f))—or does not (25 U.S.C. § 1952)—rather than the judiciary having to decide the matter. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2410 (2018) (upholding the President's travel ban under 8 U.S.C. § 1182(f), not invoking *Chevron*, but by observing that the President's proclamation "does not exceed any textual limit on the President's authority").

Such decisions do not sacrifice the Court's duty of independent judgment, nor do they place a thumb on the scale in favor of the executive's preferred interpretation of the law. They simply interpret the statute according to the only possible meaning that it can bear. The executive decides within the parameters established in the statute, and the courts (and everyone else) must accept the executive's decision as conclusive and binding.

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[4] *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 6 (1983) ("A statement that judicial deference is mandated to an administrative 'interpretation' of a statute is more appropriately understood as a judicial conclusion that some substantive law-making authority has been conferred upon the agency.").

The only time "*Chevron* deference" comes into play is when the underlying statutory language is *ambiguous*—and *Chevron* instructs courts to treat statutory ambiguity as if it were an explicit vesting of discretionary powers in the agency that administers the statute. *See Chevron*, 467 U.S. at 844. But the notion that ambiguity itself creates an "implied delegation" of lawmaking or interpretive powers to administrative agencies is a transparent fiction, as jurists and commentators have repeatedly acknowledged.[5] *See generally* Philip Hamburger, Chevron *on Stilts: A Response to Jonathan Siegel*, 72 Vand. L. Rev. En Banc 77, 90 (2018). An agency's authority to act must be granted by Congress, and one cannot concoct that congressional authority when there is no statutory language that empowers the agency to act in a particular manner.

The Supreme Court has sought to alleviate this problem by claiming that *Chevron* deference depends on a "congressional intent" to delegate. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). But congressional intent must be discerned most basically from Congress's statutes and its words, and in the ambiguous statutes to which *Chevron* applies, Congress does not grant agency lawmaking or interpretive power. Although Congress gives agencies rulemaking power in some of its authorizing statutes, this is precisely what it does *not* do in laws subject to *Chevron*.

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[5] *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (describing "*Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law."); Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753, 759 (2014) ("Even *Chevron*'s most enthusiastic champions admit that the idea of an 'implied delegation' is a fiction.").

So, in the end, *Chevron* is nothing more than a command that courts abandon their duty of independent judgment and assign controlling weight to a non-judicial entity's interpretation of a statute. It is no different from an instruction that courts must assign weight and defer to statutory interpretations announced by a congressional committee, a group of expert legal scholars, or the *New York Times* editorial page. In each of these scenarios, the courts would be following another entity's interpretation of a statute so long as it is "reasonable"—even if the court's own judgment would lead it to conclude that the statute means something else.

Article III not merely empowers but requires independent judges to resolve "cases" and "controversies" that come before them.[6] Article III makes no allowance for judges to abandon their duty to exercise their own independent judgment, let alone to rely upon the judgment of entities that are not judges and do not enjoy life tenure or salary protection. The constitutional offense is even greater when the courts behave this way in lockstep under the command of the Supreme Court.

To be clear, there is nothing at all wrong or constitutionally problematic about a court that considers an agency's interpretation and gives it weight according to its persuasiveness. *See, e.g.*, *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them"). An agency is entitled to have its views heard and considered by the court, just

[6] *See Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.").

as any other litigant or *amicus*, and a court may and should consider the "unique insights" an agency may bring on account of its expertise and experience. *Id.* "'[D]ue weight' means 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law"—due weight "is a matter of persuasion, not deference." *Id.*

Recognizing an argument's persuasive weight does not compromise a court's duty of independent judgment. But *Chevron* requires far more than respectful consideration of an agency's views; it commands that courts give weight to those views simply because the agency espouses them, and it instructs courts to subordinate their own judgments to the views preferred by the agency. The Article III duty of independent judgment allows (indeed, requires) courts to consider an agency's views and to adopt them *when persuasive*, but it absolutely forbids a regime in which courts "defer" or give automatic and controlling weight to a non-judicial entity's interpretations of statutory language—particularly when that interpretation does not accord with the court's sense of the best interpretation.

II. *CHEVRON* VIOLATES THE DUE PROCESS CLAUSE BY REQUIRING JUDGES TO SHOW BIAS IN FAVOR OF AGENCIES

A related and more serious problem with *Chevron* is that it requires the judiciary to display systematic bias in favor of agencies whenever they appear as litigants. *See generally* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). It is bad enough that a court would abandon its duty of independent judgment by "deferring" to a non-judicial entity's interpretation of a statute. But for a court to abandon its inde-

pendent judgment in a manner that favors an actual *litigant* before the court is an abomination. The Supreme Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Yet *Chevron* institutionalizes a regime of systematic judicial bias, by requiring courts to "defer" to agency litigants whenever a disputed question of statutory interpretation arises. Rather than exercise their own judgment about what the law is, judges under *Chevron* defer to the judgment of one of the litigants before them.

A judge who openly admitted that he or she accepts a government-litigant's interpretation of a statute whenever it is "reasonable"—and that he or she automatically rejects any competing interpretations that might be offered by the non-government litigant—would ordinarily be impeached and removed from the bench for exhibiting bias and abusing power. Yet this is exactly what judges do whenever they apply "*Chevron* deference" in cases where an agency appears as a litigant. The government litigant wins simply by showing that its preferred interpretation of the statute is "reasonable" even if it is wrong—while the opposing litigant gets no such latitude from the court and must show that the government's view is not merely wrong but *unreasonably* so.

Judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon me," and judges are ordinarily very careful to live up to these commitments. 28 U.S.C. § 453. Nonetheless, under *Chevron*, otherwise scrupulous judges who are sworn to administer justice "without respect to persons" must remove the judicial blindfold and tilt the scales in favor of the government's position.

In short, no rationale can defend a practice that weights the scales in favor of a *government* litigant—the most powerful of parties—and that commands systematic bias in favor of the government's preferred interpretations of federal statutes. Whenever *Chevron* is applied in a case in which the government is a party, the courts are denying due process by showing favoritism to the government's interpretation of the law. *See Tetra Tech*, 914 N.W.2d at 50 (prohibiting *Chevron* deference in the Wisconsin state courts because its "systematic favor deprives the non-governmental party of an independent and impartial tribunal").

III. THE COURT HAS THREE OPTIONS FOR CALLING OUT THESE CONSTITUTIONAL PROBLEMS WITH *CHEVRON* DEFERENCE NOTWITHSTANDING THE REQUIREMENTS OF *STARE DECISIS*

The *Chevron* case itself never considered or addressed these constitutional objections to a regime of agency deference—and neither has any subsequent Supreme Court decision. So, it cannot be said that the Supreme Court has rejected these constitutional arguments by adhering to *Chevron* for 35 years. Judicial precedents do not resolve issues or arguments that were never raised or discussed. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("Cases cannot be read as foreclosing an argument that they never dealt with."); *Hall v. Louisiana*, 884 F.3d 546, 550 (5th Cir. 2018).[7]

[7] *See also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (holding that when "standing was neither challenged nor discussed" in an earlier case, that case "has no precedential effect" on the issue of standing); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

Stare decisis therefore presents no obstacle to a lower court's raising these constitutional issues and declaring *Chevron* deference unconstitutional. And in all events, a court's ultimate duty is to enforce the Constitution—even if that comes at the expense of Supreme Court opinions that never considered the constitutional problems with what they were doing. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."). This makes particularly good sense where, as here, the Supreme Court has in recent years repeatedly declined to rely on *Chevron* to uphold agency interpretations. So, the first and best option for this court is to refuse to follow *Chevron* in its order and to repudiate *Chevron* in its opinion.

All the same, a second option may seem preferable, for lower courts ordinarily should hesitate to declare a Supreme Court precedent unconstitutional. As it happens, *Chevron* is distinctive in requiring lower courts to violate their duty and due process; it thus calls out for correction from below. But this Court may nonetheless be reluctant to go so far, especially as the Supreme Court often demands that lower courts treat its precedents as holy writ. *See, e.g.*, *Hutto v. Davis*, 454 U.S. 370, 374–75 (1982) (*per curiam*) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

If this Court feels it cannot refuse to follow *Chevron*, notwithstanding its constitutional defects, the next best option would be to write an *opinion* that flags these constitutional problems while entering an *order* or *judgment* that accords with the *status quo* deference regime. The obligations of *stare decisis* extend only to a lower court's judgment.

Thus, even if this Court must follow *Chevron* in its judgment, its judges remain free to expound on *Chevron*'s constitutional defects.[8] Indeed, because of the judges' duty to say what the law is, they must opine on *Chevron*'s failings. Lower court judges have written such opinions many times in response to Supreme Court decisions that they regard as lawless or unconstitutional,[9] and it is an appropriate and respectful way to provoke reconsideration of a mistaken Supreme Court decision. *Amicus curiae* respectfully invites the *en banc* Court at least to follow this course.

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[8] *See* Edward A. Hartnett, *A Matter of Judgment, Not A Matter of Opinion*, 74 N.Y.U. L. Rev. 123, 126–27 (1999) (differentiating opinions from judgments) ("The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment. As valuable as opinions may be to legitimize judgments, to give guidance to judges in the future, or to discipline a judge's thinking, they are not necessary to the judicial function of deciding cases and controversies. It is the judgment, not the opinion, that settles authoritatively what is to be done—and the only thing that the judgment settles authoritatively is what is to be done about the particular case or controversy for which the judgment was made." (cleaned up)); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43, 62 (1993) ("[J]udicial opinions are simply explanations for judgments—essays written by judges explaining why they rendered the judgment they did.").

[9] *See Wilson v. Safelite Group, Inc.*, 930 F.3d 429 (6th Cir. 2019); *W. Alabama Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018); *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016); *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015) (per Gorsuch, J.); *King v. Mississippi Military Dep't*, 245 So.3d 404, 408 (Miss. 2018); *In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259 (Mich. 2008); *Oregon Restaurant & Lodging Ass'n v. Perez*, 843 F.3d 355 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing *en banc*, joined by nine other Judges of the Ninth Circuit); *Arangure v. Whitaker*, 911 F.3d 333 (6th Cir. 2018) (per Thapar, J.); *Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) (*en banc*) (Kozinski, J., "disagreeing with everyone" & Reinhardt, J., dissenting); *Valent v. Commissioner of Social Security*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting); *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017) (*en banc*); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*) (per Berzon, J., dissenting, joined by Pregerson, Fisher, Paez, JJ.); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., authoring the panel opinion and writing a separate

The Court, however, should give serious consideration to the above option—if only to avoid the third—that of recusal. The code of judicial conduct requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which … the judge has a personal bias or prejudice concerning a party."[10] Though *Chevron* involves an institutionally imposed bias rather than personal prejudice, the resulting impartiality is inescapable, for the case requires judges systematically to favor an agency's statutory interpretations over those offered by opposing litigants. And a judge cannot excuse this bias by invoking the judge's duty to follow the Supreme Court, for there is no "superior-orders defense" available in the code of judicial conduct.

Thus, if this Court feels obliged to follow *Chevron* in its order—that is, if its judges are condemned by *stare decisis* to abandon their independent judgment and be biased in favor of one of the litigants—it is difficult to see how they can comply with the code of judicial conduct without recusing themselves. To avoid this extreme situation, in which judges are caught between *stare decisis* and their duty to recuse themselves, the judges should take seriously the first option of opining that *Chevron* is unconstitutional and refusing to follow it—notwithstanding that it is a Supreme Court precedent.

Chevron puts lower court judges in an impossible situation; it is an assault on their duty of independence, their oath, and the unbiased due process of their courts. It thus

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concurrence); *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting, joined by Kennedy, Alito, JJ.); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (Gorsuch, J., concurring in the judgment, joined in part by Thomas, Alito, Kavanaugh, JJ.).

[10] Canon 3(C)(1)(a), Code of Conduct for United States Judges, https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

compels them to betray the core responsibilities of judicial office. It is long past time for conscientious judges to call out the ways in which this "deference" has corrupted the judiciary—and to advocate a return to the judicial independence and unbiased judgment that our Constitution demands.

IV. THE COURT HAS TO GRAPPLE EITHER WITH THE SUPREME COURT'S ERROR IN *CHEVRON* OR ITS ERROR IN *PEABODY COAL*

Congress gave the Interior Secretary 180 days from November 8, 1978 to issue regulations. 25 U.S.C. § 1952. The Secretary waited almost *four decades* to issue the regulations that are disputed here. The BIA readily admits it blew past the deadline by a wide margin but attempts to justify its tardiness by citing *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003). *See* 81 Fed. Reg. at 38790. Only, *Peabody Coal* is of little support to BIA and should give this Court no occasion to acquiesce in the agency decision.

At issue in *Peabody Coal* was a statute stating that the Social Security Commissioner "shall, before October 1, 1993" assign each coal industry retiree to an operator who would then be responsible for funding the retiree's social security or pension benefits. 537 U.S. at 152. The Social Security Administration (SSA) made some 10,000 assignments during the two years after the October 1, 1993 deadline. *Id.* at 155 & n.3. The Supreme Court addressed the question whether assignments made after the deadline were valid. Now-Chief Justice Roberts and now-Judge Jeffrey Sutton, representing the companies, argued that when Congress sets hard deadlines, it intends to withhold authority that is otherwise delegated to the federal agency.

Justice Souter's majority opinion only partially rejected that argument. While the majority gave some latitude to SSA and allowed the post-deadline assignments made

within two years of the deadline to stand, the majority *did not* endorse a decades-long Sleeping Beauty defense. It is therefore by no means clear that *Peabody Coal* justifies the BIA.

Indeed, as Justice Scalia (joined by Justices O'Connor and Thomas) pointed out in dissent, the asserted power of federal agencies to defy statutory deadlines is not "grounded in a statutory grant of authority from Congress." *Id.* at 174. Justice Thomas, writing a separate dissent, said that "shall" means what it says and that the Court should not allow SSA to disobey such a direct command from Congress. *Id.* at 184.

Thus, if one does not take *Peabody Coal* to create an open-ended grace period, one can reasonably conclude that the three-judge panel erred when it decided at *Chevron* step one that 25 U.S.C. § 1952 is ambiguous because Congress "has not directly addressed" whether there are any constraints on BIA's "broad authority … to promulgate rules and regulations it deems necessary to carry out ICWA." *Brackeen v. Bernhardt*, 937 F.3d 406, 438 (5th Cir. 2019). From this point of view, the panel was wrong to give *Chevron* deference to BIA's assertion of "authority to issue binding regulations after thirty-seven years." *Id.* at 438. The plain text of 25 U.S.C. § 1952 (emphasis added) imposes one crucially important constraint: "the Secretary *shall promulgate*" regulations "[*w*]*ithin* one hundred and eighty days after November 8, 1978." Whatever grace period *Peabody Coal* gives federal agencies, its reasoning can easily be read to condemn a four-decade-long delay.

In other words, if the Court were not inclined to call out the constitutional problems with *Chevron* deference, there is another course of action open for the Court. The words of the statute are rendered unambiguous under an ordinary analysis that employs

traditional tools of statutory construction, and the only obstacle to this simple conclusion is the ambiguous breadth of *Peabody Coal*. If this Court were to adopt a restrictive reading of *Peabody Coal*, this would be another way for it to exercise its independent judgment in place of acquiescing in the executive agency's say-so.

Ultimately, the Court in this case must press back either against the Supreme Court's error in *Chevron* or its error in *Peabody Coal*. On the one hand, if the statute is ambiguous, the judges must question *Chevron*. On the other, if the judges do not want to challenge *Chevron*, they must conclude that the statute is unambiguous, and to do this without taking *Peabody Coal* to permit a ludicrous four-decade delay, the judges must limit *Peabody Coal*.

CONCLUSION AND PRAYER

The Court should reverse the decision of the three-judge panel by calling out the constitutional defects of *Chevron* deference or declining to defer under *Chevron* to the Interior Secretary's defiance of a Congressional mandate given in 25 U.S.C. § 1952.

Respectfully submitted,

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This Brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because:

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Dated: January 7, 2020

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