No. 21-972

IN THE

Supreme Court of the United States

THOMAS H. BUFFINGTON,

Petitioner,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CONCERNED VETERANS FOR AMERICA FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Concerned Veterans for America Foundation ("CVAF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae CVAF is a grassroots education project of Americans for Prosperity Foundation, which is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. CVAF's purpose is to empower the military community with the tools to promote freedom at home and to connect veterans in need with free market solutions to help them live healthy and prosperous lives. CVAF's mission is to empower veterans, military families, and concerned citizens with the tools they need to champion the principles of a free society; educate the military community on the benefits of laws and policies that preserve and advance the freedoms they fought to protect; and connect veterans with the available resources that will assist them to live healthy and prosperous lives at home.

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[1] All parties have consented to the filing of this brief after receiving timely notice. No counsel for a party authored this brief in whole or in part and no person other than amicus made any monetary contributions intended to fund the preparation or submission of this brief.

Working in local communities in numerous states across the country, CVAF trains and builds local networks of citizens who understand and care about important issues facing our nation and our veterans, such as ensuring veterans receive the health care and benefits they were promised and have earned, including benefits administered by the Veterans Benefits Administration and health care administered by the Veterans Health Administration, particularly those required but currently being withheld by the VA under the Veterans Community Care Program of the VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018 ("VA MISSION Act"), Pub. L. No. 115-182, 132 Stat. 1393 (2018).

Due to CVAF's focus on veterans' health and prosperity, CVAF is interested in holding the VA accountable for consistently serving a veteran's best interests. More broadly, CVAF believes due process and fairness demand that private litigants, like Mr. Buffington—a disabled veteran who honorably served his country for over nine years—should be on equal footing with the government in disputes adjudicated in Article III courts.

SUMMARY OF ARGUMENT

In this country, all government power must flow from its proper source: We the People. Our system of government relies on the consent of the governed memorialized in the U.S. Constitution. The People have agreed on a system of separated powers, in which the legislative, executive, and judicial branches function as checks and balances on one another, ensuring accountability and protecting liberty. Our

Constitution does not grant legislative or judicial powers to the Executive Branch, nor does it permit the transfer of these powers to administrative bodies.

But over time judicially-developed deference regimes have emerged that effectively transfer core Article III judicial powers (and core Article I legislative powers) to unelected federal bureaucrats, putting a thumb on the scale in favor of the nation's most powerful litigant—the federal government—thereby rigging the game against the American people. So too here.

These deference doctrines are difficult, if not impossible, to square with the Constitution and the Administrative Procedure Act ("APA"), ultimately resulting in extraconstitutional power-transfers that violate bedrock separation-of-powers principles upon which our hard-won system of checks and balances was built.

The Court should squarely overrule *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), and the Petition provides this Court with an ideal opportunity to do so. For as Justice Frankfurter warned, "[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). And as Justice Gorsuch observed more recently: "Like a tower in the game of Jenga, pull out this block or that one and the tower may seem unaffected, especially if you do it with a bit of finesse—and the lawyers who come

up with the justifications for the blending of powers have plenty of that. But keep pulling out blocks, and eventually what started out as a strong and stable tower will begin to teeter." Neil Gorsuch, *A Republic, If You Can Keep It*, 73 (2019).

Chevron removed foundational blocks from our Constitution's system of checks and balances by transferring core judicial and legislative powers to the Executive. In so doing, it provided bureaucrats a powerful tool to chisel away at the separation of powers that protect liberty, as they creatively reimagine and expand their powers. If nothing else, these bureaucrats have proven to be remarkably proficient at that constitutionally dubious task.

In addition to being unconstitutional, *Chevron* is profoundly undemocratic. The real-world harms to the American people flowing from the administrative excesses it has enabled cannot be overstated. As a practical matter, *Chevron* provided the pathway for unelected administrative officials housed within a warren of extraconstitutional administrative bodies to enforce unpopular policies, by claiming "force of law," where no such law was ever enacted by Congress.

Perhaps worse, *Chevron* deference causes concrete and particularized real-world harms to ordinary citizens, like Mr. Buffington. As Justice Gorsuch recently observed at oral argument in another *Chevron*-infected dispute:

> *Chevron* is very often asserted by the government to defend an interpretation that not only few people were given any advance notice of or understood, or

> maybe they were too exhausted to understand by the time it all was adopted, but also tends to favor the government's own pecuniary interests[.]

Tr. of Oral Arg. at 29, *Becerra v. Empire Health Foundation*, No. 20-1312 (U.S. Nov. 29, 2021) (Gorsuch, J.). That is exactly what happened to Mr. Buffington, a disabled U.S. Air Force veteran who served his country honorably for over nine years. *See* Pet. 6–10. *Chevron* was deployed here to shortchange Mr. Buffington of his hard-earned benefits based on an *ultra vires* VA regulation that "[q]uite simply . . . serves no purpose other than to deny disability benefits (and other critical retirement benefits) to veterans entitled to them solely because these men and women answered the call to return to active duty." Pet. App. 29a–30a (O'Malley, J., dissenting); *see* Pet. 8–10; *see also* Pet. App. 56a (Greenberg, J., dissenting) ("The majority opinion reflects nothing more than a rubber stamping of the Government's attempt to misuse its [regulatory] authority[.]"). The VA's wrongful actions should not be allowed to stand.

This practice of courts reflexively deferring to agencies under *Chevron*, which burdens businesses and restricts individual liberty, without fair notice of what the law prohibits or requires, has gone on for far too long. The time has come for this Court to "stop this business of making up excuses for judges to abdicate their job of interpreting the law, and simply allow the court[s] . . . to afford" private parties, like Mr. Buffington, their "best independent judgment of the law's meaning." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment). This

Court should grant Mr. Buffington's Petition and put an end to the judge-made *Chevron* regime.

ARGUMENT

I. *CHEVRON* DEFERENCE VIOLATES THE SEPARATION OF POWERS AND THREATENS INDIVIDUAL LIBERTY.

A. The Separation of Powers and Our Constitution's Promise of an Independent Judiciary Protect Individual Liberty.

"Our founding document begins by declaring that 'We the People . . . ordain and establish this Constitution.' At the time, that was a radical claim, an assertion that sovereignty belongs not to a person or institution or class but to the whole of the people."[2] *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). Under our Constitution, "[t]he government proceeds directly from the people[.] . . . In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–05 (1819) (Marshall, C.J.). And in our constitutional Republic, "[t]he federal government's powers . . . are

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[2] Notably, "the Constitution vests lawmaking power in the most politically accountable branch of our government—the Congress of the United States." *Texas v. Rettig*, 993 F.3d 408, 408 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). And for good reason: "If legislators misused this power, the people could respond, and respond swiftly." *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring).

not general but limited and divided. Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate . . . . It must also act consistently with the Constitution's separation of powers." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 595 U.S. ____ (2022) (Gorsuch, J., concurring) (slip op., at 2) (citation omitted).

To protect liberty and guard against tyranny, "the Constitution . . . vest[s] the authority to exercise different aspects of the people's sovereign power in distinct entities." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). Subject to bicameralism and presentment, Article I of the Constitution vests "[a]ll legislative Powers herein granted" in Congress—not the courts and not the Executive branch. U.S. Const. Art. I, § 1; *see McCulloch,* 17 U.S. (4 Wheat.) at 412 (federal government's "legislative powers are vested in a Congress"); *Gundy*, 139 S. Ct. at 2123 (confirming "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*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring).

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); *see also Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law[.]"). "That is the equilibrium the Constitution demands. And when one branch impermissibly delegates its powers to another, that balance is broken." *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 673 (6th Cir. 2021) (Thapar, J., concurring).

"Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. . . . The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). To be sure, "[t]he separation of powers and its role in protecting individual liberty and the rule of law can sound pretty abstract. . . . After all, the value of the separation of powers isn't always as obvious as the value of other sorts of constitutional protections." *A Republic* at 41, 45. But it bears reminding that "[w]hen the separation of powers goes ignored, those who suffer first may be the unpopular and least among us[.] . . . But they are not likely to be the last." *Id.* at 46. 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. And as Alexander Hamilton wisely cautioned: "liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." The Federalist No. 78.

This separation "might seem inconvenient and inefficient to those who wish to maximize

government's coercive power." *See Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing *en banc*). But "[t]o 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*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring in the judgment). The Founders knew that "unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). "The Founders expected that the Federal Government's powers would remain separated—and the people's liberty secure—only if the branches could check each other. The Judiciary's checking power is its authority to apply the law in cases or controversies properly before it." *Baldwin v. United States*, 140 S. Ct. 690, 692 (2020) (Thomas, J., dissenting from denial of *certiorari*).

Accordingly, "[w]hen a party properly brings a case or controversy to an Article III court, that court is called upon to exercise the 'judicial Power of the United States,' . . . [which] requires a court to exercise its [independent judgment] in interpreting and expounding upon the laws." *Perez*, 575 U.S. at 119 (Thomas, J., concurring in the judgment). Under the separation of powers, as understood by the Founders of our Constitution, "[t]he interpretation of the laws is the proper and peculiar province of the courts. . . . It therefore belongs to them to ascertain . . . the meaning

of any act proceeding from the legislative body." The Federalist No. 78. As Justice Story explained:

> [I]t is not to be forgotten, that ours is a government of laws, and not of men; and that the Judicial Department has imposed upon it, by the Constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it.

United States v. Dickson, 40 U.S. 141, 162 (1841).

Thus, as Justice Kennedy has observed, "[t]he proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary." *Pereira v. Sessions,* 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring). At least, that is how it is supposed to work.

B. *Chevron* Deference Threatens Individual Liberty by Transferring Legislative and Judicial Powers to the Executive.

By contrast, *Chevron* reflects judge-made law of the same vintage that gave us the "Walkman," VCRs, Nintendo, and the Soviet Union's boycott of the

Olympics.[3] *See also* Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the Chevron Doctrine*, 65 Admin. L. Rev. 1 (2013) (tracing origin and judicial expansion of *Chevron* deference). "In 1984, a bare quorum of six Justices decided *Chevron*." *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of certiorari). *Chevron* requires that "if a court finds a statute's meaning ambiguous it may not resolve the ambiguity using the traditional tools of statutory interpretation that judges have employed for centuries. Instead, the court must defer to an executive agency's decision about the law's meaning."[4] *A Republic* at 75. Accordingly, "*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions." *Baldwin,* 140 S. Ct. at 691 (Thomas, J., dissenting from the denial of certiorari); *see Kisor*, 139 S. Ct. at 2446 n.114 (Gorsuch, J., concurring in the judgment); *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1482 (2020) (Thomas, J., dissenting) (*Chevron* deference "likely conflicts with the Vesting Clauses of the Constitution"); *see also Pereira,* 138 S. Ct. at 2121

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[3] Professor Gus Hurwitz has thoughtfully observed that "in the thirty or so years since *Chevron* became the law of the land, our country's governing institutions have grown increasingly politicized: Perhaps *Chevron* itself . . . is in some measure responsible for this sorry political state." Gus Hurwitz, *Chevron's Political Domain: W(h)ither Step Three?*, 68 DePaul L. Rev. 615, 617 (2019).

[4] Oddly, the government apparently still cannot articulate the circumstances under which *Chevron* applies. *See* Tr. of Oral Arg. at 71–72, *Am. Hosp. Ass'n v. Becerra*, No. 20-1114 (U.S. Nov. 30, 2021) ("I don't think I can give you an answer to th[e] question" of "[h]ow much ambiguity is enough").

(Kennedy, J., concurring) ("Given the concerns raised by some Members of this Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision." (citations omitted)).

"In every case where an Article III court defers to the Executive's interpretation of a statute under *Chevron*, our constitutional separation of powers is surely disordered." *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 524 (6th Cir. 2019) (Kethledge, J., dissenting). "[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." *Id.* at 525 (Kethledge, J., dissenting). At the least, 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.* (Kethledge, J., dissenting). But that is what *Chevron* does. "*Chevron* compels judges to abdicate the judicial power without constitutional sanction." *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of certiorari). This extraconstitutional power transfer is far from constitutionally harmless, as this case illustrates. *See also* Pet. App. 56a (Greenberg, J., dissenting) ("I respectfully dissent. 'I would stop this business of making up excuses for judges to abdicate their job of interpreting the law[.]'" (quoting *Kisor*, 139 S. Ct. at 2426 (Gorsuch, J. concurring in the judgment)).

Chevron and its progeny depart from the original public meaning of the Constitution by ceding core

judicial and legislative power to the executive. These judge-made doctrines of recent vintage alter the structure of our government enshrined in the Constitution in a way that should require a supermajority of the People's affirmative consent. *See* U.S. Const. Art. V. Experience has shown these power-transfer doctrines are far from constitutionally harmless and indeed ripe for abuse. *Cf. Ala. Ass'n of Realtors v. HHS,* 141 S. Ct. 2485 (2021) (per curiam). This Court should jettison these judge-made executive-deference regimes to give back to the People *their* right to make such fundamental values-based choices about *how* they are governed and *by whom*. The rule of law and the People deserve no less.

1. *Chevron* Stacks the Deck Against the American People.

"[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). *Chevron* breaks Article III's promise of an independent, neutral judicial decisionmaker, as "[a] court must . . . [defer to the agency] even when the agency's decision is influenced by politics, and even if the agency later changes its position in response to a new election or political pressure." *A Republic* at 75.

2. *Chevron* Transfers Legislative Powers to Unelected Executive Officials.

On the front end, *Chevron* transfers Congress's lawmaking powers to Executive agents on the constitutionally dubious theory that Congress may

sub-delegate its legislative duties to another branch of government.[5] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) ("In many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."). "In reality," as Justice Thomas has observed, "agencies 'interpreting' ambiguous statutes typically are not engaged in acts of interpretation at all. Instead, as *Chevron* itself acknowledged, they are engaged in the formulation of policy." *Michigan v. EPA*, 576 U.S. at 762 (Thomas, J., concurring) (cleaned up).

More specifically, under *Chevron*, the theory claims that when Congress drafts "ambiguous" statutes, it implicitly transfers to Executive agents the authority to make generally applicable (and sometimes retroactive) rules with the force of law; "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."[6] *Id.* (Thomas,

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[5] "The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints." *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring).

[6] "Under our Constitution, the authority to make laws that impose obligations on the American people is conferred on Congress, whose Members are elected by the people. . . . Today, however, most federal law is not made by Congress. It comes in the form of rules issued by unelected administrators." *Biden v. Missouri*, 595 U.S. ____ (2022) (slip op., at 2) (Alito, J.,

J., concurring); *see also Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 286 (2016) (Thomas, J., concurring) (noting "*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").

It is challenging to see how this is a sound theory of statutory interpretation. *Cf.* Kavanaugh, 129 Harv. L. Rev. at 2151 ("[W]hen the Executive Branch chooses a weak (but defensible) interpretation of a statute, and when the courts defer [under *Chevron*], we have a situation where every relevant actor may agree that the agency's legal interpretation is not the best, *yet that interpretation carries the force of law*. Amazing." (emphasis added)). Or why these Executive agents should be allowed to set public policy. *Cf. id.* at 2150 ("*Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."). "Not only is *Chevron*'s purpose seemingly at odds with the separation of legislative and executive functions, its effect appears to be as well." *Gutierrez-Brizuela*, 834 F.3d at 1154 (Gorsuch, J., concurring). *Chevron*'s theoretical underpinnings (doctrinally complicated as they are) are counterintuitive because "[i]n a democracy, the power to make the law rests with

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dissenting); *see also City of Arlington v. FCC,* 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) ("[T]he citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating.").

those chosen by the people."[7] *King v. Burwell*, 576 U.S. 473, 498 (2015); *see* U.S. Const. Art. I, § 1.

3. *Chevron* Transfers Judicial Authority to Unelected Executive Officials.

On the back end, *Chevron* permits executive agencies "to swallow huge amounts of core judicial" power. *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). *Chevron* "forc[es] . . . [judges] to abandon what they believe is the best reading of an ambiguous statute in favor of an agency's construction. It thus wrests from Courts the ultimate interpretative authority to say what the law is and hands it over to the Executive." *Michigan v. EPA*, 576 U.S. at 761 (Thomas, J., concurring) (cleaned up). Put differently, "*Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive)." *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring).

Needless to say, "[w]hen it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal. .

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[7] "The modern administrative state illustrates what happens when we ignore the Constitution: Congress passes problems to the executive branch and then engages in finger-pointing for any problems that might result. The bureaucracy triumphs—while democracy suffers." *Rettig*, 993 F.3d at 409 (Ho, J., dissenting from denial of rehearing *en banc*).

. . It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington v. FCC*, 569 U.S. 290, 314–15 (2013) (Roberts, C.J., dissenting) (citation omitted). "This apparent abdication by the Judiciary and usurpation by the Executive is not a harmless transfer of power. . . . Perhaps worst of all, *Chevron* deference undermines the ability of the Judiciary to perform its checking function on the other branches." *Baldwin*, 140 S. Ct. at 691–92 (Thomas, J., dissenting from denial of *certiorari*). While the judiciary may have limited power to force Congress to do its job, at the minimum, the Court may and should jealously guard its own authority against encroachment by the Executive.

4. *Chevron* and Its Constitutionally Challenged Companion, *Brand* X, Are At Odds with Due Process.

Further still, the *Chevron* doctrine harms individual rights. "Transferring 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 framers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). "By transferring more and more power from the legislature and judiciary to the executive, we alter piece by piece the framers' work and risk the underlying values it was designed to serve." *A Republic* at 73. Those values include "fair notice; protection for the inherent value of every individual person, including especially dissenting voices; democratic accountability; and the rule of law

as administered by independent judges and juries." *Id.* *Chevron* plainly threatens all of them.

Chevron creates a regime where the People "are charged with an awareness of *Chevron*; [then] required to guess whether the statute will be declared 'ambiguous'. . . ; and [then] required to guess (again) whether an agency's interpretation will be deemed 'reasonable.'" *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). "Even if the people somehow manage to make it through this far unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail. Neither, too, will agencies always deign to announce their views in advance[.]" *Id.* (Gorsuch, J., concurring). Importantly, in these circumstances, "[t]he law *hasn't* changed, *only an agency's interpretation of it*. And these days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations." *Guedes v. BATFE*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement concurring in denial of certiorari) (emphasis added); *see* Lewis Carroll, Through the Looking Glass ("'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'"). Yet even when an agency does an interpretive about-face to radically alter public policy, *Chevron* requires courts to "defer to such bureaucratic pirouetting[.]" *See Guedes v. BATFE*, 140 S. Ct. at 790 (Gorsuch, J., statement concurring in denial of certiorari); *see also* Richard J. Pierce, Jr., *The Combination of Chevron*

and Political Polarity Has Awful Effects, 70 Duke L.J. Online 91, 103 (2021) ("The combination of *Chevron* and political polarity makes it certain that government policies in many important contexts will change dramatically every four to eight years.").

Making matters worse, under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), a wayward cousin and malignant outgrowth of *Chevron*, "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 means businesses and individuals cannot rely on case law interpreting statutes to plan their affairs.

Like *Chevron*, "*Brand X* appears to be inconsistent with the Constitution[.]" *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of certiorari); *see also Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113–14 (1948) (Jackson, J.) ("It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."). And as Justice Thomas has suggested, skepticism of *Brand X*'s constitutional pedigree should "begin[] at its foundation—*Chevron* deference." *Baldwin,* 140 S. Ct. at 691. (Thomas, J., dissenting from denial of certiorari).

As a leading scholar of statutory interpretation explained: "*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." Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 Fordham L. Rev. 607, 625 (2014). That sums it up well. After all, "[i]f you accept *Chevron*'s claim that legislative ambiguity represents a license to executive agencies to render authoritative judgments about what a statute means, *Brand X*'s rule requiring courts to overturn their own contrary judgments does seem to follow pretty naturally." *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring). As the capstone of the *Chevron* experiment, "*Brand X* has taken this Court to the precipice of administrative absolutism," and "it poignantly lays bare the flaws . . . [of] executive-deference jurisprudence." *Baldwin*, 140 S. Ct. at 695.

The *Chevron* framework thus stands in serious tension with the basic due process requirement of fair notice. "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." *FCC 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).[8]

II. *CHEVRON* VIOLATES THE APA.

In addition to violating the Constitution in multifarious ways, *Chevron* is contrary to the APA's plain language. As Justice Scalia observed: "There is some question whether *Chevron* was faithful to the text of the . . . [APA], which it did not even bother to cite." *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). For good reason. *See* Kavanaugh, 129 Harv. L. Rev. at 2150 & n.161 (explaining that *Chevron* is "an atextual invention by courts," noting that, "if anything, *Chevron* seems to flout the language of" the APA).

The APA tasks federal courts with independently saying what the law is without placing a thumb on the scale for the government: "To the extent necessary to decision and when presented, the reviewing *court shall decide all relevant questions of law*, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (emphasis added).

Thus, as then-Judge Gorsuch observed:

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[8] "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).

> *Chevron*'s inference about hidden congressional intentions seems belied by the intentions Congress has made textually manifest. . . . [N]ot a word can be found here about delegating legislative authority to agencies. On this record, how can anyone fairly say that Congress 'intended' for courts to abdicate their statutory duty under § 706 and instead 'intended' to delegate away its legislative power to executive agencies? The fact is, *Chevron*'s claim about legislative intentions is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that.

Gutierrez-Brizuela, 834 F.3d at 1153 (Gorsuch, J., concurring); *see also Baldwin*, 140 S. Ct. at 692 (Thomas, J., dissenting from denial of certiorari) ("Even if *Chevron* raised no constitutional concerns, these statutory arguments give rise to serious doubts about *Chevron*'s legitimacy.").[9]

CONCLUSION

This Court should grant the Petition and squarely overrule *Chevron*.

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[9] As Professor Aditya Bamzai explained: "[T]he proposition that *Chevron* has a basis in traditional interpretive methodology, the views of the Framers of the . . . Constitution, or section 706 of the [APA] should be abandoned—that proposition is a fiction." Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 1001 (2017).

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