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 INDIANA, ARIZONA, AND THIRTEEN OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the *Chevron* doctrine permits courts to defer to VA's construction of a statute designed to benefit veterans, without first considering the pro-veteran canon of construction.

2. Whether *Chevron* should be overruled.

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INTEREST OF THE *AMICI* STATES*

The States of Indiana, Arizona, Alabama, Alaska, Arkansas, Louisiana, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Utah, and Virginia respectfully submit this brief as *amici curiae* in support of the petitioner.

Amici States have significant interests in preserving the federal separation of powers and preventing overreach by federal agencies. Under the Constitution and the Administrative Procedure Act, courts have the responsibility to determine the existence and extent of administrative agencies' policymaking authority. As part of their efforts to police the boundaries of federalism, States frequently urge courts to adhere to the federalism canon when interpreting federal statutes. Accordingly, they have a particular interest in ensuring that lower courts adhere to the Court's precedents requiring use of all available canons of statutory construction before engaging in deference. Where, as in the decision below, courts fail to discharge this responsibility properly and grant an agency unwarranted deference, agency authority expands at the expense of State authority and individual liberty.

This case should provide the next vehicle address the well-known deficiencies with *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837

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* Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of *Amici* States' intention to file this brief at least ten days prior to the due date of this brief.

(1984). The Court has in recent years taken cases to address various aspects of the agency deference problem, *see, e.g.*, *King v. Burwell*, 576 U.S. 473 (2015) (concluding that no deference was warranted to ACA tax credit question of "deep economic and political significance that is central to th[e] statutory scheme"); *City of Arlington v. FCC*, 569 U.S. 290 (2013) (concluding that courts defer to agency's interpretation of an ambiguous statute concerning the scope of its jurisdiction); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (concluding that *Chevron* does not apply to certain agency decisions), and even this Term has an opportunity to direct lower courts in the application of *Chevron*. *See Am. Hosp. Ass'n v. Becerra*, No. 20-1114 (argued Nov. 30, 2021).

The decision below underscores the fundamental problems underlying *Chevron*'s application and provides a straightforward opportunity to delineate the role of courts when interpreting statutes governing federal agencies. With a straightforward statute concerning veteran-disability benefits and an administrative rule creating a one-year forfeiture rule at issue, this case presents an excellent vehicle for the Court either to affirm the only lawful approach to *Chevron*—*de novo* statutory interpretation as to the range of policymaking authority Congress has delegated using all available canons—or overrule *Chevron* altogether.

The Court should grant the petition and reverse.

SUMMARY OF THE ARGUMENT

The Court has an opportunity to resolve for the lower courts the proper application of *Chevron* or else be done with the doctrine altogether as a failed experiment.

The Federal Circuit's decision is one among many lower-court decisions violating the Court's directive that courts must apply all "tools of statutory construction" while performing *Chevron* step one, including canons of construction like the pro-veteran canon. Lower courts' failure to apply *Chevron* faithfully prejudices not only veterans—whose service to our nation is deserving of faithful adherence to the pro-veteran canon—but also countless others, including the States. When courts fail to apply the relevant substantive canons of construction, such as the federalism canon, they aggrandize federal administrative power beyond any congressional delegation.

More broadly, questions over the meaning and vitality of *Chevron* have been percolating through cases and commentary for many years. The tensions between agency deference and the institutional role of courts under both the Constitution and the Administrative Procedure Act are undeniable. The relative simplicity of the veteran-benefits issue in this case affords an excellent opportunity to resolve that tension—either by offering a convincing explanation of *Chevron*'s method and validity, or by overruling it.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's Refusal to Apply the Pro-Veteran Canon at *Chevron* Step One Warrants Review

With respect to the first question presented, the petition powerfully explains how the decision below—and the Federal Circuit's jurisprudence more generally—conflicts with *Chevron* by refusing to apply the substantive pro-veteran canon at step one of the analysis. *See* Pet. 11–25. In addition, the petitioner is correct that, with precedents so hopelessly muddled, the Federal Circuit is unlikely to resolve its own conflicts. Only this Court can do so (and should). *Amici* States underscore two grounds why review is warranted on that question.

First, the Federal Circuit's approach fundamentally disrespects veterans, the services they have rendered to our nation, and the substantial sacrifices they have made. The canon appropriately embraces gratitude to veterans in the form of "liberally construed [statutory provisions] for the benefit of those who left private life to serve their country." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Shifting such special solicitude of veterans to the stage of the analysis where the court is already deferring to agency interpretation—which the decision below exemplifies—improperly diminishes the respect that our veterans have amply earned.

That would be bad enough in any context, but it is particularly pernicious where, as here, the agency has a strong pecuniary interest in resolving ambiguity *against* veterans. That danger is hardly theoretical. As the petition observes, the Department's history of torturing even *un*ambiguous statutory text against veterans is rightfully infamous. *See* Pet. 22–23; *see also*, *e.g.*, *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (holding that a VA regulation that "flies against the plain language of the statutory text exempts courts from any obligation to defer to it").

Second, judicial failure to apply interpretive canons at *Chevron* step one enables federal agencies to aggrandize power. Substantive canons safeguard important substantive values—here, the interests of veterans, in other circumstances the interests of Tribes, *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766(1985))), and criminal defendants, *United States v. Santos,* 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). Actuating those values via interpretive canons inherently restrains federal agencies; failing to do so expands agency power. It is a zero-sum game.

Of particular interest to the *Amici* States, lower courts' infidelity to *Chevron* footnote 9 prejudices the critical federalism canon: "[I]t is incumbent upon the

federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (cleaned up)); *accord Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 432 (2002) ("We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation."). The federalism canon protects State sovereignty—particularly from infringements not intended by Congress but exploited by opportunistic bureaucrats.

The *Gregory* case powerfully illustrates the importance of applying the federalism canon at *Chevron* step one. There, rather than merely defer to the EEOC's interpretation of the Age Discrimination in Employment Act, the Court applied the federalism canon to hold that the ambiguous exception for "appointees 'on a policymaking level'" applied to state judges. 501 U.S. at 467. The Court observed that "[w]e will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*." *Id.*

That is exactly how *Chevron* footnote 9 is supposed to operate. But under the Federal Circuit's approach, *Gregory* almost certainly would have come out differently, as Justice Blackmun's *Gregory* dissent makes clear. Without even citing footnote 9, Justice Blackmun explained that *Chevron* "compel[led] [him]

to accept the EEOC's contrary reading of the exclusion if it were a 'permissible' interpretation of this ambiguous term." *Id.* at 493 (Blackmun, J., dissenting). He therefore "would [have] defer[red] to the EEOC's reasonable interpretation of this [ambiguous] term." *Id.* at 494.

The Federal Circuit's reversion to the Blackmun model shows why the first question presented is exceptionally important to anyone protected by substantive canons of construction.

II. The Court Should Take This Case Either to Explain How *Chevron* Agrees with the Constitution and the APA or to Overrule It

With respect to the second issue presented, questions over the meaning and vitality of *Chevron* have been percolating through cases and commentary for years. The tensions between agency deference and the institutional role of courts under the Constitution and the Administrative Procedure Act are undeniable. The relative simplicity of the veteran-benefits issue in this case affords an excellent opportunity to resolve that tension—either by offering a convincing explanation of *Chevron*'s method and validity, or by overruling it.

A. *Chevron* exists merely to vindicate Congressional delegation of policymaking authority, not to surrender all power to administrative agencies

Chevron did not suddenly renounce the Judiciary's obligation to ensure Executive Branch agencies (and independent agencies) stay within their delegated, statutory authority. Rather, the Court has always understood *Chevron* to effectuate Congress's policy delegations. It is premised on implementing the precise scope of authority Congress has delegated. Courts first ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Courts defer *only* to agency actions falling within the scope of delegated authority. *Id.* at 844.

1. *Chevron* makes clear that its two-step approach vindicates—not vitiates—the judiciary's duty to discern for itself the meaning of statutes. As the decision acknowledges, the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. Because agencies are creatures of Congress, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also La.*

Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

Chevron is therefore rooted in the judiciary's obligation to discern the scope of Congress's delegation of regulatory authority. *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 836 (2001) ("*Chevron* should be regarded as a legislatively mandated deference doctrine."); Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 Mo. L. Rev. 983, 990 (2016) ("[T]he Court has made clear that *Chevron* is, in fact, premised on a delegation of interpretive and policymaking authority from Congress to implementing agencies."). Other potential rationales for *Chevron*—such as those grounded in considerations of "[e]xpertise, accountability, and uniformity"—are all merely "*policy* reasons for deferring to agencies over judges" and "do not provide a *legal* basis for *Chevron*." Adler, *supra*, at 989.

2. The Court's applications of *Chevron* have repeatedly justified it as a tool for implementing congressional intent. In *Mead*, for example, the Court explained *Chevron* as authority for Congress's *implicit* delegations of authority: Even where Congress has not "expressly delegated authority or responsibility to implement a particular provision or fill a particular gap," it may—or may not—"be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space

in the enacted law." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *see also id.* at 231–32 (concluding that "the terms of the congressional delegation give no indication that Congress meant to delegate authority to [the U.S. Customs Service] to issue classification rulings with the force of law").

Mead clarified that courts should not infer a congressional intent to delegate—and thus should not defer to agency decisions—with every statutory ambiguity or "gap." Instead, the text must provide some actual "indication of a . . . congressional intent" to delegate. *Id.* at 227. Only "[w]hen circumstances implying such an expectation exist" should a reviewing court "accept the agency's position," so long as "Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Id.* at 229. *Mead* thus "eliminates any doubt that *Chevron* deference is grounded in congressional intent." Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 812 (2002).

The Court's other *Chevron* cases confirm as much. In *Adams Fruit Co. v. Barrett*, for example, the Court observed that "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." 494 U.S. 638, 649 (1990) (citing *Bowen*, 488 U.S. at 208). The Court reiterated this point in *Gonzales v. Oregon*, observing that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is in-

volved"—rather, the regulation advancing the interpretation "must be promulgated pursuant to authority Congress has delegated to the official." 546 U.S. 243, 258 (2006) (citing *Mead*, 533 U.S. at 226–27).

And in *FDA v. Brown & Williamson Tobacco Corp.*, the Court again explained that "[d]eference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." 529 U.S. 120, 159 (2000). For this reason, the Court explained, an agency's claim to authority will pass the first step of *Chevron* only where the whole statutory context reasonably justifies inference of delegation. *Id.* at 132–33 (explaining that a "reviewing court . . . must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency").

Even the Court's famously pro-agency decision in *City of Arlington v. FCC*, 569 U.S. 290 (2013), confirms this understanding of *Chevron*. Every opinion in *City of Arlington* recognized that *Chevron*'s legitimacy stems from the delegation of authority by Congress. Justice Scalia observed that "*Chevron* is rooted in a background presumption of congressional intent," which means that the "underlying question" is always "Does the statute give the agency authority to regulate . . . or not?" 569 U.S. at 296, 299 (majority op.). Similarly, Justice Breyer noted that the "question whether Congress has delegated to an agency the authority to provide an interpretation that carries the

force of law *is for the judge to answer independently*." *Id.* at 310 (Breyer, J., concurring in part and concurring in the judgment) (emphasis added). And the Chief Justice likewise explained that "*Chevron* deference is based on, and finds legitimacy as, a congressional delegation of interpretive authority," *id.* at 321 (Roberts, C.J., dissenting)—courts thus only "give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law,'" *id.* at 317 (quoting *Mead*, 533 U.S. at 229).

The Court's opinions following *City of Arlington* reaffirm that *Chevron* is rooted in delegation. For example, in *Scialabba v. Cuellar de Osorio*, the Chief Justice, now joined by Justice Scalia, observed that while "[c]ourts defer to an agency's reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency," no such assumption can be made where the ambiguity was created by Congress enacting conflicting provisions. 573 U.S. 41, 76 (2014) (Roberts, C.J., concurring in the judgment). Similarly, *King v. Burwell* explicitly observed that *Chevron* "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." 576 U.S. 473, 485 (2015) (quoting *Brown & Williamson*, 529 U.S. at 159).

In short, the Court's precedents conceptualize *Chevron* in a way that preserves congressional authority, which sets the stage for a proper understanding of the judicial role in reviewing agency actions.

B. Under the Constitution and the APA, courts must interpret statutes *de novo* to determine the extent of policy delegation

Predicated as it is on congressional authorization, the Court's agency deference scheme works only if courts "tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies' authority." *City of Arlington*, 569 U.S. at 307; *see also Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) ("The fact that Congress has left a gap for the agency to fill means that courts should defer to the agency's reasonable gap-filling decisions, *not that courts should cease to mark the bounds of delegated agency choice*." (emphasis added)). The decision below, however, used statutory silence as an excuse to eschew canons of construction and instead embrace agency deference. Unfortunately, such reflexive agency deference permeates administrative litigation, which is why the Court should either return to a judicially robust version of *Chevron* or overturn it altogether.

1. Major-questions and non-delegation doctrines affect the interplay of *de novo* review and *Chevron* deference, but courts need guidance in that regard

Our Constitution was adopted both "to enable the people to govern themselves, through their elected leaders," *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010), and to "diffuse[] power the better to secure liberty," *Youngtown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The Framers were acutely aware of the tendency of individuals—and institutions—to favor their own interests. *See* The Federalist No. 10 (James Madison) (C. Rossiter ed. 1961) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."); The Federalist No. 80 (Alexander Hamilton) (C. Rossiter ed. 1961) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias.").

A robust independent federal judiciary is a critical means of thwarting excessive self-interest and of maintaining self-government. Accordingly, the principle that "foxes should not guard henhouses" is fundamental to judicial review of agency action. *See* Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869, 889 (2008); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 446 (1989) ("The basic case for judicial review depends

on the proposition that foxes should not guard henhouses."). That point needs reinforcement from this Court, consonant with its recent pronouncements on other aspects of separation-of-powers doctrine, including the major-questions and non-delegation doctrines.

1. The Constitution's separation of governmental powers among the Branches is designed to redirect—and thereby mitigate the deleterious consequences of—official self-interestedness. *See* The Federalist No. 51 (James Madison) (C. Rossiter ed. 1961). Separation-of-powers principles guide interpretation of statutes delegating authority to federal agencies. Yet, as the Court has repeatedly observed, the expansive reach of today's federal administrative state, "which now wields vast power and touches almost every aspect of daily life," stands in tension with the Constitution's separation of powers. *Free Enter. Fund*, 561 U.S. at 499. Unelected agency personnel—often unaccountable even to the President—now exert enormous policymaking authority, including the powers to set rules, police compliance, *and* adjudicate violations. *See City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting). "The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government." *Id.*

With increasing frequency, the Court has tempered expansive agency powers by insisting on congressional control, particularly for major policy ques-

tions. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (internal quotation marks omitted) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). This Term alone, the Court has used the major-questions doctrine to rebuff power grabs by CDC and OSHA absent clear congressional directives. *See id.* (rejecting an emergency CDC rule declaring a moratorium on housing evictions pending the Covid-19 pandemic); *NFIB v. Dep't of Lab.*, 142 S. Ct. 661, 665 (2022) (staying OSHA's Emergency Temporary Standard on the ground that the statute does not "plainly authorize[] the Secretary's mandate").

Along with traditional canons of statutory interpretation, a robust major-questions doctrine enables the judiciary to exercise responsibility for interpreting statutory delegations of power. It reflects "the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting). Thus, the "determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944). To "finally decide the limits of [an agency's] statutory power" is not the job of the agency but is instead "a judicial function." *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946); *see also Adams Fruit Co.*, 494 U.S. at 650

("[I]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" (quoting *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973))).

Permitting agencies to discern the scope of their own authority risks assumption of excessive, unauthorized power. *See Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (noting that vesting agencies with this authority "wrests from Courts the ultimate interpretive authority to say what the law is and hands it over to the Executive. . . . in tension with Article III's Vesting Clause" (internal quotation marks and citations omitted)); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) (describing such deference as "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch"); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 276 (2000) ("If Congress has addressed a subject, but has done so in a limited way, this fact may itself suggest that Congress has gone as far as it could, as far as the enacting coalition wished to, on the subject in question.").

As Justice Scalia explained, courts avoid the "fox-in-the-henhouse syndrome . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line,

the agency can go no further than the ambiguity will fairly allow." *City of Arlington*, 569 U.S. at 307.

2. The need to maintain separation of powers—and its corollary bar against agency self-definition—has also undergirded non-delegation doctrine, *i.e.*, the idea that Congress is restricted in how it delegates power to agencies.

The Court "repeatedly ha[s] said that when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton v. United States*, 276 U.S. 394, 409 (1928)). The corollary to this "intelligible principle" rule is the non-delegation doctrine, which "has developed to prevent Congress from forsaking its duties" and is grounded on the rule "that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996) (citing *Field v. Clark*, 143 U.S. 649, 692 (1892)); *see also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment) (noting this rule ensures "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will").

Non-delegation doctrine stands among the "many accountability checkpoints" in the Constitution,

which "by careful design, prescribes a process for making law." *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring); *cf.* Philip Hamburger, Is Administrative Law Unlawful? 386 (2014) (contending that by "emphasizing that *all* legislative powers granted to the United States shall be in Congress," the Constitution "thereby expressly bars the subdelegation of such powers").

3. The major-questions and non-delegation doctrines are systematically related to each other and, ultimately, to the operation of *Chevron*. As Justice Gorsuch recently emphasized, the doctrines "[b]oth are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 668–69 (2022) (Gorsuch, J., concurring).

In turn, *King v. Burwell* illustrates how the Court has refused to accord deference when statutory ambiguities concern major questions—precisely over doubts that deference would effectuate congressional intent. There, because Affordable Care Act tax credits for insurance sold through a federal exchange was both "of deep 'economic and political significance'" and "central to this statutory scheme," ambiguity did not imply delegation. *See King v. Burwell*, 576 U.S. at 486, 490. Rather, "had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.* at 486 (quoting *Util. Air*, 573 U.S. at 324); *see also* Stephen Breyer, *Judicial Review of*

Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986) ("Congress is more likely to have focused upon, and answered, major questions," such as whether to confer jurisdiction to an agency, while "leaving interstitial matters," such as how delegated authority is exercised, for resolution by the agency during the "daily administration" of the statute); *Brown & Williamson*, 529 U.S. at 159 (citing Breyer, *supra*, at 370).

Put another way, when Congress delegates significant authority using a clear voice and intelligible guiding principles, agency deference is limited to a legitimate range of policy alternatives. When it does not, courts are left to wonder whether statutory ambiguity amounts to intentional—albeit unguided—delegation or merely artless drafting. In that circumstance, *Chevron* deference illegitimately vitiates both the legislative and the judicial roles.

4. Unfortunately, lower courts frequently use *Chevron* as a substitute for statutory analysis, ignoring the critical judicial role in maintaining boundaries between executive and legislative powers. For example, in the decision below, the Federal Circuit avoided *Chevron* step-one analysis altogether in the face of a supposedly silent statute. App. 13a–15a; *see also id.* at 26a–28a (O'Malley, J., dissenting).

Other judges have also remarked on the phenomenon. *See, e.g.*, *Aposhian v. Wilkinson*, 958 F.3d 969 (10th Cir. 2020), *reh'g en banc vacated*, 989 F.3d 890,

895 (10th Cir. 2021) (Tymkovich, J., dissenting) (stating that the majority "evaded . . . rules of interpretation" and incorrectly found statutory ambiguity); *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting) (observing that "federal courts have become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but of first"); *Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 921 (D.C. Cir. 2017) (Ginsburg, J., dissenting) (observing that, by deferring to agency and failing to apply the common meaning, the court had "manufacture[d] ambiguity").

Some lower-court judges understand the need for healthy *Chevron* skepticism, yet plead for further guidance. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 1003 (D.C. Cir. 2021) (Walker, J., concurring in part, concurring in judgment in part, and dissenting in part) (observing that "[o]ver time, the Supreme Court will further illuminate the nature of major questions and the limits of delegation"); *Arangure v. Whitaker*, 911 F.3d 333, 336, 339 (6th Cir. 2018) (Thapar, J.) (explaining that "all too often, courts abdicate th[eir] duty by rushing to find statutes ambiguous, rather than performing a full interpretive analysis" and that the Supreme Court's "lack of instruction has led to some uncertainty in the lower courts"); *Berndsen v. N.D. Univ. Sys.*, 7 F.4th 782, 790–91 (8th Cir. 2021) (Stras, J., concurring) (acknowledging that "concerns about judicial deference . . . grow more pronounced when an agency's efforts [to speak clearly] create a multi-layered web of regulations, interpretations,

clarifications of interpretations, and even clarifications of clarifications" until "the statute itself" "gets buried under these layers of deference").

For some time, members of the Court have recognized the need for a *Chevron* course correction. On the eve of his retirement, Justice Kennedy observed that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision." *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring). In his view, "[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." *Id.*

Justice Thomas has pointed to the "serious questions about the constitutionality of [the Court's] broader practice of deferring to agency interpretations of federal statutes." *Michigan v. EPA*, 576 U.S. at 760 (Thomas, J., concurring). Observing that "[the Court] seem[s] to be straying further and further from the Constitution without so much as pausing to ask why," he has suggested that the Court should revisit those questions. *Id.* at 763–64.

And while on the Tenth Circuit, Justice Gorsuch similarly remarked that "[m]aybe the time has come [for the Court] to face the behemoth." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

This case affords an excellent opportunity to provide necessary lower-court guidance and to ensure that doctrines of agency deference properly preserve the judicial role and the separation of powers.

2. The APA also requires *de novo* review of statutes authorizing agency action, but lower courts need guidance on that score as well

In addition to respecting these constitutional responsibilities, courts must, under the APA, entertain challenges to agency actions. And while the APA limits its judicial review in some respects, "[t]here is no statutory provision, in the APA or elsewhere, instructing courts to defer to agency interpretations of ambiguous statutory texts." Adler, *supra*, at 990.

The APA permits courts to uphold an agency action only after independently determining that the action falls within the agency's statutorily conferred authority. Indeed, Section 706 of the APA explicitly directs courts to decide "all relevant questions of law." 5 U.S.C. § 706. And for good reason: Without judicial oversight, the APA would be wholly ineffective in policing administrative agencies. A court cannot know whether an "agency action" is "in excess of statutory jurisdiction, authority, or limitations" unless it interprets the statute for itself. *Id.* § 706(2)(C).

The APA thus underscores courts' constitutional obligations to ensure agencies' regulatory decisions

have been authorized by a congressional delegation of authority. *Cf. Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment) (acknowledging that the APA "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations").

The question is whether *Chevron* deference is consonant with the APA. When they properly apply *Chevron* and afford deference only to an agency's choice among a range of alternatives approved by Congress, courts perhaps "do not ignore" Section 706, but instead "respect it" because they "give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law.'" *City of Arlington*, 569 U.S. at 317 (Roberts, C.J., dissenting) (quoting *Mead*, 533 U.S. at 229); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019) (citing this passage and offering a similar defense of *Auer* deference); Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 27–28 (1983) (noting that "the court is not abdicating its constitutional duty to 'say what the law is' by deferring to agency interpretations of law: it is simply applying the law as 'made' by the authorized law-making entity").

Yet the tension between many applications of *Chevron* and APA Section 706 is obvious. For example, where courts improperly apply *Chevron* step one by failing to engage in *de novo* review of the statute,

they likewise fail to meet their statutory duty to decide "all relevant questions of law." *See, e.g.*, *Valent*, 918 F.3d at 525 (Kethledge, J., dissenting) (describing majority's *Chevron* analysis where "the tools of statutory construction [we]re hardly employed" and led to deference to the agency's definition that "construe[d] the words of the statute in a manner that no ordinary speaker of the English language would recognize"); *Aposhian*, 989 F.3d at 898 (Tymkovich, dissenting) (describing majority's failure to "exhaust all the traditional tools [of interpretation]" before deferring to agency's interpretation). Only this Court can reconcile *Chevron*'s mandate with the courts' reviewing responsibility under the APA by either returning *Chevron* to lawful roots or overturning it altogether.

III. Alternatives to Broad Agency Deference Are Workable

The experience of the States refutes any prediction that requiring *de novo* consideration of delegated authority—or overruling *Chevron* entirely—would mean excessive or unwarranted disruption.

Arizona, for example, abolished deference to agency legal interpretations in 2018. *See* Ariz. Rev. Stat. Ann. § 12-910(F) ("In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question

by the agency.") (enacted by 2018 Ariz. Legis. Serv. ch. 180 (H.B. 2238)).

No discernible negative consequences have yet arisen. Indeed, the Arizona Supreme Court appears to have mentioned the abolition of deference to legal interpretations only twice. *Saguaro Healing LLC v. State*, 470 P.3d 636, 638 (Ariz. 2020); *Silver v. Pueblo Del Sol Water Co.*, 423 P.3d 348, 356 (Ariz. 2018).

The *Silver* case demonstrates one reason why disruptions likely will be limited: legislative ratification of long-standing agency interpretations will frequently render the issue of deference irrelevant. *See Silver*, 423 P.3d at 356 ("[T]he dissents' argument conflates judicial deference (also known as '*Chevron* deference') with legislative adoption. The amendment prohibits courts from deferring to agencies' interpretations of law. The amendment does not, however, prohibit the *legislature* from adopting an agency's interpretation of a term of art. The latter is what we have here . . . ." (citation omitted)).

Arizona is hardly alone in abolishing or limiting *Chevron*-like deference. A recent survey of states produced the "key finding . . . that not only have a large number of states abandoned deference but that a significant number of states have also moved away from deference in less dramatic respects." Daniel Ortner, *The End of Deference: How States Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines*, at 4 (March 11, 2020), https://ssrn.com/abstract=3552321. Indeed, ten states

have abolished such deference either by judicial decision (Arkansas, Colorado, Delaware, Kansas, Michigan, Mississippi, Utah, and Wisconsin) or by statute or constitutional amendment (Arizona, Florida, and Wisconsin). *Id.* at 9–23. Meanwhile, "no states . . . have gotten appreciably more deferential in the past 20 years." *Id.* at 3 n.4, 68–69. This "quiet revolution" underscores how minimally disruptive overruling *Chevron* would be.

CONCLUSION

The Court should grant the petition and reverse the decision below.

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