No. 20-1114

In the

Supreme Court of the United States

AMERICAN HOSPITAL ASSOCIATION, ET AL.,

Petitioners,

v.

XAVIER BECERRA,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

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

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BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every economic sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community. The Chamber's members have an interest in reaffirming the duty of courts under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to engage in independent and robust statutory interpretation, thus ensuring that each branch of government stays in its respective lane and that administrative agencies do not impose regulatory burdens that exceed lawful bounds.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing.

SUMMARY OF ARGUMENT

This case presents a much-needed opportunity to reinforce critical and constitutionally compelled constraints on *Chevron* deference. Distilled, *Chevron* tells courts to defer to an agency's interpretation of a statute it administers if the statute is ambiguous and the agency's interpretation is reasonable. At its inception, the doctrine was conceptualized as an effort to foster respect for the Constitution's separation of powers, ensuring that policy decisions are left to the politically accountable branches and leaving Congress with room to draw on the comparative advantages and expertise of the executive branch. But unbounded, *Chevron* deference poses a triple threat to our tripartite scheme of government. It entices Congress to abdicate its duty to make the law. It entices the executive to stray far beyond its duty to enforce the law. And it entices the judiciary to abandon its duty to say what the law is.

Cognizant of those constitutional and prudential concerns, this Court has subjected *Chevron* deference to several essential limitations and requirements. Because a provision must be *genuinely* ambiguous—not just subject to differing interpretations or difficult to interpret—before courts can permissibly infer that Congress intended to delegate something to an agency, courts must use *all* the traditional tools of statutory interpretation before conceding that a statute is ambiguous. Because questions of considerable political and economic significance are ordinarily the province of the lawmaking branch, courts should not lightly infer that Congress delegated them to the branch of government responsible for

executing the laws. Because *Chevron* deference is rooted in the putative comparative advantages of the executive branch, courts must assess whether the relevant question really implicates an agency's expertise. And because an agency is empowered to act only within the scope of the power that Congress actually delegated, courts must ensure that an agency's interpretation falls within the bounds of the discretion Congress gave it. Without those guardrails, the rationales this Court has articulated for *Chevron* deference dissolve, and any chance of compatibility with the Constitution disappears.

Unfortunately, abuse of *Chevron* deference is all too common. Courts far too often rush to find ambiguity and defer to agencies when faced with questions of statutory interpretation that are difficult, but hardly insurmountable. The result is confusion, rather than accountability, as the citizenry cannot discern which branch is responsible for policies. And agencies, for their part, are only too happy to exploit openings to aggrandize their own powers. The Court should take this opportunity to restate, clarify, and reinforce the limitations and requirements on *Chevron* deference that it has developed over the past 30-odd years. Doing so would send a strong signal to the lower courts that the proper bounds of *Chevron* deference are no mere suggestions, but are constitutionally grounded imperatives.

ARGUMENT

I. *Chevron* Deference Is Subject To Critical And Constitutionally Compelled Limitations And Requirements.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court established a basic framework to govern judicial deference to an agency's interpretation of a statute that the agency administers. In the "now-canonical formulation," *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013), a court reviewing an agency's interpretation of such a statute must proceed in two steps. "First, applying the ordinary tools of statutory construction, the court must determine 'whether Congress has directly spoken to the precise question at issue.'" *Id.* (quoting *Chevron*, 467 U.S. at 842-43). "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*, 467 U.S. at 842-43. "If, however, the court determines Congress has not directly addressed the precise question at issue"—if, that is, "the statute is silent or ambiguous with respect to the specific issue"—then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Through the years, this Court has articulated various rationales for *Chevron* deference that inform its proper application. In *Chevron* itself, the Court emphasized that administrative agencies may possess comparative advantages of subject-matter expertise and political accountability vis-à-vis courts with respect to the statutes they administer. *Chevron*, 467

U.S. at 843-45, 865-66. In later cases, the Court emphasized a "background presumption of congressional intent," *Arlington*, 569 U.S. at 296, under which statutory ambiguity "constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

Over time, the Court has also recognized that there are important constitutional constraints on any appropriate role for *Chevron* deference. Chief among those are separation-of-powers concerns. For one thing, Article I, §1 of the Constitution vests "*[a]ll* legislative Powers herein granted … in a Congress of the United States." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (emphasis added). "This text permits no delegation of those powers[.]" *Id.* Thus, "Congress may not divest itself of its legislative power by transferring that power to an executive agency." *Gundy v. United States*, 139 S.Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting); *see also Paul v. United States*, 140 S.Ct. 342, 342 (2019) (statement of Kavanaugh, J.). After all, administrative agencies may be more politically accountable than Article III courts, but they are no substitute for the elected officials to whom the Framers assigned the weighty power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated." The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). And, of course, due respect for a coordinate branch of government compels courts to construe statutes to avoid, rather than exacerbate, constitutional concerns like a nondelegation problem. *See, e.g.*, *Ashwander v. Tenn.*

Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

Just as important, "[i]t is emphatically the province and duty of the Judicial Department to say what the law is" in deciding cases or controversies. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). *Chevron* deference is not, and cannot be, a license for either the judiciary to abdicate—or the executive to arrogate—that constitutional duty. The Constitution therefore demands that courts approach agency claims to *Chevron* deference with a healthy dose of skepticism.

Cognizant of those animating and limiting principles, this Court has developed important constraints to govern and limit the scope of *Chevron* deference. These constraints are no mere appendages or suggestions; they are critical components of the doctrine. Without them, the Court's articulated rationales for *Chevron* deference fall away, and the doctrine's tension with our constitutional order becomes even more acute.

A. Courts Must Exhaust All Traditional Tools of Statutory Interpretation and Determine Whether the Statute Is Genuinely Ambiguous.

1. First, and most fundamentally, any invocation of *Chevron* deference must be faithful to the rule that "[c]ourts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue." *Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting). Accordingly, before even considering granting *Chevron* deference, courts must employ and exhaust all the traditional tools of statutory

interpretation to determine whether Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 843.[2]

That does not mean reading the statutory text and simply asking whether it is pellucidly clear. Courts must conduct a rigorous and thorough textual analysis, using all applicable canons and methodologies of statutory construction, before arriving at the conclusion that a statute is ambiguous. As this Court recently put it, courts "owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,'" they find themselves "unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S.Ct. 1348, 1358 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9). Courts thus may not rush to find ambiguity and defer under *Chevron*. Instead, they must take seriously their obligation to determine whether Congress has already decided the question itself, and,

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[2] In addition, courts must, of course, engage with the so-called "step zero" or threshold question whether the *Chevron* framework applies at all. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (limiting application of *Chevron* framework to circumstances where "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," as through a grant of rulemaking or adjudicative authority, "and that the agency interpretation claiming deference was promulgated in the exercise of that authority"). If the *Chevron* framework does not apply, the agency may still be eligible for lesser *Skidmore* deference, depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see Mead*, 533 U.S. at 227-28, 234-35.

if so, to "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843-44. Anything less would impermissibly abdicate the role of the judiciary in service of impermissibly enlarging the role of the executive.

This Court's recent discussion of the obligation of the courts in the related context of *Auer* deference is instructive. There, the Court explained that a court may not "wave the ambiguity flag" whenever it finds a statutory provision "impenetrable on first read." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019). Difficult "interpretive conundrums, even relating to complex rules, can often be solved" at step one—and must be solved, if they can be, using traditional tools of statutory interpretation. *Id.* Deference is (potentially) appropriate only "where the relevant language, carefully considered, can yield more than one reasonable interpretation, not where discerning the only possible interpretation requires a taxing inquiry." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting); *cf. Pereira v. Sessions*, 138 S.Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (criticizing "reflexive deference"). Moreover, genuine ambiguity requires more than two possible readings of the text. It requires two genuinely "reasonable interpretation[s]." *Pauley*, 501 U.S. at 707 (Scalia, J., dissenting). And rules of construction exist to weed out interpretations that are theoretically conceivable, but are not what Congress could reasonably have intended. However taxing, that inquiry is the court's duty to undertake. And in discharging that duty, the court "must 'carefully consider[]' the text, structure, history, and purpose" of a statute "in all the ways it would if it had no agency

to fall back on." *Kisor*, 139 S.Ct. at 2415 (quoting *Pauley*, 501 U.S. at 706 (Scalia, J., dissenting)). "Doing so will resolve many seeming ambiguities out of the box, without resort" to *Chevron*. *Id*. In short, unless a statutory provision truly remains "genuinely ambiguous" after the "legal toolkit is empty," *id*., there is no role for *Chevron* deference to play.

2. Because the foundational principle underlying *Chevron* deference is that "Congress has conferred on the agency interpretive authority over the question at issue," *Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting), the "inquiry into whether Congress has directly spoken to the precise question at issue" must be "shaped, at least in some measure, by the nature of the question presented," *Brown & Williamson*, 529 U.S. at 159. Courts thus must particularly "hesitate" before concluding that Congress has implicitly delegated to administrative agencies authority to resolve questions of great "economic and political significance." *Id.* at 159-60.

That "major questions" doctrine not only makes good practical sense as a rule of construction, but serves a critical constitutional function. It is "highly unlikely that Congress would leave" issues of such magnitude to the discretion of the executive branch; for Congress to do so would raise grave nondelegation concerns. *Whitman*, 531 U.S. at 468; *see also Gundy*, 139 S.Ct. at 2142 (Gorsuch, J., dissenting); *Paul*, 140 S.Ct. at 342 (statement of Kavanaugh, J.); *cf. Whitman*, 531 U.S. at 472-73 (rejecting notion that "an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute" because "[w]hether the

statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer"). Due respect for a coordinate branch of government therefore demands appreciation of the reality that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman,* 531 U.S. at 468.

For example, when EPA claimed the power under the Clean Air Act to regulate greenhouse gases in a way that "would bring about an enormous and transformative expansion in EPA's regulatory authority," this Court explained that it expects Congress to "speak clearly" if it wishes to assign decisions of such vast economic and political significance to agency discretion. *Util. Air Regul. Grp. v. EPA* (*UARG*), 573 U.S. 302, 324 (2014). Likewise, when the FDA asserted a novel interpretation of the Food, Drug, and Cosmetic Act that would have empowered (or even compelled) it to prohibit tobacco products, the Court concluded that Congress had "directly spoken to the question at issue and precluded the FDA from regulating tobacco products" in part because the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160-61.

Those decisions are hardly outliers. Time and again, this Court has approached claims of extravagant agency authority "with a measure of skepticism." *UARG*, 573 U.S. at 324; *see, e.g.*, *King v.*

Burwell, 576 U.S. 473, 485-86 (2015) ("[H]ad Congress wished to assign" to IRS the power to resolve a dispute over "billions of dollars" in tax credits "affecting the price of health insurance for millions of people," "it surely would have done so expressly."); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substances Act]'s registration provision is not sustainable."); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21A23, 2021 WL 3783142, at *3 (U.S. Aug. 26, 2021) (observing that "sheer scope" of CDC's claimed authority under Public Health Service Act to order eviction moratorium "would counsel against" embracing its interpretation).

As these and other decisions reflect, when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" or proffers a statutory interpretation that "would bring about an enormous and transformative expansion" of its authority, ambiguity is not enough; only "clear congressional authorization" to the agency to exercise such a substantial power will suffice. *UARG*, 573 U.S. at 323-24.

3. The same nondelegation concerns undergirding the major questions doctrine likewise caution against finding a delegation unless a question "in some way implicate[s the agency's] substantive expertise." *Kisor*, 139 S.Ct. at 2417. An agency's specialized knowledge and experience "largely account for the presumption that Congress delegates interpretive lawmaking power to the agency." *Id.* (citation omitted). But that "basis for deference ebbs when '[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary' duties or 'fall[s] within the scope of another agency's authority." *Id.* (quoting *Arlington*, 569 U.S. at 309 (opinion of Breyer, J.)) (alterations in original). So, too, does any constitutional justification for deference. After all, if a question does not call for factual findings or any sort of agency expertise, then it is difficult to see why Congress would delegate the matter to the branch that is supposed to enforce the laws, not make them.

Applying that principle, this Court found it "especially unlikely" that Congress would have delegated interpretive authority over a provision of the Affordable Care Act to the IRS, "which has no expertise in crafting health insurance policy." *King*, 576 U.S. at 486. Likewise, in a case involving the Controlled Substances Act, which divides implementation authority between the Attorney General and the Secretary of Health and Human Services, the Court concluded that the presumption of expertise underlying *Chevron* "works against a conclusion that the Attorney General has authority to make quintessentially medical judgments" about drugs used in physician-assisted suicide. *Gonzales*, 546 U.S. at 266-67. As these and other cases reflect,

unless an interpretive question implicates an agency's "nuanced understanding" of a statute it administers—such as a question about the meaning of a technical term or some other issue demanding policy expertise, *Kisor*, 139 S.Ct. at 2417—courts should be particularly loath to conclude that Congress intended to assign it to an agency.

B. Even If Genuine Ambiguity Remains, the Agency's Interpretation Must Be Reasonable.

1. Carefully cabining the second step of the *Chevron* inquiry is just as critical as limiting the first. If genuine ambiguity remains after the court has exhausted the traditional tools of statutory interpretation, the court still may not defer to the agency's legal interpretation unless it falls "within the bounds of *reasonable interpretation*." *Arlington*, 569 U.S. at 296 (emphasis added); *see Chevron*, 467 U.S. at 844-45. In other words, if a statute is genuinely ambiguous in the sense that it is susceptible to two different reasonable interpretations, the agency may choose one or the other, not some third unreasonable alternative. To merit *Chevron* deference, the agency's legal interpretation must "come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Kisor*, 139 S.Ct. at 2416 (citing *Arlington*, 569 U.S. at 296). As the Court recently emphasized in the similar context of *Auer* deference, "serious application" of the traditional tools of statutory interpretation "therefore has use even when" genuine ambiguity remains, because the "text, structure, history, and so forth at least establish the outer bounds of permissible interpretation." *Id*.

Here too, that constraint serves an important constitutional function. This Court has concluded that if Congress wants to delegate something to an agency, it must at the very least "'lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)) (brackets in original). Otherwise, Congress is not delegating, but abdicating. It is equally critical, then, that courts keep agencies within the guardrails that Congress established to cabin the scope of their discretion, for failure to do so risks converting permissible delegations into unconstitutional ones.

Like the first step of the inquiry, this aspect of the second step has real teeth: It "is a requirement an agency can fail," *Kisor*, 139 S.Ct. at 2416—and agencies have. In *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), for example, this Court found provisions of the 1996 Telecommunications Act governing incumbent sharing of network facilities "a model of ambiguity." *Id.* at 397. But the Court nonetheless refused to defer to the FCC's interpretation of the statute because it was not a reasonable reading—it essentially read the relevant "necessary and impair" standard out of the statute by requiring blanket access to network facilities. *See id.* at 387-92. Likewise, in *Michigan v. EPA*, 576 U.S. 743 (2015), the Court acknowledged the "capaciousness" of the "appropriate and necessary" standard governing EPA's authority to regulate power plants under the hazardous-air-pollutants program of the Clean Air Act. *Id.* at 751-52. Yet the Court concluded that EPA

"strayed far beyond" the bounds of reasonable interpretation when it read the statute to mean it could ignore costs entirely when deciding whether regulation was appropriate. *Id.* at 751-55; *see also, e.g.*, *UARG*, 573 U.S. at 320-23 (rejecting EPA's "greenhouse-gas-inclusive interpretation" of the term "air pollutant" because it was incompatible with the statutory scheme as a whole and thus strayed beyond the bounds of reasonable interpretation).

Put simply, ambiguity is not license. While an agency "can give authoritative meaning to the statute within the bounds of [] uncertainty," "the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation" of the statute. *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525 (2009). The agency must stay within the bounds of reasonable interpretation—within the scope of any statutory ambiguity that it is clear Congress left after exhausting all the traditional tools of interpretation. If an agency's legal interpretation strays outside the zone of ambiguity a court has identified, then neither the agency nor the court has any business resorting to *Chevron* deference.

2. Finally, the agency's choice among permissible interpretations must of course be both reasonable and reasonably explained. This requirement is sometimes conceived of as an aspect of *Chevron* step two, sometimes as a component of arbitrary-and-capricious review of the agency's discretion under APA §706(2)(A). *Compare, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011), *with Michigan*, 576 U.S. at 750, 752. Either way, it is another critical limitation on the agency's assertion of interpretive authority. "Not only

must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan*, 576 U.S. at 750 (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

For example, an agency must adequately explain why it has chosen a given interpretation within the scope of any statutory ambiguity—regardless of whether it is adopting a new interpretation or changing an old one. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-85, 997-1002 (2005); *Chevron*, 467 U.S. at 863-64; *see also Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016). Courts must ensure, moreover, that the agency's choice is "based on a consideration of the relevant factors" and does not reflect a "clear error of judgment." *Judulang*, 565 U.S. at 53 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Again, this requirement has real teeth: Agencies can and do flunk the test. *See Michigan*, 576 U.S. at 751-53; *Encino Motorcars*, 136 S.Ct. at 2126-27.

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If *Chevron* deference is to continue to play a role in assessing the legality of agency action, then the doctrine must remain sufficiently cabined to ensure that it does not become a license for any of the branches to abdicate, abrogate, or arrogate the roles the Constitution assigns. Each of *Chevron*'s two steps includes significant limitations and requirements that play a critical part in safeguarding the separation of powers, and that reflect the doctrine's foundational rationales of agency expertise, political accountability,

and congressional delegation. Courts must enforce those limitations and requirements to ensure that each branch of government stays within its proper bounds. Otherwise, any constitutionally permissible justification for *Chevron* deference falls away.

II. The Court Should Restate And Reinforce Key Limits On *Chevron* Deference.

In *Kisor v. Wilkie*, this Court recently restated, clarified, and reinforced important limits on *Auer* deference, the doctrine governing judicial review of agency interpretations of their own regulations. *See* 139 S.Ct. 2400. Although this case does not present the question whether the Court should overrule *Chevron*, it does present an opportunity for the Court to reinforce limits on *Chevron* deference that are akin to the limits articulated in *Kisor*.[3]

As with *Auer* deference, *Chevron* deference is a powerful tool that not only can be abused, but can raise grave constitutional concerns, particularly when courts fail to take its requirements and limitations seriously. Yet lower courts are far too often far too quick to find statutory provisions ambiguous and to defer reflexively to agency resolutions of tough legal questions, treating *Chevron* as more of a pass-go card than a genuine constraint on agency power.

Take, for instance, the collection of decisions that led to this Court's decision in *Pereira v. Sessions*. That

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[3] The Chamber takes no position in this brief on who has the better of the statutory interpretation arguments in this case, or on whether HHS's interpretation of the Medicare statute passes muster under *Chevron*. The Chamber's position in this brief is limited to urging the Court to require lower courts, including the D.C. Circuit, to apply *Chevron* rigorously.

case presented the "narrow question" whether a document that was labeled "notice to appear," but that failed to specify either the time or place of removal proceedings, was sufficient to trigger the "stop-time rule" under §1229b(d)(1)(A) of the Illegal Immigration Reform and Immigrant Responsibility Act. 138 S.Ct. at 2109-10. The relevant statutory provision specified "several required pieces of information," including the time and place of removal proceedings, that a written notice must include to qualify as a "notice to appear." *Id*. at 2109. And until the administering agency—the Board of Immigration Appeals (BIA)—weighed in, the courts of appeals that encountered the question "concluded or assumed that the notice necessary to trigger the stop-time rule" was not "'perfected' until the immigrant received all the information listed" in the statute. *Id*. at 2120 (Kennedy, J., concurring).

Yet that "emerging consensus abruptly dissolved" after the BIA "reached a contrary interpretation" of the statute. *Id*. Despite the fact that the BIA's interpretation found "little support in the statute's text," six courts of appeals concluded that the statute was "ambiguous" and that the BIA's interpretation was reasonable. *Id*. (collecting cases). Rather than take the limits of *Chevron* doctrine seriously, those courts of appeals practiced "reflexive deference" to the agency, engaging in only "cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned, and whether the BIA's interpretation was reasonable." *Id*. (citations omitted). In one case, for example, the court of appeals simply "stated, without any further elaboration," that it agreed with the BIA that the statute was ambiguous and that the BIA's

interpretation was reasonable "for the reasons the BIA gave." *Id.* at 2120 (quoting *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014)). That analysis was far closer to "an abdication of the Judiciary's proper role in interpreting federal statutes," *id.*, than to a serious effort to abide by the guardrails this Court has put on *Chevron* deference.

In another recent example, the Sixth Circuit deferred to an interpretation of the Social Security Act (SSA) that presented "almost a test case for how far an agency can go" in claiming *Chevron* deference. *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 528 (6th Cir. 2019) (Kethledge, J., dissenting). That case concerned whether the SSA authorized the Social Security Administration to sanction a recipient of disability benefits for her failure to report her "work activity." *Id.* at 525. The relevant provisions of the SSA stated that work activity could not be used as evidence that a beneficiary was no longer disabled, but also stated that benefits could be terminated if the beneficiary had earnings that exceeded an amount that represented substantial gainful activity. *Id.* at 526. The question for the court was whether those provisions allowed the agency to consider the beneficiary's work activity when determining whether she remained entitled to benefits. *Id.*

The panel majority determined that the relevant provisions of the SSA "appear[ed] to conflict with one another," which the panel concluded "create[d] an ambiguity as to whether" the agency could consider work activity that generated earnings. *Id.* at 520 (majority op.). The majority then deferred to the agency's resolution of the supposed ambiguity, which

(conveniently) allowed the agency to impose sanctions. As the dissent explained, however, the majority far too quickly equated an apparent statutory conflict with "ambiguity." *Id.* at 527 (Kethledge, J., dissenting). Rather than "use all the tools of statutory construction, if at all possible, to interpret the statute as 'an harmonious whole'"—the dissent offered several possible harmonizations—the panel simply folded in the face of a difficult interpretive question and "allow[ed] the Executive to assume the judicial role." *Id.* (quoting *Brown & Williamson*, 529 U.S. at 133).

Other examples abound. Indeed, in recent years, this Court has repeatedly reversed lower court decisions that were too quick to apply *Chevron* deference to agency legal interpretations. More often than not, the Court concluded that the relevant statute *unambiguously* foreclosed the agency's interpretation at step one. *See, e.g.*, *Digit. Realty Tr., Inc. v. Somers*, 138 S.Ct. 767, 781-82 (2018) (finding statutory definition of "whistleblower" "clear and conclusive" and reversing panel decision that had deferred under *Chevron*); *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562, 1572 (2017) (reversing panel decision that deferred to BIA and concluding that "the statute, read in context, unambiguously forecloses the Board's interpretation"); *Mellouli v. Lynch*, 575 U.S. 798, 810 (2015) (reversing panel decision and explaining that agency's interpretation was "owed no deference" because it made "scant sense"); *Carcieri v. Salazar*, 555 U.S. 379, 387-89 (2009) (finding ordinary meaning of statutory term "now" clear in context and reversing panel decision that had deferred to agency's reading under *Chevron*). Those decisions are consistent with empirical evidence that lower courts

defer far more often than this Court to agency interpretations under *Chevron*, leading some commentators to suggest that "*Chevron* Regular" is far less rigorous than "*Chevron* Supreme." Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017).

In short, misuse of *Chevron* is all too common in the lower courts, and it is likely to continue absent the clearest and strongest of messages from this Court. The Court should therefore step in to make clear that the continued vitality of *Chevron* deference depends on taking seriously the constitutional and prudential constraints that cabin its scope.

CONCLUSION

For the foregoing reasons, this Court should counteract the too-common abuse of *Chevron* in the lower courts by reinforcing key limits on the doctrine.

Respectfully submitted,

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