No. 17-1636

In The
Supreme Court of the United States

CALIFORNIA SEA URCHIN COMMISSION, et al.,

Petitioners,

v.

SUSAN COMBS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF LANDMARK LEGAL FOUNDATION[1]

Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioners California Sea Urchin Commission *et al.*'s Petition for a Writ of Certiorari. For reasons stated below, Landmark requests the Court grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

Certiorari presents the Court with the opportunity to address the constitutionality of the Court's practice of deferring to federal agencies' interpretation of federal statutes. This case demonstrates the threat posed to limited government when federal agencies such as the Fish and Wildlife Service ("the Service")

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amicus Curiae* provided notice to counsel for parties of its intent to file this brief on June 25, 2018. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

are afforded unfettered deference in interpreting their authority under the law. Instead of exercising power with proper deference to other branches of government, federal agencies disregard the expressed limits of the law. With the approval of the judiciary, federal agencies function as quasi-legislative bodies promulgating regulations beyond their statutory authority and with no respect for the separation of powers. The Service is the latest federal agency to usurp legislative authority to effectuate a particular policy.

Public Law No. 99-625 directs the Service to enact a program to diversify the territorial range of endangered sea otters. The law authorized the Service to reintroduce otters into waters off the coast of Southern California. In particular, it contains specific mandates for the number, age, and sex of otters to be relocated. Pub. L. No. 99-625 § 1(b). It also specifically mandates a prohibition on criminal prosecutions against fishermen who approach otters. Pub. L. No. 99-625, § 1(b). These protections are important because local fishermen can, inadvertently, come into contact with protected sea otters. Without protections, fishermen face serious penalties for interactions with protected wildlife. *See* Decl. of Michael Harrington, *Cal. Sea Urchin Comm'n v. Bean*, No. 13-cv-05517, ECF No. 93-5 (filed Nov. 11, 2016).

While the law contains several express mandates, it is also silent in critical respects. It neither authorizes, nor prohibits removal of fishery protections. In addition, the statute does not contain any general delegation of rulemaking authority to the Service.

Despite the statute's silence on removal of fishery protections and the lack of a general delegation of rulemaking authority, the Service improperly concluded that it could act. It unilaterally removed fishery protections, exposing fishermen to significant civil and criminal sanctions. *See* App. A-9, B-3.

The 9th Circuit upheld the Service's removal of protections. While the circuit court acknowledged the statute's silence on termination of protections for fishery, it determined that silence required deference under *Chevron, U.S.A. v. Natural Resources Defense Council*. *Cal. Sea Urchin Comm'n v. Bean*, 883 F.3d 1173, 1183 (9th Cir. 2018). As the statute contains no language about the Service's authority to terminate unilaterally protections for fishermen, the circuit court deferred to the Service's interpretation, concluding that ending protections for fishermen did exceed the agency's authority. Id. *Chevron* deference, according to the circuit court, is appropriate when the statute is completely silent. Id.

The fact that the statute contains no general delegation of rulemaking authority to the Service compounds this improper application of *Chevron*. According to the circuit court, courts should defer to agency's assertions of authority – even when the statute is silent and even without any general delegation of authority. Id.

As the circuit court has abetted the Service's usurpation of legislative authority, this case presents the ideal opportunity for the Court to reconsider the

"premises that underlie *Chevron* and how courts have implemented that decision." *Pereira v. Sessions*, 585 U.S. ___, ___ (2018) (Kennedy, J., concurring (slip op., at 3)). Granting certiorari allows the Court to address the "type of reflexive deference" exhibited by the judiciary when determining whether an agency has acted outside its statutory delegation of authority. Id. at ___, (slip op. at 2).

When agencies violate constitutional separation of powers principles, the judiciary should exercise their Article III authority by engaging in a substantive review of agency actions. U.S. Const. art. III, § 1. Deference should only be afforded when Congressional delegation of authority is clear and agency actions should be prohibited when they exceed the authority conferred by Congress. Ambiguity, in other words, should not automatically trigger deference.

ARGUMENT

The Court should grant certiorari for three reasons. One, this case presents an opportunity to state decisively that *Chevron* deference should not be applied in cases of statutory silence. Silence cannot and should not be construed as ambiguity. Two, this case will resolve the inconsistency between the 9th Circuit and other circuits on whether silence in a statute can be considered ambiguity. Three, this case presents the optimum vehicle for overturning *Chevron* and reestablishing the judiciary's role in exercising its

independent duty to determine what the law is. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

I. A statute's silence should not equate to an "ambiguity" and thus trigger *Chevron* deference.

Chevron instructs courts to uphold an agency's "reasonable resolution of an ambiguity in a statute the agency administers." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (*citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). There are recognized limits to this deference as "agencies must operate within the bounds of reasonable interpretation." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014). Additionally, while "*Chevron* allows agencies to choose among competing reasonable interpretations of a statue; it does not license interpretative gerrymanders under which an agency keeps parts of a statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 135 S. Ct. at 2708. Despite these limitations, certain lower courts continue to defer to agency interpretation in cases of statutory silence. The Court should address this issue by accepting certiorari.

This case provides the ideal opportunity for the Court to address the limits of *Chevron*. The circuit court equates silence for ambiguity – "Public Law 99-625, however, does not either expressly require the Service to operate the translocation program in perpetuity

or expressly grant authority to the Service to terminate the program. It does not speak to the issue of termination at all." *Cal. Sea Urchin Comm'n v. Bean*, 883 F.3d 1173, 1183 (9th Cir. 2018). In so doing, the lower court upheld the Service's removal of protections expressly provided in the statute. Congressional failure to deny expressly a power to an agency is not an ambiguity. In short, "agencies have no intrinsic authority and wield only the powers that the legislature delegates them." Sales, Nathan Alexander & Adler, Jonathan H., The Rest Is Silence: *Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1520 (*citing Ry. Labor Executives' Ass'n*, 29 F.3d at 670.)

The Service's actions "bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference." *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring). In removing protections for fisheries with no statutory authority, the Service has "without any particular fidelity to the text" determined that it will expose Petitioners to criminal and civil penalties. Id. at 2713.

The Court "should be alarmed that [the Service] felt sufficiently emboldened" by past decisions, *Michigan v. EPA*, 135 S. Ct. at 2713 (Thomas, J., concurring), to promulgate a rule absent both express authority and a general delegation of power. What is to prevent other agencies from substituting their policy judgments for that of Congress? Why should an agency such as the Fish and Wildlife Service operate within

its statutory bounds when courts uphold such actions? Agencies have become so emboldened they venture beyond their statutory mandates – even in cases of statutory silence and even without any general delegation of authority.

Silence should not be interpreted as ambiguity; such a principle allows agencies to legislate without an express delegation of authority from Congress. It allows courts to defer to agencies rather than using their Article III authority to interpret the law. The Court can resolve this impropriety by granting certiorari.

II. Certiorari will resolve a split in the circuit courts.

Lower courts abet agency malfeasance when they engage in limited analysis that ignores the Court's jurisprudence and jurisprudence from circuit courts. The lower court ignored the D.C. Circuit's holding in *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, which ruled "that *Chevron* step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994). The lower court ignored the admonition from the D.C. Circuit that "[w]ere courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out

of keeping with *Chevron* and quite likely with the Constitution as well" Id. at 671.

Additionally, the lower court ignored the limitation from the D.C. Circuit that "as a matter of basic separation of powers and administrative law" an agency "may only take action that Congress has authorized." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017).

The circuit court ignored the 10th Circuit's decision in *Marlow v. New Food Guy, Inc.*, when it rejected the agency's argument that statutory silence permitted the Department of Labor to regulate a restaurant tip pooling scheme. *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1164-1165 (10th Cir. 2017). The 10th Circuit also adopts the D.C. Circuit's position in *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.* Id. at 1165.

III. Certiorari is necessary to overturn *Chevron* and reassert the judiciary's role in determining whether administrative agencies are exceeding their statutory authority.

When agencies are emboldened to craft new laws by "reasonably" interpreting their administrative rules, and courts abdicate their responsibility by deferring to an agency's interpretation, what recourse exists for citizens who seek fair and impartial adjudication? Courts stand as a bulwark against tyranny. When courts allow agencies' actions to go "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 at 1152 (Gorsuch, J., concurring). In the administrative law jurisprudence of today, "courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them." Id. at 1153.

Deferring wholesale to an agency's interpretation of a statute "raises serious separation-of-powers questions." *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring). Deference "precludes judges from exercising [independent] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction." Id. (*citing Nat'l Cable & Telecomms. Assn v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)).

This case highlights the constitutional principle that "[T]he judicial power as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring). Landmark acknowledges there are instances in which a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 120-121 (1976). Thus, "[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues and defeat the Framers' design of a workable

National Government." *Loving v. United States*, 517 U.S. 748, 758 (1996).

But there are limits to an agency's authority. In *Marshall Field & Co. v. Clark*, the Court states: "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." The Court then distinguished the actions, "[t]he first cannot be done; to the latter no valid objection can be made." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692-693 (1892) (*quoting Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852)). "The legislature cannot delegate a power to determine some fact or state of things on which the law makes or intends to make, its own action depend." *Marshall Field & Co. v. Clark*, 143 U.S. at 694.

Chevron empowered agencies to engage in legislative actions and courts have failed to fulfill "their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them." *Gutierrez-Brizuela v. Lynch*, 834 F.3d at 1153 (Gorsuch, J., concurring). *Chevron* also violates the principle that "an agency literally has no power to act . . . unless and until Congress confers power upon it." Id. (*citing La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

It short, "[a] court should not defer to an agency until the court decides, on its own, that the agency is

entitled to deference." *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting). Thus, "[a]n agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency." Id.

The Service's actions suggest concerns expressed by Chief Justice Roberts are prescient: "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." Id. at 315 (*citing Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)).

Chevron abets the accumulation of all powers, legislative, executive, and judiciary into the hands of the administrative state. In the words of the Chief Justice, "[t]he 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. at 313. This accumulation poses a danger to liberty and runs contrary to the principle of separation of powers.

This case presents the optimal vehicle for reexamining the role of the judiciary in determining the legitimacy of the federal regulatory process. Today federal agencies violate the principle of separation of powers by serving as legislators, enforcers, and judges. The Court can stop these unconstitutional actions by granting certiorari.

CONCLUSION

For these reasons Landmark respectfully urges the Court to grant Petitioners' Writ of Certiorari.

Respectfully submitted,

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