No. 19-___

IN THE

Supreme Court of the United States

AMERICAN BANKERS ASSOCIATION,

Petitioner,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

By statute, federally-chartered community credit unions are limited to serving "[p]ersons or organizations within a well-defined local community, neighborhood, or rural district." 12 U.S.C. § 1759(b)(3). The statute directs the National Credit Union Administration to define those terms by regulation. *Id.* § 1759(g)(1). The agency has defined "local community" to include any "Combined Statistical Area," or portion of such an area, with a population of up to 2.5 million people. "Combined Statistical Areas" are large regions that often encompass dozens of cities and counties. The agency has also defined "rural district" to include vast areas with overwhelmingly urban populations of up to one million people.

The D.C. Circuit upheld these definitions on the basis of *Chevron* deference. In doing so, the court relied on circuit precedent holding that a statutory grant of definitional authority "necessarily suggests that Congress did *not* intend the word to be applied in its plain meaning sense" and thus grants the agency "vast discretion" to adopt its own interpretation.

The question presented is:

When a statute expressly directs an agency to define a statutory term, does the delegation expand the scope of the agency's authority at *Chevron* step two beyond its ordinary bounds?

PARTIES TO THE PROCEEDING, RULE 29.6 DISCLOSURE, AND CERTIFICATE OF RELATED CASES

The parties to this proceeding are: Petitioner American Bankers Association, which was the Plaintiff in the district court and the Appellee-Cross-Appellant in the court of appeals; and Respondent National Credit Union Administration, which was the Defendant in the district court and Appellant-Cross Appellee in the court of appeals.

Pursuant to Rule 29.6, the American Bankers Association is a trade association with no parent company. No publicly-held company has a 10 percent or greater ownership interest in the American Bankers Association.

Pursuant to Rule 14(b)(iii), counsel is not aware of any related case currently pending in this Court or any other court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner American Bankers Association ("Association") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

INTRODUCTION

This case presents an important issue under the *Chevron* doctrine: When a statute expressly directs an agency to define a statutory term by regulation, does that directive merely activate the agency's authority at *Chevron* step two, or does the delegation go further by expanding the scope of that authority beyond its ordinary bounds?

The D.C. Circuit applied the latter approach, concluding that an express grant of definitional authority confers "vast discretion" on the agency, Pet. App. 19a, and affirmatively signals that "'Congress did *not* intend the [terms] to be applied in [their] plain meaning sense,'" *id.* at 17a (quoting *Women Involved in Farm Econ. v. U.S. Dep't of Agric.*, 876 F.2d 994, 1000 (D.C. Cir. 1989) (emphasis in original). Relying on that understanding, the court granted *Chevron* deference to the National Credit Union Administration's capacious interpretations of "local community" and "rural district"—interpretations that are "not anywhere near the standard meaning" of those statutory terms. Pet. App. 70a, 88a.

The D.C. Circuit's approach stretches *Chevron* past the breaking point. Under the regulation challenged here and upheld below, sprawling regions containing dozens of cities and counties automatically qualify as single "local communit[ies]," as do narrow

strips of land connecting cities hundreds of miles apart. One such "local community," already approved by the agency under its expanded definition, stretches from one side of Utah to the other, encompassing tens of thousands of square miles and more than 80 percent of the state's total population.

The Administration's interpretation of "rural district" is equally unreasonable. Under that interpretation, five entire states each qualify as "rural district[s]," as do vast multistate regions in which nearly all of the population lives in major metropolitan areas. Thus, for example, the challenged regulation treats as a single "rural district" an area in which nearly 90 percent of the population resides in Salt Lake City or Denver—large cities separated by 370 miles. No ordinary speaker of the English language would use the terms "local community" and "rural district" in these ways.

By treating an express grant of definitional authority as expanding the scope of the agency's discretion at *Chevron* step two, and therefore as permitting the Administration's interpretations, the D.C. Circuit violated the principle that even "[w]here Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013). Properly understood, a provision directing an agency to define a statutory term resolves the question whether Congress has spoken clearly to the issue at *Chevron* step one and indicates that the reasonableness of the agency's definition must be assessed at *Chevron* step two, but does not modify the *nature* of the reasonableness inquiry or grant the agency an extra measure of deference. The D.C. Circuit's decision,

and similar decisions from other courts of appeals, depart from that understanding and in doing so raise significant separation-of-powers questions.

Review by this Court is warranted to restore *Chevron* to its proper—and properly limited—domain, and to make clear that an express delegation of definitional authority does not authorize an agency to interpret a term in ways that exceed its ordinary range of permissible meanings.

OPINIONS BELOW

The court of appeals' decision in this case (Pet. App. 1a-42a) is reported at 934 F.3d 649. The district court's opinion in this case (Pet. App. 43a-89a) is reported at 306 F. Supp. 3d 44. The court of appeals' order denying rehearing en banc (Pet. App. 90a-91a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2019. A timely petition for rehearing was denied on December 12, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the National Credit Union Act, 12 U.S.C. § 1751 *et seq*., are reproduced in the appendix to the petition. *See* Pet. App. 92a-94a.

STATEMENT OF THE CASE

1. *The National Credit Union Act*. This case concerns regulations issued by the National Credit Union

Administration, which administers the laws governing federal credit unions—member-owned financial institutions that are exempt from most state and federal taxes. To establish a federal credit union, proponents must obtain a charter from the Administration and meet eligibility criteria prescribed by the National Credit Union Act. *See* 12 U.S.C. § 1754.

Of particular relevance here, the Act mandates that "the membership of any Federal credit union shall be limited to" a defined "field of membership," such as persons engaged in a common occupation or who live in a particular geographic area. *Id.* §§ 1753(5), 1759(b). The latter type of credit unions—known as "community" credit unions—must limit their membership to "[p]ersons or organizations within a well-defined local community, neighborhood, or rural district." *Id.* § 1759(b)(3).

In *NCUA v. First National Bank & Trust Co.*, 522 U.S. 479 (1998), this Court held that the Administration had exceeded its authority by allowing credit unions to serve multiple unrelated employer groups. Following that decision, Congress amended the statute to, among other things, add the word "local" before community in 12 U.S.C. § 1759(b)(3), and to make an express finding that "a meaningful affinity and bond among [credit union] members, manifested by a commonality of routine interaction, shared and related work experiences, interests, or activities, or the maintenance of an otherwise well-understood sense of cohesion and identify is *essential* to the fulfillment of the public mission of credit unions," *id.* § 1751 note (emphasis added). Having taken these steps, Congress directed the Administration to define "local

community, neighborhood, or rural district" by regulation. *Id.* § 1759(g)(1).

2. *The Agency's Definition of "Local Community."* The Administration recognized that the addition of the term "local" to the statute requires a "more circumspect and restricted approach to chartering community credit unions." 63 Fed. Reg. 71,988, 72012 (Dec. 30, 1998). Despite this recognition, the agency soon began to adopt increasingly expansive definitions of "local community" and "rural district."[1]

The Administration's latest regulation, adopted in 2016, defines any "Combined Statistical Area" or portion of such an area as a "local community," so long as the area's population does not exceed 2.5 million people. 12 C.F.R. pt. 701, App. B. "Combined Statistical Areas," established by the Office of Management and Budget, are regions that include multiple metropolitan areas. Every Combined Statistical Area includes multiple "Core-Based Statistical Areas," which are themselves large areas consisting of a city and its surrounding suburbs.[2] To be included in a Combined Statistical Area, a Core-Based Statistical Area need

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[1] Courts have rejected the Administration's approval of expansively defined "local community" credit unions. *See Am. Bankers Ass'n v. NCUA*, 347 F. Supp. 2d 1061 (D. Utah 2004) (rejecting "local community" that spanned entire state of Utah and included 1.4 million residents); *Am. Bankers Ass'n v. NCUA*, 2008 WL 2857678 (M.D. Pa. 2008) (rejecting "local community" covering more than 3,000 square miles).

[2] A map depicting the 172 Combined Statistical Areas approved as of September 2018 is available at https://www2.census.gov/geo/maps/metroarea/us_wall/Sep2018/CSA_WallMap_Sep2018.pdf?#.

have only a modest commuting relationship with a single Core-Based Statistical Area that is part of the Combined Statistical Area.[3] Notably, there need be no "employment interchange" at all with any other Core-Based Statistical Area included in the Combined Statistical Area. As a result, Combined Statistical Areas encompass "daisy chains" of metropolitan areas "that have nothing to do with those at the other end of the chain." Pet. App. 68a-69a.

For example, Washington DC is part of the Washington-Baltimore-Arlington-DC-MD-VA-WV-PA Combined Statistical Area. This Combined Statistical Area, which is mapped in Figure 1 below, combines eight different Core-Based Statistical Areas and 40 counties and independent cities spread across four states and the District of Columbia.

[3] Specifically, a Core-Based Statistical Area will be included in a Combined Statistical Area if it has at least a 15 percent "employment interchange rate" with at least one adjacent Core-Based Statistical Area that is also included in the Combined Statistical Area. This requirement is satisfied if, for example, roughly 7.5 percent of the population of each Core-Based Statistical Area commutes to work in an adjacent Core-Based Statistical Area.

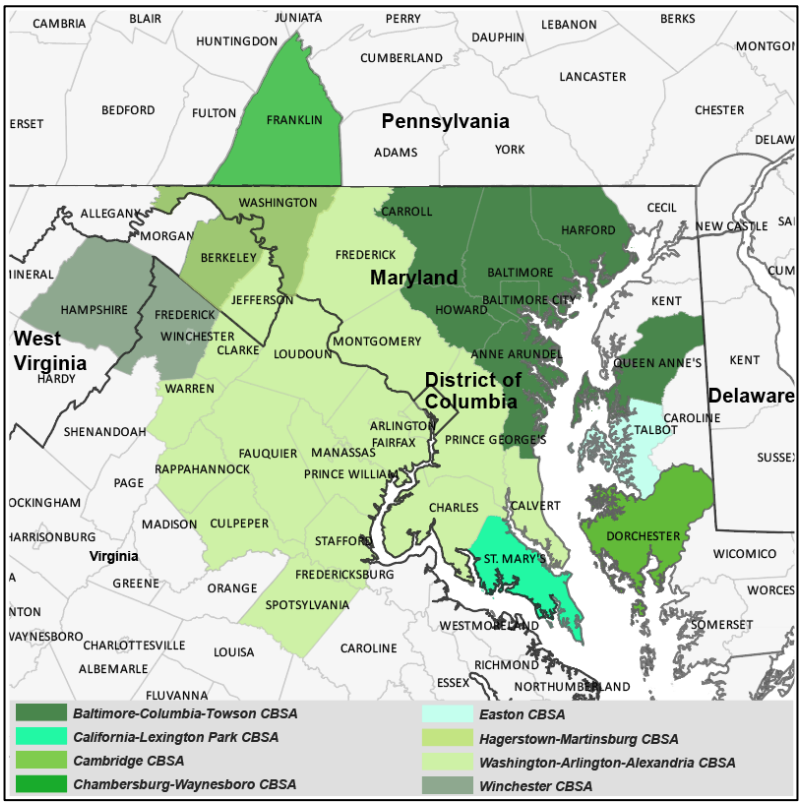

Figure 1: Washington-Baltimore-Arlington, DC-MD-VA-WV-PA Combined Statistical Area

In the Combined Statistical Area mapped in Figure 1, not a single person in the Chambersburg-Waynesboro PA Core-Based Statistical Area commutes to the Cambridge, MD, Easton, MD, or California-Lexington Park, MD Core-Based Statistical Areas.[4]

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[4] *See* U.S. Census, Residence County to Workplace County Commuting Flows for the United States and Puerto Rico Sorted by Residence Geography: 5-Year ACS, 2009-2013, https://www.census.gov/data/tables/time-series/demo/commuting/commuting-

Another "local community," already approved by Administration under its the rule challenged here and mapped in Figure 2 below, stretches from one side of Utah to the other, encompassing tens of thousands of square miles and more than 80 percent of the State's total population.

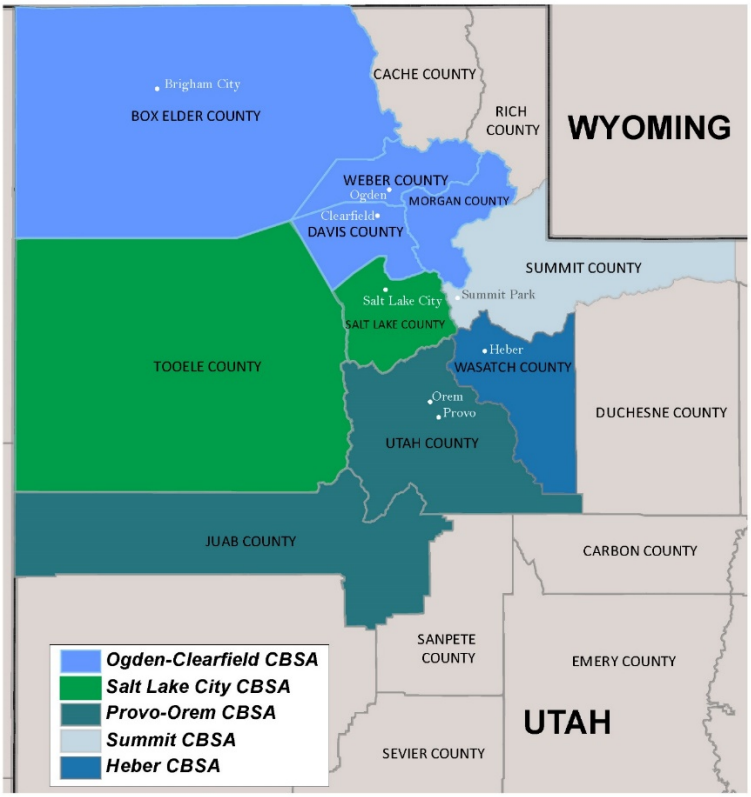

Figure 2: Salt Lake City-Provo-Orem, UT Combined Statistical Area

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flows.html (follow "Table 1" hyperlink for "County to County Commuting Flows for the U.S. and Puerto Rico: 2009-2013").

3. *The Agency's Definition of "Rural District."* Over time, the Administration has also expanded its definition of a "rural district." The latest definition defines a "rural district" as any area (i) with "well-defined, contiguous" borders, (ii) inhabited by up to one million people, (iii) in which either more than half of the population resides in geographic units designated as rural by other federal agencies or in which the average population density is "100 persons or fewer per square mile," and (iv) in which the boundaries "do not exceed the boundaries of the states that are immediately contiguous to the state in which the credit union maintains its headquarters." 12 C.F.R. pt. 701, App. B., V.A.2.

Under this labyrinthine definition, "rural district[s]" may include large cities such as Detroit or Seattle so long as the district also includes enough rural land to meet the density limit.[5] Thus, for example, an area that includes both the cities of Denver, Colorado and Salt Lake City, Utah, and in which more than 90 percent of the total population lives in one of those two cities, automatically qualifies as a "rural district" under the Administration's definition. This "rural district" is mapped in Figure 3 below.

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[5] In addition, five entire states—Alaska, North Dakota, South Dakota, Vermont, and Wyoming—each qualify as single "rural district[s]" under the Administration's rule. *See* U.S. Census, QuickFacts, https://www.census.gov/quickfacts/table/PST%20045216/02,38,46,50,56,00 (each of these states has a population under one million and a population density under 100 per square mile).

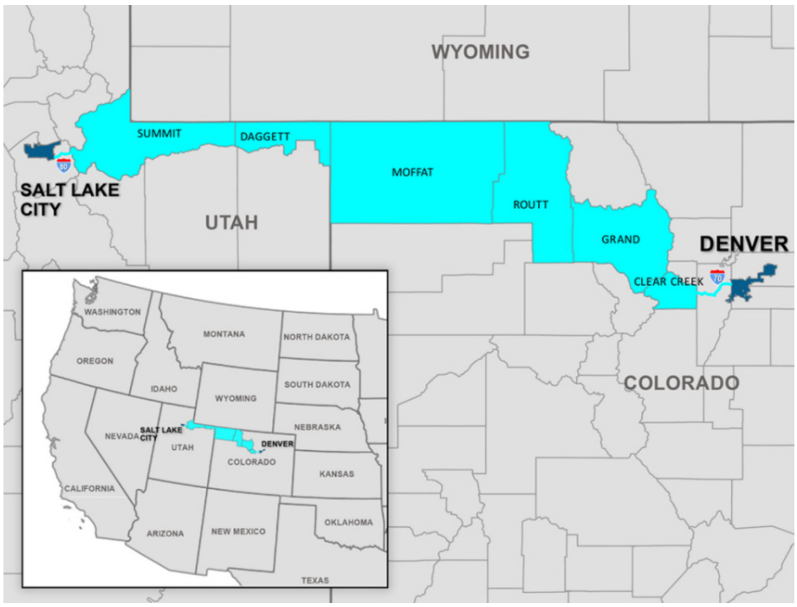

Figure 3: "Rural District" with Nearly 90 Percent of the Population in Denver or Salt Lake City

4. *This Litigation*. In 2016, Petitioner—a trade association representing banks that compete with tax-exempt federal credit unions for business—filed this suit under the Administrative Procedure Act, challenging the validity of the "local community" and "rural district" definitions described above.[6]

The district court (Friedrich, J.) held that the agency's interpretations of "local community" and "rural district" are unreasonable, and therefore not entitled to deference under step two of *Chevron*. In reaching this conclusion, the court considered "the

[6] The case also addressed other elements of the Administration's field-of-membership rules not at issue here. *See* Pet. App. 72a-81a.

meaning of [each] statutory term at the time it became law," looking to dictionaries and other examples of contemporary usage. Pet. App. 60a.

The district court reasoned that a "local community" is more limited in size and scope than a "community." Pet. App. 63a. The court also reviewed uses of "local community" at around the time Congress added the term "local" to the Act, and found that the phrase consistently refers to relatively small, unified areas. Pet. App. 63a-65a.

Based on that evidence, the district court held that Combined Statistical Areas are "not anywhere near the standard meaning" of a local community, because they "stretch across vast regions that include multiple separate urban centers with suburban and rural communities, and residents of peripheral towns that may have no common bond at all beyond regional proximity." Pet. App. 70a-71a.

The district court similarly concluded that the agency's definition of a "rural district" "is not even in the ballpark of the term's standard meaning." Pet. App. 88a. As the court observed, there is no dispute that when the "rural district" language was enacted in 1934, "the word *rural* meant what it means now – the pastoral countryside as opposed to an urban area." Pet. App. 83a. Although the term "district," on its own, can refer to a large area, "[i]t would be a mistake to conclude from the broader definitions of 'district' that a 'school district' or 'fire district' can be very large," and similarly "a mistake to conclude that a 'rural district' can be very large." Pet. App. 84a. In support of this conclusion, the district court surveyed hundreds of uses of the term "rural district" in judicial opinions and other sources from around 1934, and did

not find a single usage of the term that referred to an area even "approaching the size of a state." Pet. App. 86a.

The court of appeals reversed.[7] It began by citing circuit precedent for the proposition that "[a]n express delegation of definitional power 'necessarily suggests that Congress did *not* intend the terms to be applied in their plain meaning sense.'" Pet. App. 17a (quoting *Women Involved*, 876 F. 2d at 1000). This line of authority instructs that the terms to be defined by the agency do not "carry certain meanings," and that the agency "'enjoys broad discretion' in how to define" them. Pet. App. 17a (quoting *Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016)) (alteration omitted).

Relying on the "vast discretion" that it viewed as flowing from the Act's express delegation of interpretive authority, Pet. App. 19a, the court of appeals granted the Administration *Chevron* deference and upheld its interpretations of "local community" and "rural district."

As to "local community," the court acknowledged that a Combined Statistical Area may consist of "a mere 'daisy chain' of urban centers that "have nothing to do with those at the other end of the chain," and that such "daisy chains" automatically qualify as "local communities" under the challenged rule. Pet.

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[7] The court of appeals noted that, following the district court's decision, the National Credit Union Administration repealed the portion of its rules defining Combined Statistical Areas as local communities. Pet. App. 12a. The court of appeals held that this did not moot the issue on appeal, because the agency proposed to readopt the provision if it prevailed on appeal. Pet. App. 12a-15a.

App. 26a. The court nevertheless concluded that "community" sweeps broadly to include "society at large" and that the Administration "sensibly rea[d] the term 'local' to mean simply that the community, regardless of shape or size, should be neither 'broad' nor 'general.'" Pet. App. 19a. Although the Administration's definition encompasses "regional hubs" and sprawling areas that "might well … contravene the Act," the court of appeals held that the regulation is reasonable at *Chevron* step two. Pet. App. 26a.

As to "rural districts," the court of appeals concluded that the term "do[es] not connote specific population or geographical constraints," and that a "rural district" may consist of a large city and an overwhelmingly urban population, so long as the city and its population are "surrounded by rural land." Pet. App. 35a. The court based this interpretation in part on dictionary definitions indicating that "district" may encompass a "portion of a … country" and may be "of undefined extent." Pet. App. 35a. Although the district court cited significant evidence that "rural district" was understood at the time of the Act's adoption to encompass areas roughly the size of a county, the court of appeals dismissed this evidence, concluding that "[m]uch more is required to cabin the agency's discretion." Pet. App. 38a.

The court of appeals denied a petition for rehearing en banc. Pet. App. 90a.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit Has Expanded *Chevron* Deference Beyond Its Limits in a Way That Raises Serious Separation of Powers Issues.

A. An Express Delegation of Definitional Authority Does Not Expand an Agency's Discretion at *Chevron* Step Two.

A statutory provision directing an agency to define the terms of a statute activates, but does not expand, the agency's interpretive discretion under *Chevron*. Specifically, such a delegation resolves the question at *Chevron* step one by confirming that the statute does not "directly sp[eak] to the precise question at issue." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-43 (1984). The delegation thus makes clear that the agency has an interpretive choice to make and requires courts to assess that choice at *Chevron* step two by determining whether the agency's definition is "a permissible construction of the statute." *Id.* But, contrary to the D.C. Circuit precedent applied below, an express grant of definitional authority does not expand the *scope* of the agency's discretion at *Chevron* step two. Properly understood, that step operates in the same way whether a delegation of interpretive authority is explicit or implicit. "No matter how" the step two inquiry "is framed," "the question a court faces when confronted with an agency's interpretation of a statute it administers is *always*, simply, *whether the agency has stayed within the bounds of its statutory authority*." *Arlington*, 569 U.S. at 297 (first emphasis added); *see also Utility Air Regulatory*

Group v. EPA, 573 U.S. 302, 315 (2014) ("[t]he question for a reviewing court" at step two "is whether … the agency has acted reasonably").

In keeping with that understanding, this Court has instructed that the agency "possess[es]" at *Chevron* step two "whatever degree of discretion the ambiguity allows," *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996), and may "go no further than the ambiguity" permits, *Arlington*, 569 U.S. at 307.[8] So, for example, if Congress uses an ambiguous term such as "yellow" in a statute, the agency may interpret that term to mean light yellow or dark yellow – but not purple. *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment).[9] If the agency "goes beyond the meaning that the statute can bear," its interpretation

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[8] *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005) (express delegation); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238-39 (2004) (express delegation); *Smiley*, 517 U.S. at 739-40 (implicit delegation); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 256-57 (1995) (implicit delegation).

[9] The *Chevron* doctrine can be understood as calling for a single inquiry into the reasonableness of the agency's interpretation. On this understanding, a court will uphold an agency interpretation if it is within the statute's "zone of ambiguity." Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 601 (2009); *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 & n.4 (2009) (applying this approach). When a court concludes that the agency's interpretation is invalid at step two of *Chevron*, that "is analytically equivalent to saying that Congress *did* have an intention on the 'precise question at issue' – if that question is framed not as 'What does the statute mean?' but rather 'Is the agency's interpretation within the permissible range of readings?'" *Chevron Has Only One Step*, 95 VA. L. REV. at 600.

receives no deference under the *Chevron* doctrine. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

These principles do not change or cease to apply when Congress expressly directs an agency to define one or more ambiguous terms in a statute. There is no valid basis for concluding that a statutory directive to define a particular statutory term grants the agency extra deference or a license to go beyond the "'bounds of reasonable interpretation.'" *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (quoting *Utility Air*, 573 U.S. at 328). To be sure, when Congress assigns the task of interpreting a statutory term to an agency, it is reasonable for a court to assume that Congress viewed the term as having a range of possible meanings. Otherwise, there would be no interpretive work for the agency to do. But it would be unreasonable for a court to assume, without more, that an express directive to define a term grants the agency unusually broad discretion or permits the agency to construe the statute in ways that would be impermissible if the delegation were instead implicit.

B. The D.C. Circuit Has Expanded *Chevron* Deference Beyond Its Proper Limits.

The D.C. Circuit has taken a different approach. In a series of decisions, that court has held that an express grant of authority to define a statutory term modifies the *Chevron* step two analysis in important ways. These decisions conclude that such a delegation invests the agency with "broad discretion," *Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016), and "necessarily suggests that Congress did *not* intend the word

to be applied in its plain meaning sense," *Women Involved*, 876 F.2d at 1000 (emphasis in original).

Lindeen, which addressed the Securities and Exchange Commission's definition of the statutory term "qualified purchaser," is illustrative. There, the court of appeals explained that "[t]ypically, at *Chevron* Step 2, we defer to the [agency] so long as its definition is "based on a permissible construction of the statute." 825 F.3d at 655. "But '[b]ecause Congress ha[d] authorized the Commission … to prescribe legislative rules,'" the court determined that it "'owe[d] the Commission's judgment more than mere deference or weight.'" *Id.* (quoting *United States v. O'Hagan*, 521 U.S. 642, 673 (1997)).

The court of appeals applied this line of authority in the decision below. The court (correctly) cited the express delegation as resolving the *Chevron* step one inquiry, Pet. App. 16a-17a, but then went on to assert (incorrectly) that the Administration "possesses vast discretion to define terms" at *Chevron* step two, "because Congress expressly has given it such power," Pet. App. 19a.

The D.C. Circuit's decisions cite and rely on this Court's statement in *Chevron* that regulations issued pursuant to "an express delegation of authority to the agency" must be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844; *see Lindeen*, 825 F.3d at 656. In relying on this statement to confer "vast discretion" to an agency pursuant to a grant of definitional authority, the D.C. Circuit misconstrued the requisite deference to an agency under *Chevron* step two, which applies "[n]o matter how" the inquiry "is framed." *Arlington*, 569 U.S. at 297.

Even under the deferential *Chevron* standard, at step two "agencies must operate within the bounds of reasonable interpretation." *Michigan*, 135 S. Ct. at 2712. An agency interpretation receives no *Chevron* deference if it "goes beyond the meaning that the statute can bear." *MCI Telecomms. Corp.*, 512 U.S. at 229. The question a court faces "is *always*, simply, whether the agency has stayed within the bounds of its statutory authority." *Arlington*, 569 U.S. at 297 (emphasis added). A delegation of definitional authority is relevant to *Chevron* step one inquiry. It generally answers the question *whether* an agency has authority to interpret a particular phrase, and usually justifies an inference that Congress viewed the statutory terms at issue as open to more than one possible interpretation (i.e., as ambiguous). But a delegation of definitional authority does not fundamentally alter the requirement at *Chevron* step two that an agency operate within the bounds of reasonable interpretation.

Beyond that, an express delegation of interpretive authority says nothing about the *scope* of the agency's interpretive authority. Whether Congress expressly delegates authority to interpret a specific statutory term, or provides a more general or implicit authorization to interpret the provisions of an entire statute, "the agency can go no further than the ambiguity will fairly allow." *Arlington*, 133 S. Ct. at 1863. Absent additional evidence that Congress granted the agency extraordinary interpretive authority, an express delegation is insufficient to confer such authority. Irrespective of whether a delegation is implicit or explicit, "*Chevron* allows agencies to choose among competing reasonable interpretation of a statute," but

"does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan*, 135 S. Ct. at 2708; *see also Utility Air*, 573 U.S. at 328. To the extent that *Chevron* can be understood to authorize agency interpretations that go beyond the reasonable range of ambiguity of a statutory term, that decision should be reconsidered.[10]

Here, the agency's definitions of "local community" and "rural district" fall well outside the reasonable range of ambiguity of those statutory terms and cannot be sustained under a standard application of *Chevron* step two. Yet the court of appeals upheld those definitions by applying its modified and less rigorous version of that test.

1. Local Community. A resident of the District of Columbia could, perhaps, reasonably view her "local community" as including not only the entire District of Columbia but its surrounding suburbs. But no one could reasonably view their "local community" as a

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[10] In a handful of cases, this Court has suggested in dicta that an express delegation may warrant particularly strong deference to the agency. However, this Court has never *held* that such a rule applies or provided a reasoned justification for following it. Indeed, these cases—most of which were decided in the 1980's and 1990's, well before concerns regarding *Chevron* came to a head—often invoke without analysis language from pre-*Chevron* decisions. *See, e.g.*, *O'Hagan*, 521 U.S. at 673 (quoting *Batterton v. Francis*, 432 U.S. 416, 424-26 (1977), for the proposition that an express delegation warrants "more than mere deference or weight"); *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994) (relying on *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539-40 (1943), for the proposition that "[b]ecause this case involves [an] express delegation, the Board's views merit the greatest deference").

Combined Statistical Area sprawling across Maryland, Northern Virginia, West Virginia and Pennsylvania and including some 40 cities and counties. The Office of Management and Budget, which developed the concept of a Combined Statistical Area, has never suggested that such an area is reasonably viewed as local community. To the contrary, OMB has described a Combined Statistical Area as a "larger region." 80 Fed. Reg. 76,748, 76,749 n. 18 (2015). And although it may be reasonable to use commuting activity as a proxy for the interactions among members of a local community, it is clearly unreasonable to define the term "local community" to include Combined Statistical Areas, large portions of which have absolutely no interchange of commuters.

The court of appeals also gave insufficient weight to additional textual evidence that the agency's interpretation of "local community" is unreasonable and not entitled to judicial deference. First, the term "local community" is part of the larger phrase "local community, neighborhood, or rural district." 12 U.S.C. § 1759(b)(3). No one disputes that the term "neighborhood" refers to a relatively small area. Pet. App. 21a. But the court of appeals rejected the district court's application of the *noscitur a sociis* canon on the ground that that neither a "local community" nor a "rural district" need be small in size. *Id.* To reach that conclusion, the court of appeals reasoned that Congress's addition of the word "local" before "community" merely implies that the community at issue must be "confined to a particular place," as opposed to identifying a geographically dispersed group of individuals with "some unifying trait." Pet. App. 19a.

But even before Congress added the word "local" before community, the statutory text made clear that "community" referred to a group "confined to a particular place." That is so not only because the terms "neighborhood" and "rural district" plainly refer to limited geographic areas, but also because a separate statutory provision permits credit unions to serve members who share a single "common bond of occupation or association" without regard to whether they are located in one place. 12 U.S.C. § 1759(b)(1).

The court of appeals also gave short shrift to a statutory provision expressly finding that a "meaningful affinity and bond" among credit union members is "essential" to the fulfilling the credit union's mission. 12 U.S.C. § 1751 note. By definition, an "essential" requirement cannot be traded off against other goals. Yet the court of appeals nevertheless held that the agency was entitled to "balance" this finding against other statutory purposes. Pet. App. 23a.

2. Rural District. Similarly, it is undisputed that the term "rural" means not urban. *See* Pet. App. 35a. It is also undisputed that the term "rural district" was used hundreds of times in judicial decisions and other sources around the time that term was included in the Act, and yet not a single usage of that term applied to an area that even approach the size of a state. Pet. App. 36a. Consequently, defining a "rural district" to include a huge multi-state area with large cities and a population that is more than 90 percent urban falls well outside the reasonable range of ambiguity of the term "rural district," as the district court explained. *See* Pet. App. 87a-88a.

In sum, the agency's definitions of "local community" and "rural district" are "not anywhere near the

standard meaning" of those terms. Pet. App. 70a. Yet the court of appeals, applying an extreme form of *Chevron* deference, nevertheless deferred to the agency's interpretations.

C. The D.C. Circuit's Expansion of *Chevron* Deference Raises Serious Constitutional Concerns.

Treating express delegations of definitional authority as granting agencies "vast discretion," extending beyond the ordinary range permitted under *Chevron*, raises serious doctrinal and constitutional concerns that merit this Court's attention.

As a threshold matter, this Court has observed that it is an open question "whether *Chevron* should remain." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). Several members of this Court have expressed the view that *Chevron* raises significant separation-of-powers questions. *See, e.g.*, *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 115-19 (2015) (Thomas, J., concurring in judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J., concurring); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring).

These concerns arise in part because "the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. at 115-19 (Thomas, J., concurring in judgment). By forcing judges to reject what they believe is "'the best reading of an ambiguous statute'" in favor of the agency's construction, *Chevron* "wrests

from the Courts the ultimate interpretive authority to 'say what the law is,'" and hands that authority "over to the Executive." *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (quoting *Nat'l Cable & Telecomms. Assoc. v. Brand X Internet Servs.*, 545 U.S. at 983; *Marbury v. Madison*¸ 1 Cranch (5 U.S.) 137, 177 (1803)). "Such a transfer … is in tension with the Article III Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies." *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring); *see also Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) ("reflexive deference" under *Chevron* "suggests an abdication of the Judiciary's proper role in interpreting federal statutes").

Classifying agency interpretations as policymaking, rather than judging, does not avoid the constitutional concern, because on that view *Chevron* "permit[s] a body other than Congress to perform a function that requires an exercise of the legislative power." *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring) (quoting *Department of Transp. v. Ass'n of Am. R.R.*¸ 575 U.S. 43, 85-86 (2015) (Thomas, J., concurring in judgment)).

The expanded version of *Chevron* applied by the D.C. Circuit here significantly exacerbates these separation-of-powers problems. The standard test at *Chevron* step two already affords agencies every ounce of discretion a statute permits—i.e., "whatever degree of discretion the ambiguity allows." *Smiley*, 517 U.S. at 740-41. There is thus no additional room for increased deference based on an express delegation of definitional authority. Yet the D.C. Circuit's doctrine does just that by steering agencies away from the statute's "plain meaning sense," *Women Involved*, 876

F.2d at 1000, and granting them "broad discretion" that goes beyond the level "[t]ypically" afforded "at *Chevron* Step 2," *Lindeen*, 825 F.3d at 655.

By compelling courts to accept an agency interpretation that is not only a second-best reading of the statutory text, but that lies beyond the ordinary range of ambiguity of the statutory terms, the D.C. Circuit's cases undermine the judicial power to "say what the law is." And when the agency is not confined to choosing a meaning that falls within the range of ambiguity of the terms Congress actually used, the incursion into the legislative power is significantly increased. Once an agency is freed from the necessity of adhering to the reasonable range of meaning of the terms actually adopted by Congress and signed into law by the President, it effectively ceases to execute the laws and instead exercises a Humpty-Dumpty-like authority to make law. *See* Lewis Carroll, *Through the Looking Glass* 205 (1872) ("'When I use a word,' Humpty Dumpty said, in rather a scornful tone, it means just what I choose it to mean – neither more nor less.'"). For these reasons, the Court should "consider taking a step away from the abyss," regardless of whether it is "willing to question *Chevron* itself." *Baldwin v. United States*, No. 19-402, 2020 WL 871675, at *5 (U.S. Feb. 24, 2020) (Thomas, J., dissenting from the denial of certiorari).

The severity of the problem created by the D.C. Circuit's decisions is amplified in two important ways. *First*, the D.C. Circuit hears a significant proportion of the cases involving rulemaking by federal agencies, and thus has an outsize influence on the way in which *Chevron* is applied in practice. *See, e.g.*, John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A*

Historical View, 92 VA. L. REV. 375, 387-89 (2006). The effect of the cases cited above is magnified by this dynamic. *Second*, several other courts of appeals have followed the D.C. Circuit's lead by applying the same erroneous approach. *See, e.g.*, *Rush Univ. Medical Ctr. v. Burwell*, 763 F.3d 754, 760-62 (7th Cir. 2014); *Henry Ford Health Sys. v. Dep't of Health & Human Servs.*, 654 F.3d 660, 665 (6th Cir. 2011); *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir. 1986). These cases demonstrate that overbroad application of *Chevron* is a nationwide problem implicating the need for this Court to "reconsider" the way in which "courts have implemented that decision." *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring).

II. This Case Provides An Excellent Vehicle for Resolving the Question Presented.

This case offers the Court an excellent opportunity to resolve the question whether an express grant of definitional authority modifies the standard *Chevron* analysis.

First, the issue is clearly and cleanly presented. Congress adopted a statute that uses two common phrases: "local community" and "rural district." It expressly directed the agency to define those terms by regulation, but otherwise gave no indication that the Administration possesses "vast" or enhanced discretion to adopt meanings that extend beyond the range of ordinary usage.

Second, this case offers the Court an opportunity to place appropriate limits on *Chevron* deference. The Court has already taken steps in that direction. For example, the Court has held that *Chevron* generally is limited to situations in which the agency speaks with

the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000). In addition, the Court has concluded that *Chevron* deference does not extend to "a question of deep economic and political significance that [was] central to th[e] statutory scheme," noting that "had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); *see also Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (limiting deference to an agency's interpretation of its own ambiguous regulations in additional ways, many of which apply equally to *Chevron*). Granting review in this case would allow the Court to take an additional, necessary step to confine *Chevron* deference within appropriate boundaries.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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