No. 19-1115

In The
Supreme Court of the United States

AMERICAN BANKERS ASSOCIATION,
Petitioner,

v.

NATIONAL CREDIT UNION ADMINISTRATION,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

STEVEN M. SIMPSON
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 610
Arlington, VA 22201

GLENN E. ROPER
Counsel of Record
Pacific Legal Foundation
1745 Shea Ctr. Dr., Suite 400
Highlands Ranch, CO 80129
Telephone: (916) 419-7111
geroper@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

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INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit legal foundation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom. It is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. In pursuing its mission, PLF's attorneys have frequently represented litigants or participated as amicus in cases before this Court, including cases involving the separation of powers. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Gundy v. United States*, 139 S. Ct. 2116 (2019); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013); *Sackett v. EPA*, 566 U.S. 120 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006).

PLF's adherence to constitutional principle and broad litigation experience offer the Court an important perspective that will assist in reviewing this case. The decision below raises questions related to judicial review of administrative agency decisions,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief, and counsel of record for all parties received timely notice of the intention to file the brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any 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. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

and PLF supports Petitioner's request for a writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Petition asks this Court to review the D.C. Circuit's interpretation and application of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), a case whose continuing viability has been called into question by members of both this Court and the legal academy. *Chevron* generally requires courts to consider two "steps" when evaluating agencies' statutory interpretations: (1) whether Congress has "directly addressed the precise question at issue," and (2) if not, "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.[2] This case involves the D.C. Circuit's interpretation of *Chevron* step two.

Specifically, the D.C. Circuit below held that under *Chevron* step two, when Congress has directed an agency to define a statutory term, the agency must be granted an unusually high degree of deference that accords the agency "vast discretion" in formulating a definition. Pet. App. 19a. Under the D.C. Circuit's approach, an agency's *unreasonable* interpretation of the statutory text could become a *reasonable* interpretation, simply because Congress asked the agency to promulgate a rule defining the term. That goes well beyond the usual view of *Chevron*'s scope.

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[2] *But see* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 Va. L. Rev. 597, 599 (2009) (arguing that *Chevron* asks a "single question"; namely, "whether the agency's construction is permissible as a matter of statutory interpretation").

But the D.C. Circuit didn't stop at pressing a thumb on the deference scale. It further concluded that when Congress has directed an agency to define terms, that "suggests that Congress did *not* intend the [terms] to be applied in [their] plain meaning sense." Pet. App. 17a (quotation omitted). In other words, in the D.C. Circuit's view, it is not only acceptable, but *expected* that the agency's definition will depart from the plain meaning of the text enacted by Congress.

Given the importance of the D.C. Circuit in establishing administrative law standards, its decision to adopt such an expansive standard merits this Court's review. Congress has granted the D.C. Circuit exclusive or concurrent jurisdiction over many challenges to agency rulemaking, including rulemaking based on the authority to define statutory terms. *See infra* Part. I.A. And it is not at all unusual for Congress to authorize agencies to promulgate such definitions. *See infra* Part I.B. This Court should therefore grant certiorari to determine whether the grant of definitional authority carries with it enhanced deference under *Chevron* step two.

On the merits, the Court should hold that the D.C. Circuit's overly deferential approach stretches *Chevron* too far. It turns cautious respect for "practical agency expertise," *Pension Benefit Guaranty Corporation v. LTV Corporation*, 496 U.S. 633, 651 (1990), into uncritical acceptance that hollows out judicial oversight. And if the Court concludes that the D.C. Circuit has accurately interpreted *Chevron*'s scope, then it should take this opportunity to revisit that case. Allowing agencies to mold and revise definitions to suit their policy preferences creates extraordinary risk for regulated parties, including

businesses and ordinary citizens who are no longer able to rely on the words that Congress enacted into law.

ARGUMENT

The D.C. Circuit's expansion of *Chevron* deference establishes an important administrative law precedent that will have wide ramifications if not checked. It sets up a legal standard that goes well beyond this Court's precedents and highlights flaws in *Chevron* itself. It therefore merits review by this Court.

I. This Case Presents a Critically Important Issue that the Court Should Resolve Now.

The D.C. Circuit's expanded version of *Chevron* deference raises important questions that only this Court can resolve. There is no reason to await further percolation among the lower courts, especially given the importance of the D.C. Circuit in setting administrative law standards. And because Congress often asks agencies to define statutory terms, the D.C. Circuit's standard will have broad repercussions. Furthermore, the decision below implicates the question of *Chevron*'s continuing viability, a question that is both important and timely, as several members of this Court have recently reaffirmed.

A. Administrative law standards set by the D.C. Circuit warrant careful review.

The D.C. Circuit plays an outsized role in shaping the contours of administrative law. This is due in no small part to Congress's frequent grant of exclusive or concurrent review of agency decisions to that court, in a wide variety of statutes. *See* John G. Roberts, Jr., Lecture, *What Makes the D.C. Circuit Different? A*

Historical View, 92 Va. L. Rev. 375, 376 (2006) ("Whatever combination of letters you can put together [in an agency acronym], it is likely that jurisdiction to review that agency's decision is vested in the D.C. Circuit."); *see also, e.g.*, 7 U.S.C. § 2 (granting the D.C. Circuit appellate jurisdiction over certain decisions made by the Commodities Futures Trading Commission); 16 U.S.C. § 1536 (granting concurrent jurisdiction to review Endangered Species Act cases); 21 U.S.C. § 457 (granting appellate jurisdiction over decisions made by the Food & Drug Administration); 33 U.S.C. § 1365 (granting concurrent jurisdiction over Clean Water Act cases); 42 U.S.C. §§ 7411, 7412, 7413, 7419, 7420, 7521, 7545, 7571, 7607 (granting exclusive jurisdiction to hear certain Clean Air Act petitions); Eric M. Fraser, et al., *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Pub. Pol'y 131, 154–55 (2013) (listing more than 100 statutory provisions specifically relating to D.C. Circuit jurisdiction).[3] Such agency decisions, and the D.C. Circuit's review of them, affect the lives of millions of Americans. And given the D.C. Circuit's dominant role in reviewing administrative agency decisions, "there is a far more extensive body of

[3] *See also, e.g.*, 15 U.S.C. § 2618 (granting concurrent jurisdiction over rules relating to control of toxic substances); 30 U.S.C. § 1276 (granting exclusive jurisdiction over Surface Mining Control and Reclamation Act standards); 42 U.S.C. § 300j-7 (establishing the D.C. Circuit as the sole venue for appeal of national primary drinking water regulations); 42 U.S.C. § 6976(a) (granting exclusive jurisdiction to review Resource Conservation and Recovery Act regulations); 42 U.S.C. § 9613 (granting exclusive jurisdiction over regulations promulgated under the Comprehensive Environmental Response, Compensation, and Liability Act).

administrative law developed there than in other circuits." Roberts, *supra*, at 376.

In fact, the D.C. Circuit consistently hears about a third of all administrative reviews nationwide (excluding Social Security and immigration cases)—far more than any other circuit. *See* Fraser, *supra*, at 142 ("[T]he share of total administrative reviews in the country conducted by the D.C. Circuit has been growing steadily over time, from 28% of the national total in 1986 to 36% in 2010."). Its docket includes many of the most challenging and significant administrative law cases. *See, e.g.*, *Nat. Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).[4] Put simply, absent examination by this Court, "the D.C. Circuit is in all likelihood the final resting place for administrative controversies." Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 Yale L.J. 1174, 1214 (2019).

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[4] *See also, e.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir. 2019) (applying *Chevron* deference to uphold agency rule regarding bump stocks), *cert. denied*, 140 S. Ct. 789 (2020); *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), *rev'd sub nom. Michigan v. EPA*, 135 S. Ct. 2699 (2015) (reversing the D.C. Circuit's use of *Chevron* to approve an agency's disregard of compliance costs when regulating power plants); *Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *rev'd sub nom. Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015) (reversing a D.C. Circuit rule regarding use of notice-and-comment procedures under the APA); *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007) (reversing the D.C. Circuit's decision on whether the EPA can decline to regulate the emissions of greenhouse gases from automobiles).

Given the D.C. Circuit's well-recognized role in controlling the direction and application of administrative law principles, a decision from the D.C. Circuit governing the scope and applicability of *Chevron* deserves close review.

B. Congress frequently grants agencies definitional authority.

Judicial review of agency definitions—including the determination of whether and how *Chevron* applies—is particularly important because numerous statutes authorize or direct administrative agencies to define statutory terms. *See, e.g.*, 7 U.S.C. § 1307 ("The Secretary [of Agriculture] shall issue regulations defining the term 'person' . . . ."); 15 U.S.C. § 57a(a)(1)(B) (authorizing the Federal Trade Commission to define "acts or practices which are unfair or deceptive"); 15 U.S.C. § 1681a(q)(3) (authorizing the Consumer Financial Protection Bureau to define the term "identity theft"); 42 U.S.C. § 6292(b)(2)(C) (directing the Secretary of Energy to define the term "household"); 47 U.S.C. § 522(4) (directing the Federal Communications Commission to define the term "television channel").[5]

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[5] *See also, e.g.*, 12 U.S.C. § 84(d)(1) (authorizing the Office of the Comptroller of the Currency to prescribe "regulations to define or further define terms" governing national banks' lending limits); 12 U.S.C. § 1817(a)(7) (authorizing the Federal Deposit Insurance Corporation to "by regulation define the terms 'cash items' and 'process of collection'"); 12 U.S.C. § 1831i(f) (authorizing "[e]ach appropriate Federal banking agency" to "prescribe by regulation a definition for the terms 'troubled condition' and 'senior executive officer'"); 15 U.S.C. § 2604(h)(3) (authorizing the Environmental Protection Agency to define the

If challenged in the D.C. Circuit, definitions promulgated under these and other similar statutes would be subject to a highly deferential *Chevron* step two standard. Rather than a standard evaluation of the definition's reasonableness, tied to the plain meaning of the statutory text, a reviewing court would grant the agency "vast discretion" to depart from the plain meaning. Given the numerous statutes potentially subject to this standard, the validity of the D.C. Circuit's rule is an important question worthy of this Court's review.

C. The scope and viability of *Chevron* is an important issue.

In addition to the question of whether the D.C. Circuit properly interpreted and applied *Chevron*, this case implicates *Chevron*'s continuing viability. *See* Pet. 19 ("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."). That provides yet another reason for this Court to review the decision below.

In recent years, this Court has at times cited *Chevron* deference with apparent approval. *See, e.g.*, *Kisor*, 139 S. Ct. at 2415; *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016). But in other cases, it has avoided *Chevron* deference under various justifications. *See, e.g.*, *Smith v. Berryhill*, 139 S. Ct.

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term "small quantities" with regard to toxic chemical substances); 18 U.S.C. § 844(g)(2) (authorizing the Federal Aviation Administration to define the term "ammunition"); 26 U.S.C. § 415(j) (directing the Secretary of Labor to define the term "year" with respect to pension plans).

1765, 1778 (2019) (declining to grant deference "for an interpretation that the Government's briefing rejects"); *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (declining *Chevron* deference because statute was unambiguous); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (declining to apply *Chevron* deference because one of its "essential premises is simply missing"); *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1198 n.3 (2017) ("Because the statute alone resolves this dispute, we need not consider whether *Chevron* deference attaches . . . ."); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (declining to grant *Chevron* deference because the regulation lacked a "reasoned explanation"); *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (declining to grant *Chevron* deference to IRS interpretation of Affordable Care Act because the Act's tax credits present "a question of deep economic and political significance that is central to this statutory scheme"); *see also Pereira*, 138 S. Ct. at 2121 (Alito, J., dissenting) ("I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*."). This ambivalence creates substantial uncertainty about *Chevron*'s applicability, if not its ongoing vitality. *See also SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("[W]hether *Chevron* should remain is a question we may leave for another day.").

Moreover, multiple members of the Court have recently expressed concern over the ongoing viability and foundations of *Chevron*. *See, e.g.*, *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from the denial of certiorari) ("*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions."); *Kisor*, 139 S. Ct. at 2446 n.114 (Gorsuch, J., joined by Justices Thomas

& Kavanaugh, concurring in the judgment) (asserting that "there are serious questions" about whether *Chevron* "comports with the APA and the Constitution"); *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908 (2019) (Gorsuch, J., joined by Justice Thomas, dissenting) (noting "the mounting criticism of *Chevron* deference"); *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (expressing "concern" over how *Chevron* "has come to be understood and applied"); *id.* at 2129 (Alito, J., dissenting) (noting that "[i]n recent years, several Members of this Court have questioned *Chevron*'s foundations"). Those concerns reflect the importance of the issues presented in this case.[6]

In sum, the decision below raises important questions regarding the scope and limits of *Chevron*—one of the foundational cases in modern American

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[6] *Chevron* has also been a subject of growing and robust scholarly interest and debate, illustrating the importance of the issues presented by the Petition. *Compare* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017); Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 Ala. L. Rev. 1 (2017); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016); Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1 (2013); *and* Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779 (2010), *with* Cass R. Sunstein, Chevron *as Law*, 107 Geo. L.J. 1613 (2019); Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 Vand. L. Rev. 937 (2018); Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 Geo. Wash. L. Rev. 1392 (2017); Alan B. Morrison, Chevron *Deference: Mend It, Don't End It*, 32 J.L. & Pol. 293 (2017); *and* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 Yale L.J. 2580, 2590 (2006).

administrative law. These are questions of undeniable importance that merit this Court's review.

II. The D.C. Circuit's Approach Underscores the Problems with the *Chevron* Doctrine.

The D.C. Circuit's approach to *Chevron* in this case illustrates its infirmities. There is no support in this Court's precedents for the notion that an express delegation of definitional authority grants an agency "vast discretion" to define the relevant terms counter to their plain meaning, as the D.C. Circuit held below. *See* Pet. App. 19a; *cf. Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 326 (2014) ("Agencies exercise discretion only in the interstices created by statutory silence or ambiguity . . . .") (quotation omitted); *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 740–41 (1996) (under *Chevron,* when Congress "left ambiguity in a statute," it only intended the agency to have the "degree of discretion the ambiguity allows").

At most, an express delegation of authority to define terms in a statute resolves step one of *Chevron*. That is, it makes explicit what *Chevron* held is implicit from statutory ambiguity: Congress intended the agency to answer a particular question about the meaning of a statutory term. But once the step one question is resolved, the question at step two of *Chevron* remains the same: whether the agency's definition is "a permissible construction of the statute." *Chevron*, 467 U.S. at 843. As this Court has made clear, "[n]o matter how it 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." *City of Arlington,*

Tex. v. FCC, 569 U.S. 290, 297 (2013) (emphasis omitted).

This is so whether an agency is interpreting an ambiguous statute under an implied delegation or exercising definitional authority granted explicitly by Congress. In either scenario, the agency possesses only the authority that Congress has given it, for "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). That authority is necessarily tied to the language of the statute, whether that language is ambiguous or a term the agency is directed to define, as the agency may "go no further than the ambiguity"—or, in this case, the term to be defined—permits. *City of Arlington*, 569 U.S. at 307; *see also Michigan*, 135 S. Ct. at 2707 (stating that even under the deferential *Chevron* standard, "agencies must operate within the bounds of reasonable interpretation"); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) (stating that an agency interpretation receives no *Chevron* deference if it "goes beyond the meaning that the statute can bear"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 232 (2012) ("[T]here is a presumption against" definitions that stray far from the meaning of the word being defined because "the word being defined is the most significant element of the definition's context.").

The D.C. Circuit's approach, however, suggests that the agency has authority that goes beyond what the statutory language would permit—that the agency possesses "vast discretion" or is somehow entitled to extra deference—when Congress confers

upon it the authority to define a statutory term or provision. But that supposed standard is incoherent. Either an agency's interpretation is a reasonable interpretation of the statutory language or the agency is acting beyond the statutory language and establishing policy.

This highlights several problems with *Chevron* that members of this Court have identified. First, deference is often a subterfuge for ignoring vast delegations of law-making authority from Congress to the executive branch. *See, e.g.*, *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring) (highlighting "the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference"); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring). Second, when courts defer, they abdicate their independent duty to assess not only whether an agency is in fact operating within the bounds of its lawful authority, but also whether Congress is operating within the bounds of its *constitutional* authority. *See, e.g.*, *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 115–19 (2015) (Thomas, J., concurring in judgment); *Michigan*, 135 S. Ct. at 2712–14 (Thomas, J., concurring); *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring). Third, *Chevron* provides a significant and perverse incentive for courts to ignore the difficult task of statutory interpretation and, instead, defer to agency interpretations. *See Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (noting the "cursory analysis" many courts applied to a BIA interpretation of an immigration statute and expressing concern about the "reflexive deference" courts often give to agency interpretations under

Chevron). Those concerns apply equally, if not even more strongly, to the D.C. Circuit's decision below.

Under this Court's precedents, *Chevron* sometimes requires courts to put aside what they deem the "most reasonable" interpretation of a statute in favor of an agency's differing interpretation. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). In this case, the D.C. Circuit's standard goes even further, requiring *Chevron* deference to agency definitions that depart from the plain meaning of the text. That standard is contrary to the principle that where Congress intends for a term "to carry a specialized—and indeed, unusual—meaning," it "would have said so expressly." *Hamilton v. Lanning*, 560 U.S. 505, 517 (2010). Asking an agency to define a term is not the same thing as asking it to rewrite the statute, and the D.C. Circuit erred in concluding otherwise.

CONCLUSION

The Petition should be granted.

DATED: April 2020.

Respectfully submitted,

STEVEN M. SIMPSON
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 610
Arlington, VA 22201

GLENN E. ROPER
Counsel of Record
Pacific Legal Foundation
1745 Shea Ctr. Dr., Suite 400
Highlands Ranch, CO 80129
Telephone: (916) 419-7111
geroper@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation