No. 19-1115

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

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

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?

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INTEREST OF *AMICUS CURIAE*[1]

The National Right to Work Legal Defense Foundation, Inc. has been the nation's leading litigation advocate for employee free choice since 1968. To advance this mission, Foundation staff attorneys have represented individual employees in many cases before this Court.[2]

The Foundation has a particular interest in the Court granting *certiorari* on the question presented because it currently represents hundreds of employees across the nation whose free choice to refrain from unionization and monopoly bargaining depends on the National Labor Relations Board's proper implementation of the National Labor Relations Act. Courts have applied *Chevron*[3] deference in several cases involving such individual employees' rights.[4] Thus, whether this

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[1] Under Supreme Court Rule 37.3(a), both parties received timely notice of *amicus curiae*'s intent to file this brief and consented to its filing. Under Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission.

[2] *E.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988).

[3] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

[4] *See*, *e.g.*, *Pirlott v. NLRB*, 522 F.3d 423, 434 (D.C. Cir. 2008) ("The general chargeability issue is a matter for the Board to decide in the first instance."); *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 766 (9th Cir. 2002) (en banc) ("Courts are required to defer to the NLRB on statutory interpretation under *Chevron*."); *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998).

Court should limit *Chevron* step two is important to the Foundation's mission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Members of this Court and others have repeatedly acknowledged the serious separation of powers problems with *Chevron* deference.[5] Despite these reservations, the Court has not found occasion to reexamine whether to overrule the doctrine. And the band plays on: courts continue to skirt their constitutional duty to neutrally review agency action and thereby continue to allow executive lawmaking through broad congressional delegations.

The question presented here does not ask the Court to overrule *Chevron*, but does present the Court with the chance to plug a hole in the sinking ship. It can do so by establishing clear limits to agency discretion at *Chevron* step two. Whether to do so is not only important for Petitioner's rights, but is also an important issue of federal law for all those subject to arbitrary agency decision-making. Thus, the question presented warrants this Court's review.

A. When Congress delegates to an agency the power to define a statute's terms, *Chevron* step two

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[5] *See e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., concurring in judgment); *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting); *Michigan. v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (noting *Chevron* forces judges "to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction"); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring) (calling *Chevron* an "aggrandizement of federal executive power at the expense of the legislature").

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instructs courts to defer to the agency's reasonable construction of those terms. Yet, as this case shows, an agency often will not stay within the bounds of reason when construing the statute. When courts do not police the line of reasonableness, it creates separation of powers problems. Moreover, reflexive deference allows executive agencies to exercise legislative power by rewriting laws without going through bicameralism and presentment and creates serious fair notice problems.

B. Placing a limiting principle on *Chevron* step two is an important issue of federal law not only for Petitioner, but also for all parties regulated by federal agencies. Federal agencies like the NLRB routinely use *Chevron* deference to change a federal statute's meaning—causing serious damage to the regulated public's rights and liberties.

ARGUMENT FOR GRANTING THE PETITION

A. *Chevron* step two gives executive agencies a nearly limitless delegation of lawmaking authority when unchecked by courts.

In a world with *Chevron*, courts should ideally use all the tools of statutory construction to determine the meaning of a statute before declaring it ambiguous. This "step one" analysis, if done, would, in many cases, constrain the constitutional problems with the doctrine.[6] But that is not the reality. Often, courts skirt their judicial duty by prematurely declaring a statute ambiguous with little to no analysis. Indeed, "the persistence and willingness of judges to work hard before

[6] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989).

declaring statutes ambiguous is an important but perhaps overlooked difference between judges."[7]

Worse, Congress sometimes, as in this case, directs an agency to define a statutory term by regulation. This, in essence, is congressionally mandated ambiguity. This raises a question of scope. Does that directive merely activate the agency's authority at *Chevron* step two to make reasonable policy choices based on limiting principles within the statutory scheme? Or, does that delegation go further by expanding an agency's scope of authority to change the law's meaning to fit its policy goal? If a court takes the latter, more deferential position—as it did in this case—then there is no limiting principle to executive lawmaking.

This lack of a limiting principle at *Chevron* step two creates serious constitutional problems and undermines the rule of law. Indeed, without such a limitation, *Chevron* step two becomes a legislative act cloaked in justifications of ambiguity. "[A]gencies 'interpreting' ambiguous statutes typically are not engaged in acts of interpretation at all. Instead, as *Chevron* itself acknowledged, they are engaged in the 'formulation of policy.'"[8] This in turn allows an agency to use *Chevron,* "not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress."[9] In other words, it allows an agency to rewrite laws in violation of Article I of the Constitution, U.S. CONST. art. I.

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[7] Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 319 (2017).

[8] *Michigan v. EPA*, 135 S. Ct. at 2712–13 (citations omitted).

[9] *Id*. at 2713.

This regime undercuts the Framers' design to prevent excessive lawmaking—which the Framers thought was one of "the diseases to which our governments are most liable."[10] Article I requires a law to "win the approval of two Houses of Congress—elected at different times, by different consistencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto."[11] This gauntlet, the Framers thought, was a "bulwark[] of liberty."[12]

When lawmaking is made easy through congressional delegation, moreover, the regulated public is susceptible to having life, liberty, or property taken from them without fair notice. A fundamental tenet of the Due Process Clause requires that laws "which regulate persons or entities must give fair notice of conduct that is forbidden or required."[13] A punishment will thus violate due process when a "regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[14] *Chevron* turns

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[10] *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (footnote omitted).

[11] *Id.*

[12] *Id.* Indeed, it is a feature and not a bug of our constitutional structure that laws are hard to enact. *See* John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2d 191, 202 (2007); *see also Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 61 (Alito, J., concurring).

[13] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citations omitted).

[14] *Id.* (citations and quotation marks omitted).

this fundamental principle on its head because an executive agency can decide—after a person has acted in some cases—what an ambiguous law means and haul that person into court.

To illustrate, suppose Congress enacts a statute that allows an agency to regulate the interstate sale of sandwiches. It delegates to an agency the authority to define what "sandwich" means. The dictionary definition of sandwich reads: "two or more slices of bread or a split roll having a filling in between."[15] Of course, many food items could meet this definition. In this way, the term "sandwich" is ambiguous. Does "sandwich" include a hot dog? A burrito? A hot dog could fit within this definition.[16] A burrito less likely does.[17] But either could be within reasonable bounds of what "sandwich" means.

Yet what if the agency then decided that the same policy goals Congress sought in the legislation regulating sandwiches applied to ice cream sandwiches?

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[15] Merriam-Webster's Collegiate Dictionary (10th ed. 1994) at 1035.

[16] *See* Janine Puhak, Ruth Bader Ginsburg rules that hot dogs are sandwiches, Mar. 23, 2018, https://www.foxnews.com/food-drink/ruth-bader-ginsburg-rules-that-hot-dogs-are-sandwiches; *but see*, Josh Scherer, A Bro And A Philosopher Debate The True Meaning of a Sandwich, Apr. 21 2015, https://first-wefeast.com/eat/2015/04/philosophy-of-meat-bread (stating "the history of the hot dog is different than the history of sandwiches . . . . When history's first Frankfurter was made in Central Europe and stuck in a roll of bread, it was done outside the modern concept of a sandwich . . . they likely are sandwiches, but only in the same sense that benches are also chairs").

[17] *See White City Shopping Ctr., LP v. PR Rests., LLC*, 21 Mass. L. Rptr. 565 *3 (2006) (finding a burrito is, in fact, not a sandwich).

Sandwiches and ice cream, after all, are both food items. Suppose then, that the agency charged with administering the statute brought an adjudicatory enforcement action against an ice cream maker for not complying with the statute.

Ideally, a court would have little trouble dispatching the agency's "ice cream sandwich rule." Yet Petitioner's case shows courts do not always strike down unreasonable agency interpretations. How can a "local community" or "rural district" mean vast distances and significant chunks of populated territory?[18]

* * *

As one circuit court judge has noted, "[m]uch of the recent expressed concern about *Chevron* ignores that *Chevron*'s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion. This case presents just one example of those kinds of agency tactics."[19]

This case presents another. The Court should therefore grant the petition and provide the lower courts with a meaningful limiting principle at *Chevron* step two.

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[18] As Petitioner points out, this case provides a textbook example of how *Chevron* step two permits limitless discretion in defining and enforcing terms beyond their common meaning and in manner that alters the law and does not hinge on expertise. *See* Pet. Br. 5–7, 9–10.

[19] *Glob. Tel*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017). (Silberman, J. concurring) (footnote omitted)

B. Unbridled agency discretion at *Chevron* step two has serious consequences for the regulated public that reach beyond this case.

Petitioner's case is not an anomaly. Delegated ambiguities leave individuals and entities at the mercy of regulatory discretion in many areas of federal law. This case is just one example of how *Chevron* deference works to deprive litigants of their rights. The doctrine will continue to do so if the Court does not place limiting principles on it.

Take the NLRB's implementation of the NLRA. This Court has recognized that balancing conflicting interests in the labor context is a difficult task assigned to the NLRB. Yet employees' vital interests thus are "subject to limited judicial review."[20] Indeed, deference doctrines—including *Chevron*—give the NLRB great lawmaking power.[21] Deference of this sort is a barrier to judicial oversight and leaves important legislative power in unelected bureaucrats' hands.

Many cases reveal the breadth of discretion provided to the NLRB. In *Chamber of Commerce of the United States of America v. National Labor Relations*

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[20] *NLRB. v. Truck Drivers Local Union No. 449, Int'l Bhd. of Teamsters, Chauffeurs Warehousemen & Helpers of Am. A.F.L.*, 353 U.S. 87, 96 (1957).

[21] See, e.g., *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, AFL-CIO*, 434 U.S. 335, 350 (1978); *Indus. TurnAround Corp. v. NLRB*, 115 F.3d 248, 251 (4th Cir. 1997) ("Although we ordinarily review questions of law de novo, the NLRB's interpretation of the Act is entitled to deference if it is reasonably defensible."); *NLRB. v. Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384, 1392 (10th Cir. 1992).

Board,[22] for example, the court held that "[o]nce a reviewing court reaches [*Chevron*'s] second step, it must accord 'considerable weight' to an executive agency's construction of a statutory scheme it has been 'entrusted to administer.'"[23]

In *UC Health v. NLRB*,[24] the D.C. Circuit upheld a Regional Director's authority to direct and certify a union election even while the NLRB itself had no quorum. Citing *Chevron*'s second step, the court found the term "quorum" was ambiguous because it did not speak to the exact and unlikely circumstances of the case—the statute was silent about the issue. The majority ruled: "the structure of the statute supports the Board's interpretation just as well as it might support UC Health's construction."[25] Tie goes to the home team.

The dissent, however, recognized the NLRB's statutory interpretation was "flatly" unreasonable and incompatible with the statute.[26] In finding the NLRB's construction unreasonable, the dissent cautioned that "[w]e must bear in mind that even if we are following *Chevron*'s second step, we are construing a Congressional act—the second step is not open sesame for the Agency."[27] Yet, often, that is exactly how courts treat agency interpretations.

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[22] *Chamber of Commerce of the United States of Am. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).

[23] *Id.* at 183 (citations omitted).

[24] *UC Health v. NLRB*, 803 F.3d 669 (D.C. Cir. 2015).

[25] *Id.* at 675.

[26] *See id.* at 687 (Silberman, J. dissenting).

[27] *Id.*

Much of the rationale for this excessive deference to the NLRB and other agencies is supposedly justified by agency expertise and therefore the experts should make the rules. Yet the definitions of labor law terms are often legal and not scientific questions. What the NLRB engages in is not "expertise" so much as political will. This puts the law's status in flux all without going through the constitutionally prescribed political process.[28]

Indeed, aided in large part by *Chevron* deference, agencies across the federal government, like the NLRB, for decades have abruptly changed legal and policy positions on dozens of major issues affecting the regulated public's individual liberties. They have done so not by using the statute Congress passed, but by using supposedly ambiguous statutory language to instill their political preferences—political preferences enacted without going through the democratic processes prescribed by the Constitution.

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Applying a limiting principle at *Chevron* step two may sometimes contribute to the law's ossification. The petition here involves long ago enacted banking schemes that may require overhaul because of eco-

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[28] Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 482–83 (2016) (footnote omitted) ("Sometimes the claim to expertise is entirely fraudulent; the most well-documented case is that of the National Labor Relations Board . . . . The permanent staff of an agency may have a great deal of technical expertise, but the agency's ultimate decisions are made by the experts' political masters, who have sufficient discretion that they can make decisions based upon their own policy preferences[.]")

nomic and technological developments. Many regulatory frameworks operate under dated economic, political, and technological policy rationales, and many federal statutes likely need a fresh legislative look. However, that is a job for Congress and the democratic process—not unelected bureaucrats.

CONCLUSION

For foregoing reasons, and those stated by the Petitioner, the Court should grant the petition.

Respectfully submitted,

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