No. 19-1203

In The
Supreme Court of the United States

CHILDREN'S HOSPITAL ASSOCIATION OF TEXAS, et al.,

Petitioners,

v.

ALEX M. AZAR II, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Respondents.

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

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Because of Medicaid's low reimbursement rates, hospitals with large Medicaid patient populations have a statutory right to supplemental "Disproportionate Share Hospital" payments. Each year, those payments are capped based on a formula set by Congress: as relevant here, that cap equals the amount of costs the hospital incurred serving Medicaid-eligible patients (as determined by the Secretary of Health and Human Services (HHS)) minus the payments the hospital received from Medicaid. For years, the Centers for Medicare and Medicaid Services (CMS) followed this formula, subtracting only Medicaid payments from the hospital's costs. But then CMS changed course to also subtract the amount of private insurance payments the hospital receives from treating Medicaid-eligible patients. After its initial attempt to change the policy was enjoined for being inconsistent with existing regulations, CMS promulgated a new regulation—but continued to insist this policy was the same as the prior regulation's policy. The court below, like every court to address the question, rejected CMS's claim of consistency. Yet it upheld CMS's new regulation under *Chevron*.

The questions presented are:

1. Whether an agency may receive *Chevron* deference when it erroneously denies that its current interpretation marks a change in position.

QUESTIONS PRESENTED—Continued

2. Whether the Medicaid Act permits CMS to reduce disproportionate share hospitals' supplemental payment cap based on private insurance payments.

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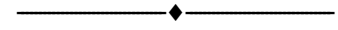
INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court. *See*, *e.g.*, *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def.*, 138 S. Ct. 617 (2018) and *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

This case is of particular interest to Amicus because *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), has become an unworkable doctrine that violates separation of powers principles. Moreover, lower courts often fail to apply the traditional tools of statutory construction when examining potentially ambiguous statutes under *Chevron*. This misapplication affords substantial and unconstitutional deference to executive agencies. Without the check of proper statutory interpretation, the executive branch is allowed to usurp both judicial and legislative powers that the Constitution does not grant it.



[1] Rule 37 statement: The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; Amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

There are many reasons to do away with *Chevron* deference. "[T]he doctrine is so indeterminate—and thus can be antithetical to the neutral, impartial rule of law—because of the initial clarity versus ambiguity decision." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2154 (2018). At *Chevron* step one, courts must ask whether the meaning of a statute's text is ambiguous. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984). Many courts, including the First, Third, Fourth, and Eleventh Circuits, erroneously assume that congressional silence automatically renders a law ambiguous.[2] Feeling satisfied that step one is met, they reflexively move on to step two. *Id.*

In *Chevron*, this Court instructed that the traditional tools of statutory interpretation exist to decipher statutory text when answers are not immediately obvious. *See Chevron*, 467 U.S. at 843 n.9; *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("Hard interpretive conundrums, even relating to complex rules, can often be solved.") (citing *Pauley v. Bethenergy Mines*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)). This Court recently explained that, when it comes to deferring to an agency's interpretation of its own regulation, relying on one or two tools is not enough;

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[2] *See*, *e.g.*, *Helen Mining Co. v. Elliott*, 859 F.3d 226, 234–35 (3d Cir. 2017); *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014) *abrogated by Pereira v. Sessions*, 138 S. Ct. 2105 (2018); *Scatambuli v. Holder*, 558 F.3d 53, 58 (1st Cir. 2009); *Castillo-Arias v. United States Att'y Gen.*, 446 F.3d 1190, 1196 (11th Cir. 2006).

judges can defer to an agency's interpretation "only when that legal toolkit is empty and the interpretive question still has no single right answer." *Kisor*, 139 S. Ct. at 2415. The same principle applies when an agency interprets a statute.

But exactly which tools are in the toolkit? To glean congressional intent, this Court has relied on the plain meaning rule, canons of construction, stare decisis, and legislative history and purpose. *See* Kristin E. Hickman & Richard J. Pierce, Jr., Federal Administrative Law 629 (2d ed. 2014). When it comes to *Chevron* deference, however, lower courts splinter over their use of statutory tools. *Compare Blandino-Medina v. Holder*, 712 F.3d 1338, 1345 (9th Cir. 2013), *Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir. 2007), *and Am. Land Title Ass'n v. Clarke*, 968 F.2d 150, 155 (2d Cir. 1992) *with Children's Hosp. Ass'n of Tex. v. Azar*, 300 F. Supp. 3d 190, 208 (D.D.C. 2018) *and Exelon Generation Co., LLC v. Local 15, IBEW*, 676 F.3d 566, 571 (7th Cir. 2012). The result: courts trust that they will simply know ambiguity "when they see it," but because statutes are often ambiguous at first glance, courts increasingly defer to agency decisions.[3]

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[3] As Justice Kavanaugh recently pointed out, the statutory tools "will almost always" guide a court to find the best interpretation of a regulation. *Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring in the judgment) ("[T]he court then will have no need to adopt or defer to an agency's contrary interpretation. In other words, the footnote 9 principle, taken seriously, means that courts will have no reason or basis to put a thumb on the scale in favor of an agency[.]"). The same rings true for statutory interpretation.

Amicus agrees with Petitioner that *Chevron* should be reconsidered and that this case is an appropriate vehicle for doing so. That said, if this Court is not yet prepared to bid adieu to *Chevron* deference, this case still presents an opportunity to provide lower courts with "candid and useful guidance"[4] about the proper way to apply the traditional tools of statutory interpretation to avoid the constitutional pitfalls that could accompany exceedingly deferential review.

ARGUMENT

I. Lower courts need stronger guidelines about which tools of statutory construction are necessary for a *Chevron* step one inquiry.

A. Courts that follow *Chevron* step one disagree about which interpretive tools are necessary or available.

Even when courts rely on the traditional tools of statutory construction to determine if a statute is ambiguous, they have expressed concerns about which tools to apply. As then-judge Gorsuch explained: "[Q]uestions linger still about just how rigorous *Chevron* step one is supposed to be. . . . what materials are we to consult? The narrow language of the statute alone? Its structure and history? Canons of interpretation? Committee reports? Every scrap of legislative history we can dig up?" *Gutierrez-Brizuela v. Lynch*,

[4] *Id.* at 2425 (Gorsuch, J., concurring in the judgment).

834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring).

Of the many tools this Court has enumerated, three canons of construction are of particular interest here: the rule against surplusage or superfluity, *expressio unius est exclusio alterius*, and the whole act rule. Here, the D.C. Circuit Court treated these tools quite differently than both the D.C. District Court and other federal courts. *See* Pet. 11 n.2, 25; *see also Children's Hosp. Ass'n of Tex.*, 300 F. Supp. 3d at 198, 207. As a result, the outcome of this case in the lower courts largely, if not entirely, depended on the forum interpreting § 1396r-4(g)(1)(A).

1. Courts can and should rely on the rule against superfluity in cases like this one.

As this Court has held, "[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). In other words, a court should presume that every word in a statute has meaning, and Congress does not intend to repeat words or add unnecessary language to a statute.

Several lower courts apply this canon when faced with competing statutory interpretations. *See*, *e.g.*, *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685, 697–98 (8th Cir. 2017) (finding that courts should not read a term into a law when that term is expressly included

in one part of the law but is "conspicuously absent" later, especially when the reading would result in superfluity); *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1274 (10th Cir. 2017) (searching for "contextual clues" within a statute to avoid surplusage and rejecting a reading that would render terms superfluous); *Schneider v. Chertoff*, 450 F.3d 944, 954 (9th Cir. 2006) (applying the tools of construction at *Chevron* step one to the Secretary of HHS's regulation and holding that "if we were to accept the Secretary's regulation as proper, [certain statutory provisions] would be surplusage").

Here, the canon against surplusage counsels against deference to the Secretary of HHS.

> The Medicaid Act separately describes the 'payments' that are subtracted from the 'costs' to obtain the Medicaid Shortfall. Congress could not have intended to grant the Secretary the discretion to include other payments within the term "costs," *while separately defining payments*. If it did, the definition of payments that must be subtracted from costs to determine the Medicaid Shortfall would be surplusage.

Children's Hosp. Ass'n of Tex., 300 F. Supp. 3d at 207 (quoting *New Hampshire Hosp. Ass'n v. Burwell*, No. 15-CV-460-LM, 016 WL 1048023, at *12 (D.N.H. Mar. 11, 2016)) (emphasis added). Why would Congress grant the Secretary broad discretion to define costs incurred *and* net payments, only to define net payments

in the very same clause?[5] "To allow the Secretary to redefine 'costs' to net out a third category of payments—i.e., 'third-party payments, including but not limited to, payments by Medicare and private insurance,' . . . would 'render the Congressional definition of "payments" in the very same clause superfluous.'" *Id.* (quoting *Children's Hosp. of the King's Daughters, Inc. v. Price*, 258 F. Supp. 3d 672, 687 (E.D. Va. 2017)). Thus, the evidence of surplusage is stacked against the D.C. Circuit, which concluded that the rule against superfluity was unhelpful here. *Id.* at 11a–12a.

2. *Expressio unius est exclusio alterius* is also a necessary tool to understand 42 U.S.C. § 1396r-4(g)(1)(A).

The canon of *expressio unius est exclusio alterius* also counsels against deference to the Secretary of HHS. Translated as "the expression of one is the exclusion of another," *expressio unius* stands for the principle that when something is specified in a law, Congress has intentionally omitted all other options. *See United States v. Arredondo*, 31 U.S. 691, 725 (1832). Although the D.C. Circuit is not alone in viewing this canon as

[5] The costs incurred are "determined by the Secretary and net of payments under this subchapter, other than under this section, and by uninsured patients[.]" 42 U.S.C. § 1396r-4(g)(1)(A). The subchapter referenced here—42 U.S.C. § 1396—is titled "Grants to States for Medical Assistance Programs" and is devoted to Medicaid. Thus, the "payments under this subchapter" are Medicaid payments.

"feeble," *expressio unius* is nevertheless a tool that remains in the statutory toolkit.[6]

Several circuit courts of appeal rely faithfully on this tool. *See*, *e.g.*, *Blandino-Medina*, 712 F.3d at 1345 (finding that where Congress expressly created categories of per se crimes in a statute, *expressio unius* dictated that the omission of other crimes was intentional, because "when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions") (quoting *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005)) (internal quotation marks and citation omitted); *Waggoner*, 488 F.3d at 636 (relying on *expressio unius* to conclude that where parts (b) and (c) of a statute required a showing of good faith, but part (a) did not, Congress intended to exclude the good faith requirement from part (a)); *Am. Land*, 968 F.2d at 155 (holding under *expressio unius* that if Congress intended to allow national banks to sell insurance in large cities, it would not have specifically limited such businesses to "any place the population of which does not exceed five thousand inhabitants"); *Serv. Life Ins. Co. v. United States*, 293 F.2d 72, 75–76 (8th Cir. 1961) (relying on Supreme Court precedent to find that "when a statute

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[6] *Children's Hosp. Ass'n of Tex.*, 300 F. Supp. 3d at 208; *see also Exelon*, 676 F.3d at 571 (referring to *expressio unius* as a "beleaguered canon"). *But see Arangure v. Whitaker*, 911 F.3d 333, 340 (6th Cir. 2018) ("Within the family of descriptive canons, linguistic canons are the strongest species. These canons simply 'reflect[ ] accepted notions of diction, grammar, and syntax.' . . . Examples include the *expressio unius* canon[.]") (quoting Black's Law Dictionary (10th ed. 2014)).

limits a thing to be done in a particular mode, it includes the negative of any other mode," and, as such, when Congress removed a variable from a tax formula and specifically placed it in a separate equation, Congress must have intended to limit the original formula accordingly).

These cases demonstrate that *expressio unius* goes hand in hand with the rule against superfluity. "It is the duty of the court to give effect, if possible, to every clause and word of a statute." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882). When reading a statute, courts must presume that Congress means what it says. These canons work together to show that Congress does not use extraneous language and that the exclusion of words is presumptively intentional.

Here, subsection (g)(1)(a) could simply say that a hospital cannot receive a DSH payment if it exceeds "*net* costs incurred . . . (as determined by the Secretary)." Or it could limit payments to "costs incurred *and net of payments* (as determined by the Secretary)." But Congress specifically couched the discretionary clause between "costs incurred" and "net payments." *See* 42 U.S.C. § 1396r-4(g)(1)(A). The rule against superfluity already suggests this was intentional.

Moreover, there were other variables available to Congress when determining its formula: Medicare payments and payments by private insurers. In a separate formula in subsection (g)(2)(A), Congress specifically excluded "amounts received . . . *from third party payors*." 42 U.S.C. § 1396r-4(g)(2)(A) (emphasis added).

Thus, Congress knew of the other available inputs—Medicare and private insurers—but it expressly omitted those variables in (g)(1)(A), opting only to include Medicaid. *Expressio unius* dictates that Congress intended to limit the Secretary's discretion to calculate costs incurred, and that it included net Medicaid payments in the calculation at the exclusion of Medicare and private insurers.

3. The whole act rule, together with the consistent usage canon, provides an unambiguous reading of this statute.

Finally, a look at the whole act—and more specifically, the consistent usage of terms within the act—also provides an unambiguous guide for CMS to follow. Although it is true that courts should be cautious when examining a statute in its entirety because "statutes are often assembled the way Christmas trees are decorated, with ornaments being added or subtracted willy nilly," the consistent usage canon is well-settled. William N. Eskridge, Jr. et al., Cases and Materials on Statutory Interpretation 343, 347 (2012). Under the consistent usage rule, courts presume that "identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *see also Castañeda v. Souza*, 810 F.3d 15, 26–35, 34 n.29 (1st Cir. 2015) (rejecting an agency interpretation at *Chevron* step one when the structure of a law and its legislative history indicated that Congress intended statutory language to remain consistent despite later amendments to the law); *City*

of Cleveland v. Ohio, 508 F.3d 827, 839–40 (6th Cir. 2007) (denying deference to an agency when the plain meaning of the text, viewed in the context of the whole statute and its legislative history, was unambiguous); *United States v. McGoff*, 831 F.2d 1071, 1080–81 (D.C. Cir. 1987) (finding an agency could not interpret a statutory provision in isolation because the reading conflicted with the act as a whole).

And just as the surplusage rule tracks closely with *expressio unius*, the consistent usage canon is also closely related. "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Here, CMS's interpretation is not consistent with the rest of the statute. "In the Medicaid and Medicare settings, Congress and the courts have long recognized a distinction between eligibility and entitlement: 'eligibility' refers to 'qualification' for the benefit, while 'entitlement' refers to a 'right' to receive that benefit." Pet. 28. A patient can be *eligible* for Medicaid even when he has private insurance. *Id.* But a patient is only *entitled* to Medicaid when he has a right to Medicaid benefits; in other words, when he does not receive private insurance. *Id.*

This distinction is "fundamental." *Id.* Looking at the Medicaid statute as a whole, surely Congress

understood the difference between these terms. By making eligibility the requirement on which the DSH calculation turns, Congress must have intended to include hospitals that treat Medicaid-eligible individuals with private insurance. Otherwise it would have simply used the word "entitled," because that term automatically excludes patients receiving private insurance. This language, examined in the context of the entire statute and consistent with its prior usage, precludes the Secretary from withholding payments from hospitals that treat Medicaid-eligible patients who have private insurance. Therefore, "[w]hat CMS here treated as a bug in the system was designed by Congress as a feature." *Id.* at 29.

B. This Court should hold lower courts accountable to their judicial duties by providing them with more explicit instructions for applying statutory tools and canons.

Despite longstanding precedent supporting the canons described above, the D.C. Circuit rejected all three tools when interpreting § 1396r-4(g)(1)(A). *Children's Hosp. Ass'n of Tex. v. Azar*, 933 F.3d 764, 770–72 (D.C. Cir. 2019). As the distinct approaches between the D.C. Circuit and D.C. District Court show, there remains significant uncertainty among lower courts about how to apply the tools of statutory interpretation at *Chevron* step one.[7] Is *expressio unius* too feeble to

[7] *See*, *e.g.*, *Helen Mining Co.*, 859 F.3d at 234–35 (finding that Congress may or may not have intended to omit a word from a

function? Should the whole act rule be a first resort or last? Can superfluity be intentional at times? Is there an order of operation courts should follow? These are just some of the questions this case raises.

It is tempting to skip *Chevron* step one altogether by abandoning the tools of statutory construction. "But all too often, courts abdicate [their] duty by rushing to find statutes ambiguous, rather than performing a full interpretive analysis." *Arangure*, 911 F.3d at 336. The traditional tools of interpretation can prevent courts from giving in to this temptation.

The tools of construction are not just optional; they are necessary. *Kisor*, 139 S. Ct. at 2415 (majority op.). To preserve uniformity and prevent distorted readings of statutes, courts must *exhaust* the traditional tools of statutory construction. *Id.* And to exhaust their tools, they need to understand exactly which ones are in the toolkit.

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statute and concluding the text was ambiguous without further statutory review); *Urbina*, 745 F.3d at 740 (agreeing with an agency "that the relevant statutory provision is ambiguous" without employing any tools of construction) *abrogated by Pereira*, 138 S. Ct. 2105; *Scatambuli*, 558 F.3d at 58 (skipping *Chevron* step one by only mentioning "ambiguous" once and failing to employ any tools of construction); *Castillo-Arias*, 446 F.3d at 1196 (finding a statute ambiguous at step one because "Congress did not directly speak on the issue" and deferring to an agency interpretation without engaging in statutory construction).

II. This case provides an opportunity for this Court to reconsider *Chevron*, or at the very least reaffirm that *Chevron* does not condone a "know it when we see it" approach to statutory ambiguity.

Although Justice Stevens—the author of *Chevron*—advised that deference "need not be an all-or-nothing venture," it has become just that. *Negusie v. Holder*, 555 U.S. 511, 533 (2009) (Stevens, J., concurring in part and dissenting in part). Through *Chevron*, judges are not the only individuals tasked with interpreting statutory language; entire agencies must also divine the congressional intent behind each word. Moreover, a court "need not conclude" that an agency's interpretation is the only possible outcome. *Chevron*, 467 U.S. at 843 n.11. It need not even agree with the agency's reading of the statute. *Id.*

This leaves room for agencies like CMS to forgo the tools of statutory construction and instead give statutes a cursory reading informed by personal preferences. *See Kisor*, 139 S. Ct. at 2442 (Gorsuch, J., concurring in the judgment). The result defies common sense: "a reviewing court must afford a reasonable, but ill-considered, agency decision just as much deference as a well-considered agency decision that happens to be reasonable." Ronald J. Krotoszynski, Jr., *Administrative Law Discussion Forum: Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 Admin. L. Rev. 735, 743 (2002). As such, courts have become increasingly deferential—and even complacent—in their application of *Chevron*.

Justice Kennedy lamented this "reflexive deference" as the "abdication of the Judiciary's proper role in interpreting federal statutes." *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring). Statistics suggest he is right: a recent study found that circuit courts of appeal engaging in *Chevron* analyses were 70% likely to conclude that a statute was ambiguous at step one. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 33–34 (2017). And when circuit courts reached step two, agency win rates were over 93%. *Id.*

"[P]recedent cautions us not to be so star-struck by [*Chevron*] that we must defer to the agency at the first sign of uncertainty about the meaning of the words that Congress chose." *Castañeda*, 810 F.3d at 23. To prevent the abdication of judicial duties through reflexive deference, courts must be instructed to rely on the tools of statutory construction. If courts continue to trust that they will recognize ambiguity when they see it, the *Chevron* test will become an all but hollow echo chamber for executive policy.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this amicus curiae brief, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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