No. _____

In the
# Supreme Court of the United States

MICHELLE VALENT,
*Petitioner*,
v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL SECURITY,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner Michelle Valent performed unpaid volunteer work for her brother's veterans organization while receiving disability benefits under Title II of the Social Security Act. The Commissioner of Social Security punished Ms. Valent's failure to report this work with $126,210 in monetary sanctions. The Commissioner acted under his authority to sanction persons who fail to disclose facts that they "know[] or should know" are "material to the determination of any initial or continuing right to" disability benefits. 42 U.S.C. § 1320a-8(a)(1)(C). The Commissioner concluded that Ms. Valent should have known that her work activity was "material" to her continuing right to receive disability benefits, even though the Act forbade the Commissioner from using Ms. Valent's "work activity . . . as evidence that" she was "no longer disabled." *Id.* § 421(m)(1)(B).

By a divided vote, the Sixth Circuit affirmed, deferring to the Commissioner's interpretation of the Act under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

The questions presented are:

1. Whether the Court should overrule *Chevron*.

2. Whether *Chevron* requires courts to defer to an agency's resolution of a conflict between statutory provisions.

3. Whether the Court should summarily reverse the decision below, because the Sixth Circuit

violated *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), by affirming an administrative order based on an allegation that the agency decisionmaker rejected as unsupported by the evidence and that the Commissioner concedes was not a basis for the order.

## RULE 14.1(b)(iii) STATEMENT

No proceedings in state or federal court are directly related to this case.

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## PETITION FOR A WRIT OF CERTIORARI

Michelle Valent respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit is reported at 918 F.3d 516 and reproduced in App. 1–29. The final order of the Commissioner of Social Security is reported at DAB No. A-15-104 and reproduced in App. 33–74.

## JURISDICTION

The Court of Appeals entered judgment on March 20, 2019. App. 1. On June 13, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 16, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Pertinent statutes and regulations are reproduced in App. 226–302.

## STATEMENT

In this case, Ms. Valent, a disabled woman, performed unpaid volunteer work for her brother's veterans organization while receiving disability benefits under Title II of the Social Security Act.

Because Ms. Valent had been receiving disability benefits for at least 24 months, the Act prevented the Commissioner from using Ms. Valent's "work activity" as "evidence" that she was "no longer disabled." 42 U.S.C. § 421(m)(1)(B). Brushing this protection aside, the Commissioner concluded that Ms. Valent should have known her unpaid "work" was "material" to whether she remained "disabled," and therefore that she was subject to civil penalties for failing to disclose her work. *See* 42 U.S.C. § 1320a-8(a)(1)(C). The Commissioner ordered Ms. Valent to pay $126,210 in monetary sanctions.

A divided Sixth Circuit panel affirmed the Commissioner's order, deferring to the Commissioner's interpretation of the law under "the *Chevron* framework." App. 8 (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984)). Judge Kethledge dissented. App. 19.

In affirming the order, the Sixth Circuit exhibited "reflexive deference" to the Commissioner's interpretation of the statute. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). The court found the statute ambiguous based on "a conclusory statement about" an apparent conflict between "two provisions at issue, and the mere fact of another court's conflicting decision." App. 25 (Kethledge, J., dissenting). The court "hardly employed" the "tools of statutory construction" at all.

App. 21. "Rather than analyze the interpretive issue, the majority merely frame[d] it" before concluding that the statute was ambiguous. App. 21. The majority then deferred to an interpretation that "is almost a test case for how far an agency can go in *Chevron*'s 'step two.' " App. 26 (Kethledge, J., dissenting). Indeed, as Judge Kethledge concluded in dissent, "the agency's interpretation—now the law of our circuit—construes the words of the statute in a manner that no ordinary speaker of the English language would recognize." App. 21.

The Sixth Circuit's opinion "suggests an abdication of the Judiciary's proper role in interpreting federal statutes." *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring). The culprit is the deference doctrine adopted by the Court in *Chevron*, 467 U.S. at 842–44. "*Chevron* requires a federal court to accept the agency's construction of" an ambiguous statute, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Given the serious concerns several Members of the Court have raised about *Chevron*, grave inconsistency and uncertainty in applying the doctrine, and lower courts' abdication of the judicial role, "the time has come to face the behemoth." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). The Court should grant review to overrule *Chevron*.

In the alternative, the Court should grant certiorari to narrow *Chevron*'s reach. The Sixth Circuit deferred because two clauses of § 421(m) "appear to conflict with one another." App. 8. But

"[d]irect conflict is not ambiguity" under *Chevron*. *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 76 (2014) (Roberts, C.J., concurring in judgment). The task of reconciling conflicting laws is a traditional judicial function reserved for the courts, not a gap-filling policy judgment delegated to agencies under *Chevron*. An agency's attempt to resolve statutory conflict is thus ineligible for *Chevron* deference. Yet, like the Sixth Circuit here, federal courts routinely defer to agencies whenever statutes seem to conflict. The Court should grant certiorari to clarify that *Chevron* does not compel courts to abandon their traditional duty of resolving statutory conflicts.

Finally, if the Court declines to grant certiorari to overrule or narrow *Chevron*, the Court should summarily reverse to redress the Sixth Circuit's stark violation of a basic principle of administrative law. The Sixth Circuit affirmed the order based on an investigator's allegation, which after a formal hearing the agency's finder of fact expressly concluded was "unsupported by the evidence," App. 155, and which the Commissioner concedes was not a basis for his order, App. 23–24 (Kethledge, J., dissenting) (citing Oral Arg. at 28:02). That is the administrative-law equivalent of relying on the prosecutor's allegation, repudiated by the trial judge, to uphold a conviction. *Chenery* forbids this result. Under *Chenery*, a reviewing court may affirm an agency decision based only on a rationale that the agency itself articulated; for it is a "basic legal principle[]" that "judicial judgment cannot be made to do service for an administrative judgment." *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam) (quoting *SEC v. Chenery*, 318 U.S. 80, 88

(1943)). The court of appeals' error warrants "summary reversal." *Id.* at 185.

## I. Legal Background

### A. Title II of the Social Security Act

Title II of the Social Security Act of 1935 provides social insurance benefits to individuals "whose disability prevents them from pursuing gainful employment." *Heckler v. Day*, 467 U.S. 104, 106 (1984). To qualify as disabled, an individual must meet two related requirements. *Barnhart v. Walton*, 535 U.S. 212, 217 (2002). First, the individual must be unable to "engage in any substantial gainful activity." 42 U.S.C. § 423(d)(1)(A). Second, this inability must stem from a "medically determinable physical or mental impairment which can be expected to result in death" or to last "not less than 12 months." *Id.* Individuals remain eligible for benefits only as long as they are disabled. The Commissioner of Social Security must periodically verify "that the beneficiary continues to be eligible for the program" through "a process called a 'continuing disability review.' " App. 3 (citing 42 U.S.C. § 421(i), (m)).

The Commissioner has interpreted "substantial gainful activity" to mean work that "[i]nvolves doing significant and productive physical or mental duties; and [i]s done (or intended) for pay or profit." 20 C.F.R. § 404.1510. To decide whether an individual is able to engage in "substantial gainful activity," the Commissioner typically considers a beneficiary's "earnings." *Id.* § 404.1574. The Commissioner has promulgated guidelines on the amounts of earnings

that rise to the level of substantial gainful activity. *Id.* § 404.1574(b).

As an alternative test for determining an individual's ability to engage in "substantial gainful activity," the Commissioner may, in some situations, look beyond earnings and examine a beneficiary's work activity. *Id.* § 404.1574(b)(3)(ii). The Commissioner may examine "work activity" to see whether it is "comparable to that of unimpaired people" in the relevant labor market, or whether it is "worth the amounts" established by the Commissioner's earning guidelines. *Id.* § 404.1574(b)(3)(ii). As explained below, however, Congress curtailed the Commissioner's use of this alternative "work activity" test in 1999, by prohibiting the Commissioner from considering, as evidence of disability, the "work activity" of individuals who have been receiving disability benefits for 24 months. *See id.* § 404.1574(b)(3)(iii) (implementing exemption).

### B. The Ticket to Work and Work Incentives Improvement Act of 1999

Individuals who have been disabled for over 24 months have strong incentives to remain on the disability rolls. At 24 months, beneficiaries get access to Medicare coverage. 42 U.S.C. § 426(b)(2)(A). So in addition to losing their disability cash payments, these individuals risk losing health insurance if they become ineligible for disability benefits. *See* 42 C.F.R. § 406.12(d). Prior to 1999, this risk was a significant "work disincentive." Pub. L. 106-170, § (2)(a)(6), 113 Stat. 1860 (Dec. 17, 1999).

In 1999, Congress amended the Social Security Act to reduce this disincentive and "to help individuals with disabilities return to work." *Id.* § (2)(a)(11). As relevant here, Congress provided that when an individual has received disability benefits for over 24 months, "no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled." 42 U.S.C. § 421(m)(1)(B). In addition, Congress prohibited the Commissioner from scheduling a continuing disability review "solely as a result of the individual's work activity." *Id.* § 421(m)(1)(A). Congress, however, continued to permit "regularly scheduled" reviews "not triggered by work." *Id.* § 421(m)(2)(A). Congress also allowed the Commissioner to terminate benefits "in the event that the individual has earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity." *Id.* § 421(m)(2)(B).

The Commissioner promulgated rules implementing these "special exceptions" for 24-month beneficiaries in 2006. *Exemption of Work Activity as a Basis for a Continuing Disability Review*, 71 Fed. Reg. 66,840, 66,843 (Nov. 17, 2006). In that rulemaking, the Commissioner concluded that 42 U.S.C. § 421(m)(1)(B) bars the agency from "consider[ing] information about" work activity "to determine that you are able to engage in substantial gainful activity and are, therefore, no longer disabled." *Id.* at 66,846. Considering § 421(m)(2)(B) in light of the prohibition set forth in § 421(m)(1)(B), the Commissioner concluded that the statute allows the agency to "consider[] earnings alone" and not work activity, when examining a 24-month beneficiary's "substantial gainful activity." *Id.* at

66,846, 66,854; *see id.* at 66,846 ("[W]e will not consider other information in addition to your earnings."); *see* 20 C.F.R. § 404.1574(b)(3)(iii).

### C. Administrative Sanctions Provisions

Under the Social Security Act, 42 U.S.C. § 1320a-8, the Commissioner may impose civil penalties and assessments on any person who "withholds disclosure of[] a fact which the person knows or should know is material to the determination of any initial or continuing right" to disability benefits, if the person "knows, or should know, that the withholding of such disclosure is misleading."[1] A "material fact" is "one which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits." *Id.* § 1320a-8(a)(2).

The Commissioner may not sanction "any person" until after "written notice and an opportunity for the determination to be made on the record after a hearing at which the person is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the person." 42 U.S.C. § 1320a-8(b)(2). This language triggers "the formal adjudication requirements of the Administrative Procedure Act (APA)." *Cappetta v. Commissioner of Social Security*, 904 F.3d 158, 160 n.1 (2d Cir. 2018); *see* 5 U.S.C. § 554(a). Under these

[1] The Commissioner may impose "a civil money penalty of not more than $5,000" each time a beneficiary receives cash benefits "while withholding disclosure of such fact," and an assessment "of not more than twice the amount of benefits or payments paid." 42 U.S.C. § 1320a-8(a)(1).

formal procedures, an Administrative Law Judge (ALJ) employed by the U.S. Department of Health and Human Services takes evidence and renders "an initial decision, based only on the record." 20 C.F.R. § 498.220. The Inspector General (IG) of the Social Security Administration, exercising the Commissioner's prosecutorial function, bears "the burden of persuasion" during this proceeding, *id.* § 498.215(b)(2), which is "judged by a preponderance of the evidence." *Id.* § 498.215(c).[2]

Parties may appeal the initial decision to the Departmental Appeals Board (the Board), which "limit[s] its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law." *Id.* § 498.221(i). The Board's "recommended decision becomes the Commissioner's final decision 60 days after the [Board] serves the decision on the parties, unless the decision is remanded to the ALJ or the Commissioner modifies the decision." *Cappetta*, 904 F.3d at 161 (citing 20 C.F.R. § 498.222(a)).

A final decision of the Commissioner that imposes sanctions is reviewable in a federal court of appeals. 42 U.S.C. § 1320a-8(d)(1).

## II. Factual Background

Ms. Valent suffers from several debilitating psychiatric diseases including anxiety disorder, depression, and bipolar disorder. App. 101. Based on

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[2] The Commissioner has delegated prosecuting and investigative functions under the statute to the agency's Inspector General. 20 C.F.R. § 498.102.

her mental impairments and inability to engage in substantial gainful activity, Ms. Valent qualified to receive Title II disability benefits in 2003. App. 101.

Six years later, Ms. Valent began to volunteer for the War Era Veterans Alliance, an organization "founded and owned by her brother and sister-in-law." App. 4. According to her brother, Ms. Valent was allowed to work "if she chose to," with "no schedule or set hours." App. 107. Ms. Valent would "do little things for War Era Veterans Alliance to help her sense of self-worth." App. 109. Ms. Valent's brother testified that he "gift[ed] her about $12,000 per year" because "he promised his dad to take care of her," but that he did not compensate Ms. Valent for her volunteer work. App. 107, 109–10.

In 2012, the IG received a tip from a former employee of the Veterans Alliance. The tipster alleged that Ms. Valent "had been working for War Era Veterans Alliance." App. 101. In response, IG employees began investigating Ms. Valent, surveilling her home and interviewing witnesses. App. 103–04.

At the close of the investigation, the IG sent Ms. Valent a letter alleging that she had failed to report work for the Veterans Alliance. App. 219–20. The letter also alleged, as an aggravating factor, that Ms. Valent was paid "$400 per week." App. 221. The IG proposed that Ms. Valent pay a $100,000 civil monetary penalty and a $68,547 assessment, and

requested a check "in the amount of $168,547." App. 222–23.[3]

Ms. Valent requested a hearing before an ALJ.

## III. Proceedings Below

### A. Administrative Proceedings

After hearing testimony from multiple witnesses and admitting numerous exhibits into evidence, the ALJ issued an initial decision concluding that there was "no basis for the imposition" of sanctions against Ms. Valent. App. 188. The ALJ concluded that, as a matter of law, Ms. Valent was protected by 42 U.S.C. § 421(m)(1)(B), which prohibits the Commissioner from using her "work activity" as evidence that she is no longer disabled. App. 214–15. The IG appealed this initial decision to the Departmental Appeals Board. App. 161.

The Board reversed and remanded the matter to the ALJ. App. 163. Notwithstanding § 421(m)(1)(B), the Board reasoned that "work is relevant in determining whether amounts paid to a recipient are earnings from work, [so] work is a fact" the Commissioner could consider in determining whether Ms. Valent remains disabled. App. 177.

On remand, the ALJ again concluded that there was "no basis" to impose sanctions on Ms. Valent. App. 75. The ALJ concluded that "in light of the lack

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[3] In separate proceedings, the Commissioner first terminated Ms. Valent's disability benefits and later reinstated them, after finding on further review that she remained disabled. The merits of these separate decisions are not at issue in this case.

of clarity" in the Commissioner's regulations and forms, Ms. Valent had no reason to know that her failure to report work activity was misleading. App. 136–37.

In the alternative, the ALJ concluded that the IG's proposed sanctions were unreasonable. App. 154–57. The ALJ found no evidence that Ms. Valent "engaged in any more than sporadic work" for the War Era Veterans Alliance. App. 156. And the ALJ found that the IG's allegation that Ms. Valent was paid was "unsupported by the evidence." App. 155. Finding her not culpable, the ALJ imposed no sanctions. App. 157.

The Board again reversed. In relevant part, the Board accepted the ALJ's findings of fact, seeing no "compelling reason" to depart from them. App. 69, 72 & n.11.[4] The Board specifically agreed with the ALJ that the evidence was "not sufficient to establish . . . that Ms. Valent was paid $400 a week." App. 69. But the Board disagreed with the ALJ's legal conclusions, imposing a civil money penalty of $75,000 and an assessment of $51,210 on Ms. Valent. App. 74.

The Board's decision became the final decision of the Commissioner, and it was served on Ms. Valent on March 15, 2016. App. 30–31. Ms. Valent timely petitioned for judicial review on May 12, 2016.[5]

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[4] The Board only "disagree[d] with the ALJ's complete rejection of" Ms. Valent's appearance on the Alliance's "website as some evidence of [her] employment." App. 69. This disagreement is immaterial, because both the ALJ and the Board found that she did work for the Alliance.

[5] Ms. Valent erroneously filed suit in the U.S. District Court for the Eastern District of Michigan. No. 16-cv-11720. The district

### B. Court Proceedings

By a 2-1 vote, the Sixth Circuit affirmed the Commissioner's order.

The court began by misstating the basis for the Commissioner's decision. Ignoring the adjudicator's unambiguous findings, App. 155–56, as well as the Commissioner's concession to the contrary, App. 23–24 (Kethledge, J., dissenting), the majority asserted that the Commissioner had penalized Ms. Valent for failing to report "work activity that generated earnings," App. 6; *cf.* App. 23 (Kethledge, J., dissenting).

Proceeding from this fictional premise, the court addressed the following question: whether failure to report "work activity that generates earnings constitutes the omission of a 'material fact' under" the Act. App. 8. The court applied the *Chevron* framework to analyze this question. App. 7.

Under step one of *Chevron*, the court summarily concluded that § 421(m) was "ambiguous with respect to the question at issue" because two of its clauses "appear to conflict with one another." App. 8. In particular, the court reasoned, "[section] 421(m)(1)(B) appears to proscribe taking [work] activity into account, yet the Commissioner would need to do so in order to determine whether the individual has earnings that amount to 'substantial gainful activity' " under § 421(m)(2)(B). App. 9. The

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judge transferred the case to the Sixth Circuit under 28 U.S.C. § 1631, curing the jurisdictional defect. Stipulated Order, Doc. No. 32 (Sept. 8, 2017); *see Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 834 (2002).

court also reasoned that another circuit's decision—which had upheld the Commissioner's interpretation under *Chevron* step one and had found no ambiguity with respect to the question—was itself "evidence of ambiguity in the statutory scheme." App. 10 (citing *Cappetta*, 904 F.3d at 168).

Applying step two of *Chevron*, the court deferred to the Commissioner's interpretation. App. 11. Under that interpretation, the Commissioner *"cannot* take work activity into account" to determine whether a beneficiary remains medically impaired, but the Commissioner "*can* take work activity into account" to determine "whether a beneficiary is engaging in substantial gainful activity." App. 10–11. The court held that this was "permissible" because the court assumed that otherwise, the Commissioner would be "unable to examine a beneficiary's substantial gainful activity." App. 11.

In dissent, Judge Kethledge first contradicted the majority's central premise: He observed that "the Commissioner imposed the sanction based *solely* on Valent's failure to report 'work activity' *period*—without regard to whether she received any earnings from that activity." App. 23 (emphasis added). The court's erroneous "characterization" of the case as involving "earnings," he argued, "distorts the question presented by blending a fact that the agency may use as evidence against a beneficiary (*i.e.*, her earnings) with a fact the agency may not (*i.e.*, her work activity)." App. 23.

Turning to the merits, Judge Kethledge criticized the court's failure to "use all the tools of construction" to read the statute "as 'an harmonious whole,' " and its determination that the statute was

ambiguous based on nothing more than a "putative conflict" with § 421(m)(2)(B). App. 24–26. He also criticized the Commissioner's "amputation" of unambiguous statutory language. App. 27. As he explained:

> "[T]he statute is 'clear' on what it precludes: section 421(m)(1)(B) says the Commissioner may not use a beneficiary's work activity as evidence that she is not 'disabled' *simpliciter*, which means the agency cannot use a beneficiary's work activity as evidence for *any* part of a determination that she is not disabled. Nothing about that proscription is ambiguous. What the agency proposes here is not interpretation of a statute, but amputation, by which the agency (and now our court) discards roughly half the protection that Congress unambiguously provided to beneficiaries in § 421(m)(1)(B)."

App. 26–27.

## REASONS FOR GRANTING THE PETITION

### I. The Court Should Reconsider *Chevron*.

"Given the concerns raised by some Members of this Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision." *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring) (citations omitted). Whether to reconsider *Chevron* is an important question of federal law, and this case is an appropriate vehicle for doing so.

### A. *Chevron* Should Be Overruled.

*Chevron* has been criticized by multiple Members of the Court as erroneous, poorly reasoned, unworkable, and indeed unconstitutional. These criticisms support reconsideration.

**1. *Chevron* is inconsistent with the APA.** "Heedless of the original design of the APA," the Court in *Chevron* "held that agencies may authoritatively resolve ambiguities in statutes." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in judgment) (citing *Chevron*, 467 U.S. 842–43). The APA provides that "the reviewing court shall decide all relevant questions of law" and "interpret constitutional and statutory provisions." 5 U.S.C. § 706 (emphasis added). At least four Justices, and many scholars, agree that section 706 "seems to require de novo review on questions of law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., concurring in judgment). Yet *Chevron* requires courts to "accept the agency's construction" of an ambiguous statute, even when it is not "the best statutory interpretation." *Brand X*, 545 U.S. at 980.

*Chevron* has also been criticized for tampering with the APA's structure. The APA exempts "interpretative rules"—statements advising the public of an agency's construction of a statute—from notice-and-comment requirements. 5 U.S.C. § 553(b). This exemption was based on Congress's expectation that agency interpretations would not have the "force of law." *Mortgage Bankers Ass'n*, 135 S. Ct. at 1212 (Scalia, J., concurring in judgment). But *Chevron* deference defies that congressional expectation, as interpretive "rules that command deference *do* have

the force of law." 135 S. Ct. at 1212 (Scalia, J., concurring in judgment).

**2. *Chevron* is unconstitutional.** First, Article III judges have a "duty . . . to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). This duty means that a court cannot "be bound to adopt the [statutory] construction given by the head of a department." *Decatur v. Paulding*, 14 Pet. 497, 515 (1840). *Chevron* conflicts with that duty, insofar as it forces judges "to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction." *Michigan v EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

Second, by allowing agencies to assume the judicial role in their own cause, *Chevron* also leads to "the very sort of due process (fair notice) . . . concerns the framers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). Indeed, in the teeth of long-held principles of stare decisis, *Chevron* even allows agencies to overrule judicial precedents interpreting ambiguous statutes. *Brand X*, 545 U.S. at 980.

Third, *Chevron* sits uneasily with the Constitution's exclusive allocation of legislative authority to Congress. *Gutierrez-Brizuela*, 834 F.3d at 1153–55 (Gorsuch, J., concurring); *see Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825). *Chevron* unrealistically assumes that Congress implicitly delegates "legislative" policymaking authority to an agency whenever there is a statutory ambiguity.

*Chevron*, 467 U.S. at 844.[6] The result of this fiction is an unprompted "aggrandizement of federal executive power at the expense of the legislature." *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring). No wonder citizens, confronting countless agency rules and orders justified by statutory ambiguity, "can perhaps be excused for thinking" that agencies are "really doing the legislating." *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

The constitutional values undermined by *Chevron*—judicial independence, due process, and legislative power—may seem abstract, but they are very real for citizens like Ms. Valent. *Chevron* leaves ordinary citizens like her at sea: without recourse to "an army of perfumed lawyers and lobbyists," they must "guess" how the executive will interpret laws at any given time, on pain of ruinous consequences if they guess wrong. *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). What oracle, let alone a private citizen of modest means with no legal training, could have divined the Commissioner's "amputation" of the law in this case? App. 27 (Kethledge, J, dissenting). Yet the Commissioner held not only that Ms. Valent got the law wrong, but that she "should [have] know[n]" how the agency would construe the law under *Chevron*, 42 U.S.C.

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[6] *But cf.* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 996 (2013) ("[M]ost of our [congressional staffer] respondents told us that their knowledge of *Chevron* does not mean that they intend to delegate whenever ambiguity remains in finalized statutory language.").

§ 1320a-8(a)(1)(C), and should be ordered to pay crushing monetary penalties. An agency that is subject to constitutionally appropriate checks, enforced by courts independently determining the meaning of the law, would be much less likely to deploy aggressive legal theories to impose such massive penalties on disabled individuals.

Despite the weighty criticisms that have been leveled at *Chevron*, the Court has never seriously attempted to square *Chevron* with the Constitution. The Court asserted in passing that *Chevron* is consistent with a "long recognized . . . principle of deference to administrative interpretations." *Chevron*, 467 U.S. at 844. But recent scholarship undermines any historical justification for *Chevron*, further supporting reconsideration. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017).

**3. *Chevron* cannot be applied predictably or consistently.** "*Chevron* has presented its fair share of practical problems in its administration." *Gutierrez-Brizuela*, 834 F.3d at 1157 (Gorsuch, J., concurring). Scholars who defend *Chevron* acknowledge that "jurisprudential inconsistency has produced a ridiculous degree of doctrinal complexity that provides endless fodder for discussion (and discontent) about *Chevron*." Nicholas R. Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 G. Wash. L. Rev. 1392, 1398 (2017). Others are less charitable. *See* Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 Fordham L. Rev. 731, 750 (2014) (*Chevron* doctrine is "an incoherent, imprecise, and arbitrarily applied set

of principles for reviewing agency statutory construction").

*Chevron* is unworkable because it rests on a shaky foundation. Under *Chevron*, cases turn "on an entirely personal question, one subject to a certain sort of *ipse dixit*: is the language clear, or is it ambiguous?" Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2142 (2016). Judges "have wildly different conceptions of whether a particular statute is clear or ambiguous." *Id.* At 2152. And there are no "neutral principles" for deciding what is ambiguous. *Id.* At 2153. This makes it extraordinarily difficult, if not impossible, for courts to apply *Chevron* consistently and even-handedly, which invites the suspicion that "judges' personal views are infecting these kinds of cases." *Id.* At 2142.

In sum, *Chevron* makes it impossible for private parties to know in advance what standard of review will govern judicial review of reams of agency rules and adjudications, and, more fundamentally, to understand the contours of the law.

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*Chevron's* deformity has now come into full view, and the doctrine is ripe for reconsideration. There is little doubt that *Chevron*'s continued viability is an important federal question. *Chevron*, after all, is an "important, frequently invoked, once celebrated, and now increasingly maligned precedent." *Pereira*, 138 S. Ct. at 2121 (Alito, J., dissenting). The Court, to be sure, could simply ignore *Chevron*. *See id.* (concluding that the Court "is simply ignoring *Chevron*"). But that would do little to make the law

applied by lower courts correct, rational, and workable. It would also do little for Ms. Valent and citizens like her, who must contend with the reflexive deference routinely afforded to executive agencies by the federal courts. *Chevron* should be overturned in its entirety.

### B. The Court Should Limit *Chevron* To Curb Reflexive Deference.

Even if the Court does not overrule *Chevron* outright, the Court should at least "expand on" the deference doctrine's exceptions "to clear up some mixed messages" it has sent in the past. *Kisor*, 139 S. Ct. at 2414.

Although this Court has suggested, in passing, that judges should apply "rigorously, in all cases, statutory limits on agencies' authority," *City of Arlington*, 569 U.S. at 307, "that is hardly what happens in reality. Instead, the federal courts have become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first." App. 20 (Kethledge, J., dissenting). "[A]ll too often, courts abdicate" their judicial duty "by rushing to find statutes ambiguous, rather than performing a full interpretative analysis." *Arangure v. Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) (Thapar, J.).[7] Such knee-jerk deference "abrogates

[7] In the great majority of cases, courts find statutes ambiguous. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 33–34 (2017) (concluding that circuit courts find ambiguity at *Chevron* step one 70% of the time, based on a sample of over 1,000 cases); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron

separation of powers without even the fig leaf of Congressional authorization." *Voices for Int'l Bus. & Educ., Inc. v. NLRB*, 905 F.3d 770, 781 (5th Cir. 2018) (Ho, J., concurring).

One can hardly blame lower courts for deferring so easily under *Chevron*. After all, no one knows "just how rigorous *Chevron* step one is supposed to be," *Gutierrez-Brizuela*, 834 F.3d at 1157 (Gorsuch, J., concurring), and this Court has applied *Chevron* reflexively, too.[8] *Cf. Kisor*, 139 S. Ct. at 2414–15 (clearing "mixed messages" sent by Supreme Court decisions applying *Auer* deference "without significant analysis of the underlying regulation" or "without careful attention to the nature and context of the interpretation").

Even assuming, arguendo, that *Chevron* should not be overruled altogether, *Chevron* deference is proper only after a court has exhausted all the tools of statutory interpretation—"when the legal toolkit is empty and the interpretative question still has no single right answer." *Kisor*, 139 S. Ct. at 2415 (citing

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*Doctrine in the U.S. Courts of Appeals*, 15 Yale J. on Reg. 1, 30 (1998) (similar).

[8] *See, e.g.*, *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45–46 (2002) (deferring because provision was "silent" on question at issue); *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417–19 (1992) (deferring because agency interpretation was "not in conflict with the plain language of the statute"); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696–97 (1991) (deferring because statute was "complex and highly technical"); *see also* Richard J. Pierce, Administrative Law Treatise 221 (5th ed. 2010) (attributing inconsistent lower court behavior to fact that Court "has not been consistent and conscientious in applying *Chevron*").

*Chevron*, 467 U.S. at 843 n.9). A court "cannot wave the ambiguity flag just because it found the [statute] impenetrable on first read." *Id.* Instead, "the court must 'carefully consider' the text, structure, history, and purpose of" a statute "in all the ways it would if it had no agency to fall back on." *Id.* As with agency interpretations of their own regulations, a rigorous understanding of *Chevron* step one implies that courts "will almost always" apply "the best interpretation," and will not "put a thumb on the scale in favor of an agency." *Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring in judgment). At the very least, certiorari is warranted to reinforce this crucial limit on *Chevron* deference.

### C. Stare Decisis Does Not Weigh Against Reconsidering *Chevron*.

Principles of stare decisis should not deter this Court from reconsidering the judicially-created interpretative methodology articulated in *Chevron*. Assuming that the same stare decisis principles that apply to judicial interpretations of statutes apply to judicial methodologies for interpreting statutes, special justifications warrant reconsidering *Chevron*.

*Chevron* is a doctrine of "this Court's own creation." *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018). The Court must therefore revisit *Chevron*, "whether or not Congress can or will act in response." *Id.* At 2097.

Moreover, there is no reason to believe the political branches will act against their interests to restrain judicial deference to agencies. For the very reason that *Chevron* distorts the Constitution's allocation of powers, allowing the Executive both to

make law and to say what the law is, there is no reason to think that *Chevron* will be redressed by the political branches. Having voluntarily relinquished interpretative authority to the President and his subordinate officers, the Court cannot sit by hoping that the President will one day voluntarily relinquish this power and sign a bill abolishing *Chevron*. *Cf.* Art. I, § 7.

Nor can the Court expect Congress to take the extraordinary step of overriding a presidential veto to restore the Court's institutional prerogatives. This is true not only because veto overrides are rare, but also because *Chevron*'s diffusion of legislative accountability results in weighty political advantages to individual members of Congress. *Chevron* allows legislators to take credit for legislation and to influence regulatory outcomes while avoiding "the difficult [and often unpopular] work of reaching consensus on divisive issues." *See Egan*, 851 F.3d at 279 (Jordan, J., concurring); *cf. Chevron*, 467 U.S. at 865 (noting that "perhaps Congress was unable to forge a coalition on either side of the question"). Given these perverse incentives, "[n]o one can look to" legislators "for effective relief" from the mischief *Chevron* has caused. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2523 (2019) (Kagan, J., dissenting). If ambition is "to counteract ambition," The Federalist No. 51 (James Madison), then the Court alone must shoulder the responsibility of reclaiming its institutional prerogatives by overturning, or at least narrowing, *Chevron*.

Overruling *Chevron* will not harm legitimate private reliance interests. *See Wayfair, Inc.*, 138 S. Ct. at 2098. *Chevron*'s very premise is that

political officials get to change course without regard to precedent, based on their current preferred interpretation of ambiguous statutes. *Brand X*, 545 U.S. at 982–83. Regulated parties cannot legitimately rely on such ephemeral precedents to guide their private conduct. Private reliance interests would be better served by a body of judicial precedents that cannot be altered except through the ordinary channels of judicial reconsideration or legislation, as would be the case without *Chevron*.

### D. This Case Is a Suitable Vehicle for Reconsidering the Validity and Scope of *Chevron*.

This case presents *Chevron* in its most deferential form. To begin with, instead of interpreting the law, the court merely "frame[d]" the issue and pronounced the statute ambiguous based on a putative conflict before applying *any* tools of interpretation. App. 21 (Kethledge, J., dissenting). The court then deferred to an agency interpretation that is "almost a test case for how far an agency can go in *Chevron* step two." App. 26. And the court did so in the charged context of an administrative adjudication imposing "massive liability" on a private citizen, a context in which *Chevron's* fair notice problems are most acute. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (describing *Auer*'s similar notice problems).

Ms. Valent is likely to prevail on remand under a less deferential standard of review. Absent *Chevron* deference, the weight (if any) to be given to the agency's view "will depend upon the thoroughness evident in its consideration, the

validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The Commissioner's interpretation of the statute in this case is neither considered nor consistent. In fact, it is facially inconsistent with existing regulations promulgated by the Commissioner after notice and comment. In that rulemaking, the Commissioner interpreted "section 221(m)(1)(B) of the Act" to mean that when "you perform work as an employee after you have received [disability] benefits for at least 24 months, . . . we may not consider information about the activities you perform in that work . . . to determine that . . . you are able to engage in substantial gainful activity and are, therefore, no longer disabled." 71 Fed. Reg. at 66,846.

To implement this interpretation, the Commissioner promulgated rules assuring 24-month beneficiaries that the Social Security Administration will consider "earnings alone" to determine "whether you have engaged in substantial gainful activity," and promising such beneficiaries that "we will not consider the activities you perform in the work you are doing or have done." 20 C.F.R. §§ 404.1574(b)(3)(iii), 416.994(b)(8)(ii).

As Judge Kethledge observed, "that quite possibly amounts to an assurance to the beneficiary herself that her work activity was not material." App. 29. Yet that is precisely the opposite of what the Commissioner now says the statute means. *See* App. 10–11 ("[T]he Commissioner argues [that] the Administration *can* take work activity into account

in determining whether a beneficiary is engaging in substantial gainful activity."). Rather than confronting this inconsistency between its interpretations, the Commissioner left these binding rules "unmentioned" in his brief before the Sixth Circuit. App. 28 (Kethledge, J., dissenting).

The Commissioner's new interpretation of the statute is unpersuasive: "discard[ing] roughly half the protection that Congress unambiguously provided" is no way to reconcile apparent tensions in statutory provisions. App. 27 (Kethledge, J., dissenting).

Ms. Valent's interpretation, by contrast, gives full meaning to every word of the statute, and it is consistent with the Administration's regulations. Under Ms. Valent's interpretation, the Commissioner may consider earnings when determining whether a beneficiary remains disabled, but may not consider work activity in making that determination. Nothing in that interpretation prevents the Commissioner from terminating benefits if a disability review discloses earnings that rise to the level of substantial gainful activity.[9] But the Commissioner may not terminate the benefits of, or impose punitive sanctions on, 24-month beneficiaries who, like Ms.

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[9] 20 C.F.R. § 404.1574(b)(3)(iii). Earnings presuppose work as an employee, but that does not mean that unpaid "work activity" is a fact the Commissioner may consider "in evaluating whether" a beneficiary remains "entitled to benefits." 42 U.S.C. § 1320-8(a)(2). Contrary to the Sixth Circuit majority's erroneous assumption, this is not a case in which the Commissioner penalized Ms. Valent for failing to report work activity that generated earnings. *See infra* p. 33.

Valent, simply do volunteer work to improve their "sense of self-worth." App. 109.

Ms. Valent would prevail even under a more limited version of *Chevron*. Under a rigorous understanding of *Chevron* step one, the Sixth Circuit "jumped the gun" in declaring the statute ambiguous. *Kisor*, 139 S. Ct. at 2423–24 (remanding case to Federal Circuit so the court can "seriously think through" all the interpretative possibilities). The Sixth Circuit "exhaust[ed] none of" the interpretive "possibilities before ceding the judicial role." App. 26 (Kethledge, J., dissenting). A remand would allow the Sixth Circuit to "make a conscientious effort to determine, based on indicia like text, structure, history, and purpose," whether the statute is indeed ambiguous. *Kisor*, 139 S. Ct. at 2424. "The canon against reading conflicts into statutes" and "other traditional canons" would counsel the Sixth Circuit to resolve the case in Ms. Valent's favor on remand. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

Review is also appropriate because the decision below has important consequences in its own right. Under the administrative construction upheld by the Sixth and Second Circuits, *see Cappetta*, 904 F.3d at 168, nearly two million disability beneficiaries who live in Connecticut, Kentucky, Michigan, New York, Ohio, Tennessee, and Vermont are now subject to the risk of ruinous penalties if they fail to disclose unpaid volunteer work they perform for their families and communities, even when they have

crippling life-long medical disabilities.[10] This will only further discourage them from work, thwarting the law Congress enacted in 1999.

## II. The Court Should Clarify That Apparent Statutory Conflict Is Not a License To Defer.

The Court should grant certiorari to clarify that *Chevron* is not a license for courts to abdicate their duty to reconcile laws that "appear to conflict with one another." App. 8.

Resolving statutory conflicts—real or imagined—is a classic judicial function. As Chief Justice Marshall put it, when "two laws conflict with each other, the courts must decide on the operation of each." *Marbury*, 1 Cranch at 177. When they so decide, courts are not filling gaps through policy expertise; they are saying "what the law is." *Id.* A conflict between statutory provisions presents a "pure question of statutory construction for the courts to decide," not a policy-laden ambiguity eligible for *Chevron* deference. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

The Court, however, has waffled on whether courts may transfer this traditional judicial function to executive agencies under *Chevron*. In *Scialabba v. Cuellar de Osorio*, 537 U.S. 41 (2014), several Justices suggested that *Chevron* does not apply to unambiguous but conflicting provisions, but the

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[10] *See* Kaiser Family Foundation, Total Disabled Social Security Disability Insurance Beneficiaries, Ages 18–64 (2017), https://bit.ly/2MkuSeD.

Court did not resolve that issue. A plurality of the Court in that case applied *Chevron* after concluding that two "Janus-faced" clauses in a statutory provision created an ambiguity that triggered *Chevron* deference. *Id.* At 57. But six Justices rejected this approach. The Chief Justice, joined by Justice Scalia and (in relevant part) Justice Alito, wrote a concurrence in which he argued that "[t]o the extent the plurality's opinion could be read to suggest that deference is warranted because of a direct conflict between these clauses, that is wrong. . . . Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice." *Id.* At 76 (Roberts, C.J., concurring in judgment); *see also id.* At 79 (Alito, J., dissenting) (agreeing that "[d]irect conflict is not ambiguity"). Justice Sotomayor, joined by Justices Breyer and Thomas, criticized the plurality for "rushing to find a conflict with the statute" and failing to apply traditional tools of statutory construction. *Id.* At 82, 87 (Sotomayor, J, dissenting).[11]

Confusion arising from the Court's splintered *Scialabba* decision is compounded by the fact that, earlier in *National Association of Home Builders v. Defenders of Wildlife*, the Court had deferred under *Chevron* after finding that EPA could not "simultaneously obey the differing mandates of

[11] In a footnote, Justice Sotomayor suggested that sometimes conflict "can make deference appropriate to an agency's decision to override unambiguous statutory text." *Id.* at 86 n.3 (Sotomayor, J., dissenting). Justice Thomas did not join that footnote. *Id.* at 81.

[Endangered Species Act] § 7(a)(2) and [Clean Water Act] § 402(b)." 551 U.S. 644, 647 (2007). *Home Builders*, however, "did not address the consequences of a single statutory provision that," as in this case, "appears to give divergent commands." *Scialabba*, 573 U.S. at 76 n.1 (Roberts, C.J., concurring in judgment). More importantly, *Home Builders* is in conflict with this Court's more recent holding that "the reconciliation of distinct statutory regimes is 'a matter for the courts,' not agencies." *Epic Sys. Corp.*, 138 S. Ct. at 1629 (quoting *Gordon v. N.Y. Stock Exch. Inc.*, 422 U.S. 659, 685–86 (1975)).

Unsurprisingly, lower court judges have reached differing conclusions on when, if ever, statutory conflict creates ambiguity under *Chevron*.

On the one hand:

- Several Federal Circuit judges have concluded that the "interpretation of the interplay between" two statutory provisions "seem[s] to reside firmly within the expertise of Article III courts" and is not eligible for *Chevron* deference. *Aqua Prod., Inc. v. Matal*, 872 F.3d 1290, 1324 (Fed. Cir. 2017) (en banc) (opinion of O'Malley, J., for five of eleven judges).

On the other hand:

- The Second Circuit has held that "tension" between two provisions renders a statute "as a whole sufficiently ambiguous to oblige us to give *Chevron* deference." *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015), *abrogated by Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 782 (2018) (finding the statute unambiguous).

- The Third Circuit has deferred under *Chevron* when two conflicting provisions could not be "reconcile[d]" in a way that "Congress clearly intended." *Cazun v. Attorney Gen. United States*, 856 F.3d 249, 259 (3d Cir. 2017). *But cf. id.* At 266–67 (Hardiman, J., concurring in judgment) (arguing that provisions were unambiguous) (quoting *Scialabba*, 573 U.S. at 76 (Roberts, C.J., concurring in judgment)).
- The Fourth Circuit has held that *Chevron* deference is appropriate when "[t]he relevant statutory sections appear to conflict with one another." *King v. Burwell*, 759 F.3d 358, 373 (4th Cir. 2014), *aff'd on other grounds*, 135 S. Ct. 2480 (2015); *see also aaiPharma Inc. v. Thompson*, 296 F.3d 227, 238 (4th Cir. 2002) (same).
- The Ninth Circuit has deferred under *Chevron* when the "interplay" of two provisions establishes "conflicting rules." *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1074–77 (9th Cir. 2016); *see also Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1220, 1223–24 (9th Cir. 2015) (same).
- The Tenth Circuit has held that two conflicting provisions make a statute ambiguous under *Chevron*. *Lorenzo v. Mukasey*, 508 F.3d 1278, 1283 (10th Cir. 2007).

And of course, the Sixth Circuit majority deferred in this case because two clauses in § 421(m) "appear to conflict with one another." App. 8.

The Court should grant certiorari to resolve this division of judicial opinion and clarify that *Chevron* does not apply to the resolution of statutory conflicts. "Courts are better equipped and more experienced than agencies in answering" questions of statutory conflict. *Arangure*, 911 F.3d at 342. Moreover, conflicting provisions or statutes do not involve "[t]he prototypical *Chevron* situation: an agency's application of law to fact," using scientific or policy expertise. *Id.* Instead, the resolution of statutory conflicts involves pure questions of law that call for traditional legal interpretation, not policy analysis. *Aqua Prod., Inc.*, 872 F.3d at 1324 (opinion of O'Malley, J.).

Courts have plenty of tools at their disposal to resolve apparent statutory conflicts on their own. For example, when "there is a conflict between a general provision and a specific provision, the specific provision prevails." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012). And if after applying all of the tools of statutory construction, "a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect." *Id.* At 189. "After all," if one "cannot 'make a valid choice between two differing interpretations, . . . we are left with the consequence that a text means nothing in particular at all.' " *Id.* "*Chevron* is not a license for an agency to repair a statute that does not make sense." *Scialabba*, 573 U.S. 76 (Roberts, C.J., concurring in judgment). Picking one provision over another is "legislative choice," not interstitial gap-filling eligible for *Chevron*. *Id.*

This case vividly illustrates the danger of allowing agencies to resolve putative statutory conflicts under *Chevron*. Instead of doing its job of reconciling the statutory provisions, the Sixth Circuit allowed the Commissioner to discard half of the meaning of the term "disabled" in § 421(m), a term of art repeatedly and consistently used through the Act. App. 26–27 (Kethledge, J., dissenting) (citing 42 U.S.C. § 423(d)(1)). That is not legal interpretation. That is allowing the Commissioner to "rewrite clear statutory terms to suit [the Commissioner's] own sense of how the statute should operate." *Utility Air Regulatory Grp. V. EPA*, 573 U.S. 302, 328 (2014).

## III. In the Alternative, the Court Should Summarily Reverse To Correct the Sixth Circuit's *Chenery* Violation.

If the Court does not grant certiorari to overrule or narrow *Chevron*, it should grant review to redress the Sixth Circuit's departure from the "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan*, 135 S. Ct. at 2710 (citing *Chenery*, 318 U.S. at 87).

The Sixth Circuit imagined that the Commissioner had penalized Ms. Valent for failing to report "work activity *that generates earnings*." App. 8 (emphasis added). That was a clear violation of *Chenery*, because the Commissioner's order was based simply on Ms. Valent's failure to report work activity, without regard to earnings. *See* App. 23–24.

As Judge Kethledge pointed out, the Sixth Circuit's assertion to the contrary is belied by the record. App. 23–24. The court cited only one item to

support its assertion: "the IG's June 3, 2013 letter to Valent" threatening her with penalties and alleging that she was paid "$400 per week." App. 14. That was an egregious error.

First, in a formal adjudication, the IG's pre-hearing letter had no more weight than the uncorroborated allegation of a prosecutor before trial. It had no weight at all. *See* 5 U.S.C. § 556(d) ("A sanction may not be imposed . . . except . . . in accordance with reliable, probative, and substantial evidence").

Second, even if the IG's letter had evidentiary value, and it does not, it would not matter here. The ALJ expressly found, after a formal hearing, that the IG's $400-per-week allegation was "unsupported by the evidence." App. 155. Indeed, the ALJ concluded that the IG had failed to show "that [Ms. Valent] received *any* compensation for her work activity." App. 156 (emphasis added). The Board deferred to the ALJ's assessment of the evidence and did not disturb these findings, which are part of the Commissioner's final decision. *See* App. 69–73 & n.11.

Moreover, even if the record supported an assertion that Ms. Valent was paid, and it does not, it would not matter here. At the end of the day, as Judge Kethledge noted, the Commissioner's "stated basis for imposing the sanction was *solely* her work activity"; the sanction was *not* based on "any earnings" that she might have received from that

activity, App. 23 (emphasis added). [12] The Commissioner's counsel candidly conceded the point:

> COURT: As I understand the record here, the Commissioner sought this penalty and repayment of benefits solely on the ground of her failure to disclose work activity, not substantial gainful [activity] or earnings.
>
> GOVERNMENT: That's correct.

App. 24 (Kethledge, J., dissenting) (citing Oral Arg. at 28:02). Yet the court of appeals asserted that the Commissioner penalized Ms. Valent for withholding not just work, but "work that generates earnings." App. 8. The Court's error was dispositive. App. 15.

That is not how administrative law is supposed to work. Courts do not get to fix agency decisions based on any alternative rationale they can conceive. In doing so here, the court of appeals failed to uphold the principle "that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan*, 135 S. Ct. at 2710 (citing *Chenery*, 318 U.S. at 87). Summary reversal is warranted on this ground alone. *See Thomas*, 547 U.S. at 186 (summarily reversing decision ignoring

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[12] *S*ee *also* App. 59 n.8 (Board) (noting that the agency imposed the sanction "based on failure to report work activity, not on failure to report earnings or substantial gainful activity"); App. 88–89 (ALJ) ("The June 3, 2013 IG notice did not charge Respondent with failure to report earnings or failure to report substantial gainful activity."); App. 150 (ALJ) ("The SSA IG does not propose to impose a [civil monetary penalty] and assessment against Respondent based on failure to report earnings from work activity or substantial gainful activity.").

*Chenery*); *INS v. Ventura*, 537 U.S. 12, 14, 16 (2002) (per curiam) (same).

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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