No. 19-221

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

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

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QUESTIONS PRESENTED

1. Whether the Court should overrule *Chevron U.S.A., Inc. v. NRDC*, *Inc.*, 467 U.S. 837 (1984).

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.

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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. *E.g.*, *Janus v. AFSCME*, 573 U.S. 616 (2018); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988).

The Foundation has a particular interest in the Court granting *certiorari* on the first question presented—whether the Court should overrule *Chevron*—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* deference in several cases involving the rights of individual employees. *See*, *e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998); *Pirlott v. NLRB*, 522 F.3d 423, 434 (D.C. Cir. 2008) ("[t]he 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

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[1] Pursuant to 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. Pursuant to 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.

760, 766 (9th Cir. 2002) (en banc) ("Courts are required to defer to the NLRB on statutory interpretation under *Chevron*"). Therefore, whether this Court should abandon the *Chevron* doctrine is important to the Foundation's mission..

SUMMARY OF ARGUMENT

The Court should grant the petition and return to first principles. The Framers constructed the Constitution to provide safeguards for the people's liberty by separating governmental powers.[2] At the federal level, the Constitution specifically delegates these powers—legislative, executive, and judicial—to the three separate federal branches respectively.[3] *Chevron* deference is an anathema to that design, causes serious damage to individual liberty, and should be overruled.[4]

A. *Chevron* deference violates the Constitution for at least two reasons. *First*, *Chevron* deference violates the Constitution's separation of powers by circum-

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[2] *See* The Federalist, No. 51 (C. Rossiter ed. 1961) (J. Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.").

[3] *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment) ("the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government.").

[4] Past and current members of this Court, circuit court judges, and legal scholars have recognized *Chevron*'s incompatibility with the Constitution. *See* Pet. Brief 16-19.

venting Article I's lawmaking process. It allows executive agencies to exercise legislative power by rewriting laws without going through bicameralism and presentment, which, in turn, creates serious fair notice problems. *Second*, *Chevron* violates the separation of powers by allowing executive agencies to exercise core judicial power that the Constitution delegates to the judiciary alone. When a court defers to an executive agency's statutory construction, it is handing the executive the judicial power to interpret the law. That creates serious due process problems by depriving a litigant of a fair hearing in court.

B. Whether this Court should overrule *Chevron* is a question that also has important ramifications for federal law that reach beyond this case. *Chevron* is a ubiquitous problem in administrative law that reaches into almost every statute in the federal code. Federal agencies like the NLRB routinely use *Chevron* deference to change the meaning of federal statutes—causing serious damages to the rights and liberties of the regulated public.

ARGUMENT

Whether this Court should overrule *Chevron* is an important constitutional question that affects the regulated public's rights and liberties.

A. *Chevron* deference is illiberal and unconstitutional.

We start with first principles. Article I of the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." U.S. Const. art. I, § 1. Article II vests "[t]he executive Power . . . in a President of the United States." *Id.* at art. II, § 1. And Article III vests "[t]he judicial Power of the

United States . . . in one supreme Court" and inferior courts established by Congress. *Id.* at art. III, § 1. The Constitution's words are clear: it delegates to each separate branch specific powers.

"The declared purpose of separating and dividing the powers of government, of course, was to diffus[e] power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (alteration in original) (quotation marks and citation omitted). The Constitution's protection of individual liberty through the separation of powers was the product of "centuries of political thought and experiences." *Perez v. Mortg. Bankers Ass'n.*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring). And these experiences taught the Framers that delegating to each separate federal branch certain limited, enumerated powers would protect the republic and its citizens better than any enumeration of rights ever could.[5] Indeed, the abandonment of the separation of powers, the Framers knew, would lead directly to the "loss of due process and individual rights." Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1538 (1991).[6]

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[5] *See N.L.R.B. v. Noel Canning*, 573 U.S. 513, 570–71 (2014) ("[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights. Indeed, so convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary.") (Scalia, J., concurring) (alteration, internal quotation marks, and citation omitted).

[6] James Madison thought that "[n]o political truth is . . . stamped with the authority of more enlightened patrons of liberty" than dividing the powers of government because "[t]he accumulation of all powers, legislative, executive, and judiciary in the same

Chevron undermines the separation of powers in at least two ways. *First*, it undermines the Constitution by short-circuiting Article I's deliberately onerous lawmaking process. It allows executive agencies to fill in the "gaps" of a statute—i.e., change the law's meaning—without going through bicameralism and presentment. This in turn creates serious fair notice problems.

Second, *Chevron* allows executive agencies to swallow core judicial power. When a court defers to an executive agency's statutory construction, it is handing the executive the judicial power to interpret the law—in its own case, no less. This in turn creates serious due process problems by depriving a litigant of a fair hearing in court.

1. Start with Article I. When the people ratified the Constitution, they delegated "[*a*]*ll*" legislative power to Congress—not some, but "*all*." *See* U.S. Const. art. I, § 1. (emphasis added).[7] Ideally, Article I's plain meaning would prevent the legislative branch from subdelegating its legislative power to another branch.[8] But this Court has not always—indeed, rarely—policed that line.[9]

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hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, 301 (James Madison) (Clinton Rossiter ed., 1961).

[7] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("Article I, § 1 . . . permits no delegation of those powers . . . .").

[8] *See Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); *see also* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 336-37 (2002).

[9] *Association of American R.Rs.*, 135 S. Ct. at 1250 (Thomas, J., concurring in the judgment).

Chevron is the inevitable upshot of abandoning Article I's text. This Court created *Chevron* deference based on a legal fiction. That fiction assumes Congress implicitly delegates its power through ambiguous statutory language (or no statutory language at all) so that an administrative agency can make legislative rules. *See Chevron*, 467 U.S. at 844.[10] The effect of this is that a law's meaning is never fixed, but becomes a malleable standard that the executive branch can change on a dime.

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." *Gundy*, 139 S. Ct. at 2134 (footnote omitted). 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." *Id.* This gauntlet, the Framers thought, was a "bulwark[] of liberty." *Id.*[11]

The Framers also designed these rigorous political gauntlets to prevent factions—interest groups in modern parlance—from capturing the legislative process,

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[10] "Statutory ambiguity … becomes an implicit delegation of rule-making authority, and that authority is used 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." *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

[11] 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 Ass'n. of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring).

and to protect minorities from the government wielding arbitrary power with no accountability in favor of majorities. *See id*; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) ("The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.") (citation and quotation marks omitted).

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." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citations omitted). 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." *Id.* (citations and quotation marks omitted). *Chevron* turns this fundamental principle on its head, however, because an executive agency can decide—after a person has acted—what an ambiguous law means and haul that person into court.[12]

[12] As Petitioner points out, this case provides a textbook example of how *Chevron* works to deprive an individual of property—"a massive fine"—without fair notice. Petitioner could not have known that her actions violated the statute because the better reading of the statute at issue did not require her to report her work activity. *See* Pet. Brief 25-29.

2. *Chevron* likewise violates Article III and creates serious due process problems. Judicial review is essential to the broader "liberal tradition, which is the dominant tradition in American constitutional law, 'emphasiz[ing] limited government, checks and balances, and strong protection of individual rights.'" Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 477 (2016) (internal punctuation and footnote omitted). The Framers thus entrusted judges with judicial power under Article III. This power, in turn, came with a judicial duty to "exercise its independent judgment in interpreting and expounding upon the laws." *Perez,* 135 S. Ct. at 1217; *see also* P. Hamburger, Law and Judicial Duty 316-326 (2008).

This duty requires judges to interpret the laws before them and "to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through either internal or external sources." *Perez*, 135 S. Ct. at 1218. The judiciary, the Framers thought, would thus provide a "check" against the other branches—including administrative agencies—when they try to expand their delegated powers. *See id*. at 1220.

When it comes to administrative law, however, the federal judiciary has essentially abandoned its duty to check the legislative and executive branches. Federal courts reflexively defer to agencies under *Chevron* and give one party an advantage over the other during litigation. *See Pereira v. Sessions,* 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring); s*ee also* Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1209-10 (2016). This abandonment of judicial duty has real world effects—including undermining the political legitimacy of our system of laws. *See* Hamburger,

Chevron Bias at 1236 ("[I]ndependent judgment of unbiased judges is the basis of the government's political legitimacy . . . especially [in] those [cases] concerning the power of government or the rights of the people, it is essential that the people have confidence that the judges are not biased toward government, but are exercising independent judgment.") (footnote omitted).

But more to the point here, the deference judges give an agency during litigation, favoring one party over another, creates serious Fifth Amendment Due Process problems. Indeed, "[w]hat is at stake here is the due process of law in Article III courts." *Id.* at 1231. The Constitution tasks judges to provide a fair and neutral process and not engage in bias toward one party. But under *Chevron*, courts have become participants "in systematic bias." *Id.* This "[d]eference to administrative interpretation is a systematic precommitment in favor of the interpretation or legal position of the most powerful of parties"—the federal government. *Id.*[13] Judges thus fail in their duty to be the natural arbiters of the law when they apply *Chevron*. They are no longer the impartial decision-maker due process requires—an essential element of individual liberty.[14]

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[13] Again, as Petitioner points out, this case serves as a primary example of how *Chevron* works to deprive regulated parties of individual liberty. She never had a chance in the court below, because the panel majority reflexively adopted the government's interpretation of the statute. *See* Pet. Brief 28.

[14] Despite this breakdown when it comes to administrative agencies, this Court has repeatedly affirmed that a neutral decision-maker is essential to a fair process: "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). And, when a judge

B. *Chevron* deference has serious consequences for the regulated public that reach beyond this case.

Petitioner's case is not an anomaly. Her case is only one example of the violence *Chevron* deference has done, and will continue to do if not overruled, to people's individual liberty.[15]

For example, *Chevron* deference has allowed administrative agencies like the NLRB to make federal law—sometimes retroactively—for years based on political decisions. One of the primary rationales for *Chevron* deference is that agency "experts" are better equipped to determine the evolving policy for the nation:

> Judges are not experts in the field, and are not part of either political branch of the Government . . . In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.

Chevron, 467 U.S. at 865.

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fails to "apply the law to [a party] in the same way he applies it to any other party[,]" *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002), he has failed in his duty.

[15] The modern administrative state has ballooned into a behemoth that "wields vast power and touches almost every aspect of daily life." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (citing *Free Enter. Fund v. Public Co. Acc'ting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010)).

But what administrative agencies engage in is not always based on "expertise." Indeed, judges and scholars have criticized the NLRB for engaging in excessive legal and policy oscillation from administration to administration based on political considerations, not expert policymaking. As one federal judge has described the problem:

> Sometimes the claim to expertise is entirely fraudulent; the most well-documented case is that of the National Labor Relations Board, the partisan majority of which routinely displaces the previous majority's psychological assertions about what employer tactics do or do not coerce workers when they are deciding whether to vote for union representation. Most often, however, expertise is simply a euphemism for policy judgments. 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, fearing neither that the expert staff will not support them nor that a court will undo their handiwork.

Ginsburg & Menashi, *Our Illiberal Administrative Law*, 10 NYU J.L. & Liberty at 482–83 (footnote omitted).

To be sure, granting agencies like the NLRB deference to say what the law is prevents "ossification of large portions of our statutory law." *United States v. Mead Corp.*, 533 U.S. 218, 247–48 (2001) (Scalia, J.,

dissenting). Even so, as noted above, a fundamental underpinning of the rule of law and separation of powers requires that only Congress, acting through Article I, change the law. *Chevron*, however, allows an executive agency to change the law with the political winds—and therefore regulated individuals will not have fair notice before the government takes their life, liberty, or property.

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 liberty. They have done so not using the statute Congress passed, but by using vague statutory language to instill their political preferences.

In sum, the Court should take this case, overrule *Chevron*, and revert to the first principle that Congress makes the law, the executive enforces the law, and the judiciary interprets the law.

* * *

Before retiring from this Court, Justice Kennedy noted that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron*[.]" *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring). This is such a case.

CONCLUSION

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

Respectfully submitted,

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September 19, 2019