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 A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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September 19, 2019

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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.

QUESTIONS PRESENTED—Continued

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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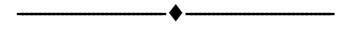
INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates 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. *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def.*, 138 S. Ct. 617 (2018), and *Util. Air Regulatory Grp., et al. 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 deference to executive agencies. Without the check of proper statutory interpretation, the executive branch has many opportunities 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

The time has come to say goodbye to *Chevron* deference. It is "erroneous, poorly reasoned, unworkable, and indeed unconstitutional." Pet. 16. Even so, if this Court decides that it is not yet time to overrule *Chevron*, the fact remains that lower courts apply the two-part test in a way that is highly deferential to agency decisions.

At 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 erroneously assume that congressional silence or disagreement about a statute's meaning automatically renders the law ambiguous. *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). Feeling satisfied, they reflexively move on to step two.

But Congress' failure to explicitly address something in the text of a statute does not always render its meaning ambiguous. Moreover, if the threshold for ambiguity is whether parties disagree about the meaning of a term, there will *always* be ambiguity because disagreement is the very cornerstone of litigation. This would render *Chevron* step one useless.

In *Chevron*, this Court instructed that the traditional tools of statutory meaning exist to discern 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; 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." *Risor*, 139 S. Ct. 2415. The same principle applies when an agency interprets a statute.

But exactly which tools are in the toolkit? This Court has relied on the plain meaning rule, canons of construction, stare decisis, and legislative history and purpose in the past to glean congressional intent. *See* Kristin E. Hickman & Richard J. Pierce, Jr., Federal Administrative Law 629 (2d ed. 2014). When it comes to *Chevron* deference, however, lower courts often use few—if any—statutory tools in their analyses. *See*, *e.g.*, *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp.*, 754 F.3d 380 (6th Cir. 2014); *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014); *Regions Bank v. Legal Outsource PA*, No. 17-11736, 2019 WL 4051703 (11th Cir. Aug. 28, 2019). 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.[2]

Amicus agrees with Petitioner that *Chevron* should be overruled 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, it should still grant the petition to provide lower courts with "candid and useful guidance"[3] 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. This Court should 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.*

[2] 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.

[3] *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment).

Holder, 555 U.S. 511, 533 (2009) (Stevens, J., concurring in part and dissenting in part). The two-step *Chevron* test requires courts to defer to an agency's interpretation of a statute if: (1) the court finds the statute ambiguous and (2) the agency's interpretation is reasonable. *Chevron*, 467 U.S. at 843–44.

Ironically, it is hard to know exactly what "ambiguous" means. Black's Law Dictionary defines "ambiguity" as "[d]oubtfulness or uncertainty of meaning or intention . . . indistinctness of signification, esp. by reason of doubleness of interpretation." Black's Law Dictionary 100 (11th ed. 2019). Words are often inherently unclear, but ambiguity may also arise when Congress intentionally omits phrases or fails to anticipate certain situations. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 528–29 (1947).

> In ordinary language [ambiguity] is often confined to situations in which the same word is capable of meaning two different things, but, in relation to statutory interpretation, judicial usage sanctions the application of the word 'ambiguity' to describe any kind of doubtful meaning of words, phrases or longer statutory provisions.

Black's Law Dictionary 100 (11th ed. 2019) (quoting Rupert Cross, Statutory Interpretation 76–77 (1976)). These statements show that statutory ambiguity largely depends on judges' personal understanding of the meaning of words. This causes courts to assume that they can recognize ambiguity when they see it.

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 to forgo the tools of statutory construction and instead give 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. 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.* To avoid this reflexive deference, courts

must turn to 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.

A. *Chevron* should not stand for the assumption that congressional silence renders a statute ambiguous.

Explaining step one of *Chevron*, this Court instructed, "First, always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. To determine whether Congress expressed its intent in a statute, a court "must exhaust all the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415 (majority op.) (quoting *Chevron*, 467 U.S. at 843 n.9). The inquiry does not end there. If "Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. This seems to require courts to engage in de novo analyses of agency decisions.

Whereas congressional silence is the absence of a phrase, "the absence of a phrase . . . is not definitive proof of ambiguity." *Negusie*, 555 U.S. at 550 (Thomas, J., dissenting). Yet courts seem to accept the opposite as true, asking only whether Congress has explicitly addressed a matter in the text of a statute. *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 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).

It is problematic to assume congressional silence is never intentional because it encourages litigants, judges, and agencies to glance hastily at the text of a statute. And we know that "clever lawyers—and clever judges—will always be capable of perceiving some ambiguity in any statute, no matter how clearly Congress struggles to emblazon its intentions on the face of the statute." *Abbott Labs. v. Young*, 920 F.2d 984, 995 (D.C. Cir. 1990) (Edwards, J., dissenting). This Court recently declared that "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." *Kisor*, 139 S. Ct. at 2415 (majority op.). Yet that is precisely what is happening under the current *Chevron* framework in the statutory context.

B. Disagreement about a statute's text does not automatically make it ambiguous.

In addition to mistaking congressional silence for deference, courts have mistaken disagreement among parties for ambiguity. For instance, the Second, Seventh, and Ninth Circuit Courts of Appeal held that the text of 8 U.S.C. § 1229b unambiguously defined "notice to appear" in the context of immigration hearings. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring). But "[t]hat emerging consensus abruptly dissolved" when the Board of Immigration Appeals interpreted the same text in a different way. *Id.* Following the Board's decision, "at least six Courts of Appeals, citing *Chevron*" concluded that the statute *was* ambiguous, even though the agency's interpretation found "little support in the statute's text." *Id.* Ultimately, this Court rejected the notion that different readings of the same statute made the text ambiguous and required automatic deference to the Board. It held in an 8-1 decision that § 1229b unambiguously defined "notice to appear" and thus there was no need to defer to the agency. *Id.* at 2113 (majority op.).[4]

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[4] Despite rejecting the notion that disagreement about a statute's meaning renders a statute ambiguous in *Pereira*, this Court had previously suggested the opposite. In *Negusie v. Holder*, the Court wrote, "The parties disagree over [the meaning of 8 U.S.C. § 1101(a)(42)] . . . As there is substance to both contentions, we conclude that the statute has an ambiguity that the agency should address in the first instance." 555 U.S. at 517. This Court has not yet formally rejected this holding in *Negusie*, contributing to lower courts' belief that ambiguity can exist solely when parties disagree.

Much like conflicts among parties, courts reflexively defer under *Chevron* when a conflict exists within the statute itself. *See* Pet. 31–32 (noting that the Sixth, Second, Third, Fourth, Ninth, and Tenth Circuits defer to agencies when two provisions in a statute appear to conflict).[5] This violates a fundamental separation of powers principle that courts are in the best position to decide "pure question[s] of statutory construction." *See*, *e.g.*, *Negusie*, 555 U.S. at 534 (Stevens, J., concurring in part and dissenting in part) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). When applied properly, *Chevron* "accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation." *Id.* at 530.

Here, the Sixth Circuit fell victim to *Chevron* in two ways: first, it assumed that congressional silence demands automatic deference. Pet'r App. 8. Second, it assumed that conflicts surrounding Title II of the Social Security Act signal ambiguity. *Id.* It reached that conclusion by finding that two clauses in § 421(m) conflicted. *Id.* at 8–9. It also concluded that "another circuit's differing interpretation of the very statute at issue is evidence of ambiguity." *Id.* at 9–10 (citing *Cappetta v. Comm'r of Soc. Sec. Admin.*, 904 F.3d 158, 168 (2d Cir. 2018)). As a result, it failed to properly apply

[5] The federal courts are not alone in according substantial deference when faced with conflicting language. *See* William N. Eskridge, Jr. et al., Cases and Materials on Statutory Interpretation 803 (2012) (showing through case examples that many state courts reflexively defer to state agency decisions).

Chevron because it ignored the traditional tools of statutory construction.

II. 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 often reach different outcomes based on the tools they choose to use.

Even when courts rely on the traditional tools of statutory construction, they have expressed concerns about which tools to apply and how to apply them. "[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*, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring).

Assuming a court even gets past the cursory examination of a statute described above, it will often take a unique approach to understand the text. For instance, three circuit courts of appeals applied three different methods to determine whether the term "applicant" was ambiguous under the Equal Credit Opportunity Act (ECOA). *See RL BB Acquisition*, 754 F.3d 380; *Hawkins*, 761 F.3d 937; *Regions Bank*, 2019 WL 4051703. This inquiry was necessary to address the

ultimate question of whether a "guarantor" qualified as an "applicant" *Id.* Although no circuit court skipped *Chevron* step one altogether, at least two circuits failed to exhaust the tools of construction because they stopped short of applying any statutory canons. *RL BB Acquisition*, 754 F.3d at 385; *Hawkins*, 761 F.3d at 941.

First, to understand the meaning of the word "applicant," the Sixth Circuit examined two other words within the ECOA: "applies" and "credit." *RL BB Acquisition*, 754 F.3d at 385. The court looked to the 1993 edition of Webster's Dictionary and the 2008 edition of the Oxford English Dictionary and discovered similar definitions for "apply." *Id.* The court then turned to the definition of "credit" within the statute. *Id.* "Moving from the text to ECOA's larger context" and considering the statute's "broad remedial goals," the court found it was possible that a guarantor and applicant could be the same person, but it was unclear whether Congress intended this result. *Id.* After only looking to these two dictionaries and considering the statute's broader goals, the Sixth Circuit found the word "applicant" ambiguous and moved to *Chevron* step two. *Id.*

Just two months later, the Eighth Circuit reached the opposite conclusion by finding the word "applicant" unambiguous. Like the Sixth Circuit, it turned to Webster's Dictionary to define "apply." *Hawkins*, 761 F.3d at 941. Unlike the Sixth Circuit, the Eighth Circuit relied on the 2002 edition of Webster's Dictionary.[6] *Id.*

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[6] In his concurring opinion, Judge Colloton analyzed the ordinary meaning of "apply" at the time Congress enacted the ECOA in 1974, and thus relied on the 1971 edition of Webster's Dictionary. *Hawkins*, 761 F.3d at 943 (Colloton, J., concurring).

And besides defining "credit," the Eighth Circuit searched for the meaning of "guaranty" (a step the Sixth Circuit skipped). *Id.* The court determined that a guarantor could not request credit and therefore could not be an "applicant" under the ECOA. *Id.* Thus, after only relying on one dictionary—a different edition than the one on which the Sixth Circuit relied—it held that the statute clearly prohibited guarantors from being applicants. *Id.*

Finally, in August 2019, the Eleventh Circuit also encountered a dispute over the meaning of the term "applicant" and whether it included a guarantor. It agreed with the Eighth Circuit that the statute was unambiguous, though its approach was more thorough. First, it began "with the statutory text" and assumed that "terms are generally interpreted in accordance with their ordinary meaning." *Regions Bank*, 2019 WL 4051703 at *4. After sifting through dictionary definitions from the time Congress enacted ECOA, the court determined the ordinary meaning of the word "applicant." *Id*. The court then followed the same process to define "guaranty." *Id.* at *5. Unlike the other circuits, the Eleventh Circuit did not stop there; it applied the whole-text and consistent-usage canons to confirm its conclusion that the statute unambiguously excluded "guarantor" from the meaning of "applicant." *Id*.

The debate about the meaning of "applicant" and whether it was ambiguous within the ECOA is just one

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He argued that the definition of "apply" in that context lent more support to the conclusion that a guarantor could not be an applicant. *Id.* at 943–45. The majority did not explain why it chose to examine the 2002 edition. *See id*. at 941.

instance in which courts try to apply tools of statutory construction but jump the gun too soon.[7] Whereas the Eighth Circuit stopped after a plain meaning analysis, the Sixth Circuit looked to the statute's broad remedial goals. The Eleventh Circuit pressed further, relying on canons like consistent usage and examining the entire statute. And even where all three courts did the same thing by using dictionary definitions to determine the plain meaning of the text, no two circuits relied on the same dictionary.[8]

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[7] *Compare Ibarra v. Holder*, 736 F.3d 903, 907, 910 (10th Cir. 2013) (refusing to defer to an agency "until the 'traditional tools of statutory construction yield no relevant congressional intent,' " then applying the plain meaning canon and examining the generic definition of a crime to determine that a law was unambiguous) *with Florez v. Holder*, 779 F.3d 207, 211 (2d Cir. 2015) (accepting the same generic definition of a crime but having "little trouble concluding" that the same statute was ambiguous without further examination) *and Martinez v. United States Att'y Gen.*, 413 Fed. Appx. 163, 166 (finding law "ambiguous because it provides no definition of the [crime]" without looking at other sources).

[8] Furthermore, courts often dispute the usefulness of canons such as constitutional avoidance and the rule of lenity. *Compare Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 816, 823 n.9 (finding that "the canon of constitutional avoidance 'is highly relevant at Chevron step one' " and showing support for the rule of lenity to keep statutory interpretation consistent) (quoting *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 504 (9th Cir. 2007) (en banc) (Thomas, J., dissenting)) *with Olmos v. Holder*, 780 F.3d 1313, 1321 (holding that "at the first step of *Chevron*, we examine solely 'whether Congress has directly spoken to the precise question at issue.' . . . Thus, the canon of constitutional avoidance does not bear on our inquiry at step one . . . [and] the rule of lenity applies only if the statute is grievously ambiguous.").

B. Only this Court can provide the necessary guidance to eliminate uncertainty in statutory interpretation.

As the cases above show, there remains significant uncertainty among lower courts about statutory interpretation. It is tempting to skip *Chevron* step one altogether by abandoning the tools of construction, opting instead for the "know it when we see it" approach. "But all too often, courts abdicate [their] duty by rushing to find statutes ambiguous, rather than performing a full interpretive analysis." *Arangure v. Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018).

The traditional tools of statutory construction can prevent courts from giving in to this temptation. This Court has relied on statutory canons to decide cases in the past.[9] Even so, lower courts fail to apply the canons because they lack sufficient guidelines. For instance, whereas the Sixth Circuit compiled a detailed list of statutory canons in *Arangure*, it failed to use any of those canons when interpreting the statutory provisions governing Ms. Valent's appeal. *Compare id.* at 339–40 *with* Pet'r App. 8–10.

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[9] *Arangure*, 911 F.3d at 339–40 (listing Supreme Court decisions that have employed the following canons: *ejusdem generis*, *expressio unius*, *noscitur a sociis*, presumption against implied repeals, presumption against retroactivity, presumption against preemption, presumption of consistent usage, and constitutional avoidance).

As this Court recently explained, the tools of construction are not 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.

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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