No. 19-402

In the

Supreme Court of the United States

HOWARD L. BALDWIN, ET UX.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Should the holding of *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), that an agency's permissible reading of a statute prevails over circuit court precedent, be overruled?

2. What, if any, deference should a federal agency's statutory construction receive when it contradicts a court's precedent and disregards traditional tools of statutory interpretation, such as the common-law presumption canon?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the role of the judiciary in interpreting statutes passed by Congress and enforced by the Executive. *See I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983); *Clinton v. City of New York*, 524 U.S. 417 (1998). The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Kisor v. Wilke*, 139 S.Ct. 2400 (2019); *Gundy v. United States*, 139 S.Ct. 2116 (2019); *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015); and *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225 (2015).

SUMMARY OF ARGUMENT

The Supreme Court should grant the petition for writ of certiorari so that it can revisit and overturn its decision in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Petitioners have ably demonstrated how *Brand X* is contrary to the constitutional structure of separated powers. This Court should also grant review to consider whether *Brand X* is contrary to the plan of the Administrative

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[1] Pursuant to this Court's Rule 37.2, this amicus brief is filed with the consent of the parties, all of whom were notified more than 10 days before this filing. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief, and no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Procedure Act which vests judicial review of legal questions in the courts. The Court's decision in *Brand X* abdicates the judiciary's statutory duty under section 706 of the Administrative Procedure Act of 1946 (5 U.S.C. § 706) to rule on questions of law and to invalidate agency actions that are contrary to statute. The *Brand X* decision accomplishes this by forcing Circuit Courts of Appeals to abandon their own precedents and instead defer to later agency interpretations of the statute. In enacting section 706, Congress intended that the judiciary continue its role of interpreting statutes and ruling on legal questions.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Review to Consider Whether the Decision in *Brand X* is Contrary to Congress's Plan of Judicial Review

Nothing in the Administrative Procedure Act demonstrates an intent by Congress to strip the courts of their power to interpret law. Precisely the opposite. The Act demonstrates a congressional intent for courts – not Executive Branch agencies – to make judgments of law.

A. Interpretation of the Administrative Procedure Act should begin with the text of the law.

In *Kisor v. Wilkie*, this Court concluded that Congress intended the courts to defer to an agency's interpretation of its own regulations. *Kisor*, 139 S.Ct. at 2419. Although such an interpretation departs from the text of the Administrative Procedure Act, the Court found support for its interpretation of congressional intent in the 1947 Attorney General's Manual

on the Administrative Procedure Act. The Court found the Attorney General's opinion as to congressional intent and the meaning of the statutory text persuasive. *Id.* at 2419; *see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978). This Court should grant review to clarify when an executive branch manual can be viewed as evidence of congressional intent and the meaning of a statutory text.

The reliance on the Attorney General's manual as evidence of the intent of Congress seems out of place. As Justice Gorsuch noted, the Attorney General's manual reflected the views of the executive branch of government. *Kisor*, 139 S.Ct. at 2436 (Gorsuch, J., concurring in the judgment). On the specific topic of judicial review, many members of Congress in fact disagreed with the views of the Attorney General. *Id.*

Outside of the line of cases under the *Chevron* doctrine, the courts have not turned to the executive branch for guidance on what Congress intended to accomplish with the enactment of a law. Even in those cases, however, the courts must still determine the meaning of the statutory text using the traditional rules of statutory interpretation. *SAS Institute, Inc., v. Iancu*, 138 S.Ct. 1348, 1358 (2018) ("Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning"). Those traditional rules of interpretation do not include the views of the executive branch of government.

Instead, the courts have looked to Congress to determine what Congress intended. The starting place for the determination of congressional intent must be

the text of the statute. *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001) ("We therefore begin (and find that we can end) our search for Congress's intent with the text …").

This Court has noted that its focus must be "on 'the intent of Congress.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377-78 (1982). Looking beyond the text of the statute at issue, this Court has found evidence of congressional intent in the history of related enactments (*Grove City Coll. v. Bell*, 465 U.S. 555, 565-66 (1984)) and the statutory scheme (*Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984), *Barlow v. Collins*, 397 U.S. 159, 164-65 (1970)). When the text is ambiguous, the Court has also looked to the problematic guide of "legislative history." *Kisor*, 139 S.Ct. at 2436 (Gorsuch, J., concurring in the judgment). The Court has cautioned, however, that "'legislative history is not the law.'" *Azar v. Allina Health Services*, 139 S.Ct. 1804, 1814 (2019) (quoting *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1631 (2018)). In *Epic*, the Court commented that "once [Congress] enacts a statute '"[w]e do not inquire what the legislature meant; we ask only what the statute means."'" *Epic*, 138 S.Ct. at 1631 (quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384,396-97 (1951) (Jackson, J. concurring)). If the Court has found legislative debates to be an uncertain guide to congressional intent, an executive branch interpretation of congressional intent should certainly not be allowed to overrule the statutory text at issue.

The idea that judicial review was intended to be something other than that set out in the Administrative Procedure Act is, at best, disputed. If the Act was

merely intended to codify the prior common law practice of judicial review, the case law seems to confirm a practice of judicial review of legal questions. This Court in *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4 (1942), noted that judicial review "is limited to determining whether errors of law have been committed." *Id*. at 10. Similarly, the Court in *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), ruled that the decision as to whether an agency exceeded the limits of its statutory power was a judicial function. *Id*. at 369. The decisions of this Court prior to the Administrative Procedure Act seem to vest the power of statutory construction firmly in the judiciary. *E.g.*, *John Kelley Co. v. Comm'r*, 326 U.S. 521, 527-29 (1946); *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944); *F.C.C. v. Pottsville Broad. Co.*, 309 U.S. 134, 144-45 (1940).

If there was any doubt about the scope of judicial review, that doubt was resolved with the text of Section 706 of the Administrative Procedure Act.

B. The courts have a duty under the Administrative Procedure Act to apply their independent judgement in interpreting the law.

In passing the Administrative Procedure Act, Congress "define[d] the relationship between courts and agencies." *Kisor*, 139 S.Ct. at 2432 (Gorsuch, J., concurring in the judgment) (citing *Abbott Laboratories v. Gardner*, 387 U. S. 136, 140 (1967)). Section 706 of the Act provides that: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Further, the court must hold unlawful

any agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706 (2)(C).

In interpreting the law and reviewing an agency action, the Act's "unqualified command" is that courts must apply their independent judgement in determining legal questions and determining the legality of an agency action. *See Kisor*, 139 S.Ct. at 2432 (Gorsuch, J., concurring in the judgment); *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, Cir. J., concurring) (stating that through the APA, "Congress vested the courts with the power to 'interpret . . . statutory provisions' and overturn agency action inconsistent with those interpretations. 5 U.S.C. § 706.").

Under section 706, the courts have a duty to independently interpret the law and dispose of any agency decision or regulation not in accordance with that interpretation. *See*, *e.g., Kisor*, 139 S.Ct. at 2432 (Gorsuch, J. concurring in the judgment) ("The APA thus requires a reviewing court to resolve for itself any dispute over the proper interpretation of an agency regulation."). When it defers to and applies an agency's legal interpretation of the law regardless of contrary judicial interpretation, "the court is abdicating the duty Congress assigned to it in the APA" to interpret the law. *Id.*

The Administrative Procedure Act confers upon the judiciary the duty of interpreting the law through its own independent judgement, a duty which is not fulfilled by ignoring judicial interpretation and deferring to agency interpretations of the law.

C. Congress did not intend to displace the judicial role of statutory interpretation.

Part of the rational of the *Brand X* decision is that Congress, in drafting ambiguous statutes, intends that federal agencies resolve such ambiguities. *See Brand X*, 545 U.S. at 982 (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1985)). This led to the conclusion in *Brand X* that federal agencies have the power to overrule contrary judicial interpretations of federal statutes. *Id.* Such a rule ignores the text of Section 706.

Section 706 provides that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Had Congress wanted the courts to defer to federal agency interpretations, it would have said so in Section 706. *See Kisor*, 139 S.Ct. at 2432 (Gorsuch, J., concurring in the judgment). For instance, the Administrative Procedure Act dictates specific standards of review in different circumstances. *Id.* at 2432 n.48 (citing §706(2)(A) as requiring "arbitrary and capricious, abuse of discretion" and §706(2)(E) as requiring "substantial evidence"; also citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 482, n.14 (1951) which noted that the APA's original judicial review provision required that courts accord "due weight" to "the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it"). In Section 706, by contrast, Congress vested the judiciary with the duty to review questions of law, including the interpretation of statutory provisions. The decision in

Brand X is directly contrary to this congressional intent. This Court should grant review to rule that nothing in the Administrative Procedure Act empowers administrative agencies to overrule a federal court's interpretation of the statutory text.

II. Failure by Congress to Reject *Brand X* Cannot be Interpreted as Congress' Approval of the Decision.

The decision in *Brand X* marked a clear departure from the text of Section 706 setting forth the scope of judicial review. Failure by Congress to reject *Brand X* through legislation cannot be interpreted as Congressional adoption of the decision. Such an interpretation would violate the clear and strict procedures for enacting federal law. Further, such an interpretation is only one of many possible reasons for Congressional inaction.

Interpreting Congressional inaction as an adoption of judicial doctrine is tantamount to the Court codifying judicial doctrine as law without necessary Congressional action. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 299 (2014) (Thomas, J., dissenting). The decision in *Brand X* was a clear departure from the text of the statute on judicial review. Treating congressional inaction as agreement with this clear departure operates as a back-door amendment of the statute without following the statutory procedure for enactment of law.

Interpreting congressional failure to act as adoption of a judicial decision altering the meaning of a statutory text is a violation of the Constitution's strict procedures for enacting federal law. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)

(stating that Congress legislates by passing a bill and "Congressional inaction cannot amend a duly enacted statute"). The "power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'" *Clinton v. City of New York*, 524 U.S. 417, 440 (1998) (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983)). Such procedure requires that a law be enacted or amended "only through the passage of a bill which is approved by both Houses and signed by the President." *Patterson*, 491 U.S. at 175, n.1. Adhering to a judicial decision "based on congressional inaction would invert [this procedural] requirement by insulating error from correction merely because Congress failed to pass a law on the subject." *Halliburton Co.*, 573 U.S. at 299 (2014) (Thomas, J., dissenting).

Further, it is "impossible to assert with any degree of assurance" that Congress's failure to correct a decision through legislation means that it approves of or adopts the merits of the decision. *Johnson v. Transportation Agency,* 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting). This is so because "'several equally tenable inferences' may be drawn" from Congress's failure to act on a decision. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)). Congress may fail to act on an incorrect judicial opinion for many reasons including, but not limited to, inability to agree on correcting legislation, unawareness, indifference, or "political cowardice." *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting). To equate inaction by Congress as an adoption of that decision is at best "treacherous" and "speculative." *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Halliburton Co.*, 573 U.S. at 299 (2014) (Thomas, J., dissenting).

Brand X requires deference to agency interpretations of the law regardless of contrary judicial precedent. 545 U.S. at 982. Yet the text of Section 706 vests the power of statutory interpretation in the reviewing court. Nothing in Section 706 even hints at the idea that an agency has the power to overrule a United States Circuit Court of Appeals decision interpreting the statute. Congress has not adopted such an approach – instead it has left the text of Section 706 unchanged. That text still requires that the judiciary determine when a federal agency decision is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

This Court should grant review to return the plan of judicial review that Congress enacted in the Administrative Procedure Act.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit denying the Baldwins the right to use the common law mailbox rule to prove timely mailing of their refund claim is based on the conceptually flawed holding in *Brand X*. The petition for writ of certiorari should be granted so that *Brand X* can be revisited and overturned.

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Respectfully submitted,

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