No. 19-_____

In The
Supreme Court of the United States

MARIA JORDAN,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; DYNCORP INTERNATIONAL LLC; CONTINENTAL CASUALTY COMPANY,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit Court of Appeals dismissed a petition for review of an agency adjudication subject to the Administrative Procedure Act. The court dismissed without providing any explanation whatsoever. Then—again without any explanation whatsoever—it denied a motion requesting transfer to district court and a motion requesting an opinion or at least a statement of the relevant law. The record shows that the Fifth Circuit dismissed this appeal without explanation to arrogate to itself the power to disregard all authority in precedent, federal law and the U.S. Constitution governing judicial review. Consequently, the questions presented are:

1. Whether the Administrative Procedure Act, as applied to Petitioner by the Fifth Circuit, is unconstitutional.

2. Whether, when dismissing a petition for review of agency action governed by the Administrative Procedure Act, a court of appeals is required to declare the governing law, state material facts, and address relevant issues presented by the parties.

3. Whether, upon the filing of a procedurally correct and adequate petition for certiorari, the U.S. Constitution requires the U.S. Supreme Court to reverse an unexplained dismissal of judicial review of an agency adjudication governed by the Administrative Procedure Act.

RELATED CASES

Maria Jordan v. Director, OWCP, *et al*., No. 16-60576, U.S. Court of Appeals for the Fifth Circuit. Judgment entered November 18, 2016.

Maria Jordan v. Director, OWCP, *et al*., No. 17-60424, U.S. Court of Appeals for the Fifth Circuit. Judgment entered July 6, 2017.

Maria Jordan v. Director, OWCP, *et al*., No. 17-60851, U.S. Court of Appeals for the Fifth Circuit. Judgment entered January 24, 2018.

Maria Jordan v. Director, OWCP, *et al*., No. 17-843, 138 S.Ct. 1609. Certiorari denied April 23, 2018.

Maria Jordan v. Director, OWCP, *et al*., No. 18-60329, U.S. Court of Appeals for the Fifth Circuit. Judgment entered June 8, 2018.

Maria Jordan v. Director, OWCP, *et al*., No. 19-60178, U.S. Court of Appeals for the Fifth Circuit. Judgment entered April 16, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Maria Jordan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

DECISIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit (App. 1) is unreported. The order of the Benefits Review Board (App. 19) denying reconsideration is unreported but available at 2019 WL 523793. The order of the Benefits Review Board dismissing the appeal is unreported but available at 2018 WL 6017798.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2019. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The U.S. Constitution, in pertinent part, provides:

"The powers not delegated to the United States by the Constitution [] are reserved [] to the people." U.S. Const. Amend. X. "No person shall . . . be deprived of

life, liberty, or property, without due process of law." *Id*. Amend. V. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." *Id*. Art. VI, cl. 2. "Congress shall make no law . . . abridging . . . the right of the people [] to petition the Government for a redress of grievances." *Id*. Amend. I. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States," and "to all Cases of admiralty and maritime Jurisdiction" and "to Controversies to which the United States shall be a Party." *Id*. Art. III, §2.

Reprinted in the appendix are cited portions of the Administrative Procedure Act ("APA"), 5 U.S.C. 702, 703, 704 and 706; the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. 919, 920, 921, 923, and 939; and the Defense Base Act ("DBA"), 42 U.S.C. 1651 and 1653 (App. 21-27).

STATEMENT OF THE CASE

For multiple reasons, this case is a very attractive vehicle for the Court to address profoundly important recurring issues of lower courts' powers and their duties to apply and comply with this Court's precedent, the APA and the Constitution. The facts are as clean, simple and straightforward as they can be. Without any explanation whatsoever, a court of appeals dismissed a petition for review of an agency's dismissal

of an adjudication governed by the APA. See App. 1, 19-20. The court—again without any explanation whatsoever—denied a motion to transfer the appeal to district court and a motion to issue an opinion or state the relevant law. See App. 3, 4. The ability of courts of appeals to avoid reviewing agency adjudications without providing any explanation is outcome-determinative in this case, and it certainly will be in many other cases if this Court allows such action to stand.

This petition addresses the most fundamental element of the constitutionality of administrative adjudications: judicial review. It addresses the nature of a reviewing court's duty to "decide all relevant questions of law" and "interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action" to the full "extent necessary to decision and when presented." 5 U.S.C. 706. Addressing this issue now will very timely and vitally supplement *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

This petition addresses the most fundamental judicial powers and duties under the Constitution. It addresses one clear usurpation of jurisdiction that was used to justify many subsequent refusals to exercise jurisdiction even though such exercise was clearly compelled by the Constitution, the APA and the LHWCA. This petition addresses whether courts of appeals have the power to choose to render superfluous all relevant Supreme Court precedent and all relevant provisions of the APA and the Constitution.

A. Legal background.

This appeal is governed by the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. 901, *et seq*., which was enacted in 1927 and profoundly amended in 1972. The Defense Base Act ("DBA"), enacted in 1941, generally incorporates the LHWCA's provisions. See App. 26 (42 U.S.C. 1651(a)). In addition, as of 1946, the Administrative Procedure Act ("APA") governed the entire LHWCA adjudicatory process because such U.S. Department of Labor ("DOL") adjudications are "on the record after opportunity for an agency hearing." 5 U.S.C. 554(a); App. 22-23, 25 (33 U.S.C. 919(c), (d) and 923(b) regarding hearings on the record). See also 5 U.S.C. 556(a), 557(a), 559, 706.

When Congress enacted the APA in 1946 and again in 1966, it established that any "person suffering legal wrong because of" DOL "action, or adversely affected or aggrieved by" DOL "action" under the LHWCA or the DBA "is entitled to judicial review thereof." 5 U.S.C. 702. "The form of proceeding for judicial review is" as provided in the LHWCA and the DBA "in a court specified" thereby. 5 U.S.C. 703. The LHWCA or DBA "specifies the form of proceeding for judicial review of" DOL decisions, but the APA "codifies the nature and attributes of judicial review." *ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 282 (1987). The APA "sets forth the full extent of judicial authority" and duty "to review executive agency action for procedural correctness." *Perez v. Mortg. Bankers*

Ass'n, 135 S. Ct. 1199, 1207 (2015). See App. 21-22 (5 U.S.C. 706).

When Congress amended the LHWCA in 1972, it established that only the DOL Benefits Review Board ("BRB") was "authorized to hear and determine appeals" of "decisions" by a DOL Administrative Law Judge ("ALJ") or an OWCP District Director under the LHWCA "and the extensions thereof" (including the DBA). 33 U.S.C. 921(b)(3). So courts "have jurisdiction" to "review" only "a final order" of the BRB under the LHWCA and any extension thereof (including the DBA). 33 U.S.C. 921(c). Of course, any "preliminary, procedural, or intermediate" DOL "action or ruling" that was "not directly reviewable" also "is subject to review on the review of" a final BRB order. 5 U.S.C. 704.

The Fifth Circuit acknowledged the foregoing in *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1112 (5th Cir. 1991). The court of appeals confirmed that the district court lacked jurisdiction to entertain an appeal under the DBA precisely because "AFIA/CIGNA sought judicial review of [a mere District Director's] order by filing suit in" district court. *Id.* at 1112. No BRB order had been issued because the "administrative appeal to the BRB [had] not yet been resolved." *Id*. "The district court" dismissed "for lack of subject matter jurisdiction," and the Fifth Circuit "affirm[ed]." *Id*. Clearly, no court had jurisdiction to review a District Director's order until after the BRB issued its order. See *id*. at 1115.

After deciding the one issue properly before the Fifth Circuit, the court proceeded to address an issue which was not before it and not ripe for review. It issued an advisory opinion stating that the court of appeals in some future appeal under the DBA would lack jurisdiction to review BRB orders because only district courts would have jurisdiction. See *id*. at 1115-16. The *Felkner* court's statements about which court would have jurisdiction to review future BRB orders were "unnecessary to" the court's "decision, and cannot be considered binding authority." *Kastigar v. United States*, 406 U.S. 441, 455 (1972).

When a petition for certiorari was filed in *Felkner*, the Director, OWCP, took the same position as Petitioner does now regarding ripeness (in *Felkner*) and all jurisdictional issues. "The issue" of "whether judicial review of a final compensation order must be initiated in district court or appellate court, will be ripe for appellate review only after the Benefits Review Board completes its review of the compensation order." Director's Br. in Opp'n at 12, *AFIA/CIGNA Worldwide v. Felkner*, 502 U.S. 906 (1991) (No. 91-48). But if this issue were ripe for review, "the Director would argue that review of the Board's decision must be instituted in the court of appeals," not in district court, as the Fifth Circuit had stated. *Id*. n.9.

In addition, the *Felkner* court reached its conclusion about jurisdiction over BRB orders by essentially failing to apply any canon of statutory construction. "When there are two acts upon the same subject, the rule is to give effect to both" as much as "possible."

Morton v. Mancari, 417 U.S. 535, 551 (1974). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Id*. Indeed, federal law that refers to the same proceeding "must be read *in pari materia*." *McFarland v. Scott*, 512 U.S. 849, 858 (1994). All "statutes addressing the same subject matter," *e.g.*, the LHWCA and its extensions, including the DBA, must be construed "as if they were one law." *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006). Instead, the *Felkner* court merely chose the DBA judicial review provision and dismissed the entirety of the LHWCA judicial review provision.

Specifically under the LHWCA (and the APA), this Court previously instructed that courts "must seek to ascertain the ordinary meaning" of the words and phrases used by Congress in "the year" in which legislation "was enacted." *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 272 (1994). "This Court presumes that Congress intended" a word or "phrase to have the meaning generally accepted in the legal community at the time of enactment." *Id*. at 268. As Petitioner briefed repeatedly, the Fifth Circuit erred in *Felkner* and in this case in failing to ascertain any intent or meaning of Congress in 1927 (when the LHWCA was enacted), in 1941 (when the DBA was enacted), or in 1972 (when the LHWCA was amended).

Petitioner repeatedly showed the extremely limited extent to which, in both 1927 and in 1941,

Congress modified the judicial review provision of Section 921(b) to apply to injuries occurring extra-territorially. In relevant respect, Congress clearly changed only the venue from the one "in which the injury occurred" to the one where "the office of the deputy commissioner" (District Director) was "located." See App. 25-26 (No. 12, showing 33 U.S.C. 921(b) read *in pari materia* with 939(b)); App. 26-27 (No. 15, showing 33 U.S.C. 921(b) read *in pari materia* with 42 U.S.C. 1653(b)). No Respondent or the court ever identified any evidence that Congress intended or meant anything else in 1927 or 1941.

This Court recently unanimously emphasized that courts reviewing administrative action "must exhaust all the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415 quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, n.9 (1984). Each "court must apply all traditional methods of interpretation" and it "must enforce the plain meaning those methods uncover." *Id*. at 2419. See also *id*. at 2425 (Roberts, C.J., concurring); *id* at 2442-43 (Gorsuch, Thomas, Kavanaugh and Alito, JJ., concurring); *id*. at 2448-49 (Kavanaugh and Alito, JJ., concurring) (each citing or quoting *Chevron* or referring to traditional tools of statutory construction). But the *Felkner* court barely touched upon any tool, and in this matter, the Fifth Circuit repeatedly refused to do so.

The APA clearly established that the *Felkner* court had the power to "decide" only "relevant questions of law." 5 U.S.C. 706. But the court did not limit itself to relevant questions. Regarding Petitioner's appeals, the

APA clearly established that the Fifth Circuit had the duty to "decide all relevant questions of law" and "interpret constitutional and statutory provisions" to the full "extent necessary to decision and when presented." *Id*. But the court repeatedly refused or willfully failed to do so.

Regarding this matter, the Fifth Circuit never addressed the fact that the LHWCA provides for "review of" any "final order of the Board" in the appropriate "court of appeals" by "filing in such court within sixty days following the issuance of such Board order a written petition," and "[u]pon such filing, the court shall have jurisdiction." 33 U.S.C. 921(c).

It is undisputed that "[e]xcept" as "modified" in the DBA, the provisions of the LHWCA apply to claims under the DBA. 42 U.S.C. 1651(a). As a consequence, the Fifth Circuit emphasized that the "LHWCA governs a claim under the DBA except to the extent the DBA specifically modifies a provision of the LHWCA." *Felkner*, 930 F.2d at 1112. The "provisions of the DBA control" only to the limited extent that a DBA provision "provides a specific modification" of an LHWCA provision. *Id*.

Moreover, it is undisputed that the following presumption governs this appeal (and this petition): in all respects "[i]n any proceeding for the enforcement of a claim," every tribunal must presume, "in the absence of substantial evidence to the contrary" that "the claim comes within the provisions of" the LHWCA. 33 U.S.C. 920(a). Petitioner's appeal necessarily "comes within

the provisions of" LHWCA Section 921(c) until somebody identifies "substantial evidence to the contrary." *Id*. No Respondent or the court ever identified any contrary evidence. *Id*.

B. Factual background and proceedings below.

In 2017, Petitioner petitioned for certiorari regarding the foregoing issues. The private Respondents refrained from filing any opposition. The Director, OWCP, filed an opposition acknowledging the foregoing issues, but she refrained from addressing most of them. See Director's Br. in Opp'n at 8-9, *Jordan v. Director, OWCP*, 138 S. Ct. 1609 (2018) (No. 17-843). The Director also had refrained entirely from addressing any such issue before the Fifth Circuit in this matter. But in opposing certiorari, the Director devoted nearly all her argument to emphatically insisting that any court would lack jurisdiction when no final BRB order had been issued. See *id*. at 5-8. Such argument necessarily applied directly to the *Felkner* court, so the Director's analysis supports Petitioner's.

Many times, Petitioner has thoroughly briefed the fact that the *Felkner* court could not have had jurisdiction to establish precedent governing appeals of BRB orders because no BRB order was at issue in *Felkner*. The Fifth Circuit never acknowledged or addressed any issue in Petitioner's analysis, except that one time the court did acknowledge that under the DBA every court was required to "dismiss [a] petition for review for lack of jurisdiction" when the "BRB has not issued

a final order." App. 15. Such conclusion necessarily applied with full force to the *Felkner* court. But the Fifth Circuit would not apply it to *Felkner*.

Many times, Petitioner presented analysis of the Constitution and many Supreme Court decisions emphasizing two facts: the *Felkner* court's attempt to establish precedent governing jurisdiction over BRB orders and the Fifth Circuit's refusals (in Petitioner's appeals) to exercise jurisdiction and adequately address its jurisdiction were clearly unlawful. See, *e.g.*, pages 21-25, below. But the Fifth Circuit repeatedly willfully failed to acknowledge that the *Felkner* court had exceeded its powers under the APA and the Constitution. The Fifth Circuit repeatedly willfully failed or expressly refused to decide any relevant question of law or interpret any constitutional or statutory provision as required by the APA. *Cf.* 5 U.S.C. 706.

Five times in three years, the Fifth Circuit willfully failed to apply LHWCA Section 921(c) to Petitioner's appeal or to construe the judicial review provisions in either the DBA or the LHWCA. The court merely summarily dismissed five appeals. Twice, the court summarily invoked *Felkner*. Only once did the court say why.

In 2016, the court dismissed Petitioner's first appeal with no more explanation than "for lack of jurisdiction." App. 7. Without any explanation, the court denied Petitioner's subsequent motion seeking clarification "except to note that, as shown by the motion to dismiss, jurisdiction is foreclosed by this court's

decision in *Felkner*." App. 9. But in dismissing two subsequent appeals, the court did not even mention *Felkner*. In 2017 and 2018, the court dismissed Petitioner's second and third appeals with no more explanation than "for want of jurisdiction" and "for lack of jurisdiction." App. 11, 12.

In 2017, Petitioner petitioned this Court for certiorari. In 2018, after this Court denied certiorari, the Fifth Circuit dismissed Petitioner's fourth appeal, again, "for lack of jurisdiction." App. 15. Apparently encouraged by the denial of certiorari, the court finally stated that "[t]his Court does not have appellate jurisdiction to review final orders from the BRB in [a DBA] case." *Id*. But the court merely cited *Felkner* for that proposition. See *id*. The court also stated that "[t]he law is clear in this Circuit that any appeal in [a DBA] case from a final order of the BRB lies with the district court." *Id*. But the court merely cited *Felkner* for that proposition, too. See *id*.

Instead of explaining how *Felkner* could constitute precedent requiring dismissal of Petitioner's appeals, the court merely summarily dismissed all Petitioner's briefing with a label: "frivolous." App. 16. To penalize Petitioner for asking the court to comply with the Constitution and the APA, the court imposed a $10,000 penalty (purportedly for "attorney's fees," which never were substantiated) "plus costs" (which also never were substantiated). *Id*. To discourage further appeals (and petitions for certiorari), the court also "enjoined" Petitioner "from seeking review" by the Fifth Circuit

"of any order issued by the BRB in this matter" without "leave of court." *Id*.

On January 18, 2019, the BRB denied reconsideration, issuing its last order in this matter. See App. 19-20. After careful consideration (but within 60 days), on March 18, 2019 (consistent with court instructions) Petitioner filed a petition for leave to file, and she did file, a petition for review with the Fifth Circuit. The court never ruled on the petition for leave to file. Once again, it merely dismissed Petitioner's appeal, but this time without any explanation whatsoever. See App. 1. Also without any explanation whatsoever, the court denied Petitioner's motion to transfer the appeal to district court, as well as her motion requesting an opinion or at least a statement of the relevant law and material facts. See App. 3, 4. The court also declined to take any action on a petition for *en banc* reconsideration of the denial of Petitioner's motion requesting an opinion. See App. 5.

In three years of briefing regarding the dismissal of five appeals (and the 2017 petition for certiorari) and the imposition of a $10,000 penalty, no Respondent even attempted to refute any of Petitioner's detailed analysis establishing that, for multiple compelling reasons, the *Felkner* court could not have established precedent warranting dismissal of any of Petitioner's appeals. See, *e.g*., pages 21-25, below. All potentially-relevant briefing by all Respondents supported Petitioner's analysis establishing that the *Felkner* court

lacked jurisdiction because no final BRB order had been issued.

REASONS FOR GRANTING THE PETITION

For many compelling reasons, this petition should be granted, and at least the Fifth Circuit's judgment should be reversed and the Fifth Circuit should be required to apply the tools of statutory construction and state the relevant law.

This case presents a timely, clean and much needed opportunity to address courts' duties when reviewing—and even more so when declining to review—agency adjudications.

This petition presents exceptional cause to address the core constitutional duties of federal courts—exercising jurisdiction and supporting the Constitution. The Fifth Circuit decided multiple important federal questions in a way that disregards or implicitly overrules many controlling decisions of this Court and many provisions of the Constitution. In this matter, the Fifth Circuit invoked a prior usurpation of jurisdiction (which clearly was unconstitutional) to justify repeatedly refusing to exercise jurisdiction over Petitioner's appeals.

In multiple respects, the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to warrant prompt exercise of this Court's supervisory power. The Fifth Circuit has

usurped powers it did not have and it has disregarded duties that were clearly established in the Constitution and the APA, and which this Court emphatically and repeatedly confirmed. The Fifth Circuit willfully abdicated of its vital role in ensuring the constitutionality of agency adjudications.

I. The Implosion of the APA in the Fifth Circuit Will Reverberate Far and Wide.

A. The refusal to review BRB orders facilitates profound violations of the APA and directly affects wide swaths of the national economy affecting important national interests.

The LHWCA and the DBA are federal workers' compensation regimes administered by the DOL. The LHWCA and its statutory extensions cover injured workers in many diverse areas crucial to the U.S. economy and national defense. The LHWCA covers workers in and near ports throughout this country. The DBA and a similar statute, the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171(a), extend the LHWCA to workers who support U.S. government operations in the U.S. and abroad, including, most notably, in war zones like Iraq and Afghanistan. Injured workers covered by the DBA commonly support U.S. interests in war zones in a manner that was previously performed by military service members. Additional statutes extend the LHWCA to coal miners, 30 U.S.C. 932(a), and to off-shore oil industry workers, 43 U.S.C. 1333(b).

Like the Fifth Circuit, with single-sentence dispositions, the BRB disposed of many issues that Petitioner presented in dozens of pages of detailed analysis of copious binding legal authorities (in the Constitution, the APA and Supreme Court precedent). See App. 19-20.

As a matter of practice, the BRB routinely willfully flouts APA commands, including the prohibition on any BRB order or sanction that is not based "on consideration of the whole record or those parts thereof cited by a party" and that is not "supported by and *in accordance with* the reliable, probative, and *substantial evidence*." *Steadman v. SEC*, 450 U.S. 91, 98 (1981) quoting 5 U.S.C. 556(d) (emphasis by the Court). "Substantial evidence" necessarily "is the foundation of all honest and legitimate adjudication." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 379 (1998). But in this matter, the BRB routinely issued decisions devoid of consideration of relevant evidence. See, *e.g.*, App. 19-20. The BRB also did far worse.

In willful violation of the APA, the BRB repeatedly refused to even consider evidence in the record, and it actively obstructed Petitioner's access to such evidence. Clearly, "all papers and requests filed in the proceeding" are included in the "record for decision" and they must "be made available to the parties" upon payment of any required costs. 5 U.S.C. 556(e). The BRB's dismissal expressly was designed to prevent Petitioner from obtaining and addressing evidence in the record. See *Jordan v. DynCorp International LLC*, BRB No. 18-0128, 2018 WL 6017798 at *1 (BRB Oct. 19, 2018)

(relating BRB history of withholding Powers' and Huber's emails). See also subsection C, pages 19-21, below. Such evidence proves that, in multiple decisions, the ALJ repeatedly knowingly and willfully misrepresented the content of emails that he received in a prohibited *ex parte* communication regarding facts that the ALJ represented were dispositive of Petitioner's claim.

The BRB willfully violated multiple clear APA prohibitions and requirements even after being reminded (repeatedly) that in 1994 this Court emphatically confirmed (over the DOL's strenuous objections) that the APA "does indeed apply to the LHWCA" adjudications, *Greenwich Collieries*, 512 U.S. at 271, and "the Department cannot" act in any "manner that conflicts with the APA," *id.* at 281. Those rulings necessarily applied to the BRB. This Court effectively invalidated two BRB decisions because they failed to comply with the requirements of Section 556(d), above. See *id*. at 269-70.

B. Allowing the Fifth Circuit's dismissal to stand would allow circuit courts to arbitrarily choose to render the APA unconstitutional.

Judicial review is the *sine qua non* of administrative adjudications. Especially to ensure the constitutionality of administrative "adjudication," Supreme Court "precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages." *Northern Pipeline Const. Co.*

v. Marathon Pipe Line Co., 458 U.S. 50, 86, n.39 (1982) citing *Crowell v. Benson*, 285 U.S. 22 (1932). Specifically under the LHWCA, and even before the APA was enacted, *Crowell* acknowledged that the constitutionality ("under the due process" clause) of the "use of the administrative" adjudications depends on "due notice, proper opportunity to be heard, and that findings are based upon evidence." *Crowell* at 47. It also depends on "the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions." *Id.* at 56.

The Fifth Circuit willfully and repeatedly denied Petitioner a proper opportunity to be heard, findings based upon evidence, and observance of constitutional restrictions by the court or by the BRB. This Court should enforce the standards that it repeatedly has emphasized are required to keep agency adjudications constitutional. See, *e.g.*, *Kisor*; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971); *Allentown*, 522 U.S. at 374-79 (reviewing agency adjudications).

Courts have an "absolute duty" to "hear and decide cases within their jurisdiction." *United States v. Will*, 449 U.S. 200, 215 (1980). Such duty clearly applies under the APA. It "is the plain duty of the courts" to "eliminate, so far as [the APA's] text permits, the practices it condemns." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45 (1950). The "courts are charged" with "ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979).

Congress specially designed the APA as a "bill of rights for [the multitude of] Americans whose affairs are controlled or regulated" by federal agencies. 92 Cong. Rec. 2149 (statement of Sen. McCarran). The APA "invest[s] courts with" the "duty" to "prevent avoidance of the requirements of the [APA] by any manner or form of indirection." *Am. Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) quoting S. Doc. No. 248, 79th Cong., 2d Sess. 19, 199, 217 (1946). It is "the duty of reviewing courts to prevent avoidance of the requirements of the [APA] by any manner or form of indirection." S. Rep. No. 752, 79th Cong., 1st Sess. 31 (1945). For example, agencies must "show the facts and considerations warranting [each] finding." *Id*. See also 92 Cong. Rec. 2159 (1946) (statement of Sen. McCarran (the APA's primary sponsor)) and H. Rep. No. 1980, 79th Cong., 2d Sess. 44 (1946) (reiterating both the foregoing propositions).

C. Multiple circuits currently refuse to exercise jurisdiction to defeat and flout the APA and the Constitution.

The problem of courts of appeals refusing to exercise jurisdiction to defeat the APA is not limited to the Fifth Circuit. For example, the D.C. Circuit similarly disposed of an appeal in a case under the Freedom of Information Act ("FOIA") that is related to this matter.

FOIA is a vital component of the APA. "The basic purpose of" FOIA is "to ensure an informed citizenry" because informed citizens are "vital to the functioning

of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Informed citizens are vital to the functioning of the Constitution. They are "needed to check against corruption and to hold the governor accountable to the governed." *Id*.

The D.C. Circuit denied plaintiff even the ability to file an opening brief. It granted the DOL's "motion for summary affirmance" based on nothing more than the court's mere assertion that "the merits" of the DOL's mere "positions are so clear as to warrant summary action." *Jordan v. U.S. Dep't of Labor*, No. 18-5128, 2018 WL 5819393 at *1 (D.C. Cir. 2018). Three judges on the D.C. Circuit Court of Appeals flouted FOIA (which expressly places the burden of proof on agencies to justify withholdings), Federal Rule of Civil Procedure 56, copious Supreme Court precedent and even the Constitution by ruling that the merits of summary judgment based on inferences asserted by the district court, itself, on behalf of the DOL were "so clear as to warrant summary" affirmance. *Id*. The *en banc* court declined to reconsider that ruling, and the panel denied a motion to issue an opinion and a motion for reconsideration of the refusal to issue an opinion.

To help the DOL continue withholding purportedly-privileged evidence that is at issue in Petitioner's appeal in this matter, the D.C. District Court had granted summary judgment for the DOL based on the DOL's mere contentions (which were entirely unsubstantiated and later proved to be false) that two emails were sent to an "attorney" to "explicitly" request his "input and review." *Jordan v. U.S. Dep't of Labor*, 273

F.Supp.3d 214, 232 (D.D.C. 2017). Regarding one of the emails, a highly-experienced federal judge (who had expressly acknowledged some 130 times in written opinions that summary judgment may not be based on inferences favoring the movant) expressly based summary judgment on inferences purporting to establish every fact that he considered material to the DOL's assertions of the attorney-client privilege. The judge *sua sponte* contended that the DOL's mere "description supports the inference" that "contractual information was sent to [an] in-house attorney" specifically "for his legal advice." *Id*.

II. This Court Must Guard against Circuit Courts Usurping or Refusing to Exercise Jurisdiction and Flouting Supreme Court Precedent.

For years in this matter, the Fifth Circuit has flouted the Constitution and overwhelming Supreme Court precedent emphasizing that the *Felkner* court's treatment of BRB orders constituted an entirely intolerable unconstitutional usurpation of jurisdiction. Courts "*have no more [power] to decline the exercise of jurisdiction which is given, than to usurp that which is not given*. The one or the other would be treason to the constitution." *Will*, 449 U.S. at 216, n.19 quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821) (Marshall, C.J.). The Fifth Circuit did both—the latter in *Felkner* and the former in this matter.

The Constitution limited "federal-court jurisdiction" to "actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). See U.S. Const. Art. III, §2. So federal courts lack "the power to render advisory opinions." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). A "court lacks discretion to consider the merits of a case" or any issue "over which it is without jurisdiction." *Budinich v. Becton Dickinson and Co*., 486 U.S. 196, 203 (1988). When "a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

"The requirement that jurisdiction be established" is "a threshold matter," and it is "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). "For a court to pronounce upon the meaning or the constitutionality of [any] law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* at 101-102. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 94.

Addressing jurisdiction over appeals of BRB orders carried the *Felkner* court "beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id*. For that reason, objections regarding jurisdiction "may be raised at any time" even after judgment and even by a

party that "previously acknowledged the court's jurisdiction." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434-35 (2011).

This Court even has clearly addressed the precise scenario that arose in *Felkner*:

> If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only. We therefore hold that because the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981).

The *Felkner* court's putative statement of law regarding which court would have jurisdiction over future appeals of BRB orders "was a violation of the federal constitution," so it affords "no justification for [any] judgment." *Allgeyer v. Louisiana*, 165 U.S. 578, 593 (1897). Any such "judgment must therefore be reversed." *Id*. A putative statement of law that "deprives" Petitioner of her "liberty without due process of law" is "a violation of" the "constitution." *Id*. at 589. It "does not [even] become due process of law, because it is inconsistent with the provisions of the constitution." *Id*. "To deprive the citizen" of a right "without due process of law is illegal." *Id*. at 591.

Federal courts have only the powers "delegated" to them. U.S. Const. Amend. X. Federal courts have "only that power authorized by Constitution and [by Congress in a] statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). So judicial power may not "be expanded by judicial decree." *Id.* "A court does not have the power, by judicial fiat, to extend its jurisdiction." *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938). A "court may not in any case, even in the interest of justice, extend its jurisdiction." *Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 818 (1988). So judicial "jurisdiction" must be "carefully guarded against expansion by" either "judicial interpretation or by prior action or consent of the parties." *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

Whenever a court proceeds beyond its jurisdiction, that "renders the act of the court a nullity." *Stoll* at 176. That fact was the primary point of, and it was repeatedly emphasized by Chief Justice Marshall throughout, *Marbury v. Madison*, 1 Cranch 137 (1803).

In "declaring what shall be the *supreme* law of the land, the constitution itself is first" and "only" statements of law "made in *pursuance* of the constitution" can be the law. *Id.* at 180 quoting U.S. Const. Art. VI, cl. 2. The "constitution is superior to any ordinary act of" any government employee. *Id.* at 178. "It is a proposition too plain to be contested, that the constitution controls any" such employee's "act repugnant to it" and no such employee "may alter the constitution by an ordinary act." *Id.* at 177. The Constitution is the "paramount law of the nation," so any "act" putatively

establishing law "contrary to the constitution is not law." *Id.*

To "declare," as the Fifth Circuit did in this matter regarding its pronouncements in *Felkner*, that they are "completely obligatory" even though "according to the" Constitution they are "entirely void" is to "subvert the very foundation of" the Constitution. *Id.* at 178. If a court (or any government employee) "shall do what is expressly forbidden" in the Constitution and then contend that "such act" is "in reality effectual," that "would be giving to" such court (or employee) "a practical and real omnipotence." *Id*. It "thus reduces to" literally "nothing what we have deemed the greatest improvement on political institutions—a written constitution." *Id*.

The Constitution clearly is "a rule for the government of *courts*." *Id.* at 180. For that reason it "direct[s] the judges to take an oath to support it," and the "oath certainly applies, in an especial manner, to [judges' official] conduct." *Id.* All "*courts*" clearly "are bound by" the Constitution, and any putative statement of "law repugnant to the constitution is void." *Id*. When any putative statement of law relevant to a case is "in opposition to the constitution," courts must "decide" the issue "conformably to the constitution, disregarding" or expressly invalidating any contrary statement of law. *Id.* at 178. "This is of the very essence of judicial duty." *Id*.

III. Unexplained Dismissals Permit Arbitrary Denials of Protection from Agency Abuses.

To the extent relevant here, all "powers not delegated to" federal courts "are reserved" to "the people." U.S. Const. Amend. X. Courts have no power to deprive any person of any liberty or property "without due process of law." *Id*., Amend. V. Petitioner has the "right" to "petition" for "redress of grievances." *Id*. Amend. I. In relevant respect, the "judicial Power" of the Fifth Circuit must "extend to all Cases, in Law and Equity, arising under" the "Constitution" and all federal "Laws," and "to all Cases of admiralty and maritime Jurisdiction" (*e.g*., under the LHWCA) and "to Controversies to which the United States shall be a Party." *Id*. Art. III, §2.

As Chief Justice Burger, writing for a unanimous Court, emphasized, courts "*have no more [power] to decline the exercise of jurisdiction which is given, than to usurp that which is not given*. The one or the other would be treason to the constitution." *Will*, *supra*, quoting *Cohens* (Marshall, C.J.).

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury*, 1 Cranch at 163. With the Constitution this country "emphatically" established "a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* That is especially true of such violations by government employees:

"where a specific duty is assigned by law, and individual rights depend upon the performance of that duty," it is "clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id.* at 166. When Congress or the Constitution creates particular "duties," and when any government employee (or court) "is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts," such employee or court "cannot at [its] discretion sport away [such] vested rights." *Id*.

The foregoing is especially crucial when the rights at issue are constitutional. "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 635 (1886). That applies even when "the obnoxious thing" (a constitutional violation) appears in its "mildest and least repulsive form" because "illegitimate and unconstitutional practices get their first footing in that way," by "silent approaches and slight deviations from legal modes of procedure." *Id*. *Accord Miranda v. Arizona*, 384 U.S. 436, 459 (1966).

"Under our Constitution no court" may "serve as an accomplice in the willful transgression of" federal law, much less of the Constitution. *Lee v. Fla*., 392 U.S. 378, 385-86 (1968).

> Our system of jurisprudence rests on the assumption that all individuals, whatever their

> position in government, are subject to federal law:
>
> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it."

Butz v. Economou, 438 U.S. 478, 506 (1978) quoting *United States v. Lee*, 106 U.S. 196, 220 (1882).

IV. The APA Is Unconstitutional as Applied to Petitioner.

The decisions and actions of the Fifth Circuit (and the D.C. District Court and D.C. Circuit), above, would throw very significant and prominent portions of this country back where it was long before the Constitution. The Declaration of Independence of 1776 specifically addressed that particular plight. It addressed the right to petition, as well as the Founders' compulsion to terminate courts' violations of such right. "In every stage of these Oppressions We have Petitioned for Redress" but "Our repeated Petitions have been answered only by repeated injury." *Ibid*., para. 30. That was one of the foremost "injuries and usurpations" that constituted evidence of "absolute Tyranny." *Id*., para. 2. Such violations were cited to "prove" to the "world" that it was our "right" and our "duty" to "throw off such Government," declare the "King" to be "unfit to be the ruler of a free People," and treat our "brethren" as "Enemies in War." *Id*., paras. 2, 31.

The Founders who dared to place their names on the Declaration of Independence "pledge[d]" literally their "Lives," their "Fortunes" and their "sacred Honor" to "secure" the "rights" inherent in "Governments" they "instituted" and "deriving their just powers" exclusively "from the consent of the" people being "governed." *Id*., paras. 32, 2. To such end, they pledged everything they and their families had or ever would have—lives, health, happiness and property.

In a manner unique in this country's history, many Founders and their families personally took up arms, and every Founder risked everything he and his family had to make particular protections become reality for the posterity of the people of that amazing time. As profoundly and as viscerally as any legislature possibly could, the Framers of the Constitution meant every word when they wrote the words in the Constitution at issue in this petition.

"The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. C.I.R.*, 501 U.S. 868, 870 (1991). "The Framers concluded that allocation of powers" in the Constitution and federal law "enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). The structure of power under the Constitution, generally, and "especially the structure of limited federal powers—is designed to protect individual liberty." *Bond v. United States*, 134 S. Ct. 2077, 2101 (2014).

Twelve years after the Declaration of Independence—and to cause Americans to ratify the Constitution—the Framers represented to the American people that our judicial system—and the Constitution—would be founded on the premise that "judges" would be the "faithful guardians of the Constitution." The Federalist No. 78 (A. Hamilton) (1788) (The Federalist Papers, Bantam ed. 2003) at 477. Courts would be "bulwarks" against "encroachments" on the Constitution. *Id*. at 476. American "courts of justice" would have the "duty" to "declare all acts contrary to the manifest tenor of the Constitution void." *Id*. at 473.

The Framers knew and expressly acknowledged that without a judiciary that enforced the Constitution, literally everything they and many others had fought, bled, died, suffered and struggled for years to accomplish "would amount to nothing." *Id*. They were very familiar with and profoundly feared judges operating without strong constraints. History had indelibly imprinted on their minds the fact that "there is no liberty" when "the power of judging" is "not separated from the legislative and executive powers." *Id*. In fact, they were very much aware that "liberty" has "every thing to fear" when the power of judges is combined with or subordinated to executive or legislative powers. *Id*.

The Constitution and the Bill of Rights were exceedingly carefully and conscientiously crafted to "establish Justice" and "secure the Blessings of Liberty" to the people and their posterity. U.S. Const. Preamble. Two of the most important and overarching principles

in the constitution are its separation of powers and its limits on federal power.

All "powers" at issue here that were "not delegated" to federal courts "by the Constitution" are "reserved" to "the people." U.S. Const. Amend. X. Neither "Congress" nor any other federal employee may "make" any "law" that abridges "the right of the people" to "petition the Government for a redress of grievances." *Id*. Amend. I. Moreover, federal "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution" or federal "Laws," and especially "to Controversies to which the United States shall be a Party." *Id*. Art. III, §2. "No person" may "be deprived of life, liberty, or property, without due process of law." *Id*. Amend. V. The "Constitution" and federal "Laws" that were "made in Pursuance thereof" are "the supreme Law of the Land; and the Judges in every State shall be bound thereby." *Id*. Art. VI, cl. 2. For that matter, "all executive and judicial Officers" are "bound" to "support this Constitution." *Id*. cl. 3. The President and all executive branch employees "shall take Care that the Laws be faithfully executed." *Id*. Art. II, §3.

The Founders of this country and the Framers of the Constitution clearly did not intend to allow any court in this country to engage in the same abuses that impelled them to risk everything they and their posterity had or ever could have. They risked all, battling one of the most powerful armies in their world, to overthrow their existing government and free themselves and their posterity of the tyranny imposed or enforced by some pre-constitutional courts. They clearly did not

intend that federal courts would arbitrarily allow and facilitate executive abuses by simply dismissing petitions for review or summarily affirming agency action without stating the controlling law and material facts.

V. Courts Must Explain their Actions When Declining to Review or Affirming Agency Action.

Each court "must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) quoting *In re Murchison*, 349 U.S. 133, 136 (1955) (internal quotation marks omitted). There can be no appearance of justice if the law appears nowhere in a court's decision.

Under the Constitution, "fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property." *W. & A.R.R. v. Henderson*, 279 U.S. 639, 642 (1929). An "outright refusal to" allow Petitioners to petition for review "without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules," and the plain language of the APA and the Constitution. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Courts also "cannot foreclose the exercise of constitutional rights by mere labels" such as "frivolous." *NAACP v. Button*, 371 U.S. 415, 429 (1963). Clearly, "litigation may well be the sole practicable avenue open"

to "petition for redress of grievances." *Id.* at 430. As in this case, litigation can be "a means for achieving the lawful objectives of equality of treatment by [the] government." *Id*.

The right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). It is "intimately connected both in origin and in purpose" with the right of "free speech." *Id*. Thus, in law, the two are "inseparable." *Id*. Use of any Court rule or ruling to "restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Courts must "allow the widest room for discussion" and only "the narrowest range for its restriction." *Id*.

"The courts must declare the sense of the law." The Federalist No. 78 at 476. That is what "jurisdiction" means: the court "pronounces the law." The Federalist No. 81 (A. Hamilton) (1788) at 498. See also *id*., n.3 ("jurisdiction" is a "compound" of *jus* and *dictio* meaning "a speaking or pronouncing of the law"). "Jurisdiction is power to declare the law." *Steel Co*., 523 U.S. at 94.

"Article III of the Constitution establishes an independent Judiciary" with the "duty" to "say what the law is" in "particular cases and controversies." *Bank*

Markazi v. Peterson, 136 S. Ct. 1310, 1322-23 (2016). "It is emphatically" the "duty" of courts "to say what the law is. Those who apply [a] rule to particular cases, must of necessity expound and interpret that rule." *Marbury*, 1 Cranch at 177.

A "Judge" is "required to declare the law." *Etting v. U.S. Bank*, 24 U.S. 59, 75 (1826) (Marshall, C.J.). If a court "refuse[s] to give an opinion on" a particular "point," parties "may except to the refusal, which exception will avail" them if they show "that the question was warranted" by the evidence and "that the opinion" they requested "ought to have been given." *Id*. One reason for this rule is vital: "if the Judge proceeds to state the law, and states it erroneously, his opinion ought to be revised; and if it can have had any influence on the" judgment, it "ought to be set aside." *Id*.

A court "would necessarily abuse its discretion if it based its ruling on" either "an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). But without an adequate statement of either the law or the facts, abuses of discretion can occur with impunity. They did occur repeatedly in this matter (and in the related FOIA case).

The APA also clearly required the Fifth Circuit to say what the law was. The APA required the court to "decide all relevant questions of law" and "interpret constitutional and statutory provisions" to the "extent necessary to" its "decision." 5 U.S.C. 706. To "interpret" means "[t]o ascertain the meaning and significance of

thoughts expressed in words." *Perez*, 135 S. Ct. at 1207-08 citing Black's Law Dictionary 943 (10th ed. 2014). Interpretation "is giving a definite meaning to an ambiguous text." *Id*. at 1208. The APA "thus contemplates that courts [] will authoritatively resolve ambiguities in statutes and regulations." *Perez* at 1211 (Scalia, J., concurring). Section 706 "requires a finding" on each relevant issue presented. *Overton Park*, 401 U.S. at 416.

"The essence of judicial decisionmaking" is "applying general rules to particular situations." *Rivers v. Roadway Exp*., *Inc*., 511 U.S. 298, 312 (1994). "A judicial construction of a statute is an authoritative statement of what the statute meant," but the Fifth Circuit failed to fulfill its "responsibility to say what [the] statute means," to authoritatively identify the court with jurisdiction over appeals of BRB orders under the DBA. *Id.* at 312-13.

"When a party properly brings a case or controversy to an Article III court, that court is called upon to exercise the 'judicial Power of the United States.'" *Perez* at 1217 (Thomas, J., concurring) quoting U.S. Const. Art. III, §1. Such "judicial power [] requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Id*. "Independent judgment required judges to decide cases in accordance with the law of the land." *Id*. at 1218. Courts have a constitutional "obligation to provide a judicial check on the other branches." *Id*. at 1213. "When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial

check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against." *Perez*, 135 S. Ct. at 1221.

Hundreds of years ago—when courts wrote with feathers dipped in ink—Chief Justice Marshall emphasized courts' duty to say what the law is. Since then, many quantum leaps in technology have phenomenally facilitated researching, writing and reproducing opinions and legal authorities. Statutes, regulations, opinions of every federal court in the country, and many memoranda, articles and treatises are available electronically. They can be identified, copied and modified rapidly, greatly facilitating saying what the law is.

Over the past two hundred thirty years, many legal issues also already have been resolved, and the analysis can be applied to many cases with modest variations. Template opinions commonly are used by tribunals to facilitate issuing opinions and judgments. Today, a multi-page analysis can be prepared in the time that was required to conceive of and commit to paper a single paragraph in *Marbury*.

Moreover, this country's jurists are among the most intelligent, experienced and articulate in the world. They should say at least as much as a *pro se* plaintiff, who must—even before discovery—state "sufficient factual matter" to show that a contention "is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As this Court has emphasized repeatedly, contentions do not even have "facial plausibility"

unless they are supported by "factual content that" at least "allows" a "reasonable inference." *Id*. The least that courts must do, especially when reviewing agency action, is expressly decide issues presented and interpret and determine the law. As the Constitution, Congress and this Court conclusively established and emphasized, courts must actually *say* what the law is.

The *Kisor* court unanimously emphasized that federal courts can no longer dispense with judicial review by uttering the talismanic phrase "*Auer* deference." This Court far more easily can and should unanimously emphasize that federal courts cannot dispense with judicial review with nothing more than the word "dismissed" or an entirely unsupported assertion of lack of jurisdiction or even a statement that "the merits of the agency's positions are so clear as to warrant summary affirmance."

The *Kisor* majority asked for "real evidence" of abuses of *Auer* deference. *Kisor*, 139 S. Ct. at 2421. Regarding this petition, the Court will have compelling evidence of abuses—by agencies and by courts that this Court is responsible for supervising. For years, multiple courts have abused rulings such as the foregoing to facilitate and enable obviously and intentionally unconstitutional conduct by courts and multiple agencies. Petitioner can present more evidence (and some might consider it more compelling) than was addressed above.

CONCLUSION

For the foregoing reasons this petition should be granted. The Fifth Circuit's judgment should be vacated and the Fifth Circuit should be required to comply with this Court's precedent.

Respectfully submitted,

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