No. 20-1113

IN THE
# Supreme Court of the United States

AMERICAN HOSPITAL ASSOCIATION, *ET AL.*,
*Petitioners*,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF IN SUPPORT OF CERTIORARI


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## RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for writ of certiorari remains accurate.

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## INTRODUCTION

At issue in this case are the outer limits of *Chevron* deference. Nine courts of appeals are divided over whether *Chevron* applies to a statutory interpretation question that determines both the lawfulness of agency action and the court's jurisdiction. *See* Pet. 13-20. That circuit split is clear, deep, and longstanding. *See id.* And it affects a broad swath of agency rulemaking, including decisions by HHS, INS, the Federal Labor Relations Authority, and state telecommunications commissions. *See id.* at 13-19. Now that the D.C. Circuit—which hears an outsized portion of

agency cases—has joined the split, further percolation is unwarranted. This Court should grant certiorari to address the division among the circuit courts.

HHS does not meaningfully contest the split. Indeed, it does not address many of the cases Petitioners cite as part of the split. *See* Opp. 26-28. Instead, HHS primarily argues that this Court cannot reach the question presented because it lacks authority to review the agency's invocation of the judicial preclusion provision that is at issue here. *Id.* at 14-19. The D.C. Circuit properly rejected that argument below, emphasizing that the federal courts have authority to determine whether a preclusion provision applies. *See* Pet. App. 12a-14a.

HHS also argues that it does not matter if the courts apply *Chevron* deference because it wins either way. *See* Opp. 19, 25-26. But the District Court held that the plain text of the statute *foreclosed* HHS's interpretation. *See* Pet. App. 56a. And the D.C. Circuit held that the statute did not "unambiguously forbid" HHS's interpretation and that it was "reasonabl[e]"—not that it was correct at *Chevron* step one. *Id.* at 19a-20a, 28a (internal quotation marks omitted).

The regulation at issue here cuts Medicare reimbursement to hospitals by over $600 million *per year* without statutory authority, disproportionately affecting rural hospitals that provide outpatient care to underserved communities. *See* Br. Amicus Curiae of 33 State and Regional Hospital Associations 3-5 ("Hosp. Ass'ns Amicus Br."). The question presented is important, there is a clear split, and there are no obstacles to review. The Court should grant certiorari.

## ARGUMENT

### I. THERE IS A DEEP CIRCUIT SPLIT ON THE QUESTION PRESENTED.

The petition explains that there is a deep circuit split among nine courts of appeals on the question presented. *See* Pet. 13-20. HHS's brief in opposition barely addresses that split. *See* Opp. 26-28. It instead says that the cases cited by Petitioners involve "other contexts." *Id.* at 27. But that is the point: Nine courts of appeals have reached opposite conclusions on the same legal question in a wide array of cases, warranting this Court's review.

The split is clear. The Fifth Circuit holds that "*Chevron* deference is not due with respect to the enforcement of the court's jurisdictional limitations," even when the court's jurisdictional ruling would "effectively decide the merits of [the] case." *Nehme* v. *INS*, 252 F.3d 415, 420-421 (5th Cir. 2001) (internal quotation marks omitted). The Seventh Circuit agrees that *de novo* review applies when "both our jurisdiction * * * and the merits of the appeal turn on" the same statutory interpretation question. *Solorzano-Patlan* v. *INS*, 207 F.3d 869, 872 (7th Cir. 2000). The D.C. Circuit takes the opposite approach, concluding that *Chevron* deference is warranted when "our consideration of the agency's statutory authority merges with our consideration of the applicability of a [judicial] preclusion provision." Pet. App. 18a. The Eighth Circuit similarly defers to an agency's "statutory interpretation concerning the scope of agency authority," even "in the face of [a co-extensive] statutory bar on review." *Key Med. Supply, Inc.* v. *Burwell*, 764 F.3d 955, 962 (8th Cir. 2014). Other courts fall on either side of the split. *See* Pet. 13-20.

Rather than address the fundamental legal disagreement among nine courts, HHS discusses the facts of a handful of cases (while ignoring the rest). *See* Opp. 26-28. But none of the cited cases undermines the split. HHS attempts (at 27) to distinguish *Soliman* v. *Gonzales*, but it leaves out the key fact—that the court there did not defer to the agency because it found that the "issue of our appellate jurisdiction" was not "within the [agency's] authority or expertise." 419 F.3d 276, 281 (4th Cir. 2005). *Soliman* illustrates the split: The D.C. Circuit's jurisdiction was not within *HHS's* authority or expertise either, but the D.C. Circuit deferred to the agency anyway. *See* Pet. App. 18a. HHS claims that *Solorzano-Patlan*, *Nehme*, and *National Association of Agriculture Employees* v. *Federal Labor Relations Authority*, 473 F.3d 983 (9th Cir. 2007), are "even further afield," Opp. 27-28, but it does not explain why. Those cases have different facts, but they demonstrate the division among the courts of appeals on the legal question here. *See* Pet. 13-16. HHS's amici similarly do not meaningfully contest the split. *See* Br. Amici Curiae of Digestive Health Phys. Ass'n, Large Urology Gp. Practice Ass'n, and Orthoforum 24-26 ("Digestive Health et al. Amicus Br.").

HHS claims that it is right on the merits of the question presented, and that *Chevron* deference should apply to its interpretation of a jurisdictional provision. *See* Opp. 21-23. But multiple courts of appeals disagree. *See* Pet. 13-16. And this Court's precedents repeatedly emphasize that *Chevron* deference does not apply when the federal courts' jurisdiction is at stake. *See id.* at 20-23. This Court should grant certiorari to resolve this clear split.

## II. THERE ARE NO VEHICLE PROBLEMS.

In an attempt to avoid this Court's review of a straightforward circuit split, HHS raises two issues that have little to do with the question presented and do not pose an obstacle to certiorari.

HHS first argues that this Court lacks authority to determine whether the regulation at issue is unlawful, citing the judicial preclusion provision in 42 U.S.C. § 1395*l*(t)(12)(A). *See* Opp. 14-19. That provision states that "[t]here shall be no administrative or judicial review" of "methods described in paragraph (2)(F)." 42 U.S.C. § 1395*l*(t)(12)(A). Section (2)(F) in turn states that "the Secretary shall develop a method for controlling unnecessary increases in the volume of covered OPD services." *Id.* § 1395*l*(t)(2)(F). According to HHS, because it adopted a "method" of volume control, courts lack jurisdiction to review the lawfulness of its actions. *See* Opp. 14-16.

The D.C. Circuit soundly rejected HHS's position, citing longstanding circuit precedent. *See* Pet. App. 12a-14a. As the court explained, although Section (12)(A) forecloses judicial review of "methods" of volume control, the question in this case is *whether* the agency adopted a "method" of volume control—or instead acted unlawfully. *See id.* The D.C. Circuit held that it had authority to address that issue, which determines whether the judicial preclusion provision applies. *See id.* Established D.C. Circuit precedent, including precedent interpreting Section (12)(A)'s preclusion provision, dictated the D.C. Circuit's conclusion. *See id.* at 13a (citing *COMSAT Corp.* v. *FCC*, 114 F.3d 223, 226-227 (D.C. Cir. 1997), *Amgen, Inc.* v. *Smith*, 357 F.3d 103, 113-114 (D.C. Cir. 2004), and

*Southwest Airlines Co.* v. *TSA*, 554 F.3d 1065, 1071 (D.C. Cir. 2009)).

That precedent is plainly correct: An agency cannot avoid judicial review simply by claiming that its actions fall within a judicial preclusion provision. *See* Opp. 16.[1] The fact that this case involves a preclusion provision, moreover, is baked into the question presented, which asks whether *Chevron* deference applies when the same statutory interpretation question determines both the lawfulness of agency action and the court's jurisdiction. That is not a vehicle problem; it is a feature of the case.

HHS next contends that this Court should deny certiorari because it would win without *Chevron* deference. *See* Opp. 19, 25-26. So do its amici—three industry groups who curiously chose to file an amicus brief *in opposition* to the petition, thus further highlighting its importance across the medical field. *See* Digestive Health et al. Amicus Br. 12 (contending that the D.C. Circuit "resolved" the issue "without resort to *Chevron*'s second step"). The courts below, however, did not reach that issue, and it thus does not pose an

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[1] HHS argues that the D.C. Circuit applied the wrong legal standard when interpreting the preclusion provision. *See* Opp. 18-19. The D.C. Circuit rejected HHS's position, however, and the agency did not file a cross-petition seeking this Court's review of that issue. *See* Pet. App. 14a-15a. This Court need not address HHS's argument, which is outside the scope of the question presented. *See* Sup. Ct. R. 14.1(a). Nor is HHS correct: Courts apply ordinary principles of statutory interpretation when determining whether a preclusion provision bars judicial review. *See Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1692 (2020) (analyzing preclusion provision "as a matter of straightforward statutory interpretation"); *Amgen*, 357 F.3d at 114 (examining "plain meaning" of statute).

obstacle to certiorari. An agency's self-serving contention that its position is correct is not a basis for denying certiorari. *See, e.g.*, *Kisor* v. *Wilkie*, 139 S. Ct. 657 (2018) (granting certiorari despite Department of Veterans Affairs' argument that its interpretation "reflects by far the best understanding of the regulation's plain text" and the question presented thus "has no practical significance," Brief in Opposition at 10-11, *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15), 2018 WL 5678446); *City of Arlington* v. *FCC*, 568 U.S. 936 (2012) (granting certiorari despite FCC's assertion that "even if the court of appeals had engaged in de novo review, there is no reason to believe that the court would have reached a different conclusion about the Commission's authority," Brief in Opposition at 12, *City of Arlington* v. *FCC*, 569 U.S. 290 (2013) (No. 11-1545), 2012 WL 3756872).

In the proceedings below, the District Court held that the plain text of Section 1395*l*(t)(2)(F) is "clear," and that it does *not* authorize HHS to cut Medicare reimbursement to hospitals by more than $600 million per year. Pet. App. 56a. According to the District Court, a method of volume control "is not a price-setting tool, and the government's effort to wield it in such a manner is manifestly inconsistent with the statutory scheme." *Id.* The D.C. Circuit reversed, but it did so "under the traditional *Chevron* framework, under which [it] defer[s] to the agency's reasonable interpretation of an ambiguous statute." *Id.* at 16a.

The D.C. Circuit did not hold that Section (2)(F)'s text is clear under *Chevron* step one. As HHS acknowledges, the D.C. Circuit did not "state explicitly how it would decide the issue absent" *Chevron* deference. Opp. 26. Instead, the court held that the

"statute is at least ambiguous as to whether" HHS's "rate adjustment lies within the agency's (2)(F) authority." Pet. App. 28a; *see id.* at 19a (text does not "unambiguously forbid" HHS's interpretation (internal quotation marks omitted)); *id.* at 20a (text "does not directly foreclose" HHS's position); *id.* at 20a (text lends "support" to HHS's interpretation); *id.* at 20a-21a (text does "not preclude" agency's interpretation (internal quotation marks omitted)); *id.* at 28a ("statute does not unambiguously foreclose" HHS's position). Based on that conclusion, the court proceeded to "*Chevron* step two," where it evaluated whether HHS's interpretation is "reasonable." *Id.* at 28a (internal quotation marks omitted). The D.C. Circuit concluded that it was, "defer[ring] to the agency's" interpretation. *Id.* at 29a. If the D.C. Circuit had determined that the plain text of Section (2)(F) dictated the result in this case, it would have said so. Instead, it held only that HHS's interpretation is "reasonable"—not that it is correct.

HHS's interpretation is *not* correct. Using mandatory language, the Medicare statute precisely defines the formula by which "[t]he amount of payment" for any given outpatient service "*is* determined." 42 U.S.C. § 1395*l*(t)(4) (emphasis added). This statute instructs that HHS "*shall* compute a * * * fee schedule amount" for each service by calculating several factors that are defined in cross-referenced provisions. *Id.* § 1395*l*(t)(3)(D) (emphasis added). Section 2(F) is not one of those specified provisions, and it thus plays no role in the statutory payment formula, as the District Court recognized. *See* Pet. App. 56a-57a.

Section (2)(F) has been on the books for over 20 years, but prior to this rulemaking, HHS had *never*

interpreted it to permit the agency to cut Medicare reimbursement, much less by hundreds of millions of dollars per year. Faced with increasing Medicare costs, HHS now claims that a sub-sub-sub provision of the Medicare statute that says nothing about reimbursement allows it to set any reimbursement amount it likes for any service, as long as doing so will reduce the "volume" of that service—which, presumably, any payment cut would. *See* Pet. 9-10. And it reached that conclusion despite Congress's considered decision to cut Medicare reimbursement *only* for new outpatient facilities, leaving in place higher reimbursement amounts for existing facilities—and Congress's further compromise one year later to allow facilities that were mid-build to collect the higher reimbursement amount. *See id.*; Hosp. Ass'ns Amicus Br. 10-13. HHS does not even discuss this statutory context in its analysis. *See* Opp. 25-26. HHS's position is a striking power grab by an administrative agency, particularly in light of the detailed statutory scheme created by Congress for determining Medicare reimbursement and Congress's explicit resolution of the policy question HHS sought to address. *See* Pet. App. 56a-65a.

This case is thus an excellent vehicle for deciding the question presented: Whether *Chevron* applies determines whether HHS has nearly limitless power to reduce Medicare reimbursement, or whether the text of the statute meaningfully cabins the agency's authority. There is a clear split, the question presented is important, and there are no obstacles to the Court's review. The Court should grant certiorari.

## CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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