No. 20-1114

IN THE
Supreme Court of the United States

AMERICAN HOSPITAL ASSOCIATION, *et al.*,
Petitioners,
v.

XAVIER BECERRA,
SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

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

BRIEF OF INDIANA, GEORGIA, LOUISIANA, MISSISSIPPI, NEBRASKA, OKLAHOMA, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. Whether *Chevron* deference permits HHS to set reimbursement rates based on acquisition cost and vary such rates by hospital group if it has not collected adequate hospital acquisition cost survey data.

2. Whether petitioners' suit challenging HHS's adjustments is precluded by 42 U.S.C. § 1395l(t)(12).

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INTEREST OF *AMICI* STATES

The States of Indiana, Georgia, Louisiana, Mississippi, Nebraska, Oklahoma, Texas, and Utah respectfully submit this brief as *amici curiae* in support of neither party.

Amici States file this brief to explain why the Court should approach the statutory interpretation question raised by this case—the scope of agency authority to "adjust[]" data in setting drug reimbursement rates—*without* deferring to the agency's view of its own authority. *Amici* States take no position, however, on the ultimate question whether HHS acted within its authority or whether judicial review of this question is barred by 42 U.S.C. § 1395l(t)(12).

Amici States have significant interests in preserving the separation of powers and preventing overreach by federal agencies. Under the Constitution and the Administrative Procedure Act, courts—not agencies—have final responsibility for determining the existence and extent of administrative agencies' policymaking authority. Where, as in the decision below, courts fail to discharge this responsibility and instead defer to agencies' views of the scope of their own authority, agency authority inevitably expands—in contravention of congressional intent and at the expense of the authority of States and the liberty of citizens.

Amici States thus urge this Court to reaffirm the judicial role in preserving federal law's essential protections against administrative overreach.

SUMMARY OF THE ARGUMENT

This case presents a highly technical question—whether the reimbursement rates for specified covered outpatient drugs (SCODs) set by the Secretary of Health and Human Services (HHS) are authorized by 42 U.S.C. § 1395l(t)(14)(A)(iii)(II) (Subclause II), which authorizes HHS to set rates using "the average price for the drug . . . as calculated and adjusted by the Secretary as necessary for purposes of" the SCOD-reimbursement program. Vast sums and important policies no doubt turn on the answer to that question.

Even more important for the rule of law, however, is *how* the Court goes about answering that question. In adjudicating disputes over the scope of agency authority, should courts interpret the authorizing statute *de novo*, or should they instead defer to the agency's view of its meaning? This is not a matter of reconsidering *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but of applying it with full force, properly understood. Far from requiring courts to tilt the scale in favor of agencies' views of the scope of their own authority, *Chevron* requires courts to consider competing statutory interpretations evenhandedly and then choose the *best* reading. Only then, if they decide an agency's decision fits within the authority delegated by the statute, do courts accord the "deference" *Chevron* requires and uphold the decision—so long as it is reasonable, even if disagreeable. *Chevron* requires—and the Constitution permits—nothing more.

1. For decades members of this Court have recognized the serious constitutional concerns raised by the enormous authority administrative agencies now exercise. Crucially, the constitutional justification for agency policymaking is that Congress has delegated it. This scheme works, however, only if courts "tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies' authority." *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).

Properly understood, this is precisely what *Chevron* does. *Chevron*'s familiar two-step approach to challenges to agency decision-making has of constitutional necessity always been grounded as an exercise in statutory interpretation. *Chevron* does not command courts to uphold agencies' "wrong but not crazy" interpretations of statutory provisions. It instead instructs courts to decide the *best* reading of a statutory provision—and when (1) the provision is best read to delegate some discretionary authority to an agency and (2) the agency's decision falls within the scope of that discretionary authority, to carry out Congress's instructions by upholding the agency's decision. Once the Court has decided whether and to what extent Congress has delegated policymaking authority to the agency, the Court defers to the agency's judgment within the range of delegated authority—subject of course to the additional requirements of the Constitution and the Administrative Procedure Act (APA).

2. This case offers an apt illustration of how this process should work. With respect to the first step of *Chevron*, all agree that Subclause II confers upon

HHS *some* policymaking authority to "calculate[] and adjust[]" average drug prices in setting reimbursement rates for SCODs. The sole question in this case pertains to the *scope* of this authority—whether that scope encompasses the way in which HHS calculated reimbursement rates as it did here. The Constitution, the APA, and *Chevron* itself require the Court to answer this question *de novo*.

ARGUMENT

I. *Chevron* Can Be Justified Only as an Exercise in Implementing Congressional Delegation of Policymaking Authority

A. The Constitution and the Administrative Procedure Act require courts to interpret statutory text *de novo* to determine how much policymaking authority, if any, Congress has delegated

1. Our Constitution was adopted both "to enable the people to govern themselves, through their elected leaders," *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010), and to "diffuse[] power the better to secure liberty," *Youngtown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The Framers were acutely aware of the tendency of individuals—and institutions—to favor their own interests. *See* The Federalist No. 10 (C. Rossiter ed. 1961) (James Madison) ("No man is allowed to be a judge in his own cause; because his interest

would certainly bias his judgment, and, not improbably, corrupt his integrity."); The Federalist No. 80 (C. Rossiter ed. 1961) (Alexander Hamilton) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."). The Constitution's separation of governmental powers among the Branches is designed to redirect—and thereby mitigate the deleterious consequences of—such self-interestedness. *See* The Federalist, No. 51 (C. Rossiter ed. 1961) (James Madison).

As the Court has repeatedly observed, however, the expansive reach of today's federal administrative state, "which now wields vast power and touches almost every aspect of daily life," lies in serious tension with the Constitution's separation of powers. *Free Enter. Fund*, 561 U.S. at 499. Unelected agency personnel—who are often unaccountable even to the President—now exert enormous policymaking authority, including the power to set rules *and* the powers to police compliance and adjudicate violations. *See City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). "The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government." *Id.*

The Court's solution to this problem—of reconciling agencies' expansive powers with our constitutional scheme—has been to insist on the principle of congressional control: The Constitution permits agencies to exercise regulatory authority, the Court has held, only because *Congress* has first passed a

law that delegates regulatory authority and defines the scope of such authority.

The Court has long insisted, for example, that the separation of powers bars agencies from defining their own policy missions. The Court "repeatedly ha[s] said that when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton v. United States*, 276 U.S. 394, 409 (1928)). The delegation doctrine "has developed to prevent Congress from forsaking its duties" and is grounded on the rule "that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996) (citing *Field v. Clark*, 143 U.S. 649, 692 (1892)); *see also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (noting this rule ensures "important choices of social policy are made by Congress, the branch of our Government most responsible to the popular will."). It stands among the "many accountability checkpoints" in the Constitution, which "by careful design, prescribes a process for making law." *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring).

2. In addition to imposing the "intelligible principle" rule as a constitutional limit on Congress's authority to delegate to agencies, the Court has applied

the principle of separation of powers to guide its interpretation of statutes delegating such authority. In particular, because agencies are creatures of Congress, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). And because agencies have only the power Congress delegates to them, a court confronted with a challenge to an agency action must carefully examine the statute Congress enacted to determine for itself whether the action falls within the agency's delegated authority. To do otherwise "would be to grant to the agency the power to override Congress," which the Court has been "both unwilling and unable to do." *Id.* at 374–75.

The Court has thus long held that the separation of powers requires that the "determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944). To "finally decide the limits of [an agency's] statutory power" is not the job of the agency but is instead "a judicial function." *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946); *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("[I]t is fundamental 'that an agency may not boot-

strap itself into an area in which it has no jurisdiction.'" (quoting *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

Placing responsibility for definitively interpreting statutory delegations of power with courts reflects "the obligation of the Judiciary "not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting). To leave the task of circumscribing agency authority with agencies themselves risks allowing agencies to wield excessive power that goes beyond that which Congress has authorized. *See Michigan v. EPA*, 576 U.S. 743, 750–51 (2015) (Thomas, J., concurring) (noting that vesting agencies with the authority to determine the scope of their own authority "wrests from Courts the ultimate interpretive authority to say what the law is and hands it over to the Executive. . . . in tension with Article III's Vesting Clause" (internal quotation marks and citations omitted)); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) (describing such deference as "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch"); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 276 (2000) ("If Congress has addressed a subject, but has done so in a limited way, this fact may itself suggest that Congress has gone as far as it could, as far as the enacting coalition wished to, on the subject in question.").

3. Finally, "[t]here is no statutory provision, in the APA or elsewhere, instructing courts to defer to agency interpretations of ambiguous statutory texts." Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 Mo. L. Rev. 983, 990 (2016). Indeed, Section 706 of the APA explicitly directs courts to decide "all relevant questions of law." 5 U.S.C. § 706. And for good reason: Without judicial oversight, the APA would be wholly ineffective in policing administrative agencies. A court cannot know whether an "agency action" is "in excess of statutory jurisdiction, authority, or limitations" unless it interprets the statute for itself. *Id.* § 706(2)(C).

The APA permits courts to uphold an agency action only after independently determining that the action falls within the agency's statutorily conferred authority: Courts "do not ignore that command [of Section 706] when [they] afford an agency's statutory interpretation *Chevron* deference; [they] respect it. [They] give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law.'" *City of Arlington*, 569 U.S. at 317 (Roberts, C.J., dissenting) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019) (citing this passage and offering a similar defense of *Auer* deference); Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 27–28 (1983) (noting that "the court is not abdicating its constitutional duty to 'say what the law is' by deferring to agency interpretations of

law: it is simply applying the law as 'made' by the authorized law-making entity").

The APA thus underscores courts' constitutional obligation to ensure agencies' regulatory decisions have been authorized by a congressional delegation of authority. *Cf. Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment) (acknowledging that the APA "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations").

B. From *Chevron* itself onward, the Court has repeatedly justified *Chevron* in terms of effectuating Congress's intent to delegate policymaking authority

1. *Chevron* did not suddenly renounce the Judiciary's obligation to ensure Executive Branch agencies (and independent agencies) stay within their delegated, statutory authority. To the contrary, its approach to reviewing agency decisions is premised on implementing the precise scope of authority Congress has delegated. *Chevron* directs courts always to ask first "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). And if the court concludes that there has been a "legislative delegation to an agency," *id.* at 844, *Chevron*'s second step instructs the court to uphold

agency actions that fall within the scope of that delegated authority, *see id.* (requiring courts to uphold an agency's "reasonable interpretation").

Chevron makes clear that this two-step approach is meant to effectuate—not abdicate—courts' duty to discern for themselves the meaning of statutory provisions. As the decision acknowledges, the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, *that intention is the law and must be given effect*." *Id.* (emphasis added).

Accordingly, as multiple scholarly observers have pointed out, *Chevron*'s approach is best understood as rooted in an attempt to discern the scope of Congress's delegation of regulatory authority. *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 836 (2001) ("*Chevron* should be regarded as a legislatively mandated deference doctrine."); Adler, *supra*, at 990 ("[T]he Court has made clear that *Chevron* is, in fact, premised on a delegation of interpretive and policymaking authority from Congress to implementing agencies."). Other potential rationales for *Chevron*—such as those grounded in considerations of "[e]xpertise, accountability, and uniformity"—are all merely "*policy* reasons for deferring to agencies over judges" and "do not provide a *legal* basis for *Chevron*." *Id.* at 989.

2. Indeed, the Court has repeatedly justified *Chevron* as a tool for implementing congressional intent. In *Mead*, for example, the Court explained that *Chevron* held that Congress may delegate authority implicitly as well as explicitly: Even where Congress has not "expressly delegated authority or responsibility to implement a particular provision or fill a particular gap," it may—or may not—"be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *see also id.* at 231–32 (concluding that "the terms of the congressional delegation give no indication that Congress meant to delegate authority to [the U.S. Customs Service] to issue classification rulings with the force of law").

Mead thus clarified that courts should not infer a congressional intent to delegate—and thus should not defer to agency decisions—every time they encounter a statutory ambiguity or "gap." Instead, there must be actual "indication of a . . . congressional intent" to do delegate. *Id.* at 227. Only "[w]hen circumstances implying such an expectation exist" should a reviewing court "accept the agency's position," so long as "Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Id.* at 229. *Mead* thus "eliminates any doubt that *Chevron* deference is grounded in congressional intent." Thomas W. Merrill, *The Mead Doctrine: Rules and*

Standards, Meta-Rules and Meta-Standards, 54 Admin. L. Rev. 807, 812 (2002).

The Court's other *Chevron* cases confirm as much. In *Adams Fruit Co. v. Barrett*, for example, the Court observed that "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." 494 U.S. 638, 649 (1990) (citing *Bowen*, 488 U.S. at 208). The Court reiterated this point in *Gonzales v. Oregon*, observing that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved"—rather, the regulation advancing the interpretation "must be promulgated pursuant to authority Congress has delegated to the official." 546 U.S. 243, 258 (2006) (citing *Mead*, 533 U.S. at 226–27).

And in *FDA v. Brown & Williamson Tobacco Corp.*, the Court again explained that "[d]eference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." 529 U.S. 120, 159 (2000). For this reason, the Court explained, an agency's claim to authority will pass the first step of *Chevron* only where the statutory context as a whole makes it reasonable to infer a delegation of authority. *Id.* at 132–33 (explaining that a "reviewing court should not confine itself to examining a particular statutory provision in isolation" and "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency").

4. Even the Court's famously pro-agency decision in *City of Arlington* confirms this understanding of *Chevron*. Every opinion in *City of Arlington*—Justice Scalia's majority opinion, Justice Breyer's concurrence, and the Chief Justice's dissent—recognized that *Chevron*'s legitimacy stems from the delegation of authority by Congress.

Justice Scalia observed that "*Chevron* is rooted in a background presumption of congressional intent," which means that the "underlying question" is always "Does the statute give the agency authority to regulate . . . or not?" 569 U.S. at 296, 298 (majority op.). Similarly, Justice Breyer noted that the "question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law *is for the judge to answer independently*." *Id.* at 310 (Breyer, J., concurring in part and concurring in the judgment) (emphasis added). And the Chief Justice likewise explained that "*Chevron* deference is based on, and finds legitimacy as, a congressional delegation of interpretive authority," *id.* at 321 (Roberts, C.J., dissenting)—courts thus only "give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law,'" *id.* at 317 (quoting *Mead*, 533 U.S. at 229).

Notably, the dispute in *City of Arlington* was not over the rationale for *Chevron* but was instead over whether the *Chevron* framework applies to "an agency's interpretation of a statutory ambiguity that

concerns the scope of its regulatory authority (that is, its jurisdiction)." *Id.* at 293 (majority op.). Writing for the majority, Justice Scalia concluded that it does, on the ground that "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage." *Id.* at 297. In doing so, however, Justice Scalia reaffirmed the principle that an agency's authority goes only so far as Congress allows: Regardless of how a statutory provision might be characterized, under *Chevron* the question "is always whether the agency has gone beyond what *Congress has permitted it* to do." *Id.* (emphasis added).

5. The Court's opinions following *City of Arlington* reaffirm that *Chevron* is rooted in delegation. For example, in *Scialabba v. Cuellar de Osorio*, the Chief Justice, now joined by Justice Scalia, observed that while "courts defer to an agency's reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency," no such assumption can be made where the ambiguity was created by Congress enacting conflicting provisions. 573 U.S. 41, 76 (2014) (Roberts, C.J., concurring).

Similarly, the Court's decision in *King v. Burwell* explicitly relies on the notion that *Chevron* "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." 576 U.S. 473, 485 (2015) (quoting *Brown & Williamson*, 529 U.S. at 159). There the IRS had issued a regulation interpreting the Affordable Care Act to authorize tax credits

for individuals who purchase insurance plans through a federal exchange, but the Court refused to defer to this interpretation—even though the IRS held general statutory authority to issue regulations implementing the statute, and even though the Court concluded the statute was ambiguous. *See id.* at 486, 490. The Court explained that because the interpretive question was "of deep 'economic and political significance'" and "central to this statutory scheme," it was unlikely that the statutory ambiguity constituted an implicit delegation; "had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.* at 486 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

Indeed, the Court's decision in *King v. Burwell* illustrates a more general point: The Court has refused to accord *Chevron* deference when statutory ambiguities concern major questions precisely because *Chevron* is all about effectuating congressional intent. *See also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("*Congress is more likely to have focused upon, and answered, major questions*," such as whether to confer jurisdiction to an agency, while "leaving interstitial matters," such as how delegated authority is exercised, for resolution by the agency during the "daily administration" of the statute (emphasis added)); *Brown & Williamson*, 529 U.S. at 159 (citing Breyer, *supra*, at 370); *King v. Burwell*, 576 U.S. at 485 (quoting *Brown & Williamson*, 529 U.S. at 159).

In sum, *Chevron* and the Court's subsequent decisions confirm that there is only one viable justification for the *Chevron* framework: It discerns and implements Congress's intent to delegate regulatory authority. This understanding conforms with the separation of powers and the APA, and it resolves many of the key questions that arise in applying *Chevron*—including the question before the Court here.

II. Because *Chevron* Is a Means of Carrying Out Congressional Acts, *Courts* Must Decide the Scope of Any Delegation to an Agency

A. Courts considering the scope of an agency's authority under *Chevron* should interpret the statutory delegation *de novo*

1. Because the purpose of *Chevron* is to effectuate congressional intent, it requires a court to uphold agency decisions only *after* the court has decided for itself how much authority Congress has conferred. As the Chief Justice has explained, a court always "must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue." *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting). "Agencies are creatures of Congress" and have "no power to act unless and until Congress confers power upon" them, which means that "[w]hether Congress has conferred such power is the relevant question of law that must be answered before affording *Chevron* deference." *Id.* (cleaned up).

Chevron thus always requires courts to interpret the statute *de novo*. Courts apply the "deference" for which *Chevron* calls only after independently determining the scope of the agency's delegated authority: When the agency acts within the scope of this authority, *then* it is entitled to deference. *See id.* at 321–22 (explaining that whether "Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner . . . must be determined by the court on its own before *Chevron* can apply"); Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 Mo. L. Rev. 983, 985 (2016) (noting that because "*Chevron* deference is predicated on a theory of delegation, courts should only provide such deference when the relevant power has been delegated by Congress"); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 836 (2001) ("The conclusion that *Chevron* rests on an implied delegation from Congress also has important implications for *Chevron*'s domain: It means that Congress has ultimate authority over the scope of the *Chevron* doctrine, and that the courts should attend carefully to the signals Congress sends about its interpretative wishes.").

At step one, *Chevron* requires the court first to determine whether Congress conferred policymaking authority on the agency at all. As the Court in *Chevron* allowed, "[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit," but regardless, the court may proceed only after determining that Congress has in fact delegated regulatory authority to the agency. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,

467 U.S. 837, 844 (1984). If the court finds Congress did delegate authority, the court then defines the scope of the agency's delegated authority under the statute—setting the outer bounds of permissible agency action at *Chevron* step two. That zone of reasonable policies, definitively articulated by the court, constitutes the scope of authority delegated by Congress. It is *within* this zone that the agency is free to take actions according to its own lights, subject always to the Constitution and the APA.

2. The Court employed precisely this approach in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994). As here, the provision at issue there, 47 U.S.C. § 203(b)(2), conferred *some* policymaking authority: It authorized the FCC to "modify any requirement" imposed by a law requiring common carriers to file tariffs with the FCC. *Id.* at 225. The key question concerned the scope of policymaking authority conferred by this "modification" clause—in particular, whether it encompassed the FCC's decision to make tariff filing optional for all nondominant long-distance carriers. *Id.* at 220.

Justice Scalia, writing for the Court, rejected the FCC's interpretation of the modification clause and held that the FCC's policy was an impermissible exercise of its authority. Relying on textual tools and canons of interpretation, the Court explained that the word "modify" connotated "increment or limitation," *id.* at 225, which was suggestive of only "moderate change." *Id.* at 228. The Court thus rejected the rule, because the FCC's rate-setting policy "effectively . . .

introduc[ed] . . . a whole new regime of regulation" not contemplated by "the one that Congress [had] established." *Id.* at 234. The Court refused to defer to the FCC's rule, in other words, because its rule exceeded the scope of the authority the statute delegated to it.

Following *MCI*, the Court has consistently insisted that—even where an agency has been delegated *some* policymaking authority—*Chevron* still requires courts to ensure that agency decisions fall within the zone of authority conferred by the statutory text. As the Court explained in *Utility Air Regulatory Group v. EPA*, "[e]ven under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation'"—which, the Court ultimately demonstrated, means the agency's decisions must fall within the scope of authority actually granted by the statute. 573 U.S. 302, 321 (2014) (quoting *City of Arlington*, 569 U.S. at 296). The Clean Air Act provisions at issue there required permits for major emitters of "any air pollutant," and the EPA had issued a regulation defining this term to include greenhouse gases. *Id.* at 316. Although this provision obviously gave the EPA some measure of regulatory authority, the Court refused to defer to the EPA's interpretation: It held that the agency's regulation was "'incompatible' with 'the substance of Congress' regulatory scheme,'" *id.* at 322 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000)), and "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization," *id.* at 324.

Similarly, in *Michigan v. EPA*, the Court invalidated an EPA regulation because the agency had again exceeded its statutory authority and thereby failed to "'operate within the bounds of reasonable interpretation.'" 576 U.S. 743, 751 (2015) (quoting *Utility Air Regulatory Group*, 573 U.S. at 321). The EPA's regulation had interpreted a statutory provision directing the agency to regulate power plants when it "'finds such regulation is appropriate and necessary,'" to "mean that cost makes no difference to the initial decision to regulate." *Id.* (quoting 42 U.S.C. § 7412(n)(1)(A)). Again, the provision at issue clearly delegated some policymaking discretion to the agency, but the Court nevertheless refused to defer to the agency's interpretation under *Chevron*: In light of the statutory context and the long history of agencies' consideration of cost, the EPA had "strayed far beyond" the bounds of reasonable interpretation "when it read [the statute] to mean that it could ignore cost when deciding whether to regulate power plants." *Id.*

3. The fundamental lesson of these decisions is that *Chevron* does not require courts to take the agency at its word that its decision is reasonable—that is, that it falls within the scope of its delegated authority. As one leading commentator has observed, "what the reasonable meanings might be is, within the *Chevron* universe, *a question for the courts to decide*." Peter L. Strauss *et al.*, *Gellhorn & Byse's Administrative Law* 1073 (11th ed. 2011) (emphasis added). "The fact that Congress has left a gap for the agency to fill means that courts should defer to the agency's reasonable gap-filling decisions, *not that*

courts should cease to mark the bounds of delegated agency choice." *Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) (emphasis added); *see also, e.g.*, Merrill & Hickman, *supra,* at 836 ("[I]t has never been maintained that Congress would want courts to give *Chevron* deference to an agency's determination that it is entitled to *Chevron* deference . . . .").

Indeed, the Court recently reiterated that, "under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation,'" which means "it must come within the zone of ambiguity *the court* has identified after employing all its interpretive tools." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (quoting *City of Arlington*, 569 U.S. at 296) (emphasis added); *see id.* (noting that the statute's "text, structure, history, and so forth . . . establish the outer bounds of permissible interpretation"). And it went on to admonish lower courts that "there be no mistake: That is a requirement an agency can fail." *Id.*

The principle that "foxes should not guard henhouses," is fundamental to judicial review of agency action. *See* Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869, 889 (2008); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 446 (1989) ("The basic case for judicial review depends upon the proposition that foxes should not guard henhouses."). And as Justice Scalia explained, courts avoid the "fox-in-the-henhouse syndrome . . . by taking seriously, and applying rigor-

ously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *City of Arlington*, 569 U.S. at 307.

B. Here, the Court should consider the parties' competing interpretations and adopt the best reading, without tilting the scales in favor of the agency

1. This case is an apt occasion for the Court to confirm that *Chevron* directs courts to uphold agency decisions only *after* they independently determine the scope of the agency's authority and then conclude that the agency's decision falls within that scope. Conveniently, step one of *Chevron*—the locus of many if not most challenges to agency decisions—is not at issue here, for Subclause II clearly grants HHS *some* policymaking authority. Where "hospital acquisition cost data are not available" (and all agree they are not, *see* Pet. App. 19a), Subclause II explicitly grants HHS the authority to set SCOD reimbursement rates using "the average price for the drug . . . *as calculated and adjusted by the Secretary* as necessary for purposes of" the SCOD-reimbursement program. 42 U.S.C. § 1395l(t)(14)(A)(iii)(II) (emphasis added).

Accordingly, the only disputed issue in this case concerns *Chevron* step two—namely, the precise *scope* of HHS's authority under Subclause II. And on this

question the parties each offer coherent, alternative readings of the statute.

Petitioners argue the Secretary's authority to "adjust[]" a drug's average price is subject to two limitations derived from the structure of the statute. When hospital acquisition cost survey data *is* available, the statute (1) directs HHS to set rates using each drug's "average acquisition cost" and (2) authorizes, "at the option of the Secretary," varying reimbursement rates "by hospital group." 42 U.S.C. § 1395l(t)(14)(A)(iii)(I) (Subclause I). Warning that any other reading would "nullify" these provisions of Subclause I, Petitioners argue that the Secretary's "adjustment" authority under Subclause II *cannot* extend (1) to basing reimbursement rates on a drug's average acquisition cost or (2) to setting different rates for different hospital groups. Pet. Br. 32–35. And beyond these two structural limitations, Petitioners further contend that the term "adjust" must be read to permit only "slight change[s]" that take average prices—not acquisition costs—as their "starting point." *Id.* at 37–38.

HHS, meanwhile, argues that the only limitation on its adjustment authority is that the adjustment be "necessary for purposes of . . . Section 1395l(t)(14)," and it argues that one such purpose is to "align specified-drug reimbursement with hospital costs." Br. in Opp. 18 (internal quotation marks, alterations, and citations omitted). HHS thus contends that Subclause II gives it expansive authority to adjust average price data so that reimbursement rates reflect hospitals' acquisition costs—a reading that reflects its conclusion

that "average price" under Subclause II serves as a proxy for average acquisition cost. *Id.* at 19. HHS further argues that the limitations Petitioners would impose on its authority would themselves render Subclause II superfluous: While Petitioners contend that the "purposes" for which HHS can adjust average prices cannot include the goal of approximating hospital acquisition costs, they "point[ed] to no other 'purpose' that could permissibly support an adjustment." *Id.* at 20 (quoting Pet. App. 24a).

The Court's task in this case is to examine the statutory text and determine which of these interpretations offer a better reading of the statute. And the Court should do so using its own best judgment, without putting a finger on the scale in favor of the agency.

2. The decision below failed to follow the appropriate approach because it misunderstood what *Chevron* is about. *Chevron* is not about upholding agency interpretations of statutes that are "close enough for government work." *See* Pet. App. 17a–18a ("[T]he sole question before us is whether HHS had statutory authority to impose its 28.5% cut to SCOD reimbursement rates . . . . On that issue of statutory interpretation, HHS is entitled to *Chevron* deference . . . ."). As explained above, *Chevron* is instead about answering "the question . . . whether the agency has stayed within the bounds of its statutory authority." *City of Arlington*, 569 U.S. at 297. And courts confronted with that question must "decide independently." *Id.* at 308 (Breyer, J., concurring in part and concurring in the judgment).

Accordingly, "HHS's understanding of its statutory authority," is not the sort of thing that is ever "entitled to *Chevron* deference." Pet. App. 18a. An agency's understanding of the scope of its statutory authority may be *correct*, in which case *Chevron* directs courts to uphold the decisions the agency takes within the scope of that authority, so long as those decisions comply with any additional requirements of the Constitution and the APA. *Chevron* does not, however, entitle agencies to decide for themselves whether statutory provisions authorize their actions. Under *Chevron*—and under the Constitution and the APA—that task is reserved to the Judiciary.

The proper course here is thus straightforward. The Court should undertake a *de novo* review of the statute and, in light of all of the relevant tools of statutory interpretation, adopt the best reading of the scope of authority conferred by Subclause II. Perhaps the Court will agree with the agency's interpretation—indeed, perhaps that is all the decision below meant to do. *See* Pet. App. 30a. If it does, the Court should uphold the agency's decision. What the Court should not do, however, is permit HHS to decide for itself how much authority it has been given by Congress. Such a result violates the separation of powers, the APA, and the Court's *Chevron* jurisprudence.

CONCLUSION

For the foregoing reasons, the Court should decide between the parties' competing interpretations of 42 U.S.C. § 1395l(t)(14)(A)(iii)(II) *de novo*, without according any deference to the agency's view of the scope of its own authority.

Respectfully submitted,

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