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 FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN FARM BUREAU FEDERATION, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND NATIONAL MINING ASSOCIATION SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are the group of unrelated business associations listed below whose members are regularly affected by the doctrines of judicial deference to agencies.[1] Each *amicus* dedicates its resources to facilitating the work and livelihoods of its members—both individuals

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund this brief's preparation or submission, and that no person or persons other than *amici* and their counsel made such a monetary contribution. Petitioners have filed a blanket consent and respondents have consented to this brief's filing.

and companies—and enhancing those members' abilities to serve the public throughout the United States. Federal agencies, often multiple agencies, pervasively regulate *amici*'s members, who repeatedly have experienced the consequences of those agencies' claims of entitlement to *Chevron* or *Auer* deference. But *Chevron*'s first step was always supposed to be rigorous: Courts must read the statutory text and *consider* deference *only* if ostensible ambiguity survives application of all the canons of construction. *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Such rigor in theory has often been replaced in practice by a dual impulse—first to find statutory ambiguity and then to defer. Reflexive deference undermines the rule of law and the ability of *amici*'s members to order their affairs.

Amici therefore have a substantial interest in this case. *Amici* are:

1. The **National Association of Home Builders** (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers; its builder members construct about 80% of all new homes built in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and economic interests of its members and those similarly situated.

2. The **American Farm Bureau Federation** (AFBF), headquartered in Washington, D.C., was

formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, the AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts, to represent its members.

3. The **American Fuel & Petrochemical Manufacturers** (AFPM) is a national trade association representing most of the United States refining and petrochemical manufacturing capacity. These companies provide jobs, directly and indirectly, to more than three million Americans, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the nation. AFPM regularly engages in legal advocacy on issues that affect its members.

4. The **National Cattlemen's Beef Association** (NCBA), based in Centennial, Colorado, is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's food supply. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to advocate for the cattle industry's policy positions and economic interests.

5. The **National Mining Association** (NMA), based in Washington, D.C., is a national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral-processing ma-

chinery, equipment, and supplies; and engineering and consulting firms, financial institutions, and other firms serving the mining industry. NMA often participates in litigation raising issues of concern to the mining community.

INTRODUCTION AND SUMMARY OF ARGUMENT

Chevron was decided in an era marked by massively unconstrained judicial discretion. This Court's decision prevented judges from improperly interfering with the Executive Branch's implementation of national policy—and it also protected *amici*'s members and the rest of the regulated public from sudden, destabilizing lurches in the law caused by judicial fiat. Even today, *Chevron* occasionally allows welcome regulatory flexibility.

But two developments bear on whether *Chevron* plays its intended role. First, this Court has made substantial progress in requiring courts to fairly, consistently, and rigorously interpret statutory and regulatory texts. The risk of *judicial* commandeering of the law—bending it to judges' own will—is not nonexistent, but has been checked. Second, agencies have become more conditioned to expect deference, which, in *amici*'s experience, has created an incentive for agencies to interpret statutes and regulatory schemes in a manner that casts aside the fairest textual reading and replaces Congress's policy judgments with their own. The risk of *administrative* commandeering of the law—bending it to their own will or otherwise displacing clear congressional command—is considerable. This case provides a clear instance of that phenomenon, and *amici* have experienced many others. Several are described in detail in this brief.

Under these circumstances, which have developed after *Chevron* was decided, reflexive judicial deference is not salutary, but corrosive. Specifically, *Chevron*'s Step

One—assessing whether statutory text actually is ambiguous, rather than (for example) merely complicated—is often honored in the breach. Courts may find it easier to decree that complex (or just tedious) statutory text is "ambiguous," and then rush to Step Two, which involves a once-over to confirm "reasonableness." The major problem with this common pathway—for the law and for *amici*'s members in practice—is that *Chevron* depends on a properly enforced Step One. As a matter of legal theory, there is no justification or warrant to deferentially consider "reasonableness" if the statute speaks clearly. And in practice, an insouciant approach to statutory construction ultimately denies the regulated public, like *amici*'s members, the certainty and predictability that they need to order their affairs. It is not a matter of legal theory for a typical homebuilder, farmer, miner, cattle producer, or fuel refiner. All acutely feel it when, in reliance on statutory commands, they have invested money, time, and sweat in a project only to see the regulatory ground upon which they stood fall from under their feet as the result of a whimsical regulatory enactment that contravenes the statute.

In other words, *Chevron*'s problems transcend the constitutional and other legal deficiencies with which the Court is familiar. *Chevron* affects Americans' everyday lives with concrete, real-world, but largely hidden consequences. When an agency invokes *Chevron*—by name or just by deed—it claims (1) that Congress has enacted a vague or ambiguous statute and (2) that it, the agency, has the power to interpret it. The public is left to guess how the agency may wield its interpretive authority. Someone facing an agency's questionable interpretation of a statute that the agency deems "ambiguous" knows (or soon will learn) that *Chevron* is always lurking. And given the degree of deference courts afford, such a person often sees little choice but to capitulate. A regulated

party's choices frequently appear to be:

- challenge the agency's interpretation in court, lose, and have to comply with the agency's regulation, or
- skip a costly lawsuit and succumb to compliance now.

Chevron's looming presence can effectively eliminate the Administrative Procedure Act's promise of judicial review.

This case presents an opportunity to meaningfully improve the law—by clearly and emphatically enforcing the proper limits on *Chevron* deference. Specifically, this Court should instruct lower courts to follow *Chevron*'s often-overlooked command to *exhaust* all the traditional tools of statutory construction *before* deeming a statute ambiguous. Rigorously enforcing—indeed, renewing and amplifying—this aspect of *Chevron* will largely cure the reflexive deference that courts have too often exhibited, restore the judiciary to its proper role in interpreting the regulatory burdens imposed on the public, and prevent agencies from overwriting Congress's policy judgments with their own.

ARGUMENT

"There's an elephant in the room with us today," *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring), and that elephant hasn't budged: Because of *Chevron*, bureaucratic agencies possess not just the authority to enforce the law but also the power to make and interpret it. This concentration of federal power poses the risk to individual liberty that caused the Framers to separate those powers in the first place. When agencies rely on *Chevron* to enforce (and make and interpret) law, they threaten to crush any individual or business standing in the way, as *amici*'s

members are all too aware.[2] Agencies are staffed by humans, who respond to incentives—and the power conferred by *Chevron* tempts agencies to push the boundaries established by Congress.

For the regulated public, this regime injects massive uncertainty. First, will an agency deem a statute (or even its own regulation[3]) to be ambiguous? Then, if so, what will an agency choose to impose on the public—and is it something that those who are regulated can accept? Next, whether the new regulation is desirable or not, the public must forecast whether the agency's promulgation will be deemed "reasonable." At any one of these stages, even if the regulated public can accept the agency's enactment, *Chevron* risks great instability on the part of those who just want to serve the public by doing their jobs.

This Court can greatly reduce these problems by reiterating the often-overlooked rule that, before concluding that a statute is ambiguous, "a court must exhaust all the 'traditional tools' of construction." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9).

I. THE LOWER COURTS' APPLICATION OF *CHEVRON* UNFAIRLY AND SIGNIFICANTLY HARMS BUSINESSES AND INDIVIDUALS

Businesses cannot avoid some kinds of uncertainty; market forces, third-party actions, and other variables

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[2] For ease of reading, and unless otherwise indicated, "*Chevron*" refers to the panoply of contemporary interpretive-deference doctrines.

[3] The Court has also deferred when an agency *itself* has regulated under a statute, then later claims that *its own regulation* is hopelessly ambiguous—but in *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019), the Court imposed greater discipline on agencies and courts before such deference is permissible. See *infra* Part II.B (arguing that similar discipline should be imposed in the *Chevron* context).

are part of life. But *Chevron* adds an additional, unjustifiable, and especially problematic form of uncertainty. "*Chevron*'s very point is to permit agencies to upset the settled expectations of the people by changing policy direction depending on the agency's mood at the moment." *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring). *Chevron* can destabilize sound business decisions, creating risk that even hiring "an army of perfumed lawyers and lobbyists" cannot eliminate. *Id.* at 1152. And if an agency may use its "adjustment" authority to make fundamental changes to a regulatory scheme enacted by Congress, the law becomes nothing more than a known unknown—even though one of the fundamental purposes of law is to eliminate as much unpredictability as possible.

A. *Chevron* promotes judicial abdication that can have crippling economic consequences

As Justice Thomas has explained, *Chevron* "wrests from Courts the ultimate interpretative authority to say what the law is and hands it over to the Executive" and "permit[s] a body other than Congress to perform a function that requires an exercise of the legislative power." *Michigan* v. *EPA*, 576 U.S. 743, 761-762 (2015) (Thomas, J., concurring) (citations and internal quotation marks omitted).[4] This bestowal of concentrated power invades what has for over two centuries been "emphatically the province and duty of the judicial department[:] to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch)

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[4] See also, *e.g.*, *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring) (quoting Federalist No. 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands * * * may justly be pronounced the very definition of tyranny."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 467 (1987) ("[F]oxes should not guard henhouses * * * . Those limited by a provision should not determine the nature of the limitation.").

137, 177 (1803).

By merging these powers, *Chevron* can result in outcomes that impose serious economic harms on regulated entities. So long as the statute has a shred of ambiguity, the regulated entity is left to the agency's whim. But the premise of ambiguity is itself often questionable. Application of *Chevron* "turns out to be an entirely personal question, one subject to a certain sort of *ipse dixit*: is the language clear, or is it ambiguous?" Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2142 (2016). Because "judges have wildly different conceptions of whether a particular statute is clear or ambiguous," "[t]he key move from step one (if clear) to step two (if ambiguous) of *Chevron* is not determinate." *Id.* at 2152. And the judge's "simple threshold determination of clarity versus ambiguity may affect billions of dollars, the individual rights of millions of citizens, and the fate of clean air rules, securities regulations, labor laws, or the like." *Id.* at 2153.

In theory, *Chevron* deference should promote natural or even reasonable interpretations, and it was born from the notion that if there truly is ambiguity, life-tenured judges should not be the ones to select among permissible policy outcomes. That principle remains true today. But in practice, the predicate for applying the doctrine turns on a judge finding some speck of ambiguity—often without using any guide that is terribly systematic, principled, or uniform. Once that step has been achieved, often quite casually, courts yield to any plausible interpretation. Indeed, circuit courts applying the *Chevron* framework concluded at Step One that the statute was ambiguous 70% of the time, and 93.8% of those agency interpretations reaching step two were upheld. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 32-34 (2017) (reviewing 1,000+ federal appellate decisions applying the *Chevron*

framework between 2003 and 2013).

That may not have been the Court's expectation in 1984. But over time, as Judge Kethledge recently put it, "the federal courts have become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first," and "[i]n too many cases, courts do so almost reflexively." *Valent* v. *Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting). The extreme deference that courts afford under *Chevron* is all too often cost-prohibitive for anyone who would challenge an agency's questionable interpretation.

Accordingly, the outcome of any challenge hinges on the court's determination whether the statute is ambiguous. This Court has already rebuked the D.C. Circuit for too readily jumping to a conclusion of ambiguity, and the present case proves that stronger medicine is needed for a more lasting cure.

This Court's correction of the D.C. Circuit's decision in *White Stallion Energy Center, LLC* v. *Environmental Protection Agency*, 748 F.3d 1222 (D.C. Cir. 2014), provides a good and familiar example. The Clean Air Act directs the Environmental Protection Agency (EPA) to regulate emissions of hazardous air pollutants from power plants if EPA finds regulation "appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A). EPA maintained that "it is reasonable to make the listing decision, including the appropriate determination, without considering costs." *White Stallion*, 748 F.3d at 1236 (citation and internal quotation marks omitted). The D.C. Circuit agreed. *Id.* at 1237-1238. "On its face, [the statute] neither requires EPA to consider costs nor prohibits EPA from doing so," and therefore, the D.C. Circuit concluded that "the statute does not evince unambiguous congressional intent on the specific issue of whether EPA was required to consider costs in making its 'appropriate and

necessary' determination." *Ibid.* The court quickly concluded that EPA's approach was "clearly permissible." *Id.* at 1238.

This Court disagreed. *Michigan*, 576 U.S. at 751. "Read naturally in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost." *Id.* at 752. This Court also noted that "[s]tatutory context reinforces the relevance of cost" to this determination. *Id.* at 753. Because the statute required the consideration of cost at this stage, EPA's refusal to do so violated the statute's command. *Id.* at 754 ("[*Chevron*] does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not."). As this illustrative episode demonstrates, a court's Step One conclusion largely determines the outcome. A habit of hastily concluding that a statute is ambiguous, or reaching that conclusion under an especially low threshold for finding ambiguity, enables an agency expansive scope to rewrite the statute.[5]

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[5] The D.C. Circuit's continued reflexive deference is reflected not just in the present case but others. For example, one of three "[r]equired elements" of annual rulemaking (where EPA had to determine a given year's "renewable fuel obligation" under the Clean Air Act's Renewable Fuel Standard program) was for EPA to ensure that the obligation "shall be applicable to refineries, blenders, and importers, as appropriate." 42 U.S.C. § 7545(*o*)(3)(B)(ii)(I). EPA never considered whether the obligation remained "appropriate" in annual rulemaking. The D.C. Circuit allowed EPA to evade the clear statutory command by deeming the command ambiguous. *Alon Ref. Krotz Springs, Inc.* v. *EPA*, 936 F.3d 628, 654-659 (D.C. Cir. 2019). This Court did not grant certiorari, but reversing in the present case will help cure the underlying problem in *Alon*: deep-seated, reflexive deference.

B. The specter of reflexive deference haunts many of *amici*'s members

Amicus American Farm Bureau Federation is currently confronting a manifestation of this problem that mirrors the facts of the case currently before the Court. The following situation is just one that would be affected by reversing the judgment below on Step One grounds.

Administered by the Department of Agriculture (USDA), the Conservation Reserve Program (CRP) compensates farmers who agree to set aside a portion of their land for environmental conservation. See 16 U.S.C. § 3834. But at what rate? The statute governing the CRP answers the question by prescribing several steps.

- First, the statute directs the Secretary of Agriculture to consider certain specified factors to determine the optimal rental rate for CRP contracts. *Id.* § 3834(d)(1).
- Second, to prevent the agency from paying as much as (and certainly *more* than) the actual rental price for farmland—which would have the U.S. government compete with farmers and affirmatively *distort* the rental price of farmland—the statute then caps CRP contracts at specified percentages of the average local rental rate for a given type of CRP contract. *Id.* § 3834(d)(2)(B)(i) (imposing a limitation on reenrolled CRP contracts), (d)(2)(C) (imposing a limitation on CRP contracts for grasslands), (d)(4)(E) (imposing a limitation on first-time CRP contracts).

In other words, the statute initially directs the Secretary to figure out what price would be required to meet various goals; then, if that price turns out to be more than Congress is willing to pay, the statute imposes express caps. This is straightforward statutory construction.

Yet USDA appears to view this precisely articulated

procedure as ambiguous, and thus easily disregarded. In an explicit effort to "[i]ncrease[] program payments to encourage more land enrollment," USDA has promulgated various incentives—*e.g.*, a "Climate-Smart Practice Incentive" and "Water Quality Incentive"—and added a one-time 10% inflationary adjustment for the life of a CRP contract. U.S. Dep't of Agric., "Conservation Reserve Program: What's New?" (June 2021).[6] For grasslands, USDA has established a CRP minimum rental rate of $15 and asserted that imposing this minimum "would benefit 1,347 counties that are currently under the $15 minimum." *Ibid.* USDA has explicitly stated that for grasslands, it will start with the limitation imposed by statute and then increase that rate with incentives and adjustments such as the Climate-Smart Practice Inventive. U.S. Dep't of Agric., "Grassland Conservation Reserve Program (CRP): Working Lands" (June 2021).[7]

That is, anticipating broad judicial deference, the agency would flip the statutory plan. The specific caps that Congress imposed (notably, in the provision *following* the Secretary's initial assessment) turn out, on the Secretary's reading, to be advisory—something that the Secretary may adjust up or down. Of course, such adjustments eliminate the point of the specific rate caps, because the Secretary already has authority to determine desired rental rates based on a host of discretionary factors. Congress clearly set out a two-step plan that constrains that discretion and is easy to follow—unless one is determined to extract ambiguity from a clear statute.

For American farmers, of course, this is not merely an intellectual exercise. It is a question of extreme im-

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[6] Available at https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/crp-whats-new-fact-sheet.pdf.

[7] Available at https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/fsa_crpgrasslands_workinglandsfactsheet_21.pdf.

portance because it will affect long-term planning for agricultural land use. Congress acted specifically to ensure that USDA did *not* destabilize rental markets by ensuring that CRP participation would be well-paying yet sufficiently below the rental price that it would not itself create a cycle of price consequences.[8] Reading the statute plainly would preserve stability; USDA's desired reading would do the opposite.

A plain reading of the statute at issue in *this* case, as petitioners request, would help generate comparable stability in the CRP program and elsewhere. Indeed, the two statutory schemes are remarkably parallel. Both agencies—the Department of Health and Human Services (HHS) and USDA—have sought to deploy *Chevron* deference by searching for *some* statutory ambiguity *somewhere* in the statute to evade what in fact are unambiguous statutory limitations on agency discretion with respect to the specific question at issue:

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[8] Congress first authorized the CRP program in 1985. Food Security Act of 1985, Pub. L. No. 99-198, tit. XII, subtit. D, 99 Stat. 1354, 1509-1514 (1985). These limitations in the form of the percentage caps noted above were not imposed until roughly 30 years later. Section 2005(c)(2) of the Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014), created the limitation for grasslands CRP contracts, *id.* at 718, and Sections 2207(c)(2)(C) and 2207(c)(5)(D) of the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018), inserted the other limitations on first-time and reenrolled CRP contracts, *id.* at 4548-4549. Should USDA be permitted to interpret the statute in this way, it will have cast aside two congressional efforts to restrain how the agency operates the CRP program and essentially treat expressly enacted text that operates to *withdraw* discretion as in fact leaving USDA with all the discretion it arguably had before.

Medicare Reimbursement, 42 U.S.C. § 1395*l*	Conservation Reserve Program, 16 U.S.C. § 3834
• HHS must conduct surveys "to determine the hospital acquisition cost" for each covered drug. § 1395*l*(t)(14)(D).	• USDA must "annually conduct a survey of per acre estimates of county average market * * * cash rental rates for cropland and pastureland in all counties" nationwide." § 3834(d)(4)(A).
• If HHS has collected the required "hospital acquisition cost survey data," HHS must set the reimbursement rate equal to "the average acquisition cost for the drug" and may vary the rate "by hospital group." § 1395*l*(t)(14)(A)(iii)(I).	• To determine "the amount of annual rental payments," USDA must consider "the amount necessary to encourage * * * participat[ion] in the program," "the impact on the local farmland rental market," and "such other factors as the Secretary determines to be appropriate." § 3834(d)(1).
• But if HHS has *not* collected the required "hospital acquisition cost data," HHS must set a reimbursement rate equal to the "average price for the drug,"	• Depending on the type of CRP contract, the rental payments may not exceed certain percentages of the average local rental rate for that type of CRP contract as

which is "calculated and adjusted by the Secretary as necessary for purposes of this paragraph [§ 1395*l*(t)(14)]." § 1395*l*(t)(14)(A)(iii)(II).	determined by the required annual survey. § 3834(d)(2)(B)(i), (d)(2)(C), (d)(4)(E).
• HHS claims "adjustment" authority to use certain criteria it otherwise *cannot* consider to set a reimbursement rate it otherwise *cannot* impose.	• USDA claims "adjustment" authority to pay rental rates for farmland that it otherwise *cannot* pay.

Further linking the two regulatory programs is their emphasis on the statute's supposed ambiguity at Step One. *Only* if there is ambiguity can *either* agency's effort to evade Congress's limitations succeed. But no ambiguity exists in either example. With respect to the pending case, Congress specified in detail that if HHS wants to set reimbursement rates based on acquisition cost and vary such rates by hospital group, the agency *must* collect sufficient hospital-acquisition-cost survey data. HHS's interpretation of its ancillary modification authority "essentially reads subclause (I) out of the statute by permitting the agency to do under subclause (II) without the requisite data what subclause (I) authorizes only with that data." Pet. App. 39a (Pillard, J., dissenting). HHS demands deference for an interpretation that renders meaningless a provision meant to limit its discretion. This striking request illustrates the need for this Court to place limits on how courts apply *Chevron*. This case may determine whether members of *amicus* AFBF must accept USDA's effort to undermine a carefully calibrated statutory scheme to ensure that USDA may support a

useful program without distorting agricultural land prices.

Of course, these cases are not unique. *Chevron* necessarily creates incentives for agencies to disregard boundaries imposed by the legislative branch. *Amici* do not contend that such disregard is always or even frequently conscious, deliberate, or malicious—nevertheless, the separation of powers and the public's ability to rely on clear law are threatened just the same.

One particularly important statute that only uneasily coexists with *Chevron* is the Administrative Procedure Act (APA) itself. The APA mandates that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. But *Chevron* (as often applied, at least) largely excuses reviewing courts from actually "interpret[ing] * * * statutory provisions":

> At *Chevron* step one, judges decide whether the statute is "ambiguous," and at step two they decide whether the agency's view is "reasonable." But where in all this does a court *interpret* the law and say what it *is*? When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person? Where *Chevron* applies that job seems to have gone extinct.

Gutierrez-Brizuela, 834 F.3d at 1152 (Gorsuch, J., concurring).

By tasking the agency with the power to declare what the law is, "*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty[,]" under both the APA and the Constitution. *Ibid.* The courts' failure to fulfill their duty ultimately means that regulated parties' "liberties may now be impaired not by an in-

dependent decisionmaker seeking to declare the law's meaning as fairly as possible—the decisionmaker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day." *Id.* at 1153. Judge Collins recently put it this way: "Where * * * the ambiguous provision at issue imposes an express legislative *constraint* on the agency's authority, the *Chevron* doctrine has the effect of placing the ability to construe authoritatively the limits on an agency's power in that agency's own self-interested hands." *Szonyi* v. *Barr*, 942 F.3d 874, 875-876 (9th Cir. 2019) (Collins, J., dissenting from denial of rehearing *en banc*).

And among Justice Kennedy's final opinions as a member of this Court, he wrote separately for the express purpose of "not[ing] my concern with the way in which the Court's opinion in *Chevron* has come to be understood and applied." *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (full citation omitted). Speaking about the issue then before the Court, but applicable to all too many others, Justice Kennedy diagnosed perhaps the single biggest flaw in current *Chevron* jurisprudence—"reflexive deference": "In according *Chevron* deference * * *, some Courts of Appeals engaged in cursory analysis of the questions whether, *applying the ordinary tools of statutory construction*, Congress' intent could be discerned * * *." *Ibid.* (emphasis added). "And," he continued, "when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still." *Ibid.*

The jurists noted above, and many others, have identified the foregoing problem as lying within the judiciary. And unsurprisingly, unchecked agencies will endorse unbounded statutory interpretations. Given the judiciary's

habitual deference, "agencies have incentives [when proposing legislation to Congress] to draft statutes flexibly, broadly, and ambiguously to trigger *Chevron* deference—and thus engage in self-delegation of primary interpretive authority," and they "have further incentives to be more aggressive in their agency statutory interpretations when they believe *Chevron* deference applies." Christopher J. Walker, *Legislating in the Shadows*, 165 U. Pa. L. Rev. 1377, 1419 (2017); see also *id.* at 1418-1419 (noting, unsurprisingly, that a majority of rule drafters responded that "a federal agency is more aggressive in its interpretive efforts if it is confident that *Chevron* deference (as opposed to *Skidmore* deference or de novo review) applies").

Agencies do not shy away from responding to these incentives and abusing the authority conferred on them by *Chevron*. As Justice Thomas put it, this unfortunate symbiosis should sound more like a klaxon than a faint tinkling of a distant bell:

> Although we hold today that EPA exceeded even the extremely permissive limits on agency power set by our precedents, we should be alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here.

Michigan, 576 U.S. at 763 (Thomas, J., concurring). Others have indicated similar concerns. *E.g.*, *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (FCC "has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends.").

II. CURING *CHEVRON* REQUIRES RESTORING THE COMMAND TO EXHAUST ALL TOOLS OF STATUTORY CONSTRUCTION AND ALLOWING COURTS TO FIND AMBIGUITY ONLY AS A LAST RESORT

A. Step One requires searching for statutory meaning, not verifying whether there is ambiguity

Lower courts have come to understand *Chevron* as directing a search for ambiguity—and when they seek ambiguity, they almost always find it. But *Chevron*'s legitimacy turns on the exact opposite premise: that courts search for *meaning*. This case provides the Court a clear opportunity to instruct lower courts that their task under *Chevron* begins—and frequently should end—with employing the normal rules and tools of statutory construction to identify statutory meaning.

To search for ambiguity instead of meaning ultimately means that "if one can perceive *any* ambiguity in a statute, however remote, slight or fanciful, the statute must be pushed into the second step of *Chevron* analysis." *Abbott Labs.* v. *Young*, 920 F.2d 984, 994 (D.C. Cir. 1990) (Edwards, J., dissenting). Starting the analysis by searching for ambiguity drains Step One of most of its significance. It ultimately means that most statutes will be (as the Barnett & Walker study cited above confirms) analyzed under Step Two. After all, "clever lawyers—and clever judges—will always be capable of perceiving *some* ambiguity in any statute, no matter how clearly Congress struggles to emblazon its intentions on the face of the statute." *Id.* at 995. If the inquiry is framed as an ambiguity-favoring nudge, any capable lawyer, including every federal judge, will be able to deliver. "[A]ll too often, courts abdicate th[e] duty [to say what the law is] by rushing to find statutes ambiguous, rather than performing a full interpretive analysis." *Arangure* v. *Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) (Thapar, J.).

The D.C. Circuit panel below did just this when it framed the Step One question in terms of ambiguity, not meaning. The majority began fairly enough: "Under *Chevron*, we first ask whether 'Congress has directly spoken to the precise question at issue.'" Pet. App. 19a (quoting *Chevron*, 467 U.S. at 842). But it soon betrayed the real goal—not using every interpretive canon to discern the statute's meaning, but trying to escape the endeavor: "[U]nder *Chevron*, we would need to conclude that Congress unambiguously barred HHS from seeking to align reimbursements with acquisition costs under subclause (II), or that HHS's belief that it could do was unreasonable." *Id.* at 24a. Framed that way, the majority needed only to identify a degree of ambiguity in the statute, which is easy to do if one does not engage all tools of construction. Having thus identified some ambiguity, the majority then declined to resolve it, holding instead that the ambiguity sufficed to move the analysis to Step Two. *Id.* at 27a ("Rather, when competing readings of a statute would each occasion their own notable superfluity, that manifests the kind of statutory ambiguity that *Chevron* permits the agency to weigh and resolve.").

If a court as intimately intertwined with administrative law as the D.C. Circuit cannot properly apply *Chevron*, this Court should use this case to provide guidance to it and other lower courts. The default presumption should be the same in this area of the law as any other—that courts will interpret statutory text. Courts are well-equipped—indeed, compelled—to perform that task.

Interpreting legal texts is perhaps the judiciary's core constitutional function. *Michigan*, 576 U.S. at 761-762 (Thomas, J., concurring). Deciding whether a party's "interpretation of the statute is correct * * * is a familiar judicial exercise." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 196 (2012). Judges are "trained" to look for "the best read-

ing" of legal texts—including of complicated legal texts. Kavanaugh, *supra*, 129 Harv. L. Rev. at 2153-2154; see also *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 129 (2015) (Thomas, J., concurring in the judgment) ("[J]udges are frequently called upon to interpret the meaning of legal texts and are able to do so even when those texts involve technical language."). Only if upon completion of that familiar task a court cannot identify a meaning should the court proceed to consider deference to an agency's construction. But the presumption should be that courts *can* do their job and that deference should be the exception, not the rule that it has become.

Restating *Chevron*'s framework in this way would engender a multitude of benefits. It would return courts to the performance of normal judicial tasks, without making administrative-law cases inherently distinct from other forms of statutory construction. It would avoid the constitutionally doubtful outcomes that flow from an impulse to defer—the concentration of non-executive powers in administrative agencies. It would more readily satisfy the APA's direction that courts actually construe statutes. The restored emphasis on statutory construction will allow the courts to concentrate their energies on developing ever more refined, principled, systematic, and predictable approaches to construing statutory text. That, in turn, will give Congress ever clearer guidance on how the courts will interpret its work, which could create the long-desired incentive for it to speak clearly (even when what it *wants* is to clearly authorize a measure of discretion for agencies). The incentive for agencies to regulate expansively apart from statutory authorization will be reversed, and regulations that aggressively claim power to broadly depart from statutory directions should decrease. Similarly, political pressure on agencies to flip-flop on statutory interpretations following elections will be less effective—the focus will be restored to changing

laws directly, which is always permissible, rather than changing them via "interpretation," which undermines the integrity of the law.

All of these positive consequences will enhance the rule of law from the perspective of regulated entities. They will be able to rely on statutory text, regulations that fairly enforce that text, and a judiciary that will give them a fair chance if agency regulations nonetheless depart from statutory text.

B. As it did in *Kisor* for *Auer* deference, this Court should now reorient *Chevron*'s Step One analysis

Returning courts to the business of statutory interpretation in administrative-law cases requires only giving a greater emphasis to *Chevron*'s own teaching—one to which this Court has *already* given new emphasis in the related context of *Auer* deference.

First, *Chevron* itself is premised on a court's obligation to first determine "whether Congress has directly spoken to the precise question at issue" in the statute authorizing the agency to act. 467 U.S. at 842. "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." *Id.* at 842-843. Thus, while courts have often misunderstood the task of determining "whether Congress has directly spoken" as authorizing a search for ambiguity, *Chevron*'s first step actually requires identifying statutory meaning if there is any way to do so. And to ascertain the meaning of the statute and thereby whether "Congress had an intention on the precise question at issue," the court "employ[s] traditional tools of statutory construction." *Id.* at 843 n.9. Thus, "whether Congress has directly spoken to the precise question at issue" cannot be answered in the negative *until* all the "traditional tools of statutory construction" are deployed but without results.

Id. at 842 & 843 n.9.

Second, this Court recently clarified in *Kisor* what it means for a court to "employ traditional tools of statutory construction" in the context of *Auer* deference for agency interpretations of ambiguous regulations. Given the "mixed messages" this Court had previously sent regarding how searching review under *Auer* should be, the Court "[took] the opportunity to restate, and somewhat expand on," the principles guiding construction of agency regulations. *Kisor*, 139 S. Ct. at 2414.

In *Kisor*, this Court emphasized that "deference is not the answer to every question of interpreting an agency's rules. Far from it." *Ibid.* Instead, "the possibility of deference can arise *only* if a regulation is *genuinely* ambiguous," and a rule may be categorized as "genuinely ambiguous" only "after a court has resorted to *all* the standard tools of interpretation." *Ibid.* (emphasis added). This teaching is drawn directly from the (all-too-often ignored) logic of *Chevron* itself—and from basic logic in general. After all, "[i]f uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Id.* at 2415. "[I]f the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Ibid.* To underscore the point in the *Auer*-deference context, the Court reiterated the point: "[B]efore concluding that a rule is genuinely ambiguous, a court *must* exhaust *all* the 'traditional tools' of construction." *Ibid.* (quoting *Chevron*, 467 U.S. at 843 n.9) (emphasis added).

There is an enormous difference between (1) seeking (and typically finding) some indicium of ambiguity and then terminating the statutory-construction exercise and (2) refusing to acknowledge ambiguity until employing all

statutory-construction tools. The difference is flipping the default presumption. A court that understands its quest as one to find meaning (rather than to confirm the absence of discernible meaning) will often be able to provide a clear answer as to the meaning of the legal text: "[H]ard interpretive conundrums, even relating to complex rules, can often be solved." *Ibid.* Therefore, "a court cannot wave the ambiguity flag just because it found the regulation impenetrable *on first read*." *Ibid.* (emphasis added).

In *Kisor*, this Court noted that *Chevron* had adopted the same approach for ambiguous statutes, and *Kisor* in fact expressly drew on *Chevron*'s analysis to inform the application of *Auer* deference to supposedly ambiguous regulations. *Ibid.* It would be incongruous to do anything less now than to clarify that *Kisor*'s *Chevron*-inspired holding fully applies in the context of *Chevron* itself. That message should not merely be clarified and repeated—it should be amplified.

In addition to *Kisor*, this Court has recently reiterated that *Chevron* deference is "not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9); *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1358 (2018) (same). Just last term, this Court, resolving a dispute between the Government and a private party over a statute's meaning, derided the Government when it "abandon[ed] any pretense of interpreting the statute's terms and retreat[ed] to policy arguments and pleas for deference." *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1485 (2021). Notably, both the majority and dissent resolved that case without even a whisper of *Chevron* deference. And just days ago, this Court resolved a question of how far a seemingly broad statute reaches without labeling the language as ambiguous. *Alabama Ass'n of*

Realtors v. *Dep't of Health & Human Servs.*, 594 U.S. __, No. 21A23, 2021 WL 3783142, at *3 (Aug. 26, 2021) ("Reading both sentences together, rather than the first in isolation, it is a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium. *Even if* the text were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation.") (emphasis added). The present case provides this Court with the opportunity to crystallize for the lower courts the *Chevron* jurisprudence it has implicitly developed over the last few terms.

C. Emphasizing meaning rather than ambiguity at Step One will dramatically reduce and confine *Chevron*'s harms

A reformed Step One analysis is a massive improvement on nearly every level—but not a panacea, at least in the sense that it cannot provide a formula to ensure that all cases will be correctly decided at once. Hard cases will always be with us, and it is inevitable that different courts examining the same statute will sometimes reach different conclusions as to its Step One meaning. After all, this Court divided last term in *Niz-Chavez* over the meaning of the statute in question, but the Court unanimously agreed that the inquiry should stop at Step One. Nonetheless, the risk of such a division is a far narrower risk than what *Chevron* as currently practiced entails—a nearly boundless realm of potential meanings of any statute.

Other examples illustrate the point. Recently, two courts of appeals examining EPA's implementation of the permitting process established by Title V of the Clean Air Act reached different conclusions on the agency's interpretation—but unlike in many cases, both searched for meaning rather than ambiguity. *Envtl. Integrity*

Project v. *EPA*, 969 F.3d 529, 539-541 (5th Cir. 2020); *Sierra Club* v. *EPA*, 964 F.3d 882, 885 (10th Cir. 2020). Both grounded their analysis at Step One and avoided affording reflexive deference. *Envtl. Integrity Project*, 969 F.3d at 539-541 (finding the agency's interpretation "persuasive" under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)); *Sierra Club*, 964 F.3d at 891 (finding plain meaning in text). If disputes like this one are more regularly fought on Step One terrain, it would mark a substantial improvement for regulated parties, who could focus their arguments on textual matters and would therefore likely see far fewer disputes over time.

After all, if courts focus their energy on Step One, every case potentially involving *Chevron* will primarily be a standard statutory-construction case just as in every other area of the law. Whether the court is construing a statute that an agency administers, a section of the federal criminal code, or a portion of a civil-rights law, all cases involving a federal statute will implicate the same overriding question: what do its words mean? No statute will be entitled to special rules or exceptions, and all will face the same textual analysis.

There is reason for great optimism about the ultimate outcome of such a reorientation of administrative law. First, the past few decades have seen extraordinary progress—progress unimaginable in 1984, when *Chevron* was announced—in the federal judiciary's ability to fairly, consistently, and rigorously interpret statutory texts. Each year brings greater clarity and consensus about how to do that job. An increased focus on statutory construction in administrative law will further accelerate the development of consistent and reliable methods for interpreting *all* texts.

Second, as courts commit themselves to systematically searching for the meaning of statutes, Congress will be increasingly encouraged (and able) to draft statutes in

ways that generate predictable results. A reinvigorated Step One analysis will restore Congress's control over the writing of laws. Its say will matter like never before, and if and when Congress truly wishes to allow a range of regulatory options, it will be encouraged to do so with clear language. Ambiguity will not be an accidental oversight but an intentional grant of options to the agency. And in those instances where Congress has deliberately chosen the agency to resolve the question at hand, then deference to the agency's choice will not only be appropriate but obligatory.

Third, a reformed Step One analysis could still result in finding some statutes ambiguous (and not necessarily because Congress expressly intended such "ambiguity"). Such scenarios should become dramatically rarer, but when they arise, Step One will still have a substantial role to play by demarcating the range of permissible options from which the agency may choose. Under current practice, a finding of ambiguity often grants the agency free reign to define the statute with only minimal Step Two oversight. But under an approach where the court must work toward identifying the meaning of the statute, the range of permissible interpretations will be constrained. For example, it is one thing to say that an adjustment authority may be used at the agency's reasonable discretion, but wholly another to specify in what specific instances such discretion can or cannot be invoked. By reducing the range of options for the agency, regulated parties will have greater certainty as to how they may be regulated *even if* some ambiguity remains.[9]

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[9] Another benefit of construing statutes at Step One is the concomitant decrease in how often agencies can invoke *National Cable & Telecommunications Association* v. *Brand X Internet Services*, 545 U.S. 967 (2005), to overrule a *court's* prior construction of a statute, which upsets regulated parties' settled expectations. See *id.* at 982

Fourth, as a practical matter, the scope of possible outcomes will be reduced by the fact that agencies will simply avoid testing the limits of their authority. Pushing Congress's boundaries will not be met with reflexive deference at Step Two but instead a clear-eyed analysis of legal text.

In sum, a rigorous Step One process that presumes the statute's meaning is clear and disfavors a finding of ambiguity will restore the separation of powers: Congress makes the law and sets policy; courts interpret that law and give it the meaning Congress intended; and agencies enforce that law and promulgate regulations, without discretion to choose policy unless the *only* reading of a statute is one in which agencies are left to choose among a permissible range.

CONCLUSION

This Court should reverse the judgment below and enforce meaningful limits on the *Chevron* doctrine by reiterating—*unambiguously*—that lower courts must exhaust all the traditional tools of statutory construction before concluding that a statute is ambiguous.

(while agencies may reinterpret ambiguous statutes, they have no such power "if the prior * * * [judicial] construction follow[ed] from the unambiguous terms of the statute").

Respectfully submitted.

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