Nos. 20-1530, 20-1531, 20-1778, 20-1780

In the

Supreme Court of the United States

WEST VIRGINIA., ET AL.,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

THE NORTH AMERICAN COAL CORPORATION,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

WESTMORELAND MINING HOLDINGS LLC,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

NORTH DAKOTA,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

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

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
CONSTITUTIONAL COUNSEL GROUP
174 W. Lincoln Ave., #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Other Authorities

Statutes

Rules

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that structural provisions of the Constitution must be upheld in order to protect individual liberty. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Kisor v. Wilke*, 139 S.Ct. 2400 (2019); *Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015), *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); *Christopher v. SmithKline Beecham, Corp.*, 567 U.S. 2156 (2012); to name a few.

SUMMARY OF ARGUMENT

Once again, this Court is presented with an agency reading of a statute that seems to defy the text of that statute. This Court should not defer to the agency's reading of the statute. Deference to an administrative agency's statutory interpretation is contrary to the Administrative Procedure Act and violates the Separation of Powers between the three branches of government that lies at the core of the Constitution's scheme for the protection of individual liberty.

---

[1] All parties consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

ARGUMENT

I. Congress did not Grant the Power of Statutory Interpretation to Administrative Agencies.

This Court has often repeated the claim that Congress intended for the courts to defer to the judgment of agencies when interpreting a statute. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). This congressional intent is claimed to be found where Congress left a gap in the statutory scheme and gave rule-making authority to the agency. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173-74 (2007); *see also King v. Burwell*, 576 U.S. 473, 485 (2015). The Court has even described this as an "express delegation of specific interpretive authority" to the agency. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

However, there is no reference to any actual statute or congressional text expressing such an intent. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996). Professor Hamburger observed: "As a result of *Chevron*'s presumption from ambiguity, the courts have ended up in the peculiar position of basing their deference on statutory authorization while presuming such authorization from what the statutes do not say." Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1192 n.15 (2016).

Further, this theory of implied congressional intent forces the courts to ignore the one clear statement from Congress on who should interpret the statute. Section 706 of the Administrative Procedure Act provides: "To the extent necessary to decision and when

presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The phrase "decide all relevant questions of law" does not appear to be ambiguous. But Congress, in the Administrative Procedure Act, decided to remove any doubt on the question by specifying that the reviewing court is tasked with the duty to "interpret constitutional and statutory provisions." *Id*.

Nothing in the Administrative Procedure Act demonstrates that Congress gave agencies authority to regulate free of interference from the courts on the question of whether the regulation comports with the statute enacted by Congress. In any event, Congress has no power to confer either lawmaking or judicial power on executive agencies. John C. Eastman, *The President's Pen and the Bureaucrat's Fiefdom*, 40 HARV. J.L. & PUB. POL'Y 639 (2017); *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935); *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 428-29 (1935).

II. Deference to the Agency in the Interpretation of the Statute Violates Separation of Powers

Deference to an agency's interpretation of a statute has administrative agencies usurping the judicial role of interpreting legal texts and the congressional role of enacting legislation. If the legislation is so vague as to have multiple or no discernable meaning, the agency is effectively exercising Congress' lawmaking power when it "interprets" the legislation. Agencies are left to fill gaps in the statutory framework and

to make policy. This administrative action is further insulated from meaningful review when the judiciary defers to the agency interpretation. This regime of deference creates the perfect storm for destruction of separation of powers limits that are embedded in the structure of the Constitution.

The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See, e.g.*, Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed., Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 150-51 (William S. Hein & Co., Inc. 1992) (1765); John Locke, THE SECOND TREATISE OF GOVERNMENT 82 (Thomas P. Peardon ed., Prentice-Hall, Inc. 1997) (1690).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. *See* FEDERALIST No. 51, at 267 (James Madison) (George W. Carey & James McClellan eds., 2001); FEDERALIST No. 47, supra, at 249, 251 (James Madison); FEDERALIST No. 9, supra, at 38 (Alexander Hamilton); *see also* Letter from Thomas Jefferson to John Adams (Sept. 28, 1787), in 1 THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in the Supreme Court and

lower federal courts. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. FEDERALIST No. 48, *supra* at 256 (James Madison). Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id*. Madison argued that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. FEDERALIST No. 51, *supra*, at 256 (Madison).

This Court has also recognized that separation of powers is the core structural principal of the Constitution that protects personal liberty. *Boumediene v. Bush*, 553 U.S. 723, 797 (2008); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc*., 501 U.S. 252, 272 (1991); *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

Deferring to agency interpretation of ambiguous statutory texts, however, breaches this core doctrine of separation of powers in two fundamental ways. First, it allows executive agencies to exercise Congress's power to legislate, a power which the Constitution vests solely in Congress and strictly limits how those laws can be made. Second, *Chevron* deference impermissibly allows executive agencies to exercise the Judiciary's well-settled power "to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

A. Deference to the Agency Allows the Executive to Exercise Legislative Power.

Chevron deference involves an explicit recognition that administrative agencies make "law"—that is to say, agencies promulgate substantive legal obligations (or prohibitions) that bind individuals. Pursuant to the doctrine, courts may not interfere with agency lawmaking so long as the congressional enactment is ambiguous, the agency has both expertise and rulemaking authority, and the agency's interpretation is at least a possible interpretation of the law. The courts have recognized that agencies are clearly involved in lawmaking when they enact substantive rules that are subject to *Chevron* deference. *See Mead*, 533 U.S. at 233. There are two problems with deference in this regard. First, the Constitution assigns lawmaking exclusively to Congress. U.S. Const. art. I, § 1. Second, reflecting the Founders' fears over the power of legislative branch, the Constitution specifies a particular procedure through which laws are to be made. U.S. Const. art. I, § 7, cl. 2. Agencies do not follow that procedure when promulgating regulations. *See* 5 U.S.C. § 553

Article I, section 1, clause 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." This is the first of the three "vesting clauses" that sets out the basic plan of government under the Constitution and that provide the framework for the scheme of separated powers. Powers vested in one branch under a vesting clause cannot be ceded to or usurped by another. *Association of American Railroads*, 575 U.S. at 67-68 (Thomas, J., concurring).

The legislative power is the power to alter "the legal rights, duties and relations of persons." *See Chadha*, 462 U.S. at 952. This is the same definition given to "substantive rules" adopted by administrative agencies. Section 551 of the Administrative Procedure Act defines the term "rule" as an agency statement that prescribes "law or policy." These are "laws" that impose "legally binding obligations or prohibitions" on individuals. *Perez*, 575 U.S. at 123 n.4 (Thomas, J., concurring). It is difficult to see much space between agency "rules" and the "legislation" that Article I of the Constitution reserved exclusively to Congress. Deference under *Chevron* and related deference doctrines makes any such space evaporate and results in the Executive exercising Congress's power to make law.

B. Deference to Agency Interpretation of Statutory Texts Allows the Executive to Exercise Judicial Power.

Article III, § 1 of the Constitution vests the "judicial power" in the "Supreme Court and in such inferior Courts as the Congress may . . . establish." In a scheme of separated powers, the key to judicial power is the "interpretation of the law." FEDERALIST No. 78, *supra* at 404 (Alexander Hamilton); *Perez*, 575 U.S. at 119-20 (Thomas, J., concurring). This is a power that must be separated from both execution and legislation. Quoting Montesquieu, Justice Story notes "there is no liberty, if the judiciary power be not separated from the legislative and executive powers." Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION, § 1568 (1833), reprinted in 4 THE FOUNDERS' CONSTITUTION 200. The purpose of the judiciary is to stand as a neutral arbiter between the legislative and executive

branches—a necessary check on the political branches of government. FEDERALIST No. 78, *supra* at 405 (Alexander Hamilton). The separate judicial power allows the courts to serve as "bulwarks" for liberty. *Id*. This requires that judges have the power to "declare the sense of the law." *Id*., *see Chadha*, 462 U.S. at 944.

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. FEDERALIST No. 51, *supra* at 269 (James Madison). In order to keep the political branches in check, the courts may not surrender their power to interpret the law to either of the political branches. Each branch of government must support and defend the Constitution and thus must interpret the Constitution. *United States v. Nixon*, 418 U.S. 683, 704 (1974). The Courts may not, however, cede their judicial power to interpret the laws to the Executive. *See id*. The judicial branch accomplishes its role by ruling on the legality of the actions of the executive and giving "binding and conclusive" interpretations to acts of Congress. William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES, reprinted in 4 THE FOUNDERS' CONSTITUTION 195. Had the Constitution not assigned such a role to the judiciary as a separate branch, the plan of government "could not be successfully carried into effect." *Id*.

Chevron deference, however, alters this framework in a way that the separation of judicial from executive power is no longer enforced. It is no longer the exclusive province of the courts to interpret congressional enactments. Instead, the court now treats the existence of an "ambiguity" as meaning that Congress intended the agency, and only the agency, to interpret the statute. So long as the agency interpretation is

"reasonable," *Chevron* requires the courts to cede their judicial power to the executive and approve the agency interpretation.

This Court took this line of argument to its logical extreme in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). There, this Court ruled that *Chevron* deference applied to the FCCs decision that cable internet providers did not provide "telecommunications service" as defined by the Communications Act, and thus were exempt from common carrier regulation. *Id*. at 977, 981. That part of the decision is not surprising. The innovation introduced by *Brand X* is that the agency interpretation of Communications Act ran contrary to a Court of Appeals interpretation of the same provision in a prior case. *Id*. at 981. The Court ruled that *Chevron* required the Court of Appeals to ignore its prior ruling interpreting the Communications Act and instead defer to the Commission's new interpretation. *Id*. at 982-83. In effect, the Supreme Court ruled that the agency had the power to overrule an Article III court on a question of statutory interpretation. The Court justified this by asserting that the agency was not engaged in statutory interpretation but rather "gap-filling." *Id*.

While *Brand X* may be the logical extreme, any deference to the agency on issues of statutory construction ignores the constitutional role of the courts to interpret legal texts. It also ignores the provisions of the Administrative Procedure Act that assign interpretation of the statute to the courts, not the agencies. This Court should use this case to put the various deference regimes to rest, starting with *Chevron*.

III. The Court Should Use this Case to Overrule Prior Cases Requiring Courts to Defer to Agency Interpretation of Statutes.

Chevron deference only applies "if the statute is silent or ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 843. Before a court can conclude a statute is ambiguous, however, it must first employ all the tools of statutory interpretation in an attempt to discern Congress's intent. *See Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). This requires the Court to search for the statute's meaning, rather than just attempting to find an ambiguity. While "clever lawyers - and clever judges - will always be capable of perceiving some ambiguity in any statute," *Abbott Lab'ys v. Young*, 920 F.2d 984, 995 (D.C. Cir. 1990) (Edwards, J., dissenting), Justice Scalia noted, "*Chevron* is . . . not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us." *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting).

This Court, in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), was confronted with a question of what exactly Congress authorized the Occupational Safety and Health Administration to do to protect workers from toxic substances. The statute at issue authorized the Secretary to promulgate health standards "which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard . . . for the period of his working life." *Id.* at 612. Did the statute authorize OSHA to regulate

for a "risk free" workplace or was the agency required to conduct a cost-benefit analysis on the regulation? If it is required to make a decision on the basis of a cost-benefit analysis, then how is the agency to draw the line? What cost is too high, and what benefit is too low?

Then Justice Rehnquist, in his concurring opinion, noted that Congress "improperly delegated" to the Secretary of Labor how to balance costs and benefits of the regulation. *Id*. at 672 (Rehnquist, J., concurring). As he explained, the statute was "completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot." *Id*. at 675. According to Justice Rehnquist, the statute could not stand because it was a delegation that failed to provide an intelligible principle, failed to establish ascertainable limits on the agency's power under the statute, and failed to provide congressional decisions on the "important policy choices" involved with the regulation. *Id*. at 685-86.

If Congress has provided sufficient textual guidance, it is the job of the courts to interpret the statute. If not, it is the job of the Courts to strike the statute and leave it to Congress to make the important policy choices. This Court should use this case to declare the deference doctrines, such as *Chevron* deference, contrary to separation of powers and thus unconstitutional.

CONCLUSION

It is past time for this Court to put the deference doctrines to rest and to reclaim the judicial power of interpretation of legal texts. This is the case in which the Court can accomplish this goal.

December 2021 Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
CONSTITUTIONAL COUNSEL GROUP
174 W. Lincoln Ave., #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae