No. 21-6898

IN THE

Supreme Court of the United States

JASPER STEVENS
AND BRENDA LOUISE MURRAY STEVENS,

Petitioners,

v.

ROBERT S. WHITMORE,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR REHEARING

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INTRODUCTION

The Ninth Circuit's ruling presents the important question of whether this Court will break with *stare decisis*. The Ninth Circuit's ruling also creates a serious predicament for every bankruptcy trustee in that Circuit and throughout this Country: When administering bankruptcy cases for hundreds of thousands of debtors each year, will trustees adhere to the direction provided by the United States Department of Justice—which is the agency designated by Congress to oversee their activity? Or will trustees adhere to a hyper-technical rule created by a Ninth Circuit panel that is "inconsistent with the Bankruptcy Code in letter, and intolerable in practice"? *In re Kane*, 628 F.3d 631, 643 (3d Cir. 2010). Pet. 5-7.

Most importantly, the Ninth Circuit's view clearly contradicts this Court's well-established precedent in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("Chevron"). On March 15, 2022, just six days prior to this Court's ruling on the petition for a writ of certiorari, the U.S. Department of Justice published its updated *Handbook for Chapter 7 Trustees*. In that updated document and its concurrently updated supplementary materials, the U.S. Department of Justice clarified its view of "scheduled assets," which is the central question before this Court. Significantly, the U.S. Department of Justice therein clearly established that its view of "scheduled assets" has not changed and will not change for the foreseeable future. The U.S. Department of Justice's view of "scheduled assets" clearly aligns with what has been published by every Circuit Court in this Country, except the Ninth Circuit.

Pursuant to Rule 44 of this Court, Petitioners Jasper Stevens and Brenda Louise Murray Stevens ("Petitioners") file this petition for rehearing within 25 days after the date of the order of denial of their petition for a writ of certiorari. This petition for rehearing is based on "intervening circumstances of a substantial or controlling effect [and] to other substantial grounds not previously presented." *Id.*

Petitioners filed their petition for a writ of certiorari on January 12, 2022. The statutory provision considered therein is 11 U.S.C. § 554(c), Pet. 1., which states:

> Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

REASONS FOR GRANTING REHEARING

I. This Court's Decision in *Chevron* Requires That Deference Be Given to the U.S. Department of Justice's View of "Scheduled Assets"

A. The U.S. Department of Justice is the Administrative Agency Authorized to Administer the Bankruptcy Code Created by Congress

The U.S. Department of Justice, under its United States Trustee Program ("USTP"), is responsible for overseeing the administration of bankruptcy cases and private trustees under 28 U.S.C. § 586 and 11 U.S.C. § 101, et seq. The USTP is a national program with broad administrative, regulatory, and litigation/enforcement authorities whose mission is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders—debtors, creditors, and the public. (https://www.justice.gov/ust, "United States Trustee Program")

The United States Trustee appoints and supervises trustees, and monitors and supervises cases under chapter 7 of title 11 of the United States Code ("Bankruptcy Code"). 28 U.S.C. § 586. To assist with this, the *Handbook for Chapter 7 Trustees* ("Handbook") is published in order to "establish or clarify the views of the United States Trustee Program (Program) on the duties owed by a chapter 7 trustee to the debtors, creditors, other parties in interest, and the United States Trustee." The *Handbook* also "incorporate[s] provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)." *Handbook*, Page 1-1.

Clearly, the U.S. Department of Justice, with its broad knowledge and experience in administering bankruptcy-related matters, is the "executive department [...] entrusted to administer" the Bankruptcy Code. *Chevron*, at 844.

B. The Facts in This Case Meet the *Chevron* Criteria for Deference

In *Chevron*, the requirements for deference are clear: (1) Congress has not directly spoken to the precise question at issue; and (2) whether the agency's interpretation is based on a permissible construction of the statute. *Chevron*, 842, 843. The facts in this case meet both criteria.

First, Congress did not define the word "scheduled" in the Bankruptcy Code. Pet. App. 7a. Therefore, lower courts (district courts and bankruptcy courts) have varied in their interpretation of what is meant by the phrase, "scheduled under section 521(a)(1)," in 11 U.S.C. § 554(c). Some courts have concluded that this includes property listed only on a "debtor's statement of financial affairs" (11 U.S.C. § 521(a)(1)(B)(iii)). Other courts have concluded that it does not. Pet. App. 6a-7a. In the instant case before this Court, Petitioners argue that the ordinary meaning of the statute—based on dictionaries and common usage as well as legislative history and statutory intent—includes property disclosed only on a "debtor's statement of financial affairs" (SOFA). Pet. 20. In contrast, the Ninth Circuit held that "absent Trustee or court action, to be abandoned under §554(c), property must be scheduled on a schedule, not just listed on the SOFA." Pet. App. 7a. This disparity in interpretation exists because Congress has not "directly spoken to the precise question at issue." *Chevron*, at 842.

Second, the U.S. Department of Justice's interpretation of this phrase is based on a "permissible construction of the statute." *Chevron*, 842, 843. In the petition for certiorari, Petitioners extensively explain the intent and legislative history of § 554 and how Petitioner's interpretation (which is in harmony with the view of the U.S. Department of Justice) is also a "permissible construction of the statute." *Id.*, 842, 843. Pet. 9-16.

In its recently released *List of Changes and Updates to the Handbook for Chapter 7 Trustees and Supplementary Materials (March 2022 and June 2022)*, the U.S. Department of Justice, Executive Office for United States Trustees announced an update to the *Primary Uniform Transaction Code Reference Guide.* It also announced "simplified and updated" changes to the *Primary Uniform Transaction Code List.* What did *not* change with this update, but rather was affirmed, is very significant to the instant case before this Court.

In the *Primary Uniform Transaction Code Reference Guide*, it provides definitions, including a definition for "scheduled assets," on Page 6, as follows:

> "Scheduled assets are those listed by the debtor on the original schedules *and statements.* Unscheduled assets, or assets not originally scheduled, are those added by the debtor on amended schedules and statements, and other undisclosed assets discovered by the trustee. Separate UTCs [uniform transaction codes] are used to distinguish scheduled and unscheduled assets, as further described later in this guide." (Emphasis added)

Examples provided on Pages 14 and 15 of the *Primary Uniform Transaction Code Reference Guide*, confirm that this definition of "scheduled assets" applies to "preference/fraudulent litigation," "personal injury litigation," and "other litigation." These examples also confirm that an asset is considered "scheduled" or

"unscheduled," "depending on whether the [litigation] was reported on [a] [s]chedule [...] *or Statement of Financial Affairs* [SOFA] *that was initially filed at the Court.*" (Emphasis added). Thus, an asset "reported [only] on" the SOFA "that was initially filed at the Court" is considered a "scheduled asset."

This clear definition of "scheduled assets" was stated by the U.S. Department of Justice in the previous version of the *Primary Uniform Transaction Code Reference Guide*, dated November 16, 2015. The updated version, effective June 1, 2022, affirms that the U.S. Department of Justice's view of what constitutes "scheduled assets" will remain unchanged for the foreseeable future.

The U.S. Department of Justice's interpretation is based on "a permissible construction of the statute" in question, namely, 11 U.S.C. § 554. *Chevron*, 842, 843. It is an interpretation which is compatible with both the history and intent of 11 U.S.C. § 554. It is also a construction that allows for reasonable application of this statute created by Congress for the purpose of abandoning property belonging to a debtor's bankruptcy estate. For example:

A debtor discloses an asset on either his petition schedules *or statements* initially filed with the bankruptcy court. That asset would be considered a "scheduled asset." The trustee subsequently does not administer the asset and the bankruptcy case closes. Then, under the efficient abandonment process outlined in 11 U.S.C. § 554(c) ("any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor") the asset is automatically abandoned at case closing, by operation of law. "Upon abandonment,

the debtor's interest in the property is restored *nunc pro tunc* as of the filing of the bankruptcy petition." *Catalano v. Comm'r*, 279 F.3d 682, 685 (9th Cir. 2002)

If a debtor does *not* disclose an asset on either his petition schedules or statements *initially filed with the bankruptcy court*; or adds an asset to *amended* schedules or statements; or it is an *unreported* asset that is subsequently discovered by the trustee after the initial petition schedules and statements have been filed, this is considered an "unscheduled asset." If the trustee does not administer the "unscheduled asset," it remains in the debtor's bankruptcy estate upon case closing. 11 U.S.C. § 554(d) ("Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.")

However, under certain circumstances the debtor could still retain "unscheduled assets" via the abandonment process. "After notice and a hearing, *the trustee* may abandon *any property of the estate* that is burdensome to the estate or that is of inconsequential value and benefit to the estate." Or, "[o]n request of a *party in interest* and after notice and a hearing, *the court* may order the trustee to abandon *any property of the estate* that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. §554(a) and (b). (Emphasis added)

Thus, the Department of Justice's "construction of the statute" is both reasonable and "permissible" based on the history and intent of the statue. Therefore, the Ninth Circuit panel "[should] not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation."

Chevron, at 843. This is especially important where, as here, "the statute is silent or ambiguous with respect to the specific issue" presented to this Court. *Id.* Therefore, based on the facts already presented to the Ninth Circuit panel in this case and the U.S. Department of Justice's view of "scheduled assets," Petitioner's scheduled litigation involving Ocwen Loan Servicing, LLC was abandoned to Petitioners when Petitioner's bankruptcy case closed. Pet. 2, 3, 28.

C. *Chevron* Deference is Not a "New Issue" Advanced on Appeal

In the hearings below, Petitioners discussed and argued the statutory construction of 11 U.S.C. § 554 (c) at length to demonstrate what Congress meant by the phrase, "any property [or asset] scheduled under section 521(a)(1) of this title." Pet. 16-19. Pet. App. 10a. Consideration of deference to the U.S. Department of Justice's view of "scheduled assets" is simply a variation of this argument. As this Court has stated regarding cases it reviews, "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." In some cases, as here, such "are not separate claims. They are, rather, separate arguments in support of a single claim." *Yee v. Escondido*, 503 U.S. 519, 534-535 (1992). This is especially so here, since the U.S. Department of Justice's view bears directly on the question presented in the petition for certiorari.

However, even if this might be construed as a "new issue," this Court has stated that "the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be

exercised on the facts of individual cases. We announce no general rule." Circumstances in which this is "justified" include, as here, "where the proper resolution is beyond any doubt," or where "injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (Citations omitted)

It is also certainly on the mark with the equitable six-point test established in the First Circuit: (1) whether the new argument raises a pure issue of law that could be decided without further fact-finding; (2) whether the argument raises an issue of constitutional magnitude; (3) whether the argument is 'highly persuasive' and the failure to consider it would threaten a miscarriage of justice; (4) whether considering the argument would work any special prejudice or inequity to the other party; (5) whether the party's failure to raise the argument below seems inadvertent or done deliberately to yield a tactical advantage; and (6) whether the argument implicates matters of 'great public moment,' such as comity and respect for the independent democratic institutions. *National Association of Social Workers v. Harwood*, 69 F.3d 622, 625-29 (1st Cir. 1995)

Therefore, *Chevron* deference in connection with the U.S. Department of Justice's view of "scheduled assets" properly merits this Court's attention in deciding whether to grant certiorari in the instant case.

D. Application of *Chevron* Deference is The Only Appropriate Way to Reach a Correct Decision in This Case

In *Chevron*, this Court held that "with regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency's

answer is based on a permissible construction of the statute." *Id.* 842-845 The discussion above in this petition for rehearing demonstrates that these criteria are met in the instant case before this Court.

In the petition for certiorari, the legislative history and intent of 11 U.S.C. § 554 is considered at length. Pet. 9-16. Petitioners' argument therein underscores the applicability and compatibility of the U.S. Department of Justice's interpretation of what constitutes a "scheduled asset." Compare *Chevron*, 845-851.

Indeed, "the power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 415 U.S. 231 (1974). As noted in *Chevron*, interpretations by an overseeing agency "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.*, at 844. And as noted in the petition for certiorari, 11 U.S.C. § 554 is about a *trustee's* statutory duties, not the debtor's duties. Pet. 12. Since the U.S. Department of Justice is responsible for administering the Bankruptcy Code (*including the oversight over all trustees*), its interpretation of "scheduled assets" should appropriately be given "controlling weight." *Id.*

When "legislative delegation to an agency on a particular question is implicit, rather than explicit, [...] a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* Since the U.S. Department of Justice's interpretation of "scheduled assets" is "reasonable," the Ninth Circuit's holding in this case, that "absent Trustee or court

action, to be abandoned under §554(c), property must be scheduled on a schedule, not just listed on the SOFA," should be rejected and vacated. As noted in *Chevron*, "when a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge *must fail.*" (Emphasis added) *Chevron*, at 866.

In reviewing the U.S. Department of Justice's definition that "[s]cheduled assets are those listed by the debtor on the original schedules and statements," it has been "long recognized" that "the principle of deference to administrative interpretations has been consistently followed by this Court whenever [...] the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding [...] has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." This principle is "well-settled." *Id*, 844, 845.

The U.S. Department of Justice's interpretation represents a reasonable accommodation for resolving conflicting views held by lower courts throughout this Country (and now by the Ninth Circuit) of what constitutes a "scheduled asset." The U.S. Department of Justice's interpretation should be adopted, "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimer*, 367 U.S. 374, 367 U.S. 382, 383 (1961). *Accord, Capital Cities Cable, Inc. v. Crisp, ante* at 467 U.S. 699-700. Petitioners respectfully ask this Court to reach the conclusion that application of *Chevron deference* is the only appropriate way to reach a correct decision in this case.

II. CONCLUSION

Ignoring the erroneous and problematic Ninth Circuit ruling will create significant confusion and inconsistency between trustees and lower courts in virtually every state in this Country. Pet. 5-6, 8. It will also erode confidence in the authority of the federal executive department tasked with the enforcement of federal law regarding the proper administration of bankruptcy cases. The instant case therefore represents an opportunity for this Court to aid Congress in its efforts to enact "Uniform Laws on the subject of Bankruptcies *throughout the United States.*" Article 1, Section 8, Clause 4 of the United States Constitution. (Emphasis added) Most importantly, it also represents an opportunity for this Court to preserve *stare decisis.*

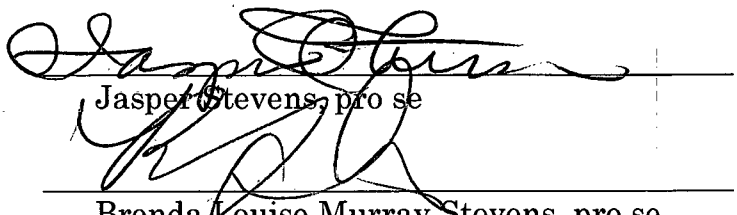
The question presented in the petition for a writ of certiorari in this case is:

> "Whether an asset can be abandoned to a debtor where (1) the asset is not administered prior to the closing of the bankruptcy case; and (2) the asset is scheduled only in the "statement of the debtor's financial affairs?"" Pet. i.

Applying *Chevron deference* in this case leads to the conclusion that an asset "not administered prior to the closing of the bankruptcy case" and "scheduled only in the "statement of the debtor's financial affairs" *is abandoned to the debtor,* pursuant to 11 U.S.C. § 554(c), which is contrary to the Ninth Circuit's holding.

Petitioners respectfully ask this Court to grant rehearing and certiorari, vacate or summarily reverse the judgments below, and remand with instructions that are in harmony with the clear direction provided by the U.S. Department of Justice and *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

Respectfully submitted,



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