No. 22-1219

IN THE

Supreme Court of the United States

RELENTLESS, INC., ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF COMMERCE. ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* THE SOUTHEASTERN LEGAL FOUNDATION AND THE DEFENSE OF FREEDOM INSTITUTE IN SUPPORT OF PETITIONERS

Braden H. Boucek
Kimberly S. Hermann
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd.
Suite 104
Roswell, GA 30075
(770) 977-2131

Donald A. Daugherty, Jr.
DEFENSE OF FREEDOM INSTITUTE
1455 Pennsylvania. Ave., NW
Suite 400
Washington, DC 20004
(414) 559-6902

Thomas R. McCarthy
Counsel of Record
J. Michael Connolly
Tiffany H. Bates
ANTONIN SCALIA LAW SCHOOL SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com

Counsel for Amici Curiae

July 17, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates to protect individual rights and the framework set forth to protect such rights in the Constitution. This aspect of its advocacy is reflected in the regular representation of those challenging overreaching governmental and other actions in violation of the constitutional framework. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014), and *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court about issues of agency overreach and deference. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

The Defense of Freedom Institute for Policy Studies, Inc. (DFI) is a nonprofit, nonpartisan 501(c)(3) institute dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker, and to protecting the civil and constitutional rights of Americans at school and in the workplace. Founded in

---

[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of this brief.

2021 by former senior leaders of the U.S. Department of Education who are experts in education law and policy, DFI has a significant interest in challenging administrative overreach by the Department. DFI's efforts in support of its mission include litigating federal authority under the Constitution to take actions through rulemaking or otherwise.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For more than three decades, the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (MSA) has authorized the National Marine Fisheries Service to require commercial herring fisherman to carry third-party monitors on board to monitor their compliance with federal fishing regulations. But when the agency ran out of money for the monitors, it shifted the responsibility of paying for them (an estimated $710 per day) to the fishermen themselves. In doing so, the agency evaded Congress's power over the purse and its ability to limit agency programming through appropriations.

That scheme raises serious separation of powers issues. The power of the purse is an important check on federal agencies. And "absent express statutory authority … agencies can only spend as much money as Congress appropriates." *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 373 (D.C. Cir. 2022), *cert. granted in part sub nom. Loper Bright Enterprises v. Raimondo*, No. 22-451, 2023 WL 3158352 (U.S. May 1, 2023) (Walker, J., dissenting). They may not "resort to nonappropriation financing" without express authority to do so. Kate Stith,

Congress' Power of the Purse, 97 Yale L.J. 1343, 1356 (1988). If an agency "could avoid limitations imposed by Congress in appropriations legislation[] by independently financing its activities," it "would vitiate the foundational Constitutional decision to empower Congress to determine what actions shall be undertaken in the name of the United States." *Id.* Yet the Fisheries Service "attempted a workaround" of those constraints here. *Loper Bright*, 45 F.4th at 373 (Walker, J., dissenting). The Court should not allow it.

Further, the Court should grant the petition to resolve the meaning of the phrase "necessary and appropriate," which has divided the lower courts. In determining that industry-funded monitors are "necessary and appropriate" under the MSA, the courts below gave that provision a meaning that is far too broad and allowed the agency to expand its power and ignore the costs that the program imposed on fishermen. In the MSA and other statutes, "necessary and appropriate" is most naturally read as a discretion-limiting provision. But even if the phrase was not clear, any ambiguity should be read narrowly to avoid raising constitutional questions about delegation.

Finally, *Amici* agree that the Court should reconsider *Chevron*. *Chevron* requires courts to uphold an agency's interpretation of a statute—even if not the best interpretation—so long as that interpretation is reasonable. This approach forces courts to defer to agencies on questions of law, thus requiring the judiciary to shirk its duty to say what the law is. Time and again, *Chevron* forces judges to

uphold interpretations that they believe are wrong. Indeed, "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). That approach represents a significant shift of power from the judiciary to administrative agencies and violates the separation of powers.

Chevron also violates bedrock principles of due process. Among other concerns, *Chevron* systematically tips the scales in the government's favor, allows an agency to act as its own judge, and deprives non-agency parties of fair notice. That scheme is incompatible with the Constitution's most fundamental safeguards. Indeed, it is "contrary to the roles assigned to the separate branches of government" and "require[s] [judges] at times to lay aside fairness and [their] own best judgment and instead bow to the nation's most powerful litigant, the government, for no reason other than that it is the government." *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d. Cir. 2017) (Jordan, J., concurring in the judgment).

The Court should grant the petition and reverse the decision below.

ARGUMENT

I. The Court should grant the petition, because allowing agencies to evade congressional appropriations and pass off enforcement costs to regulated parties violates the separation of powers.

For at least the last decade, "the Fisheries Service has had trouble affording its preferred monitoring programs with just its congressionally appropriated funds." This presented a serious problem for the agency. "[A]bsent express statutory authority … agencies can only spend as much money as Congress appropriates." *Id.*; *see e.g.*, 31 U.S.C. §1341(a)(1) ("An officer or employee of the United States Government or of the District of Columbia government may not—(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation"). And "Congress generally prohibits an agency from collecting fees and keeping the money from those fees for the agency's own purposes." *Loper Bright*, 45 F.4th at 373 (Walker, J., dissenting); *see* 31 U.S.C. §3302(b) (barring agencies from collecting fees and keeping that money to fund the agency itself; and requiring government officials "receiving money … from any source" to "deposit the money in the Treasury as soon as practicable" unless Congress establishes an exception).

So the Fisheries Service "attempted a workaround." *Loper Bright*, 45 F.4th at 373 (Walker, J., dissenting). "It decided to make fishing companies," like Relentless, Inc., "hire and pay for

their own at-sea monitors." *Id*. While the agency itself acknowledged in a related case that claiming this power to force the regulated community to pay for the government's monitoring efforts was controversial and "highly sensitive," *Loper Bright*, CADC App. 293, it claimed that power nevertheless. It simply classified the burden of contracting $700 a day third-party monitors as a reasonable compliance cost, thereby evading Congress's power of the purse and its ability to limit agency programming through appropriations. But by interpreting the Magnuson-Stevens Act to allow the agency to circumvent that process, this scheme raises serious separation-of-powers concerns.

"Congress's 'power of the purse' is at the foundation of our Constitution's separation of powers, a constitutionally mandated check on Executive power." Kate Stith, *Appropriations Clause*, Nat'l Const. Ctr., perma.cc/T7EW-S5BM; *see* U.S. Const. art. I, §9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). Indeed, the Founders considered giving the power of the purse to Congress alone as a key structural curb on executive authority. *See* The Federalist No. 58 (J. Madison) ("This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."). And it remains a "bulwark of the Constitution's separation of powers among the three branches of the National Government." *U.S. Dep't of*

Navy v. Fed. Lab. Rel. Auth., 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.).

For decades, however, executive agencies abused the appropriations process. *See* Sean M. Stiff, *Congress's Power Over Appropriations: Constitutional and Statutory Provisions*, Cong. Research Serv., R46417, 2 (June 16, 2020) ("Agencies augmented their own budgets by retaining and using public money; obligated an appropriation beyond its purpose; wrested greater funding from Congress by spending all that Congress had appropriated previously or obligated for purposes not permitted by the appropriation; and refused to obligate funds to advance policies with which a President disagreed."). In response, "Congress adopted a series of generally applicable 'fiscal control' statutes designed to" reclaim its power over appropriations and to "tighten its hold on the purse strings." *Id.*

Today, the power of the purse remains an important check on federal agencies. Indeed, it remains one of the few practical checks on overregulation. "Congress exercises virtually plenary control over agency funding." Todd Garvey & Daniel J. Sheffner, *Congress's Authority to Influence and Control Executive Branch Agencies*, Cong. Research Serv., R45442, 14 (May 12, 2021). And this power "can be used to control agency priorities, prohibit agency action by denying funds for a specific action, or force agency action by either explicitly appropriating funds for a program or activity or withholding agency funding until Congress's wishes are complied with." *Id.*; *see also* Laurence H. Tribe, American

Constitutional Law 221-22 (2d ed. 1988) ("Congress may simply refuse to appropriate funds for policies it deems unsound."). This power is a particularly potent tool for Congress because, unlike legislation, a President cannot veto the absence of an appropriation. *See* Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 Vand. L. Rev. 357, 367-68 (2018) ("Congress has ensured that presidents must always come back every year seeking money just to keep the government's lights on."); *U.S. Dep't of Navy,* 665 F.3d at 1347 (Kavanaugh, J.) (Congress's appropriations power "is particularly important as a restraint on Executive Branch officers.").

Yet the "attempted [] workaround" here, *Loper Bright*, 45 F.4th at 373 (Walker, J., dissenting), allows the agency to independently fund its operations without congressional authorization. That scheme undercuts the constitutional safeguards provided by the congressional appropriations process. *See* Stith, *Congress' Power of the Purse*, *supra*, 1356.

Under the government's theory, any agency could evade congressional oversight by designing a regulatory program that simply transferred the agency's costs directly on regulated parties. *See Dep't of Navy,* 665 F.3d at 1347 (Kavanaugh, J.) (quoting 3 Joseph Story, Commentaries on the Constitution of the United States, §1342, at 213-14 (1833)) ("If not for the Appropriations Clause, 'the executive would possess an unbounded power over the public purse of the nation.'"). Indeed, as Judge Walker recognized in a related case, the agency's theory could allow it—or other agencies—to evade congressional oversight

altogether. *Loper Bright*, 45 F.4th at 373 (Walker, J., dissenting) ("[W]hat if Congress were to entirely defund the compliance mechanisms of the Fisheries Service—could the agency continue to operate by requiring the industry to fund [the agency]? That … could undermine Congress's power of the purse."). That theory would fundamentally undermine the separation of powers.

At bottom, "[f]ederal agencies may not resort to nonappropriation financing." Stith, *Congress' Power of the Purse*, *supra*, 1356. "[T]heir activities are authorized only to the extent of their appropriations." *Id.* Thus, when an agency seeks funding outside of the appropriations process without express statutory authority, it presents serious separation-of-powers issues. The Court should take this case to consider and address the Fisheries Service's nonappropriation financing.

II. The Court should grant the petition to resolve the meaning of "necessary and appropriate" in the MSA.

A. The courts below interpreted the MSA's "necessary and appropriate" far too broadly.

In determining that industry-funded monitors are "necessary and appropriate" under the MSA, the courts below gave that provision a meaning that is far too broad. This reading allowed the agency to expand its power and ignore the costs the program imposed on fishermen. The agency itself estimated that it would

cost fisherman $710 dollars a day—"an amount that can exceed the profits from a day's fishing." Pet. 2.

The Fisheries Service sought to justify its program under its authority to implement comprehensive fishery management programs. *See* 16 U.S.C. §1801(a)(6). The law directs regional fisheries councils to create and implement these plans within certain defined limits. *Id.* §1853. And section 1853(b) specifies the areas in which the fishery management programs may permissibly regulate. That subsection ends with a catchall provision that authorizes measures that are "necessary and appropriate" to conserve the fishery. *Id.* §1853(b)(14). But the MSA does not explicitly authorize the New England Fishery Management Council's industry-funded monitoring scheme. So the Council relied on the breadth of the "necessary and appropriate" language in §1853 to justify passing off monitoring costs to the fishermen themselves.

The courts below ignored the grave separation powers concerns of the Fisheries Service's nonappropriation financing. The district court determined that the agency "reasonably concluded that industry monitored funding was necessary and appropriate to effectuate the goals of the Atlantic herring fishery management plan and the MSA." App. 64a-65a. And the First Circuit tacitly accepted this reading without conducting its own inquiry into the meaning of the phrase. *See* App. 13a. Instead, it relied on *Goethel v. Pritzker*, No. 15-CV497-JL, 2016 WL 4076831 *4 (D.N.H. July 29, 2016), which interpreted the language "necessary and appropriate" as "augment[ing] whatever existing powers have been conferred on [the agency] by Congress."

That decision flies in the face of this Court's interpretation of similar language. In *Michigan v. EPA*, 576 U.S. 743 (2015), this Court held that a "necessary and appropriate" clause in the Clean Air Act requires an agency to weigh the various, context-sensitive factors that inform sound policy. This almost always requires "some attention to cost," because Congress tasks agencies with promulgating policy under conditions of scarcity. *See id.* at 752. Put simply, "necessary and appropriate" clauses are one way that Congress expresses its view that promulgating high-cost, low-return policies is "[ir]rational, never mind 'appropriate.'" *Id*. The First Circuit did not so much as cite *Michigan*, let alone acknowledge that it might cabin the Council's discretion.

In keeping with its view that such language augments agency power, the court below failed to analyze the reasonableness or "necessary and appropriate" nature of this regulation, and it allowed the agency to essentially ignore the cost of the regulation. It did this even though the agency initially estimated that the program would cost fisherman $710 dollars a day. Pet. 2. Asked to account for actual costs during the course of litigation, the agency could not do so. Instead, the court below speculated the costs would not be as high as the regulation initially estimated. App. 15a n.5.

B. The lower courts are divided on the meaning of "necessary and appropriate."

Some courts have adopted a discretion-limiting interpretation of "necessary and appropriate" in the MSA. Earlier this year, for example, the Fifth Circuit

concluded that "the adjectives *necessary* and *appropriate* limit the authorization contained in th[at] provision" of the MSA. *Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 60 F.4th 956, 965 (5th Cir. 2023) (emphasis in original); *see also Ocean Conservancy v. Gutierrez*, 394 F. Supp. 3d 147, 156 (D.D.C. 2005) ("[NMFS's] discretion is tempered by substantive elements of the [MSA] that require all regulations to be 'necessary and appropriate'"). This discretion limiting approach typically requires agencies to consider costs. *See, e.g.*, *Mexican Gulf*, 60 F.4th at 965 ("[T]he rule is authorized by the Magnuson-Stevens Act only if it is necessary and appropriate, which at a minimum requires that its benefits reasonably outweigh its costs."). And that reading comports with the use of "necessary and appropriate" in other instances too. *See Nat'l Grain & Feed Ass'n v. OSHA*, 866 F.2d 717, 733 (5th Cir. 1988) (holding that "necessary or appropriate" clauses call for "cost-benefit justification"). *Olivas-Motta v. Holder*, 746 F.3d 907, 918 (9th Cir. 2013) (Kleinfeld, J., concurring) (A "necessary and appropriate" clause "is considerably narrower than the word 'any' might be, because it requires necessity and appropriateness."); *Sanchez v. Att'y Gen. of the U.S.*, 997 F.3d 113, 121 (3d. Cir. 2021) ("appropriate and necessary" is "limiting").

Other courts—including the court below—have held that the phrase is discretion-conferring. Last year, in *Loper Bright*, the D.C. Circuit concluded that the MSA's "necessary and appropriate" provision was a "'capacious[]' grant of power that 'leaves agencies with flexibility.'" 45 F.4th at 366 (quoting *Michigan*,

576 U.S. at 752). *See also Goethel*, 2016 WL at *4 (explaining that "necessary and appropriate" serves to augment agency powers delegated in the statute but cannot itself serve as an independent source of authority); *Al-Bihani v. Obama*, 619 F.3d 1, 25 n.11 (D.C. Cir. 2010) (in other contexts, "the words 'necessary and appropriate' … are more naturally read as emphasizing the breadth of the authorization").

These divergent views yield significant consequences for the Petitioners and the rest of the fishing industry, which operates on every coast. That division alone merits this Court's review.

C. A discretion-limiting interpretation of "necessary and appropriate" is more textually sound.

In the MSA and other statutes, "necessary and appropriate" is most naturally read as a discretion-limiting provision. "Necessary" does not encompass all possible actions. Rather, it extends only to those that are "needed" or "essential." *New Oxford American Dictionary* 1170 (Angus Stevenson and Christine A. Lindberg eds., 3rd ed. 2010). The word "appropriate" characterizes actions that are "suitable or proper in the circumstances." *Id.* at 77. Taken together, these words cabin discretion by requiring the agency to "spell out the need for any proposed rule and its potential drawbacks." *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 561 (D.C. Cir. 2020) (Pillard, J., concurring). Thus, the most textually sound reading of "necessary and appropriate" is the reading that requires agencies to weigh the costs and benefits of a

particular policy before promulgating it. *See, e.g.*, *Mexican Gulf*, 60 F.4th at 965 ("[T]he adjectives *necessary* and *appropriate* limit the authorization contained in this provision.") (emphasis in original). Moreover, because "necessary and appropriate" clauses are discretion limiting and "require[] necessity and appropriateness," they do not grant independent authority to promulgate rules not otherwise permitted by the statute. *Olivas-Motta*, 746 F.3d at 918 (Kleinfeld, J., concurring).

D. If any ambiguity exists, the Court should construe the phrase narrowly to avoid raising constitutional questions about delegation.

Even if there was some ambiguity about how to interpret the MSA's "necessary and appropriate" clause, it should be resolved in favor of the narrower interpretation to avoid raising serious constitutional questions present here. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter." *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). Constitutional avoidance is appropriate when an alternative interpretation "raise[s] serious questions of constitutionality." Antonin Scalia & Bryan A. Garner, Reading Law 248.

A broad interpretation of "necessary and appropriate" raises serious questions here concerning congressional delegation of power. "Congress may not transfer to another branch 'powers which are strictly

and exclusively legislative.'" *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825)). Though the Court has seldom invoked the nondelegation doctrine to invalidate statutes, the doctrine often informs statutory construction. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) ("[O]ur application of the nondelegation doctrine principally has" consisted of "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, this Court held that the phrase "necessary and appropriate" may raise delegation problems. 448 U.S. 607, 646 (1980). In that case, this Court interpreted §3(8) of the Occupation Health and Safety Act, which granted OSHA the authority to promulgate regulations "reasonably necessary and appropriate" to ensure workplace safety. 448 U.S. 607 (1980). The Court adopted a construction that cabined the Secretary's discretion because the alternative would constitute a "'sweeping delegation of legislative power' that might be unconstitutional." *Id.* at 646 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935)). Concurring, Justice Powell explained that a broad reading of "reasonably necessary and appropriate" would require Congress to have delegated an "irrational" amount of discretion to the agency. *Id.* at 670 (Powell, J., concurring).

This Court's logic in *American Petroleum* applies with equal force here. The First Circuit's reading of "necessary and appropriate" lacks any clear "intelligible principle" to guide agency action. *See Whitman v. Am. Truckers Ass'n, Inc.*, 531 U.S. 457, 458 (2001) (holding that a congressional act of delegation must "lay down an intelligible principle to which the person or body authorized to act is directed to conform"). It is not clear whether the court below would deem anything outside the scope of the statute's "necessary and appropriate" language. A capacious reading plausibly permits all sorts of peculiar hypothetical regulations that have a tenuous link to Congress' intended scheme. *E.g.*, *Loper*, 45 F.4th at 377 (Walker, J., dissenting) ("Could the agency require the fishermen to drive regulators to their government offices if gas gets too expensive?"). At a minimum, this raises the possibility of a delegation issue.

Recently, the Fifth Circuit invoked constitutional avoidance while constructing this very language in the MSA. In *Mexican Gulf*, fishermen challenged a rule requiring covered fishing vessels to install GPS trackers. Though the court found the meaning of "necessary and appropriate" to be sufficiently clear to adopt the narrow interpretation, they "[a]dd[ed] belt to suspenders." App. 15a. Assuming in the alternative that the phrase was vague, the court still adopted the narrow interpretation because it avoided a potential Fourth Amendment problem with the challenged rule. *Mexican Gulf*, 60 F.4th at 966-67. This Court should do the same if it finds that "necessary and

appropriate" is vague and adopt the interpretation least likely to raise a constitutional issue.

III. This Court should grant the petition and hear this case along with *Loper Bright* consider whether to overrule *Chevron*.

Finally, this case also asks the Court to reconsider *Chevron*, *U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Amici* agree. *Chevron* violates the separation of powers and basic principles of due process. This Court has already granted a petition asking the Court to reconsider *Chevron*. *See Loper Bright*, No. 22-451. The Court should also grant this petition, hear these cases together, and overrule *Chevron*. At the very least, the Court should hold this case in light of *Loper Bright*.

A. *Chevron* violates the separation of powers.

The separation of powers is an "essential precaution in favor of liberty." The Federalist No. 47 (J. Madison). Indeed, the "ultimate purpose" of the separation of powers "is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). But "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of N.Y.*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). Because the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, … may justly be pronounced the very definition of tyranny," the Framers formed a government that would keep those powers "separate and distinct." The Federalist No. 47, *supra*. They thus

adopted a Constitution that "set[] out three branches and vest[ed] a different form of power in each—legislative, executive, and judicial." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring in part).

Article III vests "[t]he judicial Power of the United States" in the federal courts alone. That division of power was intentional. The Framers believed that "the general liberty of the people can never be endangered … so long as the judiciary remains truly distinct from both the legislative and executive." The Federalist No. 78 (A. Hamilton). But *Chevron*—which often requires judges to defer to an agency's judgment on questions of law—reallocates considerable judicial power to federal agencies.

When agencies interpret the law, they exercise "[t]he judicial Power of the United States." U.S. Const., art. III, §1. "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function." *United States v. Am. Trucking Assns., Inc.*, 310 U.S. 534, 544 (1940). In the familiar words of Chief Justice John Marshall, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Yet *Chevron* forces judges to shirk this duty. It is unsurprising, then, that scholars have described *Chevron* deference as "counter-*Marbury*." Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2074-75 (1990). Under *Chevron*, judges do not "say what the law is." Instead, they pass off that task to an agency, violating the separation of powers.

Chevron invites executive agencies to take on the role of independent judges. It conflicts with the "traditional rule that judges must exercise independent judgment about the law's meaning." *Buffington v. McDonough*, 143 S. Ct. 14, 17 (2022) (Gorsuch, J.). And it instructs judges to "bypass[] any independent review of the relevant statutes." *Id.* at 14; *see, e.g.*, *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087 (9th Cir. 2013) ("If the [agency's] construction is reasonable, we must accept that construction under *Chevron*, even if we believe the agency's reading is not the best statutory interpretation."). Yet neither Congress nor the courts have constitutional authority to transfer the judicial power to agencies. Indeed, the "Vesting Clauses are exclusive" and "the branch in which a power is vested may not give it up or otherwise reallocate it." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 74 (2015) (Thomas, J., concurring in the judgment). The Framers "were concerned not just with the starting allocation, but with the 'gradual concentration of the several powers in the same department.'" *Id.* (quoting The Federalist No. 51 (J. Madison)). On top of that, agency bureaucrats—who are responsive to political pressures, budgetary concerns, and potential removal—make poor substitutes for independent judges who enjoy tenure and salary protections.

Over and over, *Chevron* forces judges to uphold interpretations that they believe are wrong. *See, e.g.*, *Kennedy v. Butler Fin. Sols., LLC*, 2009 WL 290471, at *4 (N.D. Ill. Feb. 4, 2009) ("The FTC's regulation strikes the Court as reasonable, though perhaps not the best interpretation of the law."). And sometimes

courts are required to uphold an interpretation that they have previously rejected. *See, e.g., Padilla-Caldera v. Holder*, 637 F.3d 1140, 1147-1152 (10th Cir. 2011) (holding that under *Chevron* the court is obligated to discard its earlier statutory interpretation and defer to the agency's interpretation). In fact, "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Brand X Internet Servs.*, 545 U.S. at 983.

Chevron thus shifts substantial power from the judiciary to administrative agencies, disrupting the Constitution's careful allocation of power amongst the three branches. From the start, the Framers identified the judiciary as "the weakest of the three departments of power." The Federalist No. 78, *supra*. But under *Chevron*, courts are made even weaker. Indeed, *Chevron* effectively renders the judiciary a rubber stamp for agencies that "wield[] vast power and touch[] almost every aspect of daily life." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). Such a scheme "'pose[s] a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.'" *Seila Law LLC*, 140 S. Ct. at 2212 (Thomas, J., concurring in part) (quoting *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)). "Abdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). The Constitution simply does not contemplate such "undifferentiated governmental power." *Ass'n of Am.*

Railroads, 575 U.S. at 67 (Thomas, J., concurring in judgment) (cleaned up).

B. *Chevron* violates basic due process principles.

Chevron also violates basic principles of due process. As then-Judge Gorsuch observed, "[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process … concerns the framers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); *see also* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1239 (2016) ("Precedents such as *Chevron* … require judges to give up their role as judges and … violate the due process of law."). Among other problems, *Chevron* systematically tips the scales in the government's favor, allows agencies to act as their own judge, and deprives non-agency parties of fair notice.

To start, *Chevron* "introduce[s] into judicial proceedings a 'systematic bias toward one of the parties.'" *Buffington*, 143 S. Ct. at 19 (Gorsuch, J.) (quoting Hamburger, *supra*, 1212). But Americans expect courts to "resolve disputes about their rights and duties under law without fear or favor to any party—the Executive Branch included." *Id.* at 16 (citing A. Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L. J. 908, 987 (2017)). Indeed, the "minimal rudiment of due process" includes a fair and impartial decisionmaker." *Guthrie v. Wis. Emp. Rels. Comm'n*,

111 Wis. 2d 447, 453 (1983) (citing *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970)).

But *Chevron* undermines the promise of a neutral decisionmaker. Under *Chevron*, judges must abandon their independent judgment and defer to an agency's interpretation of law. That means when judges defer to these administrative interpretations, they often simply "adopt[] the interpretation or legal position of one of the parties." Hamburger, *supra,* 1189. And they must do so as long as the agency's interpretation is reasonable, "regardless [of] whether there may be other reasonable, or even more reasonable, views." *Serono Lab'ys, Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998). That necessarily produces "systematically biased judgment[s]" in favor of one party. Hamburger, *supra,* 1211.

In no other context does a court simply defer to one of the parties. At least one federal judge has suggested that such extreme deference may violate judicial canons requiring independence. *See United States v. Havis*, 907 F.3d 439, 451 n.1 (6th Cir. 2018) (Thapar, J., concurring), *rev'd en banc*, 927 F.3d 382, n.1 (6th Cir. 2019) ("[I]f judges are predisposed to defer when the government is involved, then that pre-commitment is 'systemic bias.' And that bias violates both the first and third canon of judicial conduct. *See* U.S. Jud. Conduct Code, Canon 1 (requiring an independent judiciary for a just society); Canon 3 (requiring judges to recuse if a judge has a bias in favor or against a party)."). Instead of recognizing the judge as an impartial decisionmaker, *Chevron* requires the judge to systematically favor one party.

And not just any party. This scheme favors the federal government—"the most powerful of litigants." *Buffington*, 143 S. Ct. at 19 (Gorsuch, J.). Indeed, *Chevron* gives the federal government an unfair advantage by tipping the scales in its favor. *See* Hamburger, *supra*, 1250. Such deference conflicts with American courts' historic commitment to "favor individual liberty" and to construe certain ambiguities in law "*against* the government and with lenity toward affected persons." *Buffington*, 143 S. Ct. at 19 (Gorsuch, J.).

Chevron also undermines due process because it allows the agency to act as its own judge. "When an administrative agency interprets and applies the law in a case to which it is a party, it is to that extent acting as judge of its own cause." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 382 Wis. 2d 496, 555, (2018). But it is a "basic requirement of due process," *Buffington*, 143 S. Ct. at 19 (Gorsuch, J.), that "[n]o man is allowed to be a judge in his own cause," The Federalist No. 10 (J. Madison). As James Madison explained, "a body of men are unfit to be both judges and parties, at the same time," because a man's "interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *Id.*; *see also Williams v. Pennsylvania,* 579 U.S. 1, 8-9 (2016). And "[i]t is entirely unrealistic to expect [an] agency to function as a 'fair and impartial decisionmaker' as it authoritatively tells the court how to interpret and apply the law that will decide its case." *Tetra Tech EC, Inc.*, 382 Wis. 2d at 556.

Finally, *Chevron* violates notions of fair notice. The "central meaning of procedural due process" is the "right to notice and an opportunity to be heard … at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Under a broad reading of *Chevron*, "[f]air notice gives way to vast uncertainty." *Buffington*, 143 S. Ct. at 20. (Gorsuch, J.). Because agencies may shift from one "reasonable" interpretation to another, "individuals can never be sure of their legal rights and duties." *Id.* This uncertainty makes it difficult for individuals, especially ordinary Americans, to structure their personal affairs. They are simply "left to guess what some executive official might 'reasonably' decree the law to be today, tomorrow, next year, or after the next election." *Id.* And while "'[e]very relevant actor may agree' that the agency's latest interpretation is not the best interpretation of the law, each new iteration still 'carries the force of law.'" *Id.* (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2151 (2016)). Allowing federal agencies to shift the meaning of binding laws denies Americans fair notice.

At bottom, *Chevron* is incompatible with the Constitution's most fundamental safeguards. It is "contrary to the roles assigned to the separate branches of government" and "require[s] [judges] at times to lay aside fairness and [their] own best judgment and instead bow to the nation's most powerful litigant, the government, for no reason other than that it is the government." *Egan*, 851 F.3d at 278 (Jordan, J., concurring in the judgment). The Court should revisit *Chevron* and put an end to this

"atextual invention by courts." Kavanaugh, 129 Harv. L. Rev. at 2150.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

Braden H. Boucek
Kimberly S. Hermann
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd.
Suite 104
Roswell, GA 30075
(770) 977-2131

Donald A. Daugherty, Jr.
DEFENSE OF FREEDOM INSTITUTE
1455 Pennsylvania. Ave., NW
Suite 400
Washington, DC 20004
(414) 559-6902

Thomas R. McCarthy
Counsel of Record
J. Michael Connolly
Tiffany H. Bates
ANTONIN SCALIA LAW SCHOOL SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com

July 17, 2023

Counsel for Amici Curiae