No. 23-876

In the Supreme Court of the United States

KC TRANSPORT, INC., *Petitioner*,
v.
JULIE A. SU, ACTING SECRETARY OF LABOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

Brief of *Amici Curiae* Advancing American Freedom; Mountain States Legal Foundation; The Buckeye Institute; AMAC Action; Americans for Limited Government; Ambassador Sam Brownback; Catholics Count; Citizens United; Citizens United Foundation; Eagle Forum; Charlie Gerow; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Louisiana Family Forum; Maryland Family Institute; Men and Women for a Representative Democracy in America, Inc.; National Center for Public Policy Research; National Committee for Religious Freedom; Project21 Black Leadership Network; Rio Grande Foundation; Setting Things Right; 60 Plus Association; Students for Life of America; Wisconsin Family Action; Women for Democracy in America, Inc.; Yankee Institute; and Young America's Foundation in Support of Petitioner

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QUESTIONS PRESENTED

1. Whether a truck or a truck repair shop that is not located at nor is adjacent to an extraction or processing site or an appurtenant road is a "coal or other mine" under 30 U.S.C. § 802(h)(1).

2. Whether the D.C. Circuit's *Chevron* Step One-and-a-Half doctrine should be abrogated.

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation."[2] AAF believes, as did America's Founders, that the separation of government powers is essential to ensuring the promises of the Declaration to all Americans.

Mountain States Legal Foundation is a non-profit, public-interest law firm in Lakewood, Colorado. Since its founding in 1977, Mountain States has used pro bono litigation to fight for and restore the rights enshrined in the Constitution. Mountain States protects individual liberty, the right to own and use property, the principles of limited and ethical government, and the benefits of free enterprise. Mountain States has fought for farmers, mineral-interest owners, ranchers, recreationists, and others working the land against encroachments upon their

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[1] No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of the filing of this brief.

[2] Edwin J. Feulner, Jr, *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

rights by the federal government and non-government groups that advocate for a bigger, unlawful role for federal executive-branch actors.

As Mountain States explained in its brief supporting the petitioners in *Loper Bright Enterprises v. Raimondo*, No. 22-451 (filed July 21, 2023), it is important for Mountain States and its clients to have a clear understanding of how lower courts will apply deference regimes in cases like the one before the Court. Even more so, it is critical that our clients—the farmers, mineral-interest owners, ranchers, recreationists, and others—can rely on the judiciary when they get into disagreements with federal regulators about what this Nation's laws allow or require. "In this country, we like to boast that persons who come to court are entitled to have independent judges . . . resolve their rights and duties under law." *Buffington v. McDonough*, 143 S. Ct. 14, 18 (2022) (Gorsuch, J., dissenting from the denial of certiorari). When dealing with federal regulators, the courts must "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 courts must say "what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). There is no room for reflexive deference to the executive branch—less so for the judiciary to put its collective thumb on the scale in favor of the federal regulators and against our clients. That does not yield a "fair trial in a fair tribunal." *Buffington*, 143 S. Ct. at 18.

Accordingly, Mountain States joins amici in this brief, urging the Court to review this case and,

ultimately, direct the lower courts to stop reflexively deferring to the federal regulators, whether through the so-called "*Chevron* Step One-and-a-Half doctrine" or otherwise.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission, the exercise of citizens' constitutional rights, and the orderly functioning of the courts.

AMAC Action; Americans for Limited Government; Ambassador Sam Brownback; Catholics Count; Citizens United; Citizens United Foundation; Eagle Forum; Charlie Gerow; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Fmr. Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Louisiana Family Forum; Maryland Family Institute; Men and Women for a Representative Democracy in America, Inc.; National Center for Public Policy Research; National Committee for Religious Freedom; Project21 Black Leadership Network; Rio Grande Foundation; Setting Things Right; 60 Plus Association; Students for Life Action; Wisconsin Family Action; Women for Democracy in America, Inc.; Yankee Institute; and Young America's Foundation believe, as did America's Founders, that the maintenance of the separation of government powers into three co-equal branches is essential to ensuring the promises of the Declaration to all Americans.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Mine Safety and Health Administration (MSHA), an agency within the U.S. Department of Labor, suffers from delusions of Ruritanian aspiration nursed by decades of judicial obeisance to *Chevron v. NRDC*, 467 U.S. 837 (1984). In this case, MSHA insists that the trucks and repair facility owned by KC Transport are subject to its authority and thus to its inspection. How, exactly? By MSHA's way of thinking, although the repair facility is neither located at a mine nor owned by a mining company, the trucks, which are sometimes hired to transport coal, are parked at the repair facility which, by the mystery of *Chevron*, transforms both the trucks and the facility, though bearing the outward characteristics of trucks and facility, into the substance of "mines" subject to inspection by MSHA. It is as if, in its *Chevron*-induced ecstasy, MSHA exclaims that "There is not a square inch in the whole domain of our human existence over which MSHA, which is Sovereign over all beneath the earth and upon it, does not cry, 'Mine!'"[3]

The Constitution separates the legislative, executive, and judicial powers of the federal government to ensure that the government, which exists to protect the fundamental rights of the people, does not become a source of those rights' violation. The

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[3] With humble apologies to Abraham Kuyper, *Sphere Sovereignty* [*Souvereiniteit in Eigen Kring*], Public Address Delivered at The Inauguration of The Free University of Amsterdam, Oct. 20, 1880. Found at https://media.thegospelcoalition.org/wp-content/uploads/2017/06/24130543/SphereSovereignty_English.pdf. Last accessed February 29, 2024.

governmental structure created by the Constitution is not a suggestion or a guideline. It is the rule that those who govern must follow.

Where administrative agencies, ostensibly a part of the Article II executive branch, act beyond the power allotted to them by Congress, that separation of powers is violated. The problem is exacerbated where, following *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), courts defer to those actions on the grounds that they are products of the agency's permissible interpretation of ambiguous statutory law.

Nor are expansionistic readings of statutory law on the part of administrative agencies rare. According to then-SEC Commissioner Edward Fleischman, "the true life force of a fourth branch agency is expressed in a commandment that failed, presumably only through secretarial haste, to survive the cut for the original decalogue: Thou shalt expand thy jurisdiction with all thy heart, with all thy soul and with all thy might."[4]

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[4] Edward H. Fleischman, Commissioner, Securities and Exchange Commission, Address to the Women in Housing and Finance, *The Fourth Branch at Work*, (November 29, 1990) https://www.sec.gov/news/speech/1990/112990fleischman.pdf. As Nobel laureate Friedrich Hayek explained, "While socialists no longer have a clear-cut plan as to how their goals are to be achieved, they still wish to manipulate the economy so that the distribution of incomes will be made to conform to their conception of social justice. The most important outcome of the socialist epoch, however, has been the destruction of the traditional limitations upon the powers of the state." Friedrich A. Hayek, *The Constitution of Liberty*, 256 (University of Chicago

MSHA is no exception. Congress has granted it jurisdiction over "coal or other mine[s]." 30 U.S.C. § 803. The statute defines "coal or other mine[s]" as "(A) . . . area[s] of land from which minerals are extracted, (B) private ways and roads appurtenant to such area," and "(C) . . . facilities, equipment, … or other property … used in, or to be used in, or resulting from … the work of extracting such minerals … , or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals." 30 U.S.C. § 802(h)(1).

Roving the countryside for things to inspect like the Sherriff of Nottingham looking for peasants to tax, MSHA found KC Transport, a trucking company with a repair facility in Emmet, West Virginia. Asserting that the trucks and repair facility were a "mine" and thus under its jurisdiction, MSHA sent one of its inspectors to inspect.[5]

On review of citations issued by the inspector, the Federal Mine Safety and Health Review Commission[6] found that MSHA's interpretation of the

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Press, 1978). Available at https://archive.org/details/constitutionofli00frie/mode/2up.

[5] The question behind the question in this case is whether a word's referent is something real or whether a word's meaning is nothing more than a social construct. "We live in an age that is frightened by the very idea of certitude, and one of its really disturbing outgrowths is the easy divorce between words and the conceptual realities which our right minds know they must stand for." Richard M. Weaver, *Ideas Have Consequences*, 147 (The University of Chicago Press 2013) (1948).

[6] The Federal Mine Safety and Health Review Commission was

statutory language was incorrect and thus ruled for KC and vacated the citations against it. App. 3a. However, on appeal from the Commission, following the reflexively deferential logic of the *Chevron* doctrine, the Court of Appeals for the District of Columbia Circuit remanded the case to allow the Secretary of the Department of Labor to interpret the statute again. App. 4a. The D.C. Circuit does so under its expanded version of the *Chevron* doctrine, sometimes called the "*Chevron* Step One-and-a-Half doctrine." Thus, rather than taking the opportunity to interpret the statute for itself, the D.C. Circuit would give the agency another chance to interpret the statute, specifically with an eye toward finding some basis to defer to the agency. Because *Chevron* and the D.C. Circuit's application of *Chevron* both facilitate the illegitimate delegation and usurpation of congressional authority and represent judicial abdication of the responsibility to "say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), this Court should grant certiorari and rule for Petitioner.

ARGUMENT

The Constitution creates a government of separate co-equal branches set against one another to ensure that the powers of one are duly checked by the powers of the others. For at least a century, there has been a concerted effort to undermine the separation of powers, centralizing more and more power in the

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created by the Mine Safety and Health Amendments Act of 1977. The relevant section is codified at 30 U.S.C. § 823. The Commission reviews cases arising under the Mine Safety and Health Amendments Act.

administrative state. This case typifies both the dangers of administrative overreach and the abdication of judicial duty inherent in deference to the administrative state.

I. The Constitution Separates the Powers of the Federal Government into Coequal Branches to Facilitate the Proper Function of Government to its Proper End: The Protection of the Liberty of the People.

The founding generation understood the purpose of government to be the protection of the rights of the people. Because government can violate the people's rights, the Framers understood that government itself had to be restrained. The Constitution separates the powers of government to accomplish that goal.

A. The rights of the people pre-exist government.

The rights of the people pre-exist government. The Declaration of Independence, which imbues meaning into the founding documents of our Republic, including the Constitution, expresses the fundamental philosophy of American government: "Governments are instituted among Men" to secure "certain unalienable rights," which come from man's Creator and among which "are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). These provisions of the Declaration "refer[] to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth." *Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., dissenting).

The Declaration, though perhaps revolutionary in its clarity and universality, reflected centuries of Western thought. According to Blackstone, absolute rights are those "which are such as appertain and belong to particular men, merely as individuals or single persons."[7] The Declaration comes even closer to the ideas of Locke, who wrote, "[N]o one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business" are "made to last during his, not one another's pleasure."[8]

The Constitution, "like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State." *Obergefell*, 576 U.S. at 736 (Thomas, J., dissenting). According to the Ninth Amendment, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. Clearly, the people were to retain their *pre-existing* rights, both enumerated and unenumerated, under the new government.

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[7] 1 W. Blackstone, *Commentaries on the Laws of England* 119 (1765).

[8] John Locke, *Second Treatise on Government*, § 6 (1689).

B. The rights of the people are at all times threatened by human nature, whether in the hypothetical state of nature or under any government.

The Founders' view of government "was rooted in a general skepticism regarding the fallibility of human nature." *See INS v. Chadha*, 462 U.S. 919, 949 (1983). As John Adams wrote to Samuel Adams, "I think that [education in knowledge, virtue, and benevolence,] will confirm mankind in the opinion of the necessity of preserving and strengthening the dikes against the ocean, its tides and storms. Human appetites, passions, prejudices, and self-love will never be conquered by benevolence and knowledge alone, introduced by human means."[9]

In a state of anarchy, rights are real but are subject to violation by the strong. Under a government, the rights of the People are real but are subject to the whims of those exercising governmental power. According to Montesquieu, "constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go."[10] In thousands of years of recorded human history, that nature has not changed.[11]

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[9] John Adams to Samuel Adams, 18 Oct. 1790 at 352 (Philip B. Kurland and Ralph Lerner eds., Liberty Fund 1987).

[10] Montesquieu, *Spirit of the Laws*, § 11.4 at 150 (The Colonial Press 1899) (1748) (1748).

[11] Thomas Jefferson, *Notes on the State of Virginia*, Query XIII, 136 (1853) at 130 ("Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes. The

The Founders were familiar with the abuse of government power. The "government [is] the greatest of all reflections on human nature[.]"[12] As Madison explained:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[13]

Yet someone must rule or govern. Virtually no one would suggest that American government should be ruled by the one or the few. What about the many? Popular today is the idea that even more democracy is the solution to the problem of controlling the government. The Framers knew better. Democracy, on its own, is liable to the same faults as other forms of government. As Madison put it, while "[a] dependence on the people is, no doubt, the primary control on the government," "experience has taught mankind the

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time to guard against corruption and tyranny is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.").

[12] The Federalist No. 51 at 269 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) (1788).

[13] *Id* at 269.

necessity of auxiliary precautions."[14] *Id*. As Elbridge Gerry of Massachusetts said at the constitutional convention, "The evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots."[15]

C. Government exists to protect rights but is also a potential source of their violation. This conundrum necessitates "a government of laws and not of men."

Who, then, will rule? John Adams suggested the answer in the Massachusetts Constitution. Under that state's constitution, the executive, judicial, and legislative organs of the state government may not exercise the powers of one another so that, "it may be a government of laws and not of men." Mass. Const. pt. 1 art. XXX. Proper government does not impose the rule of one man, nor of the few or the many. Under proper government, the *law* must rule. That is the only means of ensuring the rights of the people. Citing this provision of the Massachusetts Constitution, the Court in *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), wrote that the idea of a person's rights held "at the mere will of another, seems to be intolerable in any

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[14] *See also*, Aristotle, *Politics*, Book III, 1287a (Benjamin Jowett, trans. 1885) (350 BC) ("[H]e who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.").

[15] 1 *The Records of the Federal Convention of 1787* 48 (Max Farrand, ed. 1911).

country where freedom prevails, as being the essence of slavery itself."

The law that must rule is the Constitution. The Declaration describes the higher law upon which government is based, and the truths explicated in the Declaration, including the reality of "inalienable rights," are "embedded in our constitutional structure." *McDonald v. Chicago*, 561 U.S. 742, 807 (2010) (Thomas, J., concurring in part and concurring in the judgment). The Constitution, in turn, is "the supreme Law of the Land." U. S. Const. art. VI, cl. 2. It is also "the law that governs those who govern [the people]," and "is put in writing so that it can be enforced against *the servants* of the people."[16] Those who administer American government swear an oath to uphold and defend it.[17] Thus, those who govern are bound by the Constitution. If America is to be a nation ruled by law and not by the whims of its elected or unelected officials, the Constitution must rule. Where, as here, executive agencies can effectively amend and interpret the law for themselves, free of the threat of meaningful judicial review, the rule of law is undermined.

D. Belief in separation of powers was widespread at the founding and had significant philosophical precedent.

If the law must rule but people necessarily must be engaged in the business of governing, how can the

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[16] Randy E. Barnett, *Our Republican Constitution* 23 (1st ed. 2016) (emphasis added).

[17] U.S. Const. art. II, § 1, cl. 7; U.S. Const. art. VI, cl. 3.

rule of law, and thus the rights of the people, be protected against the whims of the powerful? The Founders believed that the best answer was the separation of the government's legislative, executive, and judicial powers. For the Founders, the most important proponent of the separation of powers was Montesquieu.[18]

As Montesquieu wrote, "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to exercise them in a tyrannical manner."[19] Further, "there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control," and if it were, "joined to the executive power the judge might behave with violence and oppression."[20] For all three powers to be exercised by the same person or body "would be an end of everything."[21]

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[18] The Federalist No. 47 at 250 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) (1788) ("The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.").

[19] Montesquieu, *supra* note 9 at § 11.6 at 151-52.

[20] *Id*. at 152.

[21] *Id*.

The Founders shared Montesquieu's understanding. As Jefferson wrote, "The concentrating [of powers] in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one . . . An elective despotism was not the government we fought for."[22] Alexander Hamilton likewise wrote, "The same rule, which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render the one independent of the other."[23] The founding generation's acceptance of separation of powers as essential to liberty was so pervasive that a major antifederalist critique of the proposed

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[22] Jefferson, *supra* note 10 at 128-29. *See also*, John Adams Excerpt from *Thoughts on Government*, https://www.senate.gov/artandhistory/history/common/generic/exerpt-thoughts-on-government-adams-1776.htm (last visited Oct. 17, 2023) ("A single Assembly is liable to all the vices, follies and frailties of an individual. Subject to fits of humour, starts of passion, flights of enthusiasm, partialities of prejudice, and consequently productive of hasty results and absurd judgments: And all these errors ought to be corrected and defects supplied by some controuling power."); The Federalist No. 47 at 249 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) (1788) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

[23] The Federalist No. 71 at 371 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) (1788).

Constitution was that, because of the system of checks and balances, it did not separate powers enough.[24]

E. The Framers infused the Constitution with their shared understanding of separation of powers.

The design of the Constitution directly reflects an understanding of government that sees it as both the protector of, and a threat to, the rights of the people. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 164 (C.A.D.C. 2018) (Kavanaugh, J., dissenting) ("To prevent tyranny and protect individual liberty, the Framers of the Constitution separated the legislative, executive, and judicial powers of the new national government.").

Article I establishes the legislative branch and vests, "*All* legislative Powers" of the federal government in "a Congress of the United States which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1 (emphasis added). Article II vests "the 'executive Power' –all of it," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020), in "a President of the United States." U.S. Const. art. II, § 1. Finally, Article III vests "the judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. The judges of these courts

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[24] The Federalist No. 47 at 249 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) (1788) ("One of the principal objections inculcated by the more respectable adversaries to the Constitution is its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct.").

"shall hold their Offices during good Behaviour," and may not have their compensation reduced while in office. *Id*. The Constitution only departs from this strict separation in specific ways to create a system of checks and balances.

Those checks and balances were meant to work along with the separation of powers to ensure that each branch could protect its own power. According to Madison, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[25] He continued, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." *Id*.

If the Framers' understanding of human nature had any defect, it was their failure to foresee the willingness of political actors to sacrifice their own power or that of their institution to gain power for their political agenda.

Thankfully, the structure established by the Constitution still protects against this instinct. The Constitution enumerates specific powers that Congress may exercise and vests it with the power, "[t]o make all Laws which shall be necessary *and* proper for carrying into Execution," its enumerated powers. U.S. Const. art. I, § 8, cl. 18 (emphasis added). Those "powers not delegated to the United States by

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[25] The Federalist No. 51 at 268 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) (1788).

the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. Those powers that are delegated are not a blank check.[26] Thus, when Congress gave MSHA the authority to regulate mines, it gave MSHA authority to regulate mines, not trucking companies that sometimes do business with mining companies. And it definitely did not give the judiciary authority to sacrifice its own power—that is, abdicate its obligations—and thereby to give an advantage to federal regulators over the governed.

In contravention of these constitutional principles, there has been a concerted effort over the past century to comingle the powers of government in the executive branch. Members of those branches who have worked to confuse the powers of the three branches have violated their oaths to support the Constitution by hacking away at the very roots of the structure created by that document. That structure exists not for the benefit of but as a constraint on federal officials. When officials of the past have undermined that structure, officials in power in the present and future have a responsibility to reinforce the constitutional foundation and thus to protect the rights of the people from future governmental encroachment.

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[26] The Federalist No. 45 at 241 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) (1788) ("The powers delegated by the proposed constitution to the federal government, are few and defined.").

II. *Chevron* Facilitates and Encourages Unconstitutional Delegation of Article I Legislative Power and Article III Judicial Power to the Executive Branch.

One of the ways that constitutional structure has been undermined is the delegation of congressional and judicial power to administrative agencies and their unelected bureaucrats through the Court's decision in *Chevron*, 467 U.S. 837. Under *Chevron*, courts defer to agency interpretations of the statutes they administer if the court finds that a two-part test is satisfied. First, courts ask whether Congress has "spoken to the precise question at issue." *Chevron*, 467 U.S. at 842-43. If the answer is yes, then the court must follow the direction of Congress. *Id*. If the answer is no—if "the statute is silent or ambiguous with respect to the specific issue"—the court then decides "whether the agency's [interpretation of the statute] is based on a permissible construction of the statute." *Id* at 843.

Given the nature of language, agencies can always make a minimally plausible argument that the statute is ambiguous on the relevant issue. Where ambiguity can feasibly be claimed, the court need only find the agency's interpretation "permissible;" a very low bar. As Justice Kavanaugh noted, "when the courts defer, we have a situation where every relevant actor may agree that the agency's legal interpretation is not the best, yet that interpretation carries the force of law. Amazing." Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 HARV. L. REV. 2118, 2151 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)).

The D.C. Circuit's "*Chevron* Step One-and-a-Half doctrine" worsens this problem. When an Article III court believes a challenged agency interpretation is wrong, the court should rule based on its own interpretation rather than issuing an advisory opinion explaining what the agency must do to unlock reflexive judicial deference. The constitutional duty of Article III courts is not telling federal agencies how to *get around* the law.

But, under *Chevron* and *Chevron* Step One-and-a-Half, agencies can make de facto amendments to statutory law. Congress passes a law the best reading of which is "A," but which nonetheless is not perfectly clear. The relevant agency promulgates a regulation that depends on interpretation "B," which may be clearly less consistent with the language of the statute than interpretation "A," while still not so creative as to fall outside the bounds of the permissible. When challenged in court, the agency points to this ambiguity and argues that their interpretation is a reasonable one. Assuming the court applies *Chevron* and defers to the agency's interpretation, interpretation "B," the statutory law has effectively been amended. Thus, *Chevron* allows for an intentional or unintentional delegation of the legislative power reserved to Congress by Article I of the Constitution. As Justice Kavanaugh has noted, "[i]n many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the executive branch."[27]

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[27] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing Robert A. Katzmann,

Chevron also transfers the power to interpret the law from Article III courts to the executive branch. When the courts defer to agency interpretations of law, they abandon their constitutional responsibility. As Chief Justice John Marshall recognized, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177.[28] Similarly, Justice Thomas has noted, "Those who ratified the Constitution knew that legal texts would often contain ambiguities. . .The judicial power was understood to include the power to resolve these ambiguities over time. *Perez v. Mortg. Bankers Ass'n*,

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Reviewing Statutes (2014)). In response to Justice Kavanaugh's description of *Chevron*, Professor Cass R. Sunstein writes, "There is an obvious mystery in this claim. *Chevron* seems to transfer authority away from courts, not from Congress. Justice Kavanaugh's claim makes sense only if we see *Chevron* as allowing agencies to reject the best reading of congressional instructions—which is not at all part of the *Chevron* framework, but which, on his understanding, is precisely what it does." Cass R. Sunstein, Chevron *as Law*, 107 Georgetown Law J. 1613, 1616 n.12 (2019). But of course *Chevron* allows agencies to "reject the best reading of congressional instructions." *Chevron* does not have a "best reading" test. It asks only whether the statute is ambiguous on the point at issue and, if so, whether the agency's interpretation is permissible. Thus, *Chevron* plainly operates not only as a mechanism for shifting the interpretative power from the judiciary to the executive, but also as a means of shifting legislative power from Congress to the executive.

[28] "To prevent both legislative and executive abuses, the intervention of an independent judiciary is of no small importance. To the judges, the ministers of this power, it belongs to interpret all acts of the legislature, agreeably to the true principles of the constitution, as founded in the principles of natural law." Nathaniel Chipman, *Sketches of the Principles of Government*, at 333 (Philip B. Kurland and Ralph Lerner eds., Liberty Fund 1987) (1793).

575 U.S. 92, 119 (2015) (Thomas, J. concurring) (citations omitted); *see also*, *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) (citing *Stern v. Marshall*, 564 U.S. 462, 482-83 (2011)) ("Under our Constitution, the 'judicial power' belongs to Article III courts and cannot be shared with the Legislature or the Executive.").

It is worse still when courts give agencies multiple opportunities to produce an interpretation to which the court can defer under *Chevron*, as the Circuit Court did in this case. Yet under *Chevron*, the administrative agency, not the courts, resolve those ambiguities, and under *Chevron* Step One-and-a-Half, the agencies even have multiple attempts to get something past the courts. The courts become wielders of a rubber stamp, able only in the most extreme of cases to second guess the agency's interpretation; worse, they effectively give agencies the stamp and instruct them how to use it.

III. The D.C. Circuit's *National Cement* Doctrine Exacerbates *Chevron's* Constitutional Problems.

Following the logic of *Chevron*, the D.C. Circuit's double-deference doctrine compounds that decision's constitutional deficiencies. The Court in *Chevron* noted that, "Judges are not experts in the field, and are not part of either political branch of the government." *Chevron*, 467 U.S. at 865. As such, courts are not in a position, the Court reasoned, to replace an agency's policy judgment with their own. *Id*. at 865-66. Following that logic, the D.C. Circuit has adopted what the authors of one law review article

have called *Chevron* Step One-and-a-Half.[29] Applying this doctrine, the court below found that, while MSHA's position in litigation was that the statutory language in question was clear, that language was in fact ambiguous. *See* App. 14a. Because the agency argued that the statute was clear, the D.C. Circuit, rather than interpreting the statute for itself, remanded to the agency to allow the Secretary of Labor to interpret the statute again, this time under the assumption that the statute is ambiguous on the relevant point. *Id.*

In other words, rather than "say[ing] what the law is," *Marbury*, 5 U.S. at 177, the D.C. Circuit in this case and others gives agencies still more time to determine their own interpretation of the statutory law, leaving regulated parties in litigation limbo. Worse still, the court gave the agency the keys to unlock deference—hints, that is, regarding how to convince the court to put its thumb on the scale for the agency against the governed. The court abdicated its duty to say what the law is and to apply it. The court's decision should be reversed, and amici respectfully request that the Court provide clear guidance prohibiting the lower courts from so favoring administrative agencies.

There is no room in the constitutional structure of the federal government for administrative agencies to exercise legislative or judicial powers. Yet for about a century, the federal government has tilted power towards the administrative state and its bureaucrats.

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[29] Daniel J. Hemel, Aaron L. Nielson, Chevron *Step One-and-a-half*, 84 U. Chi. L. Rev. 757, 760-61 (2017).

There is similarly no room for the judiciary to aid administrative agencies in their efforts to thwart the separation of powers. The Court should grant certiorari in this case and rule for Petitioners to take a step in the direction of returning the federal government to the proper balance of powers established in the Constitution.

CONCLUSION

For the foregoing reasons, the Court should grant KC Transport's petition for a writ of certiorari.

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