No. 17-1636

IN THE

Supreme Court of the United States

CALIFORNIA SEA URCHIN COMMISSION, et al.,
Petitioners,

v.

SUSAN COMBS, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the U.S. Court of Appeals for the Ninth Circuit

BRIEF FOR THE CATO INSTITUTE, GOLDWATER INSTITUTE, AND CAUSE OF ACTION INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Timothy Sandefur
Aditya Dynar
SCHARF–NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
(602) 462-5000

John J. Vecchione
CAUSE OF ACTION INSTITUTE
1875 Eye Street, NW, Ste. 800
Washington, DC 20006
(202) 499-4232

Ilya Shapiro
Counsel of Record
Trevor Burrus
Reilly Stephens
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

QUESTION PRESENTED

Are agencies delegated authority by statutory silence such that actions that lack congressional authorization receive *Chevron* deference?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Regulations

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The **Goldwater Institute**, established in 1988, is a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility. Through its Scharf–Norton Center for Constitutional Litigation, Goldwater litigates cases and files *amicus* briefs when its objectives are directly implicated. The question of *Chevron* deference in light of Congressional silence is an important one sorely in need of this Court's guidance. It chokes innovation in the marketplace and affects the livelihood of thousands. Goldwater litigated one such case: *Flytenow, Inc. v. FAA*, 808 F.3d 882 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 618 (2017). And it has fueled significant state-level changes on the topic. *See, e.g.*, Timothy Sandefur, *Wisconsin Supreme Court Gets it Right on Administrative Deference*, goo.gl/ayLvdr (June 27, 2018); Jennifer Tiedmann, *New State Laws Provide*

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[1] Rule 37 statement: All parties received timely notice of *amici*'s intent to file this brief; their consent letters have been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

Important Reforms to Improve the Lives of All Arizonans, goo.gl/V1ttX1 (May 17, 2018); Kileen Lindgren, Chevron *Deference Dies in the Desert*, goo.gl/HVRpUK (May 1, 2018).

Cause of Action Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by appearing as *amicus curiae* in federal court. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (citing CoA Institute's *amicus* brief).

This case concerns *amici* because it implicates the protection for individual rights that the separation of powers provides. It also concerns a growing debate regarding the need to rebalance power between the executive and legislative branches to ensure that the Constitution's structural provisions continue their work in securing ordered liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress required that, when providing for the protection of the sea otter population, the government would also provide for the protection of the local fisheries. That was the compromise of interests approved by the legislature. Some decades later, when it became inconvenient for the agency responsible for implementing that statutory scheme, the agency decided to remove these protections from the fisheries—despite the lack of any such authority in the original statute. Yet according to the Ninth Circuit, it's of no moment

that Congress never authorized this action. The court below therefore signed off on this bureaucratic improvisation on the theory that Congress didn't get around to saying explicitly that the agency *can't* do it.

That rationale plays topsy-turvy with constitutional structure. It is Congress's role to authorize executive action in the first instance. Without a statutory mandate, the agency is without power. And, in order for that mandate to be effective, it must contain within it some intelligible principle the agency is obliged to implement. Agency action based on statutory silence is no less than the accrual of legislative authority to the agency in violation of the separation of powers. What's worse, the court below announced that it would defer to the agency's expertise in making things up.

Separation of powers is indispensable to the protection of individual liberty our constitutional system provides. Indeed, the Framers believed that the structural separation of powers—both horizontal and vertical—would be the front line of defense against an overreaching government. *See* The Federalist, No. 51 (Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people").

To protect against this accumulation, they vested the three distinct powers individually in separate departments of government. *See Dep't of Transp. v. Ass'n. of Am. R.R.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment). And each branch would

have "the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist, No. 51 (Madison).

Laws are supposed to be hard to enact, and the separation of powers ensures that would-be legal commands have run rigorous political gauntlets before becoming laws of the land. It prevents factions from capturing the legislative process and protects the people from arbitrary power being wielded with no accountability. *See* John F. Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 191, 202 (2007); *see also Ass'n. of Am. R.R.,* 135 S. Ct. at 1237 (Alito, J., concurring).

Yet the modern administrative state has been allowed to evade many of these constitutional fail-safes. It has become what some have called the "fourth branch of government," combining all three functions—legislative, executive, and judicial—into one body that does not have to run the Framer's gauntlet. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1877-1878 (2013) (Roberts, C.J., dissenting); *see generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).

This case implicates all the Framers' warnings. When an executive agency abrogates the "deal" that made its operative legislation possible, it is making law without constitutional authorization. Such legerdemain undermines Congress, which must then go about policing agency discretion. Since the number of potential silences is infinite, Congress can only guess where a creative agency might slip through the cracks of any limit its legislation imposes. It is thus incumbent on courts to curtail the executive imagination.

This Court should take this case and show that the Constitution's separation of powers do not allow such judicial enabling of executive mischief. Administrative agencies simply cannot take it upon themselves to ignore or rewrite duly enacted legislation.

ARGUMENT

I. EXTENDING *CHEVRON* TO INSTANCES OF CONGRESSIONAL SILENCE TURNS EVERY LAW INTO AN OPEN-ENDED DELEGATION WITH NO LIMITING PRINCIPLE

A. Meaningless Silences Can't Delegate Authority to Agencies as *Chevron* Requires

Chevron does not allow an agency to promulgate rules that have no basis in the text it purports to interpret. "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). And any delegation from Congress to the agency must come with an "intelligible principle" that the agency is obliged to follow. *See Whitman v. Am. Trucking Assns., Inc.,* 531 U. S. 457, 472 (2001). Unprincipled delegations are little more than grants of plenary authority. And yet the court below read *Chevron* to provide agencies this nearly boundless power to make law.

Federal agencies only have the power they are delegated by Congress. *See Chevron U.S.A. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837 (1984). In *Chevron*, the Court announced the well-known rule: first, has "Congress directly spoken to the precise question at issue."

Id. at 842. If Congress's intent is clear—if the statute is unambiguous—that is the end of the court's inquiry. *Id.* at 842–43. If, however, "the statute is silent or ambiguous with respect to the specific issue" the court then decides whether the agency's interpretation is based on a permissible construction of the statute. *Id* at 843. If both conditions are met, the agency's interpretation is given "controlling weight unless [it is] arbitrary, capricious, or otherwise manifestly contrary to the statute." *Id.* at 844.

Central to *Chevron*'s framework therefore is the *text* that is to be interpreted. Courts must consult the relevant statutory language and determine whether Congress spoke with clarity. If the language is amenable to divergent meanings, then the court asks if the agency's chosen meaning is beyond the pale. The absence of any language renders the framework incoherent. Silence is not ambiguous, it's meaningless. The agency has pulled an interpretation from the void. The best courts can possibly do is ask whether the choice is within the realm of reason, turning *Chevron*'s two-step test into a single-step test for "reasonableness."

The excesses of this judicial deference undermine the foundational rule of constitutional jurisprudence: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Indeed, the Framers envisioned that it would be the judiciary—not the executive—that would determine the law's meaning. *Perez v. Mortg. Bankers Ass'n,* 135 S. Ct. 1199, 1220 (2015) ("The Framers expected Article III judges to engage . . . by applying the law as a 'check' on the excesses of both the Legislative and Executive Branches.") (Thomas, J., concurring).

Federal judges are constitutionally charged with exercising independent judgment. That duty entails the "interpretation of laws," which is the "proper and peculiar province of the courts." The Federalist, No. 78 (Alexander Hamilton); *see also* Philip Hamburger, Law and Judicial Duty 543-48 (2008). In the context of executive overreach, the federal courts must look to "the compatibility of agency actions with enabling statutes." *Perez*, 135 S. Ct. at 1221 (citing *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427, 189 (2014)).

Multiple justices of this Court have expressed concern regarding the implementation of *Chevron* in practice, which too often amounts to a "cursory analysis" in which courts retreat to "reflexive deference." *Pereira v. Sessions*, No. 17-459, 2018 U.S. LEXIS 3838, at *33 (June 21, 2018) (Kennedy, J., concurring); *see also Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C. J., dissenting); *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-1158 (10th Cir. 2016) (Gorsuch, J., concurring). If courts are cursory when applying *Chevron* to statutory text, the situation will not be improved by suggesting they defer to no text at all.

B. Without a Grounding in Statutory Text, *Chevron* Becomes a License for Agencies to Invent Their Own Laws

Giving *Chevron* deference to statutory silence inverts the principle of nondelegation, which is based in the assumption that nothing is permitted unless Congress authorizes it and provides a principle for its execution. If there is not even an ambiguous text in which to ground agency action, the answer must be that Congress has not delegated the authority to the agency to

make such a determination. We no longer have a "conferral of discretion upon the agency, [where] the only question of law presented to the courts is whether the agency has acted within the scope of its discretion." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516 (1989). That kind of discretion has no scope.

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States,* 488 U.S. 361, 371 (1989). Article I states that "[a]ll legislative Powers herein granted shall be vested in a Congress." U.S. Const. art. I, § 1. In conjunction with the vesting clauses that open Articles II and III, the Article I Vesting Clause sets the core design of our constitutional structure. This is not a disposable organizational chart. Instead, the Framers laid out separate spheres of authority because "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison).

This Court's cases say that some sorts of delegations can be permitted, but only where Congress provides an "intelligible principle." *See Whitman,* 531 U.S. at 472 (2001); *J. W. Hampton, Jr., & Co. v. United States,* 276 U. S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power").

This theory posits that when Congress lays down such a principle, it does not really delegate its legislative power but instead gives the executive guidelines

on how to enforce the law. *Whitman*, 531 U.S. at 472 ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests 'all legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers.") (citations omitted); *Loving v. United States*, 517 U.S. 748, 770 (1996) ("The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes."); *Yakus v United States*, 321 U.S. 414, 426 (1944) ("Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose."); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694 (1892) ("The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.") (citation omitted).

The intelligible-principle test has its critics. *See, e.g.*, *Ass'n of Am. R.R.*, 135 S. Ct. at 1246 (Thomas, J., concurring) ("Although the Court may never have intended the boundless standard the 'intelligible principle' test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power"); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 329 (2002) (asserting that the Court has "found intelligible principles where less discerning readers find gibberish."). And indeed, this

Court has only twice invalidated a delegation, *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), evidently demonstrating that, since 1935, Congress and administrative agencies have scrupulously followed this Court's 83-year old guidance and maintained an administrative state that is predictable, humble, and constrained within ascertainable congressional guidelines. *But see* Philip Hamburger, Is Administrative Law Unlawful? (2015) (answering in the affirmative).

Nondelegation requirements "do not prevent Congress from obtaining the assistance of its coordinate Branches," *Mistretta*, 488 U.S. at 372 (1989), and few doubt "the inherent necessities of government coordination." *J. W. Hampton*, 276 U.S. at 406 (1928). But, whatever the nondelegation standard is, it cannot be that the agency is granted authority based on no principle whatsoever. Obtaining necessary assistance from agencies does not license the abdication of core responsibilities. Congress's rulemaking authority, as ratified by this Court, does not come from Congress's being "too busy or too divided and can therefore assign its responsibility of making law to someone else." *Mistretta,* 488 U.S. at 416 (Scalia, J., dissenting).

The question is whether the statute "furnishes a declaration of policy or a standard of action." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 416 (1935). It is entirely within Congress's power to "establish primary standards, devolving upon others the duty to carry out the declared legislative policy." *Id.* at 426. But there is no primary standard here, nor a secondary or tertiary one. The Ninth Circuit's rule is for those instances where Congress provided nothing at all. Instead a federal bureaucrat is granted "an unlimited authority to

determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Panama Ref.*, 293 U.S. at 416. This is precisely the circumstance the nondelegation doctrine abhors.

The ruling below turns every statute into a grant of plenary authority. Worse, it finds that where an agency has been granted no authority, that authority is therefore unlimited and entitled to deference—if there is no statuary language, everything is permissible. This is a far remove from *Chevron*'s purportedly humble role as gap-filler.

II. UNDER THE NINTH CIRCUIT'S RULE, CONGRESS WOULD HAVE TO ANTICIPATE AND FILL EVERY STATUTORY GAP WITH AN EXPLICIT PROHIBITION

The statute at issue says that the agency "must" adopt a regulation that "shall include" protection for the fisheries. Pet. at 9. But having previously issued the regulation, the agency now claims the power to rescind it. How many other mandatory phrases in the U.S. Code are subject to sunset at an agency's whim?

The Clean Air Act says the agency "shall promulgate" regulations regarding ambient air quality. 42 U.S.C. § 7409. But those were first promulgated a good while ago, and the air is much cleaner these days. Perhaps it's open to the agency to rescind the core requirements of the CAA when it decides it'd rather not enforce them anymore.

Title IX directs agencies to issue rules to ensure men and women enjoy equal access to educational opportunities. *See* 20 U.S.C. § 1682. Forty-plus years on, is an agency entitled to say that things are equal

enough, and we no longer need such a rule? The statute is silent on the matter, so the Ninth Circuit would defer to the agency's "reasonable" determination that sex discrimination is a thing of the past.

The Ninth Circuit asks Congress to do the impossible: to foresee every possible initiative an agency might someday come up with and decide in advance whether to preempt it. That is the logical result of the theory that the failure to expressly grant or deny authority is assumed to be a grant of authority.

Such a regime would be entirely unworkable. In the typical *Chevron* case, "Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989). Rather than attempting to ferret out the truth in every case, *Chevron* "replaced this statute-by-statute evaluation . . . with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant." *Id* at 516. But at least in the case of an ambiguous text one can say Congress intended there to be some policy on the matter. Where there is no text at all, that assumption cannot be maintained.

Such a doctrine turns Congress into the whack-a-mole branch. It must envision all possible areas the statute doesn't speak to. And since this is functionally impossible, it must go back repeatedly to slap down statutory silences agencies later discover. The very notion disrespects Congresses role as the *authorizer* of federal agency action, without whose grant of authority the agency is devoid of the appropriate mandate.

And such a doctrine disrespects the judiciary as well. The Administrative Procedure Act makes clear that the judiciary was intended to check executive overreach. The APA was "framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring) (citing *United States v. Morton Salt Co.*, 338 U. S. 632, 644 (1950)). The APA was seen as a compromise—it allowed agencies to exercise *delegated* power but at the same time provided for thorough judicial review to ensure that they stayed within the bounds of their implementing statute. *See generally* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557 (1996). As the text of the APA states, a reviewing court should overturn agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1)(A). To be in accordance with law, there must be some law to accord with.

On what ground could an agency action based on silence be identified as arbitrary? There is no context against which its rationality could be questioned. Put another way, mustn't *any* action the agency takes without reference to the empowering statute be arbitrary by definition? What could be more arbitrary than a decision with no legal basis?

The lower court ignored these constitutional and statutory principles. Indeed, in allowing an executive branch agency to have the final say on what the act means, the court directly abandoned its duty under the

Constitution. This Court should take this case and enforce the separation of powers our Founders designed. The judicial branch is supposed to be a check on the executive, not a rubber stamp for administrative agencies who rewrite the law according to their own whim.

Our constitutional structure requires that agencies act with reference to legislation that defines their authority, meaning unbound delegations are anathema. The Court should take this opportunity to make clear that executive agencies are not free to make legislative rules without—at a minimum—some directive from Congress to do so.

CONCLUSION

The petitioners have pointed out that this case creates numerous splits among the circuit courts. That fact alone warrants the Court's attention, but the constitutional implications of the decision below add further importance. The petition should be granted.

Respectfully submitted,

Timothy Sandefur
Aditya Dynar
SCHARF–NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004

John J. Vecchione
CAUSE OF ACTION INSTITUTE
1875 Eye Street, NW, Ste. 800
Washington, DC 20006

Ilya Shapiro
Counsel of Record
Trevor Burrus
Reilly Stephens
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington,
D.C. 20001
(202) 842-0200
ishapiro@cato.org

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