No. 19-1115

IN THE
Supreme Court of the United States

AMERICAN BANKERS ASSOCIATION,

Petitioner,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The regulation at issue in this case stretches two statutory terms far beyond their ordinary usage—for example, by interpreting "local community" as encompassing large regions inhabited by millions of people and comprising dozens of cities and counties. The court of appeals upheld these interpretations on the ground that agencies possess "vast discretion," above and beyond that ordinarily accorded at *Chevron* step two,[1] when acting pursuant to an express grant of interpretive authority. The Government does not defend that extra measure of deference or dispute that such deference presents an important question regarding the *Chevron* doctrine's proper scope. Instead, the Government seeks to dodge the issue altogether. The Government's arguments fail for three reasons.

First, contrary to the Government's assertion, this case *does* present the question whether an express delegation expands the agency's discretion at *Chevron* step two. The decision below applies a special, separate rule for instances in which a statute expressly (rather than implicitly) authorizes an agency to interpret statutory terms. Under that ill-founded rule, agencies receive "more than mere deference" when statutes expressly authorize them to issue implementing regulations.

Second, the Government errs in asserting that *Chevron* compels the analytical framework applied in the decision below. *Chevron* did not decide the question presented by this case, and later decisions of this Court hold that "[n]o matter how" the inquiry "is

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[1] *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). Those decisions demonstrate that *Chevron* step two, properly understood, does not grant agencies "vast discretion" merely because a statute includes an express delegation of interpretive authority.

Third, although the Government presents a grab-bag of other objections, none withstands scrutiny. It is true that Petitioner does not challenge *Chevron* in its entirety. But this Court frequently addresses specific elements of the *Chevron* doctrine. Regardless of whether *Chevron* is eventually reconsidered, the doctrine has tremendous practical effects for parties and agencies *right now*, and the D.C. Circuit's unique docket gives that court an outsize influence over *Chevron*'s day-to-day administration.

The National Credit Union Administration's extravagant interpretations of "local community" and "rural district" illustrate the serious separation-of-powers problems that arise from permissive applications of *Chevron*. Indeed, the "reflexive deference" applied by the D.C. Circuit in upholding those interpretations "suggests an abdication of the Judiciary's proper role in interpreting federal statutes." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). Thus, contrary to the Government's assertion, the reasonableness of the Administration's regulation falls within the Question Presented.

For all these reasons, the Court should grant review and restore appropriate limits on *Chevron* deference.

I. The Decision Below Squarely Presents the Question Raised by Petitioner.

The Petition for Certiorari presents the following question: "When a statute expressly directs an agency to define a statutory term, does the delegation expand the scope of the agency's authority at *Chevron* step two beyond its ordinary bounds?" Pet. i. The Government's lead argument in opposition to certiorari is that "this case does not present that question." Br. in Opp. 13. The Government is incorrect, and its arguments reinforce the need for this Court's review.

The Government asserts that "the court of appeals did not hold (or even imply) that the NCUA was entitled to any extra deference" based on the express statutory directive to define the statutory terms at issue. Br. in Opp. 14. That assertion is inconsistent with the language of the decision below.

The D.C. Circuit correctly concluded that the express delegation of interpretive authority resolved step one of the *Chevron* analysis. *See* Pet. App. 14a, 18a. But the D.C. Circuit did not stop there. At the outset of its *Chevron* step two analysis, the court concluded that the Administration "possesses vast discretion to define terms because Congress expressly has given it such power." Pet. App. 19a. Far from concluding that the Administration is entitled to no extra deference as a result of an express delegation of definitional authority, the D.C. Circuit concluded that the agency has "vast discretion to define terms" precisely "because" of the express delegation. *Id.*

The decision below also cited and followed other D.C. Circuit decisions that accord agency interpretations an added measure of deference, beyond that

ordinarily granted at *Chevron* step two, when an agency acts pursuant to an express delegation of interpretive authority. Specifically, the D.C. Circuit relied on its earlier decision in *Lindeen v. SEC*, which explained that "[t]ypically, at *Chevron* Step 2, we defer to the [agency] so long as its definition is based on a permissible construction of the statute," "[b]ut because Congress has authorized the [agency] to prescribe legislative rules, we owe the [agency's] judgment more than mere deference or weight." 825 F.3d 646, 655-56 (D.C. Cir. 2016) (citations and punctuation omitted). The court thus concluded that the express delegation signals that "Congress did *not* intend the [terms] to be applied in [their] plain meaning sense" and that the Administration "enjoys broad discretion in how to define them." Pet. App. 17a (quoting *Women Involved in Farm Econ. v. U.S. Dep't of Agriculture*, 876 F.2d 994, 1000 (D.C. Cir. 1989), and *Lindeen*, 825 F.3d at 653).

The Government's only response is that in *Lindeen* and *Women Involved* the D.C. Circuit also stated that the agency's discretion is not limitless and the agency must act "reasonably." Br. in Opp. 17 n.8. That response avoids the key issue—i.e., what counts as acting reasonably in this context. Together with *Women Involved* and *Lindeen*, the decision below indicates that the D.C. Circuit defines reasonableness at *Chevron* step two more broadly than this Court's precedents permit. *See* Pet. 16-19. The D.C. Circuit's decisions thus allow agencies acting pursuant to an express statutory delegation to adopt interpretations that fall outside the "zone of reasonableness" that would otherwise apply at *Chevron* step two.

II. The Government Relies on a Faulty Understanding of the *Chevron* Framework.

The Government incorrectly argues that there is nothing for this Court to decide because the D.C. Circuit merely followed this Court's directive in *Chevron*. Br. in Opp. 15-16. Specifically, the Government highlights the principle that "whenever Congress has explicitly left a gap for the agency to fill, the agency's regulation is given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 16 (citations and quotation marks omitted). The Government errs in suggesting that this language dictates more deferential review when an agency acts pursuant to an express delegation of interpretive authority.

First, although *Chevron* used slightly different terminology to describe the standard of review for "express delegation[s]" and "implicit" delegations, 467 U.S. at 843-44, *Chevron* dealt only with a statute that gave the agency implicit, rather than explicit, authority to interpret the statutory term at issue ("stationary source"), *see id.* at 845-51; *see also Negusie v. Holder*, 555 U.S. 511, 529-30 (2009) (Stevens, J., concurring in part and dissenting in part) (statute at issue in *Chevron* "implicitly delegated" interpretive authority to EPA). Accordingly, the Court had no occasion to address the standard for express delegations, and *Chevron*'s commentary on that issue is dicta.

Second, this Court's subsequent decisions have repeatedly applied the same test at *Chevron* step two regardless of whether the delegation is implicit or explicit. *See* Pet. 15-16 & n.8. For example, the Court

has explained that "[w]here Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *Arlington*, 569 U.S. at 307. Thus, "[n]o matter how" the step two inquiry "is framed," "the question a court faces when confronted with an agency's interpretation of a statute is *always* simply, *whether the agency has stayed within the bounds of its statutory authority*." *Id.* at 297 (first emphasis added). If an agency "goes beyond the meaning that the statute can bear," its interpretation receives no deference. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994). These decisions—and others cited in the Petition—are incompatible with the view that an express delegation confers added discretion on the agency. Remarkably, the Government's Brief in Opposition does not cite, let alone discuss, a single one of these cases.[2]

Third, as explained in the Petition and by *amici*, according added judicial deference to agency interpretations based on an express delegation raises serious constitutional concerns. *See* Pet. 22-25; Br. of Amicus Curiae Center for Constitutional Jurisprudence 8-9. The standard *Chevron* step two analysis already affords the agency every ounce of permissible discretion—i.e., "whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (S. Dakota),*

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[2] This Court has mentioned the "manifestly contrary to the statute" language only four times in the last fifteen years, and not once since 2014, despite having decided scores of agency cases during those periods. So far as Petitioner is aware, there is no basis for upholding an agency interpretation that is contrary to the governing statute, albeit not "manifestly" so. An agency interpretation that contravenes the statute—manifestly or otherwise—is *ultra vires* and thus invalid. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358-59 (2018).

N.A., 517 U.S. 735, 740-41 (1996). Yet the D.C. Circuit's approach treats an express delegation as granting the agency discretion that goes beyond the level "[t]ypically" afforded "at *Chevron* Step 2." *Lindeen*, 825 F.3d at 655. This approach undermines the power of Article III courts to "say what the law is," and also permits agencies to encroach on Congress's Article I legislative power. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712-13 (2015) (Thomas, J., concurring). The Government bypasses these important issues as well.

Strikingly, the Government's Brief in Opposition never makes an affirmative argument that an express grant of definitional authority justifies additional judicial deference to the agency's interpretation of statutory terms. Given that silence, the Government's main response boils down to the invalid (and self-contradictory) arguments that (1) the D.C. Circuit did not accord the agency's interpretation any additional deference, and (2) *Chevron* directed the D.C. Circuit to accord the agency additional deference. The Government's inability to offer a coherent defense of the D.C. Circuit's approach serves to emphasize the need for this Court's review.

Fourth, the Government's remaining arguments are unfounded. Although the D.C. Circuit described the agency's "vast" discretion as not "boundless," Br. in Opp. 15 (quoting Pet. App. 19a), the question is not whether the agency's discretion is utterly "boundless," but instead whether the boundary has been properly defined. The Government also seeks to draw support from the fact that the district court, in ruling against the agency, applied the same analytical framework as the D.C. Circuit. Br. in Opp. 17. But that is neither

surprising nor consequential, because the district court was *required* to follow D.C. Circuit precedent.

III. This Case Is an Excellent Vehicle for Addressing an Issue of Significant Practical Importance.

A. The Government's Reasons for Opposing Review Are Meritless.

The Government suggests that the Petition should be denied because it does not "urge that *Chevron* be overruled." Br. in Opp. 13. But the D.C. Circuit's approach is neither required by *Chevron* nor consistent with this Court's decisions applying the *Chevron* doctrine, and therefore rejecting the D.C. Circuit's approach does not require overruling *Chevron*. At most, this case requires a clarification or recalibration of the limitations on *Chevron* deference. Taking that step is both well within the contours of the Question Presented and consistent with recent decisions of this Court clarifying the *Chevron* doctrine's scope and structure. *See* Pet. 24-25.

There may—or may not—come a day when this Court reconsiders the *Chevron* framework as a whole. *See SAS Institute*, 138 S. Ct. at 1358 (observing that it is an open question "whether *Chevron* should remain"). The reality is that the lower courts regularly apply *Chevron* as the law stands today. The Question Presented thus has importance for litigants who are injured by overbroad applications of the *Chevron* doctrine. *See* Br. of Amici Curiae Iowa Bankers Ass'n et al. 16-19; Br. of Amicus Curiae Pacific Legal Foundation 4-11; Br. of Amicus Curiae National Right to Work Legal Defense Foundation, Inc. 8-11.

The Government does not dispute that the level of deference accorded to agency interpretations of statutory terms is an important issue. And apart from its invalid argument that the D.C. Circuit did not accord added deference to the agency's interpretation, the Government does not dispute that the Question Presented is clearly and cleanly presented here. *See* Pet. 25-26.

Although the Government observes that there is no circuit conflict on the Question Presented, Br. in Opp. 13, it offers no response to the argument that the D.C. Circuit's decision conflicts with decisions of this Court, including *Arlington*, *see* Pet. 14-19. Nor does the Government answer Petitioner's points that the D.C. Circuit hears a significant proportion of the cases involving agency rulemaking and has an outsize influence on the way in which *Chevron* is applied by other courts. *See* Pet. 24-25; Br. of Amicus Curiae Pacific Legal Foundation 4-7.

B. The Question Presented Encompasses the Administration's Unreasonable Interpretations of "Local Community" and "Rural District."

The Government contends that the Question Presented "does not fairly encompass any challenge to the validity of the NCUA's definitions of 'local community' and 'rural district.'" Br. in Opp. 18. In fact, the Question Presented expressly refers to and summarizes the Administration's definitions of both terms. *See* Pet. i. The Government's own statement of the Question Presented also encompasses the validity of the Administration's definitions. *See* Br. in Opp. i.

The Government likewise errs in contending that the validity of the Administration's definitions is a "narrow" question that does not warrant this Court's attention. *Id.* at 17. The Government understates the importance of the Administration's regulations, which expand the permissible range of activities for businesses that enjoy a sweeping exemption from federal, state, and local taxes. *See* Pet. 3-4. This Court has reviewed—and rejected—similar regulations issued by the Administration before. *See NCUA v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 503 (1998). Moreover, the validity of the agency's interpretations is linked to the D.C. Circuit's application of *Chevron* deference. Beginning with *Chevron* itself, this Court has resolved questions about the limits of judicial deference in the context of particular agency interpretations. *See, e.g.*, *Arlington*, 569 U.S. at 305-07; *United States v. Mead Corp.*, 533 U.S. 218, 226-31 (2001). That approach is appropriate here.

The overbreadth of the Administration's interpretations of "local community" and "rural district" reinforces the need for this Court's review. As the district court explained, the Administration's definitions are "not anywhere near [those terms'] standard meaning." Pet. App. 70a.

1. "Local Community." The challenged rule interprets "local community" to encompass any Combined Statistical Area or portion of such an area, so long as the population does not exceed 2.5 million people. *See* Pet. 5. Combined Statistical Areas include "daisy chains" of metropolitan areas separated by great distances and "that have nothing to do with those at the other end of the chain." Pet. App. 68a-69a. The Government ignores this point, along with nearly all the

arguments concerning "local community" set out in the Petition. *See* Pet. 5-8, 19-23.

Instead, the Government argues that Petitioner "does not dispute" a regulation defining any county as a local community, and notes that some counties are quite large. Br. in Opp. 19. That argument is a red herring: The regulation concerning counties was adopted long before the rule challenged here and is not at issue in this case. Moreover, county residents are served by a single local government, which provides a degree of interaction that is missing among residents of Combined Statistical Areas. *See* Pet. 6-7 & Fig. 1.[3]

2. "*Rural District.*" The Administration's definition of "rural district" encompasses enormous multistate regions with overwhelmingly urban populations. *See* Pet. 9-10. The Government states that Petitioner "apparently accepts" another pre-existing regulation that allows a rural district to include smaller urban areas that support the rural district's economic viability. Br. in Opp. 19-20. Once again, this pre-existing provision is not at issue in this case. Moreover, there is great difference between including a relatively small urban area that supports the surrounding rural district and defining large cities such as Denver and Salt Lake City as parts of a "rural district." *See* Pet. 9-10 & Fig. 3.

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[3] The Government asserts that the district court held that a "local community" and a "rural district" can be no larger than a county, and that Petitioner does not defend that view. Br. in Opp. 19. In fact, the district court's well-reasoned opinion was more nuanced than that, and Petitioner's arguments are congruent with the district court's opinion. *See* Pet. 10-13, 20-21; Pet. App. 62a-88a.

Finally, the Government contends that the "hypothetical" possibility that the Administration's definitions may produce unreasonable results does not make the definitions unreasonable. Br. in Opp. 20. But the unreasonableness of the Administration's definitions is more than merely hypothetical. The Administration has already applied its new definitions to approve a vast "local community" that encompasses tens of thousands of square miles and more than 80 percent of Utah's population. *See* Pet. 8 & Fig. 2.

* * *

Regardless of whether the Court is prepared "to question *Chevron* itself," it should "consider taking a step away from the abyss" by granting review in this case and resolving the question presented by this Petition. *Baldwin v. United States*, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting from denial of certiorari). Such a step would be consistent with prior cases in which this Court has clarified *Chevron* deference. Review is particularly appropriate when the Government is unwilling to defend the proposition that an express grant of interpretive authority justifies additional deference to the agency's implementing regulations.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition should be granted.

Respectfully submitted,

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