No. 20-1114

In the
Supreme Court of the United States

AMERICAN HOSPITAL ASSOCIATION, et al.,
Petitioners,

v.

XAVIER BECERRA,
Secretary of Health and Human Services, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Under federal law, the reimbursement rate paid by Medicare for specified covered outpatient drugs is set based on one of two alternative payment methodologies. If the Department of Health and Human Services (HHS) has collected adequate "hospital acquisition cost survey data," it sets the reimbursement rate equal to the "average acquisition cost for the drug," and "may vary" that rate "by hospital group." 42 U.S.C. § 1395l(t)(14)(A)(iii)(I). If HHS has not collected adequate "hospital acquisition cost data," it must set a reimbursement rate equal to the "average price for the drug," which is "calculated and adjusted by [HHS] as necessary for purposes of" the statute. 42 U.S.C. § 1395l(t)(14)(A)(iii)(II).

The question presented is whether Chevron deference permits HHS to set reimbursement rates based on acquisition cost and vary such rates by hospital group if it has not collected adequate hospital acquisition cost survey data.

2. Whether Petitioners' suit challenging HHS's adjustments is precluded by 42 U.S.C. § 13951(t)(12).

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus Pacific Legal Foundation is the most experienced public interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving the role of the Article III courts as an independent check on the Executive Branch under the Constitution's Separation of Powers, including cases considering the contemporary practices of judicial deference to agency interpretations of statutes and regulations. *See*, *e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (restricting application of *Auer* deference); *Gundy v. United States*, 139 S. Ct. 2116 (2019) (concerning delegation of authority to Attorney General); *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (enforcement of Appointments Clause) ; *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018) (interpretation of Clean Water Act venue statute); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), cert. denied, 137 S. Ct. 620 (2017) (*Auer* deference to agency staff testimony); *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (*Auer* deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "navigable waters").

PLF's adherence to constitutional principle and broad litigation experience offer the Court an important perspective that will assist in reviewing this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In our Constitutional system, the judicial branch is meant to stand as an impartial arbiter of the meaning and application of the law that the legislative branch enacts. Judges are not meant to arbitrarily favor either side, but to objectively say what the law is. Yet deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), tilts the playing field in favor of the federal government, the most powerful and prolific litigator in the country. It unjustly allows a federal agency's inferior interpretations of the law to prevail over better interpretations so long as the agency's interpretation is not unreasonable.

To mitigate some of the negative consequences that would accompany unrestrained deference, this Court has repeatedly declared that before they can defer under *Chevron*, courts must rigorously attempt to the meaning of the relevant statutes using all applicable tools and canons of construction. And yet, as the D.C. Circuit's decision here shows, lower courts have still not gotten the message. Just as this Court

did a few years ago in *Kisor v. Wilkie* with respect to *Auer* deference, it must once again send a clear signal that courts cannot simply apply *Chevron* after taking a perfunctory look at the statute.

But this Court should also confront the fact that *Chevron* deference is itself the problem. *Chevron* shifts the balance of power by pulling it from the legislature and judiciary and placing it into the hands of executive bureaucrats. It encourages the slow but steady accretion of executive power at the expense of the other branches of government—and of individual liberty. Decades of experience under *Chevron* has shown that papering over its cracks with additional safeguards cannot cover up the deep fault lines created by the practice of judicial deference. The time has come to reconsider and abandon *Chevron*.

ARGUMENT

The D.C. Circuit's cursory analysis of the statute and rush to apply *Chevron* deference here goes well beyond this Court's precedents. It also highlights flaws in *Chevron* itself that should lead the Court to reconsider the doctrine of judicial deference. The D.C. Circuit should be reversed.

I.

THE D.C. CIRCUIT'S CURSORY STATUTORY ANALYSIS WAS IMPROPER

Chevron deference can only apply when a statute is truly ambiguous such that "the law runs out, and policy-laden choice is what is left over." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). Put another way, deference "is not due unless a court, employing traditional tools of statutory construction, is left

with an unresolved ambiguity." *Epic Sys. Corp. v Lewis*, 138 S. Ct. 1612, 1630 (2018).

Just a few years ago in *Kisor*, this Court reiterated that a reviewing court must "bring all its interpretive tools to bear before finding" that a regulation is ambiguous. *Kisor*, 139 S. Ct. at 2423. That standard is no less applicable when an agency interprets a statute, rather than a regulation. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("[W]e owe an agency's interpretation of the law no deference unless, *after* employing traditional tools of statutory construction, we find ourselves unable to discern Congress's meaning." (emphasis added) (internal quotation marks omitted)).

Before deferring to an agency's interpretation, "the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose whether the regulation really has more than one reasonable meaning." *Kisor*, 139 S. Ct. at 2423–24. This is not intended to be a cursory evaluation. As Justice Gorsuch explained in his *Kisor* concurrence, judges ordinarily have at their disposal an "interpretive toolkit, full of canons and tiebreaking rules, to reach a decision about the best and fairest reading of the law." *Id.* at 2430 (Gorsuch J., concurring). All relevant tools must be employed before the court invokes deference.

A searching and thorough analysis is crucial if courts are to "perform their reviewing and restraining functions" as they are indeed obligated to do. *Id.* at 2415 (opinion of the court). To defer to an agency's interpretation when a regulation is not truly ambiguous "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a

new regulation." *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000). That is no less true for interpretations of statutes. Unfortunately, as Justice Kennedy noted, there has long been an alarming pattern of "cursory analysis" and "reflexive deference." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). This tendency encourages agencies to broadly interpret their authority and hope that courts will simply not look too closely.

This case is emblematic of the tendency towards "cursory analysis" and "reflexive deference." As Judge Pillard persuasively argued in her dissenting opinion below, the majority ignored the plain meaning of the law, as well as its structure and context, briskly concluding that HHS's interpretation was permissible under step two of *Chevron*. In particular, Judge Pillard noted that the majority's reading "renders superfluous … nearly a full column in the U.S. Code" that details how an acquisition cost survey must be conducted. Pet. App. 39a. If HHS is able to unreservedly alter reimbursement rates under its "adjust[ment]" authority, then it will never have any reason to conduct the acquisition cost survey that Congress laboriously detailed. HHS's proposed reading "drains each of these provisions of meaning." Pet. App. 40a.

Rather than engaging in the necessary thorough statutory analysis, the majority below first concluded that HHS's interpretive shift must have been proper because it was consistent with what the majority saw as the purpose of the statute—keeping Medicare costs under control. The majority then rushed to "fundamentally rework the statutory scheme" to find

an ambiguity that could support HHS's interpretation. Pet. App. 36a. And the court placed the burden on AHA to explain "why … Congress would want to preclude HHS" from adjusting rates. Pet. App. 31a.

But this is exactly backwards. A party seeking deference must show that there is a genuine statutory ambiguity *before* deference is even on the table. *Epic Sys. Corp.*, 138 S. Ct. at 1630. And considerations of legislative intent, perceived statutory purpose, or sympathy with an agency's actions cannot be used to generate an ambiguity when the text is clear. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

This Court should accordingly hold that the D.C. Circuit majority erred in rushing too quickly towards deference. And it should reiterate that courts must exhaust their "interpretive toolkit, full of canons and tiebreaking rules," to try to reach a decision about the best and fairest reading of the law; it is only after a court "bring[s] all its interpretive tools to bear" that it can conclude that there is a true ambiguity and apply *Chevron* deference. Courts must not put an *ex ante* thumb on the scale in favor of an agency's arguments and strain to discover ambiguities, as the D.C. Circuit did here.

II.

THE APPLICATION OF *CHEVRON* DEFERENCE INFRINGES THE SEPARATION OF POWERS

A clarification that deference should not be reflexive or follow cursory statutory analysis may be sufficient to resolve this case, but it is not enough to stem the tide of "reflexive deference". The truth is that *Chevron* itself is the problem. So long as that doctrine remains operative, agencies will be incentivized to expansively interpret their statutory mandate and courts will be incentivized to not carefully scrutinize agencies even when the agencies go too far. Accordingly, this Court should take this opportunity to reconsider *Chevron* deference.

Multiple Justices have expressed concern over the ongoing viability and foundations of *Chevron*. *See, e.g.*, *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from the denial of certiorari) ("*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions."); *Kisor*, 139 S. Ct. at 2446 n.114 (Gorsuch, J., joined by Justices Thomas & Kavanaugh, concurring in the judgment) (asserting that "there are serious questions" about whether *Chevron* "comports with the APA and the Constitution"); *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908 (2019) (Gorsuch, J., joined by Justice Thomas, dissenting) (noting "the mounting criticism of *Chevron* deference"); *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (expressing "concern" over how *Chevron* "has come to be understood and applied"); *id.* at 2129 (Alito, J., dissenting) (noting that "[i]n recent years, several

Members of this Court have questioned *Chevron*'s foundations").[2] That concern is well placed, as judicial deference to agency interpretations of statutes is incompatible with the Constitution's separation of powers guarantees in two fundamental respects. First, it is contrary to the power of the legislative branch to make law. Second, it is contrary to the power of the judicial branch to interpret the law. This case illustrates both of these concerns.

A. Deference Infringes on Legislative Power

This Court has repeatedly recognized that "Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted ... in a Congress of the United States'" and that "[t]his text permits no delegation of those powers." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001). When

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[2] *Chevron* has also been a subject of growing and robust scholarly interest and debate. *Compare* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017); Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 Ala. L. Rev. 1 (2017); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016); Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1 (2013); *and* Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779 (2010), *with* Cass R. Sunstein, Chevron *as Law*, 107 Geo. L.J. 1613 (2019); Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 Vand. L. Rev. 937 (2018); Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 Geo. Wash. L. Rev. 1392 (2017); Alan B. Morrison, Chevron *Deference: Mend It, Don't End It*, 32 J.L. & Pol. 293 (2017); *and* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 Yale L.J. 2580, 2590 (2006).

Congress empowers an agency to enact rules or regulations, it must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id. (citing J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928)).

Deference to executive agencies is contrary to these principles. Indeed, such deference is often a subterfuge for ignoring vast delegations of lawmaking authority to the executive branch. *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (highlighting "the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference"). When a court defers to an agency's rule or regulation that differs from the best reading of the law, then the agency is no longer constrained by the policy that the legislature has actually adopted. *See Puerto Rico v. Franklin Cal. Tax–Free Trust,* 136 S. Ct. 1938, 1949 (2016) ("[O]ur constitutional structure does not permit this Court to rewrite the statute that Congress has enacted."). And because getting a law enacted or modified by the legislature can be difficult, deference incentivizes agencies to instead adopt expansive interpretations of their own authority and try to enact their policy preferences through the backdoor.

This case illustrates how deference can result in the ceding of legislative authority to the executive branch. Through its revised statutory interpretation, HHS has claimed the authority to selectively reduce the hospital reimbursement rate without the quantum of evidence that Congress demanded. If HHS's new interpretation is granted deference, then the agency will have evaded an express statutory

limitation that Congress imposed on it. And in the future, HHS will be able to continue to adjust rates for other providers and programs without conducting the survey that Congress demanded. This process results in a slow but steady transfer of power from the legislative branch to executive agencies.

Deference also weakens legislative oversight of executive policy in another significant respect. The availability of deference may incentivize the legislature to pass vague or open-ended laws. This allows members of Congress to avoid political accountability by leaving it to unelected agencies to make the difficult policy decisions. *See Egan v. Del. River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring) (arguing that deference "leads to perverse incentives, as [the legislature] is encouraged to pass vague laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues"); *Aposhian v. Barr*, 958 F.3d 969, 991 (10th Cir.) (Carson, J., dissenting) (explaining that deference facilitates a more "expedient" approach to lawmaking than contemplated by the United States Constitution by allowing Congress to pass poorly conceived laws with the assurance that the executive branch will "remedy an unpopular or poorly drafted law through an administrative regulation"), *judgment reinstated after vacating order granting rehearing en banc*, 973 F.3d 1151 (10th Cir. 2020). Lawmaking can be difficult and so the legislative branch may at times prefer this arrangement. But the separation of powers is a structural protection on arbitrary governmental power that cannot be waived. *Bond v. United States*, 564 U.S. 211, 221 (2011) (explaining that the separation of powers "enhances freedom, first by

protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived"). For the same reason, deference violates the separation of powers even if the legislature may sometimes prefer ito

B. Deference Infringes on Judicial Power

Deference to executive agencies also leads to executive usurpation of judicial power. It is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). To abdicate that responsibility by deferring to an agency's interpretation of the law "represents a transfer of judicial power to the Executive Branch" and "amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring); *Voigt v. Coyote Creek Mining Co.,* LLC, 980 F.3d 1191, 1203–04 (8th Cir. 2020) (Stras, J., dissenting) (discussing how deference poses a "threat to the judiciary's interpretive power" and represents "a marked departure from both historical practice and the Framers' constitutional design").

Chevron deference to agency interpretations flouts the principle of judicial review because definitive statutory interpretation is the proper province of the judiciary, not the executive. Deference interferes with this core judicial function by impermissibly giving the executive the final say over what the law is. If the agency adopts an interpretation of a statute before the

judiciary has ever had a chance to interpret the law, deference prevents the judiciary from ever thoroughly engaging in statutory interpretation—indeed, it provides a significant and perverse incentive for courts to ignore the often-difficult task of statutory interpretation. In this way, deference stymies the development and deployment of "neutral and impartial . . . interpretive rules" of construction. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2139 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)).

Even more egregiously, deference may allow an agency to adopt a contrary interpretation after the judiciary has already spoken. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). As then-Judge Gorsuch explained, this form of deference "risks trampling the constitutional design by affording executive agencies license to overrule a judicial declaration of the law's meaning prospectively, just as legislation might—and all without the inconvenience of having to engage the legislative processes the Constitution prescribes." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). In other words, deference in this setting allows an agency to maintain what is essentially an executive veto over the courts' interpretation of the best meaning of a statute—so long as it can be said that the agency's interpretation is "permissible" or "not unreasonable." *See id.* at 1150 (Gorsuch, J., concurring) ("[T]his means a judicial declaration of the law's meaning in a

case or controversy before it is not 'authoritative,' . . . but is instead subject to revision by a politically accountable branch of government.").

Regardless of whether it precedes or follows a judicial interpretation, deference to an agency's interpretation of a statute is an improper derogation of judicial authority. While agencies may have "practical agency expertise," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651 (1990), in promulgating and enforcing regulatory policy, they are not experts at statutory interpretation, the province of the judiciary. *See Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 379 P.3d 1270, 1275 (Utah 2016) (rejecting deference to state agencies' interpretation of their own regulations and emphasizing that "[w]e are in as good a position as the agency to interpret the text of a regulation that carries the force of law. In fact, we may be in a better position."); *see also Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part) ("Making regulatory programs effective is the purpose of rulemaking, in which the agency uses its 'special expertise' to formulate the best rule. But the purpose of interpretation is to determine the fair meaning of the rule—to 'say what the law is[.]'"). That distinction is pronounced in this case. HHS is in no better a position than the courts to determine whether it has been given the authority to base reimbursement rates on average acquisition cost without looking at hospital acquisition cost data. Indeed, HHS is in a worse position to objectively evaluate its own authority, given that it is self-interested in the outcome of that inquiry.

III.

DEFERENCES TO AGENCIES HARMS INDIVIDUAL LIBERTY

In addition to the separation of powers concerns that it raises, *Chevron* deference is fundamentally unfair. It represents a tilting of the scales of justice in favor of one party—the government—at the expense of those who are subject to agency regulation. As Professor Hamburger put it, "when judges defer to the executive's view of the law, they display systematic bias toward one of the parties." Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1212 (2016). Deference thereby deprives citizens of their due process right to be heard before a fair and impartial arbiter. *See Voigt*, 980 F.3d at 1204–05 (Stras, J., dissenting) (noting that "structural protections afforded to judges, like life tenure and non-diminishment of salary" help prevent judges from being swayed by political pressure and personal bias). Instead, the executive branch official making critical judgments of law is often an interested party that desires a particular outcome.

Deference to executive agencies also thwarts important structural limits on government power, such as the requirements of bicameralism and presentment, that ordinarily protect individual liberty. *See I.N.S. v. Chadha*, 462 U.S. 919, 957 (1983) ("The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps."). The legislative process is designed to carry high hurdles so as to protect individuals from

oppressive government action. *Id.* But when an agency can expand its power through creative statutory interpretation that need only be found "not unreasonable," the agency bypasses one of the primary checks on its power, and the difficulty of reversing that interpretation through legislation instead becomes a shield for the agency. Moreover, as Justice Gorsuch recently argued, deference also harms individual liberty by frustrating citizens' ability to accurately know what the law means and to "fully conform their behavior to the text of the law." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790–91 (2020) (Gorsuch, J., concurring in the denial of certiorari).

This case illustrates the liberty-curtailing and government-expanding tendencies of deference. The decision to reimburse 340B hospitals based on acquisition costs rather than the sticker price of a medicine may seem like a dry and technical debate. But for the millions of Americans served by the 340B program and the hospitals and care providers that depend on these funds, this is a significant change. For this reason, Congress expressly required that HHS could not make such a change without relying on a significant quantum of evidence. If HHS prevails here, then it will have evaded that express statutory limitation. This Court should not allow such an outcome. Instead, liberty requires that agencies follow the laws rather than seek to forge their own extra-statutory path whenever they do not like the Congressionally imposed limits on their power.

CONCLUSION

This Court should hold that the D.C. Circuit erred by deferring to HHS's interpretation without engaging in a thorough statutory analysis. It should also rule that *Chevron* deference is incompatible with the separation of powers and individual liberty.

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