No. 21-972

In the Supreme Court of the United States

THOMAS H. BUFFINGTON,
Petitioner,
v.
DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE AND THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *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 to restore the principles of limited constitutional government that are the foundation of liberty. Towards those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*. Cato also participate as *amicus* in cases involving the separation of powers, due process, and deference to administrative agencies. Cato thus has strong interests in this important separation of powers case.

The National Right to Work Legal Defense Foundation, Inc. has been the nation's leading litigation advocate for employee free choice since 1968. To advance this mission, Foundation staff attorneys have represented individual employees in many cases before this Court, most recently in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). The Foundation has a particular interest in this case because its staff attorneys frequently represent private-sector employees whose free choice to refrain from forced union association and monopoly

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

bargaining depends on the National Labor Relations Board's proper implementation of the National Labor Relations Act. In several cases involving the rights of individual employees under the NLRA, U.S. Circuit Courts of Appeals have applied *Chevron* deference in reviewing Board decisions on appeal.[2] For that reason, whether this Court should overrule or limit the *Chevron* doctrine is important to the Foundation's mission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case asks the Court to reconsider *Chevron*. *Amici* agree that it should. *Chevron* requires courts to uphold an agency's interpretation of a statute—even if not the best interpretation—so long as that interpretation is reasonable. This approach forces courts to defer to agencies on questions of law, thus requiring the judiciary to shirk its duty to say what the law is. Time and time again, *Chevron* forces judges to uphold interpretations that they believe are wrong. Indeed, "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). That approach represents a significant shift of power from the

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[2] *See, e.g., Pirlott v. NLRB*, 522 F.3d 423, 433-34 (D.C. Cir. 2008) ("The general chargeability issue is a matter for the Board to decide in the first instance."); *UFCW, Loc. 1036 v. NLRB*, 307 F.3d 760, 766 (9th Cir. 2002) (en banc) ("Courts are required to defer to the NLRB on statutory interpretation under *Chevron*."); *IAM v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998).

judiciary to administrative agencies and violates the separation of powers.

Chevron also violates basic principles of due process of law. It gives the federal government a clear advantage in many cases—tipping the scales in their favor by deferring to an agency's "reasonable" interpretation.

Worse still, this Court and the lower courts are misaligned on *Chevron*'s application. This Court has carved away at *Chevron*'s reach, providing an ever-expanding list of exceptions to it application. The Court has also applied other deference doctrines in its place when *Chevron* would seemingly apply. And studies show that this Court often ignores *Chevron*, while the lower courts routinely apply it.

All of this has generated confusion among the lower courts about the application of *Chevron*—confusion that warrants review. In the end, "[i]f *Chevron* matters, we should consider whether it is functioning properly." Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 71 (2017). But there "is no reason *Chevron* should continue to govern lower courts while this Court shuns it." Pet. 35. The Court should grant the petition, reconsider *Chevron*, and reverse the decision below.

ARGUMENT

I. *Chevron* violates the separation of powers and basic principles of due process.

In the familiar words of Chief Justice John Marshall, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Yet *Chevron*—which often requires judges to defer to an agency's judgment on questions of law—forces judges to shirk this duty. It is unsurprising, then, that scholars have described *Chevron* deference as "counter-*Marbury*." Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2074-75 (1990). Under *Chevron*, judges do not "say what the law is." Instead, they pass off that task to an agency, violating the separation of powers. *See, e.g.*, *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087 (9th Cir. 2013) ("If the [agency's] construction is reasonable, we must accept that construction under *Chevron*, even if we believe the agency's reading is not the best statutory interpretation.").

Time and time again, *Chevron* forces judges to uphold interpretations that they believe are wrong. *See, e.g.*, *Kennedy v. Butler Fin. Sols., LLC*, 2009 WL 290471, at *4 (N.D. Ill. Feb. 4, 2009) ("The FTC's regulation strikes the Court as reasonable, though perhaps not the best interpretation of the law."). And sometimes courts are required to uphold an interpretation that they have previously rejected. *See, e.g.*, *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1147-1152 (10th Cir. 2011) (holding that under *Chevron* the court is obligated to discard its earlier statutory interpretation and defer to the agency's

interpretation). In fact, "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Brand X Internet Servs.*, 545 U.S. at 983.

That approach represents a significant shift of power from the judiciary to administrative agencies. When agencies interpret the law, they exercise "[t]he judicial Power of the United States." Art. III, § 1. But Article III vests "[t]he judicial Power of the United States" in the federal courts alone. That division of power was intentional. The Constitution's Framers believed that "the general liberty of the people can never be endangered … so long as the judiciary remains truly distinct from both the legislative and executive." The Federalist No. 78, at 523 (J. Cooke ed. 1961) (A. Hamilton). *Chevron* warps this scheme and invites executive agencies to take on the role of independent judges. Yet neither Congress nor the courts have constitutional authority to transfer the judicial power to agencies. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 128 Yale L.J. 908 (2017). Indeed, the Constitution does not contemplate such "undifferentiated governmental power." *Dep't of Transp. v. Ass'n of American Railroads*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring in judgment) (internal quotation marks omitted).

In addition to violating the separation of powers, *Chevron* violates basic principles of due process. As then-Judge Gorsuch observed, "[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due

process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); *see also* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1239 (2016) ("Precedents such as *Chevron* … require judges to give up their role as judges and … violate the due process of law.").

Chevron gives the federal government an unfair advantage by tipping the scales in their favor. Any interpretation—even if not the best, most likely, or most sensible interpretation—will be upheld by courts so long as it is reasonable. And reasonable is defined very generously. This arrangement gives the federal government a clear advantage in nearly every case. *See* Hamburger, *supra*, 1250 ("[J]udges defer to administrative interpretation, thus often engaging in systematic bias for the government and against other parties."). *Chevron* requires courts to defer to an agency's interpretation even when the agency itself is a litigant in the case at hand. In no other context does a court simply defer to one of the parties.

At bottom, *Chevron* is incompatible with the Constitution's most fundamental safeguards. It is "contrary to the roles assigned to the separate branches of government" and "require[s] [judges] at times to lay aside fairness and [their] own best judgment and instead bow to the nation's most powerful litigant, the government, for no reason other than that it is the government." *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d. Cir. 2017) (Jordan, J., concurring in the judgment). The Court

should grant the petition, revisit *Chevron*, and reverse the decision below.

II. This Court's application of *Chevron* creates inconsistencies among the lower courts.

In *King v. Burwell*, 576 U.S. 473 (2015), this Court stated that "[w]hen analyzing an agency's interpretation of a statute, *we often* apply the two-step framework announced in *Chevron*." *Id.* at 485 (emphasis added). "Often," however, appears to overstate this Court's use of *Chevron*. *See* William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1124-25 (2008). A study of cases reveals that this Court applied the *Chevron* framework in barely more than a quarter of the cases in which *Chevron* (by its own terms) appears applicable. *Id.* Instead of applying *Chevron* in those many cases, the Court has announced an ever-expanding list of exceptions to *Chevron* and employed a series of substitute deference doctrines in place of it.

Meanwhile, the circuit courts are nearly the opposite in application. Based on a similar study, they apply the *Chevron* framework more than three-fourths of the time in which *Chevron* theoretically should apply. Barnett & Walker, *supra*, 5-6. To put it simply, the Court's *Chevron* jurisprudence has generated confusion among the lower courts. This confusion makes one thing clear: this Court should revisit *Chevron*.

A. This Court and the lower courts are at odds regarding *Chevron*'s application.

Generally, this Court applies *Chevron* far less often than the circuit courts. Indeed, as Petitioners aptly explain, "this Court appears to be *sub silentio* abandoning the *Chevron* framework in a great many cases to which it arguably applies." Pet. 34. As one treatise explains, the Court sometimes "gives *Chevron* powerful effect," sometimes "ignores *Chevron*," and sometimes "characterizes the *Chevron* test in strange and inconsistent ways." *Id.*; Kristin Hickman & Richard Pierce, Jr., Administrative Law Treatise §§ 3.5.6, 3.6.10 (6th ed. updated Nov. 1, 2021) (surveying how the Court has treated *Chevron* in seemingly eligible cases over the last decade); *see also Pereira v. Sessions*, 138 S. Ct. 2015, 2121 (2018) (Alito, J., dissenting) ("I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.").

In another study, scholars analyzed this Court's deference cases from *Chevron* to *Hamdan*. They identified 267 cases in which "the agency interpretation was pursuant to a congressional delegation of lawmaking authority"—cases where "the *Chevron* two-step inquiry would theoretically govern." Eskridge & Baer, *supra*, 1124. Out of those 267 cases, the Court applied the *Chevron* framework in 76. *Id.* That meant that the Court did "*not* apply the *Chevron* framework in nearly three-quarters of the cases where it would appear applicable." *Id.* at 1125.

Indeed, this Court routinely overturns lower court *Chevron* decisions without applying the *Chevron* framework at all. In *Loos v. BNSF Ry. Co.*, 139 S. Ct. 893 (2019), for example, this Court never mentioned

Chevron or its two-step process, even though the Eighth Circuit applied it below. That court stopped at step one after concluding that the agency's interpretation deserved "no deference under *Chevron*, because 'the agency must give effect to the unambiguously expressed intent of Congress.'" *Loos v. BNSF Ry. Co.*, 865 F.3d 1106, 1119 (8th Cir. 2017). It's unclear, however, whether this Court agreed with the Eighth Circuit's analysis based on *Chevron* or something else entirely because the Court avoided any discussion of *Chevron* and simply analyzed the statute without any identifiable deference doctrine. *See also Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives,* 140 S. Ct. 789 (2020) (Gorsuch, J., respecting the denial of certiorari) (The D.C. Circuit held, without hesitation, that *Chevron* applied when the Bureau of Alcohol, Tobacco, Firearms, and Explosives had reinterpreted a statute to define a bump stock as a machinegun for purposes of criminal prosecution. Justice Gorsuch, however, declared *Chevron* out of bounds while agreeing the case's interlocutory posture did not merit the Court's immediate review: "But at least one thing should be clear. Contrary to the court of appeals' decision in this case, *Chevron* [] has nothing to say about the proper interpretation of the law before us.").

In recent years, this Court has narrowed the *Chevron* doctrine after reflexive applications of the framework in circuit courts. For example, in *Encino Motorcars, LLC v. Navarro*, the Court declined to apply *Chevron* deference "where the regulation is 'procedurally defective.'" 579 U.S. 211, 220 (2016) (citing *United States v. Mead*, 533 U.S. 218, 227 (2001)). Below, however, the Ninth Circuit had

"conduct[ed] the familiar two-step inquiry to determine whether to defer to the agency's interpretation." *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1271 (9th Cir. 2015).

And in *Burwell*, this Court invoked the major questions doctrine, explaining that "'[i]n extraordinary cases, [] there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.'" 576 U.S. at 485 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). It thus declined to apply the *Chevron* framework. The Fourth Circuit, however, had not prepared for this *Chevron* carveout. Instead, it "viewed the Act as 'ambiguous and subject to at least two different interpretations.'" *Id.* at 484 (citing *King v. Burwell*, 759 F.3d 358, 372 (4th Cir. 2014)). "The court [had] therefore deferred to the IRS's interpretation under *Chevron*." *Id.*

Still other decisions of this Court have ignored a lower court's *Chevron* application for an unspecified form of deference. *See New York v. FERC*, 535 U.S. 1, 28 (2002) ("[W]e nevertheless conclude that the agency had discretion to decline to assert such jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues."); *United States v. LaBonte*, 520 U.S. 751, 757 (1997). The Second Circuit, prior to the Court's ruling in *New York v. FERC*, stated that "the deferential standard of *Chevron* [] governs our review of FERC's interpretation of FPA §§ 205 and 206." *Transmission Access Pol'y Study Grp. v. FERC*, 225 F.3d 667, 687 (D.C. Cir. 2000).

While this Court has been ignoring or narrowing the *Chevron* doctrine, lower courts still apply *Chevron* regularly. Indeed, a 2017 study surveying *Chevron* in the circuit courts analyzed 1,558 agency interpretation cases. Of those, the circuit courts applied the *Chevron* framework in 1,166 of them—nearly three-quarters. Barnett & Walker, *supra*, 32. "Consistent with prior studies, the vast majority of agency interpretations (817 interpretations, or 70.0%) made it to step two. And an even greater percentage of interpretations that made it to step two (766 interpretations, or 93.8%) were upheld." *Id.* at 33.

Because of this dichotomy, the 2017 study posits that there may be two different *Chevrons* at work. It suggests that "there may be a *Chevron* Supreme and a *Chevron* Regular: whereas the choice to apply *Chevron* deference may not matter that much at the Supreme Court, it seems to matter in the circuit courts." *Id.* at 6. Such a scheme leaves this Court and the lower courts at odds. It also leaves the lower courts at odds with each other. Indeed, the 2017 study found that the circuit courts "varied considerably as to … [the] application of *Chevron*. *Id.* at 7.

This Court's application—indeed, its non-application—of *Chevron* leaves the lower courts with uncertain guidance at best. In the end, "[i]f *Chevron* matters, we should consider whether it is functioning properly." Barnett & Walker, *supra*, 71. But there "is no reason *Chevron* should continue to govern lower courts while this Court shuns it." Pet. 35.

B. This Court applies other forms of deference where *Chevron* would appear to apply by its terms.

This Court applies other deference doctrines in many case where *Chevron* would appear to apply. And it's often unclear why or to what degree of deference each standard demands. The Court has explicitly applied other deference standards in the context of labor, immigration, treaties, sentencing, energy, securities, communications, and other regulated industries.

Labor law cases, for example, often employ "*Beth Israel*" deference—a "pre-*Chevron* test permitting reasonable interpretations that are consistent with the statute." Eskridge & Baer, *supra*, 1090. While somewhat similar to the *Chevron* framework, the Court still applied *Beth Israel* deference nearly 50 times after *Chevron* was decided. *Id.* at 1107. And in the vast majority of those cases, "*Chevron* would have been appropriate" to apply. *Id.* at 1108. This Court has repeatedly employed *Beth Israel* to defer to the National Labor Relations Board. *See e.g.*, *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001) (citing *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 402-403 (1983)) ("We find that the Board's rule for allocating the burden of proof is reasonable and consistent with the Act, and we therefore defer to it."); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364 (1998) (citations omitted) ("Courts must defer to the requirements imposed by the Board if they are 'rational and consistent with the Act,' [] and if the Board's 'explication is not inadequate, irrational or arbitrary.'"); *Auciello Iron Works, Inc. v. NLRB*, 517

U.S. 781, 787-88 (1996) (citations omitted) ("To affirm its rule of decision in this case, indeed, there is no need to invoke the full measure of the 'considerable deference' that the Board is due [] by virtue of its charge to develop national labor policy, [] through interstitial rulemaking that is 'rational and consistent with the Act.'"). Nowhere do those cases indicate why they chose not to apply the *Chevron* framework. Nor have scholars identified a principled explanation. Some speculate that "[p]erhaps the most likely reason" the Court applies *Beth Israel* deference is simply because "specialized practices—such as labor … prefer their particular deference precedents and continue to cite them." Eskridge & Baer, *supra,* 1108. But that provides little guidance to the lower courts.

Immigration law also operates with a *Chevron* alternative, employing a "reasonable foundation" deference rule. *Id.*; *see Reno v. Flores*, 507 U.S. 292 (1993) (citing *Carlson v. Landon*, 342 U.S. 524, 541 (1952)) ("Respondents contend that the regulation goes beyond the scope of the Attorney General's discretion to continue custody over arrested aliens under 8 U.S.C. § 1252(a)(1). That contention must be rejected if the regulation has a 'reasonable foundation,' that is, if it rationally pursues a purpose that it is lawful for the INS to seek.").

Treaty law instructs judges to give "great weight" and "respect" to the executive branch. *See, e.g., Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006) (citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)) ("In addition, 'while courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with

their negotiation and enforcement is given great weight.'"); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) (citing *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982)) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").

Sentencing law, too, has its own "significant discretion" deference regime. *See, e.g.*, *v. LaBonte*, 520 U.S. at 757 (quoting *Mistretta v. United States*, 488 U.S. 361, 377 (1989) ("Congress has delegated to the [Sentencing] Commission 'significant discretion in formulating guidelines' for sentencing convicted federal offenders."). This Court has even applied "an unspecified but deferential mode of review to the Sentencing Commission's interpretation of its Guidelines." Eskridge & Baer, *supra*, 1108 (citing *Melendez v. United States*, 518 U.S. 120, 129-30 (1996)).

Different deference standards apply in other regulated industries as well. Those include energy, *see FERC*, 535 U.S. at 28; securities law, *see Basic Inc. v. Levinson*, 485 U.S. 224, 239 n. 16 (1988) (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)) ("[t]he SEC's insights are helpful, and we accord them due deference"); communications law, *see City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("it has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies"); and other regulated industries.

These fields of law all have unique deference doctrines where *Chevron* should have fit the definitional bill. None of these standards deliver an instructive formulation and none explain why they declined to apply or even address *Chevron*. But these cases are just the tip of the iceberg. The Court has applied numerous other deference regimes in a variety of circumstances. *See, e.g.*, Eskridge & Baer, *supra*, 1100 (collecting cases applying *Skidmore*, *Seminole Rock*, and *Curtiss-Wright* deference regimes as well as "consultative deference" regimes in which the Court "relies on some input from the agency" like an amicus brief "without invoking a named deference regime," and anti-deference regimes like the rule of lenity). Such a scheme offers little guidance to the lower courts.

* * *

As Petitioner explains, this "Court's unwillingness to consistently apply the flawed *Chevron* framework speaks volumes." Pet. 34. *Chevron* violates the separation of powers and due process and continues to cause confusion in the lower courts. Accordingly, the Court should revisit the *Chevron* doctrine and put an end to this "atextual invention by courts." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016).

CONCLUSION

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

Respectfully submitted,

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