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 Writ of Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

In 1986, Congress authorized the U.S. Fish and Wildlife Service to reintroduce sea otters into Southern California waters, conditioned on several mandatory protections of the surrounding fishery. In addition to dictating that the Service "shall" adopt a regulation that "must" contain the required fishery protections, the statute also directs that the Service "shall implement" the regulation. The statute says nothing about the Service revoking these mandatory protections.

Twenty-five years after accepting this authority and reintroducing sea otters into these waters, the Service repealed the regulation and terminated the statute's protections. Upholding that decision, the Ninth Circuit held that the statute "does not speak to the issue of termination at all." Because the statute is completely silent on the issue, the Ninth Circuit concluded it must defer to the agency's claim that it has this power under *Chevron, U.S.A., Inc.* v. *National Resources Defense Council*, 467 U.S. 387 (1984).

The questions presented are:

1) If a statute neither authorizes nor forbids an agency action, does that statutory silence trigger *Chevron* deference?

2) If yes, how should courts measure the reasonableness of an agency's interpretation where that interpretation is not based on any statutory text but instead on the absence of relevant text?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Rules

Other Authorities

STATEMENT OF AMICUS CURIAE

This amicus brief is submitted by the Buckeye Institute for Public Policy Solutions (the "Buckeye Institute").[1] The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is located directly across from the Ohio Statehouse on Capitol Square in Columbus, where it assists executive and legislative branch policymakers by providing ideas, research, and data to enable the lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

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[1] Pursuant to Rule 37.2, all parties were notified of the Buckeye Institute's intention to file this brief at least 10 days prior to its filing. All parties consented to the filing.

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 or their counsel made a monetary contribution to the brief's preparation or submission.

Through its Legal Center, the Buckeye Institute works to limit the degree to which doctrines of judicial deference to the actions of federal administrative agencies undermine the constitutional order. The Buckeye Institute joined an amicus brief in *Garco Construction, Inc. v. Speer*, No. 17-225, in the Supreme Court of the United States, in which the Petitioner and its supporting *amici* urged this Court to overrule *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997). Those decisions call for judicial deference to an executive agency's interpretation of its own ambiguous regulations.

This case presents a related challenge to another judicial deference doctrine, that of *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). That decision calls for judicial deference when a federal agency interprets an ambiguous law enacted by Congress. Thirty years of experience with *Chevron* have revealed its flaws, and Buckeye will show how jettisoning that doctrine will return the judiciary to its proper role in our governmental scheme.

SUMMARY OF ARGUMENT

The time has come to "junk *Chevron*." *See* Carlos Bea, Who Should Interpret Our Statutes and How It Affects Our Separation of Powers (Feb. 1, 2016) at 8 *available at* http://report.heritage.org/hl1272 ("*Who Should Interpret Our Statutes*"). *Chevron* has "permit[ted] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little

difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela v. Lynch*, 834 F. 3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Overruling *Chevron* would return the judiciary to is constitutional role, which is "emphatically . . . to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1804).

More specifically, as the Buckeye Institute will make clear in this brief, there are at least four compelling reasons to overrule *Chevron*. First, it is inconsistent with the constitutional role of the Judiciary. Second, it enables the growth of the administrative state, which now extends its tentacles into much of the nation's life and work. Third, in application, *Chevron* institutionalizes a bias in favor of federal agencies into the courts, marginalizing judicial independence and denying litigants their entitlement to due process of law under the Fifth Amendment. Fourth, it is inconsistent with the Administrative Procedures Act.

ARGUMENT

I. Introduction

In *Chevron*, the Court established a two-step test for evaluating the statutory interpretations made by federal administrative agencies. The reviewing court first looks to see whether the statutory language is clear. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress" 467 U.S. at 842-43. If, however, the statute is ambiguous, the reviewing court considers whether

the agency has made a "permissible construction of the statute." *Id*. at 843. In so doing, the court asks only whether a "reasonable" interpreter might have adopted that construction. *Id*. at 843 n. 11, 844.

Thomas Merrill notes that the Chevron decision "marks a significant shift in the justification for giving deference to agency interpretations of law." Thomas W. Merrill, *The Story of* Chevron: *The Making of an Accidental Landmark*, 66 Admin. L. Rev. 253, 255 (2014) ("*The Story of* Chevron"). Put simply, it's not just the judiciary that gets to say what the law is.

Thirty years later, the flaws in the *Chevron* Court's reasoning have become clear. It is time to overrule *Chevron*.

II. There is a federal leviathan and *Chevron* enables its growth.

As this Court has recognized, "the modern administrative state "wields vast power and touches almost every aspect of daily life." *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd*., 561 U.S. 477, 499 (2010). "It is fitting that we refer to the administrative state as a 'state,' for it has become a sovereign power unto itself, an *imperium in imperio* regulating virtually every dimension of our lives." Charles J. Cooper, *Confronting the Administrative State*, 36 National Affairs, 96, 97 (Fall 2015) ("*Confronting the Administrative State*").

"The Framers could hardly have envisioned today's 'vast and varied bureaucracy' and the authority administrative agencies now hold over our

economic, social, and political activities." *City of Arlington v. F.C.C.*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting).[2] There are now "over 430 departments, agencies, and sub-agencies in the federal government." *Hearing on "Examining the Federal Regulatory System to Improve Accountability, Transparency, and Integrity" Before the Senate Comm. On the Judiciary*, 114th Cong. 1 (2015) (statement of Senator Grassley). With the growth in the number of federal agencies comes a growth in the number of pages in the Federal Register. For example, the Federal Register grew from 4,369 pages in 1993, to 49,813 pages in 2003, to 81,883 pages in 2012[3] – an increase of nearly 2,000% in just 19 years. By way of another example, from 2013 to 2014, "the federal bureaucracy finalized over 7,000 regulations." *Examining the Federal Regulatory System*. When one compares those 7,000 regulations to the 300 statutes that Congress enacted during those same years, the growing power of the federal bureaucracy is undeniable. *Id.*

The number of official regulations tells only part of the story. As this Court is well aware, federal agencies issue, interpret, and enforce the rules that govern our lives. "[A]s a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by

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[2] Chief Justice Roberts was joined in his dissent by Justices Kennedy and Alito.

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[3] Karen Kerrigan and Ray Keating, Regulation and the 'Fourth Branch of Government' at 1 (2014), http://centerforregulatorysolutions.org/wp-content/uploads/2014/04/FourthBranchWhitePaper.pdf.

policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington*, 569 U.S. at 312-13 (Roberts, C.J., dissenting); *see also id.* ("C]itizens confronting thousands of pages of regulations . . . can perhaps be excused for thinking that it is the agency really doing the legislating."). This melding of governmental roles cannot be squared with the constitutional architecture.

"The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.'" *Dept. of Transportation v. Ass'n of American Railroads*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring in the judgment). Rather, it vests "[a]ll legislative powers herein granted" in Congress, "[t]he executive power" in the President, and "[t]he judicial power of the United States" in the federal judiciary. U.S. Const. Art. I, §1, Art. II §1, cl. 1, Art. III § 1, respectively. "These grants are exclusive" such that "[w]hen the government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it." *Ass'n of American Railroads*, 135 S. Ct. at 1241 (Thomas, J., concurring in the judgment).

More to the point, one branch cannot delegate powers to another that it does not have. Judge Bea explains that "even assuming that Congress may delegate its own executive power to the Executive, it has no constitutional authority to delegate judicial power, of which it has none." Carlos Bea, *Who Should Interpret Our Statutes and How It Affects*

Our Separation of Powers (Heritage Foundation, Feb. 1, 2016) at 9, available at http://report.heritage.org/hl1272 ("Who Should Interpret Our Statutes").

The separation of governmental powers rests on a sound foundation. Indeed, as Justice Story observed, "It has been deemed a maxim of vital importance that these powers should forever be kept separate and distinct." 2 Joseph Story Commentaries on the Constitution of the United States vii (1833) ("Story"). That is because "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison); *see also* 2 Story vii ("In absolute governments, the whole executive, legislative, and judicial powers are, at least in their final result, exclusively confined to a single individual; and such a form of government is denominated a despotism, as the whole sovereignty of the state is vested in him.").

Agency exercises of legislative authority often go unchecked because their regulatory interpretations often receive judicial deference under *Chevron* and related doctrines.[4] Such deference runs

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[4] *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The constitutional grounding of these doctrines has also been criticized. *See*, *e.g.*, *E.I. Du Pont de Nemours & Co. v. Smiley*, 585 U.S. ___, 2018 WL 3148557 (2018) (Gorsuch, J., dissenting from the denial of certiorari); *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 67-69 (2011) (Scalia, J., concurring)

afoul of the Constitution because it is inconsistent with separation of powers principles.

In *Confronting the Administrative State*, Charles Cooper shows how this Court's decisions "gutted" Articles I, II, and III of the Constitution. *Id.* at 101. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court held that Congress can limit the President's power to remove executive branch officials performing quasi-legislative and quasi-judicial functions. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), "was the last gasp of the so-called 'non-delegation doctrine.' *Confronting the Administrative State* at 101. Indeed, "[s]ince 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315 (2000). In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court sanctioned agency fact-finding by likening agencies to juries, in what has been characterized as a "flawed analogy." *Id.* at 102. The effect of these decisions was to "unite[] the judicial, legislative, and executive powers in the 'expert' hands of the administrative state." *Id.* at 101.

Cooper explains, "What emerged from this period was an implicit bargain: The Court would permit Congress to delegate—and the administrative state to exercise—legislative, executive, and judicial power, but it would review administrative exercises of such power to prevent lawlessness and abuse." *Id.* at 103.

But, the Court "reneged" on the deal in *Chevron*, calling for judicial deference when agencies interpret ambiguous statutes. The effect of *Chevron* and the related doctrines calling for judicial deference to agency actions is to put "a powerful weapon in an agency's regulatory arsenal." *City of Arlington*, 569 U.S. at 314 (Roberts, C.J., dissenting). "Congressional delegations to agencies are often ambiguous—expressing a mood rather than a message." *Id*. (Internal quotation omitted).

"We can now see that *Chevron* is properly understood as a kind of counter-*Marbury* for the administrative state. Indeed, it suggests that in the face of ambiguity, it is emphatically the province of the executive to say what the law is." Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power* to *Say What the Law Is*, 115 Yale L. J. 2580, 2589 (2006). But, this Court said long ago that it is "emphatically the province and duty of the judiciary to sat what the law is." *Marbury*, 1 Cranch at 177.

More than that, *Chevron* deference introduces a "systemic judicial bias" in favor of the government. Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1188 (2016). As Hamburger notes, "[T]he bias arises from institutional precedent rather than individual prejudice, but this makes the bias systematic and the Fifth Amendment due process problem especially serious. *Id*. He explains, "Under Article III, judges have a duty to exercise independent and unbiased judgment, and under the Fifth Amendment's guarantee of due process, they are barred at the very least from engaging in systematic bias. *Id*. at 1212. Indeed, when Chevron

deference applies, the odds that a court will side with the agency are 77.4%, well in excess of the 38% that follows when courts engage in de novo review. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6-8 (2017).

Put simply, *Chevron* enables the growth of the administrative state to the detriment of separation-of-powers principles. In *City of Arlington*, for example, the Court held that courts should defer to an agency's determination of its own jurisdiction. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. (2005), the Court held that an agency's interpretation of an ambiguous statute prevails over a court's prior interpretation of that statute. If brakes are to be put on to halt the inexorable growth of the administrative state, *Chevron* will need to be overruled.

III. Members of this Court have made their discomfort with *Chevron* and other judicial deference doctrines clear.

In this Court's most recent term, Justice Kennedy expressed his "concern with the way in which the Court's opinion in Chevron . . . has come to be understood and applied." *Pereira v. Sessions*, 585 U.S. ___, 2018 WL 3058276 at * 14 (2018) (Kennedy, J., concurring). He observed that, by "engag[ing] in cursory analysis" of congressional intent, "some Courts of Appeals" displayed a "reflextive deference" that "suggests an abdication of the Judiciary's proper role in interpreting federal statutes." *Id*. Justice Kennedy suggested, "[I]t seems necessary and appropriate to reconsider, in an

appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision." *Id*.

In the same case, Justice Alito characterized *Chevron* as "an important, once celebrated, and now increasingly maligned precedent." *Pereira*, 2018 WL 3058276 at *15 (Alito, J., dissenting).

In addition, in two opinions, Justice Thomas has "explained how the basic principles of our Constitution's separation of powers are incompatible with the system of bureaucratic rule" that now prevails. *Confronting the Administrative State* at 96. In *Perez v. Mortgage Bankers*, he pointed out, "*Seminole Rock* raises two related constitutional concerns. It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." 135 S. Ct. at 1217 (Thomas, J., concurring). In the same way, Justice Thomas pointed out how *Chevron* deference is inconsistent with the judicial role in his concurring opinion in *Michigan v. Environmental Protection Agency*, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring).

IV. The Ninth Circuit's decision is a paradigmatic example of judicial abdication in the face of executive lawmaking.

In Public Law 99-625, Congress sought to accommodate the interests of both the endangered sea otters and the Petitioners, who harvest sea urchins and engage in other fishing activities. In pertinent part, Congress allowed the Fish & Wildlife Service to come up with a plan to relocate a

population of sea otters from their existing range and manage it with an idea to generate a population of sea otters in Southern California waters. Pub. L. 99-625, § 1(b).

That said, Congress also sought to "prevent, to the maximum extent feasible, conflict with other fishery resources within the management zone by the experimental population." Pub. L. 99-625, § 1(b)(4)(B). The threat comes from the fact that sea otters consume 33% of their body weight in shellfish and other seafood every day.

The fisheries received further specific protection from the environmental laws: "[E]xcept that any incidental taking of such a member during the course of an otherwise lawful activity within the management zone, may not be treated as a violation of the Act or the Marine Mammal Protection Act of 1972." *Id*. § (c)(2). Under the Endangered Species Act and the Marine Mammal Protection Act, a "take" might result from any actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." 16 U.S.C. §§ 1538(a)(1)(B), 1540. Absent such protection, those found guilty of a prohibited take could "be fined not more than $50,000 or imprisoned for not more than a year, or both."[5] 16 U.S.C. § 1540 (b).

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[5] See Robert Gordon, *Take it Back: Extending the Endangered Species Act's "Take" Prohibition to All Threatened Animals Is Bad for Conservation* (Heritage Foundation Dec. 7, 2017), at 9. file:///F:/My%20Documents/Take%20It%20Back_%20Extending%20the%20Endangered%20Species%20Act%E2%80%99s%20%E2%80%9CTake%E2%80%9D%20Prohibition%20to%20All%20

In 1987, as Petitioners note, the Service adopted a regulation that included the statutory protections. 52 Fed. Reg. 29,754 (Aug. 11, 1987). It did assert the power to revoke the protections if the program did not work. 52 Fed. Reg. at 29, 772. That administrative reservation of a right to revoke statutory protections came to fruition in 2012. 77 Fed. Reg. 75,266, (Dec. 19, 2012).

By reserving an extra-statutory right to revoke statutory protections and exercising that right, the Service has engaged in rewriting Public Law 99-625. The Service did not merely take on a legislative role, it upset a carefully-crated congressional compromise. Petitioners note that Public Law 99-625 is the "compromise" product of "[b]ringing every stakeholder to the table—including the agency, fishermen, and environmental groups." Pet. at 8-9. Federal agencies should not rewrite compromise legislation to favor their own and their friends' interests.

Likewise, by allowing the agency to fill what it erroneously saw as congressional silence, the Ninth Circuit "abdicat[ed]the Judiciary's proper role in interpreting federal statutes." Pereira, 2018 WL 3058276 at *14 (Kennedy, J., concurring).

Threatened%20Animals%20Is%20Bad%20for%20Conservation%20_%20The%20Heritage%20Foundation.html. As Gordon explains, the Endangered Species Act is a strict liability statute, such that "[a] farmer on his tractor could unwittingly plow a snake's burrow or could put his cow in a pasture where it steps on salamanders in a seasonal puddle." *Id*. The farmer is potentially liable even if he does not intend to hit the snake and the rancher is likewise potentially liable even if he did not intend that his cow would step on a salamander.

V. Jettisoning *Chevron* will return the judiciary to its proper role.

For the reasons stated above, this case presents a case in which *Chevron* deference is at odds with the constitutional structure. This Court should take the opportunity this case presents to "junk" *Chevron*.

"The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the judiciary." *Pereira*, 2018 WL 3058276 at *14 (Kennedy, J., concurring) (citing *City of Arlington*, 569 U.S. at 312-16(Roberts, C.J., dissenting)).

The proper rules relating to the function and province of the judiciary start with *Marbury v. Madison*: "[I]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch at 177. "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding on the laws." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. at 1217 (Thomas, J., concurring). "*Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is the best reasoning of an ambiguous statute in favor of an agency's construction." *Michigan v. EPA*, 135 S. Ct. at 2712.

Judge Bea notes that *Chevron* rests on a misplaced Wilsonian confidence in the "expertise" of

the federal administrative agencies.[6] *Who Should Interpret Our Statutes* at 9. That confidence is misplaced for several reasons. It "converts a question of statutory interpretation into one of policymaking. The question that must be answered when interpreting a statute is not what the best policy choice would be in this statutory scheme, but what the statute, as presented, means." *Id.* at 9. Moreover, it is the "text of the statute that has the force of law, not the legislators' unexpressed intent." *Id.* Furthermore, the function of "say[ing] what the law is" is not a political one, and the judiciary, by virtue of its independence, is well suited to perform that role. *Id.*

Michigan v. EPA illustrates another problem with Wilsonian confidence in the judgment of agency experts. There, the Court rejected the EPA's interpretation of the Clean Air Act that deemed cost irrelevant in deciding whether the regulation of certain power plants was "appropriate and necessary." The effect was to impose costs of $9.6 billion a year on power plants in return for expected benefits of only $4 to $6 million per year. In his concurring opinion, Justice Thomas explained, "[W]e should be alarmed that [the EPA] felt sufficiently emboldened by [our Chevron] precedents to make the bid for deference that it did here." *Michigan v. EPA*, 135 S. Ct. at 2713 (Thomas, J. concurring); *see also id.* at 2713 n. 2 ("This is not the first time an agency has exploited our practice of deferring to agency interpretations of statutes.").

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[6] For his part, Woodrow Wilson regarded the people as "selfish, ignorant, timid, stubborn, or foolish." Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 198, 208 (1887).

More generally, to the extent that *Chevron* rests on confidence that "administrators will selflessly reflect 'good government' policies," that understanding fails to account for the agencies tendency to aggrandize their power. *Who Should Interpret Our Statutes* at 9. Public Choice theory tells us "that politicians and administrators usually act with their own self-interest in mind instead of the public's interest. They seek to maximize their utilization." *Id*.; *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 Harv. L. Rev. 2118, 2150 (Jun. 2016) ("From my more than five years of experience at the White House, I can confidently say that Chevron encourages the Executive Brach (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.").

VI. Chevron is inconsistent with Congress's view of the judicial role.

Chevron's view of the judicial role is also at odds with the Administrative Procedures Act. Justice Scalia recognized that Chevron is a "judge-made doctrine[] of deference." Perez, 135 S. Ct at 1211 (Scalia, J., concurring in the judgment). It "did not purport to be based on statutory interpretation" of the APA. 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, 785 (2010); *see also Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring) (Chevron is "[h]eedless of the original design of the APA.").

In pertinent part, the APA provides that a reviewing court "shall decide all relevant questions

of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. In addition, it calls on reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions of law found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

If *Chevron* is overruled, the courts can return to their proper role consistent with § 706. More generally, they can return to the pre-*Chevron* days when, when courts would "assess agency interpretations against multiple contextual factors." Thomas W. Merrill, *The Story of* Chevron, 66 Admin L. Rev. at 255-56. That complex interaction between the courts and the agencies gives due respect to both in the way that *Chevron* does not.

CONCLUSION

For the reasons stated in the Petition and this amicus brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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