No. 16-920

In the
Supreme Court of the United States

NATIONAL RESTAURANT ASSOCIATION, et al.,

Petitioners,

v.

DEPARTMENT OF LABOR, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq., sets the federal minimum wage. Section 203(m) of the FLSA allows an employer to count a portion of customer tips toward its minimum wage obligation—called a tip credit—if the employer satisfies certain conditions. *Id.* § 203(m). Employers who use a tip credit cannot pool tips with untipped employees. *Id.* The FLSA says nothing about the tip-pooling practices of employers who do not take a tip credit. The Department of Labor, however, promulgated a regulation extending the tip-pooling rule to all employers, regardless of whether they use a tip credit. A sharply divided Ninth Circuit, in a 2-1 panel decision that sparked a ten-judge dissent from the denial of rehearing en banc, upheld this regulation. The panel ruling underscores increasing confusion and conflict over the proper application of *Chevron* deference. The question presented is:

Can a federal agency—in administering a statute—expand the reach of a statutory requirement, so long as the statute does not expressly prohibit the agency's regulation?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is widely respected as an experienced advocate of constitutional boundaries, including separation of powers and the expanding power of executive agencies.[1] PLF attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving the relationship between the judicial power and the administrative state. *See, e.g., U.S. Army Corps of Engineers v. Hawkes*, _ U.S. _, 136 S. Ct. 1807 (2016); *Sackett v. EPA*, _ U.S. _, 132 S. Ct. 1367 (2012); *Epic Sys. Corp. v. Lewis*, 823 F.3d 1147 (7th Cir. 2016), *petition for cert. granted*, No. 16-285 (Jan. 13, 2017); *Gloucester Cnty. Sch. Bd. v. G.G.*, 822 F.3d 709 (4th Cir. 2016), *petition for cert. granted*, No. 16-273 (Oct. 28, 2016).

PLF urges this Court to grant review to clarify widespread confusion about *Chevron* deference,[2] revisit its effect on the balance of power among the branches of government, and affirm that it does not allow

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

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.

[2] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

agencies to extend the reach of a statute beyond its express terms.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Department of Labor has expanded the Fair Labor Standards Act (FLSA) beyond its express scope. The FLSA restricts the tipping practices of companies that use tips as a supplement to reach their federal minimum wage obligations—the so-called tip credit. *See* 29 U.S.C. § 203(m). The FLSA forbids such companies from requiring their tip-earning employees—such as waiters—to share any tip money with untipped staff—such as line cooks. *Id.* The FLSA imposes no such demand on companies that do not use a tip credit. Indeed, the Ninth Circuit—relying upon the plain text of the statute—had previously held that the FLSA allowed non-tip-credit businesses to divvy up tips among tip earners and untipped staff. *See Cumbie v. Woody Woo*, 596 F.3d 577, 581 (9th Cir. 2010). As the court explained, "A statute that provides that a person must do *X in order to achieve Y* does not mandate that a person must do X, period." *Id.*

The Department of Labor—authorized to administer the statute—took a different tack. The Department issued a regulation requiring all businesses to follow the FLSA's tip-pooling rule, whether the businesses relied on a tip credit or not. 29 C.F.R. § 531.52.

A group of businesses that do not use tip credits sued to invalidate the new rule. *Oregon Rest. and Lodging Ass'n v. Perez*, 816 F.3d 1080, 1085 (9th Cir. 2016). A split Ninth Circuit panel, applying *Chevron* deference, held that the statute's silence on whether

the tip-pooling rule reached businesses that do not use a tip credit created an ambiguity that the Department of Labor could exploit. *Id.* at 1088-89. According to the panel majority, the Department's extension of that tip-pooling rule to all businesses—regardless of whether they take a tip credit—was a reasonable interpretation. *Id.* at 1090.

The dissenter, Judge Randy Smith, challenged the majority's *Chevron* analysis. He said the panel had confused legislative inaction with legislative ambiguity: "[I]t is only in the ambiguous 'interstices' within the statute where silence warrants administrative interpretation, not the vast void of silence on either side of it." *Id.* at 1094 (Smith, J., dissenting). In dissent to a denial of a motion for rehearing en banc, Judge O'Scannlain—writing on behalf of ten judges—agreed. He decried the "unsupported and indefensible idea that federal agencies can regulate any class of activity that Congress has not 'unambiguously and categorically protected' through positive law. Such a notion is completely out of step with the most basic principles of administrative law, if not the rule of law itself." *Oregon Rest. and Lodging Ass'n v. Perez*, 843 F.3d 355, 365-66 (Mem.) (9th Cir. 2016).

The Ninth Circuit's misreading of *Chevron* allows agency power to balloon into the limitless silence of what Congress has chosen not to say, unless Congress expressly states that the agency may not do so. "You didn't say I couldn't" becomes the new standard for determining whether Congress has delegated rule-making authority—a presumption that Congress hands over any legislative power it leaves unused.

By presenting a novel and clear question of law, this petition gives the Court an opportunity to address lingering questions about the proper role and application of *Chevron*, review the doctrine in light of growing separation-of-powers concerns, and ensure that the doctrine remains in harmony with other evolving deference doctrines.

ARGUMENT

I

THE TIME IS RIPE TO REVIEW *CHEVRON* TO ENSURE HARMONY AMONG THE COURT'S DEFERENCE DOCTRINES AND UNIFORMITY AMONG THE CIRCUIT COURTS

A. This Court Should Seize the Chance to Concurrently Review Its Major Administrative Deference Doctrines

This Court should grant this timely *Chevron* petition to cultivate consistency and clarity regarding its key deference doctrines. Recently, the Court granted review in *Gloucester County School Board v. G.G.*, 822 F.3d 709 (4th Cir. 2016), *petition for cert. granted*, No. 16-273 (Oct. 28, 2016). *Gloucester* wrestles with the *Auer* doctrine—the deference regime in which courts defer to agency interpretations of administrative regulations. *See generally* Petition for a Writ of Certiorari, *Gloucester*, No. 16-273 (Aug. 29, 2016); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997). Because the opinions arising from *Gloucester* may address issues shared with *Chevron*, the Court should grant a concurrent *Chevron* petition to promote doctrinal symmetry.

While *Gloucester* does not directly address *Chevron*, several members of this Court have expressed a desire to reconsider *Auer* in a manner that could affect *Chevron*'s vitality and meaning. Both doctrines revolve around the relationship between the judicial power and the executive branch's power to interpret and make law. And both raise fundamental questions about the vesting powers in Articles I and III. For example, Justice Thomas recently said—referring to *Auer*—that "[w]hen courts refuse what the best interpretation is under the law, they abandon the judicial check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against." *Perez v. Mortgage Bankers Ass'n*, _ U.S. _, 135 S. Ct. 1199, 1221 (2015) (Thomas, J., concurring).

This concern also applies to *Chevron*. As Justice Scalia noted in the same case, the problems plaguing administrative deference in general are "perhaps insoluble if *Chevron* is not to be uprooted." *Id.* at 1212 (Scalia, J., concurring). Justice Thomas also raised recent concerns about *Chevron* that echo his views on *Auer*: "[*Chevron*] wrests from Courts the ultimate interpretive authority to 'say what the law is,' and hands it over to the Executive." *Michigan v. EPA*, _ U.S. _, 135 S. Ct. 2699, 2712 (2016) (Thomas, J., concurring). These parallel concerns regarding both deference doctrines deserve this Court's concurrent attention. Given the worries about deference in general from several members of the Court, the likelihood that such concerns arise in *Gloucester* are high. Granting this petition would help the Court address both deference contexts, forestalling potential confusion about *Gloucester*'s impact on *Chevron*.

B. Recent Research Demonstrates That *Chevron* Plays a Key Role in Lower Court Outcomes, and Those Outcomes Lack Uniformity Across the Federal Court System

The heavy but erratic impact of *Chevron* on appellate courts demonstrates the need for this Court's input. Scholars have debated the impact of *Chevron* since its inception, some concluding that the doctrine has little effect on this Court's decisions. *See* Jack M. Beermann, *End the Failed* Chevron *Experiment Now*, 42 Conn. L. Rev. 779, 830 (2010); William N. Eskridge & Lauren E. Baer, *The Continuum of Deference*, 96 Georgetown L.J. 1083, 1120-22 (2008). Recent research, however, indicates that *Chevron* wields tremendous influence in the lower courts.

A groundbreaking study on *Chevron* in the circuit courts—the largest of its kind—offers a glimpse of *Chevron*'s effects in federal appellate courts across the country. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 Mich. L. Rev. (forthcoming 2017) (manuscript at 5).[3] The research tells two stories: one, *Chevron* matters—it swells the likelihood of agency wins throughout the courts of appeal; and two, *Chevron*'s impact varies widely by circuit. Both findings highlight the need for this Court's review.

On a broad level, the researchers found that agency win rates—in which courts adopted agency interpretations of statutes—skyrocketed when *Chevron* applied and slumped when it did not. When *Chevron*

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[3] *Available at* https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2808848.

applied, agencies enjoyed a 77.4% win rate. *Id.* at 6. That rate slipped to 56% when the lesser *Skidmore* standard applied, and plummeted to 38% when courts exercised de novo review. *Id.* Appellate courts applied *Chevron* to 75% of cases where agencies sought deference. *Id.* at 32. Among those cases, 70% were resolved at *Chevron* step two (reasonableness of the agency interpretation). *Id.* at 6. At *Chevron* step two, the agency won 93.8% of the time. *Id.* *Chevron* thus plays a key role in statutory disputes.

But the data also tell a story of non-uniformity. The circuits vary significantly in how often they applied *Chevron*, and in how often the agency won when *Chevron* did apply. The research identified the First Circuit as the most deferential, and the Ninth Circuit as the least. *Id.* at 47. The difference between agency win rates when *Chevron* applied ranged from 88.2% to 72.3%—over a 15 percentage point gap. *Id.* And the inconsistency among circuits as to whether or not *Chevron* applied in the first instance ranged from 88% to 60.7%—nearly a 30 point gap. *Id.* The professors concluded that, given this lack of uniformity, "the case for providing more guidance becomes urgent." *Id.* at 69.

II

THIS CASE OFFERS A GOOD VEHICLE FOR ADDRESSING CONFUSION OVER *CHEVRON* STEP ONE

The Department of Labor's bold and novel vision for the *Chevron* doctrine, now approved by the Ninth Circuit, offers this Court an appropriate vehicle to clarify a doctrine mired in confusion.

The tip-pooling regulation extends a statutory rule to a new class of employers. By upholding it, the panel majority effectively held—in the words of Judge O'Scannlain—that "executive agencies have plenary power to regulate whatever they want, unless and until Congress affirmatively preempts them." 843 F.3d at 360. The panel's holding clashes with the approach to *Chevron* step one articulated by this Court and other circuits.

Chevron step one asks whether the agency interpretation fills an ambiguity in the relevant statute. *Chevron*, 467 U.S. at 842. Confusion has abounded over how to apply this rule. One scholar argues that courts now employ three different types of step one analysis, each with different outcomes. Beermann, *supra*, at 817-22. The circuit courts too have mourned the "long lingering questions . . . about just how rigorous *Chevron* step one is supposed to be." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring); *see also Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 503 (D.C. Cir. 2013) ("For all the confusion in application, the *Chevron* two-step is old hat.").

Approaches to step one fall into three camps: "original directly spoken *Chevron*," "traditional tools *Chevron*," and "plain meaning *Chevron*." Beermann, *supra*, at 817. Under the "directly spoken" approach—articulated by the *Chevron* opinion itself—courts have to defer "except in the most rare case of agency defiance of a precise statutory objective." *Id.* at 818; *see also Chevron*, 467 U.S. at 842. The "traditional tools" approach employs accepted canons of statutory construction. Beermann, *supra*, at 818; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

The "plain meaning" approach, on the other hand, employs only one canon of construction—the plain meaning rule. Beermann, *supra*, at 820. The circuit courts need guidance from this Court on how to implement *Chevron* step one.

The basic confusion over *Chevron* step one asserts itself in the Ninth Circuit opinions below. The panel majority relies on a strict "directly spoken to" approach that seems to read any statutory silence as an invitation—upholding the regulation because Congress did not expressly say whether or not non-tip-credit businesses are subject to the tip-pooling rule. *Oregon Rest.*, 816 F.3d at 1086-89. This approach upends traditional textual analysis, where courts hold that "if Congress makes an explicit provision for apples, oranges and bananas, it is most unlikely to have meant grapefruit." *American Petroleum Institute v. EPA*, 198 F.3d 275, 279 (D.C. Cir. 2000). Under Ninth Circuit precedent, an agency could toss in grapefruit or any other item on the food pyramid.

Judge Smith rejected this open-source approach, relying on the plain language of the statute. 816 F.3d at 1083 (Smith, J., dissenting). The confusion over *Chevron* step one—with each judge relying on a different formulation endorsed by this Court—all but compels diametric results.

The D.C. Circuit's opinion in *Hearth, Patio & Barbecue Association v. U.S. Department of Energy* offers a useful contrast to the *Oregon Restaurant* panel. There, the Department of Energy promulgated rules under the Energy Policy and Conservation Act. 706 F.3d at 500. The Act covered a class of products called "direct heating equipment." *Id.* at 501. The agency's rules sought to extend that class to include

decorative fireplaces. *Id.* at 502. The court rejected DOE's effort to expand the scope of the class, holding that the explicit coverage of direct heating equipment by clear inference forbade expansion of the class to non-heating products. *See id.* at 505. "Government regulators," the court said, "simply cannot choose to ignore statutory limits on their authority and expect deference to come of their intransigence." *Id.* at 506.

The fireplace case would have the opposite outcome under the new Ninth Circuit rule. Since Congress did not say the Act covers direct heating equipment and *only* direct heating equipment, the *Oregon Restaurant* rule would leave the door open for the regulator to usher in other non-enumerated products into the covered class. The regulator would not even have to distort the definition of "direct heating equipment" to expand the class, since the *Oregon Restaurant* panel accepted that a silent decision not to regulate was an invitation to expand the statute indefinitely.

The Ninth Circuit's holding—an extreme form of the "directly spoken to" approach—effectively neuters *Chevron* step one. If courts only stop at step one when Congress has explicitly told the agency "no," "it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes." *Zuni Public Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 107 (2007) (Kennedy, J., concurring). Clarity and rigor at step one become even more urgent in light of the statistic that agencies win 93.8% of cases that move to step two. Barnett & Walker, *supra*, at 6. This case—as a radical form of *Chevron* step one analysis—presents a clear question

of law that offers an excellent vehicle to address confusion over *Chevron* step one.

III

THIS CASE OFFERS A GOOD VEHICLE TO ADDRESS *CHEVRON*'S RELATIONSHIP WITH THE SEPARATION OF POWERS

This Court should grant review to resolve increasing concerns over how *Chevron* fits into the Constitution's careful separation of powers. The growth imperative of executive power requires this Court's constant vigilance. As jurist and professor Michael McConnell recently observed: "[Executive power] arguably . . . will be the most prominent Supreme Court issue of the coming decade . . . involving the ever-increasing authority of bureaucratic agencies to govern our lives without congressional say-so or real democratic accountability." Michael McConnell, *Neil Gorsuch: An Eloquent Intellectual*, Hoover Institution (Feb. 6, 2017).[4] By siphoning separated powers into the executive branch, *Chevron* presents one of these key areas of concern.

Many jurists and professors have worried that *Chevron* retrofits the balance of powers orchestrated by the Constitution. *See, e.g., Michigan v. EPA*, 135 S. Ct. at 2714 (Thomas, J., concurring); *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring); Philip Hamburger, *Is Administrative Law Unlawful*, 315-17, 319-21 (2014); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 498

[4] http://www.hoover.org/research/neil-gorsuch-eloquent-intellectual.

(1989). Here, this constitutional recalibration is even more evident. The Ninth Circuit panel's approach allows agency regulations to expand outward beyond statutory limits. It treats the outer reaches of a statute as blank pages rather than bookends. In doing so, it offers a chance for this Court to define the proper relationship between deference and the constitutional separation of powers.

A. *Chevron* Deference—Particularly the Highly Deferential Kind Here—Risks an Improper Delegation of Legislative Power to the Executive Branch

The Constitution vests all legislative power in Congress. U.S. Const. art. I, § 1. Congress lacks the authority to delegate that power—a "principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). As the foremost government power, the creation of binding law needs careful constraint to avoid abuse. For Congress, those constraints include bicameralism, presentment, and elections. Agencies, run by unelected bureaucrats, face no such constraints.

The executive's power to demand deference from the courts transforms their interpretive authority into binding, legislative power. "After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring). Thus, deference results in a

shift of core legislative power from legislators to bureaucrats.

Both English and American constitutional history reveal a long fight against the exercise of binding power by the executive. *See* Hamburger, *Administrative Law*, *supra*, at 83-110. English and American reformers alike saw the Executive's power to issue binding commands as a hallmark of the absolute prerogative power wielded by medieval monarchs. *Id.* at 128. As legal historian Philip Hamburger notes, "The prerogative to issue law-like commands was the primary point of contention in the English constitutional struggles of the seventeenth century. In response, the English developed a constitution and Americans enacted a constitution that placed all legislative power in the legislature." *Id.* Thus, *Chevron* undermines a long constitutional tradition of opposing the dangers of concentrated, prerogative power.

The *Chevron* doctrine relies on the theory that statutory ambiguity implicitly delegates legislative power to agencies. *Chevron*, 467 U.S. at 844. That rationale does not sit easy with the careful vesting of "all legislative power" in Congress. Indeed, scholars and justices alike have called this implicit delegation theory a fiction. Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 Yale L.J. 676, 689 (2007).

The *Oregon Restaurant* rule, however, takes that implicit delegation further still. By defining any silence as an ambiguity, *Oregon Restaurant* expands agencies' role from filling potholes to building interstates. This approach reshelves *Chevron* delegation from fiction to fantasy. It creates the

remarkable presumption that Congress means to delegate any legislative power it leaves untouched.

Chevron—particularly the variety at issue here—even grates against this Court's permissive non-delegation doctrine. That doctrine allows delegation through "broad general directives" with an intelligible principle. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Some judges have questioned whether the original *Chevron* doctrine can clear this low hurdle. *See, e.g., Gutierrez-Brizuela*, 834 F.3d at 1154. The propriety of the delegation becomes even more tenuous if the only limit on delegation is a congressional stop sign. Utter silence is not a broad general directive, and it offers no intelligible principle.

This petition presents an excellent vehicle to discuss *Chevron*'s relationship to Article I's vesting clause. As an extreme example of *Chevron*'s fiction, this case would offer the chance to explore *Chevron*'s outer reaches and perhaps reconsider its constitutionality under Article I.

B. *Chevron* Deference Works a Dangerous Transfer of Judicial Power from the Courts to the Executive Branch

Chevron also siphons judicial power and places it in the hands of the executive branch. This conflicts with Article III's vesting clause. As *Chevron* expands, the conflict grows.

The "judicial power" vested in federal courts is the power to interpret law: "The interpretation of the laws is the proper and peculiar province of the courts. . . . It therefore belongs to them to ascertain . . . the meaning of any particular act proceeding from the

legislative body." The Federalist No. 78 (Alexander Hamilton). The framers knew the risk that interpretation of ambiguous language could bleed into lawmaking. Jonathan T. Molot, *The Judicial Perspective in the Administrative State*, 53 Stan. L. Rev. 1, 19-20 (2000). To insulate the judiciary from that temptation, they employed various checks like tenure, fixed salaries, juries, and the executive's control over enforcement of judgments. *Id.* at 10; *Perez*, 135 S. Ct. at 1220 (Thomas, J., concurring).

As interpretive authority migrates across the power structure, the protections carefully designed to insulate the judiciary do not tag along. Fixed salaries and tenure serve as key bulwarks to ensure that the judiciary does not usurp legislative power, and "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Federalist No. 78. The transfer of power away from the institution designed to wield it undermines these constitutional checks. *See Perez*, 135 S. Ct. at 1220 (Thomas, J., concurring) ("But the agency, as part of the Executive Branch, lacks the structural protections for independent judgment adopted by the Framers, including the life tenure and salary protections of Article III. Because the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-power concerns.").

Judge Neil Gorsuch recently explained the concern this way: "*Chevron* . . . permits[s] 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. Maybe the time has come to face the behemoth." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). Judge Gorsuch feared that we have dethroned "an independent decisionmaker seeking to declare the law's meaning as fairly as possible—the decisionmaker promised to them by law," and set up in its place "an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day." *Id.* at 1153.

Deference can also endanger judicial independence and impartiality. The founders fiercely guarded the judiciary's independence. As Alexander Hamilton wrote:

> [I]ndependence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and . . . have a tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Federalist No. 78. Such ill humors, dangerous innovations, and oppressions—alive and well today—need the bulwark of an impartial judiciary.

James Madison's proposal to create a council of revision demonstrates the framers' commitment to judicial independence. *See* Philip Hamburger, *Law and Judicial Duty* 509 (2008). The council of revision,

under the proposal of James Madison and James Wilson, would comprise a body of judges and executive officers who would review and revise legislation. *Id.* Madison and Wilson floated the idea repeatedly, and the constitutional convention rejected it more often than any other proposal. *Id.* at 511. The proposals' many opponents insisted that the Constitution must avoid "an improper coalition between the Executive & Judiciary departments." *Id.* The other members of the convention acknowledged the need to check legislative power, but they refused to do so at the expense of judicial independence, since—in the words of Nathaniel Ghorum—"the Judges ought to carry into the exposition of the laws no prepossessions with regard to them." *Id.* This skirmish reflected the greater commitment to judicial independence expressed in Hamilton's essay on the judiciary: "liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments." Federalist No. 78.

By entrenching deference, courts abandon the basic purpose of independence—to ensure impartial judgment. "If [impartiality] means anything, it surely requires a judge not to defer to one of the parties, let alone to defer systematically to the government." Hamburger, *Administrative Law*, *supra*, at 312. A regime of deference—in which the executive and the judiciary collude in the interpretive quest—resurrects the concern over the council of revision: "an improper coalition between the Executive & Judiciary departments." Hamburger, *Judicial Duty*, *supra*, at 511. *Chevron* not only permits but requires that judges "carry into the exposition of the laws . . . prepossessions with regard to them." *Id.* Like the

roundly rejected council of revision, deference merges executive and judicial functions, a danger that Article III's vesting clause exists to prevent.

Deference also erodes the basic judicial allegiance to the supremacy of law. Historically, the common law courts of England opposed deference as a threat to law's supremacy. Hamburger, *Administrative Law*, *supra*, at 290-91. Deference imperiled the supremacy of the law because it placed administrative will above written law—to which judges owed their loyalty. *Id.* at 291. This supremacy rationale for rejecting deference carried into the early American experiment, making it "clear that the Constitution made federal law supreme over all competing assertions of temporal power within the nation." *Id.* at 292. When judges must supplant neutral interpretation with the politicized views of bureaucrats, the supremacy of the law suffers. This case underscores that reality, where an agency expanded a rule beyond the limits drawn by statute.

This petition presents an excellent vehicle for addressing these many questions. The lower opinions clearly present a fundamental rift regarding how to understand *Chevron*'s role in a divided government structure. This Court should grant review to clarify that understanding.

CONCLUSION

Unmoored from clear caselaw, courts applying deference doctrines "seem to be straying further and further from the Constitution without so much as pausing to ask why." *Michigan*, 135 S. Ct. at 2714 (Thomas, J., concurring). This case presents a timely opportunity to pose and answer that question. The petition should be granted.

DATED: February, 2017.

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