No. 17-1636

In the Supreme Court of the United States

CALIFORNIA SEA URCHIN COMMISSION, ET AL.,
PETITIONERS

v.

SUSAN COMBS, ACTING ASSISTANT SECRETARY FOR FISH, WILDLIFE, AND PARKS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, KANSAS, LOUISIANA, MAINE, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Kansas, Louisiana, Maine, Michigan, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Utah, West Virginia, Wisconsin, and Wyoming.[1] The Amici States have an interest in ensuring that the manner in which federal administrative agencies interpret federal statutes does not subvert the interests of States and their citizens or dispossess courts of their constitutional duty to decide what the law is.

[1] Pursuant to Supreme Court Rule 37.2, Amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amici contributed monetarily to the preparation or submission of this brief. All parties have given their consent to the filing of this brief.

SUMMARY OF ARGUMENT

In recent years, several members of this Court and numerous commentators have raised constitutional and practical concerns regarding the deference to agency interpretations of federal statutes required under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As Justice Kennedy recently acknowledged in *Pereira v. Sessions*, the time has come for the Court to reconsider *Chevron* deference. Amici States urge that *Chevron* deference should be overruled for several reasons. First, statutory construction is primarily the role of courts, not administrative agencies. Second, the *Chevron* framework foments uncertainty and instability in the law. Third, *Chevron* deference undermines principles of federalism. Finally, *Chevron* deference increasingly appears to be unnecessary. At a minimum, the Court should resolve a circuit split and clarify that the Ninth Circuit's isolated view of *Chevron*—which invites federal agencies to infer regulatory authority from congressional silence—is fundamentally wrong.

ARGUMENT

I. The Court Should Overrule *Chevron* Deference.

Chevron set out a now-familiar two-step process for judicial review of a federal agency's construction of a statute that it administers. At Step One, the reviewing court asks "whether Congress has directly spoken to the precise question at issue"; if it has, "that is the end of the matter." 467 U.S. at 842. If not, however, "the court does not simply impose its own construction on the statute." *Id.* at 843. Instead, "if the statute is silent or ambiguous with respect to the specific issue," at Step Two "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* If so, the court must defer to the agency's interpretation, even if the court on its own would have interpreted the statute differently. *Id.* Thus, in the very common situation where "the precise question" is not answered by the text of a federal statute, an agency's interpretation has the force and effect of law unless it "exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

In the Court's recent *Pereira v. Sessions* decision, Justice Kennedy wrote separately to "note [his] concern with the way in which the Court's opinion in [*Chevron*] has come to be understood and applied." No. 17-459, 2018 WL 3058276, at *14 (Kennedy, J., concurring) (U.S. June 21, 2018) (citations omitted). Justice Kennedy described as "troubling" the "reflexive deference" that some courts of appeals have exhibited in applying *Chevron*, and observed that "it 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 described *Chevron* as an "increasingly maligned precedent," *id.* at

*15 (Alito, J., dissenting), and wondered whether "the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention," *id.* at *23.

Amici States agree that the time has come to reconsider *Chevron* deference, and this case provides an appropriate vehicle. Although the Court does not lightly reconsider its precedents, it has not hesitated to do so when "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). This brief, while not attempting to categorically address all of *Chevron*'s shortcomings, will summarize some of *Chevron*'s more problematic aspects as grounds to reconsider and overrule *Chevron* deference in this or another suitable case.

A. Interpreting statutory text is primarily the role of courts, not administrative agencies.

Interpreting statutes is a core judicial function. *See, e.g.*, *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (noting that "courts are the final authorities on issues of statutory construction"). By contrast, setting public policy is a legislative or executive function. Yet the *Chevron* doctrine effectively reverses these roles by requiring courts to defer to reasonable agency interpretations of statutes.

Two years after *Chevron* was decided, then-Judge Breyer explained that *Chevron* deference, in tandem with the "hard look" doctrine formerly adopted by the D.C. Circuit, yielded the "anomalous" result of "urg[ing] courts to defer to administrative interpretations of regulatory statutes, while also urging them to review agency decisions of regulatory policy strictly." Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 364-65 (1986). As Justice Breyer ob-

served, *Chevron* gets it exactly backwards. The constitutionally proper approach is for courts to independently engage in statutory interpretation while deferring to administrative agencies' policy determinations.

As Members of this Court and others have observed, *Chevron* deference implicates several constitutional issues, most notably separation-of-powers and non-delegation concerns. Requiring courts to defer to agency interpretations "precludes judges from exercising [independent] judgment" and "wrests from Courts the ultimate interpretative authority to 'say what the law is.'" *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803)); *see Pereira*, 2018 WL 3058276, at *14 (Kennedy, J., concurring) (noting that *Chevron* deference can lead to "abdication of the Judiciary's proper role in interpreting federal statutes," and that "[t]he 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"); *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) ("[T]he citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating."); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* . . . permit[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 dif-

ficult to square with the Constitution of the framers' design."); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in the judgment) ("The deference required by *Chevron* not only erodes the role of the judiciary, it also diminishes the role of Congress."); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 513 (1989) ("Surely the law, that immutable product of Congress, is what it is, and its content—ultimately to be decided by the courts—cannot be altered or affected by what the Executive thinks about it."); The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

Chevron also has long been criticized by numerous commentators, on these and other grounds. *See, e.g.*, Christopher J. Walker, Attacking *Auer* and *Chevron* Deference: A Literature Review, 16 Geo. J.L. & Pub. Pol'y 103 (2018); Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L.J. 908 (2016); Jeffrey A. Pojanowski, Without Deference, 81 Mo. L. Rev. 1075 (2016); Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)); Philip Hamburger, *Chevron* Bias, 84 Geo. Wash. L. Rev. 1187 (2016); Jack M. Beerman, *Chevron* at the Roberts Court: Still Failing After All These Years, 83 Fordham L. Rev. 731 (2014); 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); Linda Jellum, *Chevron*'s Demise: A Survey of *Chevron* from Infancy to Senescence,

59 Admin. L. Rev. 725 (2007); Cass R. Sunstein, *Chevron* Step Zero, 92 Va. L. Rev. 187 (2006); William R. Andersen, Against *Chevron*–A Modest Proposal, 56 Admin. L. Rev. 957 (2004); David M. Hasen, The Ambiguous Basis of Judicial Deference to Administrative Rules, 17 Yale J. on Reg. 327 (2000). These widespread, well-articulated, and longstanding concerns about *Chevron*'s foundations and constitutional viability further support reconsideration of the doctrine.

B. *Chevron* deference invites instability and unpredictability in the law.

1. A broad range of agency interpretations makes it hard to know what the law is.

It is doubtless convenient for federal agencies to have little restraint on their interpretation of federal law; to be able to change their minds at any time, for any reason; and to receive deference even for interpretations expressed retroactively. But there is a price to be paid for these conveniences, and it is paid by those who are subject to the agency's regulatory authority. As then-Judge Gorsuch has explained:

> Transferring 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. Under *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute

> will be declared "ambiguous" (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed "reasonable." Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists? And, of course, that's not the end of it. Even if the people somehow manage to make it through this far unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail. Neither, too, will agencies always deign to announce their views in advance; often enough they seek to impose their "reasonable" new interpretations only retroactively in administrative adjudications.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). In this way, *Chevron* adds to uncertainty and instability in the law while marginalizing ordinary citizens from the political process.

2. *Chevron*'s applicability remains unclear.

Another major problem with *Chevron* deference is that it does not produce consistent, predictable results. For example, courts often disagree at Step One about whether a statutory term is ambiguous. *See, e.g.*, *Wisc. Cent. Ltd. v. United States*, No. 17-530, 2018 WL 3058014, at *6 (U.S. June 21, 2018) (rejecting *Chevron* deference); *id.* at *10 (Breyer, J., dissenting) (urging *Chevron* deference); *Lawson v. FMR LLC*, 571 U.S. 429, 462 (2014) (Sotomayor, J., dissenting) ("[T]he majority . . . fails to recognize that § 1514A is deeply ambiguous."); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550

U.S. 81, 100 (2007) ("[T]he language of the statute is broad enough to permit the Secretary's reading."); *id.* at 107 (Kennedy, J., concurring) ("[T]he Court is correct to find that the plain language of the statute is ambiguous."); id. at 108 (Scalia, J., dissenting) (opining that statute's plain text "clearly and unambiguously forecloses" the agency's interpretation); *Massachusetts v. EPA*, 549 U.S. 497, 529 & n.26 (2007) (finding statutory definition of "air pollutant" unambiguous); *id.* at 556-57 (Scalia, J., dissenting) (finding ambiguity in statutory definition).

Over the past decade, however, much of the controversy over *Chevron* has arisen at the so-called "Step Zero"—"the initial inquiry into whether the *Chevron* framework applies at all." Sunstein, *supra*, 92 Va. L. Rev. at 191. In other words, the Court has created multiple exceptions where it can avoid *Chevron* deference by engaging in a threshold question about whether *Chevron* even applies in the first place. This additional doctrinal layer presents even more unresolved questions about several precedents that function as exceptions to *Chevron* deference, which in turn has created "a significant increase in uncertainty about the appropriate approach" to reviewing agency decision-making. *Id.*

a. The principal *Chevron* Step Zero doctrine is reflected in a series of decisions concluding that *Chevron* deference is appropriate only "when agency decisions have followed procedures that guarantee deliberation and reflectiveness." *Id.* at 193 & n.29 (citing, *inter alia*, *United States v. Mead Corp.*, 533 U.S. 218, 221, 226-34 (2001)). In *Mead*, the Court stated that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to

make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-227. In so holding, the Court recognized that *Chevron* deference rests on a recognition that Congress has delegated to an agency the interpretive authority to implement "a particular provision" or answer "'a particular question.'" *Id.* at 229 (quoting *Chevron*, 467 U.S. at 844). After concluding that the agency interpretation at issue did not qualify for *Chevron* deference under that standard, the Court suggested that *Skidmore* deference, under which an agency ruling may "seek a respect proportional to its 'power to persuade,'" might be appropriate. *Id.* at 234-35 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Justice Scalia's dissent noted that, by declining to draw a bright-line rule reserving *Chevron* deference for cases involving rulemaking or formal adjudication, the *Mead* majority had created additional uncertainty regarding *Chevron*'s applicability. *See id.* at 241 (Scalia, J., dissenting) ("The Court has largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."). That uncertainty has long persisted in the wake of *Mead*. *Compare Barber v. Thomas*, 560 U.S. 474, 487 (2010) (invoking *Chevron* deference in reviewing agency's calculation of federal inmates' statutory good-time credit), *Gonzales v. Oregon*, 546 U.S. 243, 258-68 (2006) (applying *Mead* in rejecting *Chevron* deference to Attorney General's interpretations of Controlled Substances Act), *and Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1003 (2005)

(Breyer, J., concurring) ("I write separately . . . to point out that Justice Scalia, in my view, has wrongly characterized the Court's opinion in [*Mead* as holding] that 'some unspecified degree of formal process' before the agency 'was required' for courts to accord the agency's decision deference under [*Chevron*]."") (quoting *id.* at 1015) (Scalia, J., dissenting), *with Barber*, 560 U.S. at 502-03 (Kennedy, J., dissenting) (arguing that, following *Mead*, the agency's credit calculation was not entitled to *Chevron* deference), *Gonzales*, 546 U.S. at 292-98 (Scalia, J., dissenting) (urging *Chevron* deference to Attorney General's statutory interpretations), *and Brand X*, 545 U.S. at 1014-15 (Scalia, J., dissenting) ("To the extent it set forth a comprehensible rule, *Mead* drastically limited the categories of agency action that would qualify for deference under [*Chevron*].").

b. Another doctrine that can displace the *Chevron* framework altogether is the "major question" canon, which posits that policy questions of deep "economic and political significance" are too important to be decided on the basis of deference to agency interpretation. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *see King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); *Gonzales*, 546 U.S. at 275; *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703-08 (1995); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 226, 229-31 (1994). The major-question canon is conceptually related to the statutory-interpretation tenet that Congress "does not . . . hide elephants in mouseholes" by "alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Unsurprisingly, the courts of appeals have struggled to consistently apply the major-question canon's standard of "deep 'economic and political significance,'" *King*, 135 S. Ct. at 2488-89 (quoting *Brown & Williamson*, 529 U.S. at 160). *Compare, e.g.*, *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 383 (D.C. Cir. 2017) (Srinivasan, J., concurring in denial of rehearing en banc), *and Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1024 (6th Cir. 2016) ("This is not an 'extraordinary' case. *Chevron* applies.") (quoting *King*, 135 S. Ct. at 2488), *rev'd*, 137 S. Ct. 1562 (2017), *with U.S. Telecom Ass'n*, 855 F.3d at 402-03 (Brown, J., dissenting from denial of rehearing en banc), *and Esquivel-Quintana*, 810 F.3d at 1031-32 (Sutton, J., concurring in part and dissenting in part).

c. Yet another source of ongoing uncertainty involves the boundary between *Chevron* deference for statutory interpretations and review under the "arbitrary or capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The Court has indicated that the reasonableness inquiry under *Chevron*'s Step Two analysis is functionally equivalent to the APA's "arbitrary or capricious" standard. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011); *Verizon Comms., Inc. v. FCC*, 535 U.S. 467, 527 n.38 (2002).

"Since the scope of review is a threshold issue in nearly every administrative law case, the rise of sustained controversy over the meaning of Step Zero introduces needless uncertainty." Sunstein, *supra*, 92 Va. L. Rev. at 248. In sum, persistent doubts about whether and how to apply *Chevron* deference suggest that the doctrine is unworkable and the Court should reconsider it.

C. *Chevron* deference poses a significant threat to federalism.

There are five main virtues of a federalist system that decentralizes power: (1) accountability, (2) responsiveness, (3) innovation (that is, using states as "experimental laboratories"), (4) public participation in democracy, and (5) protection of liberty. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1493-94, 1498-1507, 1510 (1987) (book review). The importance of these virtues is heightened when federal power is exercised by administrative agencies rather than Congress. State power would promote accountability, whereas federal agencies are comprised of unelected officials located in Washington, D.C. Likewise, States would be more responsive to the diverse interests of a "heterogeneous society," *Gregory*, 501 U.S. at 458, while federal agencies must formulate national policy by accounting for interested parties throughout the nation. Federal regulation displaces the ability of states to function as experimental laboratories. Public participation is also drastically decreased as the "federal government is too distant and its compass too vast to permit extensive participation by ordinary citizens in its policy formulations." McConnell, *supra*, 54 U. Chi. L. Rev. at 1510. Finally, federal regulations may stifle policy decisions made by state governments that provide greater liberty to citizens than they receive under the federal constitution. *See, e.g.*, *Gonzalez*, 546 U.S. at 265-75.

Federalism concerns frequently arise in administrative law because every time an agency acts, it must interpret the federal statute that delegates power to the

agency, and "the sheer amount of law . . . made by the [administrative] agencies has far outnumbered the law-making engaged in by Congress through the traditional process." *INS v. Chadha*, 462 U.S. 919, 985-86 (1983) (White, J., dissenting). Over a decade ago, *Chevron*'s author, Justice Stevens—joined by the Chief Justice and Justice Scalia—observed that "a healthy respect for state sovereignty calls for something less than *Chevron* deference" for agency decisions that threaten to disrupt the federal-state balance. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Yet putting that principle into action has proven elusive.

An agency can attempt to supersede state law in an area of traditional state regulation by giving a broad interpretation to an ambiguous statutory term. As long as that interpretation is reasonable, under *Chevron*, it is entitled to deference. Unsurprisingly, federal agency officials often "consider *Chevron* deference when interpreting statutes and drafting rules" and tend to be "more aggressive in [their] interpretive efforts if [they] believe[] the reviewing court will apply *Chevron* deference (as opposed to *Skidmore* deference or de novo review)." Walker, *supra*, 16 Geo. J.L. & Pub. Pol'y at 121.

The modern administrative state "wields vast power and touches almost every aspect of daily life." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). In light of these concerns, "the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting). Consequently, "the true test of federalist principle may lie . . . in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law." *Egelhoff v. Egelhoff*

ex rel. Breiner, 532 U.S. 141, 160-61 (2001) (Breyer, J., dissenting) (citations omitted).

Chevron deference is especially problematic in disputes (like this one) between federal agencies and the States. In theory, "the structure and limitations of federalism . . . allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Gonzales*, 546 U.S. at 270 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)). In practice, however, federalism principles are inevitably marginalized when federal power is exercised by agencies rather than by Congress. "'[U]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law.'" *Watters*, 550 U.S at 41 (Stevens, J., dissenting) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting)).

Even before *Chevron*, John Hart Ely wrote: "[O]n most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat, or perhaps some independent regulatory commission, 'take the inevitable political heat." John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 131-32 (1980). Thus, "'[w]hen hard decisions have to be made, [Congress] pass[es] the buck to the agencies with vaguely worded statutes.'" *Id.* (quoting 122 Cong. Rec. H10,685 (daily ed. Sept. 21, 1976) (statement of Rep. Levitas)). The broad deference to federal bureaucrats commanded by *Chevron* invites such mischief and perpetuates the cycle of political unaccountability that is anathema to federalism.

In a related context, a due regard to federalism undergirds the presumption against preemption. *See, e.g.*, *Rosenberg v. DVI Receivables XVII, LLC*, 835 F.3d 414, 419 (3d Cir. 2016). Consistent with that principle, courts have long required a high hurdle to show congressional intent to preempt. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Yet *Chevron* undermines federalism by inviting judges to "systematically exert bias toward the [federal] government and against other parties." Hamburger, *supra*, 84 Geo. Wash. L. Rev. at 1212. Such bias is inherently inconsistent with a proper regard for federalism and the Framers' desire to avoid a centralized accumulation of power.

D. *Chevron* increasingly appears unnecessary.

The Court regularly reviews agency interpretations of statutory text without applying—and sometimes without even addressing—*Chevron*. *See, e.g.*, *Pereira*, 2018 WL 3058276 at *3-14 (reviewing Board of Immigration Appeals' interpretation of statutory term "notice to appear"); *id.* at *15 (Alito, J., dissenting) ("[T]he Court, for whatever reason, is simply ignoring *Chevron.*"); *Nat'l Ass'n of Mfrs. v. Dep't of Def.,* 138 S. Ct. 617 (2018) (rejecting the EPA's and Army Corps of Engineers' definitions of the statutory phrase "waters of the United States"); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (reviewing FCC's policy implementing statutory ban on broadcasting "any obscene, indecent, or profane language"); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005) (deciding whether Age Discrimination in Employment Act permits disparate-impact liability); *id.* at 243 (Scalia, J., concurring in part and in the judgment) ("This is an absolutely classic case for deference to agency interpretation."). The Court's willingness to

forgo the use of *Chevron* in cases where it ordinarily would be expected to apply undercuts the notion that *Chevron* is indispensable.

In a parallel vein, a number of state supreme courts have jettisoned *Chevron*-style deference (or never adopted it in the first instance) as a tool for reviewing state agency decisions interpreting state statutes. For instance, the Wisconsin Supreme Court recently announced: "We have . . . decided to end our practice of deferring to administrative agencies' conclusions of law." *Tetra Tech EC, Inc., v. Wisc. Dep't of Revenue*, No. 2015AP2019, 2018 WL 3122322, at *1 (Wis. June 26, 2018). Other States have taken similar positions. *See Stambaugh v. Killian*, 398 P.3d 574, 578 (Ariz. 2017) (Bolick, J., concurring) ("[T]his Court has never expressly considered whether *Chevron* or its progeny establish standards for administrative deference under Arizona law. I trust that, to the contrary, our constitutional separation of powers remains vibrant, notwithstanding the extent to which the United States Supreme Court has eroded it in the federal context."); *City of Brighton v. Rodriguez*, 318 P.3d 496, 501 (Colo. 2014) (courts are not bound by agencies' legal interpretations); *Gold Creek Cellular of Mont. Ltd. P'ship v. State Dep't of Revenue*, 310 P.3d 533, 535 (Mont. 2013) ("[W]e have only relied on *Chevron* deference when a federal or state agency interprets federal law or a state law companion to federal law."); *Kan. Dep't of Revenue v. Powell*, 232 P.3d 856, 859 (Kan. 2010)) ("[T]o the extent any statutory interpretation is required, our review is unlimited, with deference no longer being given to the agency's interpretation."); *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 213 P.3d 1164, 1172 (Or. 2009) (en banc)

(noting that *Chevron*-type "deference is foreign to the administrative law of this state"); *In re Complaint of Rovas Against SBC Mich.*, 754 N.W.2d 259, 271 (Mich. 2008) ("This Court has never adopted *Chevron* for review of state administrative agencies' statutory interpretations, and we decline to adopt it now.").

Similarly, the Texas Supreme Court has "never expressly adopted the *Chevron* or *Skidmore* doctrines for [its] consideration of a state agency's construction of a statute." *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011). Although a Texas agency's view may receive "serious consideration" in certain circumstances involving statutes found to be ambiguous, *id.*, the Texas Supreme Court "rarely defers to agencies." Tex. Att'y Gen. Op. No. KP-115, 2016 WL 5873029, at *5 (2016). That is because "the Texas Supreme Court has a well-developed, tiered process for assessing the meaning of statutes as a matter of law: text, context, and canons of construction," with the result that "Texas courts seldom conclude that a statute is ambiguous." *Id.* at *4 (citations omitted).

Texas's approach may be a suitable model for looking beyond *Chevron* on the national stage. When a reviewing court is more inclined to employ such tools to find "that the meaning of a statute is apparent from its text and from its relationship with other laws," that court "thereby finds *less* often that the triggering requirement for *Chevron* deference exists." Scalia, *supra*, 1989 Duke L. J. at 521. Eliminating *Chevron* will help restore the distinction between questions of statutory interpretation that require legal acumen but not technical expertise (where no agency deference is appropriate), and questions that require technical expertise or involve policy

judgments (where deference is more appropriate). Pojanowski, *supra*, 81 Mo. L. Rev. at 1086-87.

II. At a Minimum, the Court Should Hold That the Court of Appeals Manifestly Misapplied *Chevron*.

There is a split among the federal court of appeals on the question of whether an agency can properly infer authorization to act from congressional silence. The Third, Fourth, Fifth, Seventh, Tenth, Eleventh, and District of Columbia Circuit courts of appeals have all answered that question in the negative. *See, e.g.*, *Coffelt v. Fawkes*, 765 F.3d 197, 202 (3d Cir. 2014); *Chamber of Commerce of U.S. v. NLRB*, 721 F.3d 152, 154 (4th Cir. 2013); *Texas v. United States*, 809 F.3d 134, 182 (5th Cir. 2015); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002); *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1163-64 (10th Cir. 2017); *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1084-85 (11th Cir. 2013); *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc), *amended on other grounds*, 38 F.3d 1224 (D.C. Cir. 1994).

The Ninth Circuit's contrary view, as expressed in this case and several prior decisions, stands alone among the federal courts of appeals. *Cal. Sea Urchin Comm'n v. Bean*, 883 F.3d 1173 (9th Cir. 2018); *Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1089 (9th Cir. 2016), *cert. denied sub nom. Wynn Las Vegas, LLC v. Cesarz*, No. 16-163, 2018 WL 3096373 (U.S. June 25, 2018), *and cert. denied sub nom. Nat'l Rest. Ass'n v. Dep't of Labor*, No. 16-920, 2018 WL 3096374 (U.S. June 25, 2018). And even within the Ninth Circuit, that isolated view has been criticized. *See Perez*, 816 F.3d at 1094 (Smith, J., dissenting) ("[T]he majority suggests an agency may regulate

wherever that statute does not forbid it to regulate. This suggestion has no validity."); *Or. Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 363 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing en banc) ("It should come as no surprise that our sister circuits have roundly and forcefully repudiated the specious theory of agency power our court now adopts. Those circuits have echoed again and again the basic reality that silence does not always constitute a gap an agency may fill, but often reflects Congress's decision not to regulate in a particular area at all, a decision that is binding on the agency.").

The Court should grant the petition for a writ of certiorari in this case, at a minimum, to resolve this split and correct the Ninth Circuit's aberrant reading of *Chevron*. At the time the petition was filed in this case, two other petitions for writ of certiorari were pending before this Court seeking review of the Ninth Circuit's statutory-silence theory of *Chevron*. *See Wynn Las Vegas, LLC v. Cesarz*, No. 16-163 (filed Aug. 1, 2016); *Nat'l Rest. Ass'n v. U.S. Dep't of Labor*, No. 16-920 (filed Jan. 19, 2017). But the Court denied both of those petitions on June 25, 2018. Accordingly, while the Court could choose to reconsider *Chevron* in any of numerous pending or future cases, this is currently the only pending case in which the Court has an opportunity to review the Ninth Circuit's improper interpretation of *Chevron*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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JULY 2018