No. 19-221

In the

Supreme Court of the United States

MICHELLE VALENT,

Petitioner,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL SECURITY,

Respondent.

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

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE, REASON FOUNDATION, AND COMMITTEE FOR JUSTICE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Petitioner Michelle Valent performed unpaid volunteer work for her brother's veterans organization while receiving disability benefits under Title II of the Social Security Act. The Commissioner of Social Security punished Ms. Valent's failure to report this work with $126,210 in monetary sanctions. The Commissioner acted under his authority to sanction persons who fail to disclose facts that they "know[] or should know" are "material to the determination of any initial or continuing right to" disability benefits. 42 U.S.C. § 1320a8(a)(1)(C). The Commissioner concluded that Ms. Valent should have known that her work activity was "material" to her continuing right to receive disability benefits, even though the Act forbade the Commissioner from using Ms. Valent's "work activity . . . as evidence that" she was "no longer disabled." *Id.* § 421(m)(1)(B).

By a divided vote, the Sixth Circuit affirmed, deferring to the Commissioner's interpretation of the Act under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

The questions presented are:

1. Whether the Court should overrule *Chevron.*

2. Whether *Chevron* requires courts to defer to an agency's resolution of a conflict between statutory provisions.

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that the authority to "declare what the law is" is vested in the judicial branch of government and the law making power is vested in the legislative branch. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Kisor v. Wilke*, 139 S.Ct. 2400 (2019); *Gundy v. United States*, 139 S.Ct. 2116 (2019); *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015); *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225 (2015).

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commit-

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[1] All parties consented to and were given notice of the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

ment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional or legal issues.

Founded in 2002, the Committee for Justice (CFJ) is a nonprofit, nonpartisan legal and policy organization dedicated to promoting the rule of law, preserving the constitutional limits on government power, and educating government officials and the American public about the proper role of the judiciary. CFJ is concerned that the *Chevron* deference exemplified by the decision below undermines the constitutional separation of powers both by shifting the duty to engage in statutory interpretation from the judiciary to executive agencies and by encouraging those agencies' encroachment on Congress's legislative authority. CFJ believes that this court should limit the *Chevron* doctrine or overrule it entirely in order to preserve the Constitution's separation of powers.

SUMMARY OF ARGUMENT

Under the *Chevron* deference doctrine, courts must use the normal rules of statutory construction to determine the meaning of a congressional enactment. In the event that court finds the meaning of the statute ambiguous even after employing these tools of construction, the courts have indulged in a presumption that Congress intended the agency to fill in the details to resolve the ambiguity. In practice, however, courts seem to search for an ambiguity rather than the meaning of the statute. Once any type of ambiguity is identified, many lower courts consider their role concluded and the entire matter is handed over to the executive agency to "fill in the gaps" or, in some cases, to create substantive meaning where none had previously existed.

Keeping in mind that Congress clearly indicated an intent for the courts to determine legal questions like the meaning of laws (5 U.S.C. § 706; *Kisor v. Wilkie*, 139 S.Ct. at 2432 (Gorsuch, concurring in the judgment), this Court should take this case to resolve the question of what tools the lower courts must employ in a search for the meaning of a statute. Further, the Court should resolve whether the lower courts are tasked with the job of finding ambiguity or finding meaning.

The Court should also grant review to revisit the concept of deference and the scope of deference granted to an executive agency. The power to determine the meaning of a law is vested in the judiciary. Judicial deference raises questions of separation of powers – especially where it results in authorizing an agency to formulate law, interpret law, and enforce that law.

Finally, the Court should grant the petition in this case to determine when the ambiguity is so profound that deference to agency interpretation results in the delegation of law-making power to the executive, or delegation of judicial power to interpret to that executive agency.

REASONS WHY REVIEW SHOULD BE GRANTED

I. Certiorari Should Be Granted to Reiterate that at *Chevron* Step One, Courts Must Employ All the Tools of Statutory Interpretation.

When applying Step One of *Chevron* deference, the courts have failed to consistently exhaust all the tools of statutory construction before finding ambiguity.

The Court recently clarified in *Kisor v. Wilkie* that only "after a court has resorted to all the standard tools of interpretation" can a rule be declared "genuinely ambiguous." 139 S.Ct. 2400, 2414 (2019). This same requirement for determining bona fide ambiguity should be imposed on *Chevron* Step One.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court laid out a two-step process for judicial review of statutory construction by a federal agency, where the agency is acting according to congressional delegation. 467 U.S. 837 (1984). In Step One, a court determines if "Congress has spoken directly to the precise question at issue" in its authorization of the agency to promulgate regulations. *Id.* at 842. If Congress has been clear, "that is the end of the matter." *Id.* at 842. Thus, Step One of *Chevron* deference is a search for the meaning of the statute that a federal agency administers. "[T]he court . . . must give effect to the unambiguously expressed intent of Congress," and it is to do so by "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 842–43, 843 n.9.

The Court should take the opportunity presented by this case to clarify the ramifications of its recent *Kisor v. Wilkie* decision on judicial deference in general, and on *Chevron* deference in particular. In the related context of *Auer* deference, the Court in *Kisor* delineated a "cabined" approach to judicial acquiescence, warning that "deference is not the answer to every question of interpreting an agency's rules." *Id.* at 2408, 2414. Hence, the Court instructed that "[f]irst and foremost," *Auer* deference should only be granted when "the regulation is genuinely ambiguous." *Id.* at 2415. And that determination of genuine

ambiguity "must exhaust all the 'traditional tools' of construction." *Id.* Accordingly, under *Kisor*, all tools of statutory interpretation *must* be utilized when courts attempt to discern the meaning of an agency's regulation, a requirement referred to herein as the "all tools exhausted" standard. This Court noted that this was the same approach courts must use before considering deference under *Chevron*. *Id*. As demonstrated in the decision below, however, many lower courts do not apply the "all tools exhausted" standard before deferring to the agency's legal interpretation of a statute.

A. A court's semantic approach matters.

An important nuance comes to light when examining the lower courts' application of *Chevron* Step One, namely the significance of semantic approach. A court may ask at Step One, "Does this statute contain ambiguity?" or it may ask, "Is the meaning of this statute clear?" These are *not* the same question. Although the two inquiries may appear equivalent—and may at times lead to the same answer— they reflect diametricly different approaches which necessarily influence the analysis.

If a court approaches a *Chevron* examination focused on a search for ambiguity, "however remote, slight or fanciful," ambiguity will almost always be found since "clever lawyers—and clever judges—will be capable of perceiving *some* ambiguity in any statute." *Abbott Laboratories v. Young*, 920 F.2d 984, 994, 995 (D.C. Cir. 1990) (Edwards, J., dissenting) (emphasis in original). This method of addressing *Chevron* Step One allows referee courts to quickly throw the ambiguity penalty flag and call for *Chevron* Step Two

to correct the infraction. But "advancement to *Chevron's* second step is not appropriate merely where the court stumbles across a perceptible ambiguity." *Id.* Rather, true *Chevron* adherence allows a move to Step Two only if ambiguity remains after full application of the "all tools exhausted" standard. Courts which approach Step One as a simple search for ambiguity of any size or significance are in very real danger of hasty and premature advancement to *Chevron* Step Two.

When a *Chevron* Step One analysis is launched as a search for statutory meaning, application of the "all tools exhausted" standard comes naturally. Courts are accustomed to making a rigorous inquiry of text when assessing, for example, contracts and deeds. In such inquiries, "minor ambiguities or occasional imprecision in language" call for further investigation to discern meaning. *Abbott Laboratories*, 920 F.2d at 995. Therefore, for courts to "give effect to the unambiguously expressed intent of Congress" by "employing traditional tools of statutory construction"—the directive laid out in the original *Chevron* decision—they need to approach *Chevron* Step One as a serious search for true meaning and not a hasty perusal for slight ambiguity. *See Chevron*, 467 U.S. at 842–43, 843 n.9.

B. Lower courts have faltered in applying the "all tools exhausted" standard.

The "all tools exhausted" standard is needed because lower courts have not been consistent in their application of the full statutory interpretation toolkit at *Chevron* Step One. For example, in *TransAm Trucking, Inc. v. Admin. Review Bd., United States Dep't of Labor*, 833 F.3d 1206 (10th Cir. 2016) , the

Tenth Circuit declared a statute ambiguous simply because it contained terms not expressly defined within the statute. *Id.* at 1211. The term lacking definition was a common word ("operate"), not a hypertechnical term of art, yet the court failed to consult even the most basic desktop dictionary before declaring the meaning indeterminate. In his dissent, then-Judge Gorsuch pointedly reminded the court that "there are countless cases finding a statute unambiguous after examining the dictionary." *Id.* at 1216 (Gorsuch, J., dissenting). Similarly, Justice Kavanaugh, while he was on the D.C. Circuit bench, observed variation in *Chevron* application among lower courts and noted that "judges' personal views are infecting these kinds of cases" and judges "have wildly different conceptions of whether a particular statute is clear or ambiguous." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2142, 2152 (2016).

Furthermore, an empirical study found inconsistencies in the circuit courts' application of *Chevron* in general. Data compiled by Barnett and Walker offer an overview of how circuit courts apply *Chevron* deference. Barnett & Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) (summarizing case opinions at the court of appeals level from 2003-2013). The study found the circuits differed significantly in agency-win rates when *Chevron* deference was applied, from 88.2% in the Sixth Circuit, to 72.3% in the Ninth Circuit. *Id.* at 48. Some circuits are simply more deferential. The study concluded: "The circuit-by-circuit disparity in the circuit courts' invocation of *Chevron* and agency-win rates reveals that *Chevron* may not be operating uniformly among circuits." *Id.* at 72.

The disparity in rigorous application and in application of the doctrine in general has perhaps already been noticed by the Court as it has recently warned that "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." *Kisor*, 139 U.S. at 2415 (citations omitted). Indeed, the Court has noted that sometimes "interpretation requires a taxing inquiry" and "*Chevron* is . . . not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us." *Pauley v. Beth Energy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting). This "taxing inquiry" may not be omitted on account of its onerous nature; yet, courts appear to be doing just that. "*Chevron* has presented its fair share of practical problems in its administration," but guidance by this Court instructing uniform application of the "all tools exhausted" standard among the lower courts would help clarify the level of inquiry required at *Chevron* Step One. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, (10th Cir. 2016) (Gorsuch, J., concurring).

II. This Court Should Grant Review to Determine Whether Deference Results in Violation of the Separation of Powers.

Interpretation of legal texts is a core judicial function. *Michigan v. EPA*, 135 S.Ct. 2699, 2712 (2015) (Thomas, J., concurring). In his concurring opinion in *Perez*, Justice Thomas quoted from Federalist 78 where Hamilton had argued that the judicial branch was the least dangerous because it had "'neither FORCE nor WILL.'" *Perez*, 135 S.Ct. at 1218 (Thomas, J. concurring). Deferring to an administrative agency concerning the meaning of a legislative

text, however, transfers the judicial function to a branch of government that exercises *both* FORCE *and* WILL. This combines powers of government in precisely the manner that the Founders feared.

Separation of the powers of government is a foundational principle of our constitutional system. The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. James Madison, Federalist 51, THE FEDERALIST PAPERS 318 (Charles R. Kesler and Clinton Rossiter, eds., 2003); James Madison, ,Federalist 47, THE FEDERALIST PAPERS, *supra at* 298-99 ; Alexander Hamilton, Federalist 9, THE FEDERALIST PAPERS, *supra at* 67 ; *see also* Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches; vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in this Supreme Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. James Madison, Federalist 48, THE FEDERALIST PAPERS, *supra* at 305. Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id.* Madison explained that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. *Id.*; James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 317-19; *see Mistretta v. United States*, 488 U.S. 361, 380.

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. Any attempt by any branch of government to encroach on powers of another branch, even if the other branch acquiesces in the encroachment, is void. *Chadha*, 462 U.S. at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The judicial branch, especially, is called on to enforce this essential protection of liberty. *Chadha*, 462 U.S. at 944-46. The Constitution was designed to pit ambition against ambition and power against power. James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 319; *see also* John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). When this competition of interests does not stop an encroachment, however, it is the duty of this Court to void acts that overstep

the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn v. Thompson*, 103 U.S., at 199.

The judiciary, like any other branch, must jealously guard its rightful authority. It has readily done so in the past and must always be prepared to do so in the future. *Mistretta*, 488 U.S. at 382 ("[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."). The judiciary cannot abdicate its constitutional responsibility to interpret the law. *United States v. Nixon*. 418 U.S. 683, 704 (1974) ("[T]he judicial power. . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . . Any other conclusion would be contrary to the basic concept of separation of powers.").

The power to interpret the meaning of a legal text properly belongs to the judiciary, not the agency charged with implementing the statute. *Michigan v. EPA*, 135 S.Ct. at 2712 (Thomas, J., concurring). The practice of judicial deference to the agency on the question of legal interpretation allows the agency to exercise a power vested in the judiciary. This breaches the careful structure of separation of powers embedded in the Constitution to protect individual liberty. This Court should grant review to ensure that any deference to the administrative agency in the interpretation of laws is kept within the bounds of the Constitution.

III. Judicial Deference also Implicates Non-delegation Concerns.

The Constitution vests specific types of government power in each branch of government. As discussed above, power vested in one branch cannot be exercised in another. This system makes the exercise of government power more difficult – but it does so by design. *Ass'n of American Railroads*, 135 S.Ct. at 1237 (Alito, J. concurring). But just as one branch may not usurp the power of the others, neither can any of the branches of government delegate away their vested powers. *Id*.

As noted above, the second issue that the Court should examine here is the abdication of judicial power. Simply put, the judicial power cannot be shared with other branches. *Stern v. Marshall*, 564 U.S. 462, 482-83 (2011). At its core, the judicial power must be said to include "'interpretation of the laws.'" *Perez*, 135 S.Ct. at 1217 (Thomas, J. concurring (quoting Federalist 78)). Yet, this Court's *Chevron* doctrine presumes that Congress intended to empower the agency to interpret the law rather than the courts. Just as Congress cannot delegate judicial power, so to the judiciary is prohibited from abdicating its responsibilities under the Constitution. *See* Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1193 (2016) (quoting separate commentaries by Justices Breyer and Scalia).

In addition to the concerns about agencies performing a judicial function by the courts' deference to their statutory interpretation, *Chevron* deference also assumes that Congress meant to delegate some of its law-making power to an executive agency. This Court in the past has approved such sub-delegations so long

as Congress had provided an "intelligible" principle to control the exercise of delegated law-making power by the agency. Yet *Chevron* deference doctrine makes no mention of the necessity of identifying an "intelligible principle." Indeed, almost by definition, the move to *Chevron* Step 2 after a Step 1 determination of ambiguity involves the lack of an intelligible principle.

In *J.W. Hampton*, this Court ruled that delegation does not violate the separation of powers when "Congress lays down […] an intelligible principle that guides the exercise of authority or discretion." *J.W. Hampton,* 276 U.S. 394, 406 (1928). Under this standard, Congress may delegate its legislative power to an executive agency if, and only if, there is an intelligible principle that guides the exercise of authority or discretion. *J.W. Hampton*, 276 U.S. 394 at 406. This standard, at least at its inception, appeared to have some teeth.

In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), this Court noted that the intelligible principle doctrine "cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." In *Panama*, the Court struck down a provision of the National Industrial Recovery Act that authorized the President to prohibit interstate and foreign transportation of petroleum produced that exceeded state production quotas. *Panama Refining*, 293 U.S. at 405-06. Like the law at issue here, the Act did not say how the President was to make the decision authorized by the Act. Rather, it gave "to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And

disobedience to his order is made a crime punishable by fine and imprisonment." *Id.*

Similarly, in *A.L.A. Schechter*, the Court struck down the law authorizing the President to approve "codes of fair competition" for trades and industries. The statute granted the President authority to "impose his own conditions, adding to or taking away from what is proposed as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act." *A.L.A. Schechter Poultry*, 295 U.S. at 538-39. This Court ruled that the authority conferred on the President was an unconstitutional delegation of legislative power because it delegated to the President "virtually unfettered" authority. *Id.* at 541-42.

The schemes struck down in *Panama* and *A.L.A. Schechter Poultry* are little different from the power delegations upheld by the modern Court. Sweeping delegations of power are tethered to so-called intelligible principles as vague as "the public interest," "fair and equitable," or "unduly and unnecessarily complicated." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475-76 (2001). This Court admitted in *Whitman* that it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* This abandons the Court's role, however, to enforce the structural separation of powers. *See Dept. of Trans. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment).

Justice Thomas notes this "approach runs the risk of compromising our constitutional structure." *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1215 (2015) (Thomas, J., concurring in the judgment). That

constitutional structure is one upon which we rely as a structural protection of individual liberty. *Dept. of Trans.*, 135 S.Ct. at 1237 (Alito, J., concurring).

But this deference to Congress is compounded by a further deference to the executive agency that is the beneficiary of the delegation. Exceedingly broad delegations of power (such as regulation in the "public interest") have been upheld by the Court as a means of deferring to Congress' decision on the degree of policy judgment to be left to the agency. The Court then defers to the executive agency to decide what the "public interest" happens to be in any particular situation. *See F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) ("Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference"); *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793-94 (1978). There is no pretense that the agency is implementing a law enacted by Congress. *See Dept. of Trans.*, 135 S.Ct. at 1250 (Thomas, J., concurring in the judgment). Instead, the executive is exercising legislative power delegated by Congress. Law is made by the executive, not Congress. *Id.* at 1251. The restrictions of bicameralism and present are avoided, and the constitutional scheme is simply discarded. *See id.* at 1241.

In practice, *Chevron* deference often works as a presumed delegation of congressional power – but one in which the courts spend no time ensuring is limited by an "intelligible principle." The decision below is a case in point. The court found an ambiguity in the statutory scheme because there was a split in the circuits in how to reconcile the two statutes. *Valent v. Commissioner of Social Security*, 918 F.3d 516, 530-21

(6th Cir. 2019). But the assumption that an ambiguity (if one exists) implies authority for the agency to "fill in the gaps" says nothing about whether Congress has established sufficient "intelligible principles" for the agencies to follow. *Chevron* deference brings with it a problem of whether legislative power has been delegated to the executive.

This Court should grant review to consider whether the *Chevron* doctrine creates a danger of an unconstitutional delegation of power to the executive.

CONCLUSION

A troublesome feature of *Chevron* deference is that embeds a systematic judicial bias in favor of the most powerful litigant (the federal government) and against individual litigants. It does this because the doctrine requires the courts to adopt the legal position of the government agency litigating the case. *Id*. Fairness, however, is the least of the problems with the *Chevron* deference regime. The real concern is that such deference completely upends our constitutional structure. This Court should grant review to reconsider *Chevron* deference in light of these constitutional concerns.

September 2019 Respectfully submitted,

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