No. 22-451

In The Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, INC., ET AL.,
Petitioners,
v.
GINA RAIMONDO,
SECRETARY OF COMMERCE, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia

BRIEF OF THE LONANG INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The LONANG Institute is a Michigan-based, nonprofit and nonpartisan research and educational institute. Application of the "Laws of Nature and Nature's God" to contemporary legal disputes is its specialty. The "Laws of Nature and Nature's God" constitute the legal foundation of the civil governments established State by State and of the United States. The law was specifically adopted and referenced in the Declaration of Independence of 1776. As such it legally binds the States and the national government.

The Laws of Nature are also enshrined into our laws. The law animates the principles of equality, unalienable rights including freedom of speech and expression, and limited government, only by the consent of the People. See https://lonang.com/

This same law also presupposes that any civil government, branch, Department or Agency thereof, must adhere to those principles, defend unalienable rights on an equal basis, and exercise only that power textually given. Likewise, the Law of Nature affirms that the province of a judge is to declare the law, not to make it.

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than amicus curiae, or their counsel made a monetary contribution to its preparation or submission.

As friend of the Court, the LONANG Institute offers insight into the legal implications of the Law of Nature and its integral guarantees of government by consent and enumerated powers in the context of *Chevron* deference.

This founding legal principle bars an agency from rulemaking and action based on statutory silence, ambiguities or "gap-filling." It also bars Congress from extending any policy making authority to an agency. *Chevron* deference stands in direct opposition to the principles of consent and enumeration and should be overruled. A new test empowering district court judges to rein in the totalitarian administrative state is needed.

STATEMENT OF THE CASE

The National Marine Fisheries Service ("NMFS") seeks to impose on Petitioners a requirement, ostensibly under the Magnuson Stevens Act,, 16 U.S.C § 1801 et seq. (1976) ("MSA"), that they carry, berth, and pay monitors - up to an incredible 20% of a fishing vessel's revenue - to ensure that NMFS regulations are observed. Yet, the MSA does not expressly convey such a power. The court below proceeded on the theory that statutory silence produced an ambiguity justifying agency deference under the standard in Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984) ("*Chevron*").

This court granted *certiorari* on two questions, 1. Whether, under a proper application of *Chevron*, the MSA implicitly grants the NMFS the power to

force domestic vessels to pay the salaries of the monitors they must carry. 2. Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

Amicus addresses question number 2 in its brief, articulating why overruling *Chevron* is the only result consistent with the principles of government by consent and enumerated powers laid down in the laws of nature and of nature's God.

SUMMARY OF ARGUMENT

As noted, the court below proceeded on the theory that statutory silence produced an ambiguity justifying agency deference. Statutory silence, however, creates no ambiguity whatsoever. Under the fundamental doctrines of government by consent and enumerated powers, silence necessarily and unequivocally means no authority has been granted. Therefore, rather than deference, the district court should have reviewed the requirement employing Article III judicial review and struck it down as: 1) beyond any constitutional grant of authority, 2) an impermissible policy determination contrary to law, and 3) incompatible with the principles of government by consent and enumerated powers laid down in the laws of nature and of nature's God.

To be truly meaningful in the context of judicial review of agency rules or actions, Article III judicial

review of an agency rule should encompass each of the following tests:

1. Does the agency's proposed or existing action or rulemaking fall within the limited and enumerated powers of Congress in Article I, section 8? If not, the proposed action is struck down as contrary to the principle of government by consent and enumerated powers.

2. Does the underlying statute relied upon by the agency embody a rule of law, or a statement of policy? If the statute does not command what is right or prohibit what is wrong, then it is a statement of policy and as such the proposed action is struck down as contrary to the law of nature defining law as a rule of conduct.

3. Does the agency's rulemaking fall within a clear and unambiguous statutory grant of jurisdiction? If the statutory granted enumeration is not both clear and unambiguous, then the proposed action or rulemaking is struck down. Gap filling, ambiguous and silent statutory provisos afford an agency no action or rulemaking authority.

4. Does the agency's proposed or existing action or rulemaking violate any other constitutional provision, limitation, or enumerated constitutional right? Constitutionally prohibitory clauses are typically in Article I, section 9, cl. 8, and the Bill of Rights among others.

Because district courts have deferred to agency actions for almost 40 years and the tools of judicial review have become rusty though lack of use, this court must provide Congress, the courts, and federal agencies with new and sharper tools to determine the

legality of agency action and rulemaking. The bloated administrative state cannot be restrained by simply reverting to pre-*Chevron* tools of judicial review. A clear test is needed.

ARGUMENT

I. THE CONSTITUTIONAL DOCTRINE OF LIMITED AND ENUMERATED POWERS APPLIES BOTH TO CONGRESS AND THE ADMINISTRATIVE AGENCY.

A. Agency Power is Only Delegated Power.

Of Congressional power, Chief Justice John Marshall wrote:

> This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.[2]

The doctrine of enumerated powers means that unless the people have spoken in the written text of the Constitution, no authority has been granted to

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[2] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

Congress to enact legislation based on an unenumerated power. In other words, silence in the Constitution means no authority has been granted. In no case may such silence be construed as ambiguity. Silence simply means "no." It means Congress is without jurisdiction.

Yet, the Constitutional and controlling doctrine of enumerated powers is not limited to construction of the Constitution only. It also applies downstream as far as governmental delegations of authority go, for all agencies, departments and commissions of the federal government can only delegate (at most) what they have been given. At no level of civil government can the limitation imposed by the doctrine of enumerated powers be exceeded.

Thus, when Congress by statute delegates authority to a federal agency, that statutory delegation is as much under the umbrella of enumerated powers as any provision of the Constitution. Alexander Hamilton observed this obvious principle in Federalist No. 78.

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. ... To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that

> men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.[3]

B. No Department Or Agency Is Superior To Congress.

If it be an affront to the Constitution for the representatives of the people (i.e., Congress) to claim a superior right compared to the people as voiced in the Constitution, so too it is unconstitutional for mere employees of a federal Department or agency who are not representatives of the people, to claim superiority over Congress, from whom they derive all their authority. Every federal department or agency is simply a delegate of a delegate. Every federal department or agency is simply an agent of an agent. Every federal department or agency is a delegate and agent of Congress and Congress itself is a delegate or agent of the people who created it and granted it limited and enumerated powers.

The people did not create Congress and grant it undefined powers. Nor did the people empower Congress to act from silence or intentional ambiguity. Article I, section 8 both limited and enumerated the powers of Congress. If such powers are not granted therein, they do not lawfully exist for Congress to exercise. So too, every department and agency may not exercise any power Congress itself does not possess. In the instant case, a federal agency such as

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[3] The Federalist, No. 78, by Alexander Hamilton (1788).

the NMFS is a mere delegee of a delegee, in whom no implied, resulting or inherent powers exist.

The Supreme Court has also declared categorically that the legislative power of Congress cannot be delegated. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). See also Marshall Field v. Clark, 143 U.S. 649, 692 (1892). On prior occasions it has recognized, as Chief Justice John Marshall did in 1825, that, although Congress may not delegate powers that are strictly and exclusively legislative, it may delegate powers which [it] may rightfully exercise itself. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41 (1825).

C. Agency "Expertise" Creates No Delegated Power.

If it is suggested that the NMFS, or any federal agency, consists of people who are 'experts' and are therefore best suited to determine the proper scope of their own powers, Alexander Hamilton anticipated that argument, and answered it, saying:

> this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body

> between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.[4]

So too, with any federal agency, no federal statute can be supposed to enable agency experts, to substitute their will for that of Congress or fill in the blanks that an enabling congressional statute creating the agency omitted. It is far more rational to suppose that the courts would interpose themselves between that agency and the people, acting as a check and a limitation on federal employees and experts who, no more or less than anyone else, but inevitably tending to follow human nature, will always construe their own expertise and powers expansively rather than restrictively.

D. Congressional Silence Is No Basis For Agency Action.

Which brings us to the point of an application and review of the principles of judicial review and deference as announced in *Chevron*.

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the

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[4] Id.

> unambiguously expressed intent of Congress.[5]

Amicus agrees that the foregoing test should be applied, but not merely the foregoing test. Even if Congress has spoken directly to the precise question at issue that does not end the matter, additional judicial review is required. Yet, the narrow question before the court in both *Chevron* and the current case, is that Congress has not directly spoken, or its intent is not clear.

Digging deeper into *Chevron* itself, and ostensibly to avoid "simply impos[ing] its own construction of the statute,"[6] the *Chevron* court reasoned that if a statute is "silent or ambiguous with respect to the specific issue,"[7] it would defer to an agency's construction of the statute if it is "permissible" or "reasonable," that is, not "arbitrary, capricious, or manifestly contrary to the statute."[8] Here is a clear articulation of the court's failed deference test, a test which tramples down the enumerated powers doctrine and concedes judicial review in the face of silence.[9]

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[5] Chevron U.S.A. v. NRDC, 467 U.S. 837, at 42-43 (1984).
[6] Id., at 843.
[7] Id.
[8] Id. at 843-44.
[9] New York v. United States Department of Health and Human Services, 414 F.Supp.3d 475 (2019), is a typical example of the failed test in action holding that if Congress was not clear, meaning the statute was silent or ambiguous with respect to the specific issue, then a district court continues to step two, where the question for the court is whether the federal agency's answer is based on a permissible construction of the statute. This case

Right in the midst of this discussion, the Court provides a further attack on the doctrine of enumerated powers. It states: "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[10]

Let us reinterpret. In other words, if Congress has explicitly left a gap in the statute, that is, it has intentionally said nothing, or better yet, it has intentionally kept silent, then that is to be understood as an express delegation. It is at this point that the *Chevron* court made an egregious error warranting reversal.

An "express delegation," by definition, requires that Congress must have said something. To be silent is the opposite of saying something. To be silent can never be construed as an "express" anything. The doctrine that textual silence equals a grant of authority has no place in administrative law. Such muddled reasoning cannot stand. Not only does it assume that plain language is to be understood as meaning the opposite of what the words actually mean, but it also defies logic, and completely shreds

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is a typical application of *Chevron* and an all-to-common example of casting aside the enumerated powers doctrine and conceding judicial review in the face of ambiguity.

[10] Id.

the doctrine of enumerated powers with respect to federal statutes.

This is precisely the type of arbitrary power that *Chevron* empowers an agency to exercise. But that is not all it is done. In the process, *Chevron* has rendered the federal courts "aiders and abettors" after the fact, inviting and directing them to stand by the side of the rulemaking road while federal departments, commissions, and agencies array themselves beyond any meaningful legal restraint.

E. A Rule of Reasonableness Is No Rule At All.

Nor is it a question of reasonableness, for reasonableness is in the eye of the beholder. Carrying and berthing a federal observer is perfectly reasonable to Respondents, but they are not the ones trying to run a business. Just the presence of the observer and the space allotted to them onboard is a great imposition to the Petitioners. Imposing an unfunded liability to the extent of 20% of the revenue from each haul does not cost the regulators a dime, so to them it is reasonable. But to Petitioners, that significant of a dent in revenue can break a business and is not reasonable at all. Let the regulators be put under the same financial burden at the behest of someone else and see if they think it is reasonable.

Most certainly it is the function of the judiciary to determine what is the proper extent of Respondents' regulatory authority. But not for the purpose of constantly enabling an expansive

government or enabling regulators to expand their powers and self-importance. Rather, the job of the judiciary is to be an intermediate body between the people and federal agencies, in order, among other things, to keep the latter within the limits assigned to their authority. The regulators don't need protection - the people do. For the foregoing reasons, the *Chevron* doctrine of deference should be overruled.

II. A CLEAR LEGAL TEST WHICH DISTRICT COURTS SHOULD APPLY TO AGENCY ACTION IS REQUIRED.

A. The "Rule of Lenity" Provides A Standard For All Cases.

If not deference, then what? This brings us to the rule of lenity, under which "penal statutes are to be construed strictly." FCC v. Am. Broad. Co., 347 U.S. 284, 296 (1954). The United States Sixth Circuit Court of Appeals recently held in Hardin v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 65 F.4th 895 (6th Cir. 2023) and found that:

> when *Chevron* deference is not warranted and standard principles of statutory interpretation 'fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the criminal defendant's] favor.' United States v. Granderson, 511 U.S. 39, 54 (1994). 'In sum, it is not enough to conclude that a criminal statute should

> cover a particular act. The statute must clearly and unambiguously cover the act.' Cargill v. Garland, 57 F.4th 447, 473 (5th Cir. 2023) (en banc) (Ho, J., concurring) (emphases in original). Id. at 901.

The narrow and superior rule this Court might adopt in lieu of deference is that "the statute must clearly and unambiguously cover the act" whether or not it is criminal in nature.

But while overruling *Chevron* will restore the judiciary to its rightful constitutional authority, even if it adopts a "rule of lenity" form of judicial review to apply to all agency actions (not simply those involving criminal conduct), it will not solve larger abuses associated with underlying constitutional deficiencies -- that agencies like Congress are wholly creatures of the legal instruments that created them and must itself respect those firm outer boundaries of its jurisdiction.

B. Justice Gorsuch's Three Prong Test in *Gundy* Should Be Considered.

If the rule of lenity will not suffice, then what other options are there? In his historic dissent in Gundy v. United States, 204 L. Ed. 2d 522, 139 S. Ct. 2116, 2136–37 (2019), Justice Gorsuch laid out a three prong test as an alternative to Justice Alito's "intelligible principles" standard. Justice Gorsuch's alternative three-prong approach would focus on (1) whether Congress made key policy decisions just

leaving the executive to "fill up the details," (2) whether Congress announced a rule of conduct subject to executive fact-finding, and/or (3) whether Congress assigned tasks to the executive that already fall within the scope of executive power.

This approach pays careful attention to Chief Justice Marshall's opinion and insight in Wayman v. Southard, 23 U.S. 1, (10 Wheat) (1825). Writing for the Court, Chief Justice Marshall distinguished between those "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details." *Wayman,* 10 Wheat. at 43. The theme is that Congress must set forth standards "sufficiently definite and precise to enable Congress, the courts and the public to ascertain" whether Congress's guidance has been followed. *See* Yakus v. United States, 321 U.S. 414, 426, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

In addition to the forgoing prong, Justice Gorsuch identified two other prongs. "Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding . . . and [t]hird, Congress may assign the executive and judicial branches certain non-legislative responsibilities." Id. at 2136–37.

Adoption of a test which looks to whether Congress made key policy decisions just leaving the executive to "fill up the details," is a step in the right

direction. But it does not seem like a comprehensive enough test to either guide lower courts or put the administrative state on notice that rulemaking is not a pretext for imposing administrative policy despite whatever Congress may say. Even with the second and third prong, more precision and focus is needed.

C. The Law Of Nature Of Delegated Powers Requires Judicial Review Of The Congressional Delegation Itself.

That leaves us with a return to the Laws of Nature and of Nature's God, precisely where the Declaration of Independence and nation began. The law of nature supplies key elements that are needed to restrain the administrative behemoth. The law of nature of delegated power holds that every human being is endowed by their Creator with certain unalienable rights, that to secure these rights, governments are instituted by them deriving their just powers from the consent of the governed.[11] This is the law of nature—that every civil government derives its "just Powers from the Consent of the Governed."

Unjust powers, on the other hand, are derived from the government's own will. Unjust powers are simply declared by the government. In the case of the national government, unjust powers are invoked, concocted, or simply declared by its branches, departments and agencies. The Code of Federal

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[11] See Declaration of Independence (1776).

Regulations is littered with unjust powers – powers self-proclaimed from silence and contrived ambiguity.

This Court is bound by the law of nature as much as the executive and legislative branches. In the American experience this law is laid down in the Declaration of Independence. The Constitution of the United States is an expression of the people exercising their right and power to lay the foundations of the national government on such principles, define and organize its powers in such form as they have Constitutionally embodied. The branches may only exercise those just powers explicitly given. Every federal department, agency and commission is likewise bound by the same limitations.

Any test adopted by this court must incorporate the law of nature respecting government by consent and enumerated powers. Thus, if the agency rule or action cannot trace its pedigree back to an explicit grant of Constitutional *and* statutory power, then that rule or action is void.[12]

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[12] A perfect example of judicial review of a Congressional delegation is found in VanDerStok v. Garland, 625 F. Supp. 3d 570, 578 (N.D. Tex. 2022), opinion clarified, No. 4:22-CV-00691-O, 2022 WL 6081194 (N.D. Tex. Sept. 26, 2022), Memorandum Opinion & Order On Parties' Cross-Motions For Summary Judgment & Motions To Intervene, June 30, 2023. "Because Congress did not define 'frame or receiver,' the words receive their ordinary meaning. See 18 U.S.C § 921 (defining other terms); Kaluza, 780 F.3d at 659. Contrary to Defendants' assertion, in an interpretive dispute over a statutory term's meaning, the Court does not simply 'leav[e] the precise definition of that term to the discretion and expertise of ATF.' Nor is the

D. The Congressional Delegation Must Be A Delegation Of Law, Not Policy, To Survive Judicial Scrutiny.

Judicial review of an Agency rule or action requires a court to also determine if the underlying enabling statute relied upon by the agency embodies a rule of law, or a statement of policy. If policy, then the proposed action is contrary to the law of nature which defines law as a rule of conduct.

A majority of the Court approaches the law/policy issues by generically affirming that a delegation is permissible if Congress has made clear to the delegee "the general policy" he must pursue and the "boundaries of [his] authority." American Power & Light v. SEC, 329 U.S. 90, 104–105, 67 S.Ct. 133, 91 L.Ed. 103 (1946) (interpreting a statutory delegation, in light of its "purpose[,] factual background[, and] context," to provide sufficiently "definite" standards). But according to the Court, those standards are not demanding. The Court has asserted it "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." By contrast, the court has over and over upheld even very broad delegations. See

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Court bound by the agency's definition of an unambiguous statutory term, even if the ATF has 'long provided regulations defining . . . 'frame or receiver.'" p. 25.

Gundy v. United States, 588 U.S. ---, 139 S. Ct. 2116, 2129, 204 L. Ed. 2d 522, (2019).

Amicus submit this standard is no standard at all. Congressional statues delegating authority to an agency to implement policy options at its discretion or based on its expertise or any other rationale, ought to have no legal force because they are not a delegation of lawmaking power at all. Delegation of policy options to an Agency or Department are beyond congressional power as Congress acts solely by lawmaking. If Congress prefers one policy over another, then those choices ought to be embodied into law by Congress, not vested in the discretion of an unelected bureaucracy. But if Congress is on the fence between two or more competing policies, simply delegating the choice of policy options to the agency is neither an act of law nor constitutionally permitted.

Congress cannot delegate policy authority to an agency. That is not an enumerated power. If the statue delegates a statement of policy or extends policy choices, then the agency has no authority to carry that policy into effect because Congress itself, as a constitutionally defined lawmaking body, cannot lawfully delegate policy authority to an agency.

We have abandoned a true definition of law and lawmaking itself. At the time that the United States Constitution was adopted, political statesmen and legal scholars alike agreed with Sir William Blackstone that a law, was defined as a "rule of

conduct … commanding what is right and prohibiting what is wrong."[13]

This definition of law – that it must be a rule – was repeated by Justice Hugo Black in his opinion in the famous steel seizure case when he found that a Presidential order was, in fact, a law and therefore beyond the President's executive power:

> The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress – it directs that a Presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed . . . .[14]

As attorney and professor Herbert W. Titus observed in the context of Congressional delegation of authority to the Federal Communications Commission:

> If a statute merely proclaims a policy, such as, licenses are to be issued in the 'public interest, convenience, or necessity,' then it is not a rule of conduct

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[13] 1 W. Blackstone, Commentaries on the Laws of England 44 (1765).

[14] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952).

> because it does not, standing alone, prohibit any wrong action or command any right action. Rather it is only a statement of policy.

He concluded that "the Federal Communications Commission, which was created to administer that policy, becomes, in fact, the one that makes the law." In such an instance not only does it make the law, it also enforces the law. Not only does it enforce the law, it also enjoys the power to adjudicate the law. "Therefore, it [also] violates the principle that no government institution ought to exercise legislative, executive, and judicial power."[15]

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[15] See Herbert W. Titus, The Law of Our Land, Journal of Christian Jurisprudence, Vol. 6 (1986). For nearly thirty years Herbert W. Titus taught constitutional law at four different A.B.A.-approved law schools. From 1986 to 1993 he was the founding dean of the law school at Regent University. https://lonang.com/commentaries/conlaw/declaration/the-law-of-our-land/

See also Kerry L. Morgan, The Unalienable Right of Government by Consent and the Independent Agency Journal of Christian Jurisprudence, Vol. 8 (1990). "The constitutional consent of the people to organize the federal government into three separate, independent and equal branches cannot be altered by the government itself. The government, in this case Congress, may not combine three different types of civil power in a fourth type of branch" called a federal agency. https://lonang.com/commentaries/conlaw/separation-of-powers/government-consent-independent-agency/

Clearly neither the majority's policy/law test in *Grundy* or *American Power* pose any meaningful standard of review. What is needed is a return to the core concept that unless a statute states a rule of conduct as the operative agency power, prohibiting wrong action or commanding right action, then it fails the test of a legal delegation. In such cases, the statue constitutes no delegation at all and is void.[16]

E. A New Four-Prong Test Is Needed For District Courts When Reviewing Agency Action.

Though the rule of lenity and Justice Gorsuch's three-pronged test are meritorious in their own right, Amicus nevertheless proposes a comprehensive test for District courts to apply when reviewing agency rulemaking or action. The test is as follows.

1. Does the agency's proposed or existing action or rulemaking fall within the limited and enumerated powers of Congress in Article I, section 8? If not, the proposed action is struck down as contrary to the principle of government by consent.

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[16] Chambless Enterprises, LLC v. Redfield, 508 F.Supp.3d 101 (2020) is another example of a district court wrongly affirming a Congressional delegation of policy to the Secretary of Health and Human Services (HHS) and director of the Centers for Disease Control and Prevention (CDC), to take reasonably necessary measures to prevent the spread of disease. This is a delegation of a policy not law and as such fails the delegation of law test.

2. Does the underlying statute relied upon by the agency embody a rule of law, or a statement of policy? If the statute does not command what is right or prohibit what is wrong, then it is a statement of policy and as such the proposed action is struck down as contrary to the law of nature defining law as a rule of conduct.

3. Does the agency's rulemaking fall within a clear and unambiguous statutory grant of jurisdiction? If the statutory grant or enumeration is not both clear and unambiguous, then the proposed action or rulemaking is struck down. Gap filling, ambiguous and silent statutory provisos afford an agency no action or rulemaking authority.

4. Does the agency's proposed or existing action or rulemaking violate any other constitutional provision, limitation, or enumerated constitutional right? If so, the proposed action is struck down because it contravenes the Constitution itself.

CONCLUSION

Amicus urges this court to take aggressive steps to limit the dangerous and unconstitutional growth of federal departments, agencies, and commissions, by providing district courts with meaningful tools of judicial review. After many years of *Chevron,* the lower courts' agency review tools have become rusty from non-use. Judges have too easily invoked deference in lieu of judicial review or even analysis. It is too late in the day to overrule *Chevron* and just leave either a piecemeal approach or mere

reliance on the majority's meaningless test in *Gundy,* for judges to sort out.

If the Constitution is to survive predictable and endless administrative assaults on freedom by unelected bureaucrats, federal judges must be prescribed specific tools to review agency mischief and strike down every rule that has no statutory delegation authorizing it, is in the nature of a policy delegation instead of law, or tramples down the Constitutional rights of the People. To revive freedom, government by consent and its doctrine of limited and enumerated power must again be accorded its supreme position in the pantheon of American and Constitutional jurisprudence.

Respectfully submitted,

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