No. 22-451

IN THE
# Supreme Court of the United States

LOPER BRIGHT ENTERPRISES; *ET AL.*,

*PETITIONERS*,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce; *ET AL.*,

*RESPONDENTS.*

*On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

## BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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## INTEREST OF THE *AMICUS CURIAE*[1]

Since 1968, the National Right to Work Legal Defense Foundation, Inc., has been the nation's leading litigation advocate for employee free choice concerning unions. Foundation staff attorneys have represented workers in almost all of the compulsory union fee cases considered by this Court, including *Janus v. AFSCME Council 31,* 138 S. Ct. 2448 (2018), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), and *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012).

Foundation staff attorneys frequently represent private-sector employees whose right to refrain from associating with a union depends upon the National Labor Relations Board's ("NLRB" or "Board") proper implementation of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 *et seq.* In cases involving the rights of employees subject to the NLRA, United States Circuit Courts of Appeals often apply the deference mandated by *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), in reviewing NLRB decisions on appeal.[2] For that reason, the fate of the

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[1] Under Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission.

[2] *See*, *e.g.*, *UFCW, Local 1036 v. NLRB*, 307 F.3d 760, 766 (9th Cir. 2002) (*en banc*) ("Courts are required to defer to the NLRB on statutory interpretation under *Chevron*"); *IAM v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998) (finding that Board decisions concerning compulsory union fee requirements are "subject to the very light review authorized by *Chevron*").

*Chevron* doctrine is important to the Foundation's mission.

## SUMMARY OF ARGUMENT

*Chevron* should be overruled because by requiring courts to defer to agencies on legal interpretations, *Chevron* requires the judiciary to shirk its duty to say what the law is. "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). This directive inevitably results in requiring Article III to uphold agency interpretations of statutes that those courts believe to be wrong. This approach violates the separation of powers by significantly shifting judicial power from Article III courts to the Executive branch. The approach also violates due process guarantees by giving the Executive branch discretion to control the meaning of laws that branch uses to regulate or prosecute private parties.

These infirmities are particularly acute in the context of Federal labor laws generally, and especially as to individual employee rights against labor unions imposing forced unionism requirements. They therefore constitute particularly persuasive evidence that *Chevron*'s problems far outweigh any benefits, and that its formulation must be overruled.

## ARGUMENT

### I. *Chevron* Violates Separation of Powers and Due Process Guarantees Because It Grants Judicial Power to the Executive Branch.

1. If there is a "fixed star" in the constellation of this Court's jurisprudence regarding "[t]he judicial Power," Const., Art. III, § 1, it lies in the familiar words of Chief Justice John Marshall: "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This duty requires a court to "exercise its independent judgment in interpreting and expounding upon the laws." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118-19 (2015), (Thomas, J., concurring); *see also* Philip Hamburger, *Law and Judicial Duty* 316-26 (2008).

*Chevron* does violence to this principle by requiring courts to shirk their duty under Article III and defer to an executive agency's judgment on questions of law. It is unsurprising, then, that scholars have described *Chevron* deference as "counter-*Marbury*," Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2074-75 (1990). Under *Chevron*, courts do not "say what the law is" if that law is ambiguous. Courts instead surrender to executive agencies their constitutional authority to construe the law. *See*, *e.g.*, *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087 (9th Cir. 2013) ("If the [agency's] construction is reasonable, we must accept that construction under *Chevron*, even if we believe the agency's reading is not the best statutory interpretation").

This violates separation of powers because the Constitution, Art. III, § 1, vests "[t]he judicial Power of the United States" in the Federal courts alone. The Framers believed that "the general liberty of the people can never be endangered ... so long as the judiciary remains truly distinct from both the legislative and executive." *The Federalist* No. 78, at 421 (Michael L. Chadwick ed., 1987) (A. Hamilton). This is a principle long recognized and otherwise jealously guarded by this Court. *See*, *e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 730 (1986); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that the Constitution "diffuses power the better to secure liberty"). Thus, neither Congress nor the courts have constitutional authority to transfer the indefeasible "judicial Power" to agencies. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation,* 128 Yale L.J. 908 (2017). The Constitution simply does not contemplate such "undifferentiated governmental power." *Dep't of Transp. v. Ass'n of American Railroads,* 575 U.S. 43, 67 (2015) (Thomas, J., concurring in judgment) (internal quotation marks omitted).

This abandonment of judicial duty has real effects. *Inter alia*, it undermines our legal system's political legitimacy.[3] Frequently, *Chevron* forces judges to

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[3] *See* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1236 (2016) ("[I]ndependent judgment of unbiased judges is the basis of the government's political legitimacy. In all cases, and especially those concerning the power of government or the rights of the people, it is essential that the people have confidence that the judges are not biased toward government, but are exercising independent judgment") (footnote omitted).

uphold interpretations they believe to be wrong.[4] And sometimes courts are required to uphold interpretations they have previously rejected.[5]

2. *Chevron* also violates basic due process principles. As then-Judge Gorsuch observed, "[t]ransferring 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 [F]ramers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); *see also* Hamburger, *Chevron* Bias, 84 Geo. Wash. L. Rev. at 1239 ("Precedents such as *Chevron* ... require judges to give up their role as judges and ... violate the due process of law").

The Framers constructed the Constitution to safeguard the people's liberty by separating governmental powers. This design emerged from "centuries of political thought and experiences," *Perez*, 575 U.S. at 116 (Thomas, J., concurring) (citation omitted), that taught the Framers that delegating to separate federal branches' limited, specified, and distinct powers would protect the republic and its

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[4] *See*, *e.g.*, *Kennedy v. Butler Fin. Sols., LLC*, 2009 WL 290471 *4 (N.D. Ill. Feb. 4, 2009) ("The FTC's regulation strikes the Court as reasonable, though perhaps not the best interpretation of the law").

[5] *See*, *e.g.*, *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1147-52 (10th Cir. 2011) (holding that under *Chevron*, the court is obligated to discard its earlier statutory interpretation and defer to the agency's).

citizens better than any enumeration of rights ever could. "[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *NLRB v. Noel Canning*, 573 U.S. 513, 570-71 (2014) (Scalia, J., concurring). "Indeed, so convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." *Id*. (cleaned up). The abandonment of separation of powers, the Framers knew, would lead directly to the "loss of due process and individual rights." Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1538 (1991).

So it has been in the aftermath of *Chevron,* which gives the Executive branch an unfair advantage against persons it targets for regulation or prosecution. Under *Chevron*, courts must uphold the executive branch's interpretation of a law so long as it is "reasonable," which often is defined generously. Often the executive agency that receives this deference is a litigant in a case against a private party. This arrangement gives the executive agencies a marked advantage over private parties. *See* Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. at 1250 ("[J]udges defer to administrative interpretation, thus often engaging in systematic bias for the government and against other parties").

At bottom, *Chevron* is incompatible with the Constitution's fundamental structural safeguards. *Chevron* is "contrary to the roles assigned to the separate branches of government" and "require[s] [judges] at times to lay aside fairness and [their] own best judgment and instead bow to the nation's most

powerful litigant, the government, for no reason other than that it is the government." *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment).

This Court has twice vindicated the separation of powers in recent Terms, punctuating the last day of the last two Terms with ringing endorsements of the separation of powers. *Biden v. Nebraska*, 600 U.S. ___, 143 S.Ct. 2355, 2373 (2023) (striking down the President's encroachment upon authority of Congress against the former's effort to expend $400 billion for student loan "forgiveness" without congressional appropriation; "this is a case about one branch of government arrogating to itself power belonging to another");[6] *see also West Virginia v. Envtl. Protec. Agency*, 142 S.Ct. 2587, 2609 (2022) (striking down agency grasp for power unauthorized by Congress struck down on "both separation of powers principles and a practical understanding of legislative intent"; refusing to "'read into ambiguous statutory text' the delegation claimed to be lurking there").

So it should be here. *Chevron* should be overruled.

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[6] Just a day earlier, Justice Sotomayor (joined by Justice Jackson) praised the Court for declining to overrule and replace a prior statutory interpretation because it promoted the separation of powers, as Congress had declined to intervene to correct or modify the Court's prior statutory interpretation. *Groff v. DeJoy*, 600 U.S. ___, 143 S.Ct. 2279, 2297 (2023) (Sotomayor, J., concurring).

## II. The NLRB Demonstrates Why There Is No Practical Basis for *Chevron* Deference.

1. One of the primary rationales for *Chevron* deference is the supposition that agency "experts" are better equipped than courts to determine the meaning of laws. *See Chevron*, 467 U.S. at 865. The NLRB illustrates why that supposition is untenable. The rulemaking and adjudications in which the NLRB engages are not based on any sort of technical "expertise"—the meanings of labor statute provisions are not scientific questions—but rather are based on the agency's political makeup. Frequently, its adjudications are not applications of scientific "expertise." They are exercises in political will.

As two federal judges have highlighted, in many cases, "the [agency's] claim to expertise is entirely fraudulent," and often is "a euphemism for policy judgments." Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & Liberty 475, 482 (2016) (footnote omitted).

The NLRB is a notorious example, in which "the partisan majority ... routinely displaces the previous majority's psychological assertions about what employer tactics do or do not coerce workers when they are deciding whether to vote for union representation." Yet that claim to expertise is often "a euphemism for policy judgments." *Id.* at 482-83. Although some agency staff might have varying levels of technical expertise, agency heads are political actors. Indeed, "the agency's ultimate decisions are made by the experts' political masters, who have sufficient discretion that they can make decisions based upon their own policy

preferences, fearing neither that the expert staff will not support them nor that a court will undo their handiwork." *Id.*

That the NLRB and other agencies often adopt statutory interpretations for political and ideological reasons, not because a dispassionate reading of the law led to that interpretation, is reason alone for courts to decline to defer to such politicized judgments. The courts should not stamp these agency decisions as "the law" simply becuse the political actors at the agency made the decision. There is no reason for courts to assume, as *Chevron* commands, that the political appointees' interpretations of an ambiguous statute is the objectively best interpretation of that statute, as opposed to merely the interpretation the agency's political heads believe will best satisfy their policy objectives.

This is demonstrated by the Board's decisions and arguments reviewed by this Court. For example, just eight years after *Chevron*, in *Lechmere, Inc. v. NLRB*, this Court noted that the Board was "entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers." 502 U.S. 527, 536 (1992), *citing NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987), and *Chevron, supra.* There, the Board argued under its decision in *Jean Country*, 291 N.L.R.B. 11 (1988), that an employer committed an unfair labor practice when it barred nonemployee union organizers from its property, and that its construction of the NLRA was entitled to deference by this Court. 502 U.S. at 536.

This Court rejected the argument that it should defer to the Board's effort to expand its construction of § 7 rights, 29 U.S.C. § 157 ("to self-organization, to form, join, or assist labor organizations"), to nonemployee union organizers, noting that "By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers ... to whom § 7 applies only derivatively." 502 U.S. at 532-33. Moreover, the Board's argument leapfrogged over consideration of whether its decision was "consistent with our past interpretation of § 7," and the requirement that "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Id.* at 536-37, *citing Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

In short, while arguably a candidate for *Chevron* deference, the Court rejected application of that method of analysis in *Lechmere*.[7]

Likewise, just four years after *Chevron*, this Court considered *Communications Workers v. Beck*, 487 U.S. 735 (1988), holding that "§ 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on

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[7] Justice White (joined by Justice Blackmun only on this reason) found that *Chevron* deference justified affirming the Board's determination.

labor-management issues.'" *Id.*, at 762-63, *citing Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984).

*Beck* is notable because the nonunion employees prevailed in that case notwithstanding the *amicus* participation of the Solicitor General, *joined on his brief by the General Counsel and numerous Board officials*, 1987 WL 881074 (Appellate Brief), opposing the nonmembers' statutory arguments. *Id.* at 21-28. Citing *Chevron*, the dissenters would have deferred to the Board's statutory construction. *Beck*, 487 U.S. at 769 n.6 (Blackmun, J., concurring and dissenting in part) (joined by Justices O'Connor and Scalia), *citing Chevron*, 467 U.S. at 842-43 n.9 (one among three reasons). Nevertheless, this construction was rejected by the majority. *Id.* at 762-63.

That the NLRB and other agencies often adopt statutory interpretations for political and ideological reasons—and not because a dispassionate reading of the law and congressional intent led to that interpretation—is reason alone for courts not to defer to such politicized judgments. The courts should not stamp agency decisions as "the law" simply because the political actors at the agency made the decision. There is no reason for courts to assume, as *Chevron* commands, that the political appointees' interpretation of an ambiguous (or, as here, silent) statute should control its interpretation, as opposed to merely constituting the interpretation the agencies' political heads believe will best satisfy their policy objectives, one among many options to be independently adjudicated according to the normal rules governing judicial review and statutory interpretation.

Hamilton stressed the importance of the judiciary in maintaining the law. He explained "that inflexible and uniform adherence to the rights of the Constitution, and of individuals, [i]s indispensable in the courts of justice," *i.e.*, "a reliance that nothing would be consulted but the constitution and the laws." *See The Federalist* No. 78 (A. Hamilton) at 425. Deference to administrative agencies like the NLRB via *Chevron* violates these principles and prevents courts from serving as "an intermediate body" that interprets the law as their "proper and peculiar province." *Id.* The regulated public bears the cost of this to the benefit of the few.

But *Chevron* deference allows agencies throughout the federal government—like the NLRB— to change abruptly legal and policy positions on major issues affecting the regulated public's liberty. Executive agencies have done so not by using the statute Congress passed, or by applying a new statute passed to address experience or new conditions, and tested in the crucible of the legislative process, but by using supposedly or contrivedly ambiguous statutory language to instill and effectuate their political preferences, enacted without going through the inconvenience of the democratic processes prescribed by the Constitution. This undermines a fundamental underpinning of the rule of law and the Constitution's separation of powers, which requires that only Congress, acting through Article I, change the law. It must end.

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*Amicus* ends where we began, with the Framers' admonition that "the general liberty of the people can never be endangered ... so long as the judiciary remains truly distinct from both the legislature and Executive." *The Federalist* No. 78 at 421 (A. Hamilton). But when the courts defer to Executive agencies interpreting the laws they are to administer under *Chevron*, the opposite is true, and the path to tyranny becomes significantly circumscribed. Under *Chevron*, the courts have evaded, surrendered, or abdicated their duty "to say what the law is." *Marbury*, 5 U.S. at 177. That is not a bug in *Chevron*'s design; it is the point. The decision of the court below therefore cannot stand, and *Chevron* itself should be overruled.

## CONCLUSION

For the reasons stated above, the Court should reverse the decision below.

Respectfully submitted,

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