No. 20-1114

IN THE

Supreme Court of the United States

AMERICAN HOSPITAL ASSOCIATION ET AL.,

Petitioners,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF NEITHER PARTY

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of neither party.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

This case presents a familiar question: which branch of government is responsible for making public policy and how? *Amicus* takes no position here on any health care, fiscal, or other public policy issues implicated by this case. Instead, *Amicus* writes to highlight the critical separation of powers issues that underlie this case. Under the Constitution, it is not this Court's role to set public policy. Instead, the Constitution tasks the democratically elected, politically accountable branches—Congress and the President—with resolving policy questions through the deliberately arduous legislative process.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than amicus made any monetary contributions intended to fund the preparation or submission of this brief.

Amicus respectfully submits this brief in support of neither party because the panel majority's capacious framing of *Chevron* deference "confirms the continuing need for this Court to enforce limits on *Chevron* deference, particularly as it is applied in the D.C. Circuit, to ensure that it does not give cover to federal agencies when they supplant Congress's policy judgments with their own." Cert. Pet. 15. And "[i]f left undisturbed, the decision will inevitably exert a strong and unwarranted gravitational pull in the direction of deference to agency interpretations of law in the D.C. Circuit and beyond—exacerbating separation-of-powers concerns." Cert. Pet. 16. The panel majority's framing of *Chevron* deference "invites federal agencies to engage in creative reimagining of their statutory mandates." Pet. Reply 10.

AFPF has an interest in this case because it believes judicially-created executive-deference regimes are inconsistent with bedrock separation-of-powers principles and the text, structure, and history of the U.S. Constitution. These executive-deference doctrines—*Chevron*, *Brand X*, and the like—also wrongly place a thumb on the scale in favor of the nation's most powerful litigant (the federal government), rigging the judicial game against the American people. Due process and fairness demand that private litigants should be on equal footing with the government in disputes adjudicated in Article III courts.

SUMMARY OF ARGUMENT

In this country, all government power must flow from its proper source: We the People. Our system of government relies on the consent of the governed

memorialized in the U.S. Constitution. The People have agreed on a system of separated powers, in which the legislative, executive, and judicial branches function as checks and balances on one another, ensuring accountability and protecting liberty. The Constitution does not grant legislative or judicial powers to the Executive Branch, nor does it permit the transfer of these powers to administrative bodies. Nowhere in the Constitution does it say or even suggest the People have agreed to be ruled by unelected, politically unaccountable government "experts."

Accordingly, it should not be the case that an independent Article III court tasked with saying what the law is reflexively "defers" to Executive Branch statutory interpretations annunciated via "legislative rule." And *a fortiori* it should not be the case that an Article III court believes itself bound to defer to these Executive Branch policy decisions, often disguised as statutory interpretation, unless Congress specifically bars the agency from acting. That is the opposite of how our Constitution works, where power must be granted before it can be exercised—not presumed until prohibited.

It is black-letter law that federal agency power is derived from, and limited by, federal statutes. Article III tasks the Judiciary—not the Executive Branch—with independently interpreting federal statutes in contested cases. This reflects a key concept: the separation of powers vital to protecting our liberties. This means Congress legislates, the Executive Branch enforces the law, and the Judiciary says, once and for all, "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). If disputes arise between

private parties and federal officials charged with enforcing the law, basic principles of due process and fundamental fairness demand private parties be on equal footing with the government in federal court. Equally imperative, federal judges—who are experts in interpreting federal statutes, as they are constitutionally tasked with doing—should use, and jealously safeguard, their independent judgment as to what the law means.

But over time judicially-developed deference regimes have emerged that effectively transfer core Article III judicial powers (and core Article I legislative powers) to unelected federal bureaucrats, putting a thumb on the scale in favor of the nation's most powerful litigant—the federal government—thereby rigging the game against the American people.

These deference doctrines, including *Chevron*, are difficult, if not impossible, to square with the Constitution and the Administrative Procedure Act ("APA"), ultimately resulting in extraconstitutional power-transfers that violate bedrock separation-of-powers principles upon which our hard-won system of checks and balances was built.

The Court should squarely overrule *Chevron* here and now. For as Justice Frankfurter warned, "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions" imposed by the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring). And as Justice Gorsuch observed more recently: "Like a tower in the game of

Jenga, pull out this block or that one and the tower may seem unaffected, especially if you do it with a bit of finesse—and the lawyers who come up with the justifications for the blending of powers have plenty of that. But keep pulling out blocks, and eventually what started out as a strong and stable tower will begin to teeter." Neil Gorsuch, *A Republic, If You Can Keep It*, 73 (2019).

Chevron removed foundational blocks from our Constitution's system of checks and balances by transferring core judicial and legislative powers to the Executive. In so doing, it provided bureaucrats a powerful tool to chisel away at the separation of powers that protect liberty, as they creatively reimagine and expand their powers. If nothing else, these bureaucrats have proven to be remarkably proficient at that constitutionally dubious task.

In addition to being unconstitutional, *Chevron* is profoundly undemocratic. The real-world harms to the American people flowing from the administrative excesses it has enabled cannot be overstated. As a practical matter, *Chevron* provided the pathway for bureaucrats housed within a warren of extraconstitutional administrative bodies to enforce unpopular policies, by claiming "force of law," where no such law was ever enacted by Congress. This practice, which burdens businesses and restricts individual liberty, without fair notice of what the law prohibits or requires, should not be allowed to stand.

ARGUMENT

I. *CHEVRON* DEFERENCE VIOLATES THE SEPARATION OF POWERS AND THREATENS INDIVIDUAL LIBERTY.

A. The Separation of Powers and Our Constitution's Promise of an Independent Judiciary Protect Individual Liberty.

"Our founding document begins by declaring that 'We the People . . . ordain and establish this Constitution.' At the time, that was a radical claim, an assertion that sovereignty belongs not to a person or institution or class but to the whole of the people."[2] *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). Toward that end, "the Constitution proceeded to vest the authority to exercise different aspects of the people's sovereign power in distinct entities." *Id.* (Gorsuch, J., dissenting). Subject to bicameralism and presentment, Article I of the Constitution vests "[a]ll legislative Powers herein granted" in Congress—not the courts and not the Executive branch. U.S. Const. Art. I, § 1; *see Gundy*, 139 S. Ct. at 2123 (confirming "assignment of power to Congress is a bar on its further delegation"); *Loving v. United States*, 517 U.S.

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[2] Notably, "the Constitution vests lawmaking power in the most politically accountable branch of our government—the Congress of the United States." *Texas v. Rettig*, 993 F.3d 408, 408 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). And for good reason: "If legislators misused this power, the people could respond, and respond swiftly." *Tiger Lily, LLC v. HUD*, No. 21-5256, 2021 U.S. App. LEXIS 21906, at *14 (6th Cir. July 23, 2021) (Thapar, J., concurring).

748, 758 (1996) ("[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."). Article II tasks the Executive Branch with faithfully executing the law. U.S. Const. Art. II, § 3. Article III "vests the judicial power exclusively in Article III courts, not administrative agencies." *Michigan v. EPA*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring).

Under the separation of powers, Congress legislates, the Executive Branch enforces the law, and the Judiciary says, once and for all, "what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. "That is the equilibrium the Constitution demands. And when one branch impermissibly delegates its powers to another, that balance is broken." *Tiger Lily, LLC v. HUD*, No. 21-5256, 2021 U.S. App. LEXIS 21906, at *14 (6th Cir. July 23, 2021) (Thapar, J., concurring).

"Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. . . . The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). To be sure, "[t]he separation of powers and its role in protecting individual liberty and the rule of law can sound pretty abstract. . . . After all, the value of the separation of powers isn't always as obvious as the value of other sorts of constitutional protections." *A Republic* at 41, 45. But it bears reminding that "[w]hen the separation of powers goes ignored, those who suffer first may be the unpopular and least among us[.] . . . But they are not likely to be the last." *Id.* at 46. For as James Madison famously wrote, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may

justly be pronounced the very definition of tyranny." The Federalist No. 47. And as Alexander Hamilton wisely cautioned: "liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." The Federalist No. 78.

This separation "might seem inconvenient and inefficient to those who wish to maximize government's coercive power." *See Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing *en banc*). But "[t]o the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring in the judgment) (cleaned up). The Founders knew that "unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). "The Founders expected that the Federal Government's powers would remain separated—and the people's liberty secure—only if the branches could check each other. The Judiciary's checking power is its authority to apply the law in cases or controversies properly before it." *Baldwin v. United States*, 140 S. Ct. 690, 692 (2020) (Thomas, J., dissenting from denial of *certiorari*).

Accordingly, "[w]hen a party properly brings a case or controversy to an Article III court, that court is called upon to exercise the 'judicial Power of the United States,' . . . [which] requires a court to exercise

its [independent judgment] in interpreting and expounding upon the laws." *Perez*, 575 U.S. at 119 (Thomas, J., concurring in the judgment). Under the separation of powers, as understood by the Founders of our Constitution, "[t]he interpretation of the laws is the proper and peculiar province of the courts. . . . It therefore belongs to them to ascertain . . . the meaning of any act proceeding from the legislative body." The Federalist No. 78. As Justice Story explained:

> [I]t is not to be forgotten, that ours is a government of laws, and not of men; and that the Judicial Department has imposed upon it, by the Constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it.

United States v. Dickson, 40 U.S. 141, 162 (1841).

At least, that is how it is supposed to work.

B. *Chevron* Deference Threatens Individual Liberty By Transferring Legislative and Judicial Powers to the Executive.

By contrast, *Chevron* reflects judge-made law of the same vintage that gave us the "Walkman," VCRs, Nintendo, and the Soviet Union's boycott of the Olympics. "In 1984, a bare quorum of six Justices decided *Chevron*." *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of certiorari). *Chevron* requires that "if a court finds a statute's

meaning ambiguous it may not resolve the ambiguity using the traditional tools of statutory interpretation that judges have employed for centuries. Instead, the court must defer to an executive agency's decision about the law's meaning." *A Republic* at 75. Accordingly, "*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions." *Baldwin,* 140 S. Ct. at 691 (Thomas, J., dissenting from the denial of certiorari); *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 n.114 (2019) (Gorsuch, J., concurring in the judgment); *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1482 (2020) (Thomas, J., dissenting) (*Chevron* deference "likely conflicts with the Vesting Clauses of the Constitution").

"In every case where an Article III court defers to the Executive's interpretation of a statute under *Chevron*, our constitutional separation of powers is surely disordered." *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 524 (6th Cir. 2019) (Kethledge, J., dissenting). That is exactly what happened here. The focus of the panel majority's *Chevron* analysis was not even on whether the text showed Congress granted the agency the powers it claimed but precisely the opposite: whether there was conclusive proof that Congress "directly foreclose[d]" the agency's claimed authority.[3] *See* Pet. App. 19a. This is backwards and

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[3] The panel majority noted that HHS did not invoke *Chevron* "expressly until a post-argument letter submitted to the Court," but it said an "agency cannot forfeit Chevron's applicability." Pet. App. 18a. That too was error. *See HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021)

"suggests an abdication of the Judiciary's proper role in interpreting federal statutes." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

"[W]henever a federal court declares a statute ambiguous and then hands over to an executive agency the power to say what the statute means, the Executive exercises a power that the Constitution has assigned to a different branch." *Valent*, 918 F.3d at 525 (Kethledge, J., dissenting). At the least, Article III courts should not transfer core judicial powers to federal bureaucrats lightly, "[f]or just as the separation of powers safeguards individual liberty, so too the consolidation of power in the Executive plainly threatens it." *Id.* But that is what *Chevron* does. "*Chevron* compels judges to abdicate the judicial power without constitutional sanction." *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of certiorari). And that is what was done here.

1. *Chevron* Stacks the Deck Against the American People.

"[J]udges owe the people who come before them nothing less than a fair contest, where every party has an equal chance to persuade the court of its interpretation of the law's demands." *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment). *Chevron* breaks Article III's promise of an independent, neutral judicial decisionmaker, as "[a] court must . . . [defer to the agency] even when the

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("[T]he government is not invoking *Chevron*. We therefore decline to consider whether any deference might be due its regulation." (cleaned up)).

agency's decision is influenced by politics, and even if the agency later changes its position in response to a new election or political pressure." *A Republic* at 75.

2. *Chevron* Transfers Legislative Powers to Unelected Executive Officials.

On the front end, *Chevron* transfers Congress's lawmaking powers to Executive agents on the constitutionally dubious theory that Congress may sub-delegate its legislative duties to another branch of government.[4] "In reality," as Justice Thomas has observed, "agencies 'interpreting' ambiguous statutes typically are not engaged in acts of interpretation at all. Instead, as *Chevron* itself acknowledged, they are engaged in the formulation of policy." *Michigan v. EPA*, 576 U.S. at 762 (Thomas, J., concurring) (cleaned up).

More specifically, under *Chevron*, the theory claims that when Congress drafts "ambiguous" statutes, it implicitly transfers to Executive agents the authority to make generally applicable (and sometimes retroactive) rules with the force of law; "and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress." *Id.* (Thomas, J., concurring). It is challenging to see how this is a sound

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[4] "The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints." *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring).

theory of statutory interpretation. Or why these Executive agents should be allowed to set public policy. "Not only is *Chevron*'s purpose seemingly at odds with the separation of legislative and executive functions, its effect appears to be as well." *Gutierrez-Brizuela*, 834 F.3d at 1154 (Gorsuch, J., concurring). *Chevron*'s theoretical underpinnings (doctrinally complicated as they are) are counterintuitive because "[i]n a democracy, the power to make the law rests with those chosen by the people."[5] *King v. Burwell*, 576 U.S. 473, 498 (2015); *see* U.S. Const. Art. I, § 1.

3. *Chevron* Transfers Judicial Authority to Unelected Executive Officials.

On the back end, *Chevron* permits executive agencies "to swallow huge amounts of core judicial" power. *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). *Chevron* "forc[es] . . . [judges] to abandon what they believe is the best reading of an ambiguous statute in favor of an agency's construction. It thus wrests from Courts the ultimate interpretative authority to say what the law is and hands it over to the Executive." *Michigan v. EPA*, 576 U.S. at 761 (Thomas, J., concurring) (cleaned up). Put differently, "*Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with

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[5] "The modern administrative state illustrates what happens when we ignore the Constitution: Congress passes problems to the executive branch and then engages in finger-pointing for any problems that might result. The bureaucracy triumphs—while democracy suffers." *Rettig*, 993 F.3d at 409 (Ho, J., dissenting from denial of rehearing *en banc*).

enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive)." *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring).

Needless to say, "[w]hen it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal. . . . It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."[6] *City of Arlington v. FCC*, 569 U.S. 290, 314–15 (2013) (Roberts, C.J., dissenting) (citation omitted). "This apparent abdication by the Judiciary and usurpation by the Executive is not a harmless transfer of power. . . . Perhaps worst of all, *Chevron* deference undermines the ability of the Judiciary to perform its checking function on the other branches." *Baldwin*, 140 S. Ct. at 691–92 (Thomas, J., dissenting from denial of *certiorari*). While the judiciary may have limited power to force Congress to do its job, at the minimum, the Court may and should jealously guard its own authority against encroachment by the Executive.

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[6] As Justice Jackson explained, "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

4. *Chevron* and Its Constitutionally Challenged Companion, *Brand* X, Are At Odds with Due Process.

Further still, the *Chevron* doctrine harms individual rights. "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." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). "By transferring more and more power from the legislature and judiciary to the executive, we alter piece by piece the framers' work and risk the underlying values it was designed to serve." *A Republic* at 73. Those values include "fair notice; protection for the inherent value of every individual person, including especially dissenting voices; democratic accountability; and the rule of law as administered by independent judges and juries." *Id. Chevron* plainly threatens all of them.

Chevron creates a regime where the People "are charged with an awareness of *Chevron*; [then] required to guess whether the statute will be declared 'ambiguous'. . . ; and [then] required to guess (again) whether an agency's interpretation will be deemed 'reasonable.'" *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). "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[.]" *Id.* (Gorsuch, J., concurring).

Making matters worse, under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), a wayward cousin and malignant outgrowth of *Chevron*, "there are indeed some occasions when a federal bureaucracy can effectively overrule a judicial decision." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167 (10th Cir. 2015) (Gorsuch, J.). *Brand X* obligates courts to defer to "reasonable" agency interpretations of ambiguous statutes supposedly reflecting quasi-legislative agency policy choices, "even when doing so means . . . [courts] must overrule [their] . . . own preexisting and governing statutory interpretation" precedent. *Id.* This means businesses and individuals cannot rely on case law interpreting statutes to plan their affairs.

Like *Chevron*, "*Brand X* appears to be inconsistent with the Constitution[.]" *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of certiorari); *see also Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113–14 (1948) (Jackson, J.) ("It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."). And as Justice Thomas has suggested, skepticism of *Brand X*'s constitutional pedigree should "begin[] at its foundation—*Chevron* deference." *Baldwin,* 140 S. Ct. at 691. (Thomas, J., dissenting from denial of certiorari).

As a leading scholar of statutory interpretation explained: "*Brand X* is arguably the capstone of the Court's *Chevron* evolution: it works a wholesale transfer of statutory interpretation authority from federal courts to agencies." Abbe R. Gluck, *What 30*

Years of Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 Fordham L. Rev. 607, 625 (2014). That sums it up well. After all, "[i]f you accept *Chevron*'s claim that legislative ambiguity represents a license to executive agencies to render authoritative judgments about what a statute means, *Brand X*'s rule requiring courts to overturn their own contrary judgments does seem to follow pretty naturally." *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring). As the capstone of the *Chevron* experiment, "*Brand X* has taken this Court to the precipice of administrative absolutism," and "it poignantly lays bare the flaws . . . [of] executive-deference jurisprudence." *Baldwin*, 140 S. Ct. at 695.

The *Chevron*/*Brand X* framework thus stands in serious tension with the basic due process requirement of fair notice. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). And "[r]etroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Deference doctrines like *Chevron* and *Brand X* undermine this fundamental principle. *See Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).[7]

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[7] "The retroactivity of *Chevron* deference adds another paradox. An agency's authoritative interpretation of a statute attracts deference even in cases about transactions that occurred before the issuance of the interpretation. But how would this rule work

II. *CHEVRON* VIOLATES THE APA.

In addition to violating the Constitution in multifarious ways, *Chevron* is contrary to the APA's plain language. As Justice Scalia observed: "There is some question whether *Chevron* was faithful to the text of the . . . [APA], which it did not even bother to cite." *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). For good reason. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) (explaining that *Chevron* is "an atextual invention by courts").

The APA tasks federal courts with independently saying what the law is without placing a thumb on the scale for the government: "To the extent necessary to decision and when presented, the reviewing *court shall decide all relevant questions of law*, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (emphasis added).

Thus, as then-Judge Gorsuch observed:

> *Chevron*'s inference about hidden congressional intentions seems belied by the intentions Congress has made textually manifest. . . . [N]ot a word can be found here about delegating legislative authority to agencies. On this record, how can anyone fairly say that

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in a criminal setting given the Ex Post Facto Clause?" *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring).

> Congress 'intended' for courts to abdicate their statutory duty under § 706 and instead 'intended' to delegate away its legislative power to executive agencies? The fact is, *Chevron*'s claim about legislative intentions is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that.

Gutierrez-Brizuela, 834 F.3d at 1153 (Gorsuch, J., concurring).[8] *See also Baldwin*, 140 S. Ct. at 692 (Thomas, J., dissenting from denial of certiorari) ("Even if *Chevron* raised no constitutional concerns, these statutory arguments give rise to serious doubts about *Chevron*'s legitimacy.").

CONCLUSION

This Court should overrule *Chevron*.

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[8] As Professor Aditya Bamzai explained: "[T]he proposition that *Chevron* has a basis in traditional interpretive methodology, the views of the Framers of the . . . Constitution, or section 706 of the [APA] should be abandoned—that proposition is a fiction." Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 1001 (2017).

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