No. 19-402

IN THE

Supreme Court of the United States

HOWARD L. BALDWIN ET UX.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. In fulfillment of its mission, NELF has filed numerous amicus briefs in this Court in a great variety of cases.

NELF appears as an amicus in the present case for two reasons.

First, this case involves the interpretation of a statute that in effect governs economic relations between citizens and government, specifically taxpayers and the IRS. As this case demonstrates, even rules regulating communications with the government can greatly affect the property rights of private individuals.

Second, the case deals with the respective role of courts and agencies in determining the meaning of

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and that no person or entity, other than NELF, made any monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2(a), the parties received ten-day notice of NELF's intention to file this brief. Also, on September 25, 2019 Petitioners filed a consent to the filing of amicus briefs in support of either or neither party, and by letter dated October 16, 2019, the Solicitor General granted his consent to the filing of this brief.

statutes enacted by Congress. In this crossroads where all three branches of government meet, NELF is concerned that some courts fail to perform their *Chevron* due diligence before turning over to an executive agency the task of statutory interpretation. Often they do so because they misunderstand how they should interpret a statute that appears "silent" on a legal issue, as happened here. The Court should grant certiorari in order to correct the decision in this case and provide much-needed guidance to lower courts.[2]

SUMMARY OF THE ARGUMENT

When applying to a statute *Chevron's* touchstone deference formula of "silent or ambiguous," courts, such as the appeals court here, have difficulty in discerning the different kinds of silence encountered in statutes. In particular, they err by viewing silence as equivalent to ambiguity even when the silence on a legal issue means that the statute is drafted against established common law background principles governing that question.

When a common law rule is a background presumption, as here, it forms the starting point of legal analysis, and no statutory language is required to create it. Hence, the silence of 26 U.S.C. § 7502 is not ambiguous about the common law mailbox rule;

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[2] NELF shares Petitioners' concerns about the holding of *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), which is the subject of the first question they present. NELF addresses only the second question because NELF has greater familiarity with it, having briefed a similar question twice before in other courts. For that reason, NELF believes that its views on the second question may be of greater assistance to the Court.

rather, it signals that the well-established background common law applies. There is no language in the statute that expresses a clear and evident intent specifically to abrogate the common law. These considerations settle the issue. There is nothing for the agency to do.

When the question is whether a statute abrogates the common law, this Court has set a high standard for what language may be permissibly read to make such a fundamental alteration in the law. So, even if § 7502 were ambiguous, as the appeals court believed, the ambiguity would by definition fall below the standard of "clear and explicit" language that "speak[s] directly to the question addressed by the common law" required to abrogate the common law, and common law rule would remain in effect. Again, there would be no role for the agency.

ARGUMENT

I. As This Case And Others Illustrate, Silence Poses A Special Problem For Courts Conducting A *Chevron* Analysis.

Chevron deference is premised on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740–741 (1996).

As this Court has also stated, however, courts remain the "final authority on issues of statutory construction," and therefore it is their threshold responsibility to assess whether an agency is entitled

to *Chevron* deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984).

In order to make this assessment, courts apply a two-step test. Only if, in step one, the court finds the statute to be "silent or ambiguous" on the relevant legal issue may the court proceed to step two and evaluate whether the agency's construction of the statute is a permissible one entitled to deference. *Id.* at 843.

Unfortunately, the simple and unqualified formulation of "silent or ambiguous" fails to distinguish the different kinds of silence met with in statutes. Put simply, "[s]ilence . . . does not necessarily connote ambiguity." *Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018). *See*, e.g., *Morissette v. United States*, 342 U.S. 246, 262 (1952) (Congressional "silence" in act adopting common law concept of crime may warrant "quite contrary inferences" than "same silence" without common law background). "[S]ometimes," as this Court has itself acknowledged, "statutory silence, when viewed in context, is best interpreted as *limiting* agency discretion." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (emphasis added).

The Court's cautionary reminder is perhaps too little heeded. *See Arangure*, 911 F.3d at 338 (circuit courts find ambiguity at *Chevron's* step one 70% of time) (citing Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 33–34 (2017)).

The problem of what silence means seems to be felt especially acutely when the silence signals that the common law tacitly supplies a legal

presumption, as here. Like all presumptions, a common law presumption — one of the most important "traditional tools of statutory construction" — exists in statutory silence. *See id.* at 343 ("Indeed, it is hard to imagine an interpretive 'tool' more 'traditional' than the centuries-old common-law presumption."). Such silence has served to confuse more than one court.

For example, in *Woods v. START Treatment & Recovery Centers, Inc.*, the Second Circuit sought to answer the question of whether the standard of causation for a retaliation claim brought under the Family and Medical Leave Act is but-for causation or "negative factor" causation. 864 F.3d 158, 165 (2d Cir. 2017). Finding the statute silent on the issue, the court turned for instruction to this Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). In *Nassar*, this Court had ruled that the "default" causation for federal statutory torts is the "background" common law rule of but-for causation, "absent an indication to the contrary in the statute itself." *Id.* at 346-47.

The Second Circuit readily acknowledged that *Nassar* requires a clear indication of causation only when a statute *departs* from the but-for common law. Nonetheless, it concluded that *Chevron's* touchstone phrase "silent or ambiguous" must mean that the FMLA statute's silence is the equivalent of ambiguity and requires deference to the "negative factor" standard set out in the Department of Labor's regulation. *See Woods*, 864 F.3d at 168. *See also Chase v. U.S. Postal Service*, 149 F. Supp. 3d 195 (D. Mass. 2016) (on same issue, rejecting common law but-for rule because "merely a default," hence statute's silence is "ambiguous" and requires deference to agency).

In a word, in the hands of some courts, the very silence that is an inherent feature of an established background common law principle becomes a valid reason to ignore the principle. Confusion of that magnitude requires correction by this Court.

II. Because Section 7502 Is Silent But Not Ambiguous, The Appeals Court Should Not Have Ruled That The Common Law Was Abrogated.

In this case the Ninth Circuit also took its cue from *Chevron's* phrase "silent or ambiguous" and erroneously discerned ambiguity in the silence of 26 U.S.C. § 7502.

First it found § 7502 "conspicuously silent" concerning whether it "displaces" the common law mailbox rule. In part the lower court grounded its deference to the IRS regulation on the supposed ambiguity created by this silence.

In doing so, that court failed to appreciate that an established background common law principle exists as a legal presumption that may not be read out of a statute unless Congress's intention to oust it is made clear. *See*, e.g., *United States v. Texas,* 507 U.S. 529, 534 (1993) ("longstanding" principle that statutes invading common law read with "*presumption* favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident"; to abrogate common-law, statute must speak directly to common law question) (quotation marks and citations omitted; emphasis added); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008) (accord); *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35 (1983) ("well-established principle of

statutory construction" that common law not deemed repealed unless language "clear and explicit for this purpose") (quotation marks and citation omitted); *Astoria Fed. Sav. & Loan Ass'n. v. Solimino*, 501 U.S. 104, 108 (1991) ("where a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident") (quotation marks and citation omitted). *See also* 2B *Sutherland Statutory Construction* § 56:3 ("Public policy rooted in the common law appears to have extraordinary strength and vitality, as evidenced by the tenacity with which courts adhere to the rule that statutes in derogation of the common law are strictly construed.") (7th ed.).

Hence, the common law background presumption cannot be overcome here by the silence, conspicuous or otherwise, that the appeals court found in § 7502 on that question. Rather, when the appeals court admitted that it found only "conspicuous[] silen[ce]," it ipso facto ruled that it did *not* find the "clear" intent and "evident" purpose required to abrogate the common law mailbox rule. At that point, its work was done. It should have ruled that the common law rule retained its vitality, as it had ruled in *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992) (finding no "clear intent" to "displace" common law rule and so declining to read statute as excluding rule). Instead, this time it purported to discern ambiguity in a silence in which there was none.

For, once again, not all silences are the same; not all silences are empty; when a statutory silence is informed by a background common law principle or practice, as has been the case here, mere silence does

not create an ambiguity. *See Staples v. United States*, 511 U.S. 600, 619 & n.17 (1994) (against background common law favoring mens rea requirement, statute's silence does not suggest Congress dispensed with mens rea nor does it create ambiguity); *New Jersey v. New York*, 523 U.S. 767, 783 & n. 6 (1998) (in 1832 compact between states, silence did not create ambiguity as to which state would own filled land added to Ellis Island where "the silence of the Compact was on the subject of settled [common] law governing avulsion, which the parties' silence showed no intent to modify")[3]; *Id.* at 813 (Breyer and Ginsburg, JJ., concurring) ("silence is not ambiguity; silence means that ordinary background law applies"); *Garrett v. United States*, 471 U.S. 773, 793 (1985) ("presumption [exists] when Congress creates two distinct offenses . . . that it intends to permit cumulative sentences, and legislative silence on this specific issue does not establish an ambiguity or rebut this presumption"); *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 631 & n.21 (2013) (when initial examination of interstate compact's silence suggested ambiguity, court turned to "other interpretive tools," including established "background notion" that states do not easily cede sovereignty, and concluded that silence meant states did not intend to grant cross-border rights).

In its 1992 decision in *Anderson*, the appeals court got it right, therefore. It understood that legal analysis *starts with the common law presumption* and then asks whether there is a "clear" and

[3] Congressionally approved interstate compacts partake of the nature of statutes. *See Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991).

"evident" textual intent to overcome it. 966 F.3d at 491. As this Court has observed of such starting points, "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except when a statutory purpose to the contrary is evident."[4] *U.S. v. Texas*, 507 U.S. at 534 (quotation marks and citation omitted). The *Anderson* court found no such clear and evident language and so correctly affirmed the common law rule.

In this case, the appeals court again found the statute "conspicuously silent" as to any intent to abrogate, but rather than rule that the common law remains in force, it mistakenly transmuted the silence into an ambiguity, which in turn became the springboard for deferring to what is, in effect, the IRS's regulatory abrogation of the common law rule. For the reasons set out above, there is no ambiguity in that silence and no justification for the deference. *See also Entergy*, 556 U.S. at 223 (silence sometimes best read as limitation on agency discretion); *Oregon Restaurant and Lodging Association v. Perez*, 843 F.3d 355, 362 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of en banc review) ("silence does not always constitute a gap an agency may fill, but often reflects Congress's decision not to regulate in a particular area at all").

In a footnote, the appeals court seemed to find additional ambiguity in another silence, i.e., § 7502's failure to affirm overtly the retention of the common law rule. The appeals court was unmindful that a

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[4] For Congress's similar expectation about the common law mailbox rule, *see* H.R. Rep. No. 90-1104, at 2354 (1968) and S. Rep. No. 90-1014, at 2373 (1968).

common law presumption exists *only* in statutory silence. So mere silence cannot be used as an argument against its existence. *See*, e.g., *Staub v. Proctor Hospital*, 562 U.S. 411, 417 (2011) ("we start from the *premise* that when Congress creates a federal tort it adopts the *background* of general tort law") (emphasis added); *Meyer v. Holley*, 537 U.S. 280, 285 (2003) ("And the Court has *assumed* that, when Congress creates a tort action, it legislates against a legal *background* of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules") (emphasis added); *Astoria*, 501 U.S. at 108 ("Congress is *understood* to legislate against a *background* of common-law adjudicatory principles") (emphasis added).

In short, when the common law has been recognized by courts as providing a background legal presumption, as with the common law mailbox rule, the question is not whether to read it *into* the statute despite "silence," but whether there is sufficiently clear and compelling warrant in the text to justify reading it *out* of the statute. The analysis begins with the presumption. The appeals court treated the presumption wrongly as a conclusion to be reached, rather than as a starting point presumed to be valid.

For all of these reasons, the appeals court was correct in 1992, but erred in 2019. In this case it pointed to no statutory language that "speak[s] directly to the question addressed by the common law," *U.S. v. Texas*, 507 U.S. at 534, and that communicates in "clear and explicit" language, *Norfolk*, 464 U.S. at 35, an "evident" intent, *Astoria*, 501 U.S. at 108, to abrogate the common law rule. Quite the opposite — the lower court freely confessed

that it found no such language in the statute, just silence. That should have ended the matter.

III. There Is No Role For "Dueling" Interpretive Rules In This Case.

In the eyes of the appeals court, so-called "dueling" interpretive rules rendered the statute all the more ambiguous and seemed to provide a further reason to defer to the IRS. The lower court erred on that point too.

This case does not present an ordinary problem of making sense of an "ambiguous" statute. When the specific question is whether a statute abrogates an established common law, a distinctive interpretive problem is posed. For the specific purpose of answering that question, this Court has set a high standard for what language may be permissibly read to make such a fundamental alteration in the law. *See supra* pp. 6-7. As discussed earlier, § 7502's silence plainly falls below the mark.

But even assuming that the statute's language is "ambiguous," as the appeals court believed, such "ambiguous" language would, *by definition*, also fall below the standard of "clear and explicit" language that "speak[s] directly to the question addressed by the common law," etc., required to make an alteration in established law. *See supra* pp. 6-7. For that reason, the ambiguity would be in itself dispositive of the question and there would be no need for further analysis.

Moreover, because common law presumptions are always "silent," one could always argue, as the IRS did, that whatever appears expressly in the statutory text is intended to constitute the entirety of permissible conduct. Such reasoning cuts far too

wide a swath, however. The circuit court's adoption of that argument imperils even the most well-entrenched common law principles, which would require a statutory saving clause to preserve them in every instance. Such an approach would profoundly alter the relationship between background common law principles and statutory law and run contrary to the well-established interpretive standards adopted by this Court. *See supra* pp. 6-11.

The appeals court should therefore have read the common law mailbox rule and the statutory rule in harmony, rather than deferring to a reading of the statute that conflicts with and supplants the common law. *See* 2B Sutherland Statutory Construction § 50:1 ("A statutory limitation capable of more than one construction is given a construction consistent with the common law.") (collecting cases); § 56:3 ("courts generally interpret a statute to conform with common-law concepts where the letter of the statute is silent about consequences analogous to situations governed by common-law principles").

CONCLUSION

For the reasons stated above, the Court should grant certiorari and address the problem of silence and common law presumptions both in the immediate context of 26 U.S.C. § 7502 and more generally, for the instruction of lower courts.

Respectfully submitted,

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