No. 18-11479

In the United States Court of Appeals for the Fifth Circuit

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; ALTAGARCIA SOCORRO HERNANDEZ; JASON CLIFFORD; DANIELLE CLIFFORD; FRANK NICHOLAS LIBRETTI; HEATHER LYNN LIBRETTI; STATE OF TEXAS; STATE OF INDIANA; STATE OF LOUISIANA, *Plaintiffs-Appellees*

v.

DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; TARA SWEENEY, IN HER OFFICIAL CAPACITY AS ACTING ASSISTANT SECRETARY OF INDIAN AFFAIRS; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Defendants-Appellants*,

and

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS, *Intervenor-Defendants-Appellants*,

and

NAVAJO NATION, *Intervenor*

Appeal from the United States District Court
for the Northern District of Texas,
Case No. 4:17-cv-00868-O, Hon. Reed O'Connor

Brief of *Amicus Curiae* New Civil Liberties Alliance in Support of the Plaintiffs-Appellees' Petition for Rehearing *En Banc*

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Case No.: 18-11479
Case Style: Chad Everet Brackeen; Jennifer Kay Brackeen; Altagarcia Socorro Hernandez; Jason Clifford; Danielle Clifford; Frank Nicholas Libretti; Heather Lynn Libretti; State of Texas; State of Indiana; State of Louisiana, Plaintiffs-Appellees v. David Bernhardt, Secretary, U.S. Department of the Interior; Tara Sweeney, in her official capacity as Acting Assistant Secretary of Indian Affairs; Bureau of Indian Affairs; United States Department of Interior; United States of America; Alex Azar, in his official capacity as Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services, Defendants-Appellants, and Cherokee Nation; Oneida Nation; Quinault Indian Nation; Morongo Band of Mission Indians, Intervenor-Defendants-Appellants, and Navajo Nation, Intervenor.

Plaintiffs-Appellees have set forth the interested parties in this case in their Petition for Rehearing *En Banc*. Pursuant to Fifth Circuit Rule 29.2, which requires a "supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief," undersigned counsel of record certifies that, in addition to the persons listed in Plaintiffs-Appellees' petition, the following have an interest in this brief, but no financial interest in this litigation. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1. *amicus curiae* New Civil Liberties Alliance states that it is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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STATEMENT OF COMPLIANCE WITH RULE 29

Amicus Curiae New Civil Liberties Alliance is a nonprofit organization devoted to defending civil liberties. As a public-interest law firm, NCLA was founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means of advocacy.

This case is particularly important to NCLA. It is disturbed that the three judges on the Fifth Circuit eschewed their fundamental duty "to say what the law is," and deferred to agency interpretations of statutes under the *Chevron* doctrine. In doing so, they departed from their duty as judges and undermined the confidence of the people in the courts.

All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to finance the preparation or submission of this brief.

ARGUMENT

"*Chevron* deference" violates the Constitution for two separate and independent reasons. First, *Chevron* requires judges to abandon their duty of independent judgment, in violation of Article III and the judicial oath. Second, *Chevron* violates the Due Process Clause by commanding judicial bias toward a litigant.

I. *CHEVRON* VIOLATES ARTICLE III BY REQUIRING JUDGES TO ABANDON THEIR DUTY OF INDEPENDENT JUDGMENT

Chevron compels judges to abandon their duty of independent judgment. Pursuant to the Constitution, the federal judiciary was established as a separate and independent branch of the federal government, and its judges were given life tenure and salary protection to shield their decision-making from the influence of the political branches.

Despite these extraordinary measures, *Chevron* commands Article III judges to abandon their independence by giving weight to an agency's opinion of what a statute means—not because of the agency's persuasiveness, but rather based solely on the brute fact that this administrative entity has addressed the interpretive question before the Court. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("'The judicial power … requires a court to exercise its independent judgment in interpreting and expounding upon the laws,' … *Chevron* deference precludes judges from exercising that judgment.") (quoting *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring)).

This abandonment of judicial responsibility has not been tolerated in any other context—and it should never be accepted by a truly independent judiciary. Even if such deference were governed by statutes that commanded deference to a truly expert body,

such as a committee of expert law professors, so long as its pronouncements were "reasonable," the Constitution's judicial independence mandate cannot be displaced. Such statutes would be declared a gross violation of Article III and a perversion of the independent judgment that the Constitution requires from the judiciary. Yet *Chevron* operates precisely the same way. It allows a non-judicial entity to usurp the powers of judicial interpretation, and then commands judges to "defer" to the legal pronouncements of a supposed "expert" body entirely external to the judiciary.

Defenders of *Chevron* have tried to avoid this problem by pretending that the underlying statute authorizes the agency to choose between a menu of "reasonable" options, thereby creating an "implied delegation" of lawmaking authority that binds subsequent judicial decision-making. *See Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). *See also* Kenneth W. Starr, *Judicial Review in the Post*-Chevron *Era*, 3 Yale J. on Reg. 283, 308–09 (1986).

From this perspective, a court that applies "*Chevron* deference" is not actually deferring to an agency's interpretation of a statute. Instead, the court interprets the statute broadly to vest the agency with discretion to choose among multiple different policies, which makes the agency's choice conclusive and binding on the courts. This notion supposedly enables "*Chevron* deference" to co-exist with the judicial duty of independent judgment, and it is often invoked to reconcile *Chevron* with § 706 of the Administrative Procedure Act and *Marbury v. Madison*'s pronouncement that "it is

emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803).

This might make some sense if a statute actually were to say that an administrative official is vested with discretion in carrying out his statutory duties. Many statutes authorize the executive to choose among various policies and forbid the courts to second-guess those determinations. *See, e.g.*, 8 U.S.C. § 1182(f) ("Whenever the President finds [a particular fact], and for such period as he shall deem necessary, [perform a specified action]."); 25 U.S.C. § 1952 ("Within *one hundred and eighty days* after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.") (emphasis added).

In these situations, there is no need to invoke *Chevron*; a court simply reads the statute and sees that it empowers the executive (8 U.S.C. § 1182(f))—or does not (25 U.S.C. § 1952)—rather than the judiciary having to decide the matter. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2410 (2018) (upholding the President's travel ban under 8 U.S.C. § 1182(f), not invoking *Chevron*, but by observing that the President's proclamation "does not exceed any textual limit on the President's authority").

Such decisions do not sacrifice the Court's duty of independent judgment, nor do they place a thumb on the scale in favor of the executive's preferred interpretation of the law. They simply interpret the statute according to the only possible meaning that it can bear. The executive decides within the parameters established in the statute, and the courts (and everyone else) must accept the executive's decision as conclusive and binding.

The only time "*Chevron* deference" comes into play is when the underlying statutory language is *ambiguous*—and *Chevron* instructs courts to treat statutory ambiguity as if it were an explicit vesting of discretionary powers in the agency that administers the statute. *See Chevron*, 467 U.S. at 844. But the notion that ambiguity itself creates an "implied delegation" of lawmaking or interpretive powers to administrative agencies is a transparent fiction, as jurists and commentators have repeatedly acknowledged.[1] An agency's authority to act must be granted by Congress, and one cannot concoct that congressional authority when there is no statutory language that empowers the agency to act in a particular manner.

The Supreme Court has tried to alleviate this problem by claiming that *Chevron* deference depends on a "congressional intent" to delegate. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). But congressional intent must be discerned most basically from Congress's statutes and its words, and in the ambiguous statutes to which *Chevron* applies, Congress does not grant agency lawmaking or interpretive power. Although Congress gives agencies rulemaking power in some of its authorizing statutes, this is precisely what it does *not* do in laws subject to *Chevron*.

So, in the end, *Chevron* is nothing more than a command that courts abandon their duty of independent judgment and assign weight to a non-judicial entity's interpretation of a statute. It is no different from an instruction that courts assign weight and defer to statutory interpretations announced by a congressional committee, a group

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[1] *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring); Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753, 759 (2014) ("Even *Chevron*'s most enthusiastic champions admit that the idea of an 'implied delegation' is a fiction.").

of expert legal scholars, or the *New York Times* editorial page. In each of these scenarios, the courts are following another entity's interpretation of a statute so long as it is "reasonable"—even if the court's own judgment would lead it to conclude that the statute means something else.

Article III not only empowers but requires independent judges to resolve only "cases" and "controversies" in their jurisdiction.[2] Article III makes no allowance for judges to abandon their duty to exercise their own independent judgment, let alone to rely upon the judgment of entities that are not judges and do not enjoy life tenure or salary protection. The constitutional offense is even greater when the courts behave this way in lockstep under the command of the Supreme Court.

To be clear, there is nothing at all wrong or constitutionally problematic about a court that considers an agency's interpretation and gives it weight according to its persuasiveness. *See, e.g.*, *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them"). An agency is entitled to have its views heard and considered by the court, just as any other litigant or amicus, and a court may and should consider the "unique insights" an agency may bring on account of its expertise and experience. *Id.* "[D]ue weight' means 'respectful, appropriate consideration to the agency's views' while the

[2] *See Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.").

court exercises its independent judgment in deciding questions of law"—due weight "is a matter of persuasion, not deference." *Id.*

Recognizing an argument's persuasive weight does not compromise a court's duty of independent judgment. But *Chevron* requires far more than respectful consideration of an agency's views; it commands that courts give weight to those views simply because the agency espouses them, and it instructs courts to subordinate their own judgments to the views preferred by the agency. The duty of independent judgment allows (indeed, requires) courts to consider an agency's views and to adopt them *when persuasive*, but it absolutely forbids a regime in which courts "defer" or give automatic weight to a non-judicial entity's interpretations of statutory language.

II. *CHEVRON* VIOLATES THE DUE PROCESS CLAUSE BY REQUIRING JUDICIAL BIAS IN FAVOR OF AGENCIES

A related and more serious problem with *Chevron* is that it requires the judiciary to display systematic bias in favor of agencies whenever they appear as litigants. It is bad enough that a court would abandon its duty of independent judgment by "deferring" to a non-judicial entity's interpretation of a statute. But for a court to abandon its independent judgment in a manner that favors an actual *litigant* before the court is an abomination. The Supreme Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Yet *Chevron* institutionalizes a regime of systematic judicial bias, by requiring courts to "defer" to agency litigants whenever a disputed question of statutory interpretation arises. Rather than exercise their own judgment about what the law is, judges under *Chevron* defer to the judgment of one of the litigants before them.

In any circumstance other than when an executive branch agency is a litigant, a judge who openly admitted that he or she accepts a plaintiff's interpretation of a statute whenever it is "reasonable"—and that he or she automatically rejects any competing interpretations that might be offered by the other party—would be impeached and removed from the bench for bias and abuse of power. Yet this is exactly what judges do whenever they apply "*Chevron* deference" in cases where an agency appears as a litigant. The government litigant wins simply by showing that its preferred interpretation of the statute is "reasonable" even if it is wrong—while the opposing litigant gets no such latitude from the court and must show that the government's view is not merely wrong but *unreasonably* so.

Judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon me," and judges are ordinarily very careful to live up to these commitments. 28 U.S.C. § 453. Nonetheless, under *Chevron*, judges who are sworn to administer justice "without respect to persons" remove the judicial blindfold and tilt the scales in favor of the government's position.

In short, no rationale can defend a practice that weights the scales in favor of a *government* litigant—the most powerful of all parties to appear before a court—and that commands systematic bias in favor of the government's preferred interpretations of federal statutes. Whenever *Chevron* is applied in a case in which the government is a party, the courts are denying due process by showing favoritism to the government's interpretation of the law. *See Tetra Tech*, 914 N.W.2d at 50 (prohibiting *Chevron* deference

in the Wisconsin state courts because its "systematic favor deprives the non-governmental party of an independent and impartial tribunal").

III. THE COURT SHOULD CALL OUT THESE CONSTITUTIONAL PROBLEMS WITH *CHEVRON* DEFERENCE NOTWITHSTANDING THE REQUIREMENTS OF *STARE DECISIS*

Chevron never considered or addressed these constitutional objections to a regime of agency deference—and neither has any subsequent Supreme Court decision. So, it cannot be said that the Supreme Court has rejected these constitutional arguments by adhering to *Chevron* for 35 years. Judicial precedents do not resolve issues or arguments that were never raised or discussed. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("Cases cannot be read as foreclosing an argument that they never dealt with."); *Hall v. Louisiana*, 884 F.3d 546, 550 (5th Cir. 2018).[3]

Stare decisis therefore presents no obstacle to a lower court's raising these constitutional issues and declaring *Chevron* deference unconstitutional. And in all events, a court's ultimate duty is to enforce the Constitution—even if that comes at the expense of Supreme Court opinions that never considered the constitutional problems with what they were doing. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

At the same, we recognize that a lower court may be reluctant to take the step of declaring a Supreme Court precedent unconstitutional, especially when the Supreme

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[3] *See also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting).

Court so often demands that lower courts treat its precedents as holy writ. *See, e.g.*, *Hutto v. Davis*, 454 U.S. 370, 374–75 (1982) (*per curiam*) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

If the Court feels obligated to follow *Chevron* notwithstanding its constitutional defects, the next best option is to write an *opinion* that flags these constitutional problems while entering a *judgment* that accords with the *status quo* deference regime. The obligations of *stare decisis* extend only to the judgment that a court enters. The opinion has no legal force and a judge is free to expound on the constitutional defects of *Chevron* while entering a judgment that adheres to it.[4] Lower court judges have written such opinions many times in response to Supreme Court decisions that they regard as lawless or unconstitutional, and it is an appropriate and respectful way to provoke reconsideration of a mistaken Supreme Court decision.[5] Amicus curiae respectfully invites the *en banc* Court to follow this course.

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[4] *See* Edward A. Hartnett, *A Matter of Judgment, Not A Matter of Opinion*, 74 N.Y.U. L. Rev. 123, 126–27 (1999) (differentiating opinions from judgments); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43, 62 (1993) ("[J]udicial opinions are simply explanations for judgments—essays written by judges explaining why they rendered the judgment they did.").

[5] *See Wilson v. Safelite Group, Inc.*, 930 F.3d 429 (6th Cir. 2019); *W. Alabama Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018); *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016).

CONCLUSION AND PRAYER

The Court should grant the Plaintiffs-Appellees' Petition for Rehearing *En Banc* because reconsideration is needed to properly resolve the weighty issues presented in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because:

- This Brief contains **2,600** words, excluding the parts of the brief exempted by FRAP 32(a)(7)(b)(iii), and within the word limit of 2,600 under FRAP 29(b)(4).

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Dated: October 8, 2019

/s/ Margaret A. Little
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