No. 19-1203

In the
Supreme Court of the United States

CHILDREN'S HOSPITAL ASSOCIATION OF TEXAS, ET AL.,
PETITIONERS

v.

ALEX M. AZAR II, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief addresses only the first question presented by the Petitioners:

1. Whether an agency may receive *Chevron* deference when it erroneously denies that its current interpretation marks a change in position.

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INTEREST OF AMICUS CURIAE

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to be tried in front of impartial judges who provide their independent judgments on the meaning of the law. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies like the U.S. Department of Health and Human Services (HHS), and even courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

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[1] All parties consented to the filing of this brief after being timely notified more than 10 days before filing. No counsel for a party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

In this instance, NCLA is particularly disturbed by the D.C. Circuit's (mis)application of *Chevron* deference, so we address our attention to the first Question Presented. Any use of deference deprives a litigant of judicial independence and due process of law. Worse, by according near-automatic deference to an agency that refused even to admit that its new rule marked a change in policy, the D.C. Circuit once again has extended the domain of *Chevron* deference well beyond limits marked out by this Court.

The court of appeals skipped Step One of *Chevron* entirely and instead determined only whether the agency's interpretation is reasonable. This step-skipping approach requires judges to eschew their fundamental duty "to say what the law is." In doing so, NCLA believes the D.C. Circuit disregarded its judicial duty, denied the children's hospitals due process of law, allowed HHS to wield unlawful administrative power, and further undermined the viability of the *Chevron* doctrine. The Court needs to police the D.C. Circuit's misuse of *Chevron*, or—better yet—recognize that *Chevron* has long surpassed its useful life and discard it.

STATEMENT OF THE CASE

In 2017, the Centers for Medicare and Medicaid Services (CMS) issued a notice-and-comment rule ("2017 Rule"), 82 Fed. Reg. 16114 (2017), that, *inter alia*, stated that payments received by a hospital from *Medicare* and *private individuals* should be subtracted from total costs in calculating the hospitals' "costs incurred" for purposes of determining their supplemental *Medicaid* adjustments from States.

The district court employed its statutory interpretation toolkit at *Chevron* Step One and vacated the 2017 Rule as inconsistent with the statute, but the D.C. Circuit reversed. To save the rule, the appellate court engaged in a particularly passive and hence pernicious form of *Chevron* analysis. Its approach misconstrued the Administrative Procedure Act (APA), 5 U.S.C. § 706, in (at least) two ways:

(1) For claims under 5 U.S.C. § 706(2)(C) that an agency is acting in excess of statutory authority, the D.C. Circuit held that if the relevant statute *expressly* grants the federal agency *some* authority to fill statutory gaps, reviewing courts should skip over *Chevron* Step One and confine themselves to deciding whether the agency interpretation is reasonable under *Chevron* Step Two, App.8a; and

(2) The D.C. Circuit further held that an agency rule that departs from a prior rule is not subject to challenge as arbitrary and capricious under 5 U.S.C. § 706(2)(A) based on the agency's failure to explain its reasons for the departure, so long as the agency adequately explains why its current rule is the best means of advancing statutory policies, App.15a.

The appeals court claimed that it derived the first conclusion from this Court's decision in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). The D.C. Circuit held that when the statute *expressly* delegates to an agency the authority to determine a particular fact (in this case, a hospital's "costs"), the statute's meaning is clear. There is, therefore, "no need to search for statutory ambiguity," and reviewing courts should confine their review to *Chevron* Step Two (whether the agency's rule is "reasonable"). App.8a. The court said that this step-skipping rule flowed from the following language in *Chevron*:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute.

App.8a–9a (quoting *Chevron*, 467 U.S. at 843–44).

The court below noted that 42 U.S.C. § 1396r-4(g)(1)(A) (Section (g)(1)(A)) expressly delegates to the HHS Secretary the authority to calculate "costs" a hospital has incurred in furnishing hospital services. App.8a. It concluded, "Because the delegation at issue here is express rather than implied, … we have no need to search for statutory ambiguity. We skip straight to asking whether the Rule is reasonable." *Id.* The court concluded that the Secretary reasonably interpreted Section (g)(1)(A) as permitting "costs" to be defined as out-of-pocket costs less payments received for Medicaid-patient care from Medicare and private individuals. App.9a–14a.

The court then stated that arbitrary-or-capricious claims arising under 5 U.S.C. § 706(2)(A) should be judged under the four factors articulated in *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). App.15a. However, the court below did not walk through each of the traditional *State Farm* factors. It instead copy-pasted a four-sentence explanation that CMS gave in its 2017 Rule, 82 Fed. Reg. at 16117, and stated: "we agree with the plaintiffs that the 2017 Rule … established different policies. But it makes no difference. CMS explained why the statute's purposes are better fulfilled by [its new] policy … . This explanation is more than sufficient to survive review under § 706(2)(A)." App.16a–17a. Therefore, the court's review under both Sections 706(2)(C) and 706(2)(A) ultimately looked no different than mere reasonableness review.

As the D.C. Circuit recognized, CMS's definition of "costs" differs sharply from the definition CMS adopted in its 2008 regulations. The court nonetheless rejected Petitioners' claim that CMS's failure to acknowledge, let alone explain, its deviation from the 2008 regulations constituted arbitrary or capricious rulemaking under hard-look review that *State Farm* requires. The court further acknowledged that the holding in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016), requires "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the previous policy." But it held that CMS satisfied the *Encino* requirement by explaining why its 2017 Rule is the best means of advancing statutory policies. App.16a–17a.

SUMMARY OF THE ARGUMENT

The parties vigorously disagree about the meaning of Section (g)(1)(A), but this case should turn chiefly on this Court's willingness to give meaning to each and every word of 5 U.S.C. § 706 and avoid exacerbating the constitutional problems that flow from not doing so.

The D.C. Circuit operated under twin premises that jettison the Constitution's hard-won protection of non-government-litigants' right to the due process of law. The Court can mitigate the constitutional problems by granting review and deciding, under the first sentence of Section 706, that federal courts should interpret federal law even-handedly, not in a manner that favors the government's interpretation.

The matter implicates far more than splits in the circuits or error correction, for the issue is no less important than the sacred duty of Article III judges to render independent and impartial judgment in all respects toward litigants who appear before them.

The *Chevron* doctrine has become a judge-made docket-clearing mechanism that has no statutory basis in the Administrative Procedure Act and is impermissible under the Fifth Amendment's Due Process Clause. Petitioners are correct that review is warranted to resolve lower-court conflicts over whether an agency action is arbitrary or capricious if the agency fails to acknowledge or explain its departure from a prior agency position.

While purporting to apply Sections 706(2)(A) and 706(2)(C), the court neglected to give meaning to the first sentence of Section 706: "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." The Court should take this opportunity to, at the very least, distance itself from yet another D.C. Circuit *Chevron*-on-steroids innovation. The Court should clarify that the first sentence of Section 706 requires courts to use all traditional tools of statutory construction to determine the meaning of statutory text. *Stare decisis* concerns should not deter the Court from doing so.

This Court should grant review for the reasons outlined in the Petition. But it should also do so to avoid proliferating the constitutional problems that the D.C. Circuit's illicit extension of *Chevron* exacerbate.

REASONS FOR GRANTING THE PETITION

Chevron deference in the hands of the D.C. Circuit has collapsed into mere reasonableness review under two separate and distinct standards of review enumerated in the APA: Sections 706(2)(C) and 706(2)(A). Such reasonableness review also ignores the first sentence of Section 706. Unmoored in this fashion from statutory text, *Chevron* deference also 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 of the Constitution. Second, *Chevron* violates the Fifth Amendment's Due Process Clause by commanding judicial bias toward a litigant.

I. MERE REASONABLENESS REVIEW UNDER *CHEVRON* ABANDONS THE COURT'S DUTY OF INDEPENDENT JUDGMENT

The Constitution requires federal judges to exercise independent judgment and refrain from exhibiting bias when interpreting the law. These are the most foundational constitutional requirements of an independent judiciary. Article III gives federal judges life tenure and salary protection to ensure that judicial pronouncements will reflect a court's independent judgment rather than the desires of the political branches. Additionally, the Due Process Clause forbids judges to display any type of bias for or against a litigant when resolving disputes. These statements of judicial duty are so axiomatic that they are seldom if ever mentioned or relied upon in legal argument—because to even suggest that a court might depart from its duty of independent judgment or display bias toward a litigant would be a scandalous insinuation.

Yet the judiciary has been flouting these foundational constitutional commands by "deferring" to agency interpretations of federal statutes. This regime of judicial "deference" is commanded in part by *Chevron*. Unfortunately, repeated citations and incantations of any legal precedent run the danger of producing uncritical and unthinking acceptance. The constitutional problems with the court-created *Chevron* regime remain as acute as ever. Indeed, "*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions." *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari).

A. Article III Requires Judicial Independence

Led astray by *Chevron*, the court below abandoned its duty of independent judgment. The Constitution established the federal judiciary as a separate and independent branch of the federal government, and it protected federal judges in their tenure and salary to shield their independent judgment from the influence of the political branches.

In contravention of those commands, *Chevron* directs Article III judges to abandon their independence by giving controlling 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 pre-

cludes 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. The Constitution's mandate of judicial independence cannot be so facilely displaced. Yet *Chevron* allows a non-judicial entity to usurp the judiciary's power of 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 from among a menu of "reasonable" options, thereby creating an implicit, or sometimes, as here, a purportedly *express* "delegation" of lawmaking authority that binds subsequent judicial decision-making. *See Chevron*, 467 U.S. at 843–44; *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 APA Section 706 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).[2]

Such an attempt at reconciliation is a fiction. In the end, *Chevron* is nothing more than a command that courts abandon their duty of independent judgment and assign controlling weight to a non-judicial entity's interpretation of a statute. "Under *Chevron* deference, courts generally must adopt an agency's interpretation of an ambiguous statute if that interpretation is 'reasonable.'" *Baldwin*, 140 S. Ct. at 690 (Thomas, J., dissenting from denial of certiorari). Whether the statute is in fact "ambiguous," however, is for the judge, not the agency, to decide. Yet *Chevron*'s circularity, as implemented by the court below, demotes the court's duty to say what the law is into whether the agency "reasonably" thought the statute was ambiguous. Such acquiescence in someone else's interpretation of a statute ignores that the "Judicial Department has imposed upon it, by the Constitution, the solemn duty to interpret the laws." *United States v. Dickson*, 40 U.S. 141, 162 (1841) (per Story, J., writing for a unanimous Court). "[I]n cases where [the court's] judgment shall differ from that of other high functionaries, [the court] is not at liberty to surrender, or to waive it." *Id.*

Article III not merely empowers but requires independent judges to resolve "cases" and "controversies" that come before them. Article III makes no allowance for judges to abandon their duty to exercise their own

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[2] *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 6 (1983) ("A statement that judicial deference is mandated to an administrative 'interpretation' of a statute is more appropriately understood as a judicial conclusion that some substantive law-making authority has been conferred upon the agency.").

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.

B. The Court Below Skipped *Chevron* Step One Instead of Using Its Interpretive Toolkit

To leave as important a question as whether the Medicaid statutes expressly delegate to HHS the authority to define "costs" as it sees fit is to abandon that Article III duty. Doing so also led the court below down the express-delegation path to total abandonment of *Chevron* Step One. Along the way, the court skipped its duty to "exhaust all the 'traditional tools' of construction." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). It found reasonable the Secretary's assumption that an express authorization to compute costs also included authorization to redefine that term. And then, it inquired only whether the Secretary's definition was "reasonable." Contrary to the court's assumption that the statute so broadly delegates authority, Congress has provided minute details regarding how supplemental Medicaid payments to hospitals are to be computed. *See, e.g.*, 42 U.S.C. §§ 1396–1396w-5. Congress has set out in detail the maximum and minimum amounts that eligible hospitals may receive. Contrary to how the Secretary has rewritten the statutory formula, *Congress* chose not to subtract payments made by Medicare and private individuals when computing Medicaid payment caps. HHS may not undo that decision.

The court also skipped the tools traditionally employed by courts in determining a statute's meaning.

And it overlooked CMS's failure even to acknowledge that it has substantially changed its statutory interpretation. Instead of evaluating the *State Farm* four factors, the court reasoned that CMS's explanation of its interpretation "is more than sufficient to survive review under § 706(2)(A)." App.17a.

This Court's directive to lower courts is to the contrary.

> The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. … Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action.

Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575–76 (2019).

An agency change in position is procedurally defective—and thus entitled to no *Chevron* deference—when it fails to explain the reasons for the change. *Encino Motorcars*, 136 S. Ct. at 2126; *State Farm*, *supra*. *Chevron* deference is particularly inappropriate where, as here, the regulated community has substantial reliance interests in maintaining the former rule. *Id.*

Moreover, reasonableness review based on an express-delegation theory is on shaky ground because the Constitution proscribes divestiture of Congress's legislative authority, especially when major policy issues such as healthcare funding are at issue. *See* Philip Hamburger, *Delegating or Divesting?*, Nw. Univ. L. Rev. Online, Forthcoming (Feb. 24, 2020)

("The Constitution *vests* legislative powers in Congress, and that body therefore cannot *divest* itself of the power that the Constitution vests in it. Thus, what are commonly understood as delegation questions turn out in reality to be a matter of vesting and divesting. What is needed, therefore, is a shift in focus from questions about delegating to concerns about divesting.").[3] These realities make it all the more important for federal courts to exercise their Article III authority to "police the boundary between" Article I and Article II. *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

Nor can such policing benefit much from the Solicitor General's recommendation in this case. That office submits the views of its clients, the respondent executive agencies and officials. It cannot be relied upon to also simultaneously present the views of Congress, which might conflict and be at odds with the views of the S.G.'s clients. Nor is a "call for the views of Congress" necessary in such matters. That is because the Court has long promoted a potent solution: exhausting all traditional tools of statutory construction to evaluate the views that Congress has already expressed in the words of the statutory scheme under review. This case, therefore, presents an attractive vehicle to address the D.C. Circuit's unwarranted extension of *Chevron*.

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

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[3] Available at https://bit.ly/2KMFWiD

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. *Id.* "'[D]ue weight' means 'respectful, appropriate consideration to the agency's views' while the 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 the D.C. Circuit's expansive view of *Chevron* deference entails 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 Article III duty of independent judgment allows 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 and controlling weight to a non-judicial entity's interpretations of statutory language—particularly when that interpretation does not accord with the court's sense of the best interpretation based on the traditional tools of statutory construction.

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

A related and equally serious problem with *Chevron* is that it requires the judiciary to display systematic bias in favor of agencies whenever they appear as litigants. *See generally* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). 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 own independent judgment in favor of the judgment of an actual *litigant* before the court is indefensible.

This 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); *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Kagan, J., concurring) (agreeing that the Constitution forbids adjudicatory proceedings that are "infected by … bias"); *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he appearance of evenhanded justice … is at the core of due process."); *Com. Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (courts "not only must be unbiased but also must avoid even the appearance of bias"); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure" that might lead a judge "not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.").

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* (particularly as employed at the D.C. Circuit) defer to the agency litigant before the court. 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*, otherwise scrupulous judges who are sworn to administer justice "without respect to persons" must remove the judicial blindfold and tilt the scales in favor of the government's legal position.

Though *Chevron* involves an institutionally imposed bias rather than personal prejudice, the resulting partiality is inescapable. *Chevron* requires judges systematically to favor an agency's statutory interpretations over those offered by opposing litigants. And lower court judges are forced to choose between vertical *stare decisis* and their duty of impartiality. *See* Canon 3(C)(1)(a), Code of Conduct for United States Judges.[4] Unless and until this Court revisits *Chevron*, lower court judges will remain in an impossible situation; it is an assault on their duty of independence, their oaths, and their ability to administer the due process of law in their courtrooms. It thus compels them to betray the core responsibilities of judicial office. Unsurprisingly, many lower-court judges, except those on the D.C. Circuit, are openly skeptical of

[4] Available at https://bit.ly/3d7uqKM

Chevron. Abbe R. Gluck & Richard Posner, *Statutory Interpretation on the Bench: A Survey of Forty-two Judges on Federal Courts of Appeal*, 131 Harv. L. Rev. 1298, 1300 (2018) ("Most of the judges we interviewed are not fans of *Chevron*, except for the judges on the D.C. Circuit, which hears the bulk of *Chevron* cases.").

In short, no rationale can defend a practice that weights the scales in favor of a *government* litigant—the most powerful of parties—and that commands systematic bias in favor of the Executive Branch's preferred interpretations of federal statutes. Whenever *Chevron* is applied in a case in which a government agency is a party, the courts are denying due process by showing favoritism to the agency'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"). Other states have joined the chorus in rejecting *Chevron*-style deference at the state level. Ariz. Rev. Stat. § 12-910(E) (amended in 2018 to forbid deferential judicial review for questions of law); *Myers v. Yamato Kogyo Co. Ltd.*, __ S.W.3d __, 2020 Ark. 135 (rejecting "great deference"; courts decide all questions of law *de novo*); *King v. Mississippi Military Dep't*, 245 So.3d 404 (Miss. 2018) (rejecting deference to agency interpretation of statutes).

The court below *thrice* deferred to the government litigant—by attaching unwarranted significance to Section (g)(1)(A)'s delegation of authority to calculate costs of furnishing hospital services, by concluding that the Secretary's redefinition of "costs" was reasonable, and by rejecting an arbitrary-or-capricious challenge (under *State Farm*) despite CMS's failure to acknowledge its changed position.

The need for this Court's review is particularly urgent. The D.C. Circuit, often viewed as having an outsized influence on administrative law, has consistently abandoned independent, impartial judicial review. *See* Kristin E. Hickman, County of Maui *and* Chevron *Waiver—Let's Not Get Carried Away*, Yale J. on Reg. (Apr. 27, 2020) (collecting D.C. Circuit cases that have experimented with *Chevron* on steroids);[5] *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 140 S. Ct. 789 (2020) (Gorsuch, J., statement respecting denial of certiorari) (calling out the D.C. Circuit for deferring under *Chevron* when the government had waived reliance on *Chevron*). The D.C. Circuit's reasonableness-review methodology cuts against the lodestar of judicial review: judges engaging in statutory construction using all the traditional tools as the first, and often the only, step in reviewing administrative-agency action. Article III of the Constitution and the first sentence of APA Section 706 mandate such rigor. The Court should grant review to resolve the conflict between the D.C. Circuit and other federal courts on the scope of *Chevron*'s domain—and to reconsider the propriety of *any* such deference.

[5] Available at https://bit.ly/3f8oO4u

III. NOTWITHSTANDING *STARE DECISIS*, CLOSELY READING APA § 706 MITIGATES *CHEVRON*'S CONSTITUTIONAL PROBLEMS

Enforcing the first sentence of APA Section 706 as written will buttress judges' duties of impartiality and independence. The D.C. Circuit's decision is symptomatic of the widespread and growing confusion among lower courts regarding *Chevron* deference. This uncertainty stems directly from this Court's on again, off again adherence to *Chevron* deference and the extent to which the doctrine supplants ordinary rules of statutory construction. Lower courts are left trying to glean whatever guidance they can from sometimes cryptic pronouncements of this Court. The D.C. Circuit's skip-*Chevron*-Step-One doctrine is one *Chevron* innovation that this Court should spurn.

Stare decisis considerations should not deter the Court from taking a closer look at *Chevron*. *Cf. Ramos v. Louisiana*, 590 U.S. __, 2020 WL 1906545, at *17–*22 (Apr. 20, 2020) (Kavanaugh, J., concurring in part) (explaining the legal doctrine of *stare decisis*). The *Chevron* case itself never considered or addressed the Article III and Due Process objections raised herein 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).[6]

This 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."). This makes particularly good sense where, as here, the Supreme Court as well as the Solicitor General have in recent years repeatedly declined to rely on *Chevron* to uphold agency interpretations. So the first and best option is to repudiate *Chevron*. Many judges have written opinions urging courts to use all available tools of statutory construction, questioning deference doctrines and the misguided delegation rationale on which they rest.[7]

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[6] *See also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (holding that when "standing was neither challenged nor discussed" in an earlier case, that case "has no precedential effect" on the issue of standing); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

[7] *See Wilson v. Safelite Group, Inc.*, 930 F.3d 429 (6th Cir. 2019); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016); *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015) (per Gorsuch, J.); *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278–283 (3d Cir. 2017) (Jordan, J., concurring but writing separately to "note my discomfort with" *Chevron* deference); *King v. Mississippi Military Dep't*, 245 So.3d at 408 (Miss. 2018);

A second option also remains available. The first sentence of APA Section 706 provides a pre-*Chevron* statutory basis for reconsidering *Chevron* if only to avoid the constitutional problems that flow from keeping it on the books. Members of this Court have written separately in recent years urging the Court to evaluate this option. *See, e.g.*, *Baldwin v. United States*, 140 S. Ct. at 692 (Thomas, J., dissenting from denial of certiorari); *Kisor v. Wilkie*, 139 S. Ct. at 2432–2437 (Gorsuch, J., dissenting, joined by Thomas, Alito, and Kavanaugh, JJ.); *City of Arlington v. FCC*, 569 U.S. at 316–317 (2013) (Roberts, C.J., dissenting, joined by Kennedy, and Alito, JJ.).

The first sentence of Section 706 is itself an express instruction from Congress to the courts. There is no reason to read Section (g)(1)(A) as countermanding that express instruction. Under Section 706, federal courts have an obligation to decide "all" legal questions, "interpret constitutional and statutory provisions," and "determine the meaning … of the terms

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In re Complaint of Rovas Against SBC Michigan, 754 N.W.2d 259, 271 (Mich. 2008); *Oregon Restaurant & Lodging Ass'n v. Perez*, 843 F.3d 355 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing *en banc*, joined by nine other Judges of the Ninth Circuit); *Arangure v. Whitaker*, 911 F.3d 333 (6th Cir. 2018) (per Thapar, J.); *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) (*en banc*) (Kozinski, J., "disagreeing with everyone" & Reinhardt, J., dissenting); *Valent v. Commissioner of Social Security*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting); *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017) (*en banc*); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*) (per Berzon, J., dissenting, joined by Pregerson, Fisher, Paez, JJ.); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., authoring the panel opinion and writing a separate concurrence); *American Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1345 (C.I.T. 2019) (Katzmann, J., *dubitante*).

of an agency action." Any doctrine of deference is incompatible with that plain statutory text. It is long past time for the Court to recognize the ways in which this "deference" has compromised the judiciary—and return to the judicial independence and unbiased judgment that our Constitution demands and the APA enunciated.

CONCLUSION

Judges should exhaust all traditional tools of construction in interpreting statutes, and they should not accord deference to views expressed by administrative agencies. Anything short of complete examination is proscribed by Article III, which imposes on federal judges the duty to independently analyze and decide cases and controversies. Thorough analysis is also necessary to implement federal judges' obligation of non-biased decisionmaking that the Due Process Clause affords to all parties. Rather than allow *Chevron* to continue to metastasize at the D.C. Circuit and elsewhere, the Court should cut it out of the body politic altogether.

This case is an optimal vehicle in which to do so. If the Court is unwilling to re-examine *Chevron* at this time, it should still clarify that *Chevron* does not work the way the D.C. Circuit employed it. By assiduously policing the misuse of *Chevron* at the D.C. Circuit (and elsewhere), the Court can at least mitigate the tremendous damage which the doctrine is doing to children's hospitals and scores of other regulated entities in the lower courts. The petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

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