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

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QUESTIONS PRESENTED

1. Should this Court overrule *National Cable & Telecommunications Ass'n v. Brand X Internet Services.*, 545 U.S. 967 (2005)?

2. What, if any, deference should a federal agency's statutory construction receive when it contradicts a court's precedent and disregards traditional tools of statutory interpretation, such as the common-law presumption canon?

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INTEREST OF *AMICUS CURIAE*[1]

The National Right to Work Legal Defense Foundation, Inc. has been the nation's leading litigation advocate for employee free choice concerning unionization since 1968. To advance this mission, Foundation staff attorneys have represented individual employees in many cases before this Court.[2]

The Foundation has an interest in the first question presented in the petition because Foundation staff attorneys currently represent hundreds of employees across the nation whose free choice to refrain from unionization and monopoly bargaining depends on the National Labor Relations Board's proper implementation of the National Labor Relations Act.

Courts have applied *Chevron*[3] deference in several cases involving the rights of individual employees under the NLRA.[4] And the NLRB has used *Chevron* deference to argue that the *Brand X* doctrine allows it to

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[1] Pursuant to Supreme Court Rule 37.3(a), both parties received timely notice of *amicus curiae*'s intent to file this brief and consented to its filing. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission.

[2] *E.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988).

[3] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[4] *See, e.g.*, *Pirlott v. NLRB*, 522 F.3d 423, 434 (D.C. Cir. 2008) ("The general chargeability issue is a matter for the Board to decide in the first instance."); *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 766 (9th Cir. 2002) (en banc) ("Courts are required to defer to the NLRB on statutory

overrule federal court precedent.[5] Circuit court judges have also advocated for applying the doctrine to NLRA cases.[6] Whether this Court should abandon the *Brand X* doctrine is therefore important to the Foundation's mission.

SUMMARY OF ARGUMENT

As Petitioners explain, *Brand X* raises serious separation of powers concerns.[7] Indeed, the doctrine adopted in *Brand X*[8]—that *Chevron* deference allows administrative agencies to overrule a federal court's, including possibly this Court's, precedent[9]—results from the illiberal, unconstitutional deference regime that pervades modern administrative law. *Amicus* writes to provide the Court with a broader context for

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interpretation under *Chevron*."); *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998).

[5] *See, e.g.*, *Miklin Enters., Inc. v. NLRB*, 861 F.3d 812, 822–23 (8th Cir. 2017) (en banc); *Palmetto Prince George Operating, LLC v. NLRB*, 841 F.3d 211, 216–17 (4th Cir. 2016).

[6] *See, e.g.*, *NLRB v. New Vista Nursing & Rehab.*, 870 F.3d 113, 136–44 (3d Cir. 2017) (Greenaway, J. concurring in part, dissenting in part); *SSC Mystic Operating Co. v. NLRB*, 801 F.3d 302, 315–19 (D.C. Cir. 2015) (Srinivasan, J., concurring).

[7] Pet. Br. 20–25.

[8] 545 U.S. at 982.

[9] It is an open question whether *Brand X* provides an executive agency the power to overrule this Court. Compare *Id.* at 1003 (Stevens, J., concurring) (suggesting an agency's opposite statutory construction "would not necessarily be applicable to a decision by this Court"), with *id.* at 1016–17 (Scalia, J., dissenting) (arguing that the decision gives agencies the power to take actions "that the Supreme Court [had] found unlawful").

why the Court should grant the petition and overrule that doctrine.

A. Like most deviations from the Constitution's original meaning, *Brand X* has secondary consequences. It circumvents the rule of law by allowing an executive branch agency to overrule a federal court precedent—no matter how long that decision has been on the books. This, in turn, destroys fundamental due process protections—i.e., reliance and fair notice. What's more, when the executive branch overrules a judicial decision under *Brand X*, it can be applied retroactively, which also undermines the rule of law.

B. Whether this Court should overrule *Brand X* is a question that has important ramifications for federal law that reach beyond this case. *Brand X* is a ubiquitous problem in administrative law. Federal agencies like the NLRB routinely use *Chevron* deference to change the meaning of federal statutes—causing serious damage to the rights and liberties of the regulated public. And more recently, the NLRB has advocated for the power under *Brand X* to overrule circuit court precedent finding its actions violated the NLRA.

C. Granting the petition and overruling *Brand X* does not require this Court to revisit the administrative state wholesale. But overruling *Brand X* would be an important first step in restoring First Principles to federal administrative law.

ARGUMENT

Whether this Court should overrule *Brand X* is a nationally important constitutional question that affects vast areas of federal administrative law.

A. *Brand X* undermines constitutional due process protections and promotes instability in the law.

It is axiomatic that fair notice is a fundamental aspect of due process and the rule of law. Indeed, "[p]erhaps the most basic of due process's customary protections is the demand of fair notice."[10] When it comes to administrative agencies, the Court has long recognized a fundamental tenet of the Due Process Clause requires that laws "which regulate persons or entities must give fair notice of conduct that is forbidden or required."[11] An agency's action will thus violate due process when a "regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'"[12]

Brand X turns this fundamental principle on its head. An executive agency can decide—after a person has acted—what an ambiguous law means and bind

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[10] *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J. concurring) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *see also* Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 543 (2009) ("From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law").

[11] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

[12] *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008).

that person to the agency's post-hoc interpretation. All after a federal court has issued a contrary interpretation of the law.

What's more, when *Chevron* and *Brand X* are mixed with the retroactivity doctrine of *Chenery II*, a liberty destroying cocktail is created.[13] *Chenery II* on its own subverts fair notice by allowing executive lawmaking to apply retroactively. In the process of deferring to agency discretion, the Court in *Chenery II* upheld a rule applied for the first time in an adjudication that made illegal conduct that was perfectly legal before that adjudication. In describing the Court's decision as "lawlessness" in his dissent, Justice Jackson noticed the problem from the outset: "This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as of those who are subject to authority."[14]

But now imagine that an administrative agency not only applies a new rule to your case, but also does so after a circuit court has ruled your actions conformed to a statute. This seems to be the very absence of fair notice. Yet that is what happened to Petitioners here.[15]

The Court should thus take this opportunity to revisit and overrule the *Brand X* doctrine to ensure, in

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[13] *SEC v. Chenery Corp.* (*Chenery II*), 332 U.S. 194, 202–03 (1947); *see De Niz Robles v. Lynch*, 803 F.3d 1165, 1173 (10th Cir., 2015) (discussing the constitutional problems when *Chevron* deference and *Brand X* are combined with the doctrine announced in *Chenery II*.

[14] *Chenery II*, 332 U.S. at 217 (Jackson, J. dissenting) (footnote omitted).

[15] *See* Pet. Br. 12-13.

cases like this, that every litigant has the fair notice which the Constitution requires.

B. *Brand X* has serious consequences for the regulated public that reach beyond this case.

Petitioners' case is not an anomaly. Although it is a prime example of the significant, illiberal ramifications of *Chevron* deference coupled with the *Brand X* doctrine, this case is merely one in a litany of cases in which administrative deference has operated against the Constitution and done violence to individual liberty.

For example, *Chevron* deference has for years allowed federal administrative agencies like the NLRB to make federal law—sometimes retroactively[16]—based on political decisions. More recently, moreover, the NLRB has not only used *Chevron* to reinterpret the NLRA, but has also sought to overrule circuit court precedent using *Brand X*.[17]

One of the primary rationales for *Chevron* deference is that agency "experts" are better equipped to determine the evolving policy for the nation:

> Judges are not experts in the field, and are not part of either political branch of the Government . . . . In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation,

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[16] "The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises Inc.*, 344 N.L.R.B. 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995, 1006–07 (1958)).

[17] *See, e.g.*, *Miklin Enters., Inc.*, 861 F.3d at 822–823; *Palmetto Prince George Operating, LLC*, 841 F.3d at 216–17.

> properly rely upon the incumbent administration's views of wise policy to inform its judgments.[18]

But, what administrative agencies engage in is not always based on "expertise." Judges and scholars have criticized the NLRB in particular for engaging in excessive legal and policy oscillation from administration to administration based on political considerations, not expert policymaking. As one federal judge has described the problem:

> Sometimes the claim to expertise is entirely fraudulent; the most well-documented case is that of the National Labor Relations Board, the partisan majority of which routinely displaces the previous majority's psychological assertions about what employer tactics do or do not coerce workers when they are deciding whether to vote for union representation. Most often, however, expertise is simply a euphemism for policy judgments. The permanent staff of an agency may have a great deal of technical expertise, but the agency's ultimate decisions are made by the experts' political masters, who have sufficient discretion that they can make decisions based upon their own policy preferences, fearing neither that the expert staff will not support them nor that a court will undo their handiwork.[19]

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[18] *Chevron*, 467 U.S. at 865.

[19] Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 482–83 (2016) (footnote omitted).

To be sure, granting agencies like the NLRB deference to say what the law is prevents "ossification of large portions of our statutory law."[20] Even so, a fundamental underpinning of the rule of law and separation of powers *is* the ossification (i.e., stabilization) of the law, unless Congress acts through its Article I power to change it.

When combined, however, *Chevron, Brand X*, and *Chenery II* allow an executive agency to change the law retroactively with the political winds (or for no apparent reason at all)—all after a federal court has already ruled on the statutory issue.[21] As a result, regulated individuals do not have fair notice before the government changes their legal rights. It is thus important to cabin agencies' ability to rewrite the law and overrule federal court precedent—especially when an administrative agency is acting according to political rather than legal considerations.

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[20] *United States v. Mead Corp.*, 533 U.S. 218, 247–48 (2001) (Scalia, J., dissenting).

[21] *See De Niz Robles*, 803 F.3d at 1176 ("in the *Chevron* step two/*Brand X* context, it's easy to see the 'ill effect[s]' of retroactivity: upsetting settled expectations with a new rule of general applicability, penalizing persons for past conduct, doing so with a full view of the winners and losers—all with a decisionmaker driven by partisan politics.").

C. Overruling *Brand X* is an important first step in restoring First Principles to administrative law.

The trouble begins with the Court's nondelegation jurisprudence. Article I vests all legislative power in Congress—not some, but all.[22] Article I's plain meaning should prevent the legislative branch from subdelegating its legislative power to another branch.[23] But the Court does not, at least modernly, police that line. [24]

This Court's failure to prevent Congress' delegation of power begets the environment for *Chevron* deference. Indeed, *Chevron* flows from abandoning Article I's text. *Chevron* deference is based on a legal fiction. That fiction assumes Congress implicitly delegates its power through ambiguous statutory language (or no statutory language at all, i.e., silence) so that an administrative agency can make binding legislative rules and regulations.[25]

This implied delegation fiction not only allows the transfer of Article I power, but also allows executive

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[22] *See* U.S. Const. art. I, § 1; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("Article I, § 1 . . . permits no delegation of those powers . . . .").

[23] *See Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); *see also* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 336–37 (2002).

[24] *Dep't of Transp. v. Ass'n of Am. R.R.s.*, 135 S. Ct. 1225, 1250 (2015) (Thomas, J., concurring in the judgment).

[25] "Statutory ambiguity . . . becomes an implicit delegation of rule-making authority, 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." *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

agencies to exercise Article III power. It "precludes judges from exercising [independent] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction."[26] And along the way disables one of the Constitution's primary structural protections of individual liberty: the judiciary's responsibility to apply the law "as a 'check' on the excesses of both the Legislative and Executive Branches."[27]

With Article III out of the way, *Brand X* enters the anti-constitutional regime.[28] In what one scholar described as a "'WOW' moment," the Court took *Chevron* deference deeper into the anti-constitutional abyss by adopting the *Brand X* doctrine—which became the "capstone of the Court's Chevron evolution: [working] a wholesale transfer of statutory interpretation authority from federal courts to agencies."[29]

As Petitioners point out, overruling *Brand X* does not require a wholesale restoration of the Constitution's original design. The Court neither has to revisit the nondelegation doctrine nor *Chevron* deference if it grants the petition.[30] But the Court can nevertheless begin to crawl back from the abyss by reasserting its

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[26] *Id.* at 2712 (citing *Brand X*, 545 U.S. at 983).

[27] *Perez v. Mortg. Bankers Ass'n.*, 135 S. Ct. 1199, 1220 (2015) (Thomas, J. concurring in the judgment) (citations omitted).

[28] Or as one member of this Court put it: "Founders meet *Brand X*." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch., J. concurring).

[29] Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 625 (2014).

[30] *See* Pet. Br. 25.

Article III power and abandoning *Brand X*. The Court should grant the petition and do so in this case.

CONCLUSION

For all these reasons, and those which Petitioners stated, the Court should grant the petition.

Respectfully submitted,

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