No. 20-1114

IN THE
Supreme Court of the United States

AMERICAN HOSPITAL ASSOCIATION, *et al.*,
Petitioners,
v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

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

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QUESTIONS PRESENTED

Amicus curiae addresses only the second of the two Questions Presented:

Whether the court of appeals properly applied *Chevron* deference to the Department of Health and Human Services' (HHS) interpretation of 42 U.S.C. § 1395*l*(t)(14)(A)(iii)(II), and thereby permitted HHS to set Medicare reimbursement rates for specified covered outpatient drugs based on acquisition cost and vary such rates by hospital group, when HHS has not collected required hospital acquisition cost survey data.

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[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, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have neglected them for so long.

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

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

NCLA is particularly disturbed by the appeals court's decision not to exercise its independent judgment regarding the best reading of the statute at issue in this case but rather to defer to the interpretation espoused by the U.S. Department of Health and Human Services (HHS)—one of the parties to this proceeding. The court asserted that deference was warranted because the statute did not "directly foreclose" HHS's construction. Pet. App. 19a. But this Court has required far more exacting scrutiny of a statute before determining that a federal agency's construction is permissible. In failing to undertake that exacting scrutiny, the appeals court exhibited an all-too-frequent tendency: the lower federal courts "have become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first." *Valent v. Comm'r of Social Security*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting).

NCLA is also concerned by the serious constitutional infirmities that infected the proceedings below. By deferring to HHS's construction of the contested statute under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the appeals court abandoned its duty of independent judgment and biased its ruling in favor of one of the parties—the most powerful of parties—in violation of the Fifth Amendment's Due Process Clause.

STATEMENT OF THE CASE

The facts of this case are largely undisputed. Petitioners ("the Hospitals") are entitled to Medicare

reimbursement from HHS for specific covered outpatient drugs ("SCODs") provided to their patients. All agree that, under the facts of this case, HHS must establish reimbursement rates using the criteria set forth in 42 U.S.C. § 1395*l*(t)(14)(A)(iii)(II) (hereinafter, "Subclause II"). The statute states that the reimbursement rate for each SCOD "shall" be "the average price for the drug ... as calculated and adjusted" by HHS. *Ibid.* The "average price" for each SCOD is not in dispute; all agree that a drug's default "average price" equals 106% of its "average sales price" (ASP). Before HHS began making "adjustments" to average price in 2017, it generally set a reimbursement rate of ASP plus six percent.

HHS changed its methodology in 2017. While the reimbursement rate for most hospitals continues to be ASP plus six percent, HHS invoked its "adjust[ment]" authority to establish a significantly lower reimbursement rate (ASP minus 22.5 percent) for one group of hospitals: Section 340B hospitals, a group that includes Petitioners. HHS justified the lower rate by pointing to the significantly reduced drug acquisition costs faced by Section 340B hospitals. It asserted that Subclause II authorized it to "adjust[ ]" reimbursement rates by substituting acquisition costs for average price.

The Hospitals challenged the new rates, asserting that if HHS wishes to base rates on acquisition costs, it must do so under 42 U.S.C. § 1395*l*(t)(14)(A)(iii)(I) (hereinafter, "Subclause I"). The Hospitals assert that HHS has not met one of the

prerequisites for invoking Subclause I[2] and thus may not rely on that statutory provision.

The district court granted the Hospitals' motion for a permanent injunction against HHS and ordered supplemental briefing on the question of a proper remedy. Pet. App. 44a-86a. The court later expanded its ruling to include HHS's reimbursement rates for 2019 as well as 2018, and it remanded the case to HHS to decide in the first instance how best to proceed. *Id.* at 87-112.

A divided D.C. Circuit panel reversed, upholding HHS's decision to lower drug reimbursement rates for Section 340B hospitals. Pet. App. 1a-43a. The majority held that HHS's decision "rests on a reasonable interpretation of the Medicare statute." *Id.* at 2a.

Notably, the panel majority did *not* hold that HHS's construction of Subclause II is the *best* interpretation of the statute. Although conceding that the Hospitals' statutory construction arguments were "not without force," the court was "ultimately unpersuaded" because, "[f]or the Hospitals' argument to carry the day under *Chevron*, we would need to conclude that Congress unambiguously barred HHS from seeking to align reimbursement with acquisition

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[2] HHS is authorized to calculate a drug's reimbursement rate based on its "average acquisition cost" under Subclause I only if, among other things, HHS has undertaken a "hospital acquisition cost survey" that meets the exacting requirements of 42 U.S.C. § 1395*l*(t)(14)(E). HHS did not undertake any such survey before establishing the rates at issue here.

costs under subclause (II), or that HHS's belief that it could do so was unreasonable." *Id.* at 24a.

The majority tacitly conceded the Hospitals' contention that HHS's broad interpretation of its Subclause II adjustment authority would deprive Subclause I of independent significance, stating:

> As the Hospitals see it, if HHS wants to set SCOD rates based on the cost to hospitals to acquire the drugs, the agency must get the [robust study] data contemplated by subclause (I). If it were otherwise, the Hospitals contend, subclause (I)'s requirement to take into account the data collected under subparagraph (D) would be meaningless: HHS could simply forgo the study required by subclause (I) and instead use subclause (II) to approximate drug acquisition costs.

Id. at 23a-24a. But the majority held that the anomaly created by HHS's interpretation of its adjustment authority did not undermine the agency's proposed construction of Subclause II, asserting that "the Hospitals' own reading raises a similar interpretive dilemma." *Id.* at 24a. The majority noted that under the Hospitals' reading, HHS's adjustment authority under Subclause II is limited to "adjustments to account for overhead costs." *Id.* at 25a. According to the majority, this construction creates an interpretive dilemma because it "would leave subclause (II)'s adjustment authority duplicative of authority already conferred by [42 U.S.C. § 1395*l*(t)(14)(E)]." *Ibid.*

The court declined to credit arguments that "any superfluity occasioned by [the Hospitals'] reading is less substantial than the superfluity occasioned by the agency's reading." Pet. App 27a. It held that "even assuming there is a reliable metric for comparing degrees of superfluity across readings in that fashion, that kind of comparison is not the stuff of a *Chevron* step one resolution." *Ibid.* Rather, the court held, "when competing readings of a statute would each occasion their own notable superfluity across readings in that fashion, that manifests the kind of statutory ambiguity that *Chevron* permits the agency to weigh and resolve." *Ibid.*

Judge Pillard dissented. Pet. App. 31a-43a. She construed Subclause I as imposing a strict limit on HHS's authority to base reimbursement rates on a hospital's acquisition costs: HHS could not do so unless it first conducted a detailed survey of actual costs. *Id.* at 33a-34a. She concluded that HHS's broad construction of its Subclause II adjustment authority was an unwarranted "circumvention of subclause (I)." *Id.* at 34a. She stated that Subclause II's use of the word "adjust[ment]" indicates that HHS is authorized to make "moderate" changes to average sales price when setting reimbursement rates, not the major 30% change adopted by HHS here. *Id.* at 38a. She concluded, "I would therefore hold that the agency's interpretation of subclause (II) is foreclosed at *Chevron* step one." *Id.* at 32a.

SUMMARY OF ARGUMENT

NCLA agrees with the Hospitals that the HHS's authority under Subclause II to "adjust[ ]" average

sales price when calculating reimbursement rates does not include wholesale authority to substitute acquisition costs for average sales price. The appeals court should thus have ended its analysis of the Hospitals' claims no later than at *Chevron* step one.

NCLA writes separately to focus on the improperly truncated nature of the appeals court's *Chevron* analysis. The court concluded that HHS's statutory construction was entitled to *Chevron* deference because it was "reasonable" and was not "directly foreclosed" by the statutory language. Pet. 19a. But the court's novel "directly foreclosed" test assures that virtually any agency statutory interpretation can survive *Chevron* step one scrutiny. While Subclause II does not "directly" foreclose a claim that the authority granted HHS to "adjust[ ]" reimbursement rates includes the authority to substitute acquisition cost for average sales price, a similar observation could be made with respect to virtually any statute whose application to a specific factual scenario is in dispute. If courts grant *Chevron* deference any time an agency's statutory construction is not expressly foreclosed by the statute at issue, they have abandoned their constitutional "duty … to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1804).

As this Court has repeatedly stressed, deference to agency interpretations is warranted only when a statute or regulation is "genuinely ambiguous"; "[a]nd when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). Those standard tools of

interpretation are most needed when, as here, the text of the statute does not "directly" answer the question posed by a lawsuit.

The appeals court concluded that the standard tools of statutory construction provide at least some support for both sides. Pet. App. 24a-27a. But rather than proceeding further with its analysis and determining which side had the stronger arguments, the court simply threw up its hands and declared, "when competing readings of a statute would each occasion their own notable superfluity, that manifests the kind of statutory ambiguity that *Chevron* permits the agency to weigh and resolve." *Id.* at 27a. No, competing readings *do not manifest any such thing*. On the contrary, that sort of wholesale abdication of judicial decision-making responsibility conflicts sharply with this Court's teachings regarding the scope of *Chevron* deference.

Quite apart from the appeals court's misapplication of *Chevron*, there are sound reasons for declining to apply *Chevron* deference in this or any other case. The doctrine has been subject to increasing criticism in recent years from both judges and legal commentators. They have pointed out that *Chevron* deference compels judges to abandon their duties of independent judgment, thereby undermining separation-of-powers principles. *See, e.g., Baldwin v. United States*, 140 S. Ct. 690 (2020) (Thomas, J., dissenting from denial of *certiorari*); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring). More than five years have elapsed since the Court last relied on *Chevron*

deference to uphold an agency's interpretation of a federal statute. *See Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131 (2016).

Moreover, when (as is always true in cases involving Medicare reimbursement claims) the government is a party to the case, *Chevron* requires judges to favor the government's interpretation. That is, it tells judges to exhibit systematic bias in favor of one of the parties—the most powerful of parties. Such judicial bias in court proceedings violates the Fifth Amendment's Due Process Clause.

The Court should reverse the decision below. The D.C. Circuit declared Subclause II ambiguous and granted *Chevron* deference to HHS's construction without first engaging in the thorough analysis of the statute required by this Court's precedents. Had it done so, it would have concluded that Subclause II precludes HHS from basing reimbursement rates on the Hospitals' estimated acquisition costs. NCLA urges the Court to go further—to call into question the constitutional underpinnings of *Chevron* and express a willingness to consider overruling *Chevron* in a future case. It is particularly appropriate to do that in a case emanating from the D.C. Circuit because that court is especially apt to rely on *Chevron* deference. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*. 131 Harv. L. Rev. 1298, 1312-13 (2018).

ARGUMENT

I. HHS'S INTERPRETATION OF THE DISPUTED STATUTE IS NOT ENTITLED TO *CHEVRON* DEFERENCE

NCLA agrees with the Hospitals that HHS's authority under Subclause II to "adjust[ ]" average sales price when calculating reimbursement rates does not include authority to substitute acquisition costs for average sales price. NCLA writes separately to focus on the improperly truncated nature of the appeals court's *Chevron* analysis. Had the appeals court undertaken the comprehensive statutory analysis required by this Court's *Chevron* case law, any doubt that Subclause II barred HHS's use of acquisition costs in determining reimbursement rates would have been quickly eliminated.

A. *Chevron* Step One Requires Courts to Closely Examine Text and Context to Determine Whether a Statute Is Truly Ambiguous

If an agency interpretation is the sort to which *Chevron* applies, the Court has established a two-step process for determining whether to defer to that interpretation. At *Chevron* step one, a reviewing court, "applying the ordinary tools of statutory construction," must determine whether the meaning of the disputed statute is clear. *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Ibid.*

(quoting *Chevron*, 467 U.S. at 842-843). But if the statutory text is "ambiguous with respect to the specific issue, the question for the court [at step two] is whether the agency's answer is based on a permissible construction of the statute." *Ibid.* (quoting *Chevron* at 843).

In many instances, lower federal courts brush past *Chevron* step one, concluding after a perfunctory analysis that the disputed statute is ambiguous before proceeding at step two to defer to a federal agency's interpretation of the statute. As the Sixth Circuit candidly recognized, "[A]ll too often, courts abdicate [their] duty [to say what the law is] by rushing to find statutes ambiguous, rather than performing a full interpretive analysis." *Arangure v. Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018). Such abdication is "all the more tempting" in the *Chevron* context because "ambiguity means courts get to outsource [their] 'emphatic' duty [to say what the law is] by deferring to an agency's interpretation." *Ibid*. (quoting *Marbury*, 5 U.S. at 177).

The court below engaged in a perfunctory analysis of just that sort before concluding that Subclause II is ambiguous and proceeding to *Chevron* step two. Rather than beginning its analysis by attempting to discern the best interpretation of Subclause II, the appeals court placed a thumb on HHS's side of the scale: it asked whether HHS's construction was "directly foreclosed" by the statute. Pet. App. 19a. It stated, "If the statute does not directly foreclose HHS's understanding, we defer to the agency's reasonable interpretation," and held that

HHS's interpretation "is not directly foreclosed and is reasonable." *Ibid.*

The D.C. Circuit's novel "directly foreclosed" test finds no support in this Court's *Chevron* case law. The Court has stressed the importance of undertaking an "exhaust[ive]" application of all "traditional tools" of statutory construction before concluding that a statute or regulation "is genuinely ambiguous." *Kisor*, 139 S. Ct. at 2415 (citing *Chevron*, 467 U.S. at 843 n.9). If, after applying those traditional tools, a court concludes that a statute forecloses an agency's construction, it is irrelevant whether it does so "directly" or "indirectly." In either instance, the court may not defer to the agency's interpretation. Applying *Chevron* deference except where Congress has "directly" foreclosed the agency's interpretation reads far too much into statutory silence. *See Oregon Restaurant and Lodging Ass'n v. Perez*, 843 F.3d 355, 362 (9th Cir. 2016) (O'Scannlain, J., joined by nine other judges, dissenting from denial of rehearing *en banc*) (decrying the "radical idea that an agency can regulate whatever it wants until Congress says out loud it must stop").

The appeals court's assertion that statutes are ambiguous unless they "directly" foreclose the agency's construction—an assertion adopted in none of this Court's opinions—virtually assured that it would find Subclause II ambiguous and proceed to *Chevron* step two. Subclause II does not define the word "adjusted" and thus does not "directly" state that the authority granted HHS to "adjust[ ]" reimbursement rates does not include the authority to substitute acquisition cost for average sales price. But the "traditional tools" of

statutory construction have been developed precisely because statutes rarely "directly" address the myriad disputes that can arise over their meaning.

Those tools are often successfully employed to discern a single, best construction of the statute. *Kisor*, 139 S. Ct. at 2415 (noting that "hard interpretive conundrums, even relating to complex rules, can often be solved" and that ambiguity does not exist "merely because 'discerning the only possible interpretation requires a taxing inquiry'") (quoting *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)). Yet in taking its directly-foreclosed shortcut, the appeals court disregarded *Kisor*'s admonition that "a court cannot wave the ambiguity flag just because it found the regulation," or statute, ambiguous "at first read." *Ibid*.

As Petitioners' brief explains in detail, a closer read of Subclause II than the one undertaken by the D.C. Circuit demonstrates that Congress did not authorize HHS to utilize acquisition costs as its basis for setting reimbursement rates under that statute. Pet. Br. 31-46. The Court should hold that HHS's interpretation of Subclause II is foreclosed at *Chevron* step one. But it should also point out the appeals court's mistaken approach that caused it to conclude erroneously that Subclause II is ambiguous: the court reached that conclusion by mistakenly holding that a statute is ambiguous and does not foreclose an agency interpretation so long as it does not do so "directly."

B. The Appeals Court Improperly Truncated Its Statutory Analysis after Concluding that the Constructions Offered by Both Sides Raised Interpretive Dilemmas

The principal step-one shortcut employed by the appeals court in its analysis of Subclause II arose in connection with its (erroneous) conclusion that the Hospitals' proffered statutory construction created an "interpretive dilemma." Pet. App. 24a. The majority concluded that the "adjust[ment]" authority granted to HHS by Subclause II would be redundant if the word "adjusted" were interpreted as proposed by the Hospitals—it supposedly would grant HHS no more authority than it also possessed under 42 U.S.C. § 1395*l*(t)(14)(E). Although recognizing that HHS's proffered construction *also* raised interpretive dilemmas, the court held that the mere existence of the competing dilemmas precluded further comparison of the strengths of the two arguments. *Id.* at 27a. Faced with this issue, the court simply threw up its hands and declared:

> that kind of comparison is not the stuff of a *Chevron* step one resolution. Rather, when competing readings of a statute would occasion their own notable superfluity, that manifests the kind of statutory ambiguity that *Chevron* permits the agency to weigh and resolve.

Ibid. That holding directly conflicts with *Kisor*'s teaching that a statute cannot be deemed "genuinely ambiguous" until "*after* a court has resorted to *all* the

standard tools of interpretation." 139 S. Ct. at 2414 (emphasis added).

Had the D.C. Circuit "resorted to all the standard tools of interpretation," it would have ascertained that the interpretive dilemma allegedly created by the Hospitals' proffered construction of Subclause II (if it exists at all) is extremely minor and is minuscule when compared with the problems created by HHS's construction. The Hospitals assert that Subclause II authorizes HHS to "adjust" reimbursement rates for several reasons, including to account for overhead costs. The appeals court responded that overhead-cost adjustment authority is already granted by 42 U.S.C. § 1395*l*(t)(14)(E) and thus that, under the Hospitals' interpretation, the Subclause II grant of authority to "adjust" rates is a redundancy. Pet. App. 25a. The Hospitals' opening brief convincingly rebuts that charge; it demonstrates that Subclause II authorizes a wider array of overhead adjustments than does § 1395*l*(t)(14)(E). Pet. Br. 44-45.

Moreover, a statutory construction is not necessarily to be avoided simply because it creates redundancy. Congress regularly inserts redundant language in a statute to ensure that its intent is not misunderstood. Thus, in *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008), the Court rejected a "rule against superfluities" objection to its construction of a federal statute, ruling that "Congress may have simply intended to remove any doubt that [certain officials] were included in 'law enforcement officer[s]'" by saying so twice. *See also Microsoft Corp. v. i4i Limited Partnership*, 564 U.S. 91, 106 (2011) (stating

that "[t]here are times when Congress enacts provisions that are superfluous") (quoting *Corley v. United States*, 556 U.S. 303, 325 (2009) (Alito, J., dissenting)); *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 646 (1990) (noting that "technically unnecessary" examples in a statute may have been "inserted out of an abundance of caution").

More importantly, the appeals court's competing-interpretive-dilemmas holding improperly assumes that all such dilemmas should be assigned equal weight when determining whether a statute is too ambiguous to permit resolution at *Chevron* step one. That assumption is demonstrably incorrect with respect to the parties' competing interpretations of Subclause II.

HHS's proposed interpretation does far more than simply create a redundancy. Rather, it totally obliterates Subclause I. The evident purpose of Subclause I is to ensure that whenever reimbursement rates for SCODs are to be based on acquisition costs, HHS must collect the acquisition-cost data in conformity with the detailed procedural requirements set out in Subclause I. Congress did not want HHS to establish rates under Subclause I unless the agency went the extra mile to ensure the accuracy of its acquisition-cost data. As Judge Pillard points out in her dissent, HHS's interpretation of the Subclause II adjustment authority as authorizing HHS to substitute acquisition cost for average price is nothing less than an unwarranted "circumvention" of Subclause I's detailed data-collection requirements. Pet. App. 34a. Moreover, as she also pointed out, HHS's interpretation of Subclause II requires ascribing to the

word "adjusted" a definition far broader than its commonly understood meaning; it normally connotes a relatively modest change, not the wholesale revision effected by HHS. When attempting to ascertain the proper construction of Subclause II at *Chevron* step one, much more weight should be assigned to those factors than to HHS's evidence of the supposed superfluity created by the Hospitals' construction.

To support its novel competing-interpretive-dilemmas holding, the D.C. Circuit cited this Court's decision in *Nat'l Ass'n of Home Builders* ["*NAHB*"] *v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). *NAHB* is wholly inapposite. It involved a provision of the Endangered Species Act that, if read broadly, would have implicitly abrogated or repealed numerous other federal statutes. The Court held that "the statutory language—read in light of the canon against implied repeals—d[id] not itself provide clear guidance as to which command must give way," and thus that the statute's clear meaning could not be determined at *Chevron* step one. *Ibid*. The canon against implied repeals has absolutely no role to play in determining the proper construction of Subclause II.

In support of the appeals court's holding, HHS cites *dicta* in a patent case, in which the Court stated that "the canon against superfluity assists only where a competing interpretation gives effect to every clause and word in a statute." Resp. Opp. Br. at 20-21 (quoting *i4i*, 564 U.S. at 106 (citation omitted)). Read in context, the quoted language provides no support for the decision below. At issue in *i4i* was the federal statute that imposes on a patent infringement

defendant the burden of establishing patent invalidity; the parties disputed whether the statute required the invalidity defense to be proven by clear and convincing evidence. In urging adoption of a lower standard of proof, Microsoft (the defendant) argued that the plaintiffs' proffered interpretation rendered superfluous other language in the Patent Act. The Court rejected that argument, noting that Microsoft's interpretation also resulted in quite similar redundancies. *Ibid.*

The language cited by HHS, which appears in no other decisions of this Court, simply indicates that a proposed construction of a statute will not be rejected based on the canon against superfluity if all other proposed constructions create similar superfluities. But as explained above, the Hospitals' objections to HHS's proposed construction go far beyond a mere claim that it renders some statutory language redundant. Rather, the Hospitals have demonstrated that HHS's construction constitutes an unwarranted end-run around restrictions imposed by Subclause I.

HHS supports its construction of Subclause II by asserting that it serves important policy goals by better aligning reimbursement rates with a Medicare fund recipient's actual acquisition costs. But as Judge Pillard noted in dissent, "an agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." Pet. App. 41a (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 325 (2014)).

In sum, the appeals court erred by declaring Subclause II ambiguous at *Chevron* step one without

first employing all the standard tools of statutory construction. The court's stated rationale for failing to do so conflicts sharply with this Court's case law.

C. *Kisor*'s Limitations on *Auer* Deference Are Fully Applicable to *Chevron* Deference

Kisor contains the Court's most thorough explanation of the requirement that a court completely exhaust all tools of construction before concluding that it cannot discern a single, best reading of a legal standard. *Kisor* arose in the context of judicial deference to an agency's interpretation of its own regulations, so-called *Auer* deference. But the reasons articulated by the Court in *Kisor* for cabining judicial deference to an agency's legal interpretations apply just as strongly in the context of statutory interpretation. NCLA urges the Court to state explicitly that *Kisor* applies in both circumstances.

Both *Chevron* deference and *Auer* deference are rooted in a background principle of presumed congressional intent. When Congress authorizes a federal agency to administer a federal statute and then leaves ambiguities in the statute, this Court in at least some circumstances has presumed that Congress intends thereby to delegate to the agency authority to resolve the ambiguity. *City of Arlington*, 569 U.S. at 296.[3]

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[3] Although both forms of deference have been defended based on a presumed delegation of interpretive authority, there is considerable reason to doubt that Congress possesses the power to delegate such authority. The duty to interpret the law rests with the courts, not Congress, and thus it is not at all clear how

If so, then a logical corollary to that rule is that Congress has *not* delegated to an agency authority to construe a statute unless the statute is truly ambiguous. Thus, when either *Chevron* or *Auer* deference is at issue, Courts must closely examine the statute to determine whether it is ambiguous; if it is not, then Congress cannot be presumed to have delegated authority to construe the statute, and courts have no justification for deferring to agency constructions.

Moreover, in explaining the very limited nature of *Auer* deference, *Kisor* repeatedly cited cases involving *Chevron* deference. *See, e.g.,* 139 S. Ct. at 2414, 2416 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001); *id.* at 2415 (citing *Chevron*, 467 U.S. at 843 n.9); *id.* at 2416 (citing *City of Arlington*, 569 U.S. at 296).

Most of the Court's recent *Chevron* decisions have included language akin to *Kisor*'s admonitions regarding limitations on judicial deference to administrative agencies' legal interpretations. *See, e.g., SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (stating that "[e]ven under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning") (quoting *Chevron*, 467 U.S. at 843 n.9); *EPIC Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (similar). Nothing in the Court's case law suggests that the standards for applying *Chevron*

Congress could delegate authority it does not possess.

deference differ from those governing *Auer* deference. The Court can eliminate any possibility of confusion on that point by stating explicitly that the standards articulated in *Kisor* apply fully in the context of *Chevron* deference.

II. *CHEVRON* DEFERENCE SHOULD BE ABANDONED ALTOGETHER BECAUSE IT VIOLATES THE CONSTITUTION

Quite apart from the appeals court's misapplication of *Chevron*, there are sound reasons for declining to apply *Chevron* deference in this or any other case. The *Chevron* doctrine has been subject to increasing criticism in recent years from both judges and legal commentators. Those criticisms are well founded. *Chevron* is inconsistent with separation-of-powers and due-process principles embedded in the Constitution.

A. Agency Deference Violates Article III by Requiring Judges to Abandon Their Duty of Independent Judgment

Chief Justice John Marshall famously stated that it "emphatically" is the constitutional "duty" of federal judges "to say what the law is." *Marbury v. Madison*, 5 U.S. at 177. But judges who apply *Chevron* deference are abandoning that duty by issuing judgments that assign controlling weight to a non-judicial entity's interpretation of a statute.

To be clear, there is nothing wrong or constitutionally problematic when a court 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 that "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"). "'[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.*

But here, the D.C. Circuit held that HHS's interpretation of Subclause II is controlling in the absence of evidence that Congress "directly foreclosed" that construction—regardless whether a court arrives at a different interpretation. Several state Supreme Courts have concluded that such abdication of the judicial power violates separation-of-powers provisions in their state constitutions. *Tetra Tech*, 914 N.W.2d at 50 (concluding that granting deference to an administrative agency's statutory interpretation "deprives the non-government party of an independent and impartial tribunal," as required by the Wisconsin Constitution); *King v. Mississippi Military Dep't*, 245 So.3d 404, 408 (Miss. 2018) (stating, "[I]n deciding no longer to give deference to agency interpretations, we step fully into the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes.").

Indeed, until well into the twentieth century this Court recognized its Article III duty to decide cases even when the Executive Branch disagrees with the Court's statutory interpretation. In *United States v.*

Dickson, 40 U.S. 141, 161 (1841), the Court declined to defer to a longstanding Treasury Department interpretation of a federal statute, reasoning that when the interpretation "is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a Court of justice." Writing for the Court, Justice Story explained:

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

Id. at 162.

B. Agency Deference Violates Due Process by Requiring Judges to Bias Their Decisions in Favor of One Party

A related and even more serious problem with agency deference 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 independent judgment in a

manner that favors an actual *litigant* before the court violates due process.

This Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886-87 (2009). *See also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (holding that agency and judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from hostility or bias); *id.* at 1734 (Kagan, J., concurring) (agreeing that the Constitution forbids agency or judicial proceedings that are "infected by ... bias").

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."). Nonetheless, under agency-deference doctrines, otherwise scrupulous judges who are sworn to administer justice impartially somehow feel compelled to remove the judicial blindfold and tip the scales in favor of the government's position. This practice must stop.

Chevron might be defended on the ground that there are other canons of construction that purport to stack the deck in favor of a litigant appearing in court *against* the government—*e.g.*, the pro-veteran canon,

the rule of lenity, and the Indian canon. But in each of those instances, the opposing litigant is simply asking the court to resolve an ambiguous statute against the party that drafted it. By resolving ambiguities against government drafters, these canons of construction seek to encourage clear and precise drafting of veterans-benefits statutes, criminal laws, and treaties/statutes affecting Indians and tribes. They therefore cannot explain or excuse 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.

C. The Propriety of *Chevron* Deference Is Being Questioned with Increasing Frequency by Federal Courts

The Court has not formally abandoned its commitment to the *Chevron* deference regime. But the Court's recent actions as well as statements by several justices suggest that its commitment to *Chevron* is waning.

Most notably, the number of decisions in which the Court has relied on *Chevron* deference to uphold an agency's interpretation of a federal statute has declined dramatically in the past decade. It has issued no such decision in more than five years.[4]

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[4] The Court recently declined to express support for *Chevron*'s continued validity, stating merely, "But whether *Chevron* should remain is a question we may leave for another day." *SAS Institute*, 138 S. Ct. at 1358.

Moreover, the most recent such decision, 2016's *Cuozzo Speed Technologies*, involved a statute that *expressly* delegated to an administrative agency authority to interpret the relevant statute. *See* 136 S. Ct. at 2142 (noting that the statute "expressly" authorized the Patent Office to issue regulations "governing inter partes review" and that the challenged Patent Office rule was "a rule that governs inter partes review"). In other recent cases in which an administrative agency's interpretation of a federal statute was at issue, the Court interpreted the statute using traditional tools of statutory construction—and rejected the agency's interpretation without ever citing *Chevron*. *See, e.g., Babb v. Wilkie*, 140 S. Ct. 1168 (2020).

Individual justices have not hesitated to criticize deference doctrines. Justice Thomas has opined that "*Chevron* compels judges to abdicate the judicial power without constitutional sanction." *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from the denial of certiorari). He warned that "this apparent abdication by the Judiciary and usurpation by the Executive is not a harmless transfer of power," noting that "*Chevron* deference undermines the ability of the Judiciary to perform its checking function on the other branches." *Id.* at 691-92.

Justice Gorsuch has described *Chevron* as "no less than a judge-made doctrine for the abdication of the judicial duty." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). He stated that *Chevron* concentrates excessive power in the Executive Branch, and cited

James Madison's warning that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." *Id.* at 1155 (quoting *The Federalist* No. 47 (James Madison)).

Justice Kennedy described as "troubling" the "reflexive deference" exhibited by some appeals courts and their apparent "abdication of the Judiciary's proper role in interpreting federal statutes." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). He stated:

> it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary. See, *e.g., Arlington*, [569 U.S.] at 312-36 (Roberts, C.J., dissenting).

Id. at 2121.

The Court's 2019 *Kisor* decision cut back considerably on the scope of the related *Auer*-deference doctrine, which sometimes requires courts to defer to an administrative agency's interpretation of its own regulations. *Kisor*, 139 S. Ct. 2400. Four concurring justices would have gone even farther and overruled

Auer deference altogether. *Id.* at 2425 (Gorsuch, J., concurring in the judgment).

NCLA urges the Court to go beyond simply overturning the D.C. Circuit's invocation of *Chevron* deference and its invention of a new directly-foreclosed test. NCLA urges the Court, in the course of its opinion, to note the constitutionally problematic nature of the *Chevron* doctrine and express a willingness to consider overruling *Chevron* in a future case. It should join Justice Gorsuch in calling for an end to "this business of making up excuses for judges to abdicate their job of interpreting the law." *Kisor*, 139 S. Ct. at 2426 (Gorsuch, J., concurring in the judgment).

CONCLUSION

The Court should reverse the decision of the court of appeals.

Respectfully submitted,

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