No. 22-TX-0820

In the District of Columbia Court of Appeals

LHL REALTY COMPANY DC, LLC
AND LHL REALTY COMPANY,
Appellants,

v.

DISTRICT OF COLUMBIA,
Appellee.

On Appeal from the District of Columbia Superior Court

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AND THE GOLDWATER INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY AND ADVOCATING NEITHER AFFIRMANCE NOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Court of Appeals Rule 26.1, NCLA states that it is a non-profit corporation organized under the laws of the District of Columbia. It does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

The Goldwater Institute states that it is a non-profit corporation organized under the laws of the State of Arizona. It does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

/s/ John J. Vecchione
John J. Vecchione

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself: jury trials, due process of law, and the right to be free from unreasonable searches and seizures. These selfsame civil rights are also very contemporary—and in dire need of vindication—precisely because Congress and state legislatures, federal and state executive branch officials, administrative agencies, and even some federal and state 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 that the Constitution was designed to prevent. Here, NCLA is interested in the proper role and function of the judiciary, and more specifically in its irreducible

[1] No party's counsel authored any part of this brief, and no person or entity, other than *amici curiae* and their counsel, paid for the brief's preparation or submission.

authority and duty to say what the law means free from the influence of the District's Mayor and administrative agencies.[2]

The Goldwater Institute ("GI") is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files *amicus* briefs when its or its clients' objectives are implicated. Among GI's priorities is the protection of individual rights against the often-unaccountable regulatory agencies which, thanks largely to deference doctrines, contradict the separation of powers and exercise authority in undemocratic ways.

GI has often appeared in state and federal courts as an *amicus* in cases involving such deference doctrines. GI scholars have also published important research on the problems caused by deference. GI believes its legal experience and public expertise will assist this Court in deciding this case.

ARGUMENT

"[T]he Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches." *Loper Bright Enters. v. Raimondo* and *Relentless, Inc. v. Dep't of Com.*, 603 U.S. 369, 403 (2024)

[2] The undersigned counsel certifies that all parties have consented to the filing of this brief. D.C. App. R. 29(a)(2).

(collectively, "*Loper Bright/Relentless*"). Federal judges and the judges of the District of Columbia have both been endowed with "judicial power," which is, most basically, the power to decide cases through the exercise of independent judgment in saying what the law is. So, when the Supreme Court said that "*Chevron*[3] has … become an impediment, rather than an aid, to accomplishing the basic judicial task of 'saying what the law is,'" *Loper Bright/Relentless*, 603 U.S. at 410 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)) (cleaned up), it was stating the principle that jurists who derive their authority from the United States Constitution may not defer to administrative agencies' interpretations of the law.

Loper Bright/Relentless thus teaches that when the Council of the District of Columbia codified a rule of judicial deference even more sweeping than that adopted by *Chevron*, it did so in derogation of the judicial power Congress vested in the District's courts. Failure to reject this poaching of the authority to declare the law would make this Court less than what Congress constituted it to be, and it would deprive litigants of the due process of law.

I. JUDICIAL POWER IN THE DISTRICT OF COLUMBIA

The modern allocation of judicial power in the District of Columbia was accomplished, as the Court knows, by the District of Columbia Court Reorganization Act of 1970, Pub. L. 91-358, 84 Stat. 473 (codified at D.C. Code § 11-101 *et seq*.)

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

(the "Reorganization Act"). As relevant here, it amended Title 11 of the District of Columbia Code to read:

> The judicial power in the District of Columbia is vested in the following courts:
>
> (1) The following Federal Courts established pursuant to article III of the Constitution:
>
> (A) The Supreme Court of the United States.
>
> (B) The United States Court of Appeals for the District of Columbia Circuit.
>
> (C) The United States District Court for the District of Columbia.
>
> (2) The following District of Columbia courts established pursuant to article I of the Constitution:
>
> (A) The District of Columbia Court of Appeals.
>
> (B) The Superior Court of the District of Columbia.

Id. at § 111, 84 Stat. at 475. Congress confirmed this arrangement with respect to the District's courts when it adopted the District of Columbia Home Rule Act of 1973, Pub. L. 93-198, § 431, 87 Stat. 774, 792 (the "Home Rule Act") ("The judicial power of the District is vested in the District of Columbia Court of Appeals and the Superior Court of the District of Columbia.").

Although the Reorganization Act cited Article I for the source of the D.C. courts' judicial power and Article III for the source of the federal courts' judicial power, it made no distinction in the *nature* of the power it was allocating. All of it was "judicial." Further, the Reorganization Act's *commitment* of that power was identical—it was "vested," which puts it beyond the District's authority to modify.

Neither the Reorganization Act nor the Home Rule Act exempted any piece of the judicial power from the vesting requirement, nor do they contemplate redistribution of the power absent congressional amendment of the organic documents. Indeed, the Home Rule Act specifically forbids the Council of the District of Columbia from amending the provision of the D.C. Code that contains the vesting of judicial power. Home Rule Act § 602(a)(4), 87 Stat. at 813 ("The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to … enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts)." (cleaned up)).

Once the Supreme Court overruled *Chevron* in *Loper Bright/Relentless*, however, the Council adopted a temporary amendment to the District's Administrative Procedure Act that requires courts to defer to the Mayor and administrative agencies on questions of law.[4] Review of Agency Action Clarification Temporary Amendment Act of 2024, D.C. Law 25-0290, 72 D.C. Reg. 3101 (Mar. 21, 2025) (expires Oct. 18, 2025) (the "Deference Amendment").[5] By its express terms, the Deference Amendment prevents this Court from exercising its

[4] *Amici* will refer to the Mayor and the District's administrative agencies, collectively, as an "administrative agency" (or its plural).

[5] The Council has also proposed making these changes to the APA permanent. *See* Review of Agency Action Clarification Amendment Act of 2025, D.C. Bill 26-0048, 72 D.C. Reg. 1664 (Feb. 21, 2025).

judgment free from the influence of the political branches. Instead, it specifically subordinates the Court's law-declaring function to that of the administrative agencies.

While it is true that the amendment did not strip the Court of *all* its authority "to decide all relevant questions of law, to interpret constitutional and statutory provisions, and to determine the meaning or applicability of the terms of any action," its power to do so is now "[s]ubject to subsections (c) and (d) of this section[.]" D.C. Code § 2-510(a)(1). Those subsections demote this Court and elevate the administrative agencies to the role of pre-eminent expositors of the law in the District's courts, as long as they operate within certain broad parameters:

> In reviewing an order or decision of the Mayor or an agency in any court or administrative proceeding, including but not limited to proceedings under subsection (a) of this section, the reviewing tribunal shall defer to the Mayor's or agency's reasonable interpretation of a statute or regulation it administers; provided, that the interpretation is not plainly wrong, or inconsistent with the statutory or regulatory language or the legislature's intent.

D.C. Code § 2-510(c).[6]

The Deference Amendment purports to compel this Court to give up even more of its vested judicial authority than the now-discredited and abandoned *Chevron* doctrine. At least under *Chevron*, the court was not required to cede its

[6] This standard also applies when "reviewing a rule adopted by the Mayor or an agency[.]" D.C. Code § 2-510(d).

duty to interpret the law unless it first concluded the statute failed to clearly answer the question under consideration—*Chevron*'s "step one": "[I]f the court determines that 'the statute is silent or ambiguous with respect to the specific issue' at hand, the court must, at *Chevron*'s second step, defer to the agency's interpretation if it 'is based on a permissible construction of the statute.'" *Loper Bright/Relentless*, 603 U.S. at 379–80 (quoting *Chevron*, 467 U.S. at 843).

The Deference Amendment has no "step one." It commands this Court to defer to the administrative agencies without regard to whether the law is ambiguous or silent with respect to the question under consideration. In the Council's hands, *Chevron*'s exception to the judiciary's native authority to declare the meaning of the law has been inverted. The Deference Amendment makes it the *rule* that this Court must let an administrative agency provide the interpretation of the law that will decide the case. If the Deference Amendment is allowed to stand, then when it comes time to draft an opinion it will be an administrative agency writing the section that says what the law requires. And this Court will be relegated to explaining why it's letting the executive branch of government do the judiciary's job.

II. THE DEFERENCE AMENDMENT VIOLATES THE REORGANIZATION STATUTE AND CONSTITUTIONAL PRINCIPLES

The Deference Amendment is deeply flawed and should be struck down because it is wholly incompatible with *Loper Bright/Relentless*—and because it violates not only the Reorganization Statute, but also some of our most basic and

cherished constitutional principles. *Amici* focus on the Deference Amendment's two most significant shortcomings.

First, the Deference Amendment directly interferes with judges' duty to apply their own independent judgment when saying what the law is, which conflicts with *Loper Bright/Relentless*. Judges are independent of the political branches precisely because their core function—exercising judgment as to the meaning of legal rules—is fundamentally distinct from making policy choices. Applying independent judgment requires judges to discern the best meaning of the law, without reference to what an administrative agency might prefer it to mean.

Second, the Deference Amendment violates constitutional due process of law. It is patently unfair for a court to defer to an agency's interpretation in cases where the agency itself is a litigant, before that same court, in the actual case at hand. Doing so empowers the agency to act as judge in its own case and deprives citizens challenging official action of the right to an unbiased adjudicator. This violates the Constitution and the Reorganization Act. Judges are supposed to be impartial arbiters of law—not home-team cheerleaders for administrative agencies.

A. The Judicial Duty to Exercise Independent Judgment

The Reorganization Act vests the "judicial Power of the District" in "[t]he District of Columbia Court of Appeals … [and] [t]he Superior Court of the District

of Columbia." Reorganization Act, § 111, 84 Stat. at 475 (D.C. Code § 11-101).[7] Inherent in this judicial power is the duty of the District's judges to apply their own independent judgment when determining what the law means. Congress preserved the judges' independence from the political branches precisely because their core function—exercising judgment as to the meaning of legal rules—is fundamentally distinct from making policy. Applying independent judgment requires judges to faithfully give effect to what they determine is the best interpretation of that law.

Interpreting the law is a legal exercise calling for legal expertise. The Reorganization Act and the Constitution provide for experts versed in this work: "Judges," who are "selected for their knowledge of the laws, acquired by long and laborious study." The Federalist No. 81, at 544 (Alexander Hamilton) (Cooke ed., 1961); *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2154 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)) (noting that "[j]udges are trained" to determine "the best reading of the statutory text"). Neither the Constitution nor the Reorganization Act permits anyone other than those judges to resolve questions of statutory construction when properly presented to them.

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[7] This is, of course, distinct from the legislative and executive powers, which Congress vested in the District Council and Mayor, respectively. Home Rule Act, § 404, 87 Stat. at 787 ("[T]he legislative power … is vested in … the Council[.]"); *id*. at § 422, 87 Stat. at 789 ("The executive power of the District shall be vested in the Mayor[.]").

Even when the law is ambiguous, interpretation remains a legal act, not a policy act within an administrative agency's authority. "Those who ratified the Constitution knew that legal texts would often contain ambiguities," and "the judicial power was understood to include the power to resolve these ambiguities over time." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in the judgment). As James Madison recognized, statutory ambiguity is unavoidable, and "[a]ll new laws" are "more or less obscure and equivocal" in various respects. The Federalist No. 37, at 236 (James Madison) (Cooke ed., 1961).

If anything, it is precisely when statutes are ambiguous that the judges' craft of legal interpretation is most valuable. To a layperson untrained in the traditional tools of construction—for whom terms like *ejusdem generis*, *noscitur a sociis*, or *in pari materia* are truly foreign—the choice between competing interpretations of an ambiguous statute might often seem like it requires a policy judgment about the most desirable result. But judges who spend their whole careers studying and refining their understanding of legal texts will readily see that the standard "tools" of interpretation are tools for unearthing the best, or sometimes the least incorrect, readings of statutes—even if, to others, they appear undecipherable on their face. Those tools explain why the Supreme Court—composed of nine Justices whose policy views may differ widely—can often unanimously decide intricate questions of statutory interpretation.

To be sure, traditional interpretive tools may not always deliver perfectly clear answers about statutory meaning. But judges remain fully capable of reaching "a conclusion about the best interpretation" through these purely legal tools. *Wooden v. United States*, 595 U.S. 360, 377 (2022) (Kavanaugh, J., concurring). Indeed, that is precisely what judges do, every day, when interpreting constitutional or statutory provisions outside the context of the Deference Amendment. When they issue such interpretations, they are exercising legal judgment—not making policy.

The Deference Amendment discards these principles, tools of construction, and methods of reasoning in favor of the policy-driven preferences of administrative agencies. It tells judges they must apply what Justice Amy Coney Barrett has called "inferior-but-tenable" agency pronouncements rather than the law's best meaning as derived from the exercise of independent judgment untainted by political considerations. *Biden v. Nebraska*, 600 U.S. 477, 509 (2023) (Barrett, J., concurring). Acquiescence is mandatory whenever the agency's interpretation falls within an ill-defined zone of reasonableness—even if the judge believes the agency's interpretation is wrong. Congress, however, made the District's judges independent from the political branches to ensure they will exercise their core interpretive function impartially, without fear or favor. The Deference Amendment, therefore, defies Congress by forcing judges to abdicate their most important duty: to exercise independent judgment in faithfully applying the law.

This duty to interpret and apply the law independently of the influence of the political branches is one aspect of the separation of powers, a concept this Court has recognized as "solidly ingrained in our governmental system." *District of Columbia v. Pryor*, 366 A.2d 141, 143 (D.C. 1976). Whether its genesis is the U.S. Constitution or the Home Rule Act, the reasons for distributing governmental power in this manner are the same. The nation's experience with this concept therefore provides a helpful guide for its application in the District's parallel structure. It also provides the background for understanding the constitutional dimension of the *Loper Bright/Relentless* decision (as discussed below).

The Framers of the Constitution "lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). Drawing on that experience, and "centuries of political thought," they crafted the Constitution's "particular blend of separated powers." *Perez*, 575 U.S. at 116 (Thomas, J., concurring in the judgment). The Framers thus divided the government's core functions—legislative, executive, and judicial—into three branches.

Both the Home Rule Act and the Constitution vest each branch with separate and exclusive forms of power. As Chief Justice Marshall once explained, this constitutional structure ensures that "the legislature makes, the executive executes, and the judiciary construes the law." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1,

46 (1825); *see also Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

In Federalist No. 78, Alexander Hamilton explained how this separation of powers drew on ancient concepts about the faculties of individuals: force, will, and judgment. Under the Constitution, he wrote, courts "may truly be said to have neither Force nor Will, but merely judgment." The Federalist No. 78, at 523 (Alexander Hamilton) (Cooke ed., 1961). "Will and judgment were understood to be faculties of the soul, and alongside these two mental faculties—or powers of the mind—was the physical power of the body." Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1232 & n.147 (2016) ("Chevron *Bias*") (citing Philip Hamburger, *Law and Judicial Duty* 148–78 (2008) ("Law and Judicial Duty")). In the Founders' view, the legislative power represented will; the executive, force; and the judiciary, judgment.

Courts were understood to exercise such judgment—untainted by force or will—when performing their most important task of conclusively interpreting the law. As Hamilton explained, "[t]he interpretation of the laws is the proper and peculiar province of the courts." The Federalist No. 78, at 525. Indeed, "[a] constitution … belongs to [judges] to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body." *Id.*; *see also*, *e.g.*, The Federalist No. 22, at 143 (Alexander Hamilton) (Cooke ed., 1961) (explaining that the "true import" of "all" this Nation's laws "must … be ascertained by judicial

determinations").

Chief Justice John Marshall famously encapsulated these core features of the judicial power in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803). Or as Justice Story later declared, "the judicial department has imposed upon it by the constitution, the solemn duty to interpret the laws, in the last resort." *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 162 (1841). "[H]owever disagreeable that duty may be," the judiciary is "not at liberty to surrender, or to waive it." *Id*.

Independent judgment has long been considered one of "the defining characteristics" of a judge. *Stern v. Marshall*, 564 U.S. 462, 483 (2011). The judicial power was "originally understood" to require judges "to exercise [their] independent judgment in interpreting and expounding upon the laws." *Perez*, 575 U.S. at 119 (Thomas, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring). That meant applying the judge's best understanding of the law as it was, not his (or the agency's) preferences as to what the law should be. Hamburger, Chevron *Bias*, *supra* p. 13, at 1206–12 (collecting sources); Hamburger, Law and Judicial Duty, *supra* p. 13, at 148–78, 316–26 (collecting sources) (judges and attorneys had duty to advance rule of law independent of any order of the king).

The judicial duty of independent judgment is an essential safeguard of

individual liberty and the rule of law. Because judgment is conceptually distinct from the force or will exercised by the other branches of government, it checks the ability of those branches to impose their policy preferences on the citizenry. As Hamilton wrote, quoting Montesquieu, "there is no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78, at 523. Indeed, an independent judicial check is crucial to ensuring that "ours is a government of laws, and not of men." *Dickson*, 15 Pet. at 162 (Story, J.). As Hamilton recognized, judicial independence is necessary "to secure a steady, upright, and impartial administration of the laws" and to prevent judges from being "overpowered, awed, or influenced" by the political branches. The Federalist No. 78, at 522–23.

Supreme Court Justices have repeatedly embraced independent judgment as inherent to the judicial function. *See* Law and Judicial Duty 505–35. Chief Justice Marshall described one of his rulings as flowing from the "dictate of my own judgment," emphasizing that "in the performance of my duty I can know no other guide." *United States v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (No. 14,692a). Justice Story likewise explained that it was his "duty to exercise [his] own judgment, and to decide [cases] accordingly." *The Friendship*, 9 F. Cas. 822, 825 (C.C.D. Mass. 1812) (No. 5,124). Justice Iredell proclaimed that he was "bound to decide" cases "according to the dictates of my own judgment." *Georgia v. Brailsford*, 2 U.S.

(2 Dall.) 415, 416 (1793) (Iredell, J., dissenting). Chief Justice Hughes emphasized that due process of law requires cases to be brought before "'a judicial tribunal for determination *upon its own independent judgment* as to both law and facts.'" *Crowell v. Benson*, 285 U.S. 22, 60 (1932) (emphasis added) (quoting *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920)); *see also St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936) (Brandeis, J., concurring).

Modern Justices have embraced the same vision of the judicial role. At her nomination hearing, for example, Justice Ginsburg explained to the Senate that "because you are considering my capacity for independent judging, my personal views on how I would vote on a publicly debated issue were I in your shoes—were I a legislator—are not what you will be closely examining."[8] And Chief Justice Roberts famously analogized the judicial function to umpiring a fair baseball game: "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire."[9]

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[8] *Hearings Before the S. Comm. on the Judiciary: on the Nomination of Ruth Bader Ginsburg, To Be Associate Justice of the Supreme Court of the United States*, 103d Cong. 52 (1993) (statement of Hon. Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States).

[9] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be The Chief Justice of the United States).

Consider this case as an example. Although *amici* take no position on the proper interpretation of the tax laws at issue, imagine a judge applies traditional rules of construction to the District's tax laws and concludes the best interpretation is that they do not impose a transfer tax on the appellants, or that (if they do) the proper valuation date is the date of sale rather than the date the transfer tax return was filed. The Deference Amendment would nonetheless require the judge to endorse the agency's proffered interpretation of the tax statutes and regulations, resulting in the imposition of a transfer tax on the property valued as of the date the transfer return was filed.

That dynamic defies the Reorganization Act as well as the separation of powers by requiring the court to give up its judicial duty to exercise independent judgment. That surrender produces a massive "shift of power" to the District's administrative agencies, and it is unconstitutional. *See* Kavanaugh*, supra* p. 9, at 2150. Nor does the Deference Amendment square with Chief Justice Roberts's baseball-inspired theory of judging: An umpire who believes the runner is safe cannot legitimately call him out. (And he certainly cannot do so just because the opposing manager tells him to.)

The judiciary has neither force nor will, but "merely judgment." The Federalist No. 78, at 523. Judges exercise such judgment when saying what the law is, based on their best reading of the law. Without independent judgment, there is

nothing left of the judiciary's constitutionally prescribed role. By forcing judges to abandon that judgment at the behest of executive officers, the Deference Amendment defeats the very purpose of having an independent judiciary.

B. The Deference Amendment Violates Due Process

The Deference Amendment also violates the Fifth Amendment's guarantee of due process of law. By requiring courts to adopt the understanding of the law proffered by the Mayor or an administrative agency—the District's most powerful litigants—it introduces systematic bias into the adjudication of cases. The Deference Amendment further offends due process by empowering the government to act as a judge in its own case, contravening ancient and traditional notions of justice. In most cases in which the Deference Amendment will control the disposition of a case, the government will be on one side as a party. Deference to the government in such a circumstance violates due process by (1) injecting systematic pro-government bias into those proceedings, and (2) empowering the government to act as a judge in its own case. These defects flout the most basic due process requirement of unbiased judging and provide further reasons to strike the Deference Amendment.

The Fifth Amendment bars the government from depriving persons of "life, liberty, or property, without due process of law." U.S. Const. amend. V. A fundamental element of due process is having one's case adjudicated by a neutral court: "A fair trial in a fair tribunal is a basic requirement of due process." *In re*

Murchison, 349 U.S. 133, 136 (1955). And "[f]airness of course requires an absence of actual bias in the trial of cases." *Id*. The Deference Amendment denies due process by requiring judges to resolve questions of law in a manner that systematically sides with one party—the government—even when that party's interpretation is not the best reading of the statute. That mandate is patently unfair. Judges are supposed to resolve cases by applying the law of the land, not an inferior interpretation advanced by a single powerful litigant. But the Deference Amendment (like *Chevron* itself) requires just that, imposing "systematic deference to one of the parties and its judgments about the law"—and therefore a "precommitment" to favoring that party. *See* Hamburger, Chevron *Bias*, *supra* p. 13, at 1212. Indeed, judicial deference requires courts to "place a finger on the scales of justice in favor of the most powerful of litigants [the government] … and against everyone else." *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of certiorari).

By requiring deference to administrative agencies, the Deference Amendment also empowers the government to adjudicate its own rights and obligations—a violation of basic principles of fairness. The Supreme Court has recognized and reaffirmed the time-honored rule that "no man can be a judge in his own case." *Williams v. Pennsylvania*, 579 U.S. 1, 8–9 (2016) (cleaned up). That principle was well-established at common law in England, *see, e.g., Bonham's Case* (1610), 77

Eng. Rep. 646, 652; 8 Co. 113b, 118a, and was recognized by the Supreme Court just a few years after the Constitution's ratification. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (explaining that it would be "against all reason" to "entrust a Legislature" with the power to "make[] a man a Judge in his own cause." (Opinion of Chase, J.)); *see also Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (due process requires neutral and detached decision-maker). Yet the Deference Amendment enables just that classic unfairness.

Even worse is that agency officials need not conduct impartial legal analysis when issuing their interpretations. Unlike judges, their offices do not impose a duty to exercise independent legal judgment. *See Perez*, 575 U.S. at 122 (Thomas, J., concurring in the judgment) ("The Framers made the opposite choice for legislators and the Executive. Instead of insulating them from external pressures, the Constitution tied them to those pressures."); *Buffington*, 143 S. Ct. at 19 (Gorsuch, J., dissenting from denial of certiorari). The Deference Amendment invites these political pressures into the courtroom and empowers administrative agencies to make interpretive decisions based on the agency's views of *policy*—not just law—so long as they are within a vaguely defined zone of reasonableness.

By requiring judicial deference to agency *policy* preferences, the Deference Amendment deprives citizens of fair adjudications governed *by law*. Imagine a statute that can be interpreted to mean X or Y, and that both the court and the agency

agree that (1) X is the better interpretation as a pure legal matter applying traditional tools of construction, but (2) both X and Y are reasonable interpretations. If the agency exercises its authority under the Deference Amendment to choose Y on policy grounds, then the court must adopt Y as the correct interpretation and give it "the force of law." *See* Kavanaugh, *supra* p. 9, at 2151. This is true even though "every relevant actor"—*including the agency itself*—"agree[s] that" Y "is not the best." *Id*. That result is truly "[a]mazing" (and not in a good way). *Id*.

For all these reasons, the Deference Amendment violates the Constitution's promise of the due process of law. Citizens are entitled to have their cases against administrative agencies resolved by judges exercising unbiased judgment under the law of the land, not by the evolving policy whims of agency bureaucrats reflected in inferior-but-tenable interpretations of the law.

III. THE DEFERENCE AMENDMENT IS INCOMPATIBLE WITH *LOPER BRIGHT/RELENTLESS* AND THE INDEFEASIBLE JUDICIAL DUTY TO EXERCISE INDEPENDENT JUDGMENT

The Deference Amendment's legitimacy depends entirely on the proposition that which branch of government resolves questions of law in contested cases is a matter of constitutional indifference, and that the Council may relocate at least some of that power to an administrative agency if it wishes. But this is not a matter of indifference or discretion, and the Council may not remove this authority from the District's courts. This is so because, as the *Loper Bright/Relentless* Court

conclusively declared just last year, "the interpretation of the meaning of statutes, as applied to justiciable controversies, is *exclusively* a judicial function." 603 U.S. at 387 (emphasis added) (cleaned up). That conclusion applies to the District's judges just as much as it does to their federal counterparts.

A cursory read of the *Loper Bright/Relentless* opinion—but only a cursory read—might suggest the case was merely about what one statute (5 U.S.C. § 706) said about the interpretation of other statutes. But that would miss the constitutional analysis that infused and informed the Supreme Court's conclusion that judicial deference operates in derogation of the judiciary's indefeasible duty to exercise independent judgment. "*Chevron*," the Court said, "has … become an impediment, rather than an aid, to accomplishing the basic judicial task of 'say[ing] what the law is.'" *Loper Bright/Relentless*, 603 U.S. at 410 (alteration in original) (quoting *Marbury*, 1 Cranch, at 177).

That "basic judicial task" did not derive from the federal Administrative Procedure Act (or any other statute). The Supreme Court said it is inherent in, and inseparable from, what it means to be a judge. Indeed, it recognized the constitutional origin of the task when it observed that the Framers consciously structured the Constitution to make this responsibility fall to the judges—and only the judges: "The Framers … envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Id*. at 385 (quoting

Federalist No. 78, at 525 (A. Hamilton)). It reasoned that courts must exercise this power to the exclusion of the other branches of government because it was the only way "[t]o ensure the 'steady, upright and impartial administration of the laws,'" that comes from "allowing judges to exercise [their] judgment independent of influence from the political branches." *Id*. (quoting Federalist No. 78, at 522) (cleaned up). This is why the Supreme Court has recognized, from its earliest days, that "it is emphatically the province and duty of the judicial department to say what the law is," *id*. at 385 (quoting *Marbury*, 1 Cranch at 177) (cleaned up), and that "'interpreting the laws, in the last resort,'" is a "'solemn duty' of the Judiciary." *Id*. (quoting *Dickson*, 15 Pet. at 162 (Story, J.)).

The duty is so solemn, and so deeply embedded in the inherent nature of the judicial function, that judges may not relinquish it to anyone else: "As Justice Story put it, 'in cases where a court's own judgment differed from that of other high functionaries,' the court was 'not at liberty to surrender, or to waive it.'" *Id*. at 386–87 (quoting *Dickson*, 15 Pet. at 162) (cleaned up). If it were otherwise, the policy-driven preferences of an administrative agency would be supreme inside the courtroom instead of the law. "[I]n the words of Justice Brandeis," the *Loper Bright/Relentless* Court said, "'the supremacy of law demands that there shall be opportunity to have some *court* decide whether an erroneous rule of law was applied.'" *Id*. at 387 (emphasis added) (quoting *St. Joseph Stock Yards*, 298 U.S. at

84 (concurring opinion) (cleaned up)).

When Congress created (1) the United States courts with jurisdiction over the District of Columbia, and (2) the District's courts, it invested them with the identical type of authority: Judicial power. Reorganization Act, § 111, 84 Stat. at 475 (D.C. Code § 11-101). The text of the Reorganization Act is unequivocal in this regard. "The judicial power in the District of Columbia is vested in the following courts …," it says, and then it identifies the courts of the United States in the immediately following subsection and the courts of the District of Columbia in the next. *Id*. So, the nature of that power must be the same, unless Congress secretly meant "the judicial power" to simultaneously mean two different things. Because it is not to be presumed that Congress harbors secret meanings when doing its legislative work, that possibility must be discarded out of hand.

Consequently, what the Supreme Court says about the nature of "judicial power" must apply to the District's courts just as much as it applies to the courts of the United States, especially inasmuch as it all derives from the same source—the United States Constitution. *Loper Bright/Relentless* says that power—the authority and duty to authoritatively say what the law is in the case at bar—is not susceptible to division and sharing with the political branches of government. 603 U.S. at 385–87. Relocating that power, even some of it, fundamentally transforms what it means to function as a judge. It privileges politics over the law in resolving cases between

citizens and the government, and it violates the Due Process Clause by systematically favoring the governmental litigant.

The District's judges, therefore, may not defer to an administrative agency's interpretation of the law. Failure to heed *Loper Bright/Relentless* would make the courts in the District of Columbia less than what Congress created them to be and less than what the Due Process Clause requires of them. The Court should set aside the Deference Amendment so that the District's judges may once again exercise their independent judgment free of the political branches' influence.

CONCLUSION

For these reasons, this Court should hold that the Deference Amendment conflicts with *Loper Bright/Relentless* and set it aside.

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CERTIFICATE OF SERVICE

Pursuant to D.C. Court of Appeals Rule 25(a)(2)(H), I hereby certify that on July 1, 2025, I filed the foregoing document with this Court's Appellate E-Filing System. Since all parties are registered to this system, service of this filing will be accomplished via the Appellate E-Filing System.

/s/ John J. Vecchione
John J. Vecchione