No. 22-451

In The
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, et al.,

Petitioners,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF FOR GOVERNOR BRIAN P. KEMP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DAVID B. DOVE
Counsel of Record
Executive Counsel to Governor Brian P. Kemp
SAMUEL L. HATCHER
201 State Capitol
Atlanta, GA 30334
(706) 296-9360
david.dove@georgia.gov

Counsel for Amicus Curiae

July 24, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTEREST OF THE *AMICUS CURIAE* [1]

Brian P. Kemp is the 83rd Governor of the State of Georgia. The citizens of the State of Georgia have twice elected Governor Kemp on his platform of supporting business and ensuring economic development for all Georgians. This includes reducing bureaucratic hurdles for employers and employees.

Governor Kemp submits this brief in support of the Petitioners and urges the Court to overturn *Chevron*, or at least clarify statutory silence does not create an ambiguity triggering *Chevron* deference. As chief executive of the State of Georgia, Governor Kemp knows the damage federal regulations can have when federal agencies extend their regulatory purview through self-serving statutory interpretations. Governor Kemp has a vested interest in ensuring the will of Georgia's voters is carried out and not undermined by bureaucratic edicts with national effect. He also knows the difficulty of enacting statewide, comprehensive

---

[1] Rule 37 Statement: No counsel for a party authored this brief in whole or in part, and no party or counsel other than the *amicus curiae* and his counsel made a monetary contribution intended to fund preparation or submission of this brief.

policy measures in the face of unpredictable intrusion by federal agencies into areas traditionally reserved for state power.

Chevron should be overturned for a multitude of reasons, as Petitioners and other *amicus curiae* argue. One reason, sufficient on its own, is *Chevron's* propensity to deny judicial remedy to agency interpretations that upset traditional federalism principles. Any action the Court takes here should be evaluated against the backdrop of the looming questions over the proper extent of federal authority into areas traditionally reserved to the States.

At first glance, the regulations at issue in this case do not implicate federalism concerns. The Magnuson-Stevens Act (MSA) governs federal fisheries outside the territory of any State. *See* 16 U.S.C. § 1801 *et seq*. The National Marine Fisheries Service (NMSF) interpreted the MSA to allow for a mandatory, industry-funded monitoring program in the Atlantic herring fishery. 50 C.F.R. §§ 648.11(g) & (h). However, the broader question the Court has chosen to address–whether *Chevron* should be overruled or clarified–has implications far beyond the waters off the New England coast.

A fundamental question about the nature of our federal system and the proper division of power between the States and the Federal Government looms on the horizon. The Court's recent decisions bring this conflict closer to the forefront and place

limits on Congress's ability to interfere directly with traditional state concerns. "Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system." *Natl. Fed. of Independent Businesses v. Sebelius*, 567 U.S. 519, 578 (2012); *see also Bond v. United States*, 572 U.S. 844, 866 (2014) (declining to adopt interpretation of chemical weapons statute that would cause "a serious reallocation of criminal law enforcement authority between the Federal Government and the States"); *Murphy v. Natl. Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1478 (2018) ("[P]rohibiting state authorization of sports gambling...violates the anticommandeering rule" and is a "direct affront to state sovereignty").

Overruling *Chevron* here will move this critical debate to the forefront. The *Chevron* analysis focuses on what Congress intended to do, attempting to discern Congressional intent from silent or ambiguous statutes. But focusing on whether Congress intended to delegate interpretative powers to federal agencies obfuscates scrutiny of the underlying exercise of power. The Court should overrule *Chevron* and require Congress to clearly call for agency actions that alter the federal-state balance. Requiring a clear statement in all circumstances—not just the most extreme cases—brings the fundamental question of what Congress *can* do to the forefront.

SUMMARY OF ARGUMENT

Chevron may have seemed like a pragmatic standard when it was decided in 1984. But the decision, as applied in the decades since has fundamentally altered Americans' relationship with the Federal Government. By insulating a federal agency's interpretation of its enabling statute, *Chevron* and its progeny stand in stark contrast to the traditional notions of federalism that underpin the Constitution. *Chevron's* presumption that Congress may implicitly delegate legislative power to federal agencies—including the power to preempt state policies—undermines the Court's longstanding requirement that when Congress intrudes into the traditional domain of the States, it must do so explicitly. And, even when federal agencies do not directly preempt state policies, every federal agency regulation constrains state action. Regulations have ancillary effects, often leading to unintended and negative consequences not contemplated by federal agencies. And, unlike Congressional action, States (and their citizens) lack direct political representation in the regulatory process to ensure their interests are protected.

Eliminating *Chevron* may seem like a daunting proposition. If there is no *Chevron* deference, what remains? *Chevron* has stood as a proxy for federal regulation as a whole, and its proponents may analogize it to the keystone in an arch–without *Chevron*, surely the system as a whole would descend into chaos? Yet the history of

administrative deference at the state level would suggest this parade of horribles is, at worst, a remote possibility. Just as Congress can only legislate through the powers delegated to it by the Constitution, agencies would be constrained to act within the parameters set forth by Congress. Overturning *Chevron* would not necessarily prevent Congress from delegating the resolution of certain technical questions to agencies; it would merely require that Congress do so explicitly.

ARGUMENT

It is axiomatic in our federal system that authority is only conferred by express grants and delegations. *Gibbons v. Ogden*, 22 U.S. 1, 33 (1824) ("[T]he Constitution of the United states is one of limited and expressly delegated powers, which can only be exercised as granted, or in the cases enumerated."). The federal government is not free to act *carte blanche*; all federal power extends from a handful of provisions in the Constitution. Indeed, for a system of limited government to function, the default presumption must be that silence indicates a lack of authority, not an unspecified grant of authority. *Id.* at 195 ("The enumeration presupposes something not enumerated."); *see also Marbury v. Madison*, 1 Cranch 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written."). The Constitution is explicit as to how this paradigm affects the balance between states and the federal government. "The

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. The Tenth Amendment is not merely a statement of intent; it reflects a critical bargain that is fundamental to our system of government.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . .. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45 (J. Madison) (Clinton Rossiter ed., 2003); *see also Bond v. United States*, 572 U.S. 844, 887 (Thomas, J., concurring) ("Debates preceding...ratification ...confirm the limited scope of the powers possessed by the Federal Government…. The Framers understood that most regulatory matters were to be left to the States."). The Tenth Amendment's protections are emblematic of the fundamental understanding that the Federal Government may only act pursuant to specific, enumerated powers.

The Federal Government has evolved far beyond this limited scope envisioned by the Framers. Federal policy impacts virtually every aspect of daily life. The public is most familiar with blockbuster legislation that dominates the news cycles, but the Federal Government undoubtedly has its most direct impact on the public through regulations promulgated by executive agencies. Agencies regulate everything from the nomenclature of onion rings to the paperwork optometrists must provide to patients following eye examinations. *See* 21 C.F.R. § 102.39 (requiring different labels for onion rings made from diced onions versus onion rings made from dried diced onions); 16 C.F.R. § 456.2 (setting requirements for what must be provided to a patient following an eye examination).[2] Regardless of the wisdom of the substantive policy choices adopted by federal regulatory agencies, federal regulation undeniably extends well into the "objects which…concern the lives, liberties, and properties of the people," a realm

---

[2] By one estimate, federal agencies promulgated more than 88,000 federal regulations between 1995 and 2016. *See* Jimmy Sexton, *America Has Too Many Rules*, The Wall Street Journal (July 9, 2023) *available at* https://www.wsj.com/articles/america-has-too-many-rules-taxes-regulation-laws-system-inequality-756e9571.

intended to be "reserved to the Several States." Federalist No. 45 (J. Madison). "The administrative state… 'touches almost every aspect of daily life.'" *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). *Chevron* is not merely a byproduct of the growth of the administrative state; *Chevron* enabled this exponential growth.[3]

A. *Chevron* Is A Judicially-Made Firewall That Precludes States From Solving Critical Questions Regarding The Preemption Of State Law By Federal Agency Regulation.

The most pernicious examples of administrative overreach are federal regulations which expand federal authority into areas previously reserved to the States. For thirty-nine years, the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), has shielded these interpretations from

---

[3] *Chevron* has led to an explosion of administrative action. For instance, in the ten years before *Chevron* was decided, the EPA issued an average approximately five rules per year. In the ten years following *Chevron*, this figure more than tripled, to nearly sixteen per year. The EPA averaged more than 695 rules annually over the last ten years.

meaningful judicial review. These interpretations—even those which do not trigger the Court's existing limits on agency or Congressional action—have combined to vastly expand the regulatory purview of federal agencies at the expense of the States' reserved powers.

With the *Chevron* framework in place, it is wasteful for states to pursue preemption challenges against a federal agency's decision-making, even in the most egregious of circumstances. *Chevron* deference has constrained courts to follow agency interpretations any time there is a question of authority, even where the only "ambiguity" in the enabling statute is the lack of an explicit prohibition *against* the agency's proposed action. *See Id.*, at 842 ("If Congress has not directly addressed the precise question at issue...the question for the court is whether the agency's answer is based on a permissible construction of the statute."). Naturally, agencies are loathe to issue interpretations that could constrain their own actions. Agencies have their own incentive structures and compete with one another for prominence and funding.[4] Moreover, the

---

[4] The most familiar examples of these conflicts are those between law enforcement agencies. *See* Andrew Grossman, *FBI Agents Say Rivals Encroach On Their Turf*, The Wall Street Journal (Aug. 26, 2014) *available at*

Executive Branch often has strong incentives to co-opt agencies' regulatory powers to achieve policy goals that it could not achieve through the legislative process. "*Chevron* obliterates this careful design and encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016); *see also* David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 2 (2010) ("In such cases, it looks for all the world like agencies choose their policy first and then later seek to defend its legality. This gets it entirely backwards."). Congress, for its part, has appeared willing to abandon its own responsibilities to pass difficult legislation. *Chevron* "leads to perverse incentives, as Congress is encouraged to pass vague

---

https://www.wsj.com/articles/fbi-agents-say-rivals-encroach-on-their-turf-1409095148. Regulatory agencies similarly compete, however, seeking to increase the prominence of their own mission. *See generally* Taylor A. Moffett, *CFTC & SEC: The Wild West of Cryptocurrency Regulation*, 57 U. Rich. L. Rev. 713 (2023) (describing the "turf war" between the CFTC and the SEC over which agency should have primary regulatory authority over cryptocurrencies).

laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues." *Egan v. Del. River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in the judgment). The result is a bureaucratic inertia that makes regulatory expansion inevitable and difficult—if not impossible—to reverse.

The Court has issued several recent opinions that cut into the theoretical underpinnings of *Chevron*. The Court revitalized the major questions doctrine to hold that the Environmental Protection Agency's (EPA) power to determine the "best system of emission reduction" does not confer the authority to "substantially restructure the American energy market" by mandating a wholesale shift away from coal-fired power plants. *West Virginia v. EPA*, 142 S.Ct. 2587, 2607, 2610 (2022). Though the EPA's interpretation "had a colorable textual basis...common sense as to the manner in which Congress would have been likely to delegate such power to the [EPA] made it very unlikely that Congress had actually done so." *Id.* at 2609. The Court has also required that when Congress passes a law that substantially alters the federal-state balance, it must clearly articulate its intent to do so. "If the Federal Government would 'radically readjust[ ] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit' about it." *Bond*, 572 U.S. at 858 (quoting *BFP v. Resolution Tr. Corp.*, 511

U.S. 531, 544 (1994)). And the Court has narrowed the circumstances in which lower courts must defer to agency interpretations of their own regulations. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2417 (2019) ("When [an] agency has no comparative expertise in resolving a regulatory ambiguity, Congress would presumably not grant it that authority."). Regardless of rhetorical framing, however, the concerns articulated in these cases and others are rooted in a fundamental concern about the proper distribution of power in our federal system. "When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States." *West Virginia*, 142 S.Ct. at 2621 (Gorsuch, J., concurring). These "clear statement" rules essentially require that, in some cases, Congress must make its intentions explicit, rather than implicit.

Perhaps the longest standing "clear statement" rule the Court has articulated relates to Congressional (or agency) intrusion into realms traditionally controlled by the States. "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "This [clear] statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which

Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). This is not to say that Congress lacks the authority to legislate in fields historically handled by the States; it simply must do so explicitly through its enumerated powers. "As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Id.* at 460. But "[t]his is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Id.*; *see also West Virginia*, 142 S.Ct. at 2621 (Gorsuch, J., concurring) (noting the major questions doctrine and the federalism clear statement rule "often travel together" due the risk of "intruding on powers reserved to the States").

The federalism clear statement rule undoubtedly applies to actions taken by agencies, not just Congress's own actions. Statutory ambiguity alone, to say nothing of mere statutory silence, is not enough to support agency actions that fundamentally alter the relationship between the Federal Government and the States. "Where an administrative interpretation of a statute invokes the outer limits of Congress's power, we expect a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (SWANNC); *Ala. Assoc. of Realtors v. Dept. of Health and Human Servs.*, 141 S.Ct. 2485, 2489 (2021) (requiring clear Congressional statement where agency action "intrudes into an area that is the

particular domain of state law"). "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *U.S. Forest Serv. v. Cowpasture River Preservation Assoc.*, 140 S.Ct. 1837, 1849 (2020).

Even with the existing requirements of the federalism clear statement rule, however, continued deference to agencies under *Chevron* raises significant federalism concerns. In some cases, an agency's actions are so radical that the federalism clear statement rule plainly applies. Even if an agency's actions do not fundamentally alter the relationship between the Federal Government and the States as a whole, there are still significant federalism concerns. Agency actions can fundamentally alter the relationship between the Federal Government and an individual state in ways that are no less impactful to the state than the type of fundamental alterations to which the Court has applied the federalism clear statement rule. These types of actions are far more likely to evade the Court's scrutiny. Lower courts may apply *Chevron* and uphold agency action in these cases, notwithstanding the existing precedents requiring more than statutory ambiguity. These gradual intrusions on the States' reserved powers may not represent a fundamental alternation to the Federal-State balance in isolation, but the aggregate effect is

the same—the powers reserved to the States are far fewer and more constrained than they once were.

In 2003, the Tohono O'odham Nation (the "Nation") purchased 135 acres of land in Maricopa County, Arizona, that was surrounded by the City of Glendale. *Gila River Indian Comm. v. United States*, 729 F.3d 1139, 1143 (9th Cir. 2013). The Nation called on the Secretary of the Interior to take land into trust for the benefit of the Nation under the Gila Bend Act, arguing the land was not "within the corporate limits of any city or town." *Id.* at 1144. The Ninth Circuit Court of Appeals found that, when applied to a county island, the phrase "within the corporate limits" was ambiguous. *Id.* at 1147. Although the Ninth Circuit did not grant the Secretary's interpretation *Chevron* deference in *Gila River*, it nonetheless indicated deference to the Secretary's interpretation would be appropriate.[5]

---

[5] The Ninth Circuit remanded the case for further interpretation by the Secretary because, though the Secretary's interpretation was reasonable, "the Secretary's interpretation warrants no deference because it rests on a mistaken conclusion that the language has a plain meaning." *Gila River*, 729 F.3d at 1149 (citing *Negusie v. Holder*, 555 U.S. 511, 518-19 (2009)).

The dissent in *Gila River* argued that the statute was not ambiguous in the first place, because the federalism clear statement rule applied. *Gila River*, 729 F.3d at 1161 (Smith, J., dissenting).

> Thus, even if the Gila Bend Act is, as the majority concludes, "ambiguous" and "less than crystal clear," this only means that Congress never actually considered the issue of creating an Indian reservation on an unincorporated island within the geographic limits of a city. While statutory ambiguity in other contexts generally requires courts to defer to an agency's interpretation, the federalism clear statement rule prevents Congress from punting this highly charged political decision to the less politically accountable agency.

Id. at 1164. The majority in *Gila River*, however, dismissed these concerns, holding that the clear statement rule did not apply because the taking of land into trust "does not raise a question of federal encroachment on state powers." *Id.* at 1152.

Neither the outcome of *Gila River* nor the reasoning in that case are before the Court today, but the difference in characterization between the majority and the dissent illustrate the perils of relying on canons of construction that exist outside

the *Chevron* framework. First, there is evident lack of clarity as to who should apply these canons—is it the job of the agency in making the reasonable interpretation, or the court's job when determining if there is ambiguity? Despite *Chevron's* mandate that courts should apply canons of construction to determine *if* there is an ambiguity, confusion remains. 467 U.S. at 843, n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *see also Kisor*, 139 S.Ct. at 2415 (stating with respect to ambiguous agency regulations that "before concluding that a rule is genuinely ambiguous, a court must exhaust all the traditional tools of construction") (quotations omitted).

While the issue of who should apply certain canons can be resolved, *Gila River* also illustrates a more fundamental problem with the application of the federalism canon to *Chevron* decisions—what "triggers" the application of these doctrines? The majority in *Gila River* noted that "the Gila Bend Act does not implicate an 'existing balance of federal and state powers,'" because there was no fundamental alteration of federal versus state power. 729 F.3d at 1152. This is a plausible understanding. The Gila Bend Act did not, on a nationwide basis, alter the relationship between the Federal Government and the States in the abstract. *Cf. SWANCC*, 531 U.S. at 174 (overturning agency interpretation that "would

result in significant impingement of the States' traditional and primary power over land and water use" on a nationwide basis). Certainly, however, the interpretation at issue in *Gila River* significantly altered the relationship between the State of Arizona and the Federal Government, to say nothing of the City of Glendale.

This is the fundamental problem with *Chevron*, at least as it relates to federalism concerns. Nearly every federal regulatory action has a significant impact on a state's relationship with the Federal Government. Even where agency action does not result in a systemic and fundamental shift in the balance of power between the States and the Federal Government, the gradual accumulation of the actions has an enormous impact in the aggregate. Allowing the small intrusions on State sovereignty to escape meaningful judicial review may work when each decision is viewed in isolation, but the long-term effect is no less detrimental. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assocs., Inc.*, 531 U.S. 457, 468 (2001). If mice are continually added to a scale, however, they will eventually outweigh the elephant. The same principle applies to the division of regulatory power between the States and the Federal Government. Even if the federalism canon, the major questions doctrine, or other rules of construction prevent

sudden, major changes in the distribution of power, as long as *Chevron* continues to allow the gradual accumulation of regulatory power at the expense of the States, the eventual result is no less harmful.

B. Affording *Chevron* Deference To Agency Interpretations Undermines States' Ability to Implement And Administer Policies Through Their Powers Even Where There Is Not Direct Preemption That Implicates The Federalism Clear Statement Rule.

When federal agencies promulgate new regulations, they do not do so in a vacuum. Even when regulations have their intended effect, there are other consequences. More often than not, these consequences are not felt by the Federal Government, but rather must be addressed by States–if remedies are even available. Federal regulation also undermines States' own democratic accountability measures. *West Virginia*, 142 S.Ct. at 2618 (Gorsuch, J., concurring) (increasing federal agency control over areas of traditional state concern "would be a particularly ironic outcome, given that so many States have robust non-delegation doctrines designed to ensure democratic accountability in their state lawmaking process.") (citation omitted). States are forced to bear not only the consequences of federal regulation, but also the democratic backlash against such regulations, due to the lack of direct accountability of federal agencies. *See Alaska Dept. of Environmental Conservation vs. E.P.A.*, 540

U.S. 461, 518 (2004) (Kennedy, J., dissenting) (noting when federal agencies reserve "the authority to make final judgments under the guise of surveillance and oversight" it undermines "Congress' goal of allowing state governments to be accountable to the democratic process").

Two such examples can be found in the increasing regulation of physicians by the Centers for Medicare and Medicaid Services (CMS). Physicians are professionals that are overseen and licensed at the state level. *See Gonzales v. Oregon*, 546 U.S. 243, 271 (2006) ("The structure and operation of the [Controlled Substances Act (CSA)] presume and rely upon a functional medical profession *regulated under the States' police powers*.") (emphasis added). The Federal Government, however, maintains immense power over the medical profession through CMS's supervision of Medicare and Medicaid programs. *See Sebelius*, 567 U.S. at 581 ("Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs."). Even when changes to CMS reimbursement policies do not categorically exceed Congressional power, as they did in *Sebelius*, CMS still exercises significant power over hospitals and physicians through its power to control reimbursements. CMS can effectively alter the standard of care for physicians–notionally controlled by state licensing boards–by setting standards for the reimbursement through federal funds. These

efforts, however well-intentioned they might be, have had significant and deleterious effects on patient outcomes.

In 2007, for instance, CMS issued regulations that conditioned federal reimbursement for organ transplants on achieving aggregate post-transplant graft and survival rates. *Solid Transplant Programs - Outcome Thresholds - Revised Guidelines*, Centers for Medicare and Medicaid Services, at 2 (May 13, 2016); *see also* 42 C.F.R. § 482.80(c). Though framed as a standard for reimbursement, the purpose of the regulation was to set a national standard for clinical decisions about organ transplants. The effect, however, was that physicians and hospitals–concerned about losing critical federal funding–declined to perform riskier transplants, harming the patients that needed those procedures the most. Following the CMS regulation, the number of transplant candidates removed from waiting lists increased by 86 percent, and the number of potentially viable transplant organs that were discarded increased by more than 20 percent. Casey Ross, *Hospitals Are Throwing Out Organs And Denying Transplants To Meet Federal Standards*, PBS (Aug. 13, 2016) *available at* https://www.pbs.org/newshour/health/hospitals-throwing-organs-denying-transplants-meet-federal-standards. In 2016, CMS revised its policies to allow for riskier transplants. *Solid Transplant Programs*, *supra*, at 3. In expanding its regulatory purview to effectively address substantive clinical decisions,

rather than just standards for reimbursement, CMS inadvertently made it *more* difficult for patients to get the care they needed.

In another example, CMS instituted a "pay for performance" model that tied reimbursements in part to patient satisfaction surveys. One study found that of physicians surveyed, "about half of [the] clinicians reported ordering an inappropriate test and prescribing inappropriate antibiotic or opioid pain medication as a result of patient satisfaction scores." Aleksandra Zgierska, et al. *Impact Of Patient Satisfaction Ratings On Physicians And Clinical Care.* Patient Preference and Adherence vol. 8 437, 442 (Apr. 3, 2014); *see also* Ronald Hirsch, *The Opioid Epidemic: It's Time to Place Blame Where It Belongs*, Mo. Med. vol. 114:2, 82-90 (2017) ("Physicians therefore feel pressured to prescribe opioids when patients request/demand them," as a result of patient satisfaction metrics, "despite their reservations about the need for opioid medications.").

These examples are not the grand alterations to the federal system that were at issue in *Sebelius*, *West Virginia*, and other cases, but the effect of these intrusions were no less harmful to the individuals affected. They are indicative of the broader problem with federal over-regulation. CMS made regulatory decisions under the guise of its reimbursement powers that veered into the realm of substantive decisions about patient care—decisions which are

normally handled by state licensing systems. These decisions had unintended and devastating consequences. Further, these types of regulations curtail states' ability to exercise their presumed independence of state sovereignty guaranteed by the Tenth Amendment, notwithstanding the lack of direct preemption. In the organ transplant example, no matter what state laws or policies a state adopted to encourage these life-saving procedures, the threat of losing federal reimbursement funding would effectively neuter those policies. What physician or hospital would perform a procedure that risks jeopardizing a significant portion of a hospital's operating revenue? So too with opioid prescriptions and patient satisfaction surveys. If a state medical board brought disciplinary procedures against a physician it believed over-prescribed opioids, how different is the characterization of the physician's actions if he followed guidelines developed in conjunction with hospital administrators to meet federal benchmarks for satisfaction?

It is tempting to view regulatory power over a given subject as dividing a pie. The Federal Government, whether through statute or agency interpretation, can take a small piece or a much larger piece, but it is ultimately a question of quantity. States, however, as result of their reserved police power, are tasked with crafting comprehensive regulatory systems that work *together* to ensure the health, safety, and well-being of the State's citizenry. Rather than taking a slice

out of a pie, a better comparison is taking the ingredients before the pie is made—an apple pie without apples is no longer an apple pie. Constraining which ingredients States may use when crafting their own regulatory policy not only limits the "quantity" of State policy, it limits the quality of what States can create.

This is, of course, a vast oversimplification, but as federal mandates further constrain available policy choices, it limits the options available to the States to address critical needs; in other words, it constrains the potential creativity of States. Creativity leads to a lack of uniformity, but that is a feature, not a flaw, of our federal system which allows States to maintain individual identities in line with the views of their citizens.

> The difficulty of legislating at the federal level aimed as well to preserve room for lawmaking by governments more local and more accountable than a distant federal authority, and in this way allow States to serve as laboratories for novel social and economic experiments.

West Virginia, 142 S.Ct. at 2618 (Gorsuch, J. concurring). This interference affects both the implementation of current policies and the development of new policies.

The court in *Gila River*, though it dismissed these concerns, articulated the problem that States face when confronted with federal regulatory action:

> Virtually any federal legislation could be construed to have at least minor, derivative implications for traditional state functions. For example, does federal legislation appropriating funds for building and maintaining interstate highways require a plain statement of congressional intent to interfere with the traditional state functions of zoning and land use that the dissent flags in this case?

729 F.3d at 1152. Undoubtedly, there are such derivative implications. And, when viewed in isolation, they are minor. But as the dissent in *Gila River* noted, while these "derivative implications" may be minor in the Federal Government's perspective, they can be major when viewed from the States' perspective. 729 F.3d at 1169 (noting Secretary's interpretation would undermine zoning considerations and "implicate major budgetary decisions" for infrastructure and public safety spending); *see also Sebelius*, 567 U.S. at 581-82 (noting loss of Medicaid funding, from States' perspective, would be "economic dragooning" and would undermine States' "intricate statutory and administrative regimes [developed] over the course of many decades to implement their objectives under

existing Medicaid"). Every time federal regulatory action constrains future State action, States' functional abilities to exercise their traditional, reserved powers are constrained.

Chevron is not the only culprit in this trend, nor is overturning *Chevron* the only solution. As the Court has addressed in *West Virginia*, *Sebelius*, *Gregory*, and other cases, there are other mechanisms that can help achieve the same result. *Chevron* is, however, a prime culprit. Rather than continue to gradually trim *Chevron* with the major questions doctrine, the federalism clear statement rule, and other doctrines, the Court should take this opportunity to overturn *Chevron* once and for all.

C. Overturning *Chevron* Would Not Leave Courts Powerless To Defer To Agency Interpretations; It Would Merely Require That Congress Explicitly Identify The Narrow, Technical Questions It Intends To Defer To Agencies For Resolution.

If *Chevron* were to disappear, what would take its place? States administrative agencies have long operated without the robust administrative deference schemes that federal agencies enjoy, yet States have effective and robust regulatory schemes. *Chevron* is not a critical component of an effective regulatory scheme.

The short answer is that *nothing* must take *Chevron's* place. Any skepticism of this truth is merely skepticism that Congress can perform its constitutional duties without relying on the flawed crutch that *Chevron* provides. Presupposing congressional intent merely provides plausible deniability for Congress to take action that is not attributed to it, or worse, an avenue for the Executive Branch to take action that Congress would not approve. Deference to agency interpretations is appropriate when Congress clearly articulates an intent to defer such decisions to agencies. The Court set forth this extra step in *Kisor* in the context of deference to agency interpretations of their own rules. "[T]he agency's interpretation must in some way implicate its substantive expertise." *Kisor*, 139 S.Ct. at 2417. "When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Id.* The same thinking is clear in the Court's recent decisions that eat at the edges of *Chevron*.

> Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." New York v. United States, 505 U.S. 144, 187, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). But it is not plausible that Congress gave EPA the authority to

> adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.

West Virginia, 142 S.Ct. at 2616.

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 172–73 (2001) (SWANNC) (citations omitted); *Gonzales*, 546 U.S. at 262 ("It would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician or schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity outside the course of professional practice, and therefore a criminal violation of the CSA.") (citations and quotations omitted); *Gregory* 501 U.S.

at 464 ("'[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states' interests.'") (quoting L. Tribe, *American Constitutional Law* § 6–25, p. 480 (2d ed. 1988)). All these decisions require, in some circumstances, that Congress be clearer to delegate the power of binding interpretative authority to executive agencies. The same principle should be applied to deference. Courts should only be required to defer to agency interpretations where Congress has explicitly called for such deference.

Agencies have no inherent powers; they cannot act without Congress delegating power to them. *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act ... unless and until Congress confers power upon it"); *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress."); *Railway Labor Executives' Association v. National Mediation Board*, 29 F.3d 655, 670 (D.C. Cir.), *amended*, 38 F.3d 1224 (D.C. Cir. 1994) ("Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature."); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the

authority delegated by Congress."). If Congress wants to delegate gap filling authority to agencies, it can do so explicitly. Implicit delegation, however, runs contrary to the very nature of administrative law.

Chevron is, fundamentally, an attempt to ensure agencies can bring their subject-matter expertise to bear on problems without the concern of undue interference from judges.

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the

> agency charged with the administration of the statute in light of everyday realities.

Chevron, 467 U.S. at 865-66. This proposition, at its most basic level, makes sense. Agencies often have unique, technical knowledge and experience that make them far better suited to address certain highly technical issues.

> It is because of those features that Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. And so too, when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar.

Kisor v. Wilkie, 139 S.Ct. 2400, 2413 (2019). As appealing as this idea might be, however, it misses a fundamental step in the process.

Chevron involved a particularly technical question: how to define a pollution source in the context of industrial facilities that may have multiple pollution-emitting devices. *Chevron*, 467 U.S. at 840. In that context and given the EPA's role in implementing the Clean Air Act, few would reasonably argue that *some* level of deference to the

EPA's technical expertise would be warranted. *Chevron* has since been applied, however, to a wide range of issues, many of which do not involve technical questions at all. *See, e.g., Gila River*, 739 F.3d at 1144. In the case presently before the Court, the NMSF asks for deference on its interpretation of whether an industry-funded monitoring program is permissible. Neither question is technical, nor does either present a question of interpretation that an agency—as opposed to a court—would be particularly better suited to answer. Such interpretations should not receive *Chevron* deference, or any deference for that matter.

CONCLUSION

As federal agencies continue to promulgate regulations that impact the everyday lives of Americans, the role of the States is diminished. Even where federal action does not directly preempt state policies, federal actions constrain how states may exercise their reserved powers under the Tenth Amendment. If Congress wants to delegate powers—individually or in the aggregate—it should make its intent clear. A clear statement of intent may raise a question of what Congress *can* do, but it avoids a dispute over what Congress *meant* to do. The question of what Congress *can* do looms large on the horizon. But, by overturning *Chevron* in this case, the Court can ensure that the critical debate over the true nature of our federal system is brought to the forefront.

Respectfully Submitted,

DAVID B. DOVE
Counsel of Record
Executive Counsel to Governor
Brian P. Kemp
SAMUEL L. HATCHER
201 State Capitol
Atlanta, GA 30334
(706) 296-9360
david.dove@georgia.gov

Counsel for Amicus Curiae
Governor Brian P. Kemp

July 24, 2023