No. 22-451

In the

Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL.,
Petitioners,

v.

GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER AND BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
174 W. Lincoln Ave. #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae

MOTION OF CENTER FOR CONSTITUTIONAL JURISUPRUDENCE FOR LEAVE TO FILE *AMICUS CURAE BRIEF* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Center for Constitutional respectfully moves for leave to file a brief *amicus curiae* in support of petitioner. The brief follows immediately after this motion. Petitioner has granted consent and has filed a blanket consent to the filing of amicus briefs. Respondent has declined to respond to emails seeking consent sent on November 16, 2022, and December 7, 2022. Because respondent has failed to respond, the Center for Constitutional Jurisprudence presents this motion for leave of the Court to file the appended brief *amius curiae.* Respondent and Petitioner received notice of this amicus brief on November 16, more than 10 days prior to this filing.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that structural provisions of the Constitution must be upheld in order to protect individual liberty. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *West Virginia v. EPA*, 142 S.Ct. 2587 (2022); *Kisor v. Wilke*, 139 S.Ct. 2400 (2019); *Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015), *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); *Christopher v. SmithKline Beecham, Corp.*, 567 U.S. 2156 (2012); to name a few.

The proposed amicus brief seeks to bring before the Court arguments informed by *amicus's* experience in studying and briefing the issues presented. Movant believes that this brief will assist the Court in its consideration of the petition. The significant issues concerning the structural constitutional provisions protecting individual liberty warrant the granting of this motion. Movant therefor requests that its motion be granted.

Dated: December 14, 2022

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional
Counsel Group
174 W. Lincoln Ave.
#620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution

Cases

Other Authorities

Statutes

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that structural provisions of the Constitution must be upheld in order to protect individual liberty. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *West Virginia v. EPA*, 142 S.Ct. 2587 (2022); *Kisor v. Wilke*, 139 S.Ct. 2400 (2019); *Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015), *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); *Christopher v. SmithKline Beecham, Corp.*, 567 U.S. 2156 (2012); to name a few.

SUMMARY OF ARGUMENT

The Constitution embeds a finely tuned separation of powers in the frame of government as a means of protecting individual liberty. Congress is granted all legislative power, but that power is constrained by bicameralism and presentment requirements. The President is vested with the power to execute the laws but is constrained by Congress's power of the purse.

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[1] Petitioner consented to the filing of this brief. As noted in the preceding motion, respondent declined to respond to amicus's request for consent. All parties receive more than 10 days notices of this *amicus* brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

Both the President and Congress are constrained by the judicial power of review.

The court below reasoned that the statute was sufficiently ambiguous to employ *Chevron* deference to the agency's "reasonable" interpretation, ceding judicial review to the agency whose action was challenged. The court further ruled that that the agency "reasonably" interpreted the statute to permit it to create a revenue source for its regulatory activities that bypassed Congress's power to tax and appropriate. But such an interpretation cannot be reasonable because it assumes that Congress delegated its power of the purse to the Executive. Under the decision below, the finely tuned separation of powers design is eviscerated.

This Court should grant review in this case to put an end to deference doctrines that allow the Executive to usurp both Congressional and Judicial power and to rule that Congress cannot delegate its power of the purse to an executive agency.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review to Overturn Decisions Requiring Deference to Executive Agency Interpretation of Congressional Enactments.

Members of this Court have become increasingly uncomfortable with the type of deference granted to administrative agencies under so-called *Chevron* deference. *See*, *e.g.*, *Buffington v. McDonough*, 143 S.Ct. 14 (2022) (Gorsuch, J., dissent from denial of certiorari); *Michigan v. EPA*, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring); *Arlington v. FCC*, 569 U.S. 290, 312-28 (2013) (Roberts, C.J., dissenting (joined by

Justices Alito and Kennedy)). There is good reason for this discomfort. Deference to an agency's interpretation of a statute has administrative agencies usurping the judicial role of interpreting legal texts (allowing the agency to be a judge in their own case) and the congressional role of enacting legislation. If the legislation is so vague as to have multiple or no discernable meaning, the agency is effectively exercising Congress' lawmaking power when it "interprets" the legislation. Agencies are allowed to make policy that Congress never considered or perhaps could never muster a majority to enact. When agencies bypass Congress to make law, they circumvent the constitutional limitations on lawmaking of bicameralism and presentment. Important checks on the exercise of government power are simply ignored.

This administrative action is further insulated from meaningful review when the judiciary defers to the agency interpretation. The agency becomes a court of last resort in its own case on matters of legal interpretation. This regime of deference creates the perfect storm for destruction of the separation of powers limits that are embedded in the structure of the Constitution.

The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See, e.g.*, Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed., Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748); 1 William Blackstone, COMMENTARIES ON THE

LAWS OF ENGLAND 150-51 (William S. Hein & Co., Inc. 1992) (1765); John Locke, THE SECOND TREATISE OF GOVERNMENT 82 (Thomas P. Peardon ed., Prentice-Hall, Inc. 1997) (1690).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. *See* FEDERALIST No. 51, at 321-22 (James Madison) (Clinton Rossiter, ed., 1961); FEDERALIST No. 47, *supra*, at 301-02 (James Madison); FEDERALIST No. 9, *supra*, at 72 (Alexander Hamilton); *see also* Letter from Thomas Jefferson to John Adams (Sept. 28, 1787), in 1 THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in the Supreme Court and lower federal courts. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. FEDERALIST No. 48, *supra* at 308 (James Madison). Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id.*

This Court has also recognized that separation of powers is the core structural principal of the Constitution that protects personal liberty. *Boumediene v. Bush*, 553 U.S. 723, 797 (2008); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*,

501 U.S. 252, 272 (1991); *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

Employing *Chevron* deference to defer to agency interpretation of ambiguous statutory texts, however, breaches this core doctrine of separation of powers in two fundamental ways. First, it allows executive agencies to exercise Congress's power to legislate, a power which the Constitution vests solely in Congress and strictly limits how those laws can be made. Second, *Chevron* deference impermissibly allows executive agencies to exercise the Judiciary's well-settled power "to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

A. Deference to the Agency Allows the Executive to Exercise Legislative Power.

Chevron deference involves an explicit recognition that administrative agencies make "law"—that is to say, agencies promulgate substantive legal obligations (or prohibitions) that bind individuals. Pursuant to the doctrine, courts may not interfere with agency lawmaking so long as the congressional enactment is ambiguous, the agency has both expertise and rulemaking authority, and the agency's interpretation is at least a possible interpretation of the law. The courts have recognized that agencies are clearly involved in lawmaking when they enact substantive rules that are subject to *Chevron* deference. *See U.S. v. Mead Corp*, 533 U.S. 218, 233. There are two problems with deference in this regard. First, the Constitution assigns lawmaking exclusively to Congress. U.S. Const. art. I, § 1. Second, reflecting the Founders' fears over the power of legislative branch, the Constitution specifies a particular procedure through which laws are to be made. U.S. Const. art. I, § 7, cl.

2. Agencies do not follow that procedure when promulgating regulations. *See* 5 U.S.C. § 553

Article I, section 1, clause 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." This is the first of the three "vesting clauses" that sets out the basic plan of government under the Constitution and that provide the framework for the scheme of separated powers. Powers vested in one branch under a vesting clause cannot be ceded to or usurped by another. *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 67-68 (2015) (Thomas, J., concurring).

The legislative power is the power to alter "the legal rights, duties and relations of persons." *See Chadha*, 462 U.S. at 952. This is the same definition given to "substantive rules" adopted by administrative agencies. Section 551 of the Administrative Procedure Act defines the term "rule" as an agency statement that prescribes "law or policy." These are "laws" that impose "legally binding obligations or prohibitions" on individuals. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 123 n.4 (Thomas, J., concurring). It is difficult to see much space between agency "rules" and the "legislation" that Article I of the Constitution reserved exclusively to Congress. Deference under *Chevron* and related deference doctrines makes any such space evaporate and results in the Executive exercising Congress's power to make law.

B. Deference to Agency Interpretation of Statutory Texts Allows the Executive to Exercise Judicial Power.

Article III, § 1 of the Constitution vests the "judicial power" in the "Supreme Court and in such inferior Courts as the Congress may . . . establish." In a scheme of separated powers, the key to judicial power is the "interpretation of the law." FEDERALIST No. 78, *supra* at 465 (Alexander Hamilton); *Perez*, 575 U.S. at 119-20 (2015) (Thomas, J., concurring). This is a power that must be separated from both execution and legislation. Quoting Montesquieu, Justice Story notes "there is no liberty, if the judiciary power be not separated from the legislative and executive powers." Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION, § 1568 (1833), reprinted in 4 THE FOUNDERS' CONSTITUTION 200. The purpose of the judiciary is to stand as a neutral arbiter between the legislative and executive branches—a necessary check on the political branches of government. FEDERALIST No. 78, *supra* at 467 (Alexander Hamilton). The separate judicial power allows the courts to serve as "bulwarks" for liberty. *Id*. This requires that judges have the power to "declare the sense of the law." *Id*., *see Chadha*, 462 U.S. at 944.

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. FEDERALIST No. 51, *supra* at 322 (James Madison). In order to keep the political branches in check, the courts may not surrender their power to interpret the law to either of the political branches. Each branch of government must support and defend the Constitution and thus must interpret the Constitution. *United States v. Nixon*, 418 U.S. 683, 704 (1974). The Courts may not, however, cede their judicial power to interpret the laws to the Executive. *See id*. The judicial branch ac-

complishes its role by ruling on the legality of the actions of the executive and giving "binding and conclusive" interpretations to acts of Congress. William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES, reprinted in 4 THE FOUNDERS' CONSTITUTION 195. Had the Constitution not assigned such a role to the judiciary as a separate branch, the plan of government "could not be successfully carried into effect." *Id*.

Chevron deference, however, alters this framework in a way that the separation of judicial from executive power is no longer enforced. It is no longer the exclusive province of the courts to interpret congressional enactments. Instead, the court now treats the existence of an "ambiguity" as meaning that Congress intended the agency, and only the agency, to interpret the statute. So long as the agency interpretation is "reasonable," *Chevron* requires the courts to cede their judicial power to the executive and approve the agency interpretation.

This Court took this line of argument to its logical extreme in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). There, this Court ruled that *Chevron* deference applied to the FCCs decision that cable internet providers did not provide "telecommunications service" as defined by the Communications Act, and thus were exempt from common carrier regulation. *Id*. at 977, 981. That part of the decision is not surprising. The innovation introduced by *Brand X* is that the agency interpretation of Communications Act ran contrary to a Court of Appeals interpretation of the same provision in a prior case. *Id*. at 981. The Court ruled that *Chevron* required the Court of Appeals to ignore its prior ruling interpreting the Communications Act

and instead defer to the Commission's new interpretation. *Id*. at 982-83. In effect, this Court ruled that the agency had the power to overrule an Article III court on a question of statutory interpretation. The Court justified this by asserting that the agency was not engaged in statutory interpretation but rather "gap-filling." *Id*.

Any deference to the agency on issues of statutory construction ignores the constitutional role of the courts to interpret legal texts. It also ignores the provisions of the Administrative Procedure Act that assign interpretation of the statute to the courts, not the agencies.

This Court should grant review to reconsider *Chevron* deference and to reinstate the scheme of separated powers.

II. This Court Should Grant Review to Consider Whether an Agency's Interpretation of a Statute that Allows the Agency to Circumvent the Power of the Purse Is Inherently Unreasonable Because Such a Statute Would Violate the Nondelegation Doctrine.

The regulation at issue compels domestic fishing vessels to not only carry federal monitors, but also requires the fishermen to pay those monitors' salaries at a cost up to 20 percent of the revenue of fishing operation. As noted in the dissenting opinion of Judge Walker in the Court below, Congress has not appropriated enough money for the Fisheries Service to pay for the monitors at issue. Pet. App. at App. 23. By regulation, the Fisheries Service sought to circumvent Congress's decisions on appropriations. The Court

should grant review to rule that Congress could not have delegated such power to the agency.

As noted above, the power to make law is vested in Congress and Congress alone. The Constitution further limits how Congress may exercise that power with specific procedural requirements. Congress cannot delegate this power to make law to any of the other branches.

In addition to the power of lawmaking generally, Congress has the exclusive "power of the purse." Article I, section 9 prohibits withdrawal of money from the Treasury without an appropriation from Congress. The purpose of this restriction is to put the "power of the purse" in the hands of the branch of government most representative of the people. FEDERALIST 58 (James Madison) *supra* at 359. It is a significant check on the power of the executive. St. George Tucker, BLACKSTONE'S COMMENTARIES, 1:App 362-64 (1803) (*reprinted in* 3 THE FOUNDERS' CONSTITUTION at 377); Joseph Story, COMMENTARIES ON THE CONSTITUTION 3: §§ 1341-43 (1833) (*reprinted in* 3 THE FOUNDERS' CONSTITUTION at 377); *see Reeside v. Walker*, 52 U.S. 272, 291 (1850).

The Courts of Appeals have recognized that the Executive cannot circumvent this constitutional command by the simple expedient of not depositing funds into the Treasury. Monies of the federal government are public revenues and are subject to the appropriation requirement. *Schedule Airlines Traffic Offs. v. Dep't of Def.*, 87 F.3d 1356, 1362 (D.C. Cir. 1996) (citing Miscellaneous Receipts statute for proposition that money received by a government official must be deposited in the Treasury and are subject to Congress's power to appropriate).

The Fifth Circuit has recently ruled that Congress cannot set up an agency that receives its funding from other sources, free of Congress's appropriation power. *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 637-39 (5th Cir. 2022). While other courts have upheld executive agencies that are funded entirely out of nonappropriated funds, that approval does not extend to agencies that receive some of their support via appropriation. *See Am. Fed'n of Gov't Emps., AFL-CIO, Loc. 1647 v. Fed. Lab. Rels. Auth.*, 388 F.3d 405, 409-10 (3d Cir. 2004). Even if Congress only reserved the power to appropriate funds to the agency, Congress maintains its "power of the purse" and all funds spent by the agency must be authorized by appropriation, regardless of source. *Id.*

The regulation at issue opens a new path for the Executive to circumvent the constitutional scheme of separated powers. Rather than waiting for an appropriation, the agency can simply issue a regulation imposing a requirement that the regulated community pay directly for the cost of the regulation – whether that cost is in salaries or equipment. The agency can dictate how much must be paid and to whom it is paid, all without congressional approval.

Whether or not there is an ambiguity in the law, the Court cannot presume that Congress could delegate such power to an executive agency. That would constitute delegation of an exclusive power Congress – the power to appropriate funds. That power is critical to maintenance of the scheme of Separation of Powers.

CONCLUSION

The Court should grant review in this case to reconsider *Chevron* deference and to rule that Congress cannot delegate away its power under Article I, section 9 to control appropriations.

December 2022 Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
174 W. Lincoln Ave. #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae