No. 16-1189

IN THE

Supreme Court of the United States

E.I. DU PONT DE NEMOURS AND COMPANY AND ADECCO USA, INC.,

Petitioners,

v.

BOBBI-JO SMILEY, AMBER BLOW, AND KELSEY TURNER,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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May 1, 2017

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute respectfully moves for leave to file the attached brief as *amicus curiae* supporting Petitioner. All parties were provided with timely notice of amicus's intent to file as required under Rule 37.2(a). Petitioner's counsel consented to this filing. Respondents' counsel withheld consent.

The interest of the Cato Institute arises from its mission to advance and support the rights that the Constitution guarantees to all citizens. Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty.

Toward those ends, Cato conducts conferences, publishes books, studies, and the annual Cato Supreme Court Review, and files *amicus* briefs. Recent cases in which Cato has filed briefs in this Court relating to separation of powers and due process include *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Dep't of Transp. v. Ass'n. of Am. R.R.*, 135 S. Ct. 1225 (2015); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015); and *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

Cato has no direct interest, financial or otherwise, in the outcome of this case, which concerns Cato only because it implicates the protection for individual

rights that the separation of powers and due process of law provide.

For the foregoing reasons, Cato respectfully requests that it be allowed to file the attached *amicus curiae* brief.

Respectfully submitted,

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QUESTIONS PRESENTED

This case concerns whether, under the Fair Labor Standards Act ("FLSA"), employers that have paid employees for otherwise non-compensable meal breaks and included such compensation in their regular rate of pay may credit such payments against any overtime compensation owed to employees for time spent performing shift relief and donning and doffing their uniforms and protective gear. The Third Circuit and Department of Labor ("DOL") acknowledged that the FLSA is silent and does not expressly prohibit this pay practice. Nevertheless, and contrary to this Court's decisions in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942) and *Christensen v. Harris County*, 529 U.S. 576 (2000), the Third Circuit held that the FLSA's lack of express authorization of the practice at issue meant that it is implicitly prohibited. This holding also conflicts with Seventh and Eleventh Circuit rulings.

In reaching its decision, the Third Circuit deferred to *amicus* briefs submitted by the DOL, even without finding the statute to be ambiguous and even though DOL has never promulgated a regulation, issued an opinion letter, or taken any enforcement actions concerning the practice at issue. The court's decision deepens a circuit split concerning whether such deference should be accorded to statutory interpretations by agencies expressed for the first time in litigation.

The questions presented are:

1. Does the FLSA stop employers from using compensation for non-compensable meal breaks as a credit against compensation owed employees for work time?

2. Should courts defer to agency statutory interpretations advanced for the first time in litigation?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because it implicates the protection for individual rights that the separation of powers and due process of law provide. It also concerns a growing debate regarding the need to rebalance power between the executive and legislative branches to ensure that the Constitution's structural provisions continue their work in securing ordered liberty.

SUMMARY OF ARGUMENT

The court below ignored a fundamental administrative law axiom: Executive agencies can only exercise power that Congress has delegated to them. The court closed its eyes to that principle by equating statutory silence with ambiguity—without finding the statute to be ambiguous—and holding that the FLSA can prohibit any labor practice it does not explicitly allow. This precedent would give any agency a virtually unlimited power to write any regulations it feels a statute should cover, without any congressional authority.

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief. Petitioners' consent letters have been lodged with the Clerk. Respondents withheld consent, so a motion for leave to file is attached. No party's counsel authored any part of the brief and nobody other than *amicus* funded its preparation or filing.

Moreover, the circuit court only adopted this misguided conclusion after it accorded *Skidmore* deference to DOL *amicus curiae* briefs submitted at the court's request. Despite not explicitly finding any statutory ambiguity, the court deferred to the DOL's assertion that the FLSA can forbid a labor practice where the statute is silent. The DOL has never put forth this view of the FLSA before this litigation in any regulation, opinion letter, or enforcement action. Indeed, this is the first time that anyone could have ever known the FLSA forbids the practice at issue.

This development violates petitioners' due process rights in two ways. First, since this was the first time DOL had ever interpreted this section of the statute at issue, and two separate circuit courts had already ruled that the practice was legal, petitioners were denied fair notice. Second, by inviting a nonparty government agency into the litigation and deferring to its view, the lower court decided the case with bias towards one of the parties before it.

Amicus agrees with petitioners that the Third Circuit's opinion creates two circuit splits and squarely defies this Court's precedent. *See* Pet. App. 17-39. For these reasons alone, the Court should grant the petition. But the serious constitutional issues raised by the lower court's opinion should also not be ignored.

The Court should take this case and explain that the Constitution's separation of powers does not allow such judicial enabling of executive mischief. Moreover, administrative agencies simply cannot take it upon themselves to ignore or rewrite duly enacted legislation and then thrust their statutory revisions on private litigants for the first time in litigation.

ARGUMENT FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION CREATES SERIOUS SEPARATION OF POWERS CONCERNS UNDER ARTICLE I

The separation of powers is indispensable to the protection of individual liberty. Indeed, the Framers believed that the structural separation of powers—both horizontal and vertical—would be the front line of defense against an overreaching government. *See* The Federalist, No. 51 (C. Rossiter ed. 1961) (J. Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."). In the context of the division of federal powers, the Framers further recognized that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." *Id*., No. 47 (Madison); *see also*, Montesquieu, *The Spirit of the Laws* 157 (Cohler et al. trans., 1989) ("All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised [the] three [governmental] powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.").

To protect against this accumulation, they vested the three distinct powers in separate departments. *See Dep't of Transp. v. Ass'n. of Am. R.R.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment). And each branch would have "the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist, No. 51 (Madison).

This Court has confirmed these basic maxims repeatedly when the branches reach out of their proper spheres. *See*, *e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."); *Plaut v. Spendthrift Farm*, 514 U.S. 211, 239 (1995) ("[T]he doctrine of separation of powers is a structural safeguard . . . a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."); *INS v. Chadha*, 462 U.S. 919, 946 (1983) ("[The] principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that the separation of powers was constructed to "[diffuse] power the better to secure liberty.").

These are no mere platitudinal remarks giving deference to the Framers. The Court has recognized that the separation of powers functions in our government to make sure that would-be legal commands have run through rigorous political gauntlets before becoming laws of the land. The enforcement of these checks and balances seeks to prevent factions (interest groups) from capturing the legislative process, and to protect the people from the government wielding arbitrary power with no accountability. Laws are supposed to be hard to enact. *See* John F. Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 191, 202 (2007); *see also Ass'n. of Am. R.R.,* 135 S. Ct. at 1237 (Alito, J., concurring).

Yet the modern administrative state has evaded many of these constitutional fail-safes. It has become what some have called the "fourth branch of government," combining all three functions into one body that does not have to jump through the Framers' hoops. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1877-78 (2013) (Roberts, C.J., dissenting); *see generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).

Much of the gradual concentration of these powers in the executive branch relates to the breakdown of judicial policing of the boundaries between what is truly legislative power and what is mere execution of that power. The Third Circuit's holding reflects this breakdown, which merits this Court's attention.

A. Delegation of Congressional Power to an Executive Agency Requires an "Intelligible Principle"

The Constitution vests the legislative power with Congress. U.S. Const., Art I, § 1. But the degree to which Congress can delegate those powers away to administrative bodies—or whether it can at all—has not always been so clear. *See generally,* Philip Hamburger, Is Administrative Law Unlawful? (2014). One thing is certain, however—the legitimacy of the administrative state depends on the premise that "the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996).

This Court has found that where Congress lays down an "intelligible principle," however, courts will not find an *ultra vires* delegation. *See Whitman v. American Trucking Assns., Inc.,* 531 U. S. 457, 472

(2001); *J. W. Hampton, Jr., & Co. v. United States,* 276 U. S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."). This analysis is based on the idea that when Congress lays down such a principle, it does not really delegate its legislative power, but instead gives the executive guidelines on how to execute and enforce the law. *Whitman*, 531 U.S. at 472 ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests 'all legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers.") (citations omitted); *Loving*, 517 U.S. at 770 ("The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes."); *Yakus v United States*, 321 U.S. 414, 426 (1944) ("Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose."); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694 (1892) ("The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.") (citation omitted).

Despite that understanding—or is it a legal fiction?—courts have not policed the line between the legislative and executive branches strictly when determining whether Congress has provided an "intelligible principle," as one member of this Court has noted:

> [I]t has become increasingly clear . . . that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition. Implicitly recognizing that the power to fashion legally binding rules is legislative, we have nevertheless classified rulemaking as executive (or judicial) power when the authorizing statute sets out "an intelligible principle" to guide the rulemaker's discretion. Although the Court may never have intended the boundless standard the "intelligible principle" test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power.

Ass'n of Am. R.R., 135 S. Ct. at 1246 (Thomas, J., concurring); *see also*, *Whitman*, 531 U. S. at 487 ("I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'") (Thomas, J., concurring); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 329 (2002) (asserting that

the Court has "found intelligible principles where less discerning readers find gibberish.").[2]

This lenient standard is premised on the idea that while "[t]he nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government . . . [w]e also have recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989).

Despite the Court's reluctance to enforce the nondelegation principle narrowly, the Court has found other ways to cabin executive authority. *See id.* at 373 n.7 (noting that the Court has "limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional"); *see also*, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 242-47 (2000) (arguing that the nondelegation doctrine has been implemented by narrowly construing statutes that may otherwise confer non-delegable authority to executive agencies).

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[2] There is good reason for this skepticism, as the Court has not struck down a law for violating the nondelegation doctrine since the 1930s. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). And since then, the modern administrative state has ballooned into a behemoth which "wields vast power and touches almost every aspect of daily life." *City of Arlington*, 133 S. Ct. at 1878 (Roberts, C.J., dissenting) (citing *Free Enter. Fund v. Public Co. Acc'ting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010)).

But no matter how the nondelegation principle is implemented, or how leniently it is enforced, this case is a clear violation. Indeed, there must be something in the statute's text to guide the agency when it makes policy-based decisions. Moreover, any delegation must require a distinction between legislative power and "gap-filling." See Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. at 1239. It is fundamental constitutional and administrative law that "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, an agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman*, 531 U.S. at 485. Congress cannot just give an agency a blank slate to fill the U.S. Code with whatever laws it wishes.

B. The Third Circuit's Construction of the FLSA Allows Congress to Delegate Power with No "Intelligible Principle"

Despite all of these warnings from this Court, the Third Circuit ignored fundamental constitutional and administrative law in holding the FLSA's text to be no barrier to what DOL can regulate. The district court, Pet App. 31-33, the DOL, *id*. at 73-74, and the Third Circuit, *id*. at 17-20, all agreed the statute was silent as to whether the FLSA prohibited the petitioners from using non-compensable meal breaks to offset worktime. Nevertheless, the court granted deference to the DOL's misguided statutory silence theory and held that while the FLSA does not "expressly prohibit offsetting where the compensation used to offset is included in the regular rate[,]" the statute somehow magically, implicitly forbids the practice. Pet. App. 18.

The FLSA cannot be stretched so thin. It cannot give DOL authority of which it does not speak. When Congress has decided not to address a particular practice *at all*, there is simply no statutory gap to fill. Instead, Congress has decided not to regulate. Thus when DOL is allowed to enter the vast area outside of the statute, it is no longer regulating, but legislating.

If the opinion below is allowed to stand, the DOL—and any other agency charged with administering federal law—would have almost unlimited power to legislate in the future. Indeed, this statutory-silence theory would give administrative agencies unfettered authority to write laws with no limiting, much less "intelligible," principle. No matter how much leeway this Court gives Congress when it delegates its power, this theory would "effectively vaporize even that flimsy constraint by holding that an agency need not justify a given rule by tracing it to a valid statutory grant of authority; instead, it need only demonstrative that Congress has not affirmatively voiced opposition to the rule in question." *Or. Rest. & Lodging Ass'n v. Perez,* 843 F.3d 355, 360 n.3 (2016) (O'Scannlain, dissental). This is truly "delegation running riot." *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 553 (Cardozo, J., concurring).

This kind of unbound delegation cannot be upheld under our Constitution. The Court should take this opportunity to make it clear that executive agencies are not free to make legislative rules without—at a minimum—some directive from Congress to do so.

II. DEFERRING TO AN AGENCY'S STATUTORY INTERPRETATION ADVANCED FOR THE FIRST TIME IN LITIGATION VIOLATES THE DUE PROCESS OF LAW

A. Due Process Requires Fair Notice

A fundamental tenant of the Due Process Clause requires that laws "which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) (citations omitted). This applies equally whether what is being enforced is a law or regulation. *See id*. ("This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.") (citation omitted). Thus, a punishment will violate due process when a "regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* (citations and quotation marks omitted).

This Court reaffirmed this foundational principle in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). The Court denied deference to a DOL interpretation of the FLSA when addressing the question of whether pharmaceutical detailers were "outside salesmen" and therefore exempt from overtime requirements. *See id.* The DOL argued the Court should give deference to an *amicus* brief the DOL wrote three years before the litigation.

The Court noted, however, that granting deference there would "impose potentially massive liability . . . for conduct that occurred well before that interpreta-

tion was announced. To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires." *Id.* at 155-56 (citations and quotation marks omitted). Moreover, "the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully." *Id.* at 157. The *amicus* brief, therefore, did not provide fair notice because "where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute." *Id.* at 158. Therefore, "while it may be possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing, the more plausible hypothesis is that the Department did not think the industry's practice was unlawful." *Id.* (citations and quotation marks omitted). *See also De Niz Robles v. Lynch*, 803 F.3d 1165, 1172 (10th Cir. 2015) (Gorsuch, J.) ("[T]he more an agency acts like a legislator—announcing new rules of general applicability—the closer it comes to the norm of legislation and the stronger the case becomes for limiting application of the agency's decision to future conduct.").

B. Petitioners Had No Notice that Their Practice Might Be Forbidden by the FLSA

All of the factors that this Court has said violate due process and fair notice in these previous cases are present here. In *Christopher*, the DOL had at least promulgated regulations before changing its view in an amicus brief prior to the litigation. *See id.* at 152-53. Here, however, the DOL has never promulgated any regulation, issued an opinion letter, or taken any

enforcement action on the section of the FLSA at issue. And this is for a good reason: The FLSA does not address the issue. It is silent as to the practice. Yet the Third Circuit decided, on its own accord, to invite the DOL to regulate by *amicus* brief and to grant deference to its views. It was at this time—the first time—that anyone, including the petitioners, could have known their actions were not in accord with the FLSA.

Add to this the fact that, more than 20 years ago, both the Seventh Circuit in *Barefield v. Village of Winnetka*, 82 F.3d 704 (7th Cir. 1996) and the Eleventh Circuit in *Avery v. City of Talladega*, 24 F.3d 1137 (11th Cir. 1994) found the same offsetting practice now at issue to be allowed. The Third Circuit disregarded these cases because it said neither court analyzed "the issue in detail." Pet. App. 22. Again, that is for a good reason: nothing in the FLSA prohibits the practice of offsetting in this situation. The statute is silent.

It has been almost 70 years since the FLSA was enacted. During that time, numerous employers have engaged in the practice of offsetting non-work time included in their regular rate of pay as a credit against compensation owed for work time. *See* (Pet. Brief 31). The DOL has never taken any action that would tip off a person of ordinary intelligence—or even a genius—that this practice is not allowed by the statute. To subject the petitioners to the potential massive liability at stake in this case would be manifestly unfair and a violation of their due process rights.

C. Granting Deference that Favors One Party Over the Other During Litigation Creates Bias and Violates Due Process

While the petitioners certainly suffered unfair surprise and were not given fair notice that their labor practice might violate the FLSA, this case also highlights a fundamental problem with administrative jurisprudence. Due process demands that litigants get a fair hearing from an independent judge when they come into court. Yet, as this case shows, that does not always happen. The petitioners should have been afforded a setting in which they were on a level playing field. But the Third Circuit took it upon itself to invite the DOL into the litigation and then proceeded to grant deference to the DOL's view in favor of the respondents. *Amicus* does not accuse the judges of favoring one party over the other, but rather argues this is an institutional bias that deference to administrative agencies creates. The Court should address this issue.

As one member of this Court has written, the Constitution's separation of powers and checks and balances came out of "centuries of political thought and experiences." *Perez v. Mortg. Bankers Ass'n.*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring). The Framers, following such Enlightenment figures such as John Locke and Baron de Montesquieu, recognized that dividing such powers would protect individual liberty. See *id.* And "the Judiciary—no less than the other two branches—has an obligation to guard against deviations from those principles." *Id.* at 1217.

Thus, the Framers entrusted judicial officers with judicial power under Article III. This power, in turn, came with a judicial duty to "exercise its independent judgment in interpreting and expounding upon the

laws." *Id.*; *see also* P. Hamburger, Law and Judicial Duty 316-326 (2008). This duty requires judges to interpret the laws before them and "to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through either internal or external sources." *Perez*, 135 S. Ct. at 1218. This would provide a "check" against the other branches when they stepped outside of their delegated powers—including administrative agencies. See *id.* at 1219.

In modern times, however, at least when it comes to administrative litigation, this duty has been all but abandoned as a matter of doctrine. Courts readily defer to agencies and put a thumb on the scale of one party over the other during litigation. *See* Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1209-10 (2016). Judicial deference doctrines "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

This abandonment of office has real world effects, included undermining political legitimacy of our system of laws. *See* Hamburger, *Chevron Bias*, at 1236 ("The independent judgment of unbiased judges is the basis of the government's political legitimacy . . . especially those [cases] concerning the power of government or the rights of the people, it is essential that the people have confidence that the judges are not biased toward government, but are exercising independent judgment.") (footnote omitted).

But more than just undermining legitimacy, the deference given during litigation by judges to one

party over another creates serious constitutional issues under the Fifth Amendment right of due process. Indeed, "[w]hat is at stake here is the due process of law in Article III courts." *Id.* at 1231. Judges are charged with making sure due process is accorded and cannot engage in bias, but under the current regime of deference they have become participants "in systematic bias." *Id.* This "[d]eference to administrative interpretation is a systematic precommitment in favor of the interpretation or legal position of the most powerful of parties." *Id.* Judges have thus failed in their duty to be the natural arbiters of the law, and are not the impartial decision-maker that due process requires.

Despite this breakdown when it comes to administrative agencies, this Court has repeatedly affirmed that a neutral decision-maker is essential to a fair process: "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 137 (1955)). And when a court fails to "apply the law to [a party] in the same way he applies it to any other party[,]" *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002), it has failed in its duty.

This is what happened to the petitioners here. Despite the district court's finding that the FLSA did not preclude the labor practice they were sued for violating, the Third Circuit took it upon itself to invite the DOL into the litigation and adopted the agency's view by granting *Skidmore* deference. *See* (Pet App. 6-7, 18). The lower court was thus not acting as a neutral arbiter—one guaranteed to the petitioners by the Constitution—but rather as an extension of the DOL. This is not how our system of laws was designed to work.

CONCLUSION

The Third Circuit below not only defied this Court's precedent, but also created two circuit splits. These are important issues that warrant review. But this case is about more than that. Indeed, the lower court's opinion sets a precedent that has broad implications for constitutional structure and the due process of law.

The petition should be granted.

Respectfully submitted,

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