No. 17-302

In the Supreme Court of the United States

RONY ESTUARDO PEREZ GUZMAN
AKA RONNIE PEREZ-GUZMAN,
PETITIONER

v.

JEFFERSON B. SESSIONS,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR ADMINISTRATIVE LAW AND STATUTORY INTERPRETATION SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

ILAN WURMAN
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5822
iwurman@winston.com

LINDA COBERLY*
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-8768
lcoberly@winston.com

**Counsel of Record*

Counsel for Amici Curiae

QUESTIONS PRESENTED

1. Whether a court must defer to an agency's position under *Chevron* when the only ambiguity is a direct conflict between two statutory sections, which the agency has not addressed.

2. Whether the INA's asylum provision affords a noncitizen in reinstatement proceedings the opportunity to seek asylum in the United States.

This amicus brief focuses solely on the first of these questions.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[*]

The Ninth Circuit's decision in this case warrants review. Under the Ninth Circuit's ruling, courts must defer to agency rulemakings under *Chevron* v. *Natural Resources Defense Council* even where there is no dispute as to the meaning of any statutory term, but only two conflicting statutory commands. The Ninth Circuit also concluded that deference is warranted even where the agency, on whose expertise the courts depend to resolve statutory ambiguities, was unaware of the statutory conflict its expertise was supposed to help resolve.

These rulings result in extensions of *Chevron* deference to circumstances never contemplated by the Court in *Chevron*, and unwarranted by the two standard rationales for the deference framework. Even if *Chevron* deference may be justified when statutory terms are themselves ambiguous—as in the mine run of deference cases—conflicting statutory commands do not create an "ambiguity" for an agency to decide; rather, "the resolution of such a conflict" is ordinarily a matter of "legislative choice." *Scialabba* v. *Cuellar de Osorio*, 134 S.Ct. 2191, 2214 (2014) (Roberts, C.J., concurring in the judgment). More still, in the absence of congressional action, reconciling statutory provisions into a harmonious whole is ordinarily a task for *the*

---

[*] Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief. All parties consented. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

law, over which judges, not agencies, have the requisite expertise.

Amici are a group of law professors who teach administrative law or statutory interpretation. They have an interest in the sound development of these fields. Amici take no position on the underlying merits of the statutory interpretation question, but are united in their view that the merits should have been decided by the court itself. Amici respectfully request that the Court address this issue and correct an understanding of deference that conflicts with this Court's standard rationales for agency deference under *Chevron*.

Amici include James Huffman, Emeritus Dean and Professor of Law, Lewis & Clark Law School; Andrew P. Morriss, Dean, School of Innovation, Vice President for Entrepreneurship & Economic Development, & Professor of Law, Texas A&M University School of Law; Jeremy A. Rabkin, Professor of Law, Antonin Scalia Law School, George Mason University; and David Schoenbrod, Trustee Professor of Law, New York Law School.

STATEMENT

1. In 1980, Congress enacted the Refugee Act, which permitted "[a]n alien physically present in the United States, * * * irrespective of such alien's status, to apply for asylum." Pet. App. 17 (quoting 8 U.S.C. § 1158(a) (1980)). In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which slightly amended this provision to read: "Any alien who is physically present in the United States * * * irrespective of such alien's status, may apply for asylum in accordance with this section." *Id.* at 6 (quoting 8 U.S.C. § 1158(a)(1) (2012)).

As the Ninth Circuit recognized below, the statute as amended includes statutory exceptions to this provision, "barring asylum applications from individuals who can be resettled in another country, failed to timely apply, or previously were denied asylum." *Ibid.* (citing 8 U.S.C. § 1158(a)(2)(A)–(C)).

With the IIRIRA, Congress also revised the statutory provisions respecting reinstatement, i.e., the proceedings that occur when an alien who had a previous order of removal against him reenters the United States. Congress amended the statute to require such reinstatement proceedings for all aliens who illegally reenter the United States, and added the "reinstatement bar":

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, *the alien is not eligible and may not apply for any relief under this chapter*, and the alien shall be removed under the prior order at any time after reentry.

8 U.S.C. § 1231(a)(5) (emphasis added); see also Pet. App. 7–8 (quoting same). "[T]his chapter" refers to chapter 12 of title 8 of the U.S. Code, which includes the provision providing that "any" alien may apply for asylum, as well as provisions providing the standards for withholding of removal and protection under the Convention Against Torture ("CAT"). See 8 U.S.C. § 1231(b)(3) (withholding of removal); 8 U.S.C. §1252(a)(4) (judicial review of CAT claims).

2. The federal government, through the Attorney General and the Department of Homeland Security ("DHS") (collectively, the "Agency"), promulgated regulations respecting this reinstatement bar. The Agency promulgated 8 C.F.R. § 1208.16(c)(4), which permits an individual subject to the reinstatement bar to apply for relief under CAT, notwithstanding the clear language of the reinstatement bar prohibiting any relief under "this Chapter," which includes relief under CAT. Pet. App. 8 n.3.

The Agency also promulgated 8 C.F.R. § 1208.31(e)—the regulation at issue in this case—which permits an alien subject to the reinstatement bar to apply for withholding of removal, again contrary to the clear language of the reinstatement bar prohibiting any relief under "this Chapter." Pet. App. 8. The Agency explained in the course of the present litigation that these exceptions to the clear language of the reinstatement bar make sense in light of the "nondiscretionary" nature of withholding of removal and relief under CAT. Pet. App. 14 n.4, 26.

Critically, this regulation does not permit an alien subject to reinstatement to apply for asylum. In other words, although the Agency's regulations permit two exceptions to the reinstatement bar because of the "nondiscretionary" nature of those exceptions, the Agency does not allow the aliens to seek asylum even though 8 U.S.C. § 1158(a)(1) directs that "[a]ny alien, * * * *irrespective of such alien's status*, may apply for asylum." (Emphasis added.) When promulgating the regulation at issue here, the Agency did not cite or refer to this provision of the statute. Dkt. 86 (Pet. Third Supp. Br.) at 8.

3. Mr. Perez-Guzman left Guatemala and entered the United States for the first time in June 2011, but testified that he was never asked by Border Patrol agents whether he feared returning to Guatemala. Pet. App. 4. The record suggests that during expedited removal proceedings, he was asked whether he feared returning to Guatemala and answered in the negative. *Ibid.* Mr. Perez-Guzman reentered the United States in January 2012, and DHS reinstated the earlier removal order. Mr. Perez-Guzman expressed fear of returning and sought asylum, withholding of removal, and protection under CAT. *Id.* at 5. The Bureau of Immigration Appeals ("BIA") did not reach the merits of the asylum claim, believing it was barred from doing so under 8 C.F.R. § 1208.31(e).

4. Mr. Perez-Guzman challenges the regulation as contrary to the unambiguous command of § 1158(a)(1) that directs that "any" alien, irrespective of status, is entitled to apply for asylum. Pet. App. 10. The Agency counters that § 1231(a)(5) unambiguously precludes relief and supports the regulation because it directs that an alien subject to reinstatement (such as Mr. Perez-Guzman) "is not eligible and may not apply for any relief under this chapter." *Id.* at 11.

5. The Ninth Circuit requested and received briefing on whether the court was required to defer to the Agency's regulation under *Chevron USA, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the *Chevron* framework, a court first asks whether Congress "has directly spoken to the precise question at issue." 467 U.S. at 842–43. "If [the] statute is ambiguous," then "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what

the court believes is the best statutory interpretation." *Nat'l Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Applying this two-step framework, the Ninth Circuit affirmed the Agency's regulation.

6. At *Chevron*'s first step, the Ninth Circuit recognized that § 1158(a)(1) and § 1231(a)(5) "are in apparent conflict." Pet. App. 12. As the court explained: "Section 1158 broadly grants 'any alien' the opportunity to seek asylum, 'regardless of such alien's status,' subject only to a few exceptions not applicable here. Section 1231, by contrast, expressly bars aliens subject to reinstated removal orders from any relief under chapter 12, the chapter that includes asylum." *Ibid.*

The panel then explained that the "relevant question * * * is not simply whether the two provisions are absolute, but how Congress intended to harmonize them." Pet. App. 15. Quite sensibly, "[i]f one subsection's text were clearly intended to take precedence over the other, our inquiry would be at an end." *Ibid.* But the panel found that "*both* provisions are qualified in certain respects," and "[n]either subsection gives an indication of how Congress intended to resolve a conflict between the two." *Ibid* (emphasis in original).

The panel therefore turned to the other "traditional tools of statutory construction." Pet. App. 15 (quoting *Chevron*, 467 U.S. at 843 n.9). Both parties claimed the canon "the specific controls the general" supported their respective positions. *Ibid.* The Ninth Circuit explained: "Section 1158(a)(1) is more specific in that it speaks narrowly to the rules governing asylum applications. Conversely, § 1231(a)(5) is more specific in

that it speaks directly to the particular subset of individuals, like Perez, who are subject to reinstated removal orders." *Id.* at 16. Although the panel concluded that "the government's position may have a slight edge," it noted that both positions are tenable and the canon "does not help to *clearly* discern Congress's intent as to which section should take precedence." *Ibid* (emphasis in original).

The panel next turned to legislative history, but found this history "silent on the precise issue" before the court. Pet. App. 16. The panel concluded: "In sum, when read in context and compared with each other, § 1158(a)(1) and § 1231(a)(5) reveal no clear congressional intent on how to resolve a claim, like Perez's, which places the two sections in conflict. Both provisions appear to establish broad and conflicting rules." *Id.* at 17. Because Congress "has not spoken directly to whether individuals subject to reinstated removal orders may apply for asylum," the panel proceeded to decide the case under *Chevron*'s second step. *Id.* at 18.

7. Mr. Perez-Guzman additionally argued, however, that because the Agency made no mention of § 1158(a)(1) when it promulgated the regulation and was apparently unaware of the statutory conflict, that was an independent reason for the court to deny deference to the Agency's interpretation. Mr. Perez-Guzman argued that either the Agency "brushed up against this issue by mistake," or mistakenly "thought the statute compelled the result," and in either case the Agency should get "no deference." Dkt. 86 (Pet. Third Supp. Br.) at 8 (citing *Gila River Indian Cmty.* v. *United States*, 729 F.3d 1139, 1149 (9th Cir. 2013)); see also *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009).

In a footnote, the Ninth Circuit dismissed this argument, stating that "where we have remanded under *Negusie* the administrative record has more clearly shown that 'the agency misapprehended the clarity of the statute' and 'mistakenly determine[d] that its interpretation [was] *mandated* by plain meaning, or some other binding rule.'" Pet. App. 23–24 n.8 (emphasis in original).

The Ninth Circuit erred in deploying *Chevron* deference in this case. Amici believe review is warranted because the panel's decision serves as precedent for two significant extensions of the *Chevron* framework unwarranted by that case or its rationales.

REASONS FOR GRANTING THE PETITION

The *Chevron* deference framework is premised on at least two rationales. First, it is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Second, it is premised on the Court's recognition of the respective institutional competences of the three branches of government. See, *e.g.*, *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 651–52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."); *Bowen* v. *Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (noting that the deference accorded in *Chevron* was "predicated on expertise"); see also, *e.g.*, Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 Yale L.J. 2580, 2597–98 (2006) ("[T]he general argument for judicial deference to executive interpretations rests on the undeniable claims that specialized competence is often highly relevant and that political

accountability plays a legitimate role in the choice of one or another approach.").[1]

As discussed below, this case warrants review because it reflects two extensions of the *Chevron* doctrine unwarranted in light of these rationales. First, the Ninth Circuit concluded that there existed an ambiguity for the agency to resolve even though there was no ambiguity as to the meaning of any statutory term; all that was in question was the legal effect of two competing statutory commands. As Chief Justice Roberts has observed, this is the mark of a "legislative choice," not an ambiguity for an agency to fill. *Scialabba* v. *Cuellar de Osorio*, 134 S.Ct. 2191, 2214 (Roberts, C.J., concurring in the judgment); see also *id.* at 2216 (Alito, J., dissenting) (agreeing with this proposition). More still, absent congressional action, reconciling competing, unambiguous statutory commands is a task for *the law*, over which judges, not agencies, have the requisite expertise.

Second, the Ninth Circuit concluded that *Chevron* deference is necessary even where the agency gave no indication that it was aware of the very question the court was seeking to resolve. If part of *Chevron*'s rationale is to defer to the expertise of the agency tasked with administering a statute, then deference is not warranted when the agency was unaware of a relevant statutory provision and the ambiguity or conflict it cre-

---

[1] This second rationale is sometimes divided into different rationales—one based on agency expertise, the other on the political accountability of the executive branch. See, *e.g.*, Sunstein, *Beyond* Marbury, 115 Yale L.J. at 2597–98. This brief considers both under the heading of "institutional competence," which will sometimes be shorthanded as "expertise."

ated. Without an awareness of the problem to be resolved, the agency cannot be said to have deployed its expertise in resolving that problem.

I. *Chevron* deference should not apply where the only question is the legal effect of two conflicting statutory provisions.

In *Chevron*, the Supreme Court deferred to the Environmental Protection Agency's ("EPA") construction of the statutory term "stationary source." At issue in that seminal case was whether this term referred to a single pollution-emitting device, or whether the EPA could permit states to adopt a "plantwide" definition that treated an entire facility as one such "stationary source." 467 U.S. at 840. The Court held that it would defer to agency interpretations "if the statute is silent or ambiguous with respect to the specific issue," *id.* at 843, and deferred to EPA's interpretation of the term stationary source.

The Court has over time articulated a two-pronged rationale for *Chevron* deference. First, deference is warranted because the Court assumes Congress has implicitly delegated authority to the agency to resolve the question at hand. As the Court has held, "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990); see also *City of Arlington* v. *FCC*, 569 U.S. 290, 319 (2013) (Roberts, C.J., dissenting) (quoting same). Indeed, *Chevron* is a useful fiction because it is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

Second, the Court has recognized that deference is warranted because agencies often have policymaking expertise that courts should not second guess. "The power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)); see also, *e.g.*, *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 651–52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."); *Bowen* v. *Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (noting that the deference accorded in *Chevron* was "predicated on expertise"); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 Yale L.J. 2580, 2597–98 (2006) ("[T]he general argument for judicial deference to executive interpretations rests on the undeniable claims that specialized competence is often highly relevant and that political accountability plays a legitimate role in the choice of one or another approach.").

These rationales may very well have justified deference to the kind of ambiguity at issue in *Chevron*. As explained, at issue was whether the meaning of a statutory term—"stationary source"—applied to a particular set of facts. Such ambiguity over statutory terms is inevitable; all laws, although covering a core set of identifiable fact patterns, will have some ambiguity and vagueness on the margins which raise the question whether the law applies to a particular factual circumstance. Cf. H.L.A. Hart, The Concept of Law 144 (3d ed. 2012) (1961) (explaining that although rules have a "core of settled meaning," they will have an "area of open texture where the scorer"—or the judge

or administrator—"has to exercise a choice"). Administrative agencies, tasked with administering statutes in analogous and relevant factual circumstances, may very well have more expertise to decide the outer scope of statutory terms than the courts, and Congress may very well have intended the agencies to take on such a role. Cf. *Negusie* v. *Holder*, 555 U.S. 511, 534 (Stevens, J., concurring in part and dissenting in part) (noting the difference between "pure question[s] of statutory construction" and "fact-intensive question[s]" to which deference is more appropriate).

Most cases deploying *Chevron* deference have dealt with these kinds of ambiguities over the actual meaning of statutory terms. For example, in *City of Arlington* v. *FCC*, the Court described a series of questions to which the Court had previously applied the *Chevron* framework: "*Who* is an 'outside salesman'? *What* is a 'pole attachment'? *Where* do the 'waters of the United States' end? *When* must a Medicare provider challenge a reimbursement determination in order to be entitled to an administrative appeal?" 569 U.S. at 300 (citing cases). These cases all involved the meaning, scope, and applicability of statutory terms, which were vague or ambiguous as applied to particular factual circumstances with which the agency generally had expertise.

This case is different. Here there is no dispute as to the meaning of any statutory provision or whether it applies to a certain set of facts or conditions. There is no dispute that "[a]ny alien who is physically present in the United States * * * irrespective of such alien's status, may apply for asylum in accordance with this section," 8 U.S.C. § 1158(a)(1), applies to Mr. Pe-

rez-Guzman. Pet. App. 12–13. Nor is there any dispute that Mr. Perez-Guzman is subject to a reinstated prior order of removal, which means according to 8 U.S.C. § 1231(a)(5) that he "is not eligible and may not apply for any relief under this chapter," which includes asylum relief. *Ibid.*

There is no ambiguity as to the meaning of these legal provisions. The "ambiguity," if there is one at all, goes to the legal effect of these two statutory provisions, whose meanings are both clear. As the Ninth Circuit explained below, "Both provisions appear to establish broad and conflicting rules." Pet. App. 17. The issue at hand is what to do with conflicting statutory commands.

Such conflicts are not the ambiguities of the kind *Chevron* contemplated. As explained by Chief Justice Roberts in his concurring opinion in *Scialabba* v. *Cuellar de Osorio*, "Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice." 134 S. Ct. at 2214; see also *id.* at 2216 (Alito, J., dissenting) (agreeing with this proposition). The resolution of two conflicting statutory commands, as three Justices recognized in *Scialabba*, is not an exercise of policymaking or "gap filling" of the kind contemplated by *Chevron*. Rather, it is the kind of decision Congress ordinarily ought to make between two diametrically opposed commands.

But neither is it *necessarily* a matter of legislative choice. Congress routinely enacts extensive statutes with competing purposes that contain provisions that may be hard to reconcile. In the absence of further congressional action, the task of making competing statutory commands cohere is also a task for the *law*, which has developed a series of interpretive legal rules

for precisely such situations. The interpretive canon "the specific controls the general," *Morton* v. *Mancari*, 417 U.S. 535, 550–51 (1973), is one such rule. The use of these tools of statutory construction to decide a case where the meaning of the statutory provisions is otherwise clear is a function for which judges have special competence, and there is no reason to believe executive agencies will have any particular competence in deploying them—or that Congress would have wanted them to.

In a recent article, Professors William Baude and Stephen Sachs show in an analogous case why it is a task for the law to resolve cases such as these. They describe "the famous case of the two ships *Peerless*," in which the two parties to a contract "agreed to send cotton on the *Peerless*, unaware that there were two such ships sailing months apart (and that each party had a different ship in mind)." William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1083 (2017). It is futile to ask what the contract really "means," because we know everything about "meaning" that there is to know—both parties had in mind a different ship. "Yet we still have to decide the case," and the answer to the questions it raises "depend on the other *legal rules* in place." *Id.* (emphasis added). Discerning these legal rules and applying them are tasks for judges, and always have been. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. *If two laws conflict with each other, the courts must decide on the operation of each*.") (emphasis added).

In sum, when the case involves no ambiguity as to statutory meaning but only a question as to the legal effect of two otherwise clear statutory commands, *Chevron* deference makes little sense because neither rationale for deference applies. Either the conflicting statutory commands create a "legislative choice"—and thus there is no reason for the Court to presume that Congress intended to delegate decisionmaking authority over this kind of conflict to the agency—or they give rise to the kind of question that judges, not agencies, have historically had the specialized competence to decide. In either case, deference to agency interpretation is unwarranted.

II. *Chevron* deference should not apply where the agency was unaware of a statutory provision relevant to its regulation.

In *Negusie* v. *Holder*, this Court remanded to the BIA to resolve a statutory ambiguity where "the BIA misapplied" a prior decision of the Court, which it had interpreted "as mandating" a particular result. 555 U.S. 511, 516 (2009). There, the question was whether a petitioner whose assistance in the persecution of others was coerced was barred from seeking asylum and withholding of removal under the "persecutor bar." *Id.* at 513. Because the agency was mistaken in believing it was compelled by this Court's prior decision, the Court remanded to the agency to "confront the same question free of this mistaken legal premise." *Id.* at 513. Justices Scalia and Alito agreed that remand was appropriate because, free of this mistaken legal premise, either position was reasonable and it was therefore up to the agency to decide. *Id.* at 525 (Scalia, J., concurring). Justices Stevens and Breyer argued that be-

cause this was a "pure question of statutory construction for the courts to decide," they would have answered the narrow question of whether coerced participation in persecution was an automatic bar. *Id.* at 529 (Stevens, J., concurring in part and dissenting in part) (quoting *INS* v. *Cardoza–Fonseca,* 480 U.S. 421, 446 (1987)).

Negusie was in line with a long series of D.C. Circuit cases that some administrative law scholars have called "*Chevron* Step One-and-a-Half," see Daniel J. Hemel and Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. Chi. L. Rev. 757 (2017), and that is also referred to as the *Prill* doctrine. In *Prill* v. *NLRB*, the D.C. Circuit held that "an agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it 'was not based on the [agency's] own judgment but rather on the unjustified assumption that it was Congress's judgment that such [a regulation is] desirable.'" 755 F.2d 941, 948 (D.C. Cir. 1985) (quoting *FCC* v. *RCA Commc'ns, Inc.*, 346 U.S. 86, 96 (1953)). Because the agency's "decision stands on a faulty legal premise and without adequate rationale, we must remand the case for reconsideration." *Id.*

Some scholars have argued that this *Chevron* "half step" makes sense because "[i]f agencies are entrusted with discretionary power on the grounds that they are more accountable than courts, then judicial review should encourage agencies to take responsibility for their decisions." Hemel & Nielson, Chevron *Step One-and-a-Half*, 84 U. Chi. L. Rev. at 764. On the other hand, *Chevron* is also a useful fiction in that it is a way to resolve a case *even if* the agency was unaware of

statutory ambiguity, so long as the agency's interpretation is reasonable.

In other words, if both the agency and the court simply disagree on whether a particular statutory term is ambiguous, there is less reason to remand because the agency may have been exercising its expertise in concluding that the statute is unambiguous. Amici therefore do not have a unified position on whether the *Prill* doctrine is useful in all cases in which the agency fails to recognize an ambiguity. Amici all agree, however, that at least in a case such as the present one—where the issue is not merely a disagreement over whether ambiguity exists, but where the agency appears altogether unaware of a statutory provision that bears directly on the issue before it—the case for deference is weak at best.

CONCLUSION

Chevron has disputed historical origins,[2] and the doctrine has been criticized as a vehicle for courts to shirk their judicial duty to say what the law is. See, *e.g.*, *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty"). Whatever its merits in other cases, it should have no applicability here. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

ILAN WURMAN
Winston & Strawn LLP
1700 K Street, N.W.

LINDA COBERLY*
Winston & Strawn LLP
35 W. Wacker Drive

[2] See, *e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017).

Washington, DC 20006
(202) 282-5822
iwurman@winston.com

Chicago, IL 60601
(312) 558-8768
lcoberly@winston.com

**Counsel of Record*

SEPTEMBER 27, 2017