No. 18-609

IN THE

Supreme Court of the United States

JOSEPH DAVID ROBERTSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs to advance its public interest mission and has appeared as *amicus curiae* in this Court on many occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs to advance its purpose and has appeared as *amicus curiae* in this Court on many occasions.

Amici are broadly concerned that the decision of the U.S. Court of Appeals for the Ninth Circuit affirmed illegal agency actions in prosecuting Joseph Robertson based on a misreading of federal law. The Court should take this opportunity to correct the confusion in overbroad interpretations of the Clean Water Act which have led to unjust prosecutions and federal intrusions into both state authority and individual liberty.

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[1] *Amici* state that both Petitioner and Respondent have given their consent in writing to the filing of this *amicus* brief. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation and submission of this brief.

Amici are additionally concerned that unless this Court acts to rein in an unchecked administrative state, the federal separation of powers doctrine will be badly undermined. The expansion of *Chevron* doctrine in Clean Water Act jurisprudence has undermined the separation of powers outlined in the first three articles of the Constitution, which require Congress to make laws and establish policy with executive enforcement and judicial review. *Chevron* has now expanded to the point where the executive branch makes policy, the judiciary approves or rejects that policy, while Congress happily abdicates its authority and avoids all resulting political accountability. This is exactly the opposite of what the framers intended, as it greatly reduces the power of the most democratically-accountable branch of government and the only branch designed to foster genuine political compromise.

With so many laws decided by executive agencies with little need to compromise and passed on by a judiciary where compromise is inimical to its very nature, the nation is deprived of lawmaking by a deliberative body that can only act when it negotiates and builds consensus between the many diverse stakeholders to any public debate. Without Congressional compromise, the nation is further deprived of 535 members of Congress who can return to their states and districts following compromise legislation and explain to their constituents why the law was in the best interest of the nation. Members of Congress can endlessly avoid accountability and instead may pass the buck and blame the nation's problems on out-of-control presidents or out-of-control

federal courts. This Court must rein in *Chevron* to protect the founders' intent in creating three separate branches of government, forcing Congress back into its proper role of the deliberative legislative branch which decides the nation's laws and policies through negotiation and compromise.

For these and other reasons set forth below, *amici* urge the Court to grant the pending petition for certiorari.

STATEMENT OF THE CASE

Joseph Robertson is an elderly veteran of the U.S. Navy currently living in rural Montana. In his post-military private life, he ran a firefighting support truck business with his wife. To ensure adequate protection against forest fires for his own home, he dug ditches to create small ponds on property he owned and on land next to his for which he owned a mining claim. Those ditches sat on what a federal agency defines as wetlands and were situated on or near a small downhill water flow of about three garden hoses in volume. Mr. Robertson was not engaged in manufacturing or any other industrial activity which would release chemicals or waste into the water, but under the federal Clean Water Act even turning the soil with a shovel can be considered to be releasing a "pollutant" into water. 33 U.S.C. § 1362(6).

Mr. Robertson's ditches were over a football field away from the nearest permanent standing body of water, which was a small stream. That stream

feeds into a small tributary, which feeds into another tributary, which eventually feeds into Boulder Creek (a non-navigable river), which ultimately empties into the navigable Jefferson River – 40 miles away from Mr. Robertson's property. For this, Joe Robertson was sent to prison following an investigation by an "EPA Special Agent" and fined $130,000.00. *United States v. Robertson*, 875 F.3d 1281, 1285 (9th Cir. 2017). This case is proof that the balance between sane watershed protection on the one hand and citizens' ordinary ability to live their lives on the other has become hopelessly distorted and far out of step with what Congress instructed when it passed the Clean Water Act in 1972.

SUMMARY OF ARGUMENT

First, the Court should grant certiorari to revisit its fractured decision in *Rapanos v. United States*, 547 U.S. 715 (2006) by either finding the plurality correctly interpreted the Clean Water act or by restoring a more textual reading to the Act. Second, this case presents an opportunity for the Court to revisit and correct its past misapplication of the *Chevron* doctrine in Clean Water Act cases including *Rapanos*. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Finally, it is urgently important for the Court to address the increasing congressional and judicial deference to the ever-expanding administrative state, which is steadily eroding the separation of powers and leaving a one-branch government where the Constitution intended three.

ARGUMENT

I. The Court Must Clarify That the *Rapanos* Plurality Correctly Construed the Clean Water Act, or Revisit That Interpretation to Correct a Lack of Textualism

Like many instances of federal regulatory state overreach, this one begins with Congressional definitions written into a statute which have been re-defined over the years by agencies and courts. Under the Clean Water Act ("CWA"), a "point source" means any visible, confined, and discrete water conveyance which discharges into navigable waters. 33 U.S.C. § 1362(14). The "discharge of pollutants" means adding anything (including upturning existing soil or rock) to navigable waters directly or via a point source. 33 U.S.C. § 1362(12). "Navigable waters" are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Both the U.S. Army Corps of Engineers and the Environmental Protection Agency are involved with enforcing or administering the CWA.

Without further explanation in the statute, federal agencies could in theory try to stretch those definitions to assert regulatory control over one hundred percent of the nation's land because "the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls..." *Rapanos v. United States*, 547 U.S. 715, 722 (2006). To avoid this reading, Congress added that the federal CWA aims

to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use... of land and water resources...." 33 U.S.C. § 1251(b). To further clarify the line between federal and state water authority, Congress defined its contours in Section 1344 of the CWA. 33 U.S.C. § 1344(g). There, Congress specified that federal authority extends to "wetlands adjacent" to navigable waters, but beyond that line state authority controls land use and clean water management policies. 33 U.S.C. § 1344(g).

Against this backdrop, the federal regulatory agencies did what they usually do – try to claim as much power and authority for themselves as possible – and the question of the scope of the CWA came before this Court. In *Rapanos v. United States*, 547 U.S. 715 (2006), five Justices held the existing U.S. Army Corps of Engineers ("USACE") regulations exceeded the authority granted by Congress and were therefore unlawful under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). However, the same five Justices did not agree on the meaning of the statutory terms "adjacent wetlands," "point source," or "navigable waters."

Four of the five Justices read "navigable waters" to mean permanent standing bodies of water such as streams, rivers, or lakes; they read "point sources" to mean intermittent or temporary channels feeding directly into navigable waters; and finally, they read "adjacent wetlands" to mean wetlands with a surface connection to a permanent standing body of

water. *Rapanos*, 547 U.S. at 742. The fifth Justice in the majority, Justice Kennedy, instead read "navigable waters" to include both temporary or intermittent flows of water as well as any wetlands which have an impact on navigable waters regardless of surface connection, essentially reading both "point source" and "adjacent wetland" out of the statute. *Rapanos*, 547 U.S. at 779-780 (Kennedy, J., concurring). Most lower courts have treated Justice Kennedy's concurrence as law governing the scope of the CWA, including the lower courts in this case. *United States v. Robertson*, 875 F.3d 1281, 1294-1295, fn. 4 (9th Cir. 2017).

The *Rapanos* concurrence now being applied as law in the circuits was a plain error of statutory construction and the Court should take this opportunity to clarify it. First, Justice Kennedy's reading ignores the CWA's unambiguously stated directive to preserve state regulatory authority over land use and environment rules, 33 U.S.C. § 1251(b), and its unambiguous definition of where state authority applies – to all land except wetlands adjacent to navigable waterways and a few other specified areas. 33 U.S.C. § 1344(g). Congress designated federal authority over only those locations where human activity poses a relatively large risk of substantial water pollution. Other areas which pose minimal risk or could only result in minimal amounts of water pollution seeping into navigable water bodies are not federally regulated but may be regulated by the states. This was Congress' instruction. Congress created the line in Section 1344 between what was state and federal to avoid overly expansive

interpretations of defined terms in Section 1362. 33 C.F.R. § 1344, 1362. If Congress had wanted to give the agencies greater authority to interpret Section 1362, it would not have so clearly spelled out state authority in Section 1344. Where state jurisdiction authority over water starts, federal jurisdiction ends.

The CWA text preserves state power over water regulation. State agencies are better equipped to deal with small scale activity far away from navigable waterways and to manage the activities of local citizens. The Justice Kennedy standard creates a blurry line that allows the EPA and USACE to push state agencies out of the business of water regulation almost any time they feel like doing so, taking a cop off the beat. *Amici* agree with the *Rapanos* plurality that Justice Kennedy's concurrence articulates rational environmental policies for any "enlightened despot" to impose, 547 U.S. at 721, but which is beyond the scope of the Court's power. It would be entirely appropriate – and constitutional – for any U.S. state legislature to pass a law prohibiting the activities in this case. This would also be an appropriate – and, again, constitutional – law for Congress to pass to amend the CWA. It is not constitutional for the USACE to adopt this rule or for this Court to bless it. The question of which branch of government gets to make or revise policy choices is as critical to preserving the republic as any policy choice itself.

Justice Kennedy's concurrence in *Rapanos* therefore impermissibly rewrites the federal statute by nullifying certain words. *Lowe v. SEC*, 472 U.S.

181, 207 n. 53 (1985) ("[W]e must give effect to every word that Congress used in the statute."); *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) ("Congress's choice of words is presumed to be deliberate"); *Dodd v. United States*, 545 U.S. 353, 357 (2005) ("We 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there,'" *quoting Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). The Court should grant *certiorari* to clarify that Congress' choice of words in the CWA apply as written.

In the alternative, the Court could revisit *Rapanos* and find that even the plurality departed too far from a textualist reading of the statute. "Navigable" means able to be traversed with a watercraft, so the *Rapanos'* plurality inclusion of non-navigable streams and tributaries in that definition was a departure from the statute's text. *See Daniel Ball*, 77 U.S. (10 Wall.) 557, 562 (1870) (waters "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."). "Navigable waters" is unambiguous and means waters that are actually navigable, and therefore non-navigable streams and tributaries (and adjacent wetlands) that feed directly into navigable waters are "point sources." *See* 33 U.S.C. §§ 1362(12), 1362(14), and 1344(g). Water flows which require more than one intermediate step before reaching navigable waters are not covered by the CWA and properly fall under

state environmental regulatory authority. This reading most accurately reflects the limited federal reach that Congress wrote into the statute.

II. This Case Presents an Opportunity for the Court to Address Infirmities in its Application of *Chevron* Doctrine

As Petitioner explained, this case could be decided as a question of whether the CWA is void for vagueness, in which case the Court would not have to address *Chevron* directly. Petition at 27. As *amici* explain above, the Court can also decide this case as a question of statutory construction. A third option is the Court could revisit *Rapanos* to consider the application of *Chevron* in that case. *Rapanos* involved the legality of USACE regulations under the CWA which the Court resolved under *Chevron*. *Rapanos*, 547 U.S. at 739. Specifically, the Court could examine whether *Rapanos* failed to properly consider the "*Chevron* step zero" question of whether Congress explicitly directed the agency to determine the contours of "navigable waters" and other defined terms in the statute.

Lurking in the background of Justice Kennedy's statutory interpretation in *Rapanos* were federal regulatory agencies seeking leeway to enforce and apply the CWA. If Congress did not give the agencies the power to stretch the statutory definitions, doing so judicially might have been achievable (even if not strictly lawful). Accordingly, even though Justice Kennedy's concurrence rejected the agency interpretation of the CWA, the opinion

provided a judicial interpretation of the statute so vague and flexible as to guarantee agencies would enjoy greater future "deference" – not in interpreting the CWA *statute*, but in interpreting and applying the *Rapanos* concurrence itself. This could be called back-door delegation to agencies, where agencies are granted regulatory interpretive powers by the Court instead of by Congress.

Consider that Justice Kennedy's reading of the CWA takes an unambiguous word – adjacent – and makes it ambiguous. It also takes clear terms like navigable waters and point sources and nullifies them to give the agencies incredibly wide latitude to decide what is a "significant nexus" based on biological, physical, or chemical connections between wetlands and actual permanent standing bodies of water. *Rapanos*, 547 U.S. at 780, 782 (Kennedy, J. concurring). In making such an expansive interpretation, Justice Kennedy's concurrence allocated power to the regulatory agencies that was not explicitly granted by Congress.

As law, Justice Kennedy's *Rapanos* concurrence amounts to allowing the USACE to regulate almost any water flows which may eventually drain into navigable waters or point sources. Justice Kennedy's holding attempted to find a middle ground between the regulatory agencies' interpretation of a statute and Congress' unambiguous words. To do this, Justice Kennedy created a test that a wetlands must have a "significant nexus" to navigable waters, adding sufficiently ambiguous words to the CWA for agencies

to interpret. *Rapanos*, 547 U.S. at 754-755 ("One would think, after reading Justice Kennedy's exegesis, that the crucial provision of the text of the CWA was a jurisdictional requirement of 'significant nexus' between wetlands and navigable waters. In fact, however, that phrase appears nowhere in the Act..."). By inserting these words into the CWA, Justice Kennedy's concurrence gave the USACE and EPA the kind of rulemaking and enforcement deference that Justice Kennedy apparently believed was warranted. *Rapanos*, 547 U.S. at 753 ("To establish a 'significant nexus,' Justice Kennedy would require the Corps to 'establish... on a case-by-case basis' that wetlands adjacent to non-navigable tributaries 'significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"). Arguably, even the *Rapanos* plurality engaged in some of this compromise-reading by interpreting "navigable waters" to include non-navigable streams and tributaries.

The *Rapanos* decision illustrates how *Chevron* has gradually become less of a formal test and more of a guiding principle. Even without deferring to the agency interpretation of a statutory term, Justice Kennedy carved out what he thought was a reasonable amount of power for the agency to have. This case highlights the problems in applying *Chevron*, which inevitably requires policing of the separations of power between all three branches of government simultaneously.

On their face, *Chevron* cases involve at least three overlapping constitutional commands: giving effect to Congress' legislative power, showing deference to agencies' reasonable execution of their assigned task to enforce the laws, and exercising judicial restraint. In any given case, the Court has to pick among these competing interests. The path of least resistance is often to affirm the agency action. Congress wrote a statute, the agency interpreted it one way, and Congress never came back and amended the statute to say, "that agency interpretation is wrong," so judicial restraint in the face of such events and nonevents is seemingly safe.

However, the challenges of *Chevron* cases are often even greater than weighing those three competing principles, and the Court is in fact faced with a further multipart problem. First, the Court has two distinct possible ways of recognizing Congress' legislative power: the Court can defer to the agency interpretation if that is what Congress said it wanted to happen, or the Court can give effect to Congress' substantive word choices if that is what Congress said the law is. The Court is often left guessing at which one of these two mutually exclusive choices constitutes recognition of Congress' legitimate authority. Second, the Court must deciding if the application of the *Chevron* doctrine in a particular case is a matter of deference to Article I legislative power and intent (did the statute intend an outcome, or did it intend for executive branch agency to fill in gaps and make regulations) or a matter of Article III judicial restraint (do not substitute the Court's judgment for the executive agency's on statutory

interpretation *about* congressional intent).[2] And regardless of which way the Court answers those questions, the Court must assess whether it is ignoring violations of the strict constitutional separation of powers that have been committed by either Congress or the executive branch:

> The Court touches on a legitimate concern: *Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive. But there is another concern at play, no less firmly rooted in our constitutional structure. That is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well.

City of Arlington v. FCC, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

An oft-proposed solution to these problems is for the Court to never spend any time inferring expressions of congressional "intent." Instead, the Court should require explicit statutory language about how much and to what extent Congress has assigned agencies the power to interpret specific words in a statute as a part of the agencies' responsibility to issue regulation or enforce the law.

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[2] Andrew M. Grossman, CITY OF ARLINGTON V. FCC: JUSTICE SCALIA'S TRIUMPH, Cato Supreme Court Review, 2012-2013, available at https://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2013/9/grossman.pdf

But see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-843 (1984) (the Court should "give effect to the unambiguously expressed *intent* of Congress.") (italics added). The explicit language requirement should apply regardless of whether the Court is asking *if* Congress gave the agency interpretive powers or *how much* interpretive power Congress gave. *City of Arlington v. FCC*, 569 U.S. 290, 298 (2013) ("the question... is always whether the agency has gone beyond what Congress has permitted it to do, [and] there is no principled basis for carving out some arbitrary subset of such claims as 'jurisdictional.'"). The Court already occasionally applies this principle when the regulatory interpretation amounts to a "major" policy change. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (agencies may not implement a "decision of vast economic and political significance" affecting "a significant portion of the American economy," and certainly not without direct Congressional delegation of that kind of broad and expansive power to an agency by the explicit text of the statute).

An explicit statutory language requirement would essentially require a *Chevron* step zero analysis in *every* case challenging regulatory actions. Under *Chevron* step zero, before evaluating whether the statute is ambiguous, the Court must ask whether Congress explicitly delegated to the agency the power to perform the kind of statutory interpretation or reinterpretation it is engaged in. *See e.g.* Cass Sunstein, *CHEVRON* STEP ZERO, 92 Va. L. Rev. 187, 236 (2006). If the Court were to begin applying this

step in every *Chevron* case, this change would modify the current doctrine. Currently, the Court applies *Chevron* step zero only in cases where agencies adopt major rules that restructure the regulatory landscape in a way that significantly impacts large scale economic activity. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014); *see also United States Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (reh'ng en banc denied) (Kavanaugh, J., dissenting) ("This major rules doctrine... is grounded in two... presumptions: (i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch, and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies.") (citations omitted).

If such a rule were consistently applied it would also abolish the acquiescence doctrine entirely, which presumes that merely because Congress does not pass a new law to stop an agency from issuing illegal regulations that must mean Congress has blessed the regulations and desires that the agency proceed as it has. *Rapanos*, 547 U.S. at 749 ("[T]he dissent relies heavily on Congress deliberate acquiescence in the Corps' regulations... Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care....") (citations and punctuation omitted). Congress' inaction does not necessarily mean acquiescence; it could just mean political gridlock.

Applying these principles to *Rapanos*, there is no explicit congressional instruction in the CWA that the USACE redefine or reinterpret the defined term "navigable waters" as policy preferences might dictate, and Congress' failure to amend the CWA once the USACE did so is irrelevant. The *Rapanos* Court should not even have needed to reach its *Chevron* step one analysis of whether "navigable waters" was ambiguous and instead should have asked if Congress explicitly instructed the USACE to define its precise contours. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984). Moreover, to the extent the Court failed to conduct this analysis in its decisions preceding *Rapanos* as well, the CWA should return to how its text was accurately applied in 1974. Petition at 3-4; 39 Fed. Reg. 12115, 12119 (April 3, 1974); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 135 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 171 (2001).

III. Preventing *Chevron* Doctrine From Leading to a Runaway Administrative State is of Critical Importance

The urgent importance of addressing the confusion and expansion of *Chevron* doctrine and the many problems it has created constitutes an independent basis for the Court to grant *certiorari* in this case, beyond misinterpretation of the CWA or the misapplication of *Chevron* in *Rapanos*.

The Court is divining congressional intent when it supposes that the choice of an ambiguous word means that Congress wishes the agency to define it precisely. The inclusion of an ambiguous word in a statute is more often the result of a compromise to get enough votes to pass the bill, and it says nothing about how much regulatory or enforcement latitude Congress wanted to give the executive branch agencies. If Congress wishes to choose an ambiguous word and add "as the agency should define it within range x and y," *then* the Court should defer to that statutory instruction – as long as the word and range do not provide a limitless delegation of power. U.S. Const., art. 1, sec. 1 ("all legislative powers... shall be vested in a Congress"); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."); *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (grant of limited regulatory authority to an administrative agency is an implied power of Congress that is constitutional as long as Congress provides an "intelligible principle" in the statute to limit the executive branch agency); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-474 (2001) (same).

Congress' desire or intent to abandon its responsibility to clearly assign regulatory powers is both dangerous and irrelevant to the constitutional

analysis.[3] Consider an analogous example: the *Rapanos* plurality correctly observed that the States' desire to relinquish their own responsibilities for land and water management and turn them over to federal regulators did *not* render those federal regulators' actions lawful:

> Justice Kennedy contends that the Corps' preservation of the "responsibilities and rights" of the States is adequately demonstrated by the fact that 33 States plus the District of Columbia have filed an *amici* brief in this litigation in favor of the Corps' interpretation. But it makes no difference to the statute's stated purpose of preserving States' "responsibilities and rights" that some States wish to unburden themselves of them.

Rapanos, 547 U.S. at 738, fn 8, *quoting* 33 U.S.C. § 1251(b) (citations and punctuation omitted). The identical point can be made about constitutional separation of powers under modern *Chevron* doctrine. It makes no difference to the *Constitution's* purpose of

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[3] *See* George Will, *Gorsuch Strikes a Blow against the Administrative State*, National Review, April 22, 2018 (*Chevron* doctrine has become "an incentive for slovenly lawmaking by a Congress too lazy or risk-averse to be precise in making policy choices, and so lacking in institutional pride that it complacently sloughs off its Article I powers onto Article II entities."), available at https://www.nationalreview.com/2018/04/neil-gorsuch-supreme-court-decision-against-administrative-state/

preserving the branches' separate spheres of power that *Congress* wishes to unburden itself of its share.

Congress may indeed wish to simply articulate very general principles (such as "protect clean water") and then let unelected bureaucrats make all future substantive changes and revisions to the law without limit. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1227-1228 (2018) (Congress abdicated its "responsibilities for setting the standards of the criminal law" in order to "hand off the job of lawmaking") (Gorsuch, J.) (cleaned up). It is this Court's role not to allow such separation of powers violations. Congress must write words to the effect of "the agency is directed to determine the exact parameters of this term on a case by case basis within these absolute ranges." Without such a requirement, the Court is blessing violations of the separation of powers in the name of doing the good work of judicial restraint and deference to Congress' commands. There is currently no regularly applied limiting principle to this *Chevron* framework and judicial practice:

> These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference. What EPA claims for itself here is not the power to make political judgments in implementing Congress' policies... It is the power to decide—without any particular fidelity to the [statute's] text—which policy goals EPA wishes to pursue.

Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J. dissenting).

The *Chevron* test as currently applied will lead to further consolidation of more and more federal power in the executive:

> Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive. In the present context, that means ensuring that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is. That concern is ... heightened, not diminished, by the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies.

City of Arlington v. FCC, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

The pendulum has swung too far on *Chevron* and the administrative state. Justice Scalia famously saw the *Chevron* principle as merely the embodiment of a longstanding and pragmatic division of power between two government branches for the efficient administration of justice. *City of Arlington*, 569 U.S.

at 306, fn 4 ("Agencies make rules ('Private cattle may be grazed on public lands X, Y, and Z subject to certain conditions') and conduct adjudications ('This rancher's grazing permit is revoked for violation of the conditions') and have done so since the beginning of the Republic."). What the late Justice did not foresee was that the judiciary could eventually aid and abet a substantial surrender of power by Congress, effectively leaving a one- or two-branch government where the founders intended three. When the Court goes too far in reading statutes as broadly assigning sweeping interpretative power to agencies, this allows Congress to give up power and to become derelict in its necessary role of revising and repealing statutes. Congress has proven itself either willing to diminish its own power or unable to stop itself from doing so, preferring to ask the executive branch to reinterpret or reimagine statutes in ever more creative ways while sparing members of Congress accountability for national policy.[4] The Court should not countenance this upending of the constitutional order.

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[4] Yuval Levin, *Congress Is Weak Because Its Members Want It to Be Weak*, Commentary Magazine, June 2018 ("As a White House staffer in the Bush Administration, I frequently encountered member requests for executive actions in properly legislative domains that had broad popular support, or at least broad Republican support. Members were perfectly happy to claim credit for getting the president to act rather than acting themselves."), available at https://www.commentarymagazine.com/articles/congress-weak-members-want-weak/

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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