Nos. 11-1545 & 11-1547

IN THE

Supreme Court of the United States

CITY OF ARLINGTON, TEXAS; ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; ET AL.,
Respondents.

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, PROFESSORS JONATHAN H. ADLER, ROEDERICK M. HILLS, JR., JAMES HUFFMAN, DANIEL A. LYONS, ANDREW P. MORRISS, NATHAN A. SALES, AND DAVID SCHOENBROD IN SUPPORT OF PETITIONERS

Ilya Shapiro
Nicholas Quinn Rosenkranz
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
202-842-0200
ishapiro@cato.org

Colin E. Wrabley
David J. Bird
Counsel of Record
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
412-288-3131
dbird@reedsmith.com
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae include a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government and seven law professors who teach and write about administrative law, constitutional law, and related subjects.

This case is important to the *amici* because they believe the Fifth Circuit's extension of *Chevron* deference to an independent federal agency's interpretation of its own jurisdiction-controlling statutory provisions is inconsistent with decades of this Court's administrative law precedents, the constitutional principles governing the construction of statutory delegations of power to federal agencies, and the system of checks and balances established by the Constitution.

The Cato Institute 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 help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and

---

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

studies, conducts conferences and forums, and publishes the annual Cato Supreme Court Review.

Jonathan H. Adler is the Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law in Cleveland, Ohio, where he teaches and writes on administrative, constitutional, and environmental law.

Roderick M. Hills, Jr. is the William T. Comfort, III Professor of Law at the New York University School of Law. He teaches and writes on administrative law, constitutional law, and conflicts of laws.

James Huffman is Dean Emeritus at the Lewis & Clark Law School, where he teaches and writes on constitutional law, environmental law, and jurisprudence. He is a member of the Hoover Institution Property Rights, Freedom and Prosperity Task Force.

Daniel A. Lyons is an assistant professor at Boston College Law School, where he teaches and writes on property, telecommunications and administrative law.

Andrew P. Morriss is the D. Paul Jones, Jr. & Charlene A. Jones Chairholder of Law at the University of Alabama School of Law in Tuscaloosa, Alabama, where he teaches and writes on regulatory issues involving environmental, energy, and offshore financial centers. He is affiliated with the Property & Environment Research Center, the Regulatory Studies Center at George Washington University, the Institute for Energy Research, and the Mercatus Center at George Mason University. He is a

Research Fellow at the New York University Center for Labor and Employment Law, and chair of the editorial board of the *Cayman Financial Review*.

Nathan A. Sales is an assistant professor of law at George Mason University School of Law where he teaches and writes on national security law, administrative law, and criminal law.

David Schoenbrod is the Trustee Professor of Law at New York Law School in New York, New York and a visiting scholar at the American Enterprise Institute in Washington, D.C. He teaches and writes on legislation, administrative regulation, constitutional law, and environmental law.

The views expressed herein are those of the *amici* and do not necessarily reflect the views of the *amici* law professors' employers or any other group or organization with which they may be affiliated.

SUMMARY OF ARGUMENT

The Court has never decided whether a federal agency's interpretation of its own jurisdiction-controlling statutory provisions should be eligible for deference under the two-step inquiry articulated in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), but the foundation for the answer was made explicit in *United States v. Mead Corp.*, 533 U.S. 218 (2001). There, the Court held that an agency's interpretation of a statute is eligible for deference under *Chevron* only "when it appears that Congress delegated authority to the agency generally to make rules [about the meaning of that statute] carrying the force of law." *Id.* at 226-27.

Mead teaches that there must be a clear sign of congressional intent to delegate authority to interpret a statutory provision *before* a court gives

"controlling weight" (that is, "*Chevron* deference") to an agency's reasonable interpretation of ambiguities in that provision. *Mead*'s teaching comports with (1) Article I of the Constitution, which vests all legislative power in the Congress, (2) the rule that federal agencies have no inherent powers but only delegated ones, and (3) the principles directing that statutes should be construed to avoid difficult constitutional questions and in light of the modest constraints of the nondelegation doctrine. It also comports with the Administrative Procedure Act and decades of this Court's precedents. And it limits the potential for aggrandizement by federal agencies, while ensuring that Congress is able to delegate authority to an agency to interpret statutory ambiguities when necessary and proper.

Mead's implications for the particular question presented in this case are clear. A reviewing court should presume that an agency's interpretation of ambiguity in jurisdiction-controlling provisions is not eligible for *Chevron* deference. Questions of agency jurisdiction are questions of law that are for the courts to resolve in the first instance. Further, a statutory ambiguity, standing alone, does not constitute a delegation of interpretive authority to a federal agency, let alone a delegation of authority to an agency to determine the scope of its own jurisdiction.

The Fifth Circuit's decision in this case does not follow the proper analytical path. The Fifth Circuit neither looked for, nor found, a clear sign of congressional intent to delegate authority before deferring to the FCC's interpretation of the alleged ambiguity in the provisions at issue here. Standing alone, that error should lead to vacatur of the Fifth

Circuit's judgment and remand for further proceedings, consistent with *Mead* and the Court's opinion.

Affirming the Fifth Circuit's judgment and reflexively treating the FCC's interpretation of its own jurisdiction-controlling provisions as eligible for *Chevron* deference would be inconsistent with *Mead* and would establish a principle of statutory construction in direct opposition to the principles used by the Court in other cases interpreting statutes to avoid constitutional delegation problems.

Treating the jurisdictional interpretations of federal agencies as eligible for *Chevron* deference also would create a particular risk of agency aggrandizement. Just as one would not let foxes guard henhouses, courts should not presume Congress has authorized agencies to determine their own jurisdiction, for agencies will be prone to interpret ambiguities in line with agency interests. Extending eligibility for *Chevron* deference to interpretations of jurisdiction-controlling provisions also would give agencies a systematic advantage over Congress on questions of their own jurisdiction, and make it easier for Congress to shirk its responsibility to delegate power in a clear manner. None of those outcomes would be desirable or consistent with the careful allocation of power among the branches of government set forth in this Court's precedents.

The Court should adhere to *Mead*, vacate the Fifth Circuit's judgment, and remand the case so that the Fifth Circuit can make an appropriate de novo assessment of the agency's jurisdiction, without *Chevron* deference to the agency's views on that threshold matter.

ARGUMENT

I. *Chevron* Applies Only When Congress Has Delegated Interpretive Authority To An Agency.

The Court's decision in *Chevron* set forth a familiar two-step inquiry for courts to apply when evaluating agency interpretations of federal statutes. In step one, the reviewing court considers the statutory text to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, the statute controls, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If the statute is "silent or ambiguous," however, the court proceeds to step two and must defer to the agency's statutory interpretation, so long as it "is based on a permissible construction of the statute." *Id.* at 843. In other words, at step two, the agency's interpretation is given "*controlling weight*" unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844 (emphasis added). As the Court explained in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987), "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program."

Chevron itself concerned a relatively routine, technical controversy concerning the implementation of a complex regulatory statute. Nothing in the Court's decision purported to announce a landmark holding. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, in Administrative Law Stories 399, 402 (Peter L. Strauss ed., 2006). Perhaps because of the relatively routine and technical nature of the underlying

dispute in the *Chevron* case, the Court "was much clearer" in articulating *Chevron*'s two-step approach than it was in articulating "the rationale that accounted for it." Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 197 (2006). Over the years, this lack of clarity has led to significant doctrinal confusion, tension, and debate in this Court and the circuit courts, as well as among academics and commentators, over *Chevron*'s "legal pedigree" and how broadly to apply the two-step *Chevron* deference analysis. *See* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1522, 1525 (2009).

Some commentators have argued that *Chevron* is grounded in constitutional separation-of-powers principles. *See, e.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 Admin. L.J. 269, 269-70 (1988); Richard J. Pierce, Jr., *Reconciling* Chevron *and* Stare Decisis, 85 Geo. L.J. 2225, 2232-34 (1997). Others have suggested that *Chevron* should be seen as a rule of federal common law. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 618-19 (1992); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 Yale J. on Reg. 327, 345-54 (2000). Still others maintain that *Chevron* deference is derived from congressional intent. *See, e.g.*, Ernest Gellhorn & Pail Verkuil, *Controlling* Chevron*-Based Delegations*, 20 Cardozo L. Rev. 989, 1007 (1999); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 836-37, 872 (2001); Sunstein, Chevron

Step Zero, 92 Va. L. Rev. at 198; Daniel A. Lyons, *Tethering the Administrative State: The Case Against* Chevron *Deference For FCC Jurisdictional Claims*, 36 J. Corp. L. 823, 830-31 (2011).

Indeed, the conflict that presently exists among lower courts on the very question presented in this case reflects this fundamental doctrinal confusion, tension, and debate over *Chevron*'s rationale and scope.[2]

While the Court may not have been as clear as it could have been about the doctrinal pedigree of its two-step approach in *Chevron* itself, the Court has been relatively consistent in maintaining that congressional delegation is the basis for according controlling weight to an agency's reasonable interpretation of an ambiguous statute. In *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990), the Court explained that "[a] precondition to deference

---

[2] *Compare N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 847 (7th Cir. 2002); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999); *Durable Mfg. Co. v. United States Dep't of Labor*, 578 F.3d 497, 501 (7th Cir. 2009); *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998) (reviewing an agency's determination of its own statutory jurisdiction without applying *Chevron*'s two-step analysis), *with NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 355 (3d Cir. 2001); *Puerto Rico Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988); *Lyon County Bd. of Comm'rs v. EPA*, 406 F.3d 981, 983 (8th Cir. 2005); *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145-1146 (10th Cir. 2010) (applying *Chevron*'s two-step analysis to questions of an agency's statutory jurisdiction).

under *Chevron* is a congressional delegation of administrative authority." Likewise in *Dunn v. Commodity Futures Trading Comm'n*, 529 U.S. 465, 479 n.14 (1997), the Court described *Chevron* deference as "aris[ing] out of background presumptions of congressional intent" (citing *Smiley v. Citibank (S.D.)*, 517 U.S. 735, 740-41 (1996)). And in *Christensen v. Harris County*, 519 U.S. 576 (2000), a majority of the Court held that (i) Congress can only be said to have impliedly delegated the power to interpret ambiguous statutory language when it has granted an agency power to take actions that bind the public with the "force of law" and (ii) other agency interpretations should only receive a lesser form of deference (*Skidmore* deference) or no deference at all. *Id.* at 587 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

United States v. Mead Corp. made it even clearer that eligibility for *Chevron* deference depends on a delegation of interpretive authority to a federal agency. In *Mead*, the Court held that the U.S. Customs Service's tariff classification rulings were not entitled to *Chevron* deference, and its decision makes it clear that "congressional intent is the touchstone" for determining whether an agency's interpretation of a statute may be eligible for deference under *Chevron*'s two-step approach. Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1526; *see also* Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 812 (2002) ("At the most general level, *Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent."). As the Court put it then, *Chevron* applies "when it appears that Congress

delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27. The Court further explained that while there are many ways Congress may demonstrate its intention to delegate interpretive authority (including, as in *Mead* itself, by granting authority to engage in notice-and-comment rulemaking), an agency's decision is not eligible for *Chevron* deference without that demonstration of Congress's intent. *Id.* at 227.

Mead's explicit grounding of *Chevron* deference in Congress's intent to delegate authority to interpret ambiguity in a statute has several important implications for the doctrinal debates about *Chevron*'s legal pedigree and how broadly to apply the *Chevron* deference analysis.

First, by making it clear that eligibility for *Chevron* deference depends on Congress's intent, *Mead* also makes it clear that *Chevron* deference does not arise directly from constitutional separation-of-powers principles. Judicial deference under *Chevron* is possible and appropriate only where there is reason to think that Congress has delegated authority to the agency to fill in gaps and resolve ambiguities in a particular statute, and it always is subject to congressional control and revision. In other words, "*Chevron* deference should apply only where Congress would want [it] to apply." *See* Merrill & Hickman, Chevron*'s Domain*, at 836-37. *Cf.* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2130 (2002) ("Congress could by statute eliminate the *Chevron* doctrine.").

Second, *Mead* makes it clear that there must be a judicial inquiry into whether Congress intended to delegate authority to an agency to interpret a statutory ambiguity before a court extends *Chevron* deference to the agency's reasonable interpretation of that ambiguity. Merrill & Hickman, Chevron*'s Domain*, 89 Geo. L.J. at 836-37; Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. at 208. If there is a clear sign of Congress's intent to delegate interpretive authority, the interpretation is eligible for deference under *Chevron*'s two-step inquiry. If not, the agency's interpretation is not eligible for *Chevron* deference, and the court should apply a lesser form of deference or no deference at all. Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1526.

Third, *Mead* confirms that mere ambiguity in a statute is not sufficient to establish that Congress intended to delegate to an agency interpretive authority over that ambiguity. *See also Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved."). As lower courts have recognized, ambiguity is necessary, but not sufficient, to establish a delegation of authority and allow for *Chevron* deference. *See Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) ("Mere ambiguity in a statute is not evidence of congressional delegation of authority"); *Atlantic City v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) (same); *American Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005) (same); *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007).

After *Mead*, courts must look for a clear sign that Congress delegated authority to the agency to resolve

an ambiguity in a statute, relying on the traditional tools of statutory interpretation. A clear sign can be manifest in the text of the statute, in the agency's power to engage in notice-and-comment rulemaking, or in other ways. However, there must be an *affirmative* reason to conclude that Congress intended the agency to have interpretive authority and courts to give controlling weight to the agency's reasonable interpretation. As Professor Adrian Vermeule, a *Mead* critic, has written:

> Rather than taking ambiguity to signify delegation, *Mead* establishes that the default rule runs against delegation. Unless the reviewing court affirmatively finds that Congress intended to delegate interpretive authority to the particular agency at hand, in the particular statutory scheme at hand, *Chevron* deference is not due and the *Chevron* two-step is not to be invoked.

Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 Geo. Wash. L. Rev. 347, 348 (2003), *quoted in* Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1528.

Fourth, *Mead*'s focus on congressional intent also suggests that certain types of statutes are less likely to be subject to the *Chevron* framework. *Cf. Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("In extraordinary cases, … there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

For example, the Court frequently has suggested that Congress would expect a reviewing court to give controlling weight to an agency's reasonable

interpretation of an ambiguity in a statute where (1) the agency has specialized knowledge or expertise in the technical subject matter of a statute—knowledge and expertise that gives the agency an institutional advantage over a reviewing court in resolving statutory questions in accord with Congress's policy objectives and intent, (2) deference to the agency would increase political control and accountability, or (3) the agency's range of reasonable interpretive choices are tethered to express statutory mandates that serve to limit the danger of agency self-dealing and aggrandizement.[3] Conversely, the Court has been reluctant to give controlling weight to an agency's interpretation of an ambiguity in a statute where the agency lacks expertise or competence relative to a court or where deference arguably would decrease political accountability and increase the dangers of agency self-dealing and aggrandizement.[4]

---

[3] *See Chevron*, 467 U.S. at 865 (regulations eligible for deference where agency indisputably had authority to interpret statutory ambiguities and was an "expert[] in the field," and part of a "political branch of Government."); *see also City of New York v. FCC*, 486 U.S. 57, 67 (1988) (regulations deemed eligible for deference where the statute "grants the [FCC] the power to 'establish technical standards'" (citation omitted)); *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (Board's order "on an issue that implicates its expertise in labor relations" was eligible for deference where the Court previously determined "that the task of defining the scope" of the statute was for agency); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 (1969) (upholding regulations where Congress "ratified" agency construction "with positive legislation").

[4] *See, e.g.*, *Gonzales*, 546 U.S. at 243 (evaluating an executive officer's claim of delegated interpretive authority de novo; and

II. Courts Should Presume *Chevron* Does Not Apply To An Agency's Interpretation Of Its Own Jurisdiction-Controlling Statutory Provisions.

A federal agency's interpretation of its own jurisdiction-controlling statutory provisions should not be eligible for *Chevron* deference unless the reviewing court (1) conducts a de novo review of the statutory scheme and (2) finds an affirmative reason to conclude that Congress intended the agency to have authority to make interpretations of the jurisdiction-controlling provisions that carry the force of law.

A. The Court Has Never Held That An Agency's Interpretation Of Jurisdiction-Controlling Provisions Is Eligible For *Chevron* Deference.

Whenever an issue has arisen regarding an agency's authority to issue a binding interpretation of a jurisdiction-controlling provisions, the Court has reviewed the agency's authority de novo—assessing whether Congress has delegated power to make rules with the force of law. The Court never has held an agency's interpretation of its own jurisdiction-controlling provisions to be eligible for *Chevron* deference. There is no reason to reverse course.

---

rejecting the claimed authority where, among other things, the claimed authority (1) did not comport with the text of the statutory delegation provision; (2) would have an "extraordinary" effect on the balance of power among branches of the federal government and between the federal government and the states; and (3) did not align with any special "expertise" of the officer.

Two years after *Chevron*, in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), the Court made remarks that *implied* that an agency's views on the scope of its jurisdiction could be eligible for deference from the judiciary under *Chevron*. However, a close reading of *Schor* shows that the Court reviewed and decided the jurisdiction of the CFTC de novo, based on the "face of the [Commodity Exchange Act]," its "unambiguous[]" legislative history, and "abundant evidence" of what Congress "plainly intended." *Id.* at 841-43, 847. It was only *after* the Court had conducted its own independent assessment of the jurisdiction-controlling statutory provisions that the Court made passing remarks about the CFTC's "long-held position" on the meaning of the provisions. *Id.* at 845 (describing the CFTC position as reasonable and worthy of considerable weight under *Chevron*). And, even those passing remarks were prefaced by what appears to be an independent judicial determination that the CFTC had some sort of (unspecified) "delegated authority" under the Act to make rules interpreting the jurisdiction-controlling provisions. *Id.* In any event, in light of the Court's preceding independent assessment of the CFTC's jurisdiction under the Act, the Court's passing remarks about the CFTC's position on the jurisdictional issue should be seen for what they are—*dicta* from the beginning of the *Chevron* era.

Two years after *Schor*, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), Justices Scalia and Brennan wrote dueling opinions that did address the question of whether a federal agency's interpretation of its own jurisdiction-controlling provisions should be eligible

for *Chevron* deference. *Id.* at 377-84 (Scalia, J., concurring in judgment), 384-91 (Brennan, J. dissenting). Although the competing considerations of the two justices have been echoed repeatedly by jurists and academics, they were not addressed in the Court's primary opinion. *Id.* at 367-70 (Stevens, J., for the Court) (making no reference to *Chevron*). Furthermore, since *Mississippi Power*, the Court has sidestepped numerous opportunities to illuminate the extent to which jurisdictional questions ought to be analyzed under the *Chevron* framework, typically by finding the meaning of jurisdiction-controlling statutory provisions to be plain and unambiguous.[5]

---

[5] *See Mississippi Power*, 487 U.S. at 370-77 (Stevens, J., for the Court) (upholding the agency's jurisdiction without citing *Chevron*); *Dole v. United Steelworkers of America*, 494 U.S. 26, 42-43 (1990) (holding that Congress clearly denied the OMB jurisdiction to review disclosure rules under the Paperwork Reductions Act); *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218 (1994) (striking down FCC's regulation that would eliminate tariff filings for most interexchange telephones); *Brown & Williamson*, 529 U.S. at 159 (holding that Congress clearly denied the FDA jurisdiction to regulate tobacco); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (sidestepping FCC jurisdiction issues); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that the Clean Air Act unambiguously conferred jurisdiction on the EPA to regulate greenhouse gases).

B. An Agency's Interpretation Of Jurisdiction-Controlling Provisions Should Not Be Eligible For *Chevron* Deference Unless A Court Finds A Clear Sign Congress Vested The Agency With Authority To Interpret Ambiguities In Those Provisions.

The delegation principle implicit in *Chevron* and explicit in *Adams Fruit*, *Dunn*, *Christensen*, and *Mead* provides a solid foundation for the right answer to the question presented in this case. Simply put, an agency's interpretation of its own jurisdiction-controlling provisions should *not* be eligible for *Chevron* deference, unless a court finds a clear sign of congressional intent to delegate authority to the agency to determine, in a reasonable way, the meaning of ambiguity in the jurisdiction-controlling provisions. Merrill & Hickman, Chevron*'s Domain*, 89 Geo. L.J. at 836-37; Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1528-32; Lyons, *Tethering the Administrative State*, 36 J. Corp. L. at 831-32.

Furthermore, the clear sign that a court needs cannot be established by mere ambiguity in the jurisdiction-controlling provisions themselves. There must be an *affirmative* reason for the reviewing court to conclude that Congress intended or expected the agency to have interpretive authority. Merrill & Hickman, Chevron*'s Domain*, 89 Geo. L.J. at 836-37; Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1528-32; Lyons, *Tethering the Administrative State*, 36 J. Corp. L. at 831-32. That a statute fails to resolve a jurisdictional question is not, in itself, evidence of Congressional intent to delegate authority to an agency.

There should be, in other words, a strong presumption *against* treating an agency's interpretation of jurisdiction-controlling statutes as eligible for *Chevron* deference—a presumption that can be rebutted only by a de novo statutory analysis that shows that Congress affirmatively entrusted the agency with such authority. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1788 (2012) ("Rather than defer to executive assertions of power, courts should presume that Congress has not intended to delegate power unless it has done so with clarity.").

C. A Strong Presumption Against *Chevron* Deference In Cases Of Jurisdiction-Controlling Provisions Comports With Constitutional Principles Requiring That A Delegation To An Agency Be Guided By An Intelligible Principle.

A strong presumption against extending *Chevron* deference in cases involving agency interpretations of jurisdiction-controlling provisions would be consistent with (1) Article I of the Constitution, which vests all legislative power in the Congress; (2) settled principles of constitutional law that make it clear that federal agencies have no inherent powers but only delegated ones; and (3) the rules providing that statutes should be construed to avoid difficult constitutional questions and in light of the modest constraints of the nondelegation doctrine. U.S. Const. art. I, § 1; *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant

of such power by the Congress and subject to limitations that body imposes.").

It is "axiomatic" that a federal agency has no inherent power to act unless and until Congress delegates power to it through a statute. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act... unless and until Congress confers power upon it."). Furthermore, consistent with Article I, Congress cannot give an agency the power to define its own political or public policy mission; Congress must define the agency's power and authority and give the agency an "intelligible principle" to guide the agency's efforts to interpret, implement, and enforce the statute.

The nondelegation doctrine ensures that "important choices of social policy are made by Congress, the branch of our Government most responsible to the popular will." *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring). The doctrine prevents Congress from forsaking its duties and prevents agencies from arrogating undelegated powers. *Loving v. United States*, 517 U.S. 748, 757 (1996). Simply put, the doctrine fosters democratic accountability and safeguards liberty.

While this Court has been reluctant to apply the nondelegation doctrine directly to strike down statutes that delegate power to agencies, *see Mistretta v. United States*, 488 U.S. 361, 372 (1989), it consistently has reaffirmed the bedrock constitutional principle that agencies have only those powers delegated to them by Congress. The Court thus has interpreted statutes so as to avoid potential

nondelegation doctrine problems, *see, e.g.*, *Industrial Union Dep't,* 448 U.S. at 646; *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974), and has required an agency to construe a statute so as to avoid nondelegation doctrine concerns. *See AT&T Corp. v. Iowa Public Utilities Bd.*, 525 U.S. 366, 388-89 (1999).[6] This approach ensures that federal agencies only exercise those powers actually delegated by Congress. *See* Chapman & McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. at 1786-87 ("Armed with the understanding that the legislative branch, not the executive, makes law, courts should interpret statutes narrowly to ensure that any delegation is the genuine intention of Congress, and not an instance of executive overreach.").

The question of whether Congress has delegated authority to an agency to decide the meaning of jurisdiction-controlling statutory provisions logically and chronologically precedes the question of whether the agency's exercise of that power is entitled to deference under *Chevron*. *See NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987) (*Chevron* review of agency interpretations of statutes applies only to regulations "promulgated pursuant to congressional authority"); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment) (rejecting *Chevron* deference where the statute "is not administered by any agency but by the courts"); *cf. Bureau of Alcohol, Tobacco and*

---

[6] *See also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673 (1997); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315-17 (2000).

Firearms v. FLRA, 464 U.S. 89, 97 (1983) (refusing to sanction "'unauthorized assumption by an agency of major policy decisions'" (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)).

A holding in this case that recognizes this reality and establishes a strong presumption against extending *Chevron* deference to an agency's interpretation of jurisdiction-controlling provisions would advance the ultimate concerns of the nondelegation doctrine and avoid potential constitutional problems associated with giving agencies interpretive authority to define their own jurisdiction by presumption or implication.

D. A Strong Presumption Against *Chevron* Deference Also Comports With The Administrative Procedure Act And Decades Of Precedents.

The text of the Administrative Procedure Act (APA) and decades of administrative law precedents from this Court further reinforce the conclusion that an agency's interpretation of jurisdiction-controlling statutory provisions should *not* be eligible for *Chevron* deference unless a court finds a delegation by Congress to the agency of authority to issue reasonable interpretations of ambiguities in the jurisdiction-controlling provisions.

In the APA, Congress directed that the courts should decide "all relevant questions of law." 5 U.S.C. § 706. As Justice Scalia noted in his dissent in *Mead*, "[t]here is some question whether *Chevron* was faithful to the text of the [APA], which it did not even bother to cite." *Mead*, 533 U.S. at 241 (Scalia, J., dissenting). Yet, there is no genuine conflict between § 706 and *Chevron* in this case or any other,

so long as a reviewing court conducts a de novo review of the particular statutory scheme and decides for itself (without deference to the agency) whether Congress has entrusted the agency with authority to issue reasonable interpretations of a particular statutory provision that carry the force of law. If the court answers that "relevant" question of law in the affirmative, then the court's legal finding (that Congress shifted primary responsibility for interpreting statutory ambiguities from the court to the agency) makes it possible to proceed with the *Chevron* inquiry in harmony with § 706. If the court answers that "relevant" question of law in the negative, deference under *Chevron* is not possible.

The APA further recognizes a distinction between (1) questions of agency jurisdiction and (2) other questions of law or policy that are relevant to evaluating agency rulemakings and actions. As the APA makes clear, agencies only have authority to interpret, implement, and enforce a law or regulation when the agency has jurisdiction. Section 558(b), for instance, provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). Likewise § 706(2)(C) provides that courts are to invalidate and set aside those agency actions determined to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §706(2)(C).

Decades of this Court's precedents reinforce the legal distinction between questions of agency jurisdiction and other questions of law or policy. These precedents also support a holding by the Court in this case that an agency's interpretation of

jurisdiction-controlling provisions ordinarily should *not* be eligible for *Chevron* deference. *See Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973) ("an agency may not bootstrap itself into an area in which it has no jurisdiction" through the adoption of a long-standing interpretation of its statutory authority); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 288 n.5 (1978) (rejecting an administrator's "unexplained exercise of supposed authority"); *Adams Fruit Co.*, 494 U.S. at 650 (citing and quoting *Seatrain* and *Adamo Wrecking* as establishing "fundamental" principles of administrative law).

The reasoning in these cases aligns fully with *Mead*, 533 U.S. at 226-27. The agency cannot bootstrap itself into an area where it has no jurisdiction through an interpretation of jurisdiction-controlling provisions. To the contrary, an agency's interpretation of those provisions may be eligible for *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules [about the meaning of that statute] carrying the force of law." *Id.* Furthermore, as the text of the APA and the case law described above demonstrate, a reviewing court cannot wash its hands of responsibility for assessing whether Congress has made such a delegation to an agency.

Some have objected that "there is no discernible line" between jurisdictional and non-jurisdictional questions. *Mississippi Power,* 487 U.S. at 381 (Scalia, J., concurring in the judgment). Such concerns are overstated. "However fuzzy or difficult to apply the concept of jurisdiction may be in some instances, both Congress and the Court consistently have drawn a distinction between questions of

agency jurisdiction and other legal questions and limitations on agency power." Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1537. This Court and lower federal courts routinely distinguish between jurisdictional and nonjurisdictional questions, and this inquiry presents no greater challenge than those addressed by federal courts all the time. *Id.* at 1557-60; Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 Wm. & Mary L. Rev. 1463, 1522-24 (2000).

Requiring agencies to identify a statutory basis for any jurisdictional claim will resolve many cases. Courts may also consider whether a given assertion of jurisdiction is novel for an agency or strays from its "core regulatory assignment." Gellhorn & Verkuil, *Controlling* Chevron-*based Delegations*, 20 Cardozo L. Rev. at 1009, 1011; *see also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1130 (2008) (distinguishing between "wholesale" and "retail" applications of a statute). In all instances, however, the existence of agency jurisdiction is a necessary predicate for *Chevron* deference. This distinction between jurisdictional and nonjurisdictional questions should be maintained and re-affirmed when this case is resolved.

E. A Strong Presumption Against *Chevron* Deference Would Limit Agency Aggrandizement, While Ensuring That Congress Can Enact A Statute Making The Agency The Primary Interpreter Of Its Own Jurisdiction, If And When Congress Wishes To Do So.

As the Court recognized in *Brown & Williamson*, 529 U.S. at 159, in "extraordinary" cases, there is "reason to hesitate" before concluding that Congress intended to entrust an agency with primary responsibility for interpreting ambiguities in federal statutes or expected a court to give controlling weight to an agency's views.

By any fair measure, an agency's interpretation of jurisdiction-controlling provisions presents an "extraordinary" case, requiring a careful analysis of the natural and legitimate expectations of Congress both in general and in a particular case. This is so because an agency's interpretation of jurisdiction-controlling provisions poses a special risk of agency self-dealing or aggrandizement: a risk that the agency will exercise a power Congress did not intend or expect it to have or that it will extend its power more broadly than Congress envisioned.

Extending *Chevron* deference to agency to interpretations of jurisdiction-controlling provisions contravenes a fundamental principle within the Anglo-American legal tradition. *See, e.g.,* 1 William Blackstone, Commentaries 91 ("if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is

unreasonable that any man should determine his own quarrel."); The Federalist No. 10 (James Madison) (C. Rossiter ed. 1961) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."); The Federalist No. 80 (Alexander Hamilton) (C. Rossiter ed. 1961) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."). The Framers of the Constitution were acutely aware of the tendency of individuals to favor their own interest. Indeed, this was among the central problems the Constitution's structure of separated powers is designed to solve. *See* The Federalist, No. 51 (James Madison) (C. Rossiter ed. 1961).

This principle, that "foxes should not guard henhouses," is among those upon which judicial review of agency action is based. *See* Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869, 889 (2008); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 446 (1989) ("The basic case for judicial review depends upon the proposition that foxes should not guard henhouses."). Agency officials are no less prone to the temptation to interpret ambiguities in light of their own self-interest, however measured. *See* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J. L. & Pub. Pol'y 203, 208-11 (2004) (discussing agency self-interest). Judicial review of agency action helps ensure that agencies do not engage in self-dealing or aggrandizement.

Even before *Chevron*, courts were wary of allowing agencies to determine the scope of their own

power. For example, in *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944), the Court held that the "[d]etermination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." Likewise, in *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946), the Court made it clear that "[an] agency may not finally decide the limits of its statutory power[;] [t]hat is a judicial function." The Court did not abandon such concerns with *Chevron*. To the contrary, as Professors Gellhorn and Verkuil observed, the very structure of *Chevron* is attentive to the problem of agency aggrandizement in that "it requires courts to make the first determination of whether Congress answered the precise question at issue [because] agencies have no comparative advantage in reading statutes and . . . agency self-interest may cloud [an agencys] judgment." *Controlling* Chevron-*based Delegations*, 20 Cardozo L. Rev. at 1009.

Aggrandizement not only raises the risk that an agency might wield excessive power but also that it might disrupt Congress's intended distribution of power. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 276-77 ("If Congress has addressed a subject, but has done so in a limited way, this fact may itself suggest that Congress has gone as far as it could, as far as the enacting coalition wished to, on the subject in question"); *see also* Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1551-53; Merrill & Hickman, Chevron*'s Domain*, 89 Geo. L.J. at 912 (noting that no matter what Congress might naturally intend or expect in a case involving an ordinary statutory provision, it does "not follow" that

Congress would naturally harbor the same intent or expectation in a case that implicates the existence or scope of an agency's jurisdiction).[7]

A comparison of the institutional competencies and incentives of Congress, the courts, and agencies reinforces the conclusion that an agency's interpretation of a jurisdiction-controlling provision ordinarily should *not* be eligible for judicial deference under *Chevron*'s two-step inquiry.

Even if one believes that an agency may have some unique or valuable insight into the construction of jurisdiction-controlling provisions based on the

---

[7] In a smaller but no less important set of cases, an agency may interpret a statute to disclaim jurisdiction—that is, the agency may affirmatively renounce a power arguably granted to it or conclude that an undisputedly granted power does not extend as far as it might. Jurisdiction-disclaiming interpretations pose the risk of abrogation: the possibility that an agency might fail to discharge the duty with which Congress has charged it, perhaps because of policy disagreements with the legislature or because it fears public disapproval for taking politically unpopular actions. Power-disclaiming interpretations also can pose a danger of a different sort of agency aggrandizement: agencies might focus on matters that advance their own institutional interests, as distinct from the interests Congress tasked them with serving. *See* Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1503-07, 1548-50. Given the potential for self-interested agency action that might disrupt Congress's intended distribution of power, we see no doctrinal or practical reason to distinguish between jurisdiction-seizing and jurisdiction-denying agency interpretations. *Id.* And the Court has not drawn any such distinction either. *See, e.g.*, *Massachusetts*, 549 U.S. 497.

agency's expertise in a particular subject or its familiarity with a federal statutory scheme or program, *Mississippi Power*, 487 U.S. at 381-82 (Scalia, J., concurring in the judgment), it seems only fair to say that an agency will have much *less* institutional competence in answering questions of jurisdiction than in answering complex technical or scientific questions or making policy judgments about how best to implement a statutory regime. At the same time, the risks of aggrandizement or abrogation associated with an agency's interpretation of its own jurisdiction-controlling provisions are much greater than in any ordinary case involving complex technical or scientific questions or competing policy judgments about how best to implement a statutory regime. Agencies are, after all, "proactive" "'policy entrepreneurs.'" Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1553-54 (citation omitted); Lyons, *Tethering the Administrative State*, 36 J. Corp. L. at 836-37.

In contrast, federal courts have their own unique and valuable insights into the construction of jurisdiction-controlling provisions based on the courts' historical position and experience as the arbiters of power among the various branches of government. Furthermore, courts are inherently reactive institutions: they cannot issue advisory opinions or initiate proceedings to affirm or deny agency jurisdiction over an activity or field. Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1553-54 (citation omitted); Lyons, *Tethering the Administrative State*, 36 J. Corp. L. at 836-37.

On balance, "it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own

power." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987). Indeed, it is unlikely Congress would delegate such authority at all. As then-Judge Breyer observed, "Congress is more likely to have focused upon, and answered, major questions," such as whether to confer jurisdiction to an agency, while "leaving interstitial matters," such as how delegated authority is exercised, for resolution by the agency during the "daily administration" of the statute. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

III. The Fifth Circuit Did Not Follow The Proper Path When It Automatically Treated The FCC's Interpretation Of Jurisdiction-Controlling Statutory Provisions As Eligible For *Chevron* Deference.

The Fifth Circuit's decision in this case does not follow the proper analytical path. That court neither sought nor found a clear sign of congressional intent to delegate authority to the FCC to interpret ambiguity in the agency's jurisdiction-controlling provisions *before* deeming the FCC's interpretation of those provisions eligible for *Chevron* deference. Standing alone, that error should lead to vacatur of the Fifth Circuit's judgment and remand for further proceedings, consistent with *Mead* and the Court's opinion.

Affirming the Fifth Circuit's judgment and treating the federal agency's interpretation of its own jurisdiction-controlling provisions as eligible for *Chevron* deference, without requiring an independent search by a court for a clear sign of Congress's intent to vest the agency with the power to make a reasonable ruling on that issue, would be a

mistake. It would be inconsistent with *Mead* and would establish a principle of statutory construction that is in direct opposition to the principles used by the Court in other cases interpreting statutes to avoid constitutional nondelegation problems. It would create a serious risk of self-dealing and aggrandizement by federal agencies, especially by independent federal agencies that are even further removed from political control and accountability than agencies under presidential administration. It would give agencies a systematic advantage over Congress on jurisdictional questions. And it would make it easier for Congress to shirk its responsibilities to delegate power clearly. None of those outcomes would be desirable or consistent with the balance of power among Congress, courts, and agencies struck in past cases.

The Court should adhere to *Mead*, vacate the Fifth Circuit's judgment, and remand the case so that the Fifth Circuit can make an appropriate assessment of whether Congress intended to entrust the FCC with the power to interpret the jurisdiction-controlling provisions at issue and, if Congress did not, to make its own determination of the agency's jurisdiction, without *Chevron* deference to the agency's views on those threshold jurisdictional matters.

CONCLUSION

For these reasons, and those set forth by the Petitioners, the judgment below should be reversed.

Respectfully submitted,

Ilya Shapiro
Nicholas Quinn Rosenkranz
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
202-842-0200
ishapiro@cato.org

Colin E. Wrabley
David J. Bird
Counsel of Record
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
412-288-3131
dbird@reedsmith.com

Counsel for Amici Curiae

November 26, 2012