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 THE SOUTHERN COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether separation of powers principles preclude courts from affording *Chevron* deference to an agency's determination of its own jurisdiction.

## RULE 29.6 STATEMENT

*Amicus curiae* Southern Company has no parent corporations, and no publicly traded company owns 10% or more of the shares of the Southern Company's stock.

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## INTEREST OF THE *AMICUS CURIAE*[1]

The Southern Company is one of America's leading electricity producers, delivering affordable and reliable energy to more than 4.4 million customers through its operating companies, including the Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (collectively "Southern Company"). Nearly every aspect of the Southern Company's operations is regulated at the federal or state level. At the federal level, the Southern Company system is subject to regulation by, *inter alia*, the U.S. Environmental Protection Agency ("EPA") pursuant to the Clean Air Act and Federal Water Pollution Control Act, the Federal Communications Commission pursuant to the Pole Attachments Act, and the Federal Energy Regulatory Commission pursuant to the Federal Power Act. At the same time, the Southern Company is a regulated public utility, subject to intensive oversight and scrutiny by public service commissions and other state agencies.

The Southern Company's experience is that administrative agencies tend to take a more expansive view of their powers than Congress ever clearly

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that it entirely authored this brief and no party, its counsel, or any other entity but *amicus* and its counsel made a monetary contribution to fund the brief's preparation or submission. All parties have consented to the filing of this brief. Letters reflecting their consent are filed with the Clerk.

intended to delegate to them, creating significant regulatory uncertainties that impair investment and present significant operational difficulties. The Southern Company thus strongly believes that deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inappropriate to federal agencies' determination of the limits of their powers. Congress's delegation of authority, as determined *de novo* by the judiciary, and not an agency's own view as to the limits of its authority, should govern.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

*Chevron* held that reviewing courts should defer to an agency's interpretation of a statute Congress intended it to administer. Since that decision, the Court has carefully distinguished between situations where judicial deference to agency action furthers Congress's purposes in implementing statutory schemes, such as through the enactment of legislative rules to administer statutory programs where there is no question of jurisdiction, *see Chevron*, 467 U.S. at 843-44, and those where deference disserves Congress's intent or calls into question the appropriate balance of powers among the coordinate branches of government, such as where an agency promulgates a vague regulation and then demands deference in its interpretation and application of that regulation, *see Talk America, Inc. v. Michigan Bell Telephone Co.*,

131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). The Court is now faced with the question of whether an agency's determination of its jurisdiction merits deference under *Chevron*. It does not.

Given the prominence that administrative agencies have assumed in the everyday governance of the United States, judicial review of their decisions should further the separation of powers principles underlying our constitutional system. Deference to an agency's view of its own jurisdiction frustrates the orderly development and predictability of the law while promoting arbitrary government. *Cf. Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring) (discussing constitutional concerns with deferring to an agency's interpretation of its own regulations). This is because, unlike discretion inherent in congressional grants of regulatory authority, *see Chevron*, 467 U.S. at 843-44, allowing agencies both to determine the limits of their power, and then to exercise that power, impermissibly unites legislative and executive functions in the same body. This result is contrary to the fundamental separation of power principles on which our constitutional democracy is founded. *See Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring).

In particular, permitting agencies to determine the limits of their own jurisdiction, by affording those determinations *Chevron* deference, undercuts the principle of political accountability that the separation of powers was intended to further. *Chevron* deference necessarily implies a protean administrative power

than can be changed and extended within the realm of statutory silence, subject only to the procedural safeguards contained in the Administrative Procedure Act and certain organic statutes. As such, a decision deferring to an agency's extension of its own jurisdiction would excuse the political branches from their responsibility to address new challenges through constitutionally-prescribed processes, exalting existing administrative authorities that may or may not be well suited to meet those challenges.

Furthermore, as a doctrinal matter, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). In deciding the initial question of whether or not Congress actually delegated authority – that is, jurisdiction – deference under *Chevron* would be illogical and unwarranted as it presumes the very delegation that justifies *Chevron* deference in the first place. It necessarily follows that *Chevron*'s rationale does not support deferring to agency jurisdictional determinations; if anything, *Chevron* suggests that the courts must police the limits of agency power even more strictly, in view of the broad discretion agencies enjoy over matters within their authority.

Beyond constitutional principles, a presumption against deference to agency jurisdictional determinations will further both accountability and clarity in the law, helping to delineate between the areas within and without agencies' jurisdiction.

To be sure, deference is not an all or nothing proposition. A general rule declining *Chevron* deference for jurisdictional determinations will not preclude reviewing courts from honoring any relevant expertise that an agency may bring to bear on questions of its jurisdiction. This Court has long held that courts should defer to agency arguments with the "power to persuade," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and an agency will have ample opportunity to thoroughly consider jurisdictional issues and to present a reasoned and thorough legal basis for its conclusions.

For these reasons, and those discussed below, the Court should hold that *Chevron* deference is inapplicable to agencies' jurisdictional determinations, and should remand the instant case for proceedings consistent with its decision.

## ARGUMENT

### I. Affording *Chevron* Deference to an Agency's Determination of Its Own Jurisdiction Undermines the Constitutional Separation of Powers and Is Inconsistent with *Chevron*'s Doctrinal Basis

1. "Broad delegation to the Executive is the hallmark of the modern administrative state; agency rulemaking powers are the rule rather than, as they once were, the exception; and as the sheer number of modern departments and agencies suggests, we are

awash in agency 'expertise.'" Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516-17. Given the prominence that administrative agencies have assumed in the everyday governance of the United States, any principled framework for judicial review of their actions must take into account administrative agencies' place in our constitutional structure.

First, courts reviewing agency action must ensure that Congress has not impermissibly delegated its own legislative powers to administrative agencies. This is the case because the United States Constitution vests "[a]ll legislative powers herein granted . . . in a Congress of the United States," U.S. Const. art. I, § 1, and, "[s]trictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting). Instead, "[t]he whole theory of *lawful* congressional 'delegation' is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action." *Id.* at 417 (Scalia, J., dissenting). As the *legislative* branch, "it is up to Congress, by the relative specificity or generality of its statutory commands, to determine – up to a point – how small or how large that degree shall be." *Id.*

This Court has upheld statutes allowing the Executive Branch and independent agencies to exercise significant discretion so long as the exercise of

that discretion is guided by an "intelligible principle," *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-75 (2001), and it has required that "the degree of discretion that is acceptable varies according to the scope of *the power congressionally conferred*," *id.* at 475 (emphasis added). It is unquestionably *Congress* that must "lay down by legislative act an intelligible principle," not the agency. *Id.* at 472 (internal quotation marks omitted).

But if administrative agencies are afforded *Chevron* deference when reviewing their own conclusions on what power Congress has conferred, courts may be unable to determine whether the delegation is constitutionally permissible in the first place. This is because, in the event of an excess delegation, the agency could cure the unlawfulness "by adopting in its discretion a limiting construction of the statute" that is also reasonable – a practice this Court has expressly disclaimed. *See Whitman*, 531 U.S. at 472.

And in light of the vesting of legislative power in Congress, not the Executive Branch (and certainly not independent agencies), it furthers our constitutional values to "create at least a rebuttable presumption that Congress has not delegated an agency authority to determine the scope of its own jurisdiction." *See* Nathan A. Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1539. Otherwise, there would be no effective check on agency determinations of their jurisdiction: "If an ambiguity, let alone a statutory silence, is sufficient

to trigger *Chevron* deference, an ambiguous statute may become license for an agency to control the scope of its own authority, and perhaps even the ability to create regulatory authority where no such authority legitimately existed." *Id*.

Second, in reviewing Congress's delegation of authority to an administrative agency, courts must guard against the inappropriate commingling of authority that is properly distributed among the three branches of government. "In designing [the constitutional structure], the Framers themselves considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document." *Mistretta*, 488 U.S. at 422 (Scalia, J., dissenting). The Framers were, in fact, well aware that "'[w]hen the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.'" *The Federalist No. 47*, p. 224 (Hallowell, ed., 1842) (J. Madison) (quoting Montesquieu, *Spirit of the Laws* bk. XI, ch. 6)).

Thus, *Chevron* deference in the face of statutory ambiguity is generally warranted because it "does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring). That is only because "[t]he legislative and executive functions are not combined" and Congress "has no control over

[ ] implementation" but through "more precise[ ] legislation." *Id*. But an agency goes too far where it seeks to exercise both legislative and executive functions, claiming sole authority to establish rules, interpret those rules, and then enforce them. In that case, deference is inappropriate. *See id*.

Affording *Chevron* deference to agency jurisdictional determinations risks a similar aggrandizement of Executive authority. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).[2] There is a well-recognized and ever-present tendency for administrative agencies to enlarge their jurisdictions as a result of fundamental and unavoidable self-interest. *See generally* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J. L. & Pub. Pol'y 203 (2004). "Not only do [agencies] propose solutions to commonly recognized social problems, but they also sometimes

[2] Congress could not, of course, exercise the discretion to interpret statutes after it has enacted them. "When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation)." *Talk America, Inc.*, 131 S. Ct. at 2266 (Scalia, J., concurring). That is because "the constitutional power granted to Congress to legislate is granted only if it is exercised in the form of voting on specific statutes." Max Radin, *A Case Study in Statutory Interpretation:* Western Union Co. v. Lenroot, 33 Cal. L. Rev. 219, 224 (1945), *quoted in* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 375 (2012).

seek to persuade the public that there is a problem that needs solving in the first place." Sales & Adler, *supra*, at 1554. By contrast, in policing the limits of agency authority, the Judiciary has no special incentive toward aggrandizement beyond that which exists in any justiciable controversy – and perhaps less, because such disputes concern, at base, the apportionment of authority between the Legislative and Executive Branches, and not the Judicial Branch. Moreover, *Chevron* deference is a departure from the general presumption that "[i]t is emphatically the duty of the Judicial Department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and should therefore be afforded only where there is a strong inference that Congress intended that this default rule be displaced.

In sum, the presumption that Congress does not intend courts to defer to administrative agencies' interpretations of their jurisdiction is a vital guard against a commingling of powers and agency self-aggrandizement.

Third, denying *Chevron* deference to an agency's determination of its own jurisdiction furthers political accountability through the separation of powers. In enacting a statute and entrusting its administration to an administrative agency, the political branches have done no more than demonstrate the views of

an individual Congress and President.[3] "But the separation of powers does not depend on the views of individual Presidents" or Congresses. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010). Instead, where power is "diffuse[ed]" away from the political branches to an administrative agency, there is a commensurate "diffusion of accountability." *Id.* at 3155. "Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Id.* at 3155 (quoting *The Federalist No. 70* (A. Hamilton)).

Inherent in the judicial presumption of *Chevron* deference is the implicit understanding that agencies have the authority to interpret and reinterpret ambiguous statutes, consistent with their statutory mandates. This is the case even for revision to "an agency interpretation of longstanding duration," as under *Chevron*, "the agency is free to move from one to another, so long as the most recent interpretation is reasonable." *Barnhart v. Walton*, 535 U.S. 212, 226 (2002) (Scalia, J., concurring in part and concurring in the judgment).

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[3] Or an individual Congress alone, if the legislation was enacted over a Presidential veto. *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

While *Chevron* deference to an agency's changed statutory interpretations may be justified where there is no question that the statute in question is one that the agency is charged to administer, the agency acts with the level of formality required by the Court's jurisprudence for *Chevron* deference, *see United States v. Mead Corp.*, 533 U.S. 218, 228 (2001), and the agency's longstanding position was not an implicit assumption that the statute is, in fact, unambiguous, *see, e.g.*, *BankAmerica Corp. v. United States*, 462 U.S. 122, 130 (1983), applying that degree of deference to an agency's determination of its jurisdiction frustrates political accountability in addressing new challenges that arise long after Congress has legislated and that are not clearly within an existing agency's ambit.

As time passes and new policy challenges arise, it is incumbent on the institutions of government created by the U.S. Constitution to address them or to determine that they ought not to be addressed. One might even say that the key attribute of our constitutional system is to ensure that such action is supported by the representatives of a majority of the American people (the House of Representatives), those of a majority of the States (the Senate), and a coordinate branch of government also accountable to the citizenry (the President).

It is wholly appropriate for an agency to exercise jurisdiction that a prior Congress and President have unquestionably granted. But in many cases, the inevitable outcome of affording *Chevron* deference to

agency determinations of its jurisdiction is to allow the political branches to avoid their obligation to make difficult choices by enacting new statutes in favor of agency action under old statutes. This problem is particularly acute where it is an independent agency asserting jurisdiction, as political accountability is then especially attenuated.

*Chevron* helps ensure that courts do not "ossify" an agency's ability to act within the scope of its delegation. But our constitutional principles are best served when action to expand agency jurisdiction is held not to a heightened legal standard but to the same one that all other legislative action is held – a judicial decision on what Congress actually legislated, based on the best reading of the text of the statute.[4] By contrast, affording agencies deference on the scope of their own authority removes new challenges from the constitutionally-prescribed political process, short-circuiting the safeguards of the separation of powers and democratic accountability.

2. Beyond undermining constitutional principles, deferring to an agency's determination of its jurisdiction is inconsistent with the doctrinal basis of *Chevron* itself. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit*, 494 U.S. at 649; *see also*

[4] Courts reviewing agency action should, of course, give due consideration to any special expertise that an agency brings to bear on the question.

*Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996). Because *Chevron* deference is justified by a congressional delegation of administrative authority, affording deference to an agency's determination of its jurisdiction – to the very question of whether a congressional delegation of authority exists – puts the cart before the horse.

While "Congress would neither anticipate nor desire that every ambiguity in statutory authority would be addressed, *de novo*, by the court," *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 382 (1988) (Scalia, J., dissenting), Congress also likely would not have expected that the fox would guard the henhouse. Instead, it is consistent with the doctrine underlying *Chevron* for reviewing courts to determine whether a question of statutory construction is or is not jurisdictional. If the question is jurisdictional, then the Court should not defer; if the question is not jurisdictional, then the Court should normally defer under *Chevron*.

## II. Denying *Chevron* Deference to Agency's Jurisdictional Determinations Is Consistent with Sound Principles of Statutory Interpretation

Concerns have been raised about whether and how courts and agencies reasonably may distinguish between jurisdictional and non-jurisdictional provisions, but this distinction is not different in kind from others that the courts routinely draw. Similarly,

the appropriateness of confining *Chevron* to non-jurisdictional agency determinations is sharply highlighted by the fact that it would be impossible to defer to agency decisions under *Chevron* in many situations due to the possibility of overlapping jurisdictions. Finally, a decision that *Chevron* deference does not apply to agency jurisdiction would not preclude all deference; the application of *Skidmore* deference would still allow agencies to exercise the expertise they bring to such questions, while promoting greater clarity and certainty in the law.

1. Some have suggested that "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority," and that "[v]irtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'" *Mississippi Power & Light Co.*, 487 U.S. at 381 (Scalia, J., dissenting). But while potentially difficult in some cases, these questions are not fundamentally different from other difficult questions courts regularly do answer. Indeed, determining whether a statutory provision speaks to agency jurisdiction is no more complex than distinguishing provisions that concern the jurisdiction of the courts.

While "'[j]urisdiction,' it has been observed, 'is a word of many, too many meanings,'" in this context it means power, and the Court has regularly held that courts must identify and decide the question of their own power to decide a particular case at its outset, regardless of whether there may be an "easier" way to

resolve the matter. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90, 93-94 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). In enforcing this duty, the Court has carefully distinguished between jurisdictional and non-jurisdictional matters at a very specific "level of generality," such that it is now the rare case where jurisdictional and merits issues are confused. *See Steel Co.*, 523 U.S. at 89-91; *see also* Sales & Adler, *supra*, at 1508-09.

Nor should courts have much difficulty distinguishing questions of agency jurisdiction from those regarding the substance of agency action. For example, in the decision under review, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), the FCC order at issue interpreted 47 U.S.C. § 332, which in relevant part was designed to preserve local zoning jurisdiction over cell phone towers subject to certain limits. By acting to prescribe rules in an area where the Telecommunications Act of 1996 spoke to the preservation of state and local authority, there can be little doubt that the FCC was making a determination of its jurisdiction.[5]

2. The problems with applying *Chevron* deference to agency jurisdictional determinations are

[5] None of this is to say that the FCC's action is necessarily contrary to law, simply that a court should determine if that action is contrary to law without the application of *Chevron* deference in the face of statutory ambiguity, if any.

demonstrated by the fact that, in a significant number of cases, multiple agencies have a colorable claim of authority over a particular subject or issue. Take, for example, the current dispute between the Federal Energy Regulatory Commission ("FERC") and the Commodities Future Trading Commission ("CFTC") over alleged market manipulation in natural gas futures trading. *See Hunter v. FERC*, No. 11-1477 (D.C. Cir.) (filed Dec. 12, 2011). In that case, the CFTC and FERC are litigating which agency has jurisdiction – the CFTC pursuant to an assertion of exclusive jurisdiction under the Commodities Exchange Act § 2(a)(1)(A), 7 U.S.C. § 2(a)(1)(A), or FERC pursuant to § 315 of the Energy Policy Act of 2005, 15 U.S.C. § 717c-1, which amended the Natural Gas Act to prohibit market manipulation and to grant FERC certain (and contested) powers. *See also Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985) (per curiam) (dispute over whether the Secretary of Labor or the Occupational Safety and Health Review Commission had jurisdiction to maintain citations for alleged violations of the Occupational Safety and Health Act).

Taking each case in isolation and deferring under *Chevron* to each agency's determination, a reviewing court could well conclude that the CFTC has exclusive jurisdiction over energy futures market manipulation on a CFTC-regulated exchange but that FERC also has jurisdiction over natural gas futures market manipulation. But that conclusion cannot be correct. Adjudicating the agencies' dispute will necessarily

involve going beyond *Chevron* deference to ascertain Congress's intentions as to these feuding agencies' powers.

The fact that many agency jurisdictional determinations do not overlap is no answer to this fundamental problem. In *Hunter*, for example, the plain text of neither statute precludes deference to either the CFTC or FERC. Nor does the Court typically consider the enactments of a subsequent Congress to implicitly abrogate or limit those of a prior Congress. *See Massachusetts v. EPA*, 549 U.S. 497, 529-30 (2007); *but see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Instead, the conflict in *Hunter* presents a concrete example of how a presumption favoring *Chevron* deference in review of agency determinations of their jurisdiction is unwarranted and may be problematic in its consequences.

3. Denying *Chevron* deference to agency jurisdictional determinations will not deprive either the courts or the public of useful agency expertise. A decision that *Chevron* deference does not apply merely clarifies the legal standard that a court will use in determining whether or not to affirm an action under review; in no case does it necessarily mean that an agency assertion of jurisdiction will or will not be upheld. Instead, the reviewing court will simply apply the standard canons of statutory construction in ascertaining Congress's intent. In so doing, the court would apply *Skidmore* deference to the agency's determination, in which "[t]he fair measure of deference to an agency administering its own statute . . .

var[ies] with circumstances," such as "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *Mead*, 533 U.S. at 228 (citing *Skidmore*, 323 U.S. at 139-40).

While the application of *Skidmore* deference has been criticized as "indeterminate," *see Mead*, 533 U.S. at 239 (Scalia, J., dissenting), there is ample reason to believe that it is appropriate in the case of agency jurisdictional determinations. It will allow reviewing courts to take into account the agency's expertise and rationale for exercising jurisdiction in determining whether that exercise is consistent with an ambiguous delegation from Congress. At the same time, however, the courts will be the final arbiters of these decisions, setting firm lines on agency jurisdiction that further regulatory certainty and other important legal values.



## CONCLUSION

Given the prominent role that administrative agencies play in the everyday governance, but their uncertain place in our constitutional structure, the Court should be wary of a legal standard that would allow agencies to increase the scope of their discretion without legislative action and would undermine political accountability. And as a doctrinal matter, affording agency determinations of their jurisdiction *Chevron* deference is circular because it presupposes

the very delegation of authority that would merit such deference.

For these reasons and those discussed herein, the Court should hold that courts do not defer under *Chevron* when reviewing an agency's determination of its own jurisdiction and should remand these consolidated actions for proceedings consistent with that decision.

Respectfully submitted,

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