No. 19-402

In The
Supreme Court of the United States

HOWARD L. BALDWIN and KAREN E. BALDWIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Should *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), be overruled?

2. What, if any, deference should a federal agency's statutory construction receive when it contradicts a court's precedent and disregards traditional tools of statutory interpretation, such as the common-law presumption canon?

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute ("GI") is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files *amicus* briefs when its or its clients' objectives are directly implicated.

Among GI's priorities is the protection of individual rights against the administrative state—the unelected, often unaccountable regulatory apparatus which, thanks in large part to deference doctrines such as the *Brand X* Doctrine, contradicts the principle of separation of powers, deprives individuals of the due process to which they are constitutionally entitled, and as described here, violates longstanding principles of federalism. GI has litigated or participated as *amicus curiae* in courts around the nation in defense of individuals and in support of the curtailing of such deference doctrines. *See*, *e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), *Cal. Sea Urchin Comm'n v. Combs*, 139 S. Ct.

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[1] Pursuant to Supreme Court Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amicus*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

411 (2018). GI scholars have also published important research on the problems caused by the deference doctrines. *See*, *e.g.*, Timothy Sandefur, *The First Line of Defense: Litigation for Liberty at the State Level* (Goldwater Institute, 2019).[2] The Goldwater Institute believes its legal expertise and public policy experience will assist this Court in its consideration of this petition.

SUMMARY OF ARGUMENT

The *Brand X* Doctrine—whereby an executive agency can, by subsequent interpretation of a statute, overrule the judicial interpretation of that statute—has always had distressing implications for the separation of powers and for due process. It also creates troubling retroactivity problems by allowing an agency to alter the law after a judicial determination has been made on a legal question and upon which third parties may have relied.

These and other problems have been addressed in great detail in both precedent and legal literature. *See*, *e.g.*, James Dawson, *Retroactivity Analysis After Brand X*, 31 Yale J. on Reg. 219, 222 (2014); Christopher J. Walker, *How to Win the Deference Lottery*, 91 Tex. L. Rev. 73 (2013). What has not been so commonly noticed is the effect that the *Brand X* Doctrine has on the legal autonomy of states. Not only does the Doctrine enable executive agencies to alter the law as promulgated by

[2] https://goldwaterinstitute.org/first-line-of-defense/.

the judiciary, but it allows federal administrative agencies to interfere with and even rewrite the laws of states themselves. This federalism dimension of *Brand X* Doctrine is all the more reason why this Court should revisit the Doctrine and consider whether to overrule that precedent or at least to fashion limiting principles upon the authority of agencies.

ARGUMENT

I. *Brand X* Doctrine enables federal administrative agencies to effectively rewrite state laws.

The *Brand X* Doctrine holds that an administrative agency can displace a prior judicial interpretation of an ambiguous statute by articulating its own interpretation of that statute. The theory is that under the deference doctrine of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—whereby an agency's interpretation of ambiguous statutory language is entitled to deference so long as it is reasonable—the judiciary's interpretation of a statute will foreclose the agency's only if its interpretation "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Thus for a judicial interpretation of an ambiguous statute to bar the agency from further interpreting that statute "would allow a court's interpretation to override [the] agency's," which contradicts the premise of *Chevron* deference. *Id*.

The problem, however is that the *Brand X* Doctrine ultimately elevates administrative agency interpretations to a parity with—and even to a superiority over—judicial interpretations, a point that has been criticized on separation of powers grounds from the outset. Justice Scalia, dissenting in *Brand X*, warned that it amounted to the "breathtaking novelty" of "judicial decisions subject to reversal by executive officers." *Id*. at 1016 (Scalia, J., dissenting). The Doctrine, he observed, meant that agencies could adopt interpretations of a statute that contradicted even definitive Supreme Court precedent interpreting that statute, which was "probably unconstitutional," because "Article III courts do not sit to render decisions that can be reversed or ignored by executive officers." *Id*. at 1017. He argued that the better rule was the longstanding proposition that "[w]hen a court interprets a statute," that interpretation "is the law," and as such should be enforced by the executive branch—not reinterpreted or altered by it. *Id.* at 1019.

Since then, courts and commentators have observed that this anomaly does indeed enable the executive branch to exercise the quintessentially judicial function of revising interpretations of statutes. But not only does *Brand X* Doctrine empower federal administrative agencies to essentially rewrite the federal courts' interpretations of federal statutes, it also empowers federal agencies to override state laws—sometimes without even realizing that they are doing so.

A good example is *Kobold v. Aetna Life Ins. Co.*, 370 P.3d 128 (Ariz. Ct. App. 2016) ("*Kobold II*"), which

involved an Arizona law regarding insurance. Kobold was a federal employee who was injured in an accident. *See Kobold v. Aetna Life Ins. Co*., 309 P.3d 924, 925–26 ¶¶ 2–3 (Ariz. Ct. App. 2013) ("*Kobold I*"). His insurance was subject to the Federal Employee Health Benefits Act ("FEHBA"). *Id.* His insurer, Aetna, paid his medical expenses, and Kobold and the party responsible for the accident later settled their dispute for $145,000. *Id.* at 925 ¶ 3. The contract between Kobold and Aetna provided for subrogation and reimbursement. This was unenforceable under Arizona law at that time, but because Kobold was subject to FEHBA, a question arose as to whether Arizona's legal prohibition on subrogation was preempted by federal law. The Arizona Court of Appeals found that it was not preempted, *id.* at 928 ¶ 14, but after that decision, the Office of Personnel Management issued a new interpretation of the FEHBA which *did* preempt Arizona law.

This Court therefore vacated the Arizona Court of Appeals' decision and remanded for reconsideration, 135 S. Ct. 2886 (2015). On remand the Court of Appeals was compelled to change its decision as a result of *Brand X*. The state courts were required to defer to the agency, regardless of "[t]he fact that the regulations postdate our [prior] decision." *Kobold II*, 239 Ariz. at 261 ¶ 8. In other words, a state court was forced to defer to a federal administrative agency as to whether *state* law was preempted by an agency's shifting interpretation of a federal statute—a statute, moreover, that related to insurance, a quintessentially state, rather than federal, matter.

Even more strikingly, in *State In Interest of L.L.*, 2019 WL 3484201 (Utah Ct. App. Aug. 1, 2019), the Utah Court of Appeals held that the Bureau of Indian Affairs ("BIA") essentially has authority to overrule, by regulation, the state's authority to protect the interests of children who are being abused and neglected. Under the Indian Child Welfare Act ("ICWA"), children who are deemed "Indian," based exclusively on their genetic ancestry, are subject to a separate, *less-protective* set of federally-mandated rules in state-law child-welfare cases.[3] Among these is a rule that the rights of an abusive parent can only be severed upon evidence "beyond a reasonable doubt," based on expert witness testimony, that the child is at serious risk of damage. 25 U.S.C. § 1912(f). ICWA does not, however, define "expert witness." Instead the BIA has defined that term by regulation as an expert *in tribal culture*, as opposed to, say, child safety. 25 C.F.R. § 23.122(a). The Utah Court of Appeals, relying on *Brand X*, concluded that this regulation is binding. 2019 WL 3484201 at *5 ¶ 17 n.4.

Not only is child-welfare law a quintessential state law matter, so is the definition of "expert witness" in a child-welfare matter. Yet because ICWA dictates to state courts how they may apply their own state-law causes of action, and because the BIA is given authority under *Brand X* and similar decisions to promulgate rules that state how federal statutes are interpreted—

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[3] *See generally* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1 (2017).

rules that courts are then obligated to abide by—the result is to allow federal administrative agencies to rewrite the substantive rules of *state* law. Presumably if the BIA were to redefine the term "expert witness" in the future, Utah courts would be required to obey the new rule, as well.

In *In re Amtrol Holdings, Inc.*, 384 B.R. 686 (Bankr. D. Del. 2008), *rev'd*, 532 Fed. Appx. 316 (3d Cir. 2013), the family of a man who was killed by the explosion of a piece of equipment, brought an action for wrongful death and strict product liability against the manufacturer, Amtrol. *Id.* at 689 n.2. They sued in state court, raising state-law claims. *Id.* at 689. Amtrol went through bankruptcy, however, so their effort to obtain compensation went to the federal bankruptcy court, which had to determine whether their state-law claims were preempted by the federal Hazardous Materials Transportation Act, which governs the transportation of hazardous materials. The Bankruptcy Court found that their claims were not preempted because the death did not result from transportation but from the use of the device after it was delivered. *Id.* at 692. Amtrol's debtors asked the Department of Transportation ("DOT") to say otherwise, but DOT chose not to. *Id.* at 693.

Amtrol's debtors then appealed to federal district court, which affirmed two years later. *See* 532 Fed. Appx. at 317. But then DOT sought a stay to consider the matter, and in 2012—four years after the initial determination by the Bankruptcy Court—it said that the federal act *did* preempt the state law causes of

action. Citing *Brand X*, the Third Circuit then vacated the Bankruptcy Court's ruling on the grounds that the plaintiffs' wrongful death and strict liability claims were preempted by federal law. *Id*. at 318. *See also Ill. Bell Tel. Co. v. Vill. of Itasca*, 503 F. Supp. 2d 928, 945 (N.D. Ill. 2007) (relying on *Brand X* to uphold *post-hoc* agency preemption of state law).

As one scholar puts it, *Brand X* "raises potentially explosive questions about how federal agency implementation intersects with the exercise of state sovereignty in federal statutory implementation." Abbe R. Gluck, *Our (National) Federalism*, 123 Yale L.J. 1996, 2030 (2014).

As these and other cases show, *Brand X* Doctrine allows federal agencies not only to treat the judgments of the federal judiciary as essentially just advisory opinions, but even to re-interpret federal statutes *post hoc* in ways that have preemptive effect on states and override the normal course of state law. Thus aside from the separation-of-powers and stare decisis concerns that it causes, the *Brand X* Doctrine also poses a significant threat to federalism.

II. In preemption cases, the *Brand X* Doctrine is inherently contrary to the clear statement requirement.

This Court has often said that preemption of state law is not to be taken lightly, and that "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be

treated with great skepticism," and had followed a clear statement rule with regard to preemption. *See*, *e.g.*, *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004); *Tenn. v. FCC*, 832 F.3d 597, 610–11 (6th Cir. 2016).

The presumption against preemption "represents a reluctance to risk incidental statutory interference with federalism values and with state sovereignty." Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737, 755 (2004). But *Brand X* Doctrine clashes with that, and expands the ability of federal agencies to override state law in ways that may not have been anticipated by regulators—and even, as in this and the other cited cases—in ways that have retroactive effect.

This case and the other cases cited here show *Brand X* does not respect this clear-statement requirement or the presumption against preemption. *See also* Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. Cal. L. Rev. 45, 93 (2008) ("federalism clear-statement canons . . . in administrative law" are "underdeveloped"). On the contrary, it empowers agencies to adopt an interpretation with preemptive effect precisely in those circumstances where the statute is *not* clear. *Cf. In re Amtrol Holdings, Inc.*, 532 F. Appx. at 318 ("an agency's [preemptive] construction of an ambiguous statute . . . is entitled to deference. . . . Where Congress has spoken clearly on the precise issue, no deference is owed."). In other words, it is precisely where the statute is ambiguous that an executive agency is accorded deference—which means the agency is given *more*

authority to unilaterally interpret a statute as having preemptive effect in just those cases where Congress has *not* spoken clearly. This anomaly conflicts with the constitutional commitment to federalism.

The problem is especially acute with regard to environmental statutes, which are notoriously vague, and which, thanks to *Brand X*, can be interpreted by federal agencies in ways that drastically expand federal authority over what would otherwise be subject to state, rather than federal, jurisdiction. This can occur in sometimes subtle ways, given that preemption can turn on the definition of technical terms—that is, the finding of "jurisdictional facts," since these are subject to agency deference. *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013). The majority in *City of Arlington* said that "this case has nothing to do with federalism," *id.* at 305, but in combination with *Brand X* and similar doctrines, such deference certainly *does* have implications for state authority. Federal agencies can, for example, make a "factual" determination that a piece of land is a "wetland" subject to federal jurisdiction, rather than state jurisdiction. *See id.* at 315 (Roberts, C.J., dissenting) (citing *Sackett v. EPA*, 566 U.S. 120, 130 (2012)).

For example, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Army Corps of Engineers asserted jurisdiction over land that it deemed to be part of the "waters of the United States." The plurality found that the Corps' interpretation was unreasonable and not entitled to deference. Yet *Brand X* gives agencies power to revise their regulations later in ways that

would in effect override this Court's decision, if *Brand X* were faithfully followed. *See* Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of A Divided Supreme Court*, 61 Emory L.J. 1, 66–67 (2011).[4] *Cf. Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1247 (10th Cir. 2008) ("we see no reason why the holding in *Brand X* would not be equally applicable to agency constructions that displace tentative Supreme Court interpretations.").

Indeed, in *Northern California River Watch v. Wilcox*, 633 F.3d 766 (9th Cir. 2010), the Ninth Circuit Court of Appeals found that three employees of the California Department of Fish and Game had not violated federal law when they removed a plant (the Sebastopol meadowfoam) from certain privately-owned grasslands. *Id.* at 770. The defendants were state officials who were inspecting the plants as part of their official duties. *Id.* at 771. They contended that the grasslands were not subject to federal jurisdiction, and the Army Corps of Engineers claimed that it did have jurisdiction pursuant to a regulation that it had issued interpreting the Clean Water Act. The Ninth Circuit found that the statute was ambiguous, *id*. at 770, but

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[4] True, *Brand X* purports to deny deference to agency interpretations that conflict with a prior court determination as to the *unambiguous* terms of the statute, but *Rapanos* did not result in such a finding. *See* 547 U.S. at 752 ("waters of the United States" is "in some respects ambiguous"). In any event, the "unambiguous" element of *Brand X* is unworkable for reasons identified in Justice Scalia's dissenting opinion in that case. *Brand X*, 545 U.S. at 1018–19 (Scalia, J., dissenting).

concluded – relying in part on *Rapanos, supra*—that the Corps had no jurisdiction. *Id.* at 781.

Yet the court was also compelled to acknowledge that under *Brand X*, "we are not the 'authoritative interpreter' of [the statute]. . . . The [federal agency] might have good reason to issue regulations or guidance that more thoroughly addresses this issue at some later date, and our decision does not foreclose the possibility that the [agency] might adopt some version of the statutory construction [that gives it jurisdiction]." *Id.* In other words, the court acknowledged that the *Brand X* Doctrine essentially gives the federal agency authority to override state law and to establish jurisdiction even to the extent of penalizing state officials acting in performance of their duties on private land with regard to a wholly intra-state matter.

For these and other reasons, the Wisconsin Supreme Court recently issued an important decision rejecting administrative deference doctrines as a matter of its own state law—including the theory of *Brand X*. Deferring to agency interpretations of statutes, the court noted, intrudes on the principles of separation of powers and "'wrests from Courts the ultimate interpretative authority to "say what the law is," and hands it over to the Executive.'" *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 47 ¶ 59 (Wis. 2018) (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring)). Allowing administrative agencies to *retroactively* change the interpretation of statutes raises even greater concerns about the "abandonment of judicial power to the executive branch." *Id.* ¶ 60. Even greater concerns are involved

with a doctrine that allows *federal* executive bureaucracies power to override *state* court jurisprudence.

CONCLUSION

The *Brand X* Doctrine has rightly been criticized as contrary to principles of separation-of-powers and because it enables agencies to retroactively alter the law. What has not been remarked upon as much is that it also enables federal agencies power to override state autonomy—and even state jurisprudence—over matters that the Constitution reserves to the states. This intrudes on state authority in ways that even Congress may have never considered, and clashes with this Court's longstanding presumption against preemption in the absence of a "clear statement"—especially given the fact that *Brand X*'s effect increases in proportion as the statute *lacks* a clear statement.

The petition should be *granted*.

Respectfully submitted,

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