No. 17-1384

In the Supreme Court of the United States

DROPLETS, INC.,

Petitioner,

v.

ANDREI IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE,

Respondent.

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

BRIEF OF US INVENTOR, LLC AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

US Inventor, LLC is non-profit organization that represents more than 13,000 inventors and small-business owners across America. Many of the organization's members own patents and other intellectual property, and of necessity have gained an intimate familiarity with the innerworkings of the administrative regime within the U.S. patent and trademark system. That collective experience makes amicus well-situated to explain the practical impact of the Federal Circuit's departure from basic norms of administrative law at issue in this case. Amicus writes to urge the Court to reverse that erroneous legal decision so that the administrative system concerning intellectual property is not made to unfairly burden intellectual-property owners.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

More than half a century ago, this Court announced a "simple but fundamental rule" of administrative law: "that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely* by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*) (emphasis added). Thus, an agency's "action must be measured by what [the agency] did, not by what it might have done," *SEC* v. *Chenery Corp.*, 318 U.S. 80, 93–94

[1] Petitioner and respondent have each consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

(1943) (*Chenery I*), so if the agency's "grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis," *Chenery II*, 332 U.S. at 196.

Chenery remains a "bedrock principle of federal administrative law," Gary Lawson, *Federal Administrative Law* 362 (5th ed. 2009), that "continues to be cited with approval by the Court," Stephen G. Breyer *et al.*, *Administrative Law and Regulatory Policy* 433 (6th ed. 2006); e.g., *Gonzalez* v. *Thomas*, 547 U.S. 183, 186 (2006); *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002). And time has only magnified *Chenery*'s influence. *Chenery*'s rule has been applied to the full range of agency decision-making, encompassing everything from informal actions, *Camp* v. *Pitts*, 411 U.S. 138, 138 (1973), to formal notice-and-comment rule-making, *Motor Vehicle Manufacturers'. Association of the United States* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 34 (1983). And its crucial insight—that agencies should be bound by their written word in justifying their actions—has been adopted in other areas of administrative law as a prerequisite for judicial deference, as well as the foundation for Congress's enactment, a decade after *Chenery*, of the Administrative Procedures Act, Pub. L. No. 79-404, 60 Stat. 237 (1946). See Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L. J. 952, 1004 (2007).

Unfortunately, *Chenery* is yet another baseline legal norm that is not given due respect in the Federal Circuit. That court swims against the tide of *Chenery*'s expansion, enacting a restriction on its operation that dramatically reduces the rule's scope. In the Federal Circuit, *Chenery*'s rule is reserved for "fact" or "policy" ques-

tions—or things that require "agency expertise." *In re Comiskey*, 554 F.3d 967, 974 (Fed. Cir. 2009). But when an agency's action turns on *legal* questions, the Federal Circuit has declared that it will "affirm on grounds other than those [the agency] relied upon in rendering its decision." *Ibid.*

The Federal Circuit's contraction of *Chenery* presents a question of great consequence for intellectual-property owners, and an issue worthy of this Court's attention because it directly impacts the operations of the PTO. That agency is responsible for granting, invalidating, and administering many intellectual-property rights, and it is uniquely under the sway of the Federal Circuit's jurisprudence. Because the Federal Circuit has exclusive appellate jurisdiction over many of the PTO's actions, that court's interpretation of *Chenery*'s appellate-review rule gives the PTO sweeping license to change its own legal interpretations, including by varying the very metes and bounds of property rights—even years after they are originally granted. The importance of this case is only magnified by the fact that the PTO's decisions occur within an administrative environment that runs up to the limit of the constitutionally permissible, where inventors' property rights are adjudicated without access to a jury or a disinterested, life-appointed judge. In this boundary-pushing context, scrupulous insistence on reasoned agency decision-making and procedural regularity provide the only protection to the individual, and the only meaningful checks on the agency's powers. Amicus thus agrees with Petitioner that this a very important case.

Amicus also agree that the Federal Circuit's interpretation of *Chenery* makes for very bad administrative law. *Chenery* could not be plainer. It pertains to all questions

that "the agency alone" is authorized to decide, without discriminating among legal, factual, and policy questions, even if such discrimination were possible. The premise underlying the Federal Circuit's narrowing of *Chenery*—that agencies ought to be subject to the same rules for appellate review as litigants on appeal from the decisions of district courts—is fatally flawed. While it is common in appeals from ordinary district court litigation for appellate courts to substitute a proper legal rationale to affirm when the district court's grounds for its judgment are unsupportable, an agency appearing in court is no ordinary litigant. It is a co-equal branch with its own congressionally conferred responsibility to make legally binding legal decisions—decisions that often trump judicial ones. For agency decisionmakers to shift their decision-making authority to appellate lawyers slips those congressionally imposed bounds. And for an appellate court to supplant bad agency decision-making with a replacement of the court's own creation is a usurpation of Congress's power, and a derogation of the court's legitimate authority to hold agencies to account for their decisions. Excusing such shifts in legal rules also undermines one of the most important principles derived from *Chenery*: that agencies must properly justify the legality of their actions before they would wield the colossal power of government to seize property and affect basic aspects of people's everyday lives. To allow otherwise is simply inconsistent with the rule of law.

Certiorari should be granted.

ARGUMENT

I. The Federal Circuit's misinterpretation of *Chenery*'s baseline norm is a vitally important question for intellectual-property owners.

The Federal Circuit's interpretation of *Chenery* is an issue of great importance to intellectual-property owners because of that court's special role in overseeing the PTO—an agency with a particularly potent set of legal responsibilities. To the PTO, the Federal Circuit is not merely one of thirteen standard-setting courts, it is the circuit solely responsible for determining the legal standards that govern many of its functions. When the Federal Circuit exempts "legal" questions from *Chenery*'s demand and excuses agencies' failure to show their legal work, that sends a strong signal that slipshod agency work will be tolerated—one that PTO personnel will undoubtedly hear and respond to in the thousands of legal determinations they make every day. That is an untenable scenario for intellectual-property owners, whose rights hinge upon well-reasoned, legally sound decision-making.

A. The Federal Circuit's intellectual-property regime includes administrative law at its most potent and consequential.

The Federal Circuit has exclusive jurisdiction to hear appeals from most of the PTO's administrative decisions concerning both patents and trademarks, 28 U.S.C. § 1295(a)(4), 35 U.S.C. § 141. That responsibility gives the Federal Circuit near-total oversight of administrative law at its most potent and consequential. The PTO is tasked by Congress with considering well over half a million pa-

tent applications every year, 35 U.S.C. § 111, U.S. PTO, *Performance and Accountability Report* 31 (FY 2017) (PTO Report), <http://tinyurl.com/ybtz3e4k>, and nearly as many trademark applications, 15 U.S.C. § 1051, PTO Report 31. The PTO is also tasked with *reconsidering* thousands of these decisions every year in ex parte reexamination proceedings, 35 U.S.C. §§ 301–309, inter partes review before the PTAB, *id.* §§ 311–319 or post-registration review before the TTAB, 15 U.S.C. § 1067. In each of these proceedings, the PTO makes decisions concerning property rights—in the course of granting them, taking them away, or defining their proper boundaries—that carry the force of law. Each of these determinations is assigned exclusively to agency personnel, without the involvement of juries or Article III judges. The only avenue to challenge them is appellate review at the Federal Circuit.

While this Court has ruled that at least one of these administrative mechanisms is constitutional, *Oil States Energy Servs., LLC v. Greene's Energy Grp.*, ___ S. Ct. ___ (2018), that decision left no doubt that these PTO proceedings adjudicate rights of the highest importance—intellectual property rights that are "entitled to protection as any other property." *Id.* (slip op., at 10).

In short, the PTO is charged with weighty responsibilities, and operates in an administrative context that—perhaps more than any other—depends upon definite, fair application of law and reasoned decision-making. It is an administrative regime that operates at the very bleeding edge of the matters that agencies may be permitted to consider, in which agency personnel operate outside of the sorts of external constraints that might otherwise be expected to hold them to account. Within an

environment of such consequence, agencies cannot be permitted to vary their legal decisions on the fly.

B. The Federal Circuit's misunderstanding of *Chenery* harms intellectual-property owners.

Yet that is exactly what the Federal Circuit's misinterpretation of *Chenery* will do, with a number of adverse consequences for intellectual-property owners. For one thing, giving the PTO license to shift "legal" positions during appeals from initial decisions allows agency personnel to redraw the very boundaries of the property rights they adjudicate through the claim construction process. Indeed, this is exactly what occurred in this case: The PTAB concluded that the patent at issue was not patentable under 35 U.S.C. § 103 under the erroneous impression that the patented invention was not sufficiently innovative *beyond* the prior art (URLs and bookmarks). Pet. App. 13a (finding "no patentable distinction between the claimed "link" and the disclosed URL"). Then on appeal, among the various rationales the Government invented to make up for this original, infirm holding, it offered the idea that the patent supposedly *encompassed* the prior art. Gov't C.A. Br. 18. This was a rewrite of the patent's boundaries—first (during inter partes reexamination) to *exclude* the prior art, and then (on appeal) to *include* it. But the Federal Circuit condoned this slight-of-hand argument-shifting because it involved a "legal" type of magic: claim construction.

Just as the Federal Circuit's cabining of *Chenery* would allow such legal-position shifts during within agency proceedings, the logic of its position would also allow changes of agency position *between* agency proceedings, such as between the initial grant and any post-grant pro-

ceeding. All this casts a pall of uncertainty over an item of intellectual property so long as it is being reviewed by PTO personnel. The owner must not only account for and respond to the actual reasons underlying PTO decision-making, but also anticipate all the *potential* arguments that could be asserted somewhere down the line.

Worse, giving the PTO unfettered license to fix bad legal decisions on appeal encourages bad incentives. It gives agency personnel every reason to stretch the limits of their legally authorized power, secure in the knowledge that if their toes get too close to the line, appellate lawyers will be able to come up with creative hindsight justifications to shore up their flawed analysis.

The present situation also fosters conditions for bad decision-making in multiple ways. It discourages agency personnel from taking a hard look at the legality of their actions before undertaking them—which also gives them less incentive to be careful in how they proceed in other aspects of making those decisions. It also shifts agency decision-making from the experts inside the agency to the non-expert lawyers from the Department of Justice that represent the agency on appeal. The bad decisions that result are bad for everyone that participates in the innovation ecosystem: the intellectual-property owners themselves, their investors and employees, their competitors, accused infringers, and the public at large.

Finally, the Federal Circuit's rule only increases the structural tilt against intellectual-property owners in post-grant proceedings, making it even more likely that intellectual-property rights will be invalidated. These PTO post-grant proceedings are already heavily weighted toward invalidation. An petitioner in inter partes review, for example, need only prove invalidity by

a preponderance of the evidence, 35 U.S.C. § 316(e), rather than the "clear and convincing evidence" standard required in court, *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U.S. 91, 111 (2011). And the PTAB's often-dispositive findings made during claim construction are accorded deferential substantial-evidence review on appeal. *In re Morsa*, 713 F.3d 104, 109 (Fed. Cir. 2013). The PTAB also gives a patent claim its broadest reasonable interpretation in an IPR proceeding, rather than its ordinary meaning, which makes an invalidity finding more likely because the broader evidentiary standard brings into play a larger quantity of potentially relevant prior art. 37 C.F.R. § 42.100(b).

This structural bias has earned the judges of the PTAB the monikers of "death squads, killing property rights,"[2] a feature which has attracted petitioners like magnets, and made the PTAB America's most popular patent court.[3]

The rates of invalidation in IPR are staggering. As of March 2018, of the 2,085 IPRs that have reached a final decision, 65% resulted in every challenged claim being invalidated; 16% resulted in some claims being invalidated; and only 19% resulted in all the challenged claims be-

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[2] Peter J. Pitts, *'Patent Death Squads' vs. Innovation*, Wall St. J., June 10, 2015, <http://on.wsj.com/1MsqErB>.

[3] Scott A. McKeown, *PTAB Quickly Becomes Busiest Patent Court in U.S.*, Patents Post-Grant Blog (July 25, 2013), <http://bit.ly/1NXKm4L>.

ing upheld.[4] This is a far higher rate of invalidation than in federal district court, where patents are held invalid in only about 46% of cases. Gregory Dolin, *Dubious Patent Reform*, 56 B.C. L. Rev. 881, 927 (2015). And this disparity is all the more striking because in litigation, unlike IPR, patents can be invalidated on grounds aside from novelty and obviousness, such as inequitable conduct.[5]

Expanding upon those advantages still further, by allowing the PTO to fix its erroneous legal interpretations on appeal, confers to it still one more structural advantage that is not possessed by the patentholder. And that disadvantage is particularly devastating because it works to the benefit of PTO officials who not only already occupy the role of both judge and jury in post-grant proceedings, but also sometimes sit in the opposition's chair—as when they stand in for the petitioner in situations where the petitioner withdraws during the IPR.

All these problems make the Federal Circuit's interpretation of *Chenery* harmful to intellectual-property holders, and because the Federal Circuit alone reviews the PTO's administrative decisions, other circuits will not have an opportunity to weigh in and counter the circuit's mistaken application of *Chenery* in this important context.

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[4] U.S. PTO, *Patent Trial and Appeal Board Statistics* 11 (Mar. 2018), <https://tinyurl.com/ycxx9hgd>.

[5] 35 U.S.C. § 282(b); *Therasense, Inc.* v. *Becton, Dickinson & Co.*, 649 F.3d 1276, 1285 (Fed. Cir. 2011) (en banc) (noting the defense of "[i]nequitable conduct").

C. This misinterpretation of *Chenery* contributes to an environment of hostility to intellectual-property holders.

The problems caused by the Federal Circuit's misinterpretation of *Chenery* are compounded by the fact that it is only one of a series of efforts over the last decade that have rapidly eroded intellectual-property rights, many of which result from the Federal Circuit's unwillingness to follow normal principles of federal law.

The Federal Circuit is frequently criticized for sidestepping the division of labor between trial and appellate courts, either by interpreting questions of fact or mixed questions as purely questions of law, or by applying a de novo standard of review to inquiries properly regarded as factual.[6] The Federal Circuit has also proven unwilling to apply normal administrative-law principles to the PTO until being forced to do so by this Court, as it did with the requirements of APA Section 10 in *Dickenson* v. *Zurko*, 527 U.S. 150 (1999), a failure that created unpredictability and uncertainty in patent claim construction. And until this Court intervened last term in *SCA Hygene Products Aktiebolag* v. *First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017), the Federal Circuit strangely insisted on allowing accused infringers to use the laches

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[6] Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 Colum. L. Rev. 1035, 1056 (2003) (noting that the Federal Circuit "has subjected trial court fact finding in infringement or declaratory judgment actions to a level of review that is contrary to traditional principles of appellate review"); William F. Lee & Anita K. Krug, *Still Adjusting to* Markman: *A Prescription for the Timing of Claim Construction Hearings*, 13 Harv. J.L. & Tech. 55, 67 (1999).

defense in patent infringement proceedings, *id.* at 959, even for claims brought within the Patent Act's 6-year limitations period, 35 U.S.C. § 286, and even after this Court invalidated the laches defense in the copyright context, *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2016), under circumstances that strongly indicated the Court would apply a similar logic in the patent context as well.

The Federal Circuit's mistaken interpretation of *Chenery* is simply yet another in a long line of these cases disadvantaging intellectual-property owners through erroneous application of baseline legal norms. And just as in these previous cases, this Court needs to step in to correct it.

II. The Federal Circuit's interpretation of *Chenery* is manifestly wrong.

Certiorari is also warranted because the Federal Circuit is wrong.

A. The Federal Circuit misunderstands *Chenery* and ignores its underlying separation-of-powers concerns.

1. *Chenery* lays out a bright-line rule that admits no exception for "legal" questions. Indeed, the Federal Circuit's stance that "legal" questions are exempted from *Chenery* is flatly inconsistent with *Chenery* itself. There the Court emphasized that the flaw in the SEC's analysis—the one that made its action invalid and led to its now famous shift on appeal—occurred when the agency "misconceived the law": the common law principles of fiduciary duty. *Chenery I*, 318 U.S. at 85–86, 94. Nor can that stance be squared with more recent decisions of this

Court, or circuit-level opinions of members who have since joined the Court, which have shown no hesitation in applying *Chenery* to legal questions. *NLRB* v. *Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001) ("We may not enforce the Board's order by applying a legal standard the Board did not adopt") (citing *Chenery I*); *RNS Services, Inc.* v. *Sec'y of Labor*, 115 F.3d 182, 189 (3d Cir. 1997) (Alito, J., dissenting) ("If the [agency] reached a result that we believed to be correct, but relied upon an incorrect view of the law in so deciding, we are obligated to remand to allow the [agency] to reconsider its decision under the correct legal standard"). Indeed, as Petitioner has explained, only the Eighth Circuit has signed on to the Federal Circuit's understanding of *Chenery*. Pet. 14–21. Virtually everywhere else, *Chenery* has always been understood to prohibit an appellate court from substituting a rationale for agency action *whenever* the agency's reasons are wrong, even if "the wrong reason is an erroneous view of the law." Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L. J. 199, 222 (1969).

2. *Chenery* is absolute because it is based on separation-of-powers concerns that allow for no qualification. *Chenery* prohibits appellate courts from any "'intru[sion] upon the domain which Congress has exclusively entrusted to an administrative agency,'" *Orlando Ventura*, 537 U.S. at 16 (quoting *Chenery I*, 318 U.S. at 88), so *any matter* that Congress has delegated for an agency to decide is not fair game for courts to decide for themselves on appeal.

This is because when Congress designates a decisionmaker within an agency to exercise power, no other organ of government can constitutionally change that

designation—not the decisionmaker, not the agency, and certainly not an appellate court. In *Chenery*'s words, once Congress has spoken, it is a "determination the agency [and the agency decisionmaker are] alone authorized to make." *Chenery I*, 318 U.S. at 454.

Chenery teaches that allowing courts to "fix" erroneous agency determinations on appeal is an impermissible encroachment on Congress's designation—a double bypass of a regime that only Congress has the power to change.

First, permitting such shifts would permit agencies to shift their delegated responsibilities away from the repository for those powers that Congress designated—here taking agency power away from the examiners of the PTO and the judges of the PTAB and giving it to appellate lawyers of the Department of Justice who are not even within the agency.

Second, if an appellate court adopts an agency's revised rationale on appeal, the court effectively *becomes* the decisionmaker, once again supplanting Congress's design, and virtually cutting the agency out of the process of making its own decisions. But appellate courts are empowered only to review agency actions, not to craft them. Thus, the very act of reaching and resolving the issue is an improper encroachment on Congress's delegation of that authority to the agency decisionmaker.

Making matters worse, sanctioning agency shifts in policy is also an abdication of the court's *proper* role in reviewing agency action. *Chenery* stands for the proposition that "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." 318 U.S. at 94. And preventing

exactly these kinds of shifts is vital to "preserv[ing] the meaningful quality of judicial review." Friendly 223.

These serious separation-of-powers concerns are in no way diminished when the delegated powers at issue concern legal questions rather than matters of "fact" or "policy." Congress frequently assigns legal decision-making to agencies, and not just when it authorizes agencies to enact legally binding regulations. Whenever Congress delegates an agency decisionmaker to make final, binding decisions, that grant carries with it the exclusive authority to resolve legal issues that the agency encounters along the way to reaching those decisions—that is why they carry the force of law. Indeed, that is what Congress did when it authorized the SEC to approve a public utility's reorganization under the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 *et seq.* (repealed 2005), which empowered the agency to make legal determinations regarding fiduciary law. *Chenery I*, 318 U.S at 82, 85, 92.

Congress made similar designations of authority when it empowered PTO examiners to rule on patent applications, because fulfilling that responsibility requires the examiner to make all the legal decisions necessary to determine the invention's patentability, 35 U.S.C. §§ 101–103, during the patent application process. That is also what Congress did when it granted examiners and the PTAB authority to reconsider those decisions in post-grant proceedings, and to review examiner's decisions on appeal, 35 U.S.C. §§ 301–309, 311–319. The authority of examiners and the PTAB in the inter partes re-examination proceeding at issue here is equally broad and powerful. American Inventors Protection Act of 1999, Pub. L. No. 106-113, § 4604 (secs. 311(a), 312(a)),

113 Stat. 1501 (1999) (repealed 2011). Both PTO trademark examiners and the TTAB also wield similar congressionally designated authority. 15 U.S.C. § 1066–1070. There is no way to meaningfully distinguish between these congressionally designated legal decisions and decisions of "fact" or "policy" in determining *Chenery*'s reach. Such a division is simply not constitutionally permissible.

3. The Federal Circuit has nevertheless claimed to find support for its division between "legal" and "policy" questions in *Chenery* itself. But the portions of that opinion that the lower court relies upon do nothing to soften *Chenery*'s constitutionally mandated uncompromising approach.

The Federal Circuit laid out its thinking on this issue in *Comisky*. 554 F.3d at 974. There it referred to a portion of *Chenery* that analogized its newly announced rule for review of agency actions to the ordinary rules for appellate review of district court judgments. *Ibid.* (quoting *Chenery* 318 U.S. at 88). In normal appeals from district court judgments, *Chenery* explained, the "settled rule" is that an appellate court can "affirm[] if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason,'" 318 U.S. at 88 (quoting *Helvering* v. *Gowan*, 302 U.S. 238, 245 (1987)). That is because "[i]t would be wasteful to send a case back to a lower court" simply for it to render a new judgment based on a rationale that had already been supplied by the appellate court. *Ibid.* But there is an exception to that settled rule when the "correctness of the lower court's decision depends upon a determination of fact *which only a jury could make but which has not been*

made," in which case remand is required for the jury to fulfil its exclusive authority." *Ibid.* (emphasis added).

Chenery made clear that the agency always plays the jury in that analogy, down to the parallel language it used to describe its rule, explaining that in situations where the order of an agency "is valid only as a determination of policy or judgment *which the agency alone is authorized to make and which it has not made*, a judicial judgment cannot be made to do service for an administrative judgment." *Ibid.* (emphasis added).

Yet the Federal Circuit read that passage as nibbling around the edges of *Chenery*'s absolutist rule. It saw *Chenery* as saying that when the propriety of the agency action turns on "legal" judgment, or matters of "policy or judgment," the must-remand rule for jury determinations ought not apply. *Comisky*, 554 F.3d at 974. But in doing so, the lower court took *Chenery*'s jury analogy, and its reference to agency "policy or judgment," way too far.

Chenery did not mean to suggest that agencies are stuck with their original work product only when they delve into "jury" work like fact-finding. Rather *Chenery* used the jury analogy to explain that when the appellate court would be supplying an answer to a question that has been assigned to *someone else*—be that a jury question in traditional litigation, or an agency exercising congressionally assigned powers—then the court is powerless to act.

Further, it makes no sense to suggest that agencies' authority to decide congressionally designated questions is only "exclusively entrusted" to the agency, 318 U.S. at 88—thereby excluding appellate judicial meddling—only

for determinations requiring agency "policy or judgment." Rather, an agency's authority is exclusive whenever Congress decides that it is. The relevant question for *Chenery* is thus not whether the agency's action requires a "determination of policy or judgment," but rather whether it concerns a determination "the agency is alone authorized to make." 318 U.S. at 88.

The Federal Circuit's assumption that agencies stand on the same footing as any other litigant appealing from determinations of a district court fails for another reason. Unlike litigants in normal district court litigation, a remand is not "wasteful," *Chenery I*, 318 U.S. at 88, even when the appellate court *could* fashion a justification for affirming the agency's action. Remand is instead a vital part of the process of formulating agency policy. A remand affords the agency opportunity "bring its expertise to bear on the matter" and "evaluate the evidence" before deciding whether the rationale the court would supply is the best one. *Orlando Ventura*, 537 U.S. at 17. A remand also affords the agency an opportunity to "explain[] and reconcil[e] the arguably contradictory rationales that sometimes occur in the course of lengthy and complex administrative decisions." *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 658 (2007). Having agencies take the time to resolve legal questions for whole classes of cases, rather than having appellate courts dispense with them piecemeal, also promotes uniformity and certainty in the law. This is why the rule "[g]enerally speaking," for agencies is the opposite of the rule for litigants on appeal from district court judgments: In most cases, "a court of appeals should remand a case to an agency for decision of a matter that statutes place

primarily in agency hands"—for legal as well as factual determinations. *Orlando Ventura*, 537 U.S. at 16–17.

The Federal Circuit's *Chenery* exemption for "legal" issues also runs into a more practical problem. It assumes a divisibility between agencies' determinations of law, fact, and policy that does not exist in the real world. It may be easy enough for appellate courts to differentiate between lower courts' resolution of "fact" questions and "legal" questions. But that task becomes far more difficult when reviewing agency conclusions. This Court's agency-deference cases teach that even pure legal determinations are often suffused with policy implications, and informed by the agency's peculiar expertise and knowledge of facts on the ground. E.g., *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (noting that Congress might assume that "those with great expertise and charged with responsibility for administering the provision would be in a better position to" interpret a statute than judges that "are not experts in the field"). Thus, even pure issues of law are not *solely* issues of law when placed in agency hands, which is why agencies enjoy controlling deference for many of those legal determinations. *Ibid.* "Policy" and "fact" questions are thus hard to untangle from "legal" ones." It would be very hard to maintain any rigid rule that would treat them separately.

B. The Federal Circuit's *Chenery* interpretation also poses problems for the rule of law.

Perhaps even more fundamental than the separation-of-powers problems posed by the Federal Circuit's narrowing of *Chenery* are the problems it poses for the rule of law. Exempting "legal" questions from *Chenery*'s

reach would undermine the signal principle that agencies should be required to justify the legality of their actions before they would wield the colossal power of the state to affect people's daily lives.

The basic principle that agencies must articulate a reasoned decision for a course of action and then commit it to writing emanates from *Chenery*, Slack 1004, and now underlies virtually every important development in administrative law. The enactment of the APA, the *Chevron* doctrine, and the "hard-look" mode of agency review are all dependent upon the basic rule that agencies must create a written record containing the agency's deliberative process and the rationale for its decision. *Ibid.*[7]

And for good reason. This process of writing things down makes for better agency decision-making, in legal matters as in all other things. The deliberation required to commit ideas to writing favors the development of clearer and more informed standards of agency action. See, e.g., *Negusie* v. *Holder*, 555 U.S. 511, 523–524 (2009); *Orlando Ventura*, 537 U.S. at 17. It also encourages agency consistency, thereby allowing for fundamentally fairer adjudications. And providing "informed discussion and analysis," helps courts to "later determine whether [an agency's] decision exceed[ed] the leeway that the law

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[7] See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 463–74 (1987) (characterizing the "hard look" doctrine, beginning in the late 1960s and early 1970s, as a requirement that agencies-- and courts themselves--take a close look at regulatory benefits and disadvantages).

provides." *Ibid.* Writing things down also promotes "agency accountability" *Bowen* v. *Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986), by ensuring that decisions of agency personnel are ratified by agency heads who can be held responsible if they prove harmful. Further still, in agency adjudications, having administrative judges commit their decisions to writing ensures some measure of neutrality—that there is some division between the role of judge and advocate.

It is equally critical to good agency decision-making that agencies be bound to what they have written. When agencies are not held to their initial decisions, that "preclude[s] the agency from thinking deeply and fully about [a] matter," which is "the very thing * * * *Chenery II* is meant to make the agency do." *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296, 343 (2d Cir. 2007) (Calabresi, J., concurring and dissenting). And it gives agencies the power, and the perverse incentive, to make vague pronouncements that they can later reinterpret without engaging in notice-and-comment rulemaking or final agency decision-making.

This is especially critical when the decision at issue is a legal one. Agency legal pronouncements carry the force of law—they *are* the law. Permitting agencies to shift legal positions between initial decision and appeal thus alters the very fabric of the law. Further still, when the law made by agencies can no longer be found within the pages of the Federal Register or in the published decisions of agency tribunals (or worse, when the legal pronouncements to be found there have been abandoned on appeal), and the law must be cobbled together from appellate briefs and transcripts, citizens cannot "know what conduct is permitted or prohibited by an agency rule." 3

Richard J, Pierce, Jr. *Administrative Law Treatise* § 6.8 (5th Ed. 2010). The law simply cannot be known. That is intolerable. Agencies must be held to a better standard than the Emperor Nero, who published the laws "high up on the pillars, so that they could not easily be read," Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 13 (1997). The rule of law requires it. Thus, for legal pronouncements above all others, it is paramount that "[t]he grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained." *Chenery I*, 318 U.S. at 95.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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