No. 13-10014

In the United States Court of Appeals
For the Fifth Circuit

BNSF Railway Company,
formerly The Burlington Northern and Santa Fe Company, as successor by merger to Burlington Northern Railroad Company and The Atchison Topeka and Santa Fe Railway Company,

Plaintiff – Appellee

v.

United States of America,

Defendant – Appellant.

On Appeal from the United States District Court
For the Northern District of Texas,
Case No. 4:11-cv-00455-A

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* CATO INSTITUTE, PATRICK J. SMITH, AND PROFESSORS MICHAEL P. MORELAND, JEFFREY POJANOWSKI, AND NATHAN A. SALES IN SUPPORT OF THE PETITION FOR REHEARING OF PLAINTIFF-APPELLEE

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Case No.: 13-10014

Case Style: BNSF Railway Company, formerly The Burlington Northern and Santa Fe Railway Company, as successor by merger to Burlington Northern Railroad Company and The Atchison Topeka and Santa Fe Railway Company v. United States of America.

BNSF Railway Company has set forth the interested parties in this case at pages i-iii of its Petition for Rehearing *En Banc*. Pursuant to Fifth Circuit Rule 29.2, which requires a "supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief," undersigned counsel of record certifies that, in addition to the persons listed in BNSF Railway Company's petition, the following have an interest in this brief, but no financial interest in this litigation. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Attorney of Record for *Amici Curiae*

To the Honorable Court:

Pursuant to Federal Rule of Appellate Procedure 29(b) and Fifth Circuit Rule 29.1, the *Amici Curiae* listed below respectfully request leave to file the attached brief in support of the Plaintiff-Appellee and would respectfully show the Court the following:

BACKGROUND AND INTEREST OF AMICI CURIAE

The *Amici Curiae* include a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government; an attorney who specializes in complex tax matters raising administrative law issues; and three law professors who teach and write about administrative law and related subjects. This case is important to the *Amici Curiae* because they believe the panel's application of *Chevron* contravenes longstanding administrative law precedent from the Supreme Court and this Court in a way that undermines the separation of powers doctrine central to *Chevron*.

The attached brief should be filed pursuant to Rule 29(b)(2) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 29.2 because it adds to and expands upon arguments made by the Plaintiff-Appellee. Specifically, the brief explains the relationship between the *Chevron* doctrine and separation of powers principles and illustrates the imbalance of power that results from the approach to statutory interpretation taken by the panel opinion in this case. Thus, the *Amici*

Curiae, whose interests are discussed in further detail below, believe the attached brief will aid the Court in its consideration of the issues presented by BNSF Railway Company's Petition for Rehearing *En Banc*.

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

Patrick J. Smith is a partner in the Washington, D.C. office of Ivins, Phillips & Barker. Through his representation of clients in complex tax controversies, he has developed an expertise in relevant principles of administrative law and has lectured and written extensively on the *Chevron* doctrine.

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

CONCLUSION AND PRAYER

For the reasons discussed above, the *Amici Curiae* respectfully request that this Court grant them leave to file the attached brief in support of BNSF Railway Company's Petition for Rehearing *En Banc*. The *Amici Curiae* further request that the Court deem the brief to be properly filed without the need for any further action on the part of the *Amici Curiae*.

Respectfully Submitted,

/s/ Jeremy D. Kernodle

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CERTIFICATE OF CONFERENCE

Pursuant to Federal Rule of Civil Procedure 29, counsel for *Amici Curiae* Jeremy Kernodle conferred with counsel for Appellee BNSF Railway Company Allyson Ho, who consented to filing the attached brief, and with counsel for Appellant United States of America Ellen P. DelSole, who stated that the United States does not consent at this time.

/s/ Jeremy D. Kernodle
Jeremy D. Kernodle

CERTIFICATE OF SERVICE

The undersigned certifies that on this 5th day of May, 2014, a copy of the foregoing document was electronically transmitted to the United States Court of Appeals for the Fifth Circuit using the Court's ECF filing system and was served on all counsel of record via the Court's ECF filing system.

/s/ Jeremy D. Kernodle
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STATEMENT OF COMPLIANCE WITH RULE 29

The *Amici Curiae* include a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government; an attorney who specializes in complex tax matters raising administrative law issues; and three law professors who teach and write about administrative law and related subjects. This case is important to the *Amici Curiae* because they believe the panel's application of *Chevron* contravenes longstanding administrative law precedent from the Supreme Court and this Court in a way that undermines the separation of powers doctrine central to *Chevron*.

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The views expressed herein are those of the *Amici Curiae* 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.

This brief was not written in whole or in part by counsel for a party, and no person or entity has made a monetary contribution to the preparation and submission of this brief.

ARGUMENT

I. The *Chevron* framework reinforces separation of powers principles.

As this Court has recognized, the Supreme Court, in devising the *Chevron* analysis, relied on and reinforced the "basic principles of democratic government" embodied in the separation of powers doctrine. *Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 299 (5th Cir. 1994) (*en banc*). Thus, in step one of *Chevron*, courts use "traditional tools of statutory construction" to assess "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 & n.9 (1984). If so, "that is the end of the matter," and both courts and executive agencies "must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. This approach respects Congress's role as "the supreme branch for making [policy] choices" by giving primacy to those choices. *Miss. Poultry Ass'n*, 31 F.3d at 299. It also maintains the role of courts "as the final authority on issues of statutory interpretation" to say what the law is. *Chevron*, 467 U.S. at 843 n.9.

In similar fashion, step two of the *Chevron* analysis preserves the relationship between the executive and legislative branches. The second step applies only where courts determine that Congress "has not directly addressed the precise question at issue." *Id*. at 843. In that case, whether the delegation of authority to the agency is explicit or implied, the courts' role is to determine

whether the agency's actions are "based on a permissible construction of the statute." *Id*. at 843-44. By conditioning step two deference on the absence of congressional direction in step one, the *Chevron* court recognized that agency discretion to act is dependent on a delegation of authority by Congress. *See id*. But agency discretion is not unlimited—even where Congress delegates authority to an agency, that agency is still bound to act within the reasonable bounds of the statute. *Id*. at 844-45. The deferential posture taken by courts applying this analysis reflects the need for federal judges, "who have no constituency," to "respect legitimate policy choices made by those who do," recognizing that the Constitution "vests such responsibility in the political branches." *Id*. at 866.

II. The panel opinion upsets the *Chevron* balance, shifting power from Congress to the IRS.

The panel's opinion undermines the carefully calibrated framework of *Chevron*, transferring authority from Congress to the IRS by deferring to regulatory pronouncements without engaging in the rigorous statutory analysis required to determine whether Congress intended such a shift of authority in the first place. The panel's perfunctory step one analysis sets a dangerous precedent that will naturally result in aggrandizement of administrative agencies at Congress's expense. The Court should grant BNSF Railway Company's petition for rehearing to restore the balance intended by *Chevron*.

A. The panel's analysis falls short of the rigorous statutory interpretation necessary to determine congressional intent.

In *Chevron*, the Supreme Court emphasized that congressional intent is evaluated through the "traditional tools of statutory construction." *Id*. at 843 n.9. Expanding on the *Chevron* court's instruction, this Court has demonstrated how those tools are employed. *See Reich v. Arcadian Corp.*, 110 F.3d 1192, 1195-96 (5th Cir. 1997). The starting point "must be the language of the statute"—where a statute "speaks with clarity to an issue, judicial inquiry into the statute's meaning . . . is finished." *Id*. at 1195 (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). That said, statutory language must be assessed in light of the statutory provision in which it is used. *Id*. at 1195-96 (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)). In that way, statutory context can be used to eliminate irrelevant definitions from a statutory term that might otherwise be held ambiguous when considered in isolation. *Id*. at 1196 (quoting *Deal*, 508 U.S. at 131-32). Statutory terms should also be evaluated in light of the language used in the statute as a whole to ensure an interpretation that is internally consistent and gives every word operative effect. *Id*. at 1196 (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)).

The panel's cursory review of the statute at issue in this case falls far short of the interpretive standards set by cases like *Chevron* and *Reich*. The panel's analysis hinges on two points. First, the panel looked not to the words of the

statute, but to *other* sources, including other federal statutes and court of appeals opinions, to determine whether the phrase at issue ("any form of money remuneration") had been used.[1] (Slip. Op. 11.) This directly contravenes "the first rule of statutory construction" that courts "may not ignore the plain language of a statute." *New Orleans Depot Servs., Inc. v. Director, Office of Worker's Compensation Programs*, 718 F.3d 384, 393 (5th Cir. 2013) (*en banc*).

Second, the panel then turned its attention to the actual words of the statute itself, only to conclude by reference to multiple dictionaries that the term "money" did not have an ordinary meaning. (Slip. Op. 11-12.) But this Court, sitting *en banc*, has long since rejected this approach to statutory interpretation. *See Miss. Poultry Ass'n*, 31 F.3d at 307. In *Mississippi Poultry*, the *en banc* Court refused to adopt a "dictionary rule" whereby a term with more than one dictionary meaning would be considered ambiguous. *Id*. As the Court recognized, such a rule would "preclude courts from ever reaching, much less using, 'traditional tools of statutory construction' such as canons, structure, or history, to ascertain the intent of Congress." *Id*. Moreover, the Supreme Court has similarly rejected reliance on the "dictionary rule." *Id*. at 307-08 (citing *MCI Telecomm'cns Corp. v. Am. Telephone & Telegraph Corp.*, 512 U.S. 218, 225-26 (1994)).

[1] In a similar vein, the panel closed its analysis of the statute by reviewing academic publications from the time the statute was enacted. (Slip. Op. 12.)

This flawed analysis, contained in three short paragraphs, constitutes the whole of the panel's efforts to determine Congress's intent. (Slip. Op. 10-12.) The panel made no reference to the words of the full provision or the context and structure of the entire statute.[2] The contrast between the panel's efforts here and the *en banc* Court's analysis in *Mississippi Poultry* is telling. *Mississippi Poultry* required the Court to apply *Chevron* analysis to address the meaning of the phrase "the same" as used in a statute regulating poultry products. *Id*. at 299. The Court recognized that, in isolation, the word "same" has "a range of meanings" that included the agency's interpretation. *Id*. at 300. But unlike the panel opinion, the Court did not stop there. Instead, it turned to the context of the statutory provision and the structure and history of the statute itself to hold that the statute had a clear meaning that excluded the agency's interpretation. *Id*. at 300-02; *see also, e.g., Loving v. IRS*, 742 F.3d 1013, 1016-22 (D.C. Cir. 2014) (applying "traditional tools of statutory interpretation," including "the statute's text, history, structure, and context" to reject IRS regulation). This multifaceted approach to statutory interpretation is consistent with the approach taken by the Supreme Court when applying *Chevron*'s first step.[3]

[2] Although ironically, the panel did resort to such tools under its step two analysis to support its conclusion that the regulation was consistent with a permissible construction of the statute. (Slip. Op. 13-15.)

[3] *See, e.g., Carcieri v. Salazar*, 555 U.S. 379, 387-89 (2009) (refusing to apply *Chevron* deference based on the text and structure of the relevant statute); *Barnhart v. Sigmon Coal Co.*,

B. The panel's approach to step one will lead to artificially expanded agency authority under step two.

The panel's failure to engage in a full statutory analysis at step one, especially combined with its attempt to revive the long-rejected "dictionary rule," will naturally result in a "radical shift in power from Congress to administrative agencies." *Id*. at 307. This Court illustrated why in *Mississippi Poultry*: a perfunctory review of the statute in question increases the likelihood of an ambiguity finding, which in turn triggers deferential review under *Chevron* step two, whereby agency action will be generally upheld "subject only to the vague caveat that the agency's choice 'makes some sense' under the statute." *Id*. Thus, courts play a gatekeeping role under *Chevron* by "taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013). In this way, favorable treatment under step two is available "[i]f, but only if" the statute, when reviewed as a whole, demonstrates that Congress intended a delegation of authority to the administrative agency. *Miss. Poultry Ass'n*, 31 F.3d at 299; *see also Chevron*, 467 U.S. at 843-44.

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534 U.S. 438 (2002) (refusing to apply *Chevron* deference in light of statutory language, context, and history); *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 500-03 (1998) (relying on the language of provision to refuse *Chevron* deference); *MCI Telecomm'cns Corp.*, 512 U.S. at 225-28 (relying on statutory language and context to refuse *Chevron* deference).

By relying on the "dictionary rule" to the exclusion of proper tools of statutory construction, the panel neglected its gatekeeping role under *Chevron* step one, resulting in an unwarranted transfer of authority from Congress to the IRS. The Court should grant the petition for rehearing and follow the holding of *Mississippi Poultry* requiring meaningful statutory review and disfavoring use of the "dictionary rule."

CONCLUSION AND PRAYER

For the foregoing reasons, the *Amici Curiae* respectfully request that the Court grant BNSF Railway Company's Petition for Rehearing *En Banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This Brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

■ this Brief contains 2,016 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

■ this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: May 5, 2014.

/s/ Jeremy D. Kernodle
Jeremy D. Kernodle
Attorney for *Amici Curiae*

ECF CERTIFICATION

I hereby certify that (i) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; (ii) this electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; (iii) this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses; (iv) the original paper document was signed by the attorney of record and will be maintained for a period of three years after mandate or order closing the case issues, pursuant to 5th Cir. R. 25.2.2.

/s/ Jeremy D. Kernodle
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The undersigned certifies that on this 5th day of May, 2014, a copy of the foregoing document was electronically transmitted to the United States Court of Appeals for the Fifth Circuit using the Court's ECF filing system and was served on all counsel of record via the Court's ECF filing system.

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