NO. 12-262

IN THE

Supreme Court of the United States

BRIAN HALL, et al.,
Petitioners,

v.

KATHLEEN SEBELIUS, et al.,
Respondents.

On Petition for Writ of Certiorari
to the U.S. Court Of Appeals
for the District of Columbia Circuit

Brief of the Cato Institute as *Amicus Curiae*
in Support of Petitioners

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QUESTION PRESENTED

Can the Social Security Administration fundamentally change the relationship between two statutes—the Social Security Act and the Medicare Act—through a "rule" contained in the "Programs Operation Manual System" that was promulgated without following proper administrative procedures or offering reasons for its enactment?

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INTEREST OF *AMICUS CURIAE*[1]

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, the Cato Institute publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case concerns Cato because it raises vital questions about the limits and legitimacy of administrative agencies' powers.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Cato submits this brief to underscore the fact that giving too much deference to administrative agencies threatens the promise not only of good government, but of *legitimate* government. Courts must limit federal agency actions to those consistent with the only branch of government—Congress—that is duly authorized by the people to pass laws. An agency cannot reach beyond statutory authority to effect a substantial and fiscally irresponsible change of law.

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or counsel made a monetary contribution to its preparation or submission.

Here, all presumptions must be drawn against the legitimacy of the "rule" promulgated in the Program Operation Manual System (POMS). Not only should we presume that Congress doesn't "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), but we should presume that, in a time of fiscal crisis, Congress wouldn't make it substantially harder for citizens to save the government a significant amount of money. Moreover, the absence of both any attempt at formal rulemaking and any reasons given for the rule—compelling or otherwise—weighs heavily against giving the POMS any deference whatsoever.

The Social Security Administration (SSA) lacked any statutory authority to use the POMS to order petitioners to forfeit their Social Security benefits when they sought to opt out of Medicare Part A—benefits that the petitioners have paid into for decades. The relevant statutes don't even hint that implementing agencies may precondition one on the acceptance of the other. The plain language of both the Social Security Act and the Medicare Act state that petitioners are "entitled" to benefits. 42 U.S.C. § 402(a) (Social Security Act); *id.* at § 426(a) (Medicare Act). Both the legal and general usage of the word "entitled" describe someone who is "legally qualified" and thus has the *option* of laying claim to benefits. The word "mandate"—not "entitle"—better indicates when such a choice is not available.

Finally, the SSA's interpretation creates unreasonable results. The agency's ruling would have the government, during the greatest fiscal crisis since the Great Depression, pay out benefits unnecessarily to recipients who not only can find coverage elsewhere but who *want* to find coverage

elsewhere. Combined with the statutes' unadorned language, we shouldn't presume that Congress wanted to make it substantially harder for citizens to voluntarily save the government money.

REASONS FOR GRANTING THE PETITION

I. BY USING THE POMS TO EFFECT A SUBSTANTIAL CHANGE IN THE RELATIONSHIP BETWEEN SOCIAL SECURITY AND MEDICARE, THE SSA MOVED BEYOND ITS CONGRESSIONALLY DELEGATED AUTHORITY

A. Administrative agencies have no powers not granted to them by Congress.

The SSA is a derivative organization with powers that come entirely from Congress. It has no independent authority and is constitutionally bound by the statutes that empower it. As John Locke wrote, "The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands." John Locke, *Second Treatise of Government* 244 (M. Mayer ed., 1957).

The courts, therefore, have a duty to rein in administrative excess and enforce the limits imposed by statutory language. "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of

Congress as expressed by the statute." *Manhattan Co. v. Comm'r of Internal Revenue*, 297 US 129, 134 (1936); *see also*, *id.* ("A regulation which…operates to create a rule out of harmony with the statute, is a mere nullity"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (the exercise of quasi-legislative authority by governmental departments "must be rooted in a grant of power" and "subject to the limitations which that body imposes").

With most of the federal government's legislative authority now being filtered through agencies, the derivative nature of those agencies should not be forgotten. The rule of law, as well as legitimate government authorized by and for the people, depends upon this oft-forgotten truism. Popular will, as expressed through recurrent elections, is the foundation for legitimate, democratic government. It enables the citizenry to exercise control over public policy, and it ensures that government bodies remain accountable for their actions. This mechanism not only empowers the people to assess the direction of government, but enables them to check government abuse and subject elected officials to referenda.

Occasionally, those imbued with legitimate power by the popular will can loan that legitimacy to another entity in order to more effectively perform a needed task, but that transferred power can only be used within defined parameters and ultimately must be tethered to its source. Otherwise, third parties illegitimately don a cloak painted with the public will. Moreover, without a vigilant judiciary enforcing this adherence to congressional grants, administrative agencies can sidestep the separation of powers altogether, adopting regulations, interpreting their breadth, and enforcing them on

individuals who are left without legal recourse. An unleashed agency thus unifies the three traditional spheres of power such that it becomes for all practical purposes prosecutor, judge, jury, and executioner. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, 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." Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949).

Historically, this Court has not forgotten the importance of reining in administrative agencies, and it should not do so here. *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Auer v. Robbins* 519 U.S. 452 (1997); *Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Administrative agencies, and even Congress itself, cannot be trusted to enforce limits on their own power because of the human tendency to escape the political obstacles which hinder the passage of new laws. Instead, this duty must fall on the least political branch—the judiciary. Courts have a responsibility to place robust limits on agency action, and they must do so in a way that complements an administrative agency's status as an entity derivative of and subordinate to Congress. They must enforce the simple but non-negotiable rule that the discharge of delegated authority cannot exceed the scope of Congress's grant of power. Too much deference, when not supported by statute, unlawfully cedes popular sovereignty to agencies—eating at the very foundation of democratic government and ultimately the rule of law.

B. The plain meaning of "entitled," as well as the far-reaching, fiscally irresponsible consequences of tying Medicare and Social Security together, demonstrates that the SSA has moved beyond its statutory moorings.

The plain language of the relevant statutes, as well as common sense, indicates that Medicare is a voluntary program and that any attempt to penalize petitioners' decisions to opt out (by forcing them to surrender their Social Security benefits) exceeds Congress's entitlements regime.

Neither the Social Security Act nor the Medicare Act requires an "entitled" individual to accept the offered benefits, much less predicate the receipt of Social Security benefits on an individual's acceptance of Medicare Part A. Instead, "[t]he POMS alone does that." *Hall v. Sebelius*, 667 F.3d 1293, 1301 (D.C. Cir 2012) (Henderson, J., dissenting). The Social Security Act states plainly that citizens "shall be entitled" to receive Social Security benefits once they reach 62 years of age or over and apply for benefits. 42 U.S.C. § 402(a). The statute attaches no additional conditions on obtaining those benefits. Nor was the text altered by the Medicare Part A statute, which in turn provides that "every individual who has attained the age of 65 and is entitled to monthly [Social Security] benefits, shall be entitled to hospital insurance benefits." 42 U.S.C §426(a). This statute also contains no additional conditions.

As the dissenting judge below noted, "Here, the scope of the relevant provisions . . . is as plain as the definition of entitled." *Hall*, 667 F.3d at 1299 (Henderson, J., dissenting). The word "entitled" is synonymous with the word "eligible," meaning that

petitioners are "legally qualified" and have the requisite requirements to exercise the option of laying claim to benefits. It doesn't imply that petitioners must accept said benefits but rather that qualified individuals retain a choice. *See also Black's Law Dictionary*, (6th ed. 2002) ("entitled" means "capable of being chosen") and *Webster's Third New International Dictionary* (1993) (to be entitled is "to give right or legal title to, qualify for something; furnish with the proper grounds for seeking or claiming something"). This Court has also affirmed that definition in *Ingalls Shipbuilding v. Dir.*, 519 U.S. 248, 256 (1997) ("Both in legal and general usage, the normal meaning of entitlement…means only that the person satisfies the prerequisites attached to the right"), as well as numerous circuit courts. *See Krishnan v. Barnhart*, 328 F.3d 685, 688 (D.C. Cir. 2003); *Jewish Hospital, Inc. v. Sec'y of HHS*, 19 F.3d 270, 275 (6th Cir. 1994); *Fagner v. Heckler*, 779 F.2d 541, 543 (9th Cir. 1985).

This Court should take Congress at its word. The language of these statutes is clear and unambiguous. It leaves the SSA no wiggle room for extra-congressional pronouncements that impermissibly tether two separately funded and independently operated entitlements regimes together. If Congress intended to authorize the SSA to penalize an individual who seeks to decline Medicare coverage by requiring him to forfeit his Social Security benefits and repay all payments already received, it wouldn't have hidden the imposition in the non-germane phrase "shall be entitled." That maneuver would indeed be hiding an elephant in a mousehole.

Instead, by using the word "entitled," Congress created exactly what the language suggests: a legal

right to Medicare that, while available by operation of law, is not unwaivable, much less waivable only by sacrificing benefits for which an individual has already paid. Any other reading would confer on the SSA a power neither provided for nor contemplated by Congress. Thus, in keeping with this Court's clear line of precedent reaching back to *Skidmore*, such *ultra vires* administrative leaps of words and logic should not receive deference.

Moreover, the POMS decree doesn't reflect the intellectual rigor and impartial examination expected of administrative rulemakings and rulings that substantially alter every citizen's enrollment in the federal government's two biggest entitlement programs. "Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law do not warrant *Chevron-style* deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The theory of agency deference only comes into play when Congress has delegated authority to an agency to make rules imbued with the force of law and if the rule exacted was "promulgated in the exercise of that authority." *Id.* (quoting *United States v. Mead. Corp.*, 533 U.S. 218, 226-27 (2001)).

The SSA is also not entitled to the more limited *Skidmore* deference. *See Hall*, 667 F. 3d at 1299 (Henderson, J., dissenting) ("neither *Skidmore, Chevron* nor *Mead* requires any deference to an *ultra vires* 'interpretive document.'") As this Court noted in *Skidmore*, "The weight [accorded an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its

consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. *See also Mead*, 533 U.S. at 235 (under *Skidmore*, an agency interpretation gets only the deference its persuasiveness warrants).

Here, the POMS was crafted through ad hoc reasoning that neither persuades nor reflects the intellectual thoroughness contemplated in *Skidmore*. Instead "without so much as a word of explanation as to the statutory basis or rationale behind it, the provision announces SSA's answer, dubbing it 'Policy.'" *Hall*, 667 F.3d at 1298 (Henderson, J., dissenting). The rules cite no authorities, contain no reasons, and consider no alternative interpretations; the entirety of SSA's underwhelming findings is put into simplistic dialogue form that merely reforms the question before answering it. It is a casual, backhanded way of lawmaking that offers little comfort or respect to Petitioners and other citizens who possess, in the SSA's words, genuine "religious or philosophical reasons" to want to waive Medicare Part A benefits.

To be valid, a regulation must not only reconcile with the statute, but also be reasonable. *International Ry. Co. v. Davidson*, 257 U.S. 506, 514 (1922). The POMS doesn't even meet this standard. Social Security and Medicare Part A are separately funded and separately operated programs. The solvency of one in no way depends upon who participates in the other. The SSA, therefore, has no cost-saving or efficiency reasons whatsoever to predicate Social Security benefits on acceptance of Medicare Part A coverage.

If anything, SSA's arbitrary decision to link Medicare and Social Security undermines the sustainability of both programs. Petitioners concede that they must continue to pay Medicare taxes on all their earnings—even after retirement—and that they will receive no benefits in the exchange. Their opting out of Medicare Part A, therefore, provides a generous windfall for the government and other Medicare participants. That remains true even if Petitioners retain all their Social Security benefits. During a fiscal crisis, it is irresponsible for the SSA reject a straightforward way to save money without cutting services to those citizens who actually want and depend on Medicare, and it is beyond good sense to presume that Congress wishes to make it substantially harder for citizens to voluntarily save the government a significant amount of money.

The only advantage the POMS has is that it lays a heavy hand on those individuals who, for religious, philosophical, or financial reasons, have the gall to question the dominant place Medicare has on later-age care. The SSA knows that few opponents of these entitlement programs would be equipped to mount a challenge if it required them to bear a major financial penalty. Opting out of Medicare already exacts a substantial price without the POMS's interference since these individuals will continue to pay taxes for a service they won't receive. Forcing them to sacrifice an unrelated entitlement just pulls that heavy burden down faster. Thus, while the POMS rule finds no basis in statute, congressional intent, or good fiscal policy, it does stand as a strong assertion of power that shores up the SSA's position by corralling unwilling citizens into a program under the agencies' dominion. This Court must reject such

a naked power grab and return these decisions to Congress, as demanded by the rule of law and accountable, democratic governance.

II. WITHOUT COURTS' POLICING THE LIMITS OF ADMINISTRATIVE AGENCIES' POWERS, AGENCIES WILL CONTINUE TO PUSH THE BOUNDARIES OF FEDERAL LAWS—AND CONGRESS IS LIKELY TO LET THEM

Administrative agencies have an ingrained, institutional incentive to reach for *ultra vires* authority when faced with inconvenient statutory roadblocks within their areas of expertise. The laws that constrain agencies will often be seen as impediments, particularly when the agency's goals are felt to be praiseworthy. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 714 (2006) (rejecting an interpretation of the Clean Water Act by the Army Corps of Engineers that was "essentially limitless").

Unfortunately, Congress also has an institutional incentive to permit such agency overreach. To keep their political liabilities as low as possible, legislators tend to claim credit when agencies are thought to succeed and to shirk blame when they fail. Only the judiciary's vigilance can guard against these inevitable tendencies and prevent a one-way ratchet towards arbitrary government that is untethered from popular sovereignty and legitimate authority.

The law is not static. A congressional grant of authority—which may start as an efficient concession of power—can in the course of time become unwieldy and misshapen. Facts change, new problems arise, and Congress misjudges what powers an agency needs to implement a program. That is

one reason why this Court grants departments and agencies a rationed amount of deference in carrying out their orders so long as the propagated rules are securely anchored in the relevant statute and represent the agency's fair and considered judgment. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Awarding administrative agencies unlimited discretion in their interpretation of grants of authority is dangerous, particularly when that reading, as here, flouts both the plain language of the statute and responsible fiscal policy. The government after all is made up of people—and people tend to want to exercise power outside of public scrutiny. Government officials are no different. Those running administrative agencies, often for the good-hearted purpose of fulfilling their policy mission, seek to expand power and correct what they view as congressional lapses. Because passing new legislation is challenging—new laws need bicameral support, face the possibility of a presidential veto, must survive public comment, and navigate a labyrinth of procedural hurdles, all for the dubious honor of being amended beyond recognition for political purposes—agencies resort to advancing creative readings of statutes already in effect. The only way to stop the encroachment on Congress's legislative power is for other branches to push back.

When Congress predictably fails to act to counter a power grab by an administrative agency, this Court has a duty to enforce a Constitution designed to put limits on the predictable tendencies of those in power. As James Madison wrote in Federalist 51:

> If angels were to govern men, neither external nor internal controls on government would be

> necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

CONCLUSION

The SSA's arbitrary decision to fundamentally alter the relationship between the federal government's two biggest entitlement programs violates the agency's congressional authorization and imperils separation of powers. A system of limited government only succeeds if internal actors check each other's excesses. This Court must assume responsibility and become the auxiliary precautions necessary for liberty. This Court should stop SSA's intrusion on Congress's authority and enforce the relevant statutes as written.

Respectfully submitted,

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