Perez: A Call for a Renewed Look at *Chevron*, Jurisdictional Questions, and Statutory Silence

ABSTRACT

In City of Arlington v. FCC*, the Supreme Court ended the debate over whether an agency's interpretation of the scope of its jurisdiction should receive* Chevron *deference, answering in the affirmative. This Comment, however, argues that the Supreme Court should revisit this issue and establish a no-deference rule for jurisdictional cases in which the agency's assertion of power comes from statutory silence.*

The Ninth Circuit's recent decision in Oregon Restaurant & Lodging Ass'n v. Perez *serves as the vehicle for illustrating the necessity of this Comment's proposed no-deference rule. This Comment examines how the* Perez *decision fits within this narrow issue of jurisdictional questions and merits establishment of this Comment's rule. In support of this proposal, this Comment draws on* Chevron*'s presumption of congressional intent. This no-deference rule also serves as a valuable safeguard against agency aggrandizement.*

INTRODUCTION

Consider a statute that reads "no dogs allowed in federal parks." Clearly, this statute authorizes the National Parks Service to enforce the terms of this statute by banning all dogs, but what about all other types of animals? Does the fact that the statute is "silent" about other animals, in the sense that only dogs are listed, give the Parks Service the authority to ban those animals not specifically listed in the statute? Unless some other provision grants the Parks Service the power to expand the scope of the statute, this statute alone cannot serve as a source of authority to ban certain things it does not cover. The reason is simple but fundamental: "Agencies exercise whatever powers they possess because—and only because—such powers have been delegated to them by Congress."[1] This illustration exemplifies the fundamental error of the Ninth Circuit's decision in *Oregon Restaurant & Lodging Ass'n v. Perez* (*Perez II*),[2] which upheld the Department of Labor's (DOL's) interpretation of § 203(m) of the Fair Labor Standards Act (FLSA).[3]

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1. Or. Rest. & Lodging Ass'n v. Perez (*Perez III*), 843 F.3d 355, 356 (O'Scannlain, J., dissenting), *denying reh'g of* 816 F.3d 1080 (9th Cir. 2016).

2. Or. Rest. & Lodging Ass'n v. Perez (*Perez II*), 816 F.3d 1080 (9th Cir. 2016). Note, this Comment uses the terms *Perez*, *Perez II*, and *Perez III* to refer to the various cases that make up this controversy. There were two district court decisions that addressed the validity of the DOL's regulation regarding § 203(m). *See* Or. Rest. & Lodging v. Solis (*Perez*), 948 F. Supp. 2d 1217 (D. Or. 2013); Cesarz v. Wynn Las Vegas, L.L.C., No. 2:13-cv-00109-RCJ-CWH, 2014 U.S. Dist. LEXIS 3094, at *6 (D. Nev. Jan. 10, 2014). Because *Cesarz* was decided after *Solis*, the *Solis* opinion offers the more robust analysis. This Comment refers to the *Solis* decision as *Perez* because it was the primary precursor to the appellate decisions under that name. The Ninth Circuit consolidated *Perez* and *Cesarz* after hearing arguments on both cases together. *Perez II*, 816 F.3d at 1083. *Perez II* denotes the Ninth Circuit's decision reversing *Perez* and *Cesarz*. *Perez III* designates the ten-judge dissenting opinion accompanying the denial of rehearing *en banc* of *Perez II*.

3. *Perez II*, 816 F.3d at 1090; *see also* Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832, 18,841 (Apr. 5, 2011) (codified at 29 C.F.R. pts. 516, 531, 553, 778–80, 785–86, 790) (amending, *inter alia*, wage regulations found in 29 C.F.R. § 531.52, 531.55, 531.59) [hereinafter Updating Regulations].

Section 203(m) limits how an employer may use an employee's tips when taking a tip credit.[4] Under the FLSA, an employer can pay its tip-earning employees less than minimum wage and use the employees' tips to make up the difference.[5] When an employer uses this payment scheme, § 203(m) proscribes the employer from requiring the tip-earning employees to share their tips with other employees who do not ordinarily receive tips.[6]

The *Perez II* court addressed the validity of a DOL regulation that expanded the scope of § 203(m) in a similar manner to the Parks Department hypothetical above.[7] Where the restriction contained in § 203(m) only applies to one group of employers, the DOL's challenged regulation expanded the scope of this section's restriction to *all* employers.[8] The *Perez II* court upheld the DOL's interpretation of the statute under an administrative law doctrine which dictates that reviewing courts give deference to an agency's interpretation of a statute that it administers.[9] This doctrine, called *Chevron* deference, gives controlling weight to an agency's interpretation when the statute is ambiguous or silent and the interpretation is reasonable.[10] The *Perez II* court reasoned that § 203(m)'s silence, in that its restriction only applied to one group of employers, afforded the DOL's new rule deference under *Chevron*.[11] This new rule meant § 203(m)'s restriction applied to *all* employers.[12] To frame it differently, the Ninth Circuit applied *Chevron* deference to the DOL's interpretation regarding its "jurisdiction," or the scope of its power under the FLSA.

Until recently, courts and commentators disagreed over whether courts must defer (apply *Chevron*) to an agency's own interpretation of a statutory ambiguity that concerns the scope of an agency's authority (that is, its

4. *See* 29 U.S.C. § 203(m) (2012); *see also infra* Section II.A.

5. 29 U.S.C. § 203(m); *see also infra* Section II.A.

6. 29 U.S.C. § 203(m); *see also infra* Section II.A.

7. *Perez II*, 816 F.3d at 1082–83.

8. *See id.*; *see also* Updating Regulations, *supra* note 3.

9. *See Perez II*, 816 F.3d at 1090.

10. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *see also infra* Section I.A for an in-depth discussion of this doctrine.

11. *Perez II*, 816 F.3d at 1090.

12. *See e.g.,* Updating Regulations, *supra* note 3.

jurisdiction).[13] In *City of Arlington v. FCC*,[14] the Supreme Court purported to resolve this debate by holding that *Chevron* deference is applicable to an agency's interpretation of its jurisdiction.[15] This Comment, however, argues that the Supreme Court should modify this bright-line rule with another bright-line rule: *Chevron* deference is *not* applicable to jurisdictional questions in which the underlying assertion of power comes from this *Perez II* type of "statutory silence." Such a rule is necessary for two reasons. First, this rule would ensure that congressional intent is the benchmark for *Chevron* analysis by requiring an agency to locate an affirmative statutory grant of authority before deference is accorded. The fact that a statute is silent, in the sense that it neither grants nor denies a specific power, suggests a congressional intent *not* to speak about that power. Second, this rule would prevent the biggest problem facing this type of jurisdictional question: agency aggrandizement.[16] As the *Perez II* decision illustrates, deference on this type of jurisdictional question results in agencies asserting power *ex nihilo* to regulate groups that Congress never intended to regulate.

Part I of this Comment details the cases that form the *Chevron* doctrine, traces the debate over jurisdictional questions, and considers how courts have treated cases where the claim of jurisdiction comes from a statutory silence. Part II discusses the pre-*Perez* regulatory and statutory background, the lower court decision of *Perez*, the Ninth Circuit's analysis in the *Perez II* decision, and the need for the Supreme Court to revisit the question of agency jurisdiction. Part III offers a no-deference rule for jurisdictional questions

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13. *See* Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1522–27 (2009). This article provides an overview of this debate and notes that the Supreme Court has not resolved this issue indefinitely. *See id.* at 1500 n.15 (citing Bus. Roundtable v. SEC, 905 F.2d 406, 408 (D.C. Cir. 1990) ("The Supreme Court cannot be said to have resolved the issue definitively.")); *see also* Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 812 n.151 (2007) ("The question of whether *Chevron* deference applies to the resolution of 'jurisdictional' issues has proved troublesome to courts."); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 844 (2001) ("The Court has never resolved whether there should be a 'scope of jurisdiction' exception to *Chevron* deference . . . ."); *but see, e.g.*, Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354, 381 (1988) (Scalia, J., concurring); 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5, at 157 (4th ed. 2002) (stating that the "pattern" of the Court's decisions suggests "*Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.").

14. City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

15. *Id.* at 1864.

16. *See* Sales & Adler, *supra* note 13, at 1503 (describing aggrandizement as "the risk that the agency will exercise a power Congress did not intend for it to have, or that it will extend its power more broadly than Congress envisioned").

arising out of statutory silences. Part III also discusses how this rule finds support in *Chevron*'s background presumption of congressional intent and prevents agencies from exceeding the scope of their authority.

I. BACKGROUND—*CHEVRON*, JURISDICTIONAL QUESTIONS, AND STATUTORY SILENCE

Because the Ninth Circuit relied on *Chevron* in its decision upholding the DOL's interpretation of § 203(m), this Part begins by providing a general overview of the *Chevron* doctrine and how this doctrine is rooted in congressional intent. Next, this Part defines the various types of jurisdictional cases. Lastly, this Part focuses on cases where jurisdiction arises from a statutory silence and provides an overview of how courts have historically treated these types of cases.

A. Chevron *and Its Progeny*

When the Supreme Court decided *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[17] the Court unknowingly created the most important decision concerning how courts should treat an agency's interpretation of a statute it administers.[18] This Court provided the following two-part test for determining the validity of an agency's interpretation of a statute:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, *if the statute is silent or ambiguous with respect to the specific issue,* the question for the court is whether the agency's answer is based on a permissible construction of the statute.[19]

A presumption of congressional intent is the foundation of this canonical framework: namely, "that Congress, when it left ambiguity in a statute administered by an agency, understood that the ambiguity would be resolved,

17. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

18. *See* Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1872 (2015) (*Chevron* is the "Supreme Court's most important decision regarding judicial deference to agency views of statutory meaning.").

19. *Chevron*, 467 U.S. at 842–43 (emphasis added) (footnotes omitted).

first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[20]

In *Chevron* step one, reviewing courts "employ[] traditional tools of statutory construction" in order to ascertain congressional intent.[21] Thus, *Chevron* dictates that the judiciary has the "final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[22] If the reviewing court decides Congress's intent is clear, *Chevron* deference is inapplicable, and the plain meaning of the statute must prevail.[23] *Chevron* step two applies only if "the statute is silent or ambiguous with respect to the specific issue."[24] If step two is applicable, the court determines whether the agency's action is "based on a permissible construction of the statute."[25] At step two, the reviewing court gives significant deference to the agency's construction, entitling the agency's construction "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute."[26]

Although *Chevron* only lays out a two-question framework, the Supreme Court in *United States v. Mead Corp.*[27] added an additional step to the formulation—step zero.[28] This preliminary step zero determines whether an agency's interpretation of a statute is entitled to *Chevron* deference at all.[29] In order for it to apply, a reviewing court must determine that "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming

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20. *City of Arlington*, 133 S. Ct. at 1868 (internal quotation marks omitted). "*Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *Id.* (citing AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999)).

21. *Chevron*, 467 U.S. at 843 n.9. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.*

22. *Id.*

23. *Id.* at 842–43.

24. *Id.* at 843.

25. *Id.*

26. *Id.* at 844.

27. United States v. Mead Corp., 533 U.S. 218 (2001).

28. *See id.* at 226–27. Although the Supreme Court has never invoked the term "step zero," courts and commentators refer to the rule established in *Mead* as *Chevron* step zero. *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining "*Chevron* Step Zero"); *see also Perez II*, 816 F.3d 1080, 1086 n.3 (9th Cir. 2016) ("At *Chevron* step zero, we ask whether the *Chevron* framework applies at all.").

29. *See Perez II*, 816 F.3d at 1086 n.3.

deference was promulgated in the exercise of that authority."[30] The *Mead* Court confirmed that "congressional intent is the touchstone for [*Chevron*] analysis" and that *Chevron* deference is not applicable if there is no congressional "intention to delegate interpretive authority."[31]

B. Defining Jurisdictional Questions

The Supreme Court has held that *Chevron* deference is applicable to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's own authority.[32] Writing for the majority in *City of Arlington*, Justice Antonin Scalia dispelled the notion that a distinct category of jurisdictional questions even existed and admonished that "judges should not waste their time in the mental acrobatics needed to decide whether an agency's interpretation of a statutory provision is 'jurisdictional' or 'nonjurisdictional.'"[33] For Justice Scalia, the question is "always, simply, *whether the agency has stayed within the bounds of its statutory authority.*"[34]

Notwithstanding Justice Scalia's argument, several commentators have identified jurisdictional questions.[35] Jurisdictional questions address "whether an agency's views on the extent of its own powers should merit

30. *Mead Corp.*, 533 U.S. at 226–27 (noting various ways this may be shown: "By an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent").

31. Sales & Adler, *supra* note 13, at 1525–26 ("[T]he Supreme Court has been fairly consistent . . . in maintaining that congressional delegation is the basis for according [*Chevron*] deference . . . .").

32. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1874–75 (2013) ("[W]here Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. . . . [I]n rigorously applying [this] rule, a court need not pause to puzzle over whether the interpretive question presented is 'jurisdictional.' If 'the agency's answer is based on a permissible construction of the statute,' that is the end of the matter." (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984))).

33. *Id.* at 1870. This "argument against deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations . . . define the agency's 'jurisdiction.' Others . . . are simply applications of jurisdiction the agency plainly has." *Id.* at 1868. According to Justice Scalia, that premise is "false, because the distinction . . . is a mirage." *Id. But see id.* at 1879–80 (Roberts, C.J., dissenting) (arguing that "jurisdiction" concerns "whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue"); Sales & Adler, *supra* note 13, at 1555–64 (arguing a distinction does exist and identifying various types of "jurisdictional questions").

34. *City of Arlington*, 133 S. Ct. at 1868.

35. *See* Sales & Adler, *supra* note 13. Although these authors defined jurisdictional questions prior to *City of Arlington*, their definitions help illustrate the jurisdictional debate and provide a framework within which this Comment's proposed no-deference rule would work. *See infra* Part III.

Chevron deference,"[36] and these questions can be broken down into "analytically distinct categories."[37] Although some of the definitions overlap, Sales and Adler[38] describe at least five types of jurisdictional cases: (1) "agency assertions of jurisdiction," (2) "disclaimers of jurisdiction," (3) "existence of agency jurisdiction," (4) "scope of jurisdiction," and (5) "presence (or lack) of a factual predicate necessary to trigger agency jurisdiction."[39]

This first category, "jurisdiction-asserting cases," involves the most common jurisdictional issue: "That is, the agency interprets a statute as evincing Congress's design to confer on it a particular power."[40] These types of cases present the classic danger a no-deference rule seeks to prevent—agency aggrandizement.[41] Conversely, the second category, "jurisdiction-disclaiming cases," deals with an agency relinquishing a power Congress arguably bestowed upon the agency.[42] For instance, the Environmental Protection Agency determined it lacked authority to regulate greenhouse gases under the Clean Air Act because it claimed greenhouse gases were not "air pollutants" under the Act.[43] According to Sales and Adler, this type of jurisdictional case involves the opposite danger of jurisdiction-asserting cases—the risk of abrogation.[44]

The third jurisdictional category, "existence-of-power cases," arises when an agency asserts "a novel power unrelated to the authority with which Congress has entrusted it."[45] For example, the Commodity Futures Trading Commission (CFTC) claimed the power to adjudicate state counterclaims, even though the Commodity Exchange Act only granted the CFTC authority

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36. Sales & Adler, *supra* note 13, at 1502.

37. *Id.*

38. These two *Chevron* scholars co-authored an influential article in 2009 that identified various types of jurisdictional cases. *Id.*

39. *Id.* These authors proposed a no-deference rule for all jurisdiction cases except factual predicate cases. *Id.* at 1501 ("[C]ourts should deny *Chevron* deference regardless of whether an agency is asserting or disclaiming jurisdiction."). This Comment offers a more modest proposal: deference is not warranted *only* in jurisdiction-asserting cases arising from statutory silence like the silence in *Perez II*.

40. *Id.* at 1503 (citing Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989, 992 (1999)).

41. *Id.*

42. *Id.*

43. Massachusetts v. EPA, 549 U.S. 497, 511–13 (2007).

44. Sales & Adler, *supra* note 13, at 1504 (describing abrogation as "the possibility that an agency might fail to discharge the duty with which Congress has charged it").

45. *Id.* at 1504–05 (In essence, "the agency creates a power for itself *ex nihilo* (or categorically disclaims any power whatsoever).").

to review federal commodities law.[46] Similar to the third category, "scope-of-power cases" occur when "Congress has delegated an agency a certain quantity of authority but [Congress] has left its magnitude and reach somewhat unclear."[47] Because of their similarities, these two groups of jurisdictional cases overlap each other frequently, causing identification issues.[48] Lastly, the "factual-predicate case" pertains to "whether a given set of facts necessary for the exercise of [an agency] power exists."[49]

As Sales and Adler demonstrate, jurisdictional questions can be identified and divided into classes apart from non-jurisdictional questions, contrary to Justice Scalia's charge in *City of Arlington*. After *City of Arlington*, courts must apply *Chevron* deference to all of these types of jurisdictional questions.[50] This Comment, however, argues that the Supreme Court should create a no-deference rule for a narrow subset of jurisdiction-asserting cases, where the assertion of authority comes from the statute's silence on the proposed power.[51]

C. Cases Where Jurisdiction Arises from a Statutory Silence

Chevron deference applies when an agency is delegated rule-making authority and when a statute is ambiguous or silent.[52] Sometimes an agency asserts that a statute's silence (in the sense that the statute does not *explicitly* deny the asserted power) is evidence that Congress delegated to the agency the power to regulate the very practice on which the statute is silent.[53] For example, the National Mediation Board (NMB) asserted authority to investigate sua sponte representation disputes between railroad employees,

46. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 837–45 (1986).

47. Sales & Adler, *supra* note 13, at 1505 (noting that this category deals with an "agency interpret[ing] its grant of jurisdiction to entail another power, or to permit it to exercise its power in a particular way").

48. *Id.* ("[I]t can be particularly challenging to draw the line between expanding the scope of an existing power and asserting an entirely new power.").

49. *Id.* "In these cases, Congress has identified the general conditions under which the agency can exercise its regulatory authority, but has delegated the agency responsibility for determining when the relevant conditions are met." *Id.* at 1505–06.

50. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013).

51. Sales & Adler, *supra* note 13, at 1506; *see also infra* Section I.C.

52. *See supra* Section I.A (explaining when *Chevron* deference is appropriate).

53. *See* Sales & Adler, *supra* note 13, at 1506 (Sales and Adler describe this type of case as a "subset of jurisdiction-asserting cases," in which (agencies claim) "the fact that a statute is silent on the conferral of a proposed power—i.e., the fact that the statute neither grants nor denies it—[is] evidence that Congress anticipated that the agency would exercise that power.").

mainly because of the Railway Labor Act's failure to expressly prohibit this power.[54]

In *Railway Labor Executives' Ass'n v. National Mediation Board*, the D.C. Circuit declined to apply *Chevron* deference to the NMB's interpretation of the Railway Labor Act.[55] Instead, the D.C. Circuit reviewed the statute de novo and employed traditional tools of statutory construction to invalidate the agency's interpretation of the statute.[56] The D.C. Circuit proceeded to emphatically reject the NMB's theory of agency power,[57] stating:

> To suggest, as the [NMB] effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.*[,] when the statute is not written in 'thou shalt not' terms), is both flatly unfaithful to . . . principles of administrative law . . . and refuted by precedent. Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.[58]

This passage illustrates the fundamental principle underlying the court's decision and *Chevron* deference in general: "An agency's power is no greater than that delegated to it by Congress."[59] Thus, the D.C. Circuit concluded that the Railway Labor Act left "no gap for the agency to fill" because "Congress has directly spoken to the precise question at issue."[60]

The problem with the NMB's assertion of agency power is that the agency's interpretation conflated two types of statutory silence. In *Perez III*,

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54. *See* Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 658 (D.C. Cir. 1994) (en banc) (explaining that the Railway Labor Act grants the NMB authority to investigate representation disputes "upon the request of either party to the dispute," but the Act is silent about whether the NMB could investigate sua sponte (quoting 45 U.S.C. § 152 (1988)).

55. *Id.* at 671 ("[T]his [is not] a case in which principles of deference to an agency's interpretation come into play. Such deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'" (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984))).

56. *Id.* at 664–69 ("We need look no further than the language of [the section of the statute at issue], the structure of the Act, and its legislative history to determine that these proposed procedures are not only unprecedented, but legally insupportable as well.").

57. Essentially, the NMB's position "amount[ed] to the bare suggestion that it possess[ed] *plenary* authority to act within a given area simply because Congress [had] endowed it with *some* authority to act in that area." *Id.* at 670.

58. *Id.* at 671 (citations omitted).

59. *See id.* at 670 (quoting Lyng v. Payne, 476 U.S. 926, 937 (1986)).

60. *Id.* at 671 (quoting *Chevron*, 467 U.S. at 842).

Judge O'Scannlain of the Ninth Circuit concisely described the two differing types of statutory silence:

> Sometimes "[statutory] silence is meant to convey nothing more than a refusal to tie the agency's hands," meaning that Congress has given the agency discretion to choose between policy options Congress itself has placed on the table. But "sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." In other words, not all statutory silences are created equal.[61]

Thus, a statute's silence does not always mean Congress delegated legislative authority to the agency to expand its scope, but rather the silence is better understood as a limit on an agency's regulatory authority.

Numerous other circuits have addressed this issue; all agree that "silence does not always constitute a gap an agency may fill, but often reflects Congress's decision not to regulate in a particular area at all, a decision that is binding on the agency."[62] Most importantly, the Supreme Court agrees with these lower circuit decisions, stating that "[w]here Congress has established a clear line, the agency cannot go beyond it."[63] Therefore, it appears that a statute's noninterference with an activity is a "clear line," indicating Congress's intention that the activity is off-limits from agency action. This Comment's no-deference rule ensures that the

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61. *Perez III*, 843 F.3d 355, 360 (9th Cir. 2016) (O'Scannlain, J., dissenting) (citations omitted) (quoting Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 222–23 (2009)). For a discussion on the difference between the two types of statutory silence, *see infra* notes 205–17 and accompanying text.

62. *See Perez III*, 843 F.3d at 362 (O'Scannlain, J., dissenting); *see also* Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1174–75 (D.C. Cir. 2003) ("[T]he Postal Service's position seems to be that the disputed regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency. We reject this position as entirely untenable under well-established case law."); Coffelt v. Fawkes, 765 F.3d 197, 202 (3d Cir. 2014) ("Even where a statute is 'silent' on the question at issue, such silence 'does not confer gap-filling power on an agency unless the question is in fact a gap—an ambiguity tied up with the provisions of the statute.'" (quoting Lin-Zheng v. Attorney Gen., 557 F.3d 147, 156 (3d Cir. 2009) (en banc))); Chamber of Commerce v. NLRB, 721 F.3d 152, 160 (4th Cir. 2013) ("Because we do not presume a delegation of power simply from the absence of an express withholding of power, we do not find that *Chevron*'s second step is implicated 'any time a statute does not expressly *negate* the existence of a claimed administrative power.'" (quoting Am. Bar Ass'n v. F.T.C., 430 F.3d 457, 468 (D.C. Cir. 2005))); Texas v. United States, 809 F.3d 134, 186 (5th Cir. 2015) (as revised) ("The dissent repeatedly claims that congressional silence has conferred on DHS the power to act. To the contrary, any such inaction cannot create such power." (citation omitted)); Sierra Club v. EPA, 311 F.3d 853, 861 (7th Cir. 2002) ("Courts 'will not presume a delegation of power based solely on the fact that there is not an express withholding of such power.'" (quoting Am. Petroleum Inst. v. EPA, 52 F.3d 1113, 1120 (D.C. Cir. 1995))).

63. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

courts, not agencies, decide whether Congress set down a "clear line," thereby preventing the risk of agency aggrandizement.

II. *PEREZ II*: A CASE FOR NO DEFERENCE

Chevron and *City of Arlington* dictate deference to agency interpretations on the scope of an agency's jurisdiction under a statute; however, as Section I.C illustrated, cases where jurisdiction arises from a statutory silence should arguably not receive deference.[64] Nevertheless, the *Perez II* decision applied *City of Arlington*'s command by upholding the DOL's interpretation of § 203(m) of the FLSA.[65] This case illustrates why jurisdictional questions arising from statutory silences should not warrant *Chevron* deference because it exemplifies the problem of agency aggrandizement.[66] Part II begins with an overview of the statutory and regulatory landscape that created this controversy. Next, this Part discusses the lower court decision of *Perez*. Lastly, this Part provides an overview of the majority's analysis in *Perez II*, demonstrates how this decision fits into the jurisdictional framework outlined in Part I, and shows why this decision should be overturned.

*A. Pre-*Perez *Statutory and Regulatory Landscape*

Enacted in 1938, "the FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act . . . would be protected from the 'evil of overwork as well as underpay.'"[67] This Act[68] established an hourly minimum wage that employers must pay their employees.[69] If the employee is a "tipped employee,"[70] employers can meet this wage requirement in two ways: (1) paying their employees at or above the minimum requirement or (2) paying employees below minimum "but only if such employees receive enough

64. *Id.* at 1874–75; *see also supra* Section I.C.

65. *Perez II*, 816 F.3d 1080, 1090 (9th Cir. 2016).

66. *See* Sales & Adler, *supra* note 13, at 1503 (describing aggrandizement as "the risk that the agency will exercise a power Congress did not intend for it to have, or that it will extend its power more broadly than Congress envisioned").

67. Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981) (emphasis omitted) (internal quotation marks omitted) (quoting Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942)).

68. 29 U.S.C. § 201 (2012).

69. *Id.* § 206(a).

70. "'Tipped employee' means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." *Id.* § 203(t).

money in tips to make up the difference."[71] The service industry refers to the second option as a "tip credit" because employers use the employee's tips as a credit against their minimum wage requirement.[72] In addition, employers in the service industry commonly require their employees to share their tips with one another, a practice known as "tip pooling."[73] Under § 203(m) of the FLSA, an employer taking a tip credit cannot require an employee to participate in a tip pool consisting of both employees who are "customarily and regularly tipped"[74] and employees who are not.[75] For example, a restaurant owner could not pay the waiting staff below minimum wage (using a tip credit) while requiring them to share their tips with the kitchen staff.[76]

In *Cumbie v. Woody Woo, Inc.*,[77] the Ninth Circuit held that § 203(m) does not prohibit tip pooling among all employees when no tip credit is taken.[78] The *Cumbie* court determined that the plain text of § 203(m) only "imposes *conditions* on taking a tip credit and does not state freestanding *requirements* pertaining to all tipped employees."[79] Therefore, *Cumbie* established that the "FLSA does not restrict tip pooling when no tip credit is taken."[80]

Shortly after *Cumbie*, the DOL promulgated new regulations on this issue, contradicting *Cumbie*.[81] In addition, the DOL stated in the preamble to these regulations that it "respectfully believes that [*Cumbie*] was incorrectly decided."[82] Under the new regulations, employers who do not take a tip credit cannot retain any of an employee's tips unless in furtherance of a valid tip pool.[83] According to the DOL, a valid tip pool "can only include those employees who customarily and regularly receive tips."[84] Several

71. *Perez III*, 843 F.3d 355, 356 (9th Cir. 2016) (O'Scannlain, J., dissenting).

72. *Id.*; *see also* 29 U.S.C. § 203(m).

73. *See* 29 U.S.C. § 203(m).

74. A restaurant server is an employee who is "customarily and regularly tipped," while the kitchen staff is not. *Perez III*, 843 F.3d at 356 (O'Scannlain, J., dissenting) (quoting *id.* § 203(m)).

75. *Id.*; 29 U.S.C. § 203(m).

76. *See Perez III*, 843 F.3d at 356 (O'Scannlain, J., dissenting).

77. Cumbie v. Woody Woo, Inc., 596 F.3d 577 (9th Cir. 2010).

78. *Id.* at 580–83.

79. *Id.* at 581 ("A statute that provides that a person must do X *in order to achieve* Y does not mandate that a person must do X, period.").

80. *Id.* at 582.

81. *See* Updating Regulations, *supra* note 3.

82. *Id*.

83. 29 C.F.R. § 531.52 (2011) ("Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA.").

84. *Id.* § 531.54.

months later, the DOL issued a Field Assistance Bulletin, which described the 2011 regulations as gap fillers for the "silence" left in § 203(m) pertaining to tip pooling and tip credits.[85] Returning to the previous example, under the DOL's new regulations, a restaurant owner cannot make the waitstaff share their tips with the kitchen staff, even though the owner pays both above minimum wage.[86]

B. The District Court Decision

The *Perez* decision addressed the apparent conflict between the DOL's 2011 regulations on the one hand and the *Cumbie* decision on the other.[87] In *Perez*, a restaurant association and an individual owner sued the DOL, arguing that the 2011 regulation was invalid.[88] All plaintiffs paid their employees above the federal minimum wage and required their servers to share tips with the kitchen staff.[89] The plaintiffs sought to invalidate the 2011 regulation and continue their tip-pooling arrangement.[90] Siding with the plaintiffs, the district court struck down the DOL's 2011 regulation as invalid at *Chevron* step one[91] and denied the defendant's motion for summary judgment.[92] As the basis for the ruling, the *Perez* court considered several justifications for why the DOL's regulations did not warrant *Chevron* deference.

First, *Cumbie* already established that the language of § 203(m) is "clear" and "plain," only "impos[ing] *conditions* on taking a tip credit and does not state freestanding *requirements* pertaining to all tipped employees."[93] Relying on the standard from *National Cable & Telecommunications Ass'n v. Brand X Internet Services* (*Brand X*), which states that a "prior judicial construction of a statute trumps [a later] agency construction,"[94] the district court concluded that *Cumbie* precluded the

85. *See* Memorandum from Nancy J. Leppink, Deputy Adm'r, U.S. Dep't of Labor, to Regional Administrators and District Directors (Feb. 29, 2012), https://perma.cc/PJL3-4KTT ("These regulations fill a gap in the statutory scheme left by the Act's silence on the use of employees' tips when no tip credit is taken.").

86. *See id.*; 29 C.F.R. § 531.52.

87. *See Perez*, 948 F. Supp. 2d 1217 (D. Or. 2013).

88. *Id.* at 1219.

89. *Perez II*, 816 F.3d 1080, 1085 (9th Cir. 2016).

90. *Perez*, 948 F. Supp. 2d at 1218–19.

91. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 842 (1984) (Step one asks "whether Congress has directly spoken to the precise question at issue.").

92. *Perez*, 948 F. Supp. 2d at 1227.

93. *Id.* at 1223 (quoting Cumbie v. Woody Woo, Inc., 596 F.3d 577, 581 (9th Cir. 2010)).

94. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its

DOL's regulation applying § 203(m) to all employers.[95] The DOL, however, argued that *Cumbie* only applies to employers who take a tip credit, that both § 203(m) and *Cumbie* are silent concerning those who do not take a tip credit, and that *Chevron* deference is appropriate because of this silence.[96] The district court rejected this argument,[97] noting that the "clear and unambiguous text" of § 203(m) shows "Congress intended *only* to limit the use of tips by employers when a tip credit is taken."[98] Therefore, "[*Cumbie*] leaves no room for agency discretion here."[99]

Second, although *Cumbie* already clarified Congress's intentions regarding the issue of whether § 203(m) applies to *all* employers, the *Perez* court undertook the task of determining congressional intent through traditional tools of statutory construction, per *Chevron*'s instructions.[100] Looking at the text of § 203(m), the district court concluded that the text is "clear and unambiguous"[101] and that reading the text to apply to all employers would "render its reference to the tip credit, as well as its conditional language and structure, superfluous."[102]

Third, the district court relied on the purpose and general structure of the FLSA to illustrate that the DOL's interpretation does not warrant *Chevron* deference.[103] The district court judge explained that the FLSA

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construction 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. (*Brand X*), 545 U.S. 967, 982 (2005). Both dissenting opinions in the *Perez* line of cases also argued that *Brand X* dictates that *Chevron* not apply. *See Perez II*, 816 F.3d at 1093 (Smith, J., dissenting); *Perez III*, 843 F.3d 355, 356–57 (9th Cir. 2016) (O'Scannlain, J., dissenting). This Comment agrees with the dissenting opinions; however, this Comment focuses on why *Perez II* should be overruled and a no-deference rule for statutory silences should be established. Therefore, this Comment does not address the *Brand X* argument in detail.

95. *Perez*, 948 F. Supp. 2d at 1224.

96. *Id.*

97. The plaintiffs in *Cumbie* made the same argument. *See Cumbie*, 596 F.3d at 580 (stating the DOL's argument in that action: "That under section 203(m), an employee must be allowed to retain all of her tips—except in the case of a 'valid' tip pool involving only customarily tipped employees—regardless of whether her employer claims a tip credit.").

98. *Perez*, 948 F. Supp. 2d at 1224 ("This is not silence. This is repudiation.").

99. *Id.*

100. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

101. *Perez*, 948 F. Supp. 2d at 1224 ("[Section 203(m)] imposes conditions on employers that take a tip credit but does not impose a freestanding requirement pertaining to all tipped employees.").

102. *Id.* (quoting *Cumbie*, 596 F.3d at 581).

103. *Id.* at 1225.

"protect[s] all covered workers from substandard wages and oppressive working hours,"[104] "includes specific statutory protections,"[105] and is "an Act of defined scope."[106] Based on these observations, the district court concluded that Congress provided two choices for employers: "[E]ither pay the full minimum wage free and clear of any conditions, or take a tip credit and comply with the conditions imposed by [§ 203(m)]."[107] Both, the district court declared, would fulfill the purposes of the FLSA and protect an employee's right to minimum wage.[108] The DOL's new regulations, however, do not "protect covered workers from substandard wages or oppressive working hours, nor do they vindicate any of the FLSA's specific statutory protections."[109] Therefore, the district court concluded that these regulations do not comport with the purpose and general structure of the FLSA.[110]

Lastly, the district court turned its attention back to the DOL's argument regarding silence[111] in order to invalidate the regulations at *Chevron* step one.[112] The district court judge articulated that the DOL's position fails to appreciate the nuances of discerning congressional intent at step one.[113] For the district court, the question was "whether the absence of language regarding an employer's use of tips when no tip credit is taken amounts to an implicit gap left for the agency to fill or an area where Congress intended free economic choice."[114] The judge lambasted the DOL's position that "[c]ongressional silence regarding an area of economic activity is *never* a

104. *Id.* (quoting Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981)); *see also supra* Section I.A.

105. *Perez*, 948 F. Supp. at 1225. For example, § 6(a) sets a federal minimum wage, and § 203(m) defines the term "wage," allowing for certain tip credits. *See* 29 U.S.C. §§ 206(a), 203(m) (2012); *see also supra* Section II.A.

106. *Perez*, 948 F. Supp. 2d at 1225; *see also supra* Section II.A.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* ("According to the DOL, [§ 203(m)] is silent regarding an employer's use of tips when no tip credit is taken. That is, the FLSA does not authorize the unfettered use of tips when no tip credit is taken, nor does it expressly prohibit the DOL from regulating tips under such circumstances. Therefore, Congress has not directly spoken to the precise question at issue, and [the reviewing court] need only ask whether the DOL's construction is reasonable.").

112. *Id.*

113. *Id.* at 1225–26 ("To express its intention that certain activities be left free from regulation, Congress need not lace the United States Code with the phrase, 'You shall not pass!'").

114. *Id.* at 1226.

considered decision to let the economic actors make their own choices."[115] By employing traditional tools of statutory construction, the district court found that the silence in § 203(m) clearly indicated Congress's desire to only restrict those who take a tip credit.[116] Because the district court found that the DOL's regulations were invalid under *Chevron* step one, the *Perez* court granted the plaintiff's motion for summary judgment, resulting in an appeal to the Ninth Circuit.

C. Majority Chevron *Analysis*

Both *Perez* and *Perez II* agreed that the DOL's regulations satisfied *Chevron* step zero;[117] however, the two courts diverged over whether *Cumbie* foreclosed the agency from promulgating these new regulations under *Chevron* step one. The district court held that the prior interpretation in *Cumbie* barred the agency's new interpretation.[118] In contrast, the Ninth Circuit believed *Cumbie* did not foreclose the agency's regulation, based on a "crucial distinction between statutory language that affirmatively protects or prohibits a practice and statutory language that is silent about that practice."[119] According to the *Perez II* majority, *Cumbie* did not hold that the FLSA "unambiguously and categorically protects" employers (who do not take a tip credit) who implement tip-pooling arrangements consisting of those who customarily receive tips and those who do not.[120] Rather, "[*Cumbie*] held that 'nothing in the text purports to restrict' the practice in question."[121] Based on this distinction, the *Perez II* court reasoned that § 203(m) is silent on whether it applies to employers who do not take a tip credit, leaving room for the DOL's 2011 rule.[122]

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115. *Id.*

116. *Id.*

117. *See id.* at 1223; *see also Perez II*, 816 F.3d 1080, 1086 n.3 (9th Cir. 2016) ("The DOL exercised its rulemaking authority within its substantive field when it promulgated the 2011 rule.").

118. *Perez II*, 816 F.3d at 1086 (citing *Perez*, 948 F. Supp. 2d at 1226; Cesarz v. Wynn Las Vegas, L.L.C., No. 2:13-cv-00109-RCJ-CWH, 2014 U.S. Dist. LEXIS 3094, at *3, *6 (D. Nev. Jan. 10, 2014)).

119. *Perez II*, 816 F.3d at 1087.

120. *Id.* at 1086.

121. *Id.* (quoting Cumbie v. Woody Woo, Inc., 596 F.3d 577, 583 (9th Cir. 2010)). The *Perez II* majority reaches this conclusion based on the different question at issue in *Cumbie* and that before the court in *Perez II*. *Id.* For the majority, *Cumbie* dealt with whether a restaurant's tip-pooling practice violated the FLSA, and the question before the Ninth Circuit in *Perez II* was whether the DOL had the authority to regulate employers who do not take a tip credit. *Id.*

122. *Id.* at 1088.

In defending this position, the Ninth Circuit pointed to *Christensen v. Harris County*[123] and Justice Souter's single-sentence concurrence[124] for the proposition that "the DOL, by regulation, could prohibit the very practice the Court held to be neither explicitly nor implicitly prohibited by the FLSA."[125] In *Christensen*, the Supreme Court upheld a "forced use"[126] policy because "no relevant statutory provision expressly or implicitly prohibits" the policy.[127] The *Perez II* majority emphasized the *Christensen* Court's rationale that Harris County's policy did not violate the FLSA because the statute was silent about the practice.[128] Most importantly, the majority latched on to *Christensen*'s suggestions that "were the agency to enact future regulations, *Chevron* deference would apply."[129]

Because *Cumbie* was a case "grounded in statutory silence," the majority was bound by *Christensen* to give discretion to the DOL in *Perez II*.[130] Although the dissent argued *Cumbie* clearly established that § 203(m) applies only to those who take a tip credit,[131] the majority contended *Cumbie* only established that this section does not constitute a "statutory impediment" that would prevent those who do not take a tip credit from implementing tip pooling.[132] Therefore, *Chevron* step one was satisfied because "the FLSA is silent regarding the tip pooling practices of employers who do not take a tip credit."[133]

After concluding step one was satisfied, the majority moved to step two[134] and determined that the "DOL's interpretation is more closely aligned with [c]ongressional intent, and at the very least, that the DOL's

123. Christensen v. Harris Cty., 529 U.S. 576 (2000).

124. *Id.* at 589 (Souter, J., concurring) ("I join the opinion of the Court on the assumption that it does not foreclose a reading of the [FLSA] of 1938 that allows the Secretary of Labor to issue regulations limiting forced use.").

125. *Perez II*, 816 F.3d at 1087.

126. Harris County implemented a policy "forcing" employees to use compensatory time in order to avoid paying large sums of monetary overtime compensation. *See Christensen*, 529 U.S. at 580–81.

127. *Id.* at 588.

128. *Perez II*, 816 F.3d at 1087.

129. *Id.* (citing *Christensen*, 529 U.S. at 586–87).

130. *Perez II*, 816 F.3d at 1088.

131. *Id.* at 1091–92 (Smith, J., dissenting).

132. *Id.* at 1088 (majority opinion) (quoting Cumbie v. Woody Woo, Inc., 596 F.3d 577, 583 (9th Cir. 2010)). "What was 'clear' in *Cumbie* was that the FLSA's tip credit provision did not impose any 'statutory interference' that would invalidate tip pooling when no tip credit is taken—i.e., that the FLSA was silent regarding this practice." *Id.* at 1088 n.4.

133. *Id.* at 1089.

134. *See supra* Section I.A (describing *Chevron* step two).

interpretation is reasonable."[135] In reaching this conclusion, the Ninth Circuit looked to several sources that support the DOL's interpretation of § 203(m), including legislative history suggesting that the "only acceptable use by an employer of employee tips is a tip credit,"[136] comments from the DOL concerning the need for clarification in § 203(m),[137] and the overall purpose of the FLSA.[138] Based on these sources, the Ninth Circuit concluded that the DOL's interpretation was reasonable and reversed both of the district court judgments.[139]

D. The Dissenting Opinions Correctly Concluded the 2011 Regulations Were Invalid

A divided panel in *Perez II* upheld the DOL's 2011 regulations under *Chevron*, with Judge N. Randy Smith dissenting.[140] The plaintiffs petitioned for panel rehearing and rehearing en banc.[141] Although the full court voted on the matter, the petition failed to receive a majority of votes in favor of en banc consideration; therefore, the panel denied both petitions.[142] The denial of rehearing en banc included a dissent written by Judge O'Scannlain that nine other circuit judges joined.[143] This Section provides an overview of the main reasons, according to the *Perez II* and *Perez III* dissents, why the decision was wrong.

In his dissenting opinion in *Perez II*, Judge Smith began with the following admonishment: "Colleagues, even if you don't like circuit precedent, you must follow it. Afterwards, you call the case en banc. You cannot create your own contrary precedent."[144] According to Judge Smith, the majority ignored *Cumbie*, which was binding precedent; therefore, his

135. *Perez II*, 816 F.3d at 1090.

136. *Id.*; S. REP. NO. 95-440, at 368 (1977) ("Tips are not wages, and under the 1974 amendments tips must be retained by the employees . . . and cannot be paid to the employer or otherwise used by the employer to offset his wage obligation, except to the extent permitted by section [20]3(m).").

137. *Perez II*, 816 F.3d at 1089 ("The DOL . . . concluded that, as written, 203(m) contained a 'loophole' that allowed employers to exploit the FLSA tipping provisions." (citing Updating Regulations, *supra* note 3, at 18,842)).

138. *Id.* at 1090 ("[T]he FLSA is a broad and remedial act that Congress has frequently expanded and extended.").

139. *Id.*

140. *Id.* at 1090–91 (Smith, J., dissenting).

141. *See Perez III*, 843 F.3d 355, 355–56 (9th Cir. 2016).

142. *Id.*

143. *Id.* at 356.

144. *Perez II*, 816 F.3d at 1091 (Smith, J., dissenting).

opinion began by detailing the analysis in *Cumbie*.[145] Judge Smith continued by illustrating how the facts of *Perez* were "identical" to those in *Cumbie* and how "this case should have ended with a memorandum disposition."[146] The difference this time, according to Judge Smith, was the DOL's 2011 rule, which "interpret[s] section 203(m) differently than [the Ninth Circuit] interpreted it in *Cumbie*."[147] Judge Smith concluded "this new rule changes nothing" because a court need not defer to an agency interpretation when "Congress's intent behind a statute is clear."[148]

After considering *Brand X*,[149] Judge Smith turned to the majority's statutory silence[150] argument and contended that *Cumbie* put this claim to rest because "[n]owhere in its text, either explicitly or implicitly, does section 203(m) impose a blanket tipping requirement on all employers."[151] *Christensen*, Judge Smith argued, also has no validity here;[152] and if it were relevant, the majority's interpretation would uproot the fundamental underpinning of *Chevron* "that administrative rulemaking be rooted in a congressional delegation of authority."[153] The problem with the majority's argument, according to Judge Smith, was that the "Supreme Court has made clear that it is only in the ambiguous 'interstices' *within* the statute where

145. *See id.* at 1091–93 (noting *Cumbie* did not disturb *Williams*' presumption that arrangements to redistribute tips are valid and that "the plain text of section203(m) . . . only imposed a *condition* on employers who take a tip credit, rather than a blanket *requirement* on all employers regardless of whether they take a tip credit"); *see also supra* Section II.A.

146. *Perez II*, 816 F.3d at 1092. Judge Smith pointed out that the employers in both cases did *not* take a tip credit and paid their employees above the federal minimum wage; that both employers implement a tip-pooling practice consisting of all employees, including those not customarily tipped; and that the tipped employees challenged this tip-pooling practice "under the same theory advanced [and rejected] in *Cumbie*." *Id.*

147. *Id.*

148. *Id.* at 1092–93.

149. Judge Smith detailed how the DOL's interpretation should not have survived because *Cumbie*'s construction "trumps an agency construction otherwise entitled to *Chevron* deference." *Id.* at 1093 (quoting *Brand X*, 545 U.S. 967, 982 (2005)).

150. *See supra* Section II.C.

151. *Perez II,* 816 F.3d at 1093 (Smith, J., dissenting) ("We explained, 'A statute that provides that a person must do *X in order to achieve Y* does not mandate that a person must do X, period.'" (quoting Cumbie v. Woody Woo, Inc., 596 F.3d 577, 581 (9th Cir. 2010))).

152. *Id.* at 1094 n.4 ("In *Christensen*, the Supreme Court allowed the DOL to enact further regulation over compensatory time, because the DOL had been given the express authority to do so. However, under § 203(m), the DOL has only been given authority to regulate the tips of employers who take a tip credit. The DOL has not been given authority to regulate the tips of employers who pay their employees a minimum wage and do not take a tip credit. Therefore, unlike *Christensen*, there was no statutory silence permitting the DOL further regulation of this issue." (citation omitted)).

153. *Id.* at 1094 ("In other words, the majority suggests an agency may regulate wherever that statute does not forbid it to regulate.").

silence warrants administrative interpretation, not the vast void of silence on either side of it."[154]

According to the dissent, this is not how *Chevron* deference works. Agencies are not "a legislative body unto [themselves], but instead must carry out Congress's intent."[155] Here, *Cumbie* declared Congress's intent was clear; therefore, the agency cannot "go through the backdoor by promulgating a new rule codifying its argument in *Cumbie* and its preferred interpretation of section 203(m)."[156] Further, the dissenting opinion from the denial of rehearing concluded that the majority "has stumbled off a constitutional precipice."[157] Judge O'Scannlain believed that the majority's theory concerning the silence in § 203(m) was "entirely alien to our system of laws"[158] and violated the well-known proposition that the Executive's power must come from "an act of Congress or from the Constitution itself."[159] According to Judge O'Scannlain, the majority missed the fundamental principle underlying this distinction, that "a statute's deliberate non-interference with a class of activity is not a 'gap' in the statute at all; it simply marks the point where Congress decided to stop authorization to regulate."[160] The *Perez III* dissent argued that the majority's theory effectively allowed the DOL to legislate by "interfer[ing] with conduct [§ 203(m)] consciously left alone."[161] For Judge O'Scannlain, however, the Constitution does not allow agencies to exercise this power.[162]

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154. *Id.* (citing Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014) ("Agencies exercise discretion only in the interstices created by statutory silence or ambiguity . . . .")).

155. *Id.*

156. *Id.* at 1094.

157. *See Perez III*, 843 F.3d 355, 358–59 (9th Cir. 2016) (O'Scannlain, J., dissenting).

158. *Id.* at 359–60 (citing Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952)).

159. *Id.* at 360 n.2 (quoting *Steel Seizure*, 343 U.S. at 585). "*Youngstown* necessarily rejects the idea that the Executive may interfere with a given interest simply because Congress has not 'unambiguously and categorically protected' it." *Id.* (quoting *Steel Seizure*, 343 U.S. at 585).

160. *Id.* at 360.

161. *Id.*

162. *Id.* at 360 n.3. Judge O'Scannlain stated in a footnote:

> As every novice learns, the official theory of the administrative state begins from the premise that "the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity." Agency rulemaking respects that constraint so long as it remains guided by an "intelligible principle" supplied by Congress. But the panel majority would effectively vaporize even that flimsy constraint by holding that an agency need not justify a given rule by tracing it to a valid statutory grant of authority; instead, it need only demonstrate that Congress has not affirmatively voiced opposition to the rule in question. The majority's

E. The Perez II *Decision Epitomizes the Problem of Deferring to Jurisdictional Questions Concerning Statutory Silence*

As the majority illustrates, the DOL found its authority to regulate those who do not take a tip credit in § 203(m)'s silence concerning the practice, and the Ninth Circuit upheld this interpretation under *Chevron*.[163] However, as the dissenting opinions correctly pointed out, this silence cannot trigger *Chevron* deference because Congress did not intend the DOL to regulate those who do not take a tip credit. This Section demonstrates how *Perez II* fits within the definition of jurisdiction-asserting cases arising out of statutory silence and why a rule of no deference is preferable in this circumstance.

Looking at the various types of jurisdictional questions,[164] this case comports with the definition of jurisdiction-asserting cases because the DOL found its authority to extend § 203(m)'s restriction to all employers based on the fact that the statute only mentions employers who take a tip credit.[165] For the DOL and Ninth Circuit, the statute's silence regarding employers who do not take a tip credit constituted a gap that the DOL was authorized to fill.[166] Because the DOL utilized the absence of statutory language addressing employers who do not take a tip credit, rather than an ambiguity over which employers the statute mentions, *Perez II* exemplifies the type of jurisdictional question this Comment criticizes—a jurisdiction-asserting case arising out of statutory silence.[167]

By allowing deference to the DOL's regulations, *Perez II* illustrates the problem of deferring to this type of jurisdictional question. In addition to the reasoning of the district court in *Perez* and the dissents in *Perez II* and *III*, the Ninth Circuit erred in three major aspects, warranting implementation of a no-deference rule. First, the *Perez II* decision remains at odds with other judicial treatment of the same statute. Second, this decision flouts firmly established Supreme Court precedent on the powers agencies possess. Lastly, *Perez II* ignores one of our Nation's most fundamental principles—separation of powers. Because of these grave errors, the Supreme Court should repudiate *Perez II*'s theory of agency deference and implement a no-

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> vision makes a fear of "delegation running riot" look quaint by comparison, for it would dispense with even the pretense of delegation altogether.

Id. (citations omitted).

163. *See Perez II*, 816 F.3d 1080, 1088 (9th Cir. 2016).

164. *See supra* Section I.B.

165. *See Perez II*, 816 F.3d at 1086–89.

166. *Id.*

167. *See* Sales & Adler, *supra* note 13, at 1502–03 (defining jurisdiction-asserting cases).

deference rule for jurisdiction-asserting cases arising out of this type of statutory silence.

With respect to interpreting § 203(m), the *Perez II* court stands out as the only court to uphold the DOL's regulation.[168] Looking at the text of § 203(m), all courts that have addressed the issue have interpreted this section to only apply to employers who take a tip credit, not all employers.[169] According to these courts, the text of § 203(m) is clear and unambiguous.[170] In addition, the Tenth Circuit recently held that the DOL lacked authority to promulgate the DOL's 2011 rule.[171] Addressing the DOL's statutory silence argument, the Tenth Circuit recognized that *Chevron* allows "agencies to resolve an issue when 'the statute is silent' or leaves a 'gap.'"[172] However, the Tenth Circuit specified that the Supreme Court only speaks of gaps when "considering undefined terms in a statute or a statutory directive to perform a specific task without giving detailed instructions."[173] In *Marlow*, the statutory text contained no gap regarding any specific task; rather, the DOL pointed to the "*absence* of any statutory directive to the contrary."[174] The Tenth Circuit denied that this silence created a gap and rebuked the DOL for attempting to legislate.[175]

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168. *See* Marlow v. New Food Guy, Inc., 861 F.3d 1157, 1162 (10th Cir. 2017).

169. *See id.* at 1161; *see also* Trejo v. Ryman Hosp. Props., Inc., 795 F.3d 442, 448 (4th Cir. 2015) ("[Section] 203(m) 'does not state freestanding *requirements* pertaining to all tipped employees,' but rather creates rights and obligations for employers attempting to use tips as a credit against the minimum wage."); Cumbie v. Woody Woo, Inc. 596 F.3d 577, 580–81 (9th Cir. 2010); Aguila v. Corp. Caterers II, Inc., 199 F. Supp. 3d 1358, 1361 (S.D. Fla. 2016); Malivuk v. Ameripark, LLC, No. 1:15-cv-2570-WSD, 2016 U.S. Dist. LEXIS 97093, at *5–6 (N.D. Ga. July 26, 2016); Brueningsen v. Resort Express Inc., No. 2:12-cv-00843-DN, 2015 U.S. Dist. LEXIS 9262, at *10 (D. Utah Jan. 26, 2015); Mould v. NJG Food Serv. Inc., No. JKB-13-1305, 2014 U.S. Dist. LEXIS 84441, at *13–14 (D. Md. June 17, 2014); Czarnik v. All Resort Coach, Inc., No. 2:12-CV-1097 TS, 2013 U.S. Dist. LEXIS 121766, at *14, *24–25 (D. Utah Aug. 26, 2013).

170. *Marlow*, 861 F.3d at 1162.

171. *Id.* at 1164 ("In sum, § 203(m)'s 'silence' about employers who decline the tip credit is no 'gap' for an agency to fill. Instead, the text limits the tip restrictions in § 203(m) to those employers who take the tip credit, leaving the DOL without authority to regulate to the contrary.")

172. *Id.* at 1163 (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

173. *Id.*

174. *Id.* at 1164.

175. *Id.* "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.* (quoting Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc)).

In addition to creating circuit splits, *Perez II* breaks from nearly century-old precedent regarding an agency's ability to determine the scope of its powers. *Addison v. Holly Hill Fruit Productions, Inc.*[176] stands for the proposition that "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."[177] In *Addison*, the Supreme Court addressed regulations promulgated by the Wage and Hour Division (WHD) under the FLSA that defined the "area of production" based in part on the number of employees engaged in canning operations, rather than basing the definition solely on geographical areas.[178] The *Addison* court reasoned that, although Congress granted the WHD the authority to define the geographical area, the statutory language was sufficiently detailed to "preclude their enlargement by implication."[179] Applying *Addison* to the present dispute, § 203(m)'s language is sufficiently detailed, in that it only addressed employers taking a tip credit, to preclude the DOL from expanding the scope to include all employers.[180]

Lastly, and most importantly, *Perez II* raises serious separation of powers concerns because the majority's decision effectively allowed the DOL to legislate. As the *Perez III* dissent points out, an agency's power to regulate must come from "an act of Congress."[181] This is true because "[a]gencies are creatures of Congress; 'an agency literally has no power to act . . . unless and until Congress confers power upon it.'"[182] Just as the "Constitution permits the national government to exercise only those powers affirmatively granted to it by the people of the several states," an agency cannot act without Congress conferring authority on it.[183]

Here, the DOL reversed the longstanding rule that any tip-pooling arrangements are valid as long as the employer does not take a tip credit and purported to have authority to regulate a class of employers not addressed in

176. Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607 (1944).

177. *Id.* at 616.

178. *Id.* at 608–11.

179. *Id.* at 618. "Congress did not leave it to the [WHD] to decide whether within geographic bounds defined by [the WHD] the Act further permits discrimination between establishment and establishment based upon the number of employees." *Id.* at 616.

180. *See* Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 35 (1987) ("[W]here the FLSA provides exemptions 'in detail and with particularity,' we have found this to preclude 'enlargement by implication.'" (quoting *Addison*, 322 U.S. at 617)).

181. *Perez III*, 843 F.3d 355, 360 n.2–3 (9th Cir. 2016) (O'Scannlain, J., dissenting) (quoting *Steel Seizure*, 343 U.S. 579, 585 (1952)).

182. City of Arlington v. FCC, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (quoting La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)).

183. Am. Bus Ass'n v. Slater, 231 F.3d 1, 9–10 (D.C. Cir. 2000) (Sentelle, J., concurring).

the statute.[184] By upholding the DOL's interpretation, the Ninth Circuit effectively allowed the DOL to legislate, yet this is something agencies cannot do because they lack any inherent powers.[185]

III. THE SUPREME COURT SHOULD REJECT *PEREZ II* TYPES OF "STATUTORY SILENCE" DEFERENCE AND IMPLEMENT THIS COMMENT'S PROPOSED NO-DEFERENCE RULE

The *Perez II* decision reverses *Chevron*'s presumption of congressional intent and represents a grave error by grounding its decision in § 203(m)'s silence. This Part argues that if the Supreme Court has the opportunity to hear another case like *Perez II*, it should grant certiorari and establish a no-deference rule for agency interpretations on jurisdictional questions grounded in statutory silence. In support of this new rule, Part III offers two principal justifications for why agency interpretations do not warrant deference in this context. First, this rule ensures that congressional intent remains the benchmark for *Chevron* analysis. Second, this rule prevents agency aggrandizement by requiring courts, not agencies, to determine whether a statute grants an agency interpretive authority. Lastly, this Part addresses Justice Scalia's critiques of a no-deference rule for jurisdictional questions.

A. Proposed No-Deference Rule and Justifications

When courts review an agency's interpretation of its jurisdiction arising from statutory silence, *Chevron* dictates that the agency's interpretation receives deference, so long as the agency stays within its statutory authority.[186] This Comment argues that an exception to this rule deserves merit; specifically, the Supreme Court should hold that *Chevron* deference is not applicable to jurisdictional questions in which the underlying assertion of power comes from this *Perez II* type of statutory silence. In these situations, the reviewing court should review the statute de novo in order to ascertain whether the agency possessed the statutory authority required.

This rule finds support in *Chevron*'s background presumption of congressional intent.[187] Because the agency's asserted authority rests on a

184. *See supra* Section II.B.

185. *See* Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 670 (D.C. Cir 1994) (en banc) ("[A]n agency's power is no greater than that delegated to it by Congress." (quoting Lyng v. Payne, 476 U.S. 926, 937 (1986))).

186. *City of Arlington*, 133 S. Ct. at 1868.

187. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001); *see also supra* Section I.A.

statute's silence, in the sense that it does not expressly deny or grant the power, a reviewing court should not defer to the agency interpretation. Such deference contradicts *Chevron*'s teachings because the fact that the statute does not explicitly address the proposed power means Congress could not have had an intention to delegate that decision to the agency.[188] As Judge O'Scannlain of the Ninth Circuit pointed out, a statute's silence does not always mean Congress delegated legislative authority to the agency to expand its scope; rather, the silence is best interpreted as a limit on an agency's regulatory authority.[189] This Comment's proposed rule guarantees that the judiciary decides whether the silence is just "the point where Congress decided to stop authorization to regulate."[190]

As the *Perez II* decision illustrates, deference to agency interpretations on matters of jurisdiction arising from statutory silence not only allows but also promotes agency aggrandizement.[191] If the Ninth Circuit's decision stands, the DOL will possess authority to regulate a class of employers' tip-pooling practices that Congress never intended to regulate.[192] As *Cumbie* established, Congress intended to only regulate those who do take a tip credit.[193] For employers who do not take tip credits, Congress left them free to do as they wish.[194] The *Perez II* court effectively allowed the DOL a backdoor into powers the statute did not grant. For this reason alone, the Supreme Court should adopt this no-deference rule because the threat of aggrandizement is too high, something the Supreme Court has recognized before.[195]

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188. In essence, deference in this scenario flouts the established maxim *expressio unius est exclusio alterius*—"the expression of one thing implies the exclusion of others." *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012). As is the case with the language of § 203, Justice Scalia acknowledges that "[t]he more specific the enumeration, the greater the force of the canon." *Id.* at 108. "[I]f Parliament in legislating speaks only of specific things and specific situations, it is a legitimate inference that the particulars exhaust the legislative will. The particular which is omitted from the particulars mentioned is the casus omissus, which the judge cannot supply because that would amount to legislation." *Id.* at 108 (quoting J. A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 298 (1936)).

189. *Perez III*, 843 F.3d 355, 360 (9th Cir. 2016) (O'Scannlain, J., dissenting) (citing Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 223 (2009)).

190. *Id.*

191. *See* Sales & Adler, *supra* note 13, at 1503.

192. *See supra* Section II.D.

193. *See* Cumbie v. Woody Woo, Inc., 596 F.3d 577, 581–82 (9th Cir. 2010) ("[The] FLSA does not restrict tip pooling when no tip credit is taken.").

194. *Id.*

195. *See* Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 616 (1944) ("[D]etermination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested.").

B. Justice Scalia's Criticism

Arguably the fiercest critic of a no-deference rule, Justice Scalia consistently maintained that *Chevron* deference is applicable to jurisdictional questions. This Section provides an overview of this criticism and illustrates how this Comment's no-deference rule provides a solution to this problem without raising any of the concerns Justice Scalia pointed out.

Although Justice Scalia purported to settle the issue of whether an agency receives deference on interpretations concerning its jurisdiction in *City of Arlington*,[196] the debate on the Supreme Court over this issue traces back to *Mississippi Power & Light Co. v. Mississippi* ex rel. *Moore*,[197] where Justice Brennan and Justice Scalia grappled with this issue at length.[198] Justice Scalia took aim at no-deference proposals for two reasons. First, he contended that courts lacked the ability to distinguish between jurisdictional and nonjurisdictional questions.[199] Second, deference on these questions allows courts to substitute their own policy considerations for that of the agency by manipulating the level of generality at which jurisdiction is defined.[200] Justice Scalia further reiterated this fear of judicial activism in *City of Arlington* by contending that "[s]avvy challengers of agency action would play the 'jurisdictional' card" in order to transfer interpretative authority from the agencies to the courts.[201] According to Justice Scalia, agencies must decide jurisdictional issues because "'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency."[202]

Although Justice Scalia raised several valid points, this Comment's no-deference rule preserves the overall purpose of *Chevron* without implicating any of Justice Scalia's concerns. First of all, jurisdictional questions arising

196. See City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013); see also Section I.B.

197. Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354 (1988).

198. *Compare id.* at 381 (Scalia, J., concurring) (contending "it is settled law that the rule of [*Chevron*] deference applies even to an agency's interpretation of its own statutory authority or jurisdiction") *with id.* at 386–87 (Brennan, J., dissenting) (contending "[a]gencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies").

199. *Id.* at 381 (Scalia, J., concurring) (arguing "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority").

200. *Id.* ("Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'" (citing NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 n.7 (1984))).

201. *City of Arlington*, 133 S. Ct. at 1873. "The effect [of this no-deference exception] would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts." *Id.*

202. *Id.* (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980)).

out of statutory silence do not present much difficulty for courts to identify.[203] This is because the underlying assertion of power comes from a statute's failure to expressly mention the act in question; therefore, a court could easily discern, through the normal tools of statutory construction, whether or not a statute was silent.

To illustrate this point, consider Justice Scalia's Common Carrier Act hypothetical from *City of Arlington*.[204] He provided two alternative formulations of a statute to "illustrate just how illusory the proposed line between 'jurisdictional' and 'nonjurisdictional' agency interpretations is."[205] His first formulation was: "SECTION 1. The Agency shall have jurisdiction to prohibit any common carrier from imposing an unreasonable condition upon access to its facilities."[206] His second formulation stated: "SECTION 1. No common carrier shall impose an unreasonable condition upon access to its facilities. SECTION 2. The Agency may prescribe rules and regulations necessary in the public interest to effectuate Section 1 of this Act."[207] Further, Justice Scalia presumed that the Agency promulgated a rule that included Internet Service Providers within the term "common carrier" in Section 1 of both acts.[208]

According to Justice Scalia, this example shows that the jurisdictional label is illusory because the issue can be restated as whether the agency "exceed[ed] the scope of its authority (its 'jurisdiction') [or] exceed[ed] authorized application of authority that it unquestionably has."[209] For Justice Scalia, the label of jurisdiction is irrelevant because the question is always "whether the statutory text forecloses the agency's assertion of authority, or not."[210] Whereas, Chief Justice Roberts opined that this example illustrates that *courts* must determine whether "Congress has delegated authority to the agency to issue those interpretations with the force of law."[211] Although the two disagree about whether deference is warranted, both justices have no

203. *See* Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 665 (D.C. Cir. 1994) (en banc) (explaining that the Railway Labor Act grants the NMB authority to investigate representation disputes "upon the request of either party to the dispute," but the Act is silent about whether the NMB could investigate sua sponte). The court easily identified that the agency's assertion of authority came from a statute's silence and emphatically rejected that deference was required. *Id.* at 671.

204. *See City of Arlington,* 133 S. Ct. at 1869–70.

205. *Id.*

206. *Id.* at 1869.

207. *Id.*

208. *Id.*

209. *Id.* at 1870.

210. *Id.* at 1871.

211. *Id.* at 1885 (Roberts, C.J., dissenting).

difficulty agreeing that whether Internet Service Providers fall within the purview of the statute can be characterized as a jurisdictional question.[212]

Specifically, this common carrier hypothetical falls within the first category of jurisdictional cases identified by Sales and Adler—a jurisdiction-asserting case.[213] Under either version of the statute, the Agency relies on the ambiguous term "common carrier" as evidence that Congress intended the Agency to define this term, thereby expanding its scope within the statute. Concededly, this is exactly the type of agency interpretation that warrants *Chevron* deference because the statute is ambiguous and Congress included no limiting language.[214] In addition, this Comment agrees that deference is warranted because this example does not present the same jurisdictional question as *Perez II*—one in which the assertion of jurisdiction arises out of a statutory silence.[215]

To illustrate this point, consider the following amended version of the Common Carrier Act: "The Agency shall have jurisdiction to prohibit any common carrier [that is publicly owned] from imposing an unreasonable condition upon access to its facilities."[216] In this version of the statute, the Act only addresses common carriers that are publicly owned, failing to mention whether this restriction applies to all (or privately owned) common carriers. If the Agency promulgated regulations that applied this Act's prohibition to all common carriers, including privately owned common carriers, the Agency's action would fall within the subcategory of jurisdiction-asserting cases arising out of a statutory silence.[217] In this narrow case, this Comment's proposed no-deference rule would require the court to consider whether any statutory language permits the Agency's interpretation, rather than affording *Chevron* deference.

Further, this example illustrates how courts can easily identify jurisdictional questions arising out of statutory silence. Where the first example deals with an ambiguity within the statute, normal *Chevron* deference applies; however, where the statute is silent on the proposed power, not merely ambiguous, the assertion of jurisdiction does not warrant deference. Because the assertion of power comes from the lack of any statutory ambiguity, a reviewing court need look no further than the text of the statute to determine whether this Comment's no-deference rule would apply. This Comment's rule would require *courts* to determine whether the

212. *See id.*; *see also id.* at 1869–70 (majority opinion).

213. *See* Sales & Adler, *supra* note 13, at 1503.

214. *See supra* Section I.A.

215. *See Perez II*, 816 F.3d 1080, 1090 (9th Cir. 2016).

216. *City of Arlington*, 133 S. Ct. at 1869.

217. *See* Sales & Adler, *supra* note 13, at 1506; *see also supra* Section I.C.

statute allows the agency action in this limited scenario, rather than deferring to the agency's interpretation.

Additionally, a no-deference approach in this narrow circumstance does not present the judicial aggrandizement that Justice Scalia warned against for several reasons. First, this type of jurisdictional assertion based on silence cannot be manipulated by the level of generality at which jurisdiction is defined because this type of jurisdictional claim relies on a statute being silent in the sense that Congress did not authorize an agency to act. Returning to our revised Common Carrier hypothetical, the statute only addresses common carriers that are publicly owned, yet the Agency used this statute's silence (on whether this restriction applies to privately owned carriers) as the basis for applying the Act's restriction to all carriers. This type of assertion of jurisdiction only exists in this narrow factual setting, and reviewing courts could not manipulate the first hypothetical to fit within this type of jurisdictional question.

By basing this rule on the lack of statutory text, there is no level of generality to manipulate because the statute never authorized the agency authority in the first place. In addition, the risk of judicial activism is low because this proposed rule only asks a reviewing court to use "traditional tools of statutory construction" to determine if the statute is in fact silent, per *Chevron*'s instructions.[218] Therefore, this rule comports with *Chevron*'s overall theme of congressional intent because this exception tasks the courts with determining if "Congress has directly spoken to the precise question at issue."[219] Further, as Chief Justice Roberts pointed out in his dissent in *City of Arlington*, the Constitution tasks the Judiciary with ensuring that the other branches of the government stay within their respective spheres.[220] In the *Chevron* context, this duty "means ensuring that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch."[221] By not deferring to an agency's interpretation of authority arising out of statutory silence, the Judiciary faithfully performs its intended function of guaranteeing all branches of government stay within their respective roles. Overall, a no-deference rule for jurisdictional questions arising out of statutory silence finds support in *Chevron* and its progeny and does not raise the concerns associated with a no-deference rule for all jurisdictional questions.

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218. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

219. *See id.* at 842.

220. *City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting).

221. *Id.*

CONCLUSION

If given another chance to hear a *Perez II* type case, the Supreme Court should clarify its *Chevron* jurisprudence by establishing a no-deference rule for statutory silence cases. Just as the statute forbidding dogs in a park cannot serve as authority for a Parks Department to ban other animals not listed, § 203(m) of the FLSA cannot be read to serve as authority for the DOL to regulate a class of employers not addressed in the text of the statute: those who do not take a tip credit. As the dissenting opinion in *Perez II* illustrated, this decision ignored FLSA precedent, contradicted basic teachings of administrative law, and "turn[ed] *Chevron* on its head."[222] Unfortunately, this decision presents an even more fundamental error because deference on this type of statutory silence case effectively allows an agency to *legislate*, yet only Congress possesses this power.[223]

The Supreme Court should adopt this Comment's proposed bright-line rule for statutory silence cases: *Chevron* deference is *not* applicable to jurisdictional questions in which the underlying assertion of power comes from a *Perez II* type of statutory silence. As this Comment illustrates, this rule is necessary for two reasons. First, this rule ensures that congressional intent is the benchmark for *Chevron* analysis by guaranteeing that an agency locate a statutory grant of authority before deference is accorded. The fact that a statute is silent, in the sense that it neither grants nor denies a specific power, shows a congressional intent *not* to speak about that power. Second, this rule prevents the biggest problem facing this type of jurisdictional questions: agency aggrandizement. As the *Perez II* decision illustrates, deference on this type of jurisdictional question results in agencies asserting power *ex nihilo* to regulate groups which congress never intended to regulate.

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222. *Perez II*, 816 F.3d 1080, 1094 (2016) (Smith, J., dissenting).

223. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

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