No. _____

In the
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, et al.,

Petitioners,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Magnuson-Stevens Act (MSA) governs fishery management in federal waters and provides that the National Marine Fisheries Service (NMFS) may require vessels to "carry" federal observers onboard to enforce the agency's myriad regulations. Given that space onboard a fishing vessel is limited and valuable, that alone is an extraordinary imposition. But in three narrow circumstances not applicable here, the MSA goes further and requires vessels to pay the salaries of the federal observers who oversee their operations—although, with the exception of foreign vessels that enjoy the privilege of fishing in our waters, the MSA caps the costs of those salaries at 2-3% of the value of the vessel's haul. The statutory question underlying this petition is whether the agency can also force a wide variety of domestic vessels to foot the bill for the salaries of the monitors they must carry to the tune of 20% of their revenues. Under well-established principles of statutory construction, the answer would appear to be no, as the express grant of such a controversial power in limited circumstances forecloses a broad implied grant that would render the express grant superfluous. But a divided panel of the D.C. Circuit answered yes under *Chevron* on the theory that statutory silence produced an ambiguity that justified deferring to the agency.

The questions presented are:

1. Whether, under a proper application of *Chevron*, the MSA implicitly grants NMFS the power to force domestic vessels to pay the salaries of the monitors they must carry.

2. Whether the Court should overrule *Chevron* or

at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellants below) are Loper Bright Enterprises, Inc.; H&L Axelsson, Inc.; Lund Marr Trawlers LLC; and Scombrus One LLC.

Respondents (defendants-appellees below) are Gina Raimondo, in her official capacity as Secretary of Commerce; the Department of Commerce; Richard Spinrad, in his official capacity as Administrator of the National Oceanic and Atmospheric Administration (NOAA); NOAA; Chris Oliver, in his official capacity as Assistant Administrator for NOAA Fisheries; and the National Marine Fisheries Service.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporations, and no shareholders own 10% or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Loper Bright Enterprises, Inc., v. Raimondo*, No. 21-5166 (D.C. Cir.), judgment entered on August 12, 2022;
- *Loper Bright Enterprises, Inc. v. Ross*, No. 1:20-cv-00466-EGS (D.D.C.), judgment entered on June 24, 2021.

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PETITION FOR WRIT OF CERTIORARI

Operating fishing vessels in the Atlantic is hard work. The vessel operators tend to be small, family-owned enterprises. The profit margins are tight, and the quarters onboard are tighter still. The typical vessel has room for only five or six individuals. Nonetheless, the Magnuson-Stevens Act (MSA) requires petitioners and other vessel owners to make room onboard for federal observers who can oversee operations to ensure compliance with a slew of federal regulations. That is an extraordinary imposition that few would tolerate on dry land. But without any express statutory authorization, the National Marine Fisheries Service (NMFS) has decided to go one very large step further and require petitioners to pay the salaries of government-mandated monitors who take up valuable space on their vessels and oversee their operations. That is truly remarkable, so much so that even the agency acknowledged that the power it asserted was highly controversial. In a country that values limited government and the separation of powers, such an extraordinary power should require the clearest of congressional grants. The MSA provides such a grant, but only in three narrow circumstances inapplicable here, and even then, subject to strict caps on how financially onerous the payment requirement can be for domestic vessels. In light of those clear and clearly limited authorizations, the agency's claimed power to impose payment requirements on other domestic vessels unburdened by statutory caps should have been a complete non-starter.

Instead, a divided panel of the D.C. Circuit deferred to the agency by purporting to identify silence in the statutory scheme, which it perceived as an ambiguity that called for *Chevron* deference. That is either a fundamental overreading of *Chevron* or a powerful argument for its overruling (or both, as Judge Walker observed in dissent). Either way, this Court should grant review to impose sensible limits on agency deference.

The decision below poses a dual threat to efforts to rein in agency overreach. One of the few practical constraints on agency overregulation is the need for sufficient congressionally appropriated funds to actually enforce the agency's regulations. One of the few legal restraints on agency overreach is sensible rules of statutory construction that recognize reasonable limits on agency authority. The decision below simultaneously eviscerates both constraints. It authorizes agencies to force the governed to quarter and pay for their regulatory overseers without clear congressional authorization. And it perceives ambiguity in statutory silence, where the logical explanation for the statutory silence is that Congress did not intend to grant the agency such a dangerous and uncabined authority. Whether by clarifying *Chevron* or overruling it, this Court should grant review and reverse the clear agency overreach at issue here.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 45 F.4th 359 and reproduced at App.1-37. The district court's opinion is reported at 544 F.Supp.3d 82 and reproduced at App.38-114.

JURISDICTION

The D.C. Circuit issued its opinion on August 12, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the MSA are reproduced at App.115-135.

STATEMENT OF THE CASE

A. Legal Framework

In 1976, after recognizing that "[c]ommercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation," 16 U.S.C. §1801(a)(3),[1] Congress passed and President Ford signed the MSA to "promote domestic commercial and recreational fishing under sound conservation and management principles," among other purposes, §§1801(b)(1), (3). The MSA entrusts those goals to the Secretary of Commerce, who in turn has delegated the administration of the statute to NMFS. §§1802(39), 1855(d).

The MSA divides the Nation's federal fisheries into eight regions, each of which is governed by a "fishery management council" whose members include an assortment of federal and state officials and federal appointees. §1852(b)-(c). An essential duty of each regional council is to prepare a "fishery management plan" for each of the region's fisheries. §1852(h). Regional councils also have authority to "amend"

[1] All further statutory references are to Title 16 of the U.S. Code unless otherwise noted.

those plans as is "necessary from time to time." §1852(h). After a regional council prepares a fishery management plan, or an amendment to such a plan, it must seek approval from NMFS. §1854. After NMFS reviews the plan or an amendment for consistency with applicable legal requirements, it must provide a period for public comment and eventually decide whether to approve or disapprove the proposal. §1854(a). If NMFS approves the proposal, the agency promulgates it as a final regulation. *See* §1854(b)(3).

The MSA sets forth various "required provisions" that fishery management plans "shall" contain, as well as "discretionary provisions" that they "may" contain. §1853(a)-(b). Among the required provisions, fishery management plans "*shall* contain the conservation and management measures" that are "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." §1853(a)(1)(A) (emphasis added). Among the discretionary provisions, fishery management plans "*may* require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery." §1853(b)(8) (emphasis added). The statute also contains a catch-all provision stating that plans also "may prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery." §1853(b)(14).

Space onboard a commercial fishing vessel is a scarce and precious resource. Thus, displacing someone engaged in active fishing to make way for a federal observer tasked with overseeing regulatory compliance is already an enormous imposition. Making the fishing vessels foot the bill for that imposition adds insult to injury. In light of that reality, when Congress wanted the fishing industry to cover the cost of federal observers, it has said so expressly. For example, the MSA expressly provides that the North Pacific Council—whose jurisdiction encompasses Alaska, Washington, and Oregon and some of the largest and most commercially successful enterprises, §1852(a)(1)(G)—"may … require[] that observers be stationed on fishing vessels … for the purpose of collecting data necessary for the conservation, management, and scientific understanding of any fisheries under the Council's jurisdiction," and "to pay for the cost of implementing the plan," the Council "may … establish[] a system … of fees." §1862(a). Those fees are expressly capped and "not to exceed 2 percent[] of the unprocessed ex-vessel value of fish and shellfish harvested under the jurisdiction of the Council." §1862(b)(2)(E).

Similarly, for "limited access privilege programs"—*i.e.*, programs where persons are permitted to harvest a specific quantity of the total allowable catch for the fishery, *see* §1802(26), where the need for regulatory compliance is particularly acute—the MSA provides that regional councils "shall … include an effective system for enforcement, monitoring, and management of the program, including the use of observers," and "shall … provide … for a program of fees paid by

limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities." §1853a(c)(1)(H), (e)(2). Once again, those fees are capped and "shall not exceed 3 percent of the ex-vessel value of fish harvested under any such program." §1854(d)(2)(B).

Finally, the statute understandably expresses an especial concern that authorized "foreign fishing"—*i.e.*, fishing involving foreign rather than U.S. vessels, *see* §1802(19)—not deplete offshore resources within our exclusive economic zone. Thus, for foreign fishing, the MSA provides that "a United States observer will be stationed aboard each foreign fishing vessel while that vessel is engaged in fishing within the exclusive economic zone" and that NMFS "shall impose … a surcharge in an amount sufficient to cover all the costs of providing a United States observer aboard that vessel." §1821(h)(1)(A), (4). To guard against the possibility that "insufficient appropriations" would allow foreign fishing to proceed unmonitored, the MSA also provides that the agency shall certify a cadre of other U.S. nationals to serve as observers as part of a "supplementary observer program" and "establish a reasonable schedule of fees that certified observers or their agents shall be paid by the owners and operators of foreign fishing vessels for observer services." §1821(h)(6)(A), (C).

The MSA backs these limited and express authorizations for industry-funded observers with provisions authorizing the imposition of penalties on vessels that fail to comply. In particular, the MSA authorizes "sanctions" on vessels that fail to make "any payment required for observer services provided

to or contracted by an owner or operator." §1858(g)(1)(D). And the MSA also declares it "unlawful" to "forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel … or any data collector employed by [NMFS] or under contract to any person to carry out responsibilities under this chapter." §1857(1)(L). Beyond these provisions, the MSA is silent with respect to forcing the fishing industry to pay for the cost of inspectors.

B. Factual Background

The New England Council develops fishery management plans for the fisheries in the Atlantic Ocean off the coasts of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. *See* §1852(a)(1)(A). One of those fisheries is the herring fishery.[2] Unlike the permissive authorization for industry-funded observers in the North Pacific and the mandatory authorization for limited access and foreign fishing, nothing in the MSA authorizes making vessels involved in the Atlantic herring fishery foot the bill for federal inspection efforts. As a consequence, and because NMFS has experienced budgetary shortfalls in recent years, NMFS has spent the better part of a decade attempting to develop a workaround. *See, e.g.*, 79 Fed. Reg. 8,786, 8,793 (Feb. 13, 2014) ("Budget uncertainties prevent NMFS from

[2] Although the New England Council has primary responsibility for the Atlantic herring fishery, it shares that responsibility with the Mid-Atlantic Council, whose jurisdiction covers New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina. §1852(a)(1)(A).

being able to commit to paying for increased observer coverage in the herring fishery.").

In 2013, the New England Council began developing the attempted workaround at issue here: an "omnibus amendment" to all the New England fishery management plans that would give the Council the power expressly granted in three inapplicable circumstances—*i.e.*, "the option to allow the fishing industry to pay its costs for additional monitoring, when Federal funding is unavailable." CADC.App.273[3]; *see also* 83 Fed. Reg. 55,665 (Nov. 7, 2018); 83 Fed. Reg. 47,326 (Sept. 19, 2018). That proposal drew intense opposition from over 90% of commenters. *See* 81 Fed. Reg. 64,426 (Sept. 20, 2016); Docket No. NOAA-NMFS-2016-0139-0001, http://bit.ly/2p5NO1s.

Nonetheless, the New England Council formally submitted its amendment to NMFS, which then opened a comment period before promulgating a final rule approving it. *See* 83 Fed. Reg. 47,326; 83 Fed. Reg. 55,665. In February 2020, NMFS published the final rule, thus formally establishing a standardized process to introduce forced "industry-funded monitoring"[4] across all New England fisheries in any

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[3] "CADC.App." refer to the appendix filed with the D.C. Circuit.

[4] The final rule refers to the program as an industry-funded "monitoring" program instead of an industry-funded "observer" program because "observers" are typically federally funded and perform statutorily required duties. By contrast, industry-funded "monitors" are government-approved third parties with whom vessels must directly contract, and they supplement the minimum observing required by the MSA and other statutes. But the terms "monitor" and "observer" are often used

year when certain conditions are met.[5] *See* 85 Fed. Reg. 7,414 (Feb. 7, 2020). NMFS took that action despite industry warnings that it would impose an "impossible financial burden" on small businesses. CADC.App.46. And NMFS moved ahead despite its own assessment that "[i]ndustry-funded monitoring is a complex and highly sensitive issue" due to the "socioeconomic conditions of the fleets that must bear the cost" and because "it involves the Federal budgeting and appropriations process." CADC.App.293.

As to the herring fishery in particular, the final rule creates an industry-funded monitoring program that aims to cover 50% of herring trips undertaken by vessels with either a Category A permit (authorizing them to fish in any of the Atlantic herring management areas) or a Category B permit (authorizing them to fish in those same areas except for the Gulf of Maine). 85 Fed. Reg. at 7,417. More precisely, "[p]rior to any trip declared into the herring fishery, representatives for vessels with Category A or

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interchangeably, *see, e.g.*, 50 C.F.R. §648.2 (defining "observer or monitor"), which reflects the reality that industry-funded monitors and federally funded observers perform the same basic function on fishing vessels.

[5] One such condition is that there must at least be sufficient appropriations for NMFS' training of the monitors. *See* 85 Fed. Reg. at 7,416-17; 50 C.F.R. §§648.11(g), (g)(4). NMFS recently announced that there would be insufficient funding for the 2023 fishing year, *see* NOAA Fisheries, *Atlantic Herring Industry-Funded Monitoring Program Suspended Beginning in April 2023* (Nov. 2, 2022), https://bit.ly/3G22Y2G, but this condition was satisfied in prior years, and there is no reason to think that it will not be met in future fishing years.

B permits are required to notify NMFS for monitoring coverage." *Id.* If NMFS determines that an observer is required on a particular vessel, but NMFS does not assign an observer under a federally funded program, the vessel is required to contract with and pay for a government-approved third party that provides monitoring services. *Id.* at 7,417-18. If the vessel refuses to foot the bill, it is "prohibited from fishing for, taking, possessing, or landing any herring." *Id.* at 7,418.

This industry-funded monitoring program is not cheap. In addition to taking up precious real estate onboard, NMFS has estimated that "industry's cost responsibility associated with carrying an at-sea monitor" is "$710 per day." *Id.* On an annual basis, the program is estimated to "reduce" returns-to-owner by "approximately 20 percent." *Id.*

C. Proceedings Below

1. Petitioners are four family-owned and family-operated companies that "regularly participate in the Atlantic herring fishery." App.4. In February 2020, petitioners filed suit alleging, as relevant here, that the MSA did not authorize NMFS to mandate industry-funded monitoring in the herring fishery. Petitioners moved for summary judgment, and NMFS cross-moved for summary judgment. The district court awarded summary judgment to NMFS.

The district court began by explaining that its analysis is "governed by *Chevron*." App.60. Remarkably, the court found for NMFS at step one of the framework, holding that the MSA unambiguously authorizes industry-funded monitoring in the herring fishery. The court emphasized that the statute says

that fishery management plans "may require" fishing vessels to "carr[y]" observers and that it contains two sections authorizing such plans to include other "necessary and appropriate" provisions. App.61. "Taken together," the court continued, these provisions "'vest broad authority in [NMFS] to promulgate such regulations as are necessary to carry out the conservation and management measures of an approved [fishery management plan]." App.62 (alteration omitted). The court also thought that the MSA's provision authorizing "sanctions" on vessels that fail to pay observers "provided to or contracted by an owner or operator" reinforced the idea that the statute "most certainly does not prohibit" industry-funded monitoring. App.65 (emphasis omitted).

The district court acknowledged petitioners' argument that Congress expressly addressed industry-funded observers in three circumstances, none of which implicate the herring fishery. *See* App.65-66. But the court determined that, "[e]ven if [petitioners'] arguments were enough to raise an ambiguity in the statutory text," NMFS' "interpretation" of the MSA is a "reasonable reading" of the statute "[u]nder step two of the *Chevron* analysis." App.60, 69.

2. A divided panel of the D.C. Circuit affirmed. Writing for the majority, Judge Rogers likewise applied "the familiar two-step *Chevron* framework."[6] App.5. The majority acknowledged that this Court "has not applied th[at] framework" in "recent cases,"

[6] Now-Justice Jackson heard oral argument in the D.C. Circuit, but Chief Judge Srinivasan replaced her following her nomination to this Court.

but it felt obligated to apply it because only this Court can "overrul[e] its own decisions." App.15.

Like the district court, the majority emphasized that the MSA contemplates that fishery management plans can require vessels to "carry" observers, that the statute contains two "necessary and appropriate" clauses, and that the statute includes "penalties" that "indicate that Congress anticipated industry's use of private contractors." App.7. The majority also noted that regulated parties "generally bear the costs of complying" with "regulatory requirements," and it observed that nothing in the MSA "imposes a funding-related restriction on [NMFS'] authority to require monitoring in a plan," which purportedly "suggests the [MSA] permits [NMFS] to require industry-funded monitoring" in the herring fishery. App8. But the Court did not rest its decision on step one of *Chevron*; it instead concluded that the statute is not "wholly unambiguous" and in fact leaves "unresolved" the question whether NMFS "may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan." App.6; *see* App.13 ("[T]he text does not compel [NMFS'] interpretation of the Act as granting authority by omission to require industry-funded monitoring."). The majority considered whether the MSA's specific provisions addressing industry-funded observers in three inapplicable circumstances resolved that ambiguity, but it concluded that they do not. *See* App.6-13.

The majority thus explained that "it behooves the court to proceed to Step Two of the *Chevron* analysis." App.13. Applying a "deferential" standard of review at that step, the majority held that NMFS'

interpretation of the MSA is a "reasonable" way of resolving the "silence on the issue of cost of at-sea monitoring." App.15-16.

Judge Walker dissented. In his view, "Congress unambiguously did not" "authorize [NMFS] to make herring fishermen in the Atlantic pay the wages of federal monitors who inspect them at sea." App.21. He explained that everyone agreed that Congress did not "explicitly empower" NMFS to impose such a requirement and that NMFS had failed to demonstrate that Congress had "implicit[ly]" done so. App.27.

Judge Walker first examined the MSA provision that permits fishery management plans to require vessels to carry observers. *See* App.28-29. He acknowledged that "[r]egulatory mandates … often carry compliance costs," but he stated that NMFS "has identified no other context in which an agency, without express direction from Congress, requires an industry to fund its inspection regime." App.29; *see* App.29 ("[I]t is not usual to require a regulated party to pay the wages of its monitor when the statute is silent.").

Judge Walker also found NMFS' reliance on the MSA's "necessary and appropriate" clauses unavailing. *See* App.29-34. He observed that the statutory sections surrounding those clauses "inform" the scope of NMFS' authority, and "none of the measures in those sections look anything like the funding scheme that [NMFS] contemplates here." App.31. He observed that the logic of NMFS' theory "could lead to strange results" and "undermine Congress's power of the purse." App.31-32. And he

noted that, "if Congress had wanted to allow industry funding of at-sea monitors in the Atlantic herring fishery, it could have said so," but it "instead chose to expressly provide for it in only certain *other* contexts." App.32-33. In short, he concluded, nothing authorizes NMFS to require herring fishermen to "spend a fifth of their revenue on the wages of federal monitors embedded by regulation onto their ships." App.37.

REASONS FOR GRANTING THE PETITION

The divided decision below got an exceptionally important issue exceptionally wrong. One of the few bulwarks of the citizenry against overregulation is that federal agencies must limit their regulations to those they can practically enforce given resources expressly authorized by Congress. The decision below eviscerates that practical limit by green-lighting federal agencies to make the citizenry foot the bill for enforcing their regulatory regimes in the absence of any congressional authorization for those costly and controversial practices. Congress expressly gave NMFS the power to commandeer scarce real estate on vessels by requiring federal observers to be onboard. And in three specific circumstances, it gave the agency discretionary or mandatory authority to require vessels to foot the bill. But that was not enough for NMFS. It has added insult to injury by forcing the herring fleet to pay for the costs of federal monitoring, without any express authorization from Congress. The decision below approving that remarkable intrusion—and elimination of a critical practical constraint on regulatory overreach—cannot stand.

That the decision below reached that result by applying *Chevron* only heightens the stakes and the

need for this Court's plenary review. This Court has shied away from giving agencies deference under *Chevron* in recent years for good reason. While the doctrine may have made sense in theory on the assumption that faithful application of principles of statutory interpretation would make step-one cases the rule and step-two cases the exception, *Chevron* has been a disaster in practice. Lower courts see ambiguity everywhere and have abdicated the core judicial responsibility of statutory construction to executive-branch agencies. The exponential growth of the Code of Federal Regulations and overregulation by unaccountable agencies has been the direct result.

The decision below is a case in point and an ideal vehicle for this Court's review. Silence is not ambiguity, especially when the extraordinary power of making the citizenry pay for the cost of regulatory enforcement is expressly granted in three limited and obviously inapplicable circumstances. If *Chevron* really requires deference in these circumstances, then *Chevron* can no longer be ignored, but must be overruled so that lower courts stop abdicating their responsibility to interpret statutes sensibly whenever they confront any difficulty that can be labeled an ambiguity. But whether to clarify that agencies cannot force the governed to foot the bill for agency enforcement or to reconsider *Chevron* more broadly, this Court should not allow the extraordinary decision below to stand.

I. The D.C. Circuit's Split Decision Applying *Chevron* Deference Is Indefensible.

A. Congress Did Not Silently Empower the National Marine Fisheries Service to Require Herring Fishermen to Cede 20% of Their Annual Returns to Pay the Salaries of Government Monitors.

This Court emphasized in *Chevron* that, "[i]f 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." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Here, those tools—"text, structure, history, and so forth," *Kisor v. Wilkie*, 139 S.Ct. 2400, 2416 (2019)—unambiguously confirm that Congress did not silently empower NMFS to promulgate a regulation requiring herring fishermen to fork over 20% of their revenues to pay the salaries of at-sea monitors.

Starting with the text, the MSA nowhere explicitly provides the sweeping authority that NMFS now asserts. "An agency … 'literally has no power to act' … unless and until Congress authorizes it to do so by statute." *FEC v. Cruz*, 142 S.Ct. 1638, 1649 (2022). Thus, "statutory silence, when viewed in context," is in many situations "best interpreted as *limiting* agency discretion," not creating it. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (emphasis added). That is precisely the situation here.

Indeed, the broader statutory context makes clear beyond cavil that Congress knew how to draft language that allows or requires the extraordinary

practice of forcing vessels to pay for government observers onboard and that it carefully limited that authority to three specific contexts—none of which include the herring fishery. In particular, the MSA gives the North Pacific Council the discretion (but not the obligation) to "require[] that observers be stationed on fishing vessels" and to "establish[] a system … of fees … to pay for the cost of implementing the plan." §1862(a). That express authorization for industry-funded observers in the discretion of a regional council is powerful evidence that other regional councils may not exercise the same power. And allocating that extraordinary power to the North Pacific Council alone was no accident, as the waters governed by that Council involve large commercial fishing operations that can more feasibly bear the costs. The situation in other areas is far different, with family-owned vessels operating on tight margins being far more prevalent. *Compare* NOAA Fisheries, *Alaska*, https://bit.ly/2WaalL4 (last visited Nov. 10, 2022) ("Alaska produces more than half the fish caught in waters off the coast of the United States, with an average wholesale value of nearly $4.5 billion a year."), *with* Jessica Hathaway, "Feds Declare East Coast Herring Fishery a Disaster," *National Fisherman* (Nov. 23, 2021), https://bit.ly/3fHxN1I (NOAA economist estimating value of Atlantic herring fishery at $6.77 million in 2020).

The MSA further provides that a "limited access privilege program" "shall … include an effective system for enforcement, monitoring, and management of the program, including the use of observers," §1853a(c)(1)(H), and that a regional council "shall … provide … for a program of fees paid by

limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities," §1853a(e)(2). And the MSA additionally provides that, in the context of foreign fishing, NMFS "shall impose … a surcharge in an amount sufficient to cover all the costs of providing a United States observer," but if Congress provides "insufficient appropriations" for that observer program, NMFS can establish a "supplementary observer program" with "certified observers" who abide by standards that are "equivalent to those applicable to Federal personnel," and those certified observers "shall be paid by the owners and operators of foreign fishing vessels for observer services." §1821(h)(4), (6). Those two limited but mandatory authorizations for industry-funded observers make perfect sense. When vessels are given a "limited access privilege" to operate in restricted areas with strict catch limits, both the need for observation and the reasonableness of making special-privilege holders foot the bill are at their apex. Similarly, when foreign vessels are given the special privilege to operate within our exclusive economic zone, it only makes sense for them to pay for the observers' costs instead of domestic vessels or taxpayers. *See* §1801(a)(3) (congressional finding that "massive foreign fishing fleets" contributed to overfishing and "interfered with domestic fishing efforts"). No comparable justification exists for garden-variety domestic fishing operations.

The limited and express authorization for industry-funded observers powerfully indicates that the agency lacks comparable power in other contexts. As this Court has explained, "[w]here Congress

includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) ("[I]t is fair to suppose that Congress considered the unnamed possibility and meant to say no to it[.]").

That presumption is particularly appropriate given that Congress has authorized both the permissive use of industry-funded observers (in one context) and the mandatory use of industry-funded observers (in two separate contexts). If Congress had done no more than mandate the use of industry-funded observers in two limited contexts, it might be plausible to argue that Congress never considered the possibility of granting permissive authority at all. But here, Congress considered both distinct authorities and conveyed neither in this context.

The MSA's statutory evolution powerfully reinforces that Congress' failure to grant permissive authority to make vessels pay for the government's inspection efforts outside the North Pacific was deliberate. Congress granted the North Pacific Council the discretion to establish an industry-funded observer program as part of the Fishery Conservation Amendments of 1990. *See* Pub. L. No. 101-627, §118(a), Nov. 28, 1990, 104 Stat. 4447. In the very same law, Congress enacted the MSA provision authorizing the "carrying" of observers on vessels, which supplemented the preexisting authority to include other "necessary and appropriate" provisions.

See id. §109(b)(2), 104 Stat. 4436, 4448 (codified at §1853(b)(8)); *see also* Pub. L. No. 94-265, §303(a)(1)(A), (b)(7), Apr. 13, 1976, 90 Stat. 351, 351-52. As Judge Walker explained below, "[i]t is hard to believe that, when Congress decided to *explicitly* allow industry-funding for observers in one way (fees) in one place (the North Pacific), it also decided to *silently* allow all fisheries to fund observers in any other way they choose." App.34 (Walker, J., dissenting); *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("'[N]egative implications raised by disparate provisions are strongest' where the provisions were 'considered simultaneously when the language raising the implication was inserted.'"). Indeed, if Congress provided such sweeping general authorization, it would have rendered the specific grant of authority to the North Pacific Council utterly pointless. *But see Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S.Ct. 768, 779 (2020) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

The presumption is further reinforced by the reality that, where Congress has expressly authorized industry-funded observer programs for domestic vessels, it has put strict caps on the level of fees to ensure that the financial burden of paying for government inspectors does not render the fishing enterprise uneconomical. *See* §1862(b)(2)(E) (2% cap in the North Pacific context); §1854(d)(2)(B) (3% cap in the context of limited access privilege programs). In the absence of any congressional authorization, NMFS has shown no such restraint. The levies imposed on the herring fishery extract upwards of "*20 percent*" of a commercial fisherman's net operating revenues. 85

Fed. Reg. at 7,418 (emphasis added). All this under authority purportedly derived from a statute (the MSA) enacted with a specific finding that "[c]ommercial … fishing constitutes a major source of employment and contributes significantly to the economy of the Nation," with "[m]any coastal areas … dependent upon fishing and related activities." §1801(a)(3). The notion that the MSA nevertheless permits NMFS to force herring fishermen to pay the salaries of government monitors thus strains all credulity.

Equally telling, Congress has considered multiple proposals over the course of several decades that, if enacted into law, would have provided expanded authority for industry-funded observer programs. *See, e.g.*, H.R. 5018, 109th Cong. §9(b) (2006); H.R. 39, 104th Cong. §9(b)(4) (1995); H.R. 1554, 101st Cong. §2(a)(3) (1989). But "the most noteworthy action" that Congress has taken vis-a-vis those proposals is to *reject* them. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S.Ct. 661, 666 (2022) (*NFIB*). "[W]e cannot ignore" that history, *West Virginia v. EPA*, 142 S.Ct. 2587, 2614 (2022), as it confirms that NMFS "decided to do" via regulatory action "what Congress had not" done via statute, *Ala. Ass'n of Realtors v. HHS*, 141 S.Ct. 2485, 2486 (2021) (per curiam).

The power that NMFS seeks to divine from statutory silence is quite literally extraordinary. As Judge Walker observed, NMFS "has identified *no other context* in which an agency, without express direction from Congress, requires an industry to fund its inspection regime." App.29 (emphasis added). Indeed, just as it did in the MSA, Congress ordinarily

speaks clearly when it wishes to authorize such extraordinary impositions on regulated parties. *See, e.g.*, 42 U.S.C. §7552(a) (authorizing EPA to "promulgate (and from time to time revise) regulations establishing fees to recover all reasonable costs [to EPA] associated with" a specified program). As this Court has repeatedly admonished, a "'lack of historical precedent'" is a "'telling indication'" that agency action is "beyond the agency's legitimate reach." *NFIB*, 142 S.Ct. at 666 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)).

Just so here, especially given that the lack of agency funding to actually enforce the ever-burgeoning content of the Code of Federal Regulations is one of the few practical constraints on overregulation. The prospect of an agency that lacks this practical constraint is not just ahistorical but frightening. It is bad enough that the corpus of federal regulations is so extensive that virtually everyone is in non-compliance with something. But if the agencies can saddle each of us with personal monitors that we pay and house at our expense, then there is no practical constraint on the administrative state remaining.

Even the agency recognized that arrogating to itself the power to make the regulated community pay for the government's monitoring efforts was "highly sensitive." CADC.App.293. Highly unconstitutional would be more accurate. After all, the appropriations process is a primary mechanism by which Congress prevents regulatory overreach and keeps the executive branch in check. *See, e.g.*, *U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012)

(Kavanaugh, J.) ("The Appropriations Clause is … a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers[.]"); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1825 (2012) ("The crudest method of control through appropriations is to curtail an agency's activity by reducing its budget[.]"). By interpreting the MSA in a manner that would allow it to evade that process, NMFS' theory raises grave separation-of-powers concerns. That is one more strike against the NMFS' alarming construction of the statute. This Court's precedent teaches that, "[w]hen a serious doubt is raised about the constitutionality of an act of Congress, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018) (quotation marks omitted). Petitioners' (and Judge Walker's) interpretation of the MSA does exactly that.

B. The D.C. Circuit's Application of *Chevron* Is Egregiously Wrong.

The D.C. Circuit majority's understanding of the MSA was flawed from start to finish, and its (mis)application of *Chevron* cries out for this Court's review. Although the majority ultimately concluded at *Chevron* step one that the MSA is "not … wholly unambiguous" on the question whether NMFS may require industry-funded monitoring in the herring

fishery, it nonetheless drew an "inference" that the statute conveyed this extraordinary power with clarity—and then deferred to the agency at step two for largely the same reasons. App.8. In doing so, the majority first invoked the MSA sections stating that fishery management plans may "require that … observers be carried on board a vessel," §1853(b)(8), and may include other "necessary and appropriate" provisions, §1853(a)(1)(A), (b)(14). According to the majority, "reduc[ing]" a fisherman's "annual returns by 'approximately 20 percent'" to pay the wages of at-sea monitors is merely a "necessary and appropriate" way of imposing routine "costs of compliance." App.6-8.

That position is untenable. Indeed, while the "necessary and appropriate" compliance costs associated with "carrying" a government monitor might include the marginal cost of paying for extra fuel to accommodate additional weight or the opportunity cost of ceding one of the fishing vessel's limited bunks to a non-fisherman, no ordinary person would say that the "necessary and appropriate" compliance costs of "carrying" that person entail the costs of paying his salary. That presumably explains why NMFS has never identified any example where any other agency has ever suggested such an absurdity. *See* pp.13, 21-22 *supra*; *cf. Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1484-85 (2021) (stating that statutory interpretation is an exercise in "how ordinary people understand the rules that govern them").

The problems with the majority's invocation of the MSA's "necessary and appropriate" clauses run

deeper. As this Court has explained, the other provisions surrounding a provision like a necessary-and-appropriate provision "inform[] the grant of authority by illustrating the kinds of measures that could be necessary." *Ala. Ass'n of Realtors*, 141 S.Ct. at 2488. Here, the MSA's first "necessary and appropriate" provision—which is in the section addressing what fishery management plans are required to contain—includes provisions that discuss matters like "a description of the fishery," "objective and measurable criteria for identifying when the fishery to which the plan applies is overfished," and "a mechanism for specifying annual catch limits in the plan." §1853(a)(2), (10), (15). And the MSA's second "necessary and appropriate" provision—which is in the section addressing what fishery management plans may contain—includes provisions that discuss matters like "designat[ing] zones where, and periods when, fishing shall be limited," "incorporat[ing] … the relevant fishery conservation and management measures of the coastal States nearest to the fishery," and "reserv[ing] a portion of the allowable biological catch of the fishery for use in scientific research," §1853(b)(2)(A), (5), (11). None of that is remotely analogous to paying the salaries of at-sea monitors, which only further underscores that it is a "stretch" to suggest that the MSA's necessary-and-appropriate clauses encompass that power. *Ala. Ass'n of Realtors*, 141 S.Ct. at 2488.

Furthermore, if those clauses actually extended as far as NMFS suggests, it is hard to see where the agency's power would end. As Judge Walker explained, the logic of the theory that the majority embraced below is that NMFS could "require …

fishermen to drive regulators to their government offices if gas gets too expensive" or even "requir[e] the industry to fund a legion of independent contractors to replace … federal employees" if Congress chose to "entirely defund" NMFS' "compliance" wing, App.32, since those efforts would also further the goals of fishery "conservation and management," §1853(a)(1)(A), (b)(14). Tellingly, the majority below did not dispute any of that. But the "usual rule" is that Congress "does not … hide elephants in mouseholes." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1627 (2018). And there is no reason to think that Congress deviated from that usual rule here.

The majority also suggested that the MSA's "penalty" provisions, *see* §§1857(1)(L), 1858(g)(1)(D), "further indicate that Congress anticipated industry's use of private contractors." App.7. But those penalty provisions simply reflect the reality that the provisions expressly addressing industry-funded observers explicitly contemplate private contractors. The foreign fishing provision, for instance, empowers NMFS to establish a "supplementary observer program" comprised of private contractors who "shall be paid by the owners and operators of foreign fishing vessels for observer services." §1821(h)(6)(C); *see* 50 C.F.R. §600.506(h)-(j) (referring to supplementary observers as "contractors" 18 times).

The majority tried to downplay the importance of the three instances in which Congress expressly authorized industry-funded observers, but those arguments are distinctly unavailing. The majority first suggested that the section addressing "limited access privilege program[s]" does not "speak directly"

to "observers" or "say anything about who may fund observers." App.9. But the statutory text belies that claim. As noted, §1853a expressly states that a limited access privilege program "shall … include … *the use of observers*" and that a regional council "shall … provide … for a program of *fees paid by limited access privilege holders*." §§1853a(c)(1)(H), (e)(2) (emphases added).

As for the provisions regarding industry-funded observers in the North Pacific and foreign fishing contexts, the majority tried to "distinguish[]" them from what NMFS did in the herring-fishery context by asserting that those other programs contemplate "fees" paid to the government, which in turn pays the observers—not (as here) salaries paid directly to the monitors. *See* App.10. But even setting aside that the supplementary observer program in the foreign fishing context expressly provides for a direct-to-observer payment scheme materially indistinguishable from the one at issue here, *see* §1821(h)(6)(C), that middleman-is-dispositive argument misses the forest for the trees. There is no denying that NMFS sought to achieve here the same basic objective that Congress authorized in the North Pacific and foreign fishing contexts but not in the herring-fishery context: industry funding for federal inspection efforts. Moreover, "[t]o the extent there is a meaningful difference between paying fees to the government and paying observers directly," that only highlights the "novelty" of NMFS' assertion of power, which "cuts even more against" it. App.35-36 (Walker, J., dissenting).

Finally, the majority asserted that nothing in the MSA "imposes a funding-related restriction on [NMFS'] authority to require monitoring in a plan," which "suggests the [MSA] permits [NMFS] to require industry-funded monitoring." App.8. But it is difficult to imagine an inference from statutory silence that is more obviously wrong: "Federal agencies may not resort to nonappropriation financing because their activities are authorized only to the extent of their appropriations." Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1356 (1988); *see also Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015) ("The dissent repeatedly claims that congressional silence has conferred on [the agency] the power to act. To the contrary, any such inaction cannot create such power[.]" (citation omitted)); *Chamber of Commerce of U.S. v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013) (similar); *Bayou Lawn & Landscape Servs. v. Sec'y of Lab.*, 713 F.3d 1080, 1085 (11th Cir. 2013) (similar); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) (similar). Thus, when an agency seeks "funding" outside of the appropriations process without express statutory authority, it "suggests" that the agency's action is *ultra vires* and unconstitutional.

C. If *Chevron* Tolerates the Result Below, the Court Should Overrule It or Clarify Its Limits.

As the foregoing demonstrates, a proper application of *Chevron* leaves no doubt that the decision below is plainly wrong. But if the decision below is somehow consistent with *Chevron*, rather than an overreading of *Chevron*, the Court should overrule that decision or at least clarify its limits—in

particular, by explaining that silence does not create ambiguity when the claimed power is granted expressly elsewhere in the statute. Given the manifold problems with *Chevron* recognized by members of this Court,[7] it is understandable that the Court has declined to mention *Chevron* even in cases where it is directly at issue. *See, e.g.*, *Am. Hosp. Ass'n v. Becerra*, 142 S.Ct. 1896 (2022). But, as this case well illustrates, lower courts continue to feel obligated to apply it because the Court has not yet formally overruled it. *See* App.15 (acknowledging the "recent cases in which the Supreme Court has not applied the framework," but concluding that it "does not affect" *Chevron*'s applicability). Accordingly, in an appropriate case, it remains "necessary and appropriate to reconsider … the premises that underlie *Chevron* and how courts have implemented that decision." *Pereira*, 138 S.Ct. at 2121 (Kennedy, J., concurring). This case is an appropriate case.

At a minimum, the decision below provides an opportunity to clarify that silence is not ambiguity, especially when it comes to an extraordinary power that is expressly conveyed elsewhere in the statute. This Court has made clear that courts are supposed to exhaust the statutory-construction toolkit before declaring an ambiguity that causes the tie to go the

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[7] *See, e.g.*, *Pereira v. Sessions*, 138 S.Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); *Michigan v. EPA.*, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109-10 (2015) (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150-54 (2016).

agency. *See, e.g.*, *Kisor*, 139 S.Ct. at 2415. Among the most obvious and important tools are the canons against superfluity and *expressio unius est exclusio alterius*, both of which strongly indicate that silence about the authority to make vessels pay for federal observers outside the narrow contexts where Congress has expressly authorized the practice is no ambiguity. It is a clear indication that the agency lacks that power. That would seem to be particularly clear in a context like this, where even the agency recognizes that the power expressly conferred in limited circumstances is "highly sensitive." CADC.App.293.

But if *Chevron* really supports the result below, then it is no longer sufficient for this Court to ignore *Chevron*. Whatever theoretical benefits might have been perceived with *Chevron* when it was decided, decades of practice have exposed its many flaws. To begin with, *Chevron* "wrests from Courts the ultimate interpretative authority to 'say what the law is'" and places it in the executive's hands. *Michigan*, 576 U.S. at 761 (Thomas, J., concurring). When a law is truly unambiguous, there is little need for statutory construction. The whole business of statutory construction concerns statutory text that at least one of the litigants perceives to be ambiguous. Thus, a doctrine that defers to the executive at the first sign of ambiguity is nothing short of an "abdication of the judicial duty." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

Moreover, precisely because the judiciary is weakened under *Chevron*, the doctrine also encourages the executive branch's aggrandizement at the expense of the judiciary, Congress, and the

citizenry. It is no accident that the Code of Federal Regulation has burgeoned during the *Chevron* era. It is far easier to gin up ambiguity in a statute than it is to run the gauntlet of bicameralism and presentment. *Compare Ramos v. Louisiana*, 140 S.Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part) ("Both by design and as a matter of fact, enacting new legislation is difficult."), *with* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 33-34 (2017) (sampling over 1,000 cases and concluding that courts of appeals find ambiguity at *Chevron* step one 70% of the time). Worse still, it is far harder for Congress to enact new legislation when one party or the other can rely on their friends in the executive branch to fix the problem without the hassle and accountability that comes with actually legislating.

As bad as *Chevron* has been for the judiciary and the Congress, the real loser has been the citizenry. At one level, that is obvious. In a liberty-loving Republic, one would expect the rule to be that, when there is doubt about whether the executive has authority over the governed, the tie would go to the citizenry. But *Chevron* quite literally erects the opposite rule for breaking not only ties, but anything that can be fairly deemed ambiguous. The difficulties for the citizenry take more subtle forms as well. It is perhaps a tolerable fiction that the citizenry can master the various provisions of the United States Code. But "[u]nder *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess

whether the statute will be declared 'ambiguous' (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed 'reasonable.'" *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

Nearly four decades of judicial experience with *Chevron* have demonstrated that courts are incapable of applying its two-step *Chevron* framework in a consistent manner. As Justice Kavanaugh has explained, "the fundamental problem … is that different judges have wildly different conceptions of whether a particular statute is clear or ambiguous." Kavanaugh, *Fixing Statutory Interpretation*, at 2152; *see also* Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 817 (2010). Many judges find ambiguity immediately and engage in "reflexive deference" to the agency. *Pereira*, 138 S.Ct. at 2120 (Kennedy, J., concurring). In stark contrast, other judges may literally never find ambiguity. *See, e.g.*, Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017) ("I personally have never had occasion to reach *Chevron*'s step two in any of my cases[.]"). Thus, while *Chevron* might make theoretical sense as a doctrine reserved for a narrow band of hopelessly ambiguous statutes, in practice, courts have not even been able to agree on whether a given statute is ambiguous. This case is a perfect example of this dynamic: The district court thought that the statute unambiguously favored NMFS; the D.C. Circuit majority found it ambiguous and so

deferred to NMFS; and Judge Walker thought that the statute unambiguously favored petitioners.

In sum, the decision below vividly illustrates that *Chevron* is overdue for either a reboot or an overruling. Simply ignoring it will just lead to more problematic results like the decision below. Thus, as Justice Gorsuch recently emphasized: "No measure of silence (on this Court's part) and no number of separate writings (on my part and so many others) will protect [Americans]. At this late hour, the whole [*Chevron*] project deserves a tombstone no one can miss." *Buffington v. McDonough*, 2022 WL 16726027, at *7 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from the denial of certiorari).

II. This Case Is An Ideal Vehicle To Resolve Exceptionally Important Issues.

This case is profoundly important on multiple levels. As NMFS has acknowledged (with considerable understatement), the action that it took here is "highly sensitive" and "controversial," including because "it involves the Federal budgeting and appropriations process" and because numerous participants in the herring fishery "cannot afford" to pay for mandatory at-sea monitors, CADC.App.293, 411, which could cost fisherman upwards of 20% of their net operating revenue, App.4. That kind of draconian financial burden is difficult for even the largest companies to bear, but it is especially crushing for small or family-owned businesses, whose futures are now in peril. And NMFS has not limited this extraordinary burden to the herring fishery, but imposed it on several other fisheries—an injustice that even Hollywood has noticed. *See* 50 C.F.R.

§§648.11(g)(5), 648.87(b); *see also CODA* (Vendôme Pictures & Pathé Films 2021) (referencing observers in the New England groundfish fishery). This case thus is indisputably consequential to the fishing industry, which (as Congress has expressly found) "contributes significantly" to the national economy. §1801(a)(3).

But the importance of this case is by no means limited to NMFS or the fishing industry. Courts and litigants alike have an undeniable interest in whether agencies can force them to fund enforcement efforts and on the current state of *Chevron*, which applies to countless statutes involving the entire alphabet soup of federal agencies. Virtually every agency has some residual "necessary and appropriate" clause akin to the one invoked here. "[I]n the field of federal administrative law, Congress has enacted numerous statutes authorizing agency action that is 'necessary and appropriate' to a certain end." *Al-Bihani v. Obama*, 619 F.3d 1, 25 n.11 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc). Accordingly, if agencies have *carte blanche* to leverage that language to engage in fundraising whenever congressionally appropriated funds run short and get away with it under *Chevron*, the threat to the separation of powers will grow only more pronounced.

This case is an ideal vehicle to resolve these issues. Although other cases have challenged NMFS' efforts to impose industry-funded monitoring, they have fizzled on procedural grounds before arriving at this Court. *See, e.g.*, *Goethel v. Pritzker*, 2016 WL 4076831 (D.N.H. July 29, 2016), *aff'd sub nom. Goethel*

v. Dep't of Commerce, 854 F.3d 106 (1st Cir.), *cert. denied*, 138 S.Ct. 221 (2017). This case suffers from no such defects. To the contrary, both the district court and the D.C. Circuit thoroughly analyzed the relevant statutory provisions in decisions that collectively exceeded 120 pages. And both of those decisions relied exclusively on *Chevron*. *See* App.5 (D.C. Circuit explaining that "[t]he court applies the familiar two-step *Chevron* framework."); App.60 (district court explaining that its analysis is "governed by *Chevron*").

Moreover, the fact that this case arises from the D.C. Circuit makes certiorari here all the more appropriate. *Chevron* may have "fallen into desuetude" in some circles, but that has not occurred in the D.C. Circuit. *Buffington*, 2022 WL 16726027, at *7 (Gorsuch, J., dissenting from the denial of certiorari); *see* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1301-02 (2018) (surveying 42 federal appellate judges and explaining that "[m]ost of them are not fans of *Chevron*, with the significant exception of the judges we interviewed from the D.C. Circuit, the court that hears the most *Chevron* cases"). Moreover, even in circuits that sometimes ignore *Chevron*, a panel will revive it occasionally to duck responsibility for resolving a particularly nettlesome question. Like *Lemon v. Kurtzman*, 403 U.S. 602 (1971), before it, *Chevron* is a "useful monster" that "is worth keeping around." *Lamb's Chapel v. Central Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring). In all events, the D.C. Circuit is where the action is—home to "the vast

majority of challenges to administrative agency action," *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 535 n.14 (1978)—and there, *Chevron* is alive and well, *see* Kavanaugh, *Fixing Statutory Interpretation*, at 2153 (explaining that the D.C. Circuit encounters *Chevron*'s problems "all the time" in its "many agency cases" and that they have "significant practical consequences"). There is simply no substitute for granting review either to stop the overreading of *Chevron* or to start its overruling.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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