No. 22-451

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

BRIEF AMICUS CURIAE OF THE BUCKEYE INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONERS

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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 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—up to 20% of the vessel's revenue—for the salaries of the monitors they must carry. Under well-established principles of statutory construction, the better answer is no, as the express grant of such a controversial power in limited circumstances forecloses a broader 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 justifying deference.

The questions presented are:

1. Whether, under a proper application of *Chevron*, the MSA implicitly grants the 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 powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

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INTEREST OF *AMICI CURIAE*

This *amicus* brief is submitted by The Buckeye Institute and the National Federation of Independent Business.[1] The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is located directly across from the Ohio Statehouse on Capitol Square in Columbus, where it assists executive and legislative branch policymakers by providing ideas, research, and data to enable the lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

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[1] Counsel provided the notice required by Rule 37.2, albeit within 10 days of the due date for the filing of this brief. All parties consented to the filing. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

Through its Legal Center, the Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, the Buckeye Institute files lawsuits and submits amicus briefs.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C. and all fifty states. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their business. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files amicus briefs in cases that will impact small businesses. NFIB joins as an amicus in this case for two primary reasons: 1) to speak on behalf of the thousands of small businesses concerned with agency aggrandizement of power through *Chevron* deference, and 2) the Rule will have detrimental effects and impose severe financial burdens on small and independent fisheries.

SUMMARY OF ARGUMENT

In his First Letter from a Farmer in Pennsylvania, John Dickinson wrote:

> If the British Parliament has a legal authority to issue an order that we shall furnish a single article for the troops here, and to compel obedience to that order, they have the same right to issue an order for us to supply those troops with arms, clothes, and every necessary, and to compel obedience to that order also; in short, to lay any burdens they please upon us. What is this but the taxing of a certain sum and leaving us only the manner of raising it?

John Dickinson, Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies (Dec. 3, 1767), https://tinyurl.com/4rjjuu9h. *Plus ça change, plus c'est la meme chose.* What the British sought to do to the American colonists, the National Marine Fisheries Service ("NMFS") now seeks to do to Atlantic herring fishing vessels and the owners.

This case presents a paradigmatic and problematic example of agency aggrandizement. The NMFS is part of the National Oceanic and Atmospheric Administration ("NOAA") and has an Office of Law Enforcement ("OLE") which "conducts enforcement activities through patrols both on and off the water [and] criminal and civil investigations." Office of Law Enforcement, Nat'l Oceanic &

Atmospheric Admin., *About Us*, NOAA Fisheries, https://tinyurl.com/NOAAabout (last visited Dec. 13, 2022). As part of a law enforcement body, NMFS claims the power to require herring fishing boats in the Atlantic Ocean to carry, berth, *and pay* monitors to insure, among other things, that catch limits are observed. The Magnuson-Stevens Act ("MSA") does not expressly covey such a power, so the first question that must be answered is whether the agency has the power at all. There is no basis for such a conclusion in the statute. Without any statutory support, *Chevron* deference to the agency's interpretation is unwarranted.

Moreover, the agency's claimed power raises a number of serious constitutional concerns. As Judge Walker noted in his dissent below, the agency's action end runs the appropriations process. See Pet'r's App. at 22-24. Second, it raises Third Amendment concerns because the small business herring fishermen must carry, berth, and feed the monitor on a small boat over a period of several days. Finally, the agency action raises Fourth Amendment concerns. These constitutional considerations counsel against allowing one agency to open the door for other federal agencies to follow.

ARGUMENT

I. Introduction

This case offers the Court an opportunity to clarify the limits of *Chevron* deference. *Amici* will show that the deference given to the NMFS by the D.C. Circuit was unwarranted. As Petitioners note, even the agency recognized that its action raised "a

complex and highly sensitive issue," with significant implications attributable to the "'socioeconomic conditions of the fleets that must bear the cost' and because 'it involves the Federal budgeting and appropriations process.'" Pet. at 9 (quoting C.A. App. at 293). The agency's own concerns should have set off alarm bells in the minds of the D.C. Circuit.

In this brief, *Amici* will first show that the MSA does not support the agency's claim. Given the lack of statutory support, the D.C. Circuit should not have applied *Chevron* deference. Had the D.C. Circuit applied the correct analysis, the NMFS would have lost, and the follow-on consequences of the agency action would have been averted. *Amici* will point to several of the most noteworthy constitutional concerns raised by the NMFS rule.

II. The MSA's statutory "silence" did not empower the NMFS to force the regulated parties to pay the salaries of government mandated bureaucrats living on the boats.

In *Chevron*, the Court said, "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." *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). The use of two different terms, "silence" and "ambiguity," demonstrates the involvement of two distinct concepts. In other words, "a statutory silence is not in itself an ambiguity." Jonathan Adler & Nathan Sales, *The Rest Is Silence*: Chevron *Deference, Agency*

Jurisdiction, and Statutory Silence, 2009 Univ. of Ill. L. Rev. 1497, 1499 (2009). Thus, the analyses for agency actions based on statutory silence and statutory ambiguity are not interchangeable.

Where a case involves statutory silence regarding the claimed agency authority, the first question must be whether Congress intended to empower the agency to act in the first place. This *Chevron* "step zero" inquiry "must be made in deciding whether courts should turn to the Chevron framework at all." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 836 (2001). "Agencies only have authority to make policy determinations if Congress has delegated them that power, and the issue . . . is precisely whether that delegation has taken place." Adler & Sales, *supra*, at 1502. After all, "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander* v. *Sandoval*, 532 U.S. 275, 291 (2001); see also *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

As Judge Walker noted in his dissent, "[b]oth sides agree that nowhere in the Magnuson-Stevens Act does Congress explicitly allow the fisheries Service to require the Atlantic herring fishermen to fund an at-sea monitoring program." Pet'r's App. at 27. The absence of specific statutory authority alone is dispositive. As the Court has held, "[A]dministrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally

to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp*., 533 U.S. 218, 226-27 (2001). Although the Court said that such a delegation can be shown "in a variety of ways," *id.*, nothing indicating such a delegation appears in the MSA.

Congress did not empower the NMFS to require Atlantic herring fishery vessels to carry, berth, and feed monitors. To the extent that the MSA allows the North Pacific Council 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," the statute expressly covers only the Pacific Ocean. 16 U.S.C. § 1862(a)(1)-(2). Another statutory provision that creates a funding monitoring program applies by its terms only to foreign fishing vessels. 15 U.S.C. § 1821(h)(4).

Contrary to the majority below, the maxim *expressio unius est exclusio alterius* controls. See generally Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 107-11 (2012) (discussing the "Negative-Implication Canon"). The "doctrine properly applies only when the [thing specified] can reasonably thought to be an expression of *all* that shares in the grant or prohibition involved." *Id.* at 107 (emphasis in original). The doctrine properly applies here. The specification of North Pacific in § 1862 means just that. It does not mean the North Atlantic or Gulf of Mexico. See *United States* v. *Giordano*, 416 U.S. 505 (1974) (unanimously concluding that a statute expressly stating only "the Attorney General, or any Assistant Attorney general

specifically designated by the Attorney General" could authorize a wiretap application excluded the Attorney General's executive assistant from doing so). Without a more direct authorization from Congress, NMFS cannot go as far as it has here.

Reliance on broader grants of agency authority cannot make up for the lack of specific authorization. The NMFS is authorized to:

> 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 date necessary for the conservation and management of the fishery.

16 U.S.C. § 1853(b)(8). Carrying an observer is one thing, paying for the privilege of doing so is another entirely. The "necessary and appropriate" clauses in the MSA likewise provide only general authority and do not "look anything like the funding scheme that the fisheries Service contemplates here." Pet'r's App. at 31 (discussing 16 U.S.C. §§ 1853(a)(1)(A), (b)(1)).

III. If allowed to stand, the NMFS final rule promises constitutional confusion.

If allowed to stand, the NMFS final rule will only encourage other federal agencies to cure their financial woes by requiring regulated entities to fund their oversight. In addition, the agencies could require regulated entities to house and feed regulators in the premises of regulated entities.

A. The NMFS final rule is inconsistent with federal appropriations law.

The Constitution provides, "All bills for raising Revenue shall originate in the House of Representatives." U.S. Const., art. 2, § 7, cl. 1. It is beyond cavil that the NMFS is engaged in raising money to fund its program. In doing so, it is circumventing the limits imposed by Congress and the appropriations process. See Pet'r's App. at 23 n.11 (quoting Fisheries of the Northeastern United States Atlantic Mackerel, Squid, and Butterfish Fisheries: Amendment 14, 79 Fed. Reg. 10,029, 10,038 (Feb. 24, 2014) ("Without industry funding, 'increased observer coverage levels would amount to an unfunded mandate, meaning regulations would obligate [the Fisheries Service] to implement something it cannot pay for.'")). That end run around the appropriations process will cost the fisheries "more than $700 per day and could reduce financial returns to the fishermen by twenty percent." Pet'r's App. at 24.

Moreover, the NMFS is not simply laying its hands on private funds, it is putting them to use without the benefit of a congressional appropriation. That violates federal fiscal law: "[A] officer or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3002(b). Further, agencies are limited to spending the funds that Congress appropriates for them. 31 U.S.C. § 1341(a)(1) ("[A]n officer or employee of the United States Government . . . may not—(A) make or authorize an expenditure or obligation exceeding an amount

available in an appropriation or fund for the expenditure or obligation.").

Agencies attempting to appropriate money without regard to Congress's appropriation powers set forth in the Constitution threaten to upend the separation of powers. "The accumulation of all powers, legislative, executive, and judiciary, in the very same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 322 (Madison) (Easton Press ed., 1979). The separation of powers is "not simply an abstract generalization" but is instead "woven throughout the Constitution." *INS* v. *Chadha*, 462 U.S. 919, 946 (1983) (citation omitted). Moreover, it has been said that without the separation of powers, our Bill of Rights would be "worthless." *Morrison* v. *Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting).

Congress must not only approve the raising of revenue, but also the spending of funds raised. See U.S. Const. art. I, §§ 7, 9. Under the final rule, the NMFS is both raising and spending funds by requiring the fisheries to pay the costs and salaries of the required monitors. If agencies can raise and spend funds without congressional approval, Congress's ability to restrain their activities will suffer. And the people will lose their ability to hold members of Congress responsible for their use of the exclusive appropriation and spending power vested in them. See *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting). To reaffirm the separation of powers, this Court should grant the petition and reaffirm that it is Congress, not the agencies, that approves the raising and spending of public monies. See *Cummings* v. *Premier Rehab Keller, P.L.L.C.,* 142 S. Ct. 1562, 1576 (2022)

(Kavanaugh, J., concurring) (using the Constitution's separation of powers to prevent one branch of government from intruding on Congress's lawmaking powers).

The $700 per day wage charge, which causes reduced net revenues, is different from the ordinary compliance costs imposed by a federal regulation. As Judge Walker explained, "[T]here is no inherent, or even intuitive, connection between paying a monitor's wage and providing him passage." Pet'r's App. at 29. Regulatory costs are generally internalized as part of the cost of doing business. They do not include paying the salaries of federal regulators. Moreover, "the Fisheries Service has identified no other context in which an agency, without express direction from Congress, requires an agency to fund its inspection regime." Pet'r's App. at 29. The novel nature of the agency action in this case, as pointed out by Judge Walker below, is further reason for this Court to grant the writ of certiorari.

As Judge Walker notes, the NMFS requires herring fishery vessels to bear the cost because it cannot afford to do so out of its appropriated funds. Pet'r's App. at 30. In the 17th century, King James I sought to raise revenue without the participation of Parliament. The King's representative, Lord Chancellor Ellesmere, invoked royal prerogative and suggested that "in cases in which there is no authority and precedent," the judiciary should "leave it to the King to order it according to his wisdom." Case of Proclamations (1611) 77 Eng. Rep. 1352, 1353 (K.B.). Chief Justice Coke rejected that argument,

explaining, "[T]he King cannot change any part of the common law, nor create any offense by his proclamation, which was not an offense before, without Parliament." *Id*. So, too, the NMFS cannot act without Congress, and its effort to do so should be declared "utterly against Law and Reason, and for that void." See Philip Hamburger, *Law and Judicial Duty* 202 (2008).

The threat to the Constitution's separation of powers stemming from agencies establishing their own appropriations procedures independent of Congress and the novel nature of the agency action in this case, as noted by Judge Walker below, are important reasons for this Court to review the D.C. Circuit decision.

B. The NMFS Final Rule borders on an unconstitutional quartering of federal agents on private property.

The Third Amendment to the Constitution states, "No soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner prescribed by law." U.S. Const., amend. III. The Petitioners have not explicitly pled a violation of this amendment, but the NMFS violates all the principles upon which the amendment rests.

The forcible billeting or quartering of government agents has long been a civilian concern. King Henry II's London Charter of 1155 provided "that within the walls no one shall be forcibly billeted, or by assignment of the marshal." William Sutton

Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of* Soldiers, 124 Mil. L. Rev. 195, 196 (1989). The New York Assembly's 1683 Charter of Libertyes and Privileges read, "Noe freedman shall be compelled to receive any Marriners or Souldiers into his house and there suffer them to Sojourne, against their willes provided Alwayes it be not in time of Actuall Warr within this province." *Id.* at 200 (citation omitted).

But, in 1756, rather than appropriating sufficient funds to pay for housing troops in the American colonies, "Parliament passed a quartering act requiring the colonists to bear the costs of quartering and supplying British troops for the French and Indian War." James P. Rogers, *Third Amendment Protections in Domestic Disasters*, 17 Cornell J.L. & Pub. Pol'y 747, 752 (2006).

"The colonists deeply resented the financial burden of maintaining the British Army and the abuses to their persons, properties, and liberties that had resulted from the presence of British soldiers in their homes and cities. At the onset of the Revolution this popular resentment found expression in the first Continental Congress's Declaration and Resolves of 1774." Fields, *supra*, at 201 (citing Charles Tansill, *Documents Illustrative of the Formation of the union of American States* 1 (1927)). Subsequently, in the Declaration of Independence, the colonists declared as two of the causes of their separation from the British Crown, the King's practice of "send[ing] hither swarms of Officers to harass our people and eat out their

substance" and "Quartering large bodies of armed troops among us."

While "many scholars have questioned whether the Third Amendment is largely 'obsolete,' in regard to modern-day concerns," this case shows that the courts still need to be vigilant against infringement upon the values underlying the amendment. Samantha A. Lovin, *Everyone Forgets About the Third Amendment: Exploring the Implications of Third Amendment Case Law of Extending its Prohibitions to Include Actions by State Police Officers,* 23 Wm. & Mary Bill Rts. J. 529, 530 (2014).

As Joseph Story noted, "[T]he Third Amendment's plain object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all *civil* and military intrusion." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1893 (1833) (emphasis added). He explained, "the billeting of soldiers in time of peace upon the people has been a common resort of arbitrary princes, and is full of inconvenience and peril." *Id.*

In 1982, the Second Circuit found that the Third Amendment is incorporated against the States through the Fourteenth Amendment. *Engblom* v. *Carey*, 677 F.2d 957, 961 (2d Cir. 1982). The case involved the housing of National Guard members, serving under a state call, in a state prison's staff housing building after the prison guards went out on strike. *Id.* at 958-61. The court grounded the Third Amendment in the assurance of "a fundamental right

to privacy." *Id.* at 962. In addition, the court held that the "property-based privacy interests protected by the Third Amendment are not limited solely to those arising out of fee simple ownership but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others." *Id.*[2]

The Petitioners' boats may not be land-based houses, but they are Petitioners' houses nonetheless. Their fishing trips last 3-4 days at a time. The fishermen eat and sleep in the boats' close living quarters. Those living quarters typically house five or six persons in a typically very small cabin. See Pet. at 1. The sleeping berths are narrow, and with an NMFS enforcement officer on board, the fishermen may have to "hot bunk" or double up in those bunks to accommodate the extra passenger. Accordingly, the fishermen may not only have to work with the federal agents, they may have to sleep with them as well.

While the Third Amendment speaks of "soldiers," its underlying principles are not so limited.

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[2] Judge Kaufman concurred in part and dissented in part. He objected to the majority's expansive definition of house but concurred in the conclusion that the protection of the Third Amendment was incorporated against the states, and that its protection is grounded in a privacy interest. *Id.* at 966 (Kaufman, J., concurring in part and dissenting in part). He explained, "The Third Amendment embraces aspects of liberty and privacy that have justified the application of the Fourth Amendment's prohibition against unreasonable searches and seizures to the states." *Id.* at 967 (Kaufman, J., concurring in part and dissenting in part).

Here, the NMFS' federal law enforcement officers have the authority to pursue criminal matters. They "enforce[e] domestic laws and support [] international treaty requirements[.]" Office of Law Enforcement, *About Us*, *supra*. The Office of Law Enforcement uses information gathered from NMFS "observers" in its prosecutions.

Furthermore, one might be tempted to regard the Third Amendment as useless because of the Fourth Amendment. It is true that the Fourth Amendment's ban on "unreasonable searches and seizures" could "render the Third Amendment's proscription redundant were it merely protecting individuals against having their homes seized by soldiers." Lovin, *supra*, at 543-44 (citation omitted). But quartering is fundamentally different from a mere seizure. "[T]he Founders used the word 'quartering' to expansively refer to a practical and substantial intrusion that threatened the legitimacy of government and the rule of law . . . soldiers [were] being used to escort the 'exciseman' or the 'Sheriff or Constable' into homes to enforce the law. Josh Dugan, Note, *When is a Search Not a Search? When It's a Quarter: The Third Amendment Originalism, and NSA Wiretapping*, 97 Geo. L. J. 555, 558 (2009). In the instant case, not only have the federal officers seized a portion of Petitioners' boats, but they have also forced Petitioners to feed, house, and pay the wages of the federal officers.

The Petitioners have not asked this Court to determine that the NMFS has violated the Third Amendment, but the Court should consider the values

and principles underlying the Third Amendment as it addresses the NMFS' unprecedented federal quartering of its officers in the narrow confines of Petitioners' floating houses. If the NMFS can require fishermen to house, feed, and pay monitors for several days, what stops any other federal agency from doing so? Congress has called for the hiring of some 87,000 new IRS agents, some of whom could become armed enforcement officers. See Grover Norquist, *How many of Biden's new IRS agents will be packing heat—and how many of us will they target?*, New York Post (Aug. 16, 2022), https://tinyurl.com/BidenIRS. Could the IRS call for housing some of these agents in the spare bedrooms of uber-wealthy and other taxpayers working out of their homes, with a directive to feed and pay them, to monitor tax compliance?

To the extent that the interests protected by the Third Amendment are grounded in a right to privacy in one's home, whether at land or sea, it should make little difference whether the government functionary being quartered is a soldier, a NMFS enforcement officer, observer or monitor, or an IRS agent. All are equally intrusive. The NMFS final rule offends against and undermines the fundamental values undergirding the Third Amendment.

C. The NMFS final rule infringes on rights protected by the Fourth Amendment.

The Fourth Amendment to the Constitution states, in part, "The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. While an inspection need not be supported by probable cause, an inspection generally does not continue for several days much less call for berthing, feeding, and payment. The final rule is unreasonable.

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013). The protection given to the home extends to the curtilage surrounding the home. *Collins* v. *Virginia*, 138 S. Ct. 1663, 1670 (2018). That protection is intended to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo* v. *United States*, 533 U.S. 31, 34 (2001).

Similarly, the Court has held that, when police attached a GPS tracking device on a private automobile without a warrant and used that device to monitor the vehicle's movements, they conducted a search. *United States* v. *Jones*, 565 U.S. 400 (2012). The Court explained that "[t]he Government['s] physical[] [occupation of] private property for the purpose of obtaining information" was a search. *Id*. at 949.

Viewed in that light, the NMFS final rule intrudes into space that deserves protection. The fishing boats are the homes of the fishermen for the time they are out. The NMFS final rule "attaches" people to the boat without any showing of suspicion.

IV. This case presents an excellent vehicle for the Court to address the issues presented because it demonstrates how far the Government will go if it can rely on *Chevron* deference.

As noted above, the agency recognized that its action raised "a complex and highly sensitive issue," with significant implications attributable to the "'socioeconomic conditions of the fleets that must bear the cost' and because 'it involves the Federal budgeting and appropriations process.'" Pet. at 9 (quoting C.A. App. at 293). The agency further saw that, if it could not shift the cost to the fishermen, it could not fund the program. Pet'r's App. at 23 n.11. The agency went ahead, nonetheless.

Professor Christopher Walker suggests two reasons why. First, through a survey of agency officials at six federal agencies and two independent agencies, Walker found that agency rule drafters were very aware of *Chevron*. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stanford L. Rev. 999 (2015). Of 128 respondents, 94% knew of the *Chevron* doctrine and 90% used it when drafting regulations. *Id*. at 1061-62. Walker suggests, "[W]hen rule drafters indicate that they 'use' administrative law doctrines when interpreting statutes, it could mean that they are more or less aggressive in their interpretive efforts, depending on which deference standard applies." *Id*. at 1063.

Second, agency aggressiveness is frequently rewarded. Walker and Kent Bennett reviewed "every

published circuit court decision that cite[d] *Chevron* deference from 2003 to 2013 . . . ." Christopher J. Walker, *Lawmaking Within Federal Agencies and Without Judicial Review*, 32 J. Land Use & Env't L. 551, 554 (2017). They found that, when courts apply *Chevron* deference, the agency wins 77.4% of the time. *Id*. The agencies won 93.8% of the time "when courts found the statute ambiguous and thus assessed the agency's interpretation for reasonableness." *Id*.

In the Administrative Procedure Act, Congress tasked the courts with the responsibility to "decide all relevant questions of law [and] interpret constitutional or statutory provisions . . . ." 5 U.S.C. § 706. Creating ambiguity to give agencies such power effectively gives the agencies a lawmaking function reserved to Congress. In addition, for the courts, "[t]here is nothing so liberating . . . as the discovery of an ambiguity." Raymond Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 316 (2017). Judge Kethledge further notes, "[T]he idea that most statutes are badly written is a myth." *Id*. at 320. As a result, "statutory ambiguities are less like dandelions on an unmowed lawn than they are like manufacturing defects in a modern automobile: they happen, but they are pretty rare, given the number of parts involved." *Id*.

This case presents the Court with an opportunity to rein in a rogue agency that has been abetted by a court that rushed to find a statutory ambiguity.

V. The burden from overregulation crushes small businesses.

The NMFS final rule is another oppressive governmental burden on top of a crushing load of cumbersome and excessive regulations on small entities.

The sheer amount of federal regulation is impossible to follow. By one account, the Code of Federal Regulations now spans more than 180,000 pages. *Buffington* v. *McDonough*, 143 S. Ct. 14, 20 (2022) (Gorsuch, J., dissenting from denial of certiorari). Each year, the agencies add between "three thousand to five thousand final rules." *West Virginia* v. *E.P.A.*, 142 S. Ct. 2587, 2619 n. 2 (2022) (Gorsuch, J., concurring) (quoting Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 Geo. Mason L. Rev. 683, 694 (2021)).

Historically, overregulation has imposed significant costs on the business community, with small businesses disproportionately bearing the brunt of these costs. A 1995 report found that businesses with over 500 employees spent $2,979 per employee on regulatory costs in 1992, while businesses with fewer than 20 employees spent $5,532 per employee on regulatory costs in the same year. Thomas D. Hopkins, *Profiles of Regulatory Costs* 20 (1995), https://bit.ly/3URWXsY. Recently, this number exploded. As of 2014, businesses with fewer than 50 employees spent $11,724 in regulatory costs per employee per year. W. Mark Crain & Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy,*

Manufacturing and Small Business 1 (2014), https://bit.ly/2uJZgUz. Meanwhile, medium sized firms spend only $10,664 per employee per year, and large firms spend less than $10,000 per employee per year. *Id*.

Overregulation itself is a significant obstacle to the success of small businesses. Every four years, the NFIB Research Center surveys small businesses to determine their most important concerns. In 2020, small businesses ranked "Unreasonable Government Regulations" as their 6th biggest problem, with 19% labelling it "critical." NFIB Research Center, *Small Business Problems and Priorities* 9 (2020), https://bit.ly/3uJQE04. The "Cost of Government Required Equipment/Procedures," like the monitors required by the NMFS final rule, ranked 39th. *Id.* at 10. For context, small business ranked these concerns ahead of operational issues like sales, employee turnover, and marketing.

CONCLUSION

For the reasons stated in the Petition and this *amicus* brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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