No. 22-451

In the Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL., *Petitioners,*

v.

GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL.

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

BRIEF FOR INDEPENDENT WOMEN'S LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

Treatises

Other Authorities

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The court of appeals in this case held that a federal agency may require local fisheries to pay the wages of monitors that the agency requires them to hire, despite an absence of statutory text authorizing such charges. Although the statute governing the fisheries is at best silent on the matter—and, when read as a whole, confirms that Congress did *not* intend Atlantic fisheries to be charged such fees—the court of appeals deferred to the plan adopted by the National Marine Fisheries Service (Service) under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

That kind of unbridled deference to the executive cannot be squared with the structural separation of powers demanded by the United States Constitution. See, *e.g.*, *Baldwin* v. *United States*, 140 S. Ct. 690, 691 (2020) (THOMAS, J., dissenting from denial of certiorari) ("*Chevron* * * * gives federal agencies unconstitutional power."). Judicial deference to the executive is particularly problematic in cases such as this one, where an agency has used its alleged authority to create an independent source of funding for its regulatory

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have consented in writing to the filing of this brief; all parties were notified by *amicus curiae* of its intent to file this brief more than 10 days prior to its due date.

mission. Such self-financing cannot be squared with the Constitution's Appropriations Clause, which limits agency spending to that which Congress has authorized. And it can have devastating consequences for the small businesses that are forced to shoulder the costs of a larger regulatory agenda.

This threat to both the constitutionally demanded separation of powers and small businesses across the nation is of great concern to *amicus* Independent Women's Law Center (IWLC). IWLC is a project of Independent Women's Forum (IWF), a nonprofit, nonpartisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes access to free markets and the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit the reach of government. IWLC supports this mission by advocating for equal opportunity, individual liberty, and respect for the American constitutional order.

IWLC agrees with Petitioners that (1) the court of appeals erred in concluding that the Magnuson-Stevens Fishery Conservation and Management Act (MSA) authorizes the Service to force fisheries to assume the expense of agency-required monitors; and (2) this Court should grant the petition to either clarify the proper application of *Chevron* or overrule it entirely. IWLC writes further to explain the constitutional and practical dangers of the majority's decision permitting agencies to shift their operational costs to regulated entities. Those dangers provide ample additional reason for this Court to grant the petition for certiorari, reverse the decision below, and return

agencies to their rightfully limited place in our constitutional scheme.

REASONS FOR GRANTING THE PETITION

In deferring to the Service's decision to rewrite the MSA, the court of appeals abdicated its duty to say what the law is. Worse yet, the court did so in the context of an agency decision that requires those it regulates to *fund* its regulatory mission without one iota of congressional authorization and outside the normal constitutional appropriations process. The court below ignored this Court's recent and repeated admonitions that *every* tool of statutory interpretation must be employed before deferring to an administrative interpretation. This case is thus the latest in a long line where the courts of appeals have reflexively deferred to erroneous and aggressive agency interpretations of the law. It should be the last.

The Service's end-run around the limited authority it was given by Congress and creative funding of its regulatory mission outside of the congressional appropriations process is not only unlawful but also devastating for Petitioners and other small businesses. This Court should reverse the decision below and either limit *Chevron* to its appropriate role or overrule it entirely.

I. The Lower Court's Reliance on *Chevron* Violates the Separation of Powers.

At bottom, this case is fundamentally about the proper separation of powers among the legislative, executive, and judicial branches of our federal government. The court of appeals' reliance on *Chevron* violated that constitutionally required separation.

A. The Constitution Carefully Divides Powers Among the Branches.

"To the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (THOMAS, J., concurring in the judgment) (citation omitted). Indeed, the Founders were well aware that, without independent judicial review, "executives throughout history" had long "sought to exploit ambiguous laws as license for their own prerogative." *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (GORSUCH, J., concurring).

By 1787, as a result of the failure of individual state governments, there was widespread concern about the concentration of power in any one branch of government. James Madison captured that concern when he famously warned that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, * * * may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). The central innovation of the Constitution was, therefore, the division of powers among three co-equal branches of government. This structural separation of powers was "essential to the preservation of liberty." The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961). As Justice Scalia explained, "[w]ithout a secure structure of separated powers, our Bill of Rights would be worthless." *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (dissenting).

B. Agencies Have Routinely Encroached on the Legislative and Judicial Powers Under *Chevron*.

Unfortunately, the administrative state has blurred—if not eviscerated—the separation of powers that the Framers established for the purpose of protecting our liberty. The result is that, today, Americans are most often governed not by Congress but by the "hundreds of federal agencies poking into every nook and cranny of daily life." *City of Arlington* v. *FCC*, 569 U.S. 290, 314–315 (2013) (ROBERTS, C.J., dissenting) (citation omitted).

1. Indeed, rule by administrative agency is the order of our day.[2] Each year, agency administrators issue thousands upon thousands of regulations, while Congress usually enacts fewer than two hundred statutes.[3] In short, as Chief Justice Roberts has explained, the administrative state "wields vast power and touches almost every aspect of daily life." *City of Arlington*, 569 U.S. at 314–315 (dissenting) (citation omitted).

As part of the executive branch, moreover, agencies have swallowed vast amounts of government power. Far from merely enforcing the law, agencies frequently write regulations with the force of law and adjudicate disputes arising under those very regulations. As the Chief Justice put it, "It would be a bit much to describe the result as 'the very definition of

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[2] See Erin Hawley, *Legal Policy Focus: The Future of Administrative Law* 2, Indep. Women's Forum (Apr. 22, 2020), https://tinyurl.com/mwrr733w.

[3] See *ibid.*

tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.*

2. One of the few checks on agency authority is the straightforward proposition that an agency "'has no power to act' * * * unless and until Congress authorizes it to do so by statute." *Federal Election Comm'n* v. *Cruz*, 142 S. Ct. 1638, 1649 (2022) (citation omitted). That check, however, has looked more like a blank one ever since this Court's decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Chevron is a powerful tool in an agency's arsenal. It requires federal courts to defer to an agency's interpretation of an ambiguous statute, even when that interpretation is not the fairest reading of the statute or the one that the Court would arrive at on its own interpretation. See *id.* Under *Chevron*, agencies have the power not only to enforce the law but to make it.

3. Many members of this Court have noted the separation of powers problem with such an approach. Among other things, *Chevron* "wrests from Courts the ultimate interpretative authority to 'say what the law is' and hands it over to the Executive," *Michigan* v. *EPA*, 576 U.S. 743, 761 (2015) (THOMAS, J., concurring) (citing *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)), and permits executive agencies "to swallow huge amounts of core judicial" power, *Gutierrez-Brizuela*, 834 F.3d at 1149 (GORSUCH, J., concurring). "Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies." *Michigan*, 576 U.S. at 762 (THOMAS, J., concurring).

Chevron allows agencies to "chang[e] policy direction depending on the agency's mood at the moment." *Gutierrez-Brizuela*, 834 F.3d at 1158 (GORSUCH, J., concurring).

This "is not a harmless transfer of power." *Baldwin* v. *United States*, 140 S. Ct. 690, 691–692 (2020) (THOMAS, J., dissenting from denial of certiorari). Rather, *Chevron* "undermines" the ability of federal courts to check unlawful executive action and allows agencies themselves to determine the scope of their own authority. *Id.*; see Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 Harv. L. Rev. 421, 467 (1987) ("[F]oxes should not guard henhouses * * *. Those limited by a provision should not determine the nature of the limitation.").

To the point, forty years under *Chevron* has shown that ambiguity is almost entirely in the eye of the beholder. Whether the language is clear or ambiguous "turns out to be an entirely personal question." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2142 (2016) (reviewing Robert A. Katzman, *Judging Statutes* (2014)). Individual "judges have wildly different conceptions of whether a particular statute is clear or ambiguous," and that "threshold determination * * * may affect billions of dollars, the individual rights of millions of citizens, and the fate of clean air rules, securities regulations, labor laws, or the like." *Id.* at 2152–2153.

4. And indeed, agencies win most of the time. In a study reviewing over 1,000 federal appellate decisions applying *Chevron*, the relevant statute was found to be ambiguous a whopping 70% of the time.

Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 32–34 (2017). Upon a finding of ambiguity, the federal appellate courts upheld the agency interpretation no less than 93.8% of the time. *Id.*

Given the reflexive deference often accorded under *Chevron*, "agencies have incentives" to urge Congress to "draft statutes flexibly, broadly, and ambiguously to trigger *Chevron* deference—and thus engage in self-delegation of primary interpretive authority." Christopher J. Walker, *Legislating in the Shadows*, 165 U. Pa. L. Rev. 1377, 1419 (2017). They "have further incentives to be more aggressive in their agency statutory interpretations when they believe *Chevron* deference applies." *Id.* The looming presence of *Chevron* deference incentivizes them to reject the fairest reading of a statute—and Congress's policy objectives—in favor of their own. See *id.*

5. There is no question that *Chevron* has emboldened agency decision-makers. Under the aegis of that decision, federal agencies routinely promulgate jaw-dropping regulations. In just the last few years, this Court has been required time and again to step in and declare aggressive agency interpretations of the law unlawful. The Centers for Disease Control, for example, recently issued a *nationwide* moratorium on evictions, even though that agency's mandate has little to nothing to do with housing, and even though Congress had expressly rejected extending the moratorium. See *Alabama Ass'n of Realtors* v. *Department of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021) (per curiam) (reversing stay of judgment holding moratorium unlawful). Similarly, the Occupational Safety and

Health Administration, an agency supposedly limited to regulating workplace safety, issued a *nationwide* vaccine mandate on some eighty million workers—something this Court found to be an extraordinary and unlawful assertion of agency power. See *National Fed'n of Indep. Bus.* v. *Department of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 664–665 (2022) (per curiam).

Or take the Clean Power Plan. Under that administrative action, the Environmental Protection Agency took it upon itself to impose a nationwide cap and trade program with the goal of changing the national energy grid—again, something Congress has voted *not* to do. See *West Virginia* v. *Environmental Protection Agency*, 142 S. Ct. 2587, 2614 (2022).

Most recently, the Department of Health and Human Services has aggressively interpreted Section 1557 of the Affordable Care Act, which prohibits discrimination on the basis of sex, to require that *every* American doctor be required to perform risky, permanent, and medically unnecessary sex-change operations on minors, even if the doctors believe the operation to be dangerous to the minor or if it violates their conscience. See *Franciscan All., Inc.* v. *Becerra*, 47 F.4th 368, 376–380 (5th Cir. 2022). As Justice Gorsuch has cautioned, "when the separation of powers goes ignored, those who suffer first may be the unpopular and least among us. But they are not likely to be the last." Neil M. Gorsuch, *A Republic, If You Can Keep It* 46 (2019)). And that is one more reason such policy decisions should be made by Congress—not by insulated agencies acting on behalf of the executive branch.

6. To address this serious problem, this Court has recently suggested that the lower courts should take seriously footnote nine of *Chevron*. That footnote states that a court may not find a statute ambiguous without "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. In fact, recent opinions from this Court conspicuously fail to cite to *Chevron* at all, instead rejecting the application of that doctrine in favor of those "traditional tools of statutory interpretation." *American Hosp. Ass'n* v. *Becerra*, 142 S. Ct. 2354, 2362 (2022). And the Court has done so even in a case where the "ordinary meaning [of the statutory text] * * * d[id] not exactly leap off the page." *Becerra* v. *Empire Health Found.*, 142 S. Ct. 2354, 2362 (2022).

The lower courts, it seems, are not listening. They continue, as in this case, to reflexively defer to impermissible agency interpretations that run riot through separation of powers principles. The Court should take this opportunity to declare—unambiguously—that the days of blind deference to administrative agencies are over.

II. Allowing Agencies to Self-Fund Without Congressional Authorization Is an Especially Egregious Violation of the Separation of Powers.

The decision below subverts the constitutional separation of powers not only by abdicating the court's responsibility to interpret governing law, but also by allowing an agency to impose the cost of regulation on the regulated community. In this case, without express authorization from Congress, the Service

required small family-owned fishing businesses to pay to be inspected by federally required monitors—costs equal to an estimated twenty percent of annual revenue. Yet the Constitution is clear: only Congress has the power to tax and spend, and the court of appeals was wrong to hold that the Service itself could exercise that power here.

A. The Constitution Expressly Limits the Power of the Purse.

1. Article I of the Constitution of the United States provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Appropriations Clause is "a bulwark of the Constitution's separation of powers among the three branches of the National Government." *U.S. Dep't of Navy* v. *Federal Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.). This "power over the purse" is "one of the most important authorities allocated to Congress in" the Constitution. *Id.* at 1346–1347.

The constitutional limitation on appropriations "is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, 'the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.'" *Id.* at 1347 (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213–214 (1833)). In fact, the Founders' desire to "[r]estrain[] unruly executive power by giving the legislature control of the purse strings has its pedigree in the English Revolution," when Parliament took pains to eliminate the

Crown's sources of ordinary revenue and ensure that the monarch had to approach the House of Commons each year to obtain funding. *Consumer Fin. Prot. Bureau* v. *All Am. Check Cashing, Inc.*, 33 F.4th 218, 225–226 (5th Cir. 2022) (Jones, J., concurring). As a result, the Framers not only "vest[ed] Congress * * * with the power to tax and spend, but also remove[d] 'the option *not* to require legislative appropriations prior to expenditure.'" *Id.* at 221 (Jones, J., concurring) (quoting Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1349 (1988)).

Congress, too, has safeguarded its power over the purse by enacting statutes that limit executive spending. The Miscellaneous Receipts Act of 1849 requires government officials who receive "money for the Government from any source" to deposit the money in the Treasury. 31 U.S.C. § 3302(b). The Anti-Deficiency Act of 1905 makes it unlawful for a federal agency to "make or authorize an expenditure or obligation exceeding an amount available in an appropriation." 31 U.S.C. § 1341(a)(1)(A). Both the Constitution and federal statutes are thus clear: to fund regulatory activities, the executive must come to Congress.

2. In addition, "[r]ecent history confirms that Congress's appropriations powers have proven a forcible lever of accountability" on the executive. *All Am. Check Cashing,* 33 F.4th at 232 (Jones, J., concurring). Congress has repeatedly used its power over the purse to limit agency action of which it disapproved. As Judge Walker noted in his dissent below, for example, Congress at one point "used its funding power in its effort to end commercial horse slaughter by defunding the requisite ante-mortem inspections." Pet. App. 32.

Likewise, in 2014, Congress reduced the budget of the Internal Revenue Service by over $500 million after "learn[ing] that the IRS [had] engaged in flagrant political targeting." *All Am. Check Cashing,* 33 F.4th at 232 n.49 (Jones, J., concurring). Congressional decisions to reduce 60% of the Consumer Product Safety Commission's budget similarly limited the operations of that agency over the years. *Id.* at 223. In the 1970s, Congress "even [used its appropriations power] to end armed combat." *Id.* at 232 n.49 (citing Continuing Appropriations, 1974, § 108, 87 Stat. 130, 134 (1973) (providing that no appropriated funds could be used for "combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia")).

Allowing an agency to obtain independent sources of funding for its regulatory mission—or, as here, to impose unilaterally those costs on the businesses it regulates—allows it to bypass this important legislative check on the exercise of executive power. Congressional silence should not be understood to authorize independent funding. To rule otherwise, as did the majority below, is to permit the executive to regulate much more than the legislature or Constitution has authorized.

B. Agencies are Increasingly Turning to Self-Funding to Finance Their Regulatory Agendas.

1. Despite the constitutional and statutory provisions that limit executive action to that which Congress has funded, administrative agencies have increasingly turned to independent sources of revenue to

finance their regulatory activities.[4] In other words, Agencies are not simply collecting money to offset the costs of services the federal government provides the general public—for example, setting entrance fees for national parks—but are charging regulated parties fees that cover the agencies' own overhead costs and fund the performance of the agencies' statutory mandates.[5]

Agencies apparently view this self-funding as a workaround for what they see as Congress's "underfunding" of activities the agencies believe provide "benefits [that] clearly exceed costs."[6] In this case, for example, the Service forced Petitioners to assume the cost of federal monitors only after the agency faced budgetary shortfalls in recent years. See Pet. 7.

As explained above, however, the Constitution squarely places spending decisions in the hands of the legislature. And Congress knows how to authorize

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[4] See James MacDonald et al., Econ. Rsch. Serv., U.S. Dep't of Agric., Agric. Econ. Rep. No. 775, User-Fee Financing of USDA Meat and Poultry Inspection 6 (1999), https://tinyurl.com/ywvye5x7 ("Many Federal agencies now rely on user fees for at least some funding, and the importance of user fees as a source of funding has grown sharply in recent years.").

[5] See Christopher C. DeMuth & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 Geo. Mason L. Rev. 555, 556–557 (2017); MacDonald, *supra* note 4, at iii ("Overhead may be paid for out of general tax revenues, but it is frequently recovered through user fees").

[6] MacDonald, *supra* note 4, at iv. ("Interest in user-fee financing frequently arises from concerns that general revenue financing can lead to underfunding of some activities whose benefits clearly exceed costs.").

specific user fees when it believes they are warranted.[7] Indeed, in the very statute at issue in this case, Congress specifically authorized the Service to impose monitoring fees on *other* fisheries. Pet. App. 32–34 (Walker, J., dissenting); see Pet. 17–18. When Congress decides not to provide for that type of funding, the executive should not be given the authority to overrule the legislature's choice.

2. Troublingly, the full extent of the executive's self-financing remains unknown. "Neither the Office of Management and Budget, the Department of the Treasury, the enforcement agencies, nor Congress publishes—or evidently even compiles—systematic accounts of agency revenue raising and the uses made of such funds."[8] The Congressional Research Service has concluded that "the format and level of detail of published data make it difficult to address some government-wide policy questions regarding user fees and charges."[9] Decisions like the one below—which permit

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[7] See *id.* at iii (confirming that the "USDA's Food Safety and Inspection Service" "has frequently requested expanded authority to charge user fees for its operations, but Congress has consistently rejected the requests, despite approving expanded user-fee authority for other Federal agencies").

[8] Demuth & Greve, *supra* note 5, at 557; see Written Testimony of Kevin Kosar, Dir. Governance Project, R St. Inst., at 7, to H. Comm. Oversight & Gov't Reform, Subcomm. on Gov't Ops. & Healthcare, Benefits, & Admin. Rules, *Restoring the Power of the Purse: Legislative Options*, 114th Cong., 2nd sess. (Dec. 1, 2016), available at https://tinyurl.com/96j6hspe ("I would suggest that legislators should first get help mapping the scope of the problem. It simply is not clear how many agencies collect monies from the public and businesses, or what discretion they have over them.").

[9] D. Andrew Austin, Cong. Rsch. Serv., R45463, Economics of Federal User Fees 10 (2019), https://tinyurl.com/3w7aasv7.

an agency to impose fees on regulated parties despite no identifiable statutory authorization for doing so—merely compound the problem.

Notwithstanding the lack of detailed data on the subject, it seems plain that agencies are willing and eager to finance themselves. The Federal Communications Commission (FCC), for example, collects a "universal service fee" from telecommunications providers that "has no relation to any benefit conferred by the FCC" and that the FCC simply "adjusts * * * each quarter to keep pace with its program spending."[10] The Public Company Accounting Oversight Board's annual budget is similarly "funded almost entirely by its own tax, which it calls an 'accounting support fee,' on the equity capital or net asset value of public companies and broker-dealers."[11] And, although members of Congress once announced that they would seek to counter executive changes to immigration policies through appropriations to the Customs and Immigrations Service, those legislators later discovered that this tactic would not work because the agency "is self-funded and financially independent of Congress."[12]

Not all of the executive's attempts at self-funding have been successful, however. The Fourth Circuit, for instance, has rejected an attempt by the Federal Aviation Agency to divert a portion of collected air carrier fees to increase bus service at Dulles International Airport. *Motor Coach Indus., Inc.* v. *Dole*, 725 F.2d 958, 960–961, 967–968 (4th Cir. 1984). The court

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[10] Demuth & Greve, *supra* note 5, at 564–565.

[11] *Id.* at 565.

[12] *Id.* at 563.

refused to uphold "the agency's end-run around normal appropriation channels," which would have "enabl[ed] it effectively to supplement its budget by $3 million without congressional action." *Id.* at 968. When the Federal Aviation Agency "finally followed proper channels and requested budget authority from Congress to purchase the necessary buses," Congress appropriated $500,000 less than the agency had taken it upon itself to spend. *Id.* at 967, 968 & 968 n.14. As the Fourth Circuit correctly recognized, therefore, it is Congress, and not the executive, that has the authority to make funding decisions.

III. Increased Regulatory Costs Are Devastating for Small Businesses.

Agency decisions to impose the costs of regulation on regulated businesses, like the small family fishing operations here, are not only constitutionally problematic but also financially devastating. While some large corporations may have the resources necessary to take on agency overhead as a cost of doing business, that financial burden can be crushing for a small enterprise. The majority in this case, for instance, did not dispute that the $710-per-day monitoring cost the Service imposed on fisheries can "reduce annual returns by approximately 20 percent." Pet. App. 4 (citation and internal quotation marks omitted). That is a significant burden, particularly in an industry where profit margins are often slim in the first place.[13]

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[13] See Bob Egelko, *Court taking another look at higher fishing fees for nonresidents*, sfgate.com (Feb. 26, 2016, 7:05 PM), https://tinyurl.com/nhz2tv82 (discussing limitation on non-residents fishing in California and noting that "in the herring business * * * the profit margin is usually slim"); see also App. Vol. II

Indeed, this may well explain why Congress authorized monitoring fees in the Pacific, rather than the Atlantic, region: Pacific "waters * * * involve large commercial fishing operations that can more feasibly bear the costs." Pet. 17.

Despite Congress's attempts to alleviate the regulatory burden on small businesses through legislation like the Regulatory Flexibility Act of 1980, it is well established that "regulations often harm startups more than large and established businesses in at least three ways: disproportionate cost burdens, economies of scale in compliance, and entry barriers."[14] One study concluded that "[f]irms with fewer than 50 employees pay nearly 75% more per year per employee to comply with environmental compliance standards than larger companies."[15]

Indeed, family-owned businesses like Petitioners often struggle heavily under the weight of compliance regimes. The extensive regulation of apple orchards, for example, has posed difficulties for companies like Indian Ladder Farms, a fifth-generation family operation in Albany, New York. Although estimates vary,

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at A293, *Loper Bright Enters., Inc.* v. *Raimondo,* No. 21-5166 (D.C. Cir. 2022) (Service's recognition that imposition of monitoring fees would be a "highly sensitive issue" in light of the "socio-economic conditions of the fleets that must bear the cost[s]").

[14] Chris Edwards, *Entrepreneurs and Regulations: Removing State and Local Barriers to New Businesses* 7, Cato Inst. (May 5, 2021), https://tinyurl.com/4f37h2zv.

[15] Cindy Ryoo, Baker Inst. Blog, *Environmental Regulation: Reducing the Burden on Small Business and Entrepreneurs*, Rice Univ. Baker Inst. for Pub. Pol'y (Aug. 1, 2019), https://tinyurl.com/ycy5akur.

by even a minimal count, such orchards are governed by approximately 5,000 federal restrictions.[16] It is no wonder, as one expert in food policy has explained, that farmers say that "stricter and stricter regulations have put many of their neighbors and friends out of business, and in doing so cost them their homes, land and livelihoods."[17] The regulatory burden facing these family businesses is overwhelming.

The same is true for Petitioners, with the added insult that the fisheries have now been forced to pay for federally required monitoring themselves. And federal charges are not the end of the regulatory story. Fisheries are also governed by state regulators, which may likewise enact stringent limitations on fishing operations.[18] Increased regulatory expenses in turn exacerbate other financial difficulties fisheries have faced in recent years. Among other things, the price of herring roe—which for some is the most prized part of the herring catch—has declined sharply over the last few decades. "In the 1990s, that roe could sell for $1,000 a ton. But in 2019, that price was at $75."[19]

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[16] Steve Eder, *When Picking Apples on a Farm With 5,000 Rules, Watch Out for the Ladders*, N.Y. Times (Dec. 27, 2017), https://tinyurl.com/2wv26xp7.

[17] *Ibid.*

[18] Renee Wolcott Shannon, *The Fate of a Fishery: Shad and River Herring at the Turn of the 21st Century*, Coastwatch (Spring 2000), https://tinyurl.com/3bak9msx (explaining that "N[orth] C[arolina] Marine Fisheries Commission * * * regulations have become more and more stringent").

[19] Isabelle Ross, *Togiak herring fishermen can tap a huge quota in 2020, but some are still staying home*, KDLG (Dec. 13, 2019, 11:33 AM), https://tinyurl.com/ypet7wb5.

In short, there is no question that fishing for herring is not an easy way to make a living.[20] Federal agencies should not be permitted to make it more difficult and more expensive without explicit congressional authorization.

CONCLUSION

The court of appeals' decision to the contrary has devastating consequences for small businesses like Petitioners. Nor can it be squared with the separation of powers the Constitution requires. As Justice Frankfurter once warned, "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions" imposed by the Constitution. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

For these reasons, as well as those stated by Petitioners, the petition for certiorari should be granted, and the lower court's decision reversed.

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[20] Shannon, *supra* note 18 (explaining that shad and herring fishing has provided sustenance for "[f]or generations of hard-working citizens—often the state's poorest and most invisible people").

Respectfully submitted,

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*Not yet admitted to the D.C. Bar. Practicing under the supervision of D.C. Bar members pursuant to Rule 49(c)(8).

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