No. 22-451

IN THE

Supreme Court of the United States

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

v.

GINA RAIMONDO,
SECRETARY OF COMMERCE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates to protect individual rights and the framework set forth to protect such rights in the Constitution. This aspect of its advocacy is reflected in the regular representation of those challenging overreaching governmental and other actions in violation of the constitutional framework. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014), and *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court about issues of agency overreach and deference. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of this brief and have consented to its filing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For more than three decades, the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (MSA) has authorized the National Marine Fisheries Service to require commercial herring fisherman to carry third-party monitors on board to monitor their compliance with federal fishing regulations. But when the agency ran out of money for the monitors, it shifted the responsibility of paying an estimated $700 per day for them to the fishermen themselves. In doing so, the agency evaded Congress's power over the purse and its ability to limit agency programming through appropriations.

That scheme raises significant separation of powers issues. The power of the purse is an important check on federal agencies. And "absent express statutory authority … agencies can only spend as much money as Congress appropriates." App. 23 (Walker, J., dissenting). They simply may not "resort to nonappropriation financing" without express authority to do so. Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1356 (1988). If an agency "could avoid limitations imposed by Congress in appropriations legislation[] by independently financing its activities," it "would vitiate the foundational Constitutional decision to empower Congress to determine what actions shall be undertaken in the name of the United States." *Id.* Yet the Fisheries Service "attempted a workaround" those constraints here. App. 23 (Walker, J.). And this Court should not allow it to do so.

This case also asks the Court to reconsider *Chevron*. *Amicus* agrees that it should. *Chevron* requires courts to uphold an agency's interpretation of a statute—even if not the best interpretation—so long as that interpretation is reasonable. This approach forces courts to defer to agencies on questions of law, thus requiring the judiciary to shirk its duty to say what the law is. Time and again, *Chevron* forces judges to uphold interpretations that they believe are wrong. Indeed, "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). That approach represents a significant shift of power from the judiciary to administrative agencies and violates the separation of powers.

Chevron also violates basic principles of due process of law. Among other concerns, *Chevron* systematically tips the scales in the government's favor, allows agencies to act as their own judge, and deprives non-agency parties of fair notice. That scheme is incompatible with the Constitution's most fundamental safeguards. Indeed, it is "contrary to the roles assigned to the separate branches of government" and "require[s] [judges] at times to lay aside fairness and [their] own best judgment and instead bow to the nation's most powerful litigant, the government, for no reason other than that it is the government." *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d. Cir. 2017) (Jordan, J., concurring in the judgment).

The Court should grant the petition and reverse the decision below.

ARGUMENT

I. Allowing agencies to design regulatory programs and require regulated parties to fund them beyond congressional appropriations violates the separation of powers.

For at least the last decade, "the Fisheries Service has had trouble affording its preferred monitoring programs with just its congressionally appropriated funds." App. 22-23 (Walker, J., dissenting). This presented a serious problem for the agency. "[A]bsent express statutory authority … agencies can only spend as much money as Congress appropriates." *Id.* at 23; *see e.g.*, 31 U.S.C. §1341(a)(1) ("An officer or employee of the United States Government or of the District of Columbia 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"). And "Congress generally prohibits an agency from collecting fees and keeping the money from those fees for the agency's own purposes." App. 23 (Walker, J.); *see* 31 U.S.C. §3302(b) (barring agencies from collecting fees and keeping that money to fund the agency itself; and requiring government officials "receiving money … from any source" to "deposit the money in the Treasury as soon as practicable" unless Congress establishes an exception).

So the Fisheries Service "attempted a workaround." App. 23 (Walker, J.). "It decided to make fishing companies, like Loper Bright Enterprises, hire and pay for their own at-sea monitors." *Id.* While the agency itself acknowledged that claiming this power to force the regulated community pay for the government's monitoring efforts was "highly sensitive," *see* Pet. 22; CADC App. 293, it claimed that power nevertheless. It simply classified the burden of contracting $700 a day third-party monitors as a reasonable compliance cost, thereby evading Congress's power of the purse and its ability to limit agency programming through appropriations. But by interpreting the Magnuson-Stevens Act to allow the agency to circumvent that process, this scheme raises serious separation-of-powers concerns.

"Congress's 'power of the purse' is at the foundation of our Constitution's separation of powers, a constitutionally mandated check on Executive power." Kate Stith, *Appropriations Clause*, Nat'l Const. Ctr., perma.cc/T7EW-S5BM; *see* U.S. Const. art. I, §9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). Indeed, the Founders considered giving the power of the purse to Congress alone as a key structural curb on executive authority. *See* The Federalist No. 58 (J. Madison) ("This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."). And it remains a "bulwark of the

Constitution's separation of powers among the three branches of the National Government." *U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.).

For decades, however, executive agencies abused the appropriations process. *See* Sean M. Stiff, *Congress's Power Over Appropriations: Constitutional and Statutory Provisions*, Cong. Research Serv., R46417, 2 (June 16, 2020). ("Agencies augmented their own budgets by retaining and using public money; obligated an appropriation beyond its purpose; wrested greater funding from Congress by spending all that Congress had appropriated previously or obligated for purposes not permitted by the appropriation; and refused to obligate funds to advance policies with which a President disagreed."). In response, "Congress adopted a series of generally applicable 'fiscal control' statutes designed to" reclaim its power over appropriations and to "tighten its hold on the purse strings." *Id.*; *see supra* 4; App. 22-23 (Walker, J.).

Today, the power of the purse remains an important check on federal agencies. Indeed, as Petitioners explain, it remains "one of the few practical constraints on overregulation." Pet. 22. "Congress exercises virtually plenary control over agency funding." Todd Garvey & Daniel J. Sheffner, *Congress's Authority to Influence and Control Executive Branch Agencies*, Cong. Research Serv., R45442, 14 (May 12, 2021). And this power "can be used to control agency priorities, prohibit agency action by denying funds for a specific action, or force

agency action by either explicitly appropriating funds for a program or activity or withholding agency funding until Congress's wishes are complied with." *Id.*; *see also* Laurence H. Tribe, American Constitutional Law 221-22 (2d ed. 1988) ("Congress may simply refuse to appropriate funds for policies it deems unsound."). This power is a particularly vital tool for Congress because, unlike legislation, a President cannot veto the absence of an appropriation. *See* Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 Vand. L. Rev. 357, 367-68 (2018) ("Congress has ensured that presidents must always come back every year seeking money just to keep the government's lights on."); *U.S. Dep't of Navy,* 665 F.3d at 1347 (Kavanaugh, J.) (Congress's appropriations power "is particularly important as a restraint on Executive Branch officers.").

Yet the "attempted [] workaround" here, App. 23 (Walker, J.), essentially allows the agency to independently fund its operations without congressional authorization. That scheme undercuts the constitutional safeguards provided by the Congressional appropriations process. *See* Stith, *Congress' Power of the Purse*, *supra*, 1356.

Under the government's theory, any agency could evade congressional oversight by designing a regulatory program that simply transferred the agency's costs directly on regulated parties. *See Dep't of Navy,* 665 F.3d at 1347 (Kavanaugh, J.) (quoting 3 Joseph Story, Commentaries on the Constitution of the United States, §1342, at 213-14 (1833)) ("If not for the Appropriations Clause, 'the executive would

possess an unbounded power over the public purse of the nation.'"). Indeed, as Judge Walker recognized below, the agency's theory could allow it—or other agencies—to evade Congressional oversight all together. App. 32 (Walker, J.) ("[W]hat if Congress were to entirely defund the compliance mechanisms of the Fisheries Service—could the agency continue to operate by requiring the industry to fund [the agency]? That … could undermine Congress's power of the purse."). That theory would fundamentally undermine the separation of powers.

At bottom, "[f]ederal agencies may not resort to nonappropriation financing." Stith, *Congress' Power of the Purse*, *supra*, 1356. "[T]heir activities are authorized only to the extent of their appropriations." *Id.* Thus, when an agency seeks funding outside of the appropriations process without express statutory authority, it presents serious separation-of-powers concerns. This Court should not overlook those concerns. It should grant the petition and reverse the decision below.

II. This Court should overrule *Chevron* because it violates the separation of powers and basic principles of due process.

This case also asks the Court to reconsider *Chevron*. *Amicus* agrees that it should, because *Chevron* violates the separation of powers and basic principles of due process.

A. *Chevron* violates the separation of powers.

The separation of powers is an "essential precaution in favor of liberty." The Federalist No. 47 (J. Madison). Indeed, the "ultimate purpose" of the separation of powers "is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). But "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of N.Y.*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). Because the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, … may justly be pronounced the very definition of tyranny," the Framers formed a government that would keep those powers "separate and distinct." The Federalist No. 47, *supra*. Thus they adopted a Constitution that "set[] out three branches and vest[ed] a different form of power in each—legislative, executive, and judicial." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring in part).

Article III vests "[t]he judicial Power of the United States" in the federal courts alone. That division of power was intentional. The Framers believed that "the general liberty of the people can never be endangered … so long as the judiciary remains truly distinct from both the legislative and executive." The Federalist No. 78 (A. Hamilton). But *Chevron*—which often requires judges to defer to an agency's judgment on questions of law—reallocates considerable judicial power to federal agencies.

When agencies interpret the law, they exercise "[t]he judicial Power of the United States." U.S. Const., art. III, §1. "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function." *United States v. Am. Trucking Assns., Inc.*, 310 U.S. 534, 544 (1940). In the familiar words of Chief Justice John Marshall, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Yet *Chevron* forces judges to shirk this duty. It is unsurprising, then, that scholars have described *Chevron* deference as "counter-*Marbury*." Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2074-75 (1990). Under *Chevron*, judges do not "say what the law is." Instead, they pass off that task to an agency, violating the separation of powers.

Chevron invites executive agencies to take on the role of independent judges. It conflicts with the "traditional rule that judges must exercise independent judgment about the law's meaning." *Buffington v. McDonough*, 143 S. Ct. 14, 17 (2022) (Gorsuch, J., dissenting from denial of cert.). And it instructs judges to "bypass[] any independent review of the relevant statutes." *Id.* at 14; *see, e.g.*, *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087 (9th Cir. 2013) ("If the [agency's] construction is reasonable, we must accept that construction under *Chevron*, even if we believe the agency's reading is not the best statutory interpretation."). Yet neither Congress nor the courts have constitutional authority to transfer the judicial power to agencies. Indeed, the "Vesting Clauses are exclusive" and "the branch in which a power is vested

may not give it up or otherwise reallocate it." *Dep't of Transp. v. Ass'n of American Railroads*, 575 U.S. 43, 74 (2015) (Thomas, J., concurring in the judgment). The Framers "were concerned not just with the starting allocation, but with the 'gradual concentration of the several powers in the same department.'" *Id.* (quoting The Federalist No. 51 (J. Madison)). On top of that, agency bureaucrats—who are responsive to political pressures, budgetary concerns, and potential removal—make poor substitutes for independent judges who enjoy tenure and salary protections.

Over and over, *Chevron* forces judges to uphold interpretations that they believe are wrong. *See, e.g.*, *Kennedy v. Butler Fin. Sols., LLC*, 2009 WL 290471, at *4 (N.D. Ill. Feb. 4, 2009) ("The FTC's regulation strikes the Court as reasonable, though perhaps not the best interpretation of the law."). And sometimes courts are required to uphold an interpretation that they have previously rejected. *See, e.g., Padilla-Caldera v. Holder*, 637 F.3d 1140, 1147-1152 (10th Cir. 2011) (holding that under *Chevron* the court is obligated to discard its earlier statutory interpretation and defer to the agency's interpretation). In fact, "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Brand X Internet Servs.*, 545 U.S. at 983.

Chevron thus shifts substantial power from the judiciary to administrative agencies, disrupting the Constitution's careful allocation of power amongst the

three branches. From the start, the Framers identified the judiciary as "the weakest of the three departments of power." The Federalist No. 78, *supra*. But under *Chevron*, courts are made even weaker. Indeed, *Chevron* effectively renders the judiciary a rubber stamp for agencies that "wield[] vast power and touch[] almost every aspect of daily life." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). Such a scheme "'pose[s] a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.'" *Seila Law LLC*, 140 S. Ct. at 2212 (Thomas, J., concurring in part) (quoting *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)). "Abdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). The Constitution simply does not contemplate such "undifferentiated governmental power." *Ass'n of American Railroads*, 575 U.S. at 67 (Thomas, J., concurring in judgment) (cleaned up).

B. *Chevron* violates basic due process principles.

Chevron also violates basic principles of due process. As then-Judge Gorsuch observed, "[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process … concerns the framers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); *see also* Philip Hamburger, Chevron *Bias*,

84 Geo. Wash. L. Rev. 1187, 1239 (2016) ("Precedents such as *Chevron* … require judges to give up their role as judges and … violate the due process of law."). Among other problems, *Chevron* systematically tips the scales in the government's favor, allows agencies to act as their own judge, and deprives non-agency parties of fair notice.

To start, *Chevron* "introduce[s] into judicial proceedings a 'systematic bias toward one of the parties.'" *Buffington*, 143 S. Ct. at 19 (Gorsuch, J.) (quoting Hamburger, *supra*, 1212). But Americans expect courts to "resolve disputes about their rights and duties under law without fear or favor to any party—the Executive Branch included." *Id.* at 16 (citing A. Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L. J. 908, 987 (2017)). Indeed, the "minimal rudiment of due process" includes a fair and impartial decisionmaker." *Guthrie v. Wisconsin Emp. Rels. Comm'n*, 111 Wis. 2d 447, 453 (1983) (citing *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970)).

But *Chevron* undermines the promise of a neutral decisionmaker. Under *Chevron*, judges must abandon their independent judgment and defer to an agency's interpretation of law. That means when judges defer to these administrative interpretations, they often simply "adopt[] the interpretation or legal position of one of the parties." Hamburger, *supra,* 1189. And they must do so as long as the agency's interpretation is reasonable, "regardless [of] whether there may be other reasonable, or even more reasonable, views." *Serono Lab'ys, Inc. v. Shalala*, 158 F.3d 1313, 1321

(D.C. Cir. 1998). That necessarily produces "systematically biased judgment" in favor of one party. Hamburger, *supra,* 1211.

In no other context does a court simply defer to one of the parties. At least one federal judge has suggested that such extreme deference may violate judicial canons requiring independence. *See United States v. Havis*, 907 F.3d 439, 451 n.1 (6th Cir. 2018) (Thapar, J., concurring), *rev'd en banc*, 927 F.3d 382, n.1 (6th Cir. 2019) (explaining that "if judges are predisposed to defer when the government is involved, then that pre-commitment is 'systemic bias.' And that bias violates both the first and third canon of judicial conduct. *See* U.S. Jud. Conduct Code, Canon 1 (requiring an independent judiciary for a just society); Canon 3 (requiring judges to recuse if a judge has a bias in favor or against a party)."). Instead of recognizing the judge as an impartial decisionmaker, *Chevron* requires the judge to systematically favor one party.

And not just any party. This scheme favors the federal government—"the most powerful of litigants." *Buffington*, 143 S. Ct. at 19 (Gorsuch, J.). Indeed, *Chevron* gives the federal government an unfair advantage by tipping the scales in its favor. *See* Hamburger, *supra*, 1250. Such deference conflicts with American courts' historic commitment to "favor individual liberty" and to construe certain ambiguities in law "*against* the government and with lenity toward affected persons." *Buffington*, 143 S. Ct. at 19 (Gorsuch, J.).

Chevron also undermines due process because it allows the agency to act as its own judge. "When an administrative agency interprets and applies the law in a case to which it is a party, it is to that extent acting as judge of its own cause." *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 382 Wis. 2d 496, 555 (2018). But it is a "basic requirement of due process," *Buffington*, 143 S. Ct. at 19 (Gorsuch, J.), that "[n]o man is allowed to be a judge in his own cause," The Federalist No. 10 (J. Madison). As James Madison explained, "a body of men are unfit to be both judges and parties, at the same time," because a man's "interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *Id.*; *see also Williams v. Pennsylvania,* 579 U.S. 1, 8-9 (2016). And "[i]t is entirely unrealistic to expect [an] agency to function as a 'fair and impartial decisionmaker' as it authoritatively tells the court how to interpret and apply the law that will decide its case." *Tetra Tech EC, Inc.*, 382 Wis. 2d at 556.

Finally, *Chevron* violates notions of fair notice. The "central meaning of procedural due process" is the "right to notice and an opportunity to be heard … at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Under a broad reading of *Chevron*, "[f]air notice gives way to vast uncertainty." *Buffington*, 143 S. Ct. at 20. (Gorsuch, J.). Because agencies may shift from one "reasonable" interpretation to another, "individuals can never be sure of their legal rights and duties." *Id.* This uncertainty makes it difficult for individuals, especially ordinary Americans, to structure their personal affairs. They are simply "left to guess what

some executive official might 'reasonably' decree the law to be today, tomorrow, next year, or after the next election." *Id.* And while "'[e]very relevant actor may agree' that the agency's latest interpretation is not the best interpretation of the law, each new iteration still 'carries the force of law.'" *Id.* (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2151 (2016)). Allowing federal agencies to shift the meaning of binding laws denies Americans fair notice.

At bottom, *Chevron* is incompatible with the Constitution's most fundamental safeguards. It is "contrary to the roles assigned to the separate branches of government" and "require[s] [judges] at times to lay aside fairness and [their] own best judgment and instead bow to the nation's most powerful litigant, the government, for no reason other than that it is the government." *Egan*, 851 F.3d at 278 (Jordan, J., concurring in the judgment). The Court should grant the petition, revisit *Chevron*, and put an end to this "atextual invention by courts." Kavanaugh, 129 Harv. L. Rev. at 2150.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

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