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

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS AND BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM, THE PELICAN INSTITUTE, AND AMERICA FIRST LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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December 15, 2022

MOTION OF ADVANCING AMERICAN FREEDOM FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), Advancing American Freedom respectfully moves for leave to file an amicus curiae brief in support of petitioners. The brief follows immediately after this motion. Petitioners have granted consent and have filed a blanket consent to the filing of amicus briefs. Respondent has declined to file a blanket consent to the filing of amicus briefs and has failed to respond to an email sent on December 13, 2022 seeking consent. Because respondent has failed to file a blanket consent nor responded to an email seeking consent, Advancing American Freedom presents this motion for leave of the Court to file the appended brief amicus curiae. Advancing American Freedom is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness. American freedom has created the greatest and most prosperous country in the history of the world, and if future generations are going to enjoy those blessings, we must secure individual rights in our own time.

The Pelican Institute is a nonpartisan research and educational organization—a think tank—and the leading voice for free markets in Louisiana. The Institute's mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government. The Pelican Institute routinely

challenges administrative overreach when it interferes with Louisianians' right to earn a living. Notably, the Pelican Institute represented Louisiana business owner Brandon Trosclair in his challenge to the OSHA vaccine-or-test mandate. *BST Holdings, L.L.C., et al. v. Occupational Safety & Health Administration, et al.*, 17 4th 604 (5th Cir. 2021).

America First Legal Foundation (AFL) is a public interest law firm providing citizens with representation in cases of broad public importance to vindicate Americans' constitutional and common law rights, protect their civil liberties, and advance the rule of law. AFL employs former high-ranking Department of Justice and Executive Branch lawyers who are intimately familiar with the government's use and abuse of the Chevron doctrine to unhinge the separation of powers. Thus, AFL has a strong interest in the question presented.

This case is important to amici because it presents to this Court the opportunity to overrule *Chevron v. NRDC*, 467 U.S. 837 (1984), which for too long has permitted the confusion of powers of the several branches of the Federal government. The genius of the Constitution is its structure, dividing power against itself into three coequal branches and thereby protecting the liberties of its citizens from Leviathan.

The proposed amicus brief seeks to bring before the Court arguments informed by amicus's experience in studying and briefing the issues presented. Movant believes that this brief will assist the Court in its consideration of the petition. The significant issues concerning the structural constitutional provisions

protecting individual liberty warrant the granting of this motion. Movant therefor requests that its motion be granted.

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Dated: December 15, 2022.

QUESTION PRESENTED

Whether *Chevron v. NRDC,* 467 U.S. 837 (1984), should be overruled.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness. American freedom has created the greatest and most prosperous country in the history of the world, and if future generations are going to enjoy those blessings, we must secure individual rights in our own time.

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[1] Pursuant to Sup. Ct. R. 37.2(a), amicus curiae provided timely notice of its intention to file this brief. Petitioners consented to the filing of this brief and respondents declined to respond to amicus's request for consent. Counsel for amicus curiae authored this brief in whole. No person or entity other than amicus curiae, its members or counsel, made a monetary contribution to the preparation or submission of this brief.

L.L.C., et al. v. Occupational Safety & Health Administration, et al., 17 4th 604 (5th Cir. 2021).

America First Legal Foundation (AFL) is a public interest law firm providing citizens with representation in cases of broad public importance to vindicate Americans' constitutional and common law rights, protect their civil liberties, and advance the rule of law. AFL employs former high-ranking Department of Justice and Executive Branch lawyers who are intimately familiar with the government's use and abuse of the Chevron doctrine to unhinge the separation of powers. Thus, AFL has a strong interest in the question presented.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

An anchoring principle for over two hundred years of judicial review was articulated by Chief Justice John Marshall: "[i]t is emphatically the province and duty of the judicial department to say what the law is." See *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The Chevron doctrine was laid down in an effort to consistently apply rules of statutory construction in litigation over the tidal wave of regulations

descending from agencies established in the New Deal and afterwards. See *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984); *Buffington v. McDonough*, No. 21–972, slip op. at 8 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from denial of cert). Perhaps never loved, thirty years ago Chevron was thought to be a "useful monster" that "is worth keeping around." *Lamb's Chapel v. Central Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

Now, after nearly four decades of trying to make it work, Chevron deference to regulatory agencies has become widely understood as unconstitutional in its application and effect. Its legacy is one of circumscribing the liberties of the people that the framers of the Constitution sought to protect, may they live in fishing communities with names like Atlantic, Cape May, Portsmouth, Ocean, and Monmouth or work for fishing companies like Loper Bright Enterprises, Inc.; H&L Axelsson, Inc.; Lund Marr Trawlers LLC; and Scombrus One LLC. Petitioners seek redress for over-reaching Federal regulations that misguided *Chevron* deference has caused. Petitioners in this case are herring fishermen who face unfair financial hardships under new regulations promulgated under the putative authority of the Magnuson-Stevens Act ("MSA"). Pet. at 7. The MSA divided the nation's fisheries into regions, each with a "fishery management council" tasked with creating a "fishery management plan" for that region. *Id.* at 3–4. The MSA stated that these "fishery management plans 'may require that one or more observers be carried on board a [fishing] vessel.'" *Id.* at 4; 16 U.S.C. § 1853(b)(8) (1996). In 2020, the National

Marine Fisheries Service ("NMFS") invoked this authority to promulgate a regulation requiring "industry funded monitoring" of catch amounts for vessels fishing in New England waters. Pet. at 8–9; 85 Fed. Reg. 7,414 (Feb. 7, 2020) ("bureaucrats on boats regulation").

This bureaucrats on boats regulation is costly to petitioners, but is burdensome in others ways as well. First, petitioners are "gonna need a bigger boat" (Jaws, Universal Pictures, 1975) or make room on a crowded vessel to carry a monitor, which takes up precious working space and complicates safety protocols. Pet. at 24. Surprisingly, the bureaucrats on boats regulation insists that the vessels must pay the monitor's wages. *Id.* at 10. This can cost up to $710 a day and paying for monitors is expected to reduce the fishermen's profits by 20%. *Id.* Those fishermen who refuse to pay for monitors are prohibited under the regulation from fishing for herring. *Id.* The petitioners sued, and the district court upheld the agency's regulation as a proper interpretation of MSA's "may require" language. *Id.* at 10–11. The court of appeals for the District of Columbia Circuit upheld that decision, but on a different rationale. The panel concluded that the statute was ambiguous as to whether fishing operations could be forced to pay the cost of their own monitoring. But it concluded that NMFS's interpretation of the statute was a reasonable one, and therefore held for the government at "Step Two" of the Chevron Doctrine. *Id.* at 12–13.

This case presents the question of Chevron deference dead on without any need to tack, offering an excellent opportunity to abandon this sinking ship

and to offer lower courts a more seaworthy vessel for judicial review. Chevron deference has long been persuasively criticized as unconstitutional, both for violating Article III's vesting of all judicial powers in the judiciary and for violating due process. See *Michigan v. E.P.A.*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring); Charles J. Cooper, The Flaws of Chevron Deference, 21 Tex. Rev. L. & Pol'y 307, 310–11 (2016); Douglas H. Ginsburg & Steven Menashi, Our Illiberal Administrative Law, 10 NYU J.L. & Liberty 475, 507 (2016); Philip Hamburger, Chevron Bias, 84 Geo. Wash. L. Rev. 1187, 1211 (2016); Jack M. Beerman, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 779, 817 (2010).

This Court should grant certiorari and overrule Chevron.

ARGUMENT

I. Congressional Silence Is Not Congressional Delegation.

This Court should grant certiorari to decide whether Congress has "silently" authorized the National Marine Fisheries Service (NMFS) to exercise the power of the purse reserved for Congress in Article I of the Constitution: may the agency make up for lack of appropriations in this area to compel commercial fishing boats under its jurisdiction to pay the daily wages of NMFS's at-sea inspectors, known as "observers," under § 1853(b)(8) of the Magnuson-Stevens Fishery Conservation and Management Act

16 U.S.C. §§ 1801-1884 (Act).[2] Certiorari is also warranted to clarify, once and for all, that "*Chevron* [*U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984),] did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts." *Buffington v. McDonough*, No. 21-972, 2022 WL 16726027, at *7 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from denial of certiorari)

Congress clearly gave the agency discretion in § 1853(b)(8) of the Act for the fish management plan 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 data necessary for the conservation and management of the fishery." 16 U.S.C. § 1853(b)(8). But the silence of Congress on who is to pay for the monitors in no way authorized a whale of a conclusion

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[2] Section 1853(b)(8) of the Act provides:

(b) Any fishery management plan which is prepared by any [Regional Fishery Management Council], or by the Secretary [of Commerce], with respect to any fishery, may…

(8) require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery; except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized[.]

16 U.S.C. § 1853(b)(8).

by the agency – that commercial fishing vessels themselves would be forced to pay for the bureaucrats on boats scheme. See 85 Fed. Reg. 7,414, 7,422 (Feb. 7, 2020) ("Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry-Funded Monitoring Final Rule"). NMFS claims implausibly that mandating payment for the at-sea monitors is an implied cost of compliance for "carry[ing] [an observer] on board a vessel," under § 1853(b)(8). "The requirement to carry observers [at sea], along with many other requirements under the Magnuson-Stevens Act, includes compliance costs on industry participants." 85 Fed. Reg. at 7,422. As a result, NMFS promulgated a final rule requiring certain fishing vessels within the Atlantic herring fishery to pay the daily wages of at-sea observers. See 85 Fed. Reg. at 7,430. A divided panel of the federal court of appeals for the District of Columbia upheld NMFS's final rule. Appendix (App.) at 5. The court applied its understanding of Chevron and concluded that § 1853(b)(8) was ambiguous as to whether industry funding was an implied cost of compliance, and that NMFS's resolution of this purported ambiguity in its final rule was reasonable. App. at 6-15.

Notably, and disturbingly, the D.C. Circuit emphasized several times throughout its opinion that Congress, by remaining silent on the issue, somehow delegated its Constitutional duty to oversee the power of the purse and failed to prohibit NMFS from requiring fishing vessels to pay for at-sea observers in § 1853(b)(8). The lower court's opinion displays a fishy interpretation of the protean Chevron doctrine, and it also turns the Constitution's separation of powers on

its head. "Chevron did not undo, and could not have undone," the foundational principle that an Executive Branch agency is entirely a creature of Congress. The agency can only exercise those powers that Congress has given it. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) (cleaned up). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) ("'When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.'") (quoting *Stark v. Wickard*, 321 U.S. 288, 309 (1944)).

The D.C. Circuit's opinion is in dangerous waters when it asserts Congressional silence is tantamount to delegating one of the core powers of the legislative branch. Here, there is no plain language of delegation. "[W]hen a statute's language is plain, the sole function of the courts . . . is [generally] to enforce it according to its terms." *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013). Silence does not create ambiguity when the claimed delegation of power from Congress is granted expressly elsewhere in the statute. "[S]tatutory silence, when viewed in context, is [here] best interpreted as limiting agency discretion," and not expanding that discretion. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009).

It is regrettable that the Court has declined to mention Chevron even in cases where it is directly at issue (See, e.g., *Am. Hosp. Ass'n v. Becerra*, 142 S.Ct. 1896 (2022)) given the many problems with Chevron recognized by members of this Court. See, e.g., *Pereira*

v. Sessions, 138 S.Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); *Michigan v. EPA.*, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109-10 (2015) (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring); Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150-54 (2016). But, as this case well illustrates, lower courts continue to feel obligated to apply Chevron because the Court has yet to clearly to overrule it.

II. Under *Chevron*, A Federal Court Must Decide If An Administrative Agency Has Exceeded Its Authority.

One of the most important powers reserved to Congress in the Constitution is the power of the purse, specifically the Appropriations Clause. Constitution of the United States, Article I, Section 9, Clause 7. One of the few practical constraints on agency overregulation is congressionally appropriated funds – to turn on the spigot to provide the resources to enforce the agency's regulations, or to turn off the spigot when the agency has gone overboard. But the court below made a whale of an error in finding that Congressional silence allowed the agency to freeboot at the expense of its regulated community: "Federal agencies may not resort to nonappropriation financing because their activities are authorized only to the extent of their appropriations." Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1356 (1988); see also *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015); *Chamber of Commerce of U.S. v. NLRB*, 721

F.3d 152, 160 (4th Cir. 2013) (similar); *Bayou Lawn & Landscape Servs. v. Sec'y of Lab.*, 713 F.3d 1080, 1085 (11th Cir. 2013) (similar); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) (similar). Thus, when an agency seeks resources outside of the appropriations process without express statutory authority from Congress, it is not free to go on regulatory pirate raids to meet their budget. The decision below inexplicably perceives ambiguity in statutory silence, where the logical explanation for the statutory silence is that Congress did not intend to grant the agency such a dangerous, roving authority.

Far from suggesting any unwarranted deference to agency action, Chevron reinforces the crucial role of an independent Federal Judiciary to determine congressional intent, in order to decide whether an agency has exceeded its statutorily delegated powers. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9.3 Indeed, Article III of the Constitution requires a federal court "'to protect justiciable individual rights against administrative action fairly beyond the granted powers,'" by "'adjudicat[ing] cases and controversies as to claims of infringement of individual rights . . . by the exertion of unauthorized administrative power.'" *Defenders of Wildlife*, 504 U.S. at 577 (quoting *Stark*, 321 U.S. at 310). "The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It [allows the agency] to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe [the Act's] silence as exactly

that: silence." *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015) (interpreting Title VII) (emphasis added). Instead, Chevron instructs a court, as always, to "employ[] traditional tools of statutory construction" before deciding whether a statute is genuinely "silent or ambiguous with respect to the specific issue" of agency power. *Chevron*, 467 U.S. at 843 & n.9. See also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

III. A Federal Court Must Enforce The Plain Language Of A Statute.

"When a statute's language is plain, the sole function of the courts . . . is [generally] to enforce it according to its terms." *Sebelius*, 569 U.S. at 38. The simple statutory language makes clear Congressional intent and the lower court's error. Congress permitted NMFS to require fishing vessels to "to carry an observer on board." 16 U.S.C. § 1853(b)(8). "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, Georgia, 140 S. Ct. 1731, 1738 (2020). The ordinary public meaning of the phrase "carried on board" certainly does not suggest "a bureaucrat on a boat at your expense." "[T]he Court need not resort to Chevron deference, as [this] lower court[] ha[s] done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018). Silence is still golden, in that it limits agency power. "[S]tatutory silence, when viewed in context, is [here] best interpreted as limiting agency discretion." *Entergy Corp.*, 556 U.S. at 223. See also *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296

(2013) ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.") (emphasis added). "In other words, not all statutory silences are created equal. But you would never know that from the majority's opinion." *Oregon Restaurant and Lodging Ass'n v. Perez*, 843 F.3d 355, 360 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing en banc) (contrasting statutory silence that precludes agency action with statutory silence that creates ambiguity for agency to resolve "If the intent of Congress is clear, that is the end of the matter; for the court, as well as he agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (emphasis added). See also *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) ("Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer.").

For four decades, Chevron deference has been a menace in the land, and now on the sea. Perhaps the instant regulation mandating bureaucrats on boats will finally capsize this leaky doctrine, now close to its final watch. Justice Gorsuch recently warned this court on the dangers of this drifting hulk: "No measure of silence (on this Court's part) and no number of separate writings (on my part and so many others) will protect [Americans]. At this late hour, the whole [Chevron] project deserves a tombstone no one can miss." *Buffington v. McDonough*, 2022 WL 16726027, at *7 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from the denial of certiorari).

Whatever hopeful benefits might have been countenanced when Chevron was decided in 1984, nearly four decades of experience and navel gazing have done little to bind agencies to the Constitutional mast. Chevron "wrests from Courts the ultimate interpretative authority to 'say what the law is'" and places it in the executive's hands. *Michigan*, 576 U.S. at 761 (Thomas, J., concurring). Happy is the law that is truly unambiguous, for there is no need for inquiry into statutory interpretation. But when one party comes before a court asserting that statutory text is ambiguous, it is like Blackbeard hoisting the Jolly Roger: surrender is the customary and pusillanimous response. The first hint of ambiguity often leads to an abject "abdication of the judicial duty" *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) when a double-charged full broadside is what is called for. America expects that every judge will do his duty, for it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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