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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (NELF) is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston.[1] NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting inclusive economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF is interested in this case because a lower federal court has misapplied *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), to uphold a federal regulation that burdens the Atlantic herring fishery, when the relevant statute does not authorize any such agency action. NELF is committed to upholding the Constitution's separation of powers, reinforced by § 706 of the Administrative Procedure Act, under which an independent federal judiciary must say what the law is and decide whether an administrative agency has exceeded its delegated powers.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored NELF's amicus brief, in whole or in part, and that no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

NELF is also committed to the core principle of *stare decisis*, which in this case means applying the Court's traditional tools of statutory construction to ascertain a statute's meaning. To the extent that *Chevron* contains language suggesting an interpretive rule to the contrary, the Court should consider disavowing any such meaning attributable to that language or, if necessary, disavowing any freestanding validity to that language altogether.

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue of so-called *Chevron* deference presented in this case.

SUMMARY OF ARGUMENT

The Court should consider clarifying "step one" of its two-step test, announced in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), for determining the validity of a federal agency's regulation. In part, *Chevron* restates "well-settled principles" regarding the federal judiciary's role to "employ traditional tools of statutory construction," in order to decide independently whether Congress has authorized an agency regulation.

However, *Chevron* also contains misleading and unnecessary language suggesting, to the contrary, that a court should subordinate the traditional tools of statutory construction to the *untraditional* interpretive rule that an agency has implied plenary powers, unless and until Congress "has directly spoken to the precise question at issue," by literally withholding the disputed regulatory

power. *Chevron* also contains misleading language suggesting that every purported statutory "silence" creates a genuine ambiguity for the agency to resolve.

The lower court certainly read *Chevron* that way when it upheld the disputed regulation, despite all clear textual and contextual cues to the contrary. Under its hyperliteral reading of *Chevron*, the lower court concluded that Congress "silently" authorized the disputed agency regulation because the statute failed to literally prohibit that regulation.

To dispel this fundamental confusion, and to prevent any more erroneous decisions like this one, the Court should consider, at minimum, disavowing the lower court's misreading of *Chevron* as creating a hyperliteral interpretive rule that would place a virtually impossible, and unheard-of, drafting burden on Congress to take exhaustive steps to withhold an agency's regulatory powers, in every administrative statute. Alternatively, the Court could disavow any freestanding validity to *Chevron*'s misleading language itself. The Court has undertaken similar corrective measures in order to clarify its doctrinal tests in other areas of the law. Either way, the Court would make clear, once and for all, that, under *Chevron* step one, lower courts must, as always, interpret a statute with a fresh and independent eye, free of any rogue pro-agency presumption, by giving effect to the text's ordinary meaning, and by drawing reasonable inferences from statutory context, in order to determine a regulation's validity.

Undoubtedly, the *Chevron* Court did not intend to suggest the upside-down presumption that an agency has the implied power to regulate an issue whenever Congress has not literally withheld that regulatory power. After all, the Court was merely restating well-settled principles requiring a court to apply *traditional* tools of statutory construction. Nor has the Court recognized any such rogue pro-agency presumption when it discusses or engages in a *Chevron* step-one analysis itself. However, *Chevron*'s misleading language does invite the misinterpretation that the lower court applied here.

Such an interpretation of *Chevron* is insupportable. An agency is a creature of Congress and can only exercise those powers that Congress has actually given it. Moreover, both Congress and the citizenry need to know the legal effect of the language that Congress adopts, primarily by relying on the text's ordinary meaning.

Perhaps most importantly, this misinterpretation of *Chevron* would eviscerate independent judicial review, as it did here. Because the lower court could not find statutory language that literally prohibited the regulation, the court concluded that its interpretive job was done, and that the Government could take over from there.

As a result, the court lost sight of the ordinary meaning of the statutory language at issue, which has nothing whatsoever to do with the Government's regulation requiring certain commercial fishing vessels to fund its federal inspection regime. The court also repudiated traditional interpretive tools

that draw reasonable inferences from statutory context to explain a purported congressional silence. According to the court, those tools were too weak and indirect to satisfy *Chevron*'s "directly speaking" requirement.

What's more, the lower court missed the big picture. If allowed to stand, the Government's (mis)interpretation of the statute would allow the Government to take the extreme step of requiring potentially *all* domestic commercial fishing vessels within its jurisdiction to fund its inspection regime. But if Congress had really wanted to delegate such a vast and unusual power to the Government, it would have said so, plainly and distinctly. Congress would not have concealed such a monolithic power in stray and obscure textual "clues," scattered here and there in the statute, as the lower court essentially concluded.

The lower court apparently concluded that, under *Chevron*, every purported statutory silence creates a genuine ambiguity for the agency to resolve. This is wrong, because not every purported silence is ambiguous. As with any other issue of statutory construction, a *court* must interpret a purported silence to decide what it means, if it means anything at all. If the lower court had properly "emptied its legal toolkit," unencumbered by its misunderstanding of *Chevron*, it would have seen that the purported silence carried only one plausible meaning. Congress was *limiting* the Government's powers.

Sometimes, as in *Chevron* itself, a court engages with a statute and uncovers a genuine ambiguity. When the *Chevron* Court referred, imprecisely, to a "silent or ambiguous" statute, the Court was apparently generalizing from its own conclusion that it had found a statutory silence that was also ambiguous. But that was not the case here. Nonetheless, the lower court misinterpreted *Chevron* as requiring it to relinquish interpretive authority to the Government, as soon as it found a purported silence on the face of the statute.

Notably, this Court does not invoke *Chevron*'s misleading language, or the pro-agency presumption that it suggests, when the Court undertakes or discusses a step-one analysis of a statute. In those cases, the Court gives effect to the statute's ordinary meaning, and it interprets the disputed language in its context, in order to resolve any purported ambiguity that would favor the agency. This case would allow the Court to make express what it has apparently already done in practice, thereby clarifying a lower court's crucial gatekeeping role under *Chevron* step one.

ARGUMENT

I. THIS COURT SHOULD CLARIFY THAT *CHEVRON* REQUIRES A FEDERAL COURT, AS ALWAYS, TO APPLY TRADITIONAL TOOLS OF STATUTORY CONSTRUCTION TO DECIDE WHETHER AN ADMINISTRATIVE AGENCY HAS EXCEEDED ITS DELEGATED POWERS.

A. While *Chevron* Properly States This Standard Of Independent Judicial Review, The Opinion Also Contains Misleading And Unnecessary Language Suggesting The *Untraditional* Interpretive Rule, Applied By The Lower Court, That Congress Has "Silently" Authorized An Agency Regulation Whenever It Has Not Literally Prohibited The "Precise" Regulatory "Question At Issue."

This case presents the Court with the opportunity to clarify "step one" of its familiar two-step test, announced in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), for determining the validity of a federal agency's regulation.[2] In part, *Chevron* restates "well-settled

[2] *See Chevron*, 467 U.S. at 842-43 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly

principles," *id.*, 467 U.S. at 845, that "[t]he judiciary is the final authority on issues of statutory construction," *id.* at 843 n.9, and that a court should "employ traditional tools of statutory construction," *id.*, in order to decide whether Congress has authorized the disputed agency regulation.

Indeed, n.9 of *Chevron* states all that a federal court needs to know to undertake a proper independent analysis of an administrative statute.[3] "Even under *Chevron,* we owe an agency's interpretation of the law *no deference* unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S.

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addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, 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.").

[3] In *Chevron* n.9, the Court wrote, in full:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Id., 467 U.S. at 843 n.9 (citations omitted).

Ct. 1348, 1358 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9) (emphasis added). *See also Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (applying *Chevron* n.9 to step one of related *Auer* deference test, and explaining that "a court must exhaust all the 'traditional tools' of construction. . . . Only when that *legal toolkit is empty* and the interpretive question still has no single right answer can a judge conclude that it is more one of policy than of law.") (cleaned up) (quoting *Chevron*, 467 U.S. at 843 n.9) (emphasis added).[4]

However, *Chevron* also contains misleading and unnecessary language suggesting, to the contrary, that a court should subordinate the "traditional tools of statutory construction" to the

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[4] The succinct language from *Chevron* n.9 is consistent with a federal court's independent duty, under both Article III of the Constitution and the Administrative Procedure Act, "to say what the law is," *Marbury v. Madison,* 1 Cranch 137, 177, 5 U.S. 137 (1803), and to "decide all relevant questions of law [and] interpret . . . statutory provisions, in order to decide whether to hold unlawful and set aside agency action . . . found to be . . . in excess of statutory . . . authority." 5 U.S.C. § 706(2)(C).

When a court engages in an independent review of a statute and decides, as the Court did in *Chevron* itself, that Congress has left unresolved an issue of policy, and has delegated the resolution of that issue to the agency, "[w]e do not ignore th[ese] [constitutional and statutory] command[s]; we respect [them.] We give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities with the force of law." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting)) (cleaned up) (emphasis in original).

untraditional and insupportable interpretive rule that an agency has implied plenary powers, unless and until Congress expressly withholds those powers. This language also suggests that every purported statutory "silence" creates a genuine ambiguity for the agency to resolve:

> First, always is the question whether *Congress has directly spoken to the precise question* at issue. . . . If, however, the court determines *Congress has not directly addressed the precise question* at issue, . . . [i.e.,] *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, 467 U.S. at 842-43 (emphasis added).

The lower court certainly read *Chevron* that way when it upheld the disputed regulation, despite all clear textual and contextual cues to the contrary.[5]

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[5] *See* Appendix (App.) at 6 ("Th[e] text makes clear the [Government] may direct vessels to carry at-sea monitors but *leaves unanswered* whether the [Government] must pay for those monitors or may require industry to bear the costs . . . . When Congress *has not 'directly spoken to the precise question at issue,'* the agency may fill this gap with a reasonable interpretation of the statutory text.") (quoting *Chevron*, 467 U.S. at 842) (emphasis added); App. at 8 ("[N]either [the relevant statutory provision] nor any other provision of the Act *imposes a funding-related restriction* on [the Government's] authority to require monitoring in a plan. That also suggests the Act permits [the Government] to require industry-funded monitoring.") (emphasis added); App. at 12 ("[The statute]

In particular, the court concluded that, under its reading of *Chevron*, Congress "silently" authorized the disputed agency regulation because the statute's text did not "directly sp[eak] to the precise question at issue," *id.*, 467 U.S. at 842, by not literally prohibiting the regulation of that exact issue.[6]

To dispel the lower court's fundamental confusion, and to prevent any more erroneous decisions like this one, the Court should consider clarifying *Chevron* step one. The Court could do this by disavowing the lower court's misreading of *Chevron* as creating a hyperliteral interpretive rule that would place a virtually impossible, and unheard-of, drafting burden on Congress to take exhaustive steps to limit an agency's regulatory powers, in every administrative statute. Alternatively, the Court could disavow any freestanding validity to *Chevron*'s misleading language that gave rise to the lower court's misunderstanding in the first place. The Court has undertaken similar corrective measures in the past, in order to clarify its doctrinal tests in other areas of the law:

> On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase--

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expressly envisions that [at-sea] monitoring programs will be created and, *through its silence*, leaves room for agency discretion as to the [funding] design of such programs. . . . [T]he Act contains *no bar* on industry-funded monitoring programs[.]") (emphasis added).

[6] *See* n.5, above.

> however fortuitously coined. . . . Today we correct course . . . and indeed conclude that [the disputed language from the Court's prior opinion] has no proper place in our [applicable] jurisprudence.

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 531, 548 (2005) (rejecting language from *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980), stating incorrectly that government regulation of private property "effects a taking if such regulation does not substantially advance legitimate state interests[.]") (cleaned up). *See also Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022) ("[R]espect for past judgments also means *respecting their limits*. This Court has long stressed that the language of an opinion is not always to be parsed as though we were dealing with the language of a statute.") (cleaned up) (emphasis added).

Either way, the Court would make clear, once and for all, that, under *Chevron* step one, lower courts must, as always, interpret a statute with a fresh and independent eye, free of any rogue pro-agency presumption, by giving effect to the text's ordinary meaning, and by drawing reasonable inferences from its context, in order to determine a regulation's validity.

B. The Rogue Pro-Agency Presumption That The Lower Court Gleaned From *Chevron*'s Misleading Language Offends The Separation Of Powers And Eviscerates Independent Judicial Review, By Causing A Court To Throw In The Interpretive Towel As Soon As It Sees A Purported "Silence" On The Face Of A Statute.

Undoubtedly, the *Chevron* Court did not intend to suggest an upside-down interpretive rule that an agency has the implied power to regulate an issue whenever Congress has "failed" to literally withhold that regulatory power.[7] After all, the

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[7] It is possible that the *Chevron* Court inadvertently overstated a court's duty to confine itself to the statute's literal text because the Court was responding to the lower court's misplaced reliance on the statute's *purpose* to drive its decision to invalidate the disputed regulation. *See Chevron*, 467 U.S. at 841 ("[The D. C. Circuit] reasoned that '*the purposes* of the [Clean Air Act's] nonattainment program should guide our decision here [to strike down the regulation].'") (quoting *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718**,** 726 n.39 (D. C. Cir. 1982)) (emphasis added).

In fact, the lower court in *Chevron* acknowledged that neither the statute's text nor its legislative history addressed the disputed definitional question, concerning the application of the statutory term, "stationary source" of air pollutants, to a Clean Air Act program for States that had not yet attained federal air quality standards. *See Chevron*, 467 U.S. at 841 ("The [lower] court observed that the relevant part of the amended Clean Air Act 'does not explicitly define what Congress envisioned as a "stationary source," to which the permit program . . . should apply,' and further stated that the precise issue was not 'squarely addressed in the legislative history.'") (quoting

Chevron Court was merely restating "well settled principles" that require a court to apply "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9, 845.[8] Nowhere do those traditional tools recognize an agency's presumptive power to regulate an issue unless Congress literally withholds that regulatory power. Nor does this Court recognize any such rogue pro-agency presumption when it discusses or engages in a *Chevron* step-one analysis.[9]

Instead, "[w]e examine . . . arguments about the [agency's delegated powers] much as we would any other about statutory meaning, looking to the text and context of the law in question and guided by the traditional tools of statutory interpretation." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894,

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Natural Res. Def. Council, 685 F.2d, at 723). Nonetheless, the lower court concluded that the agency's resolution of that definitional gap was "inappropriate," in light of the statute's goals. *Chevron*, 467 U.S. at 841.

In apparent response to this misplaced purposivism, the *Chevron* Court may have unintentionally gone too far in emphasizing the primacy of the statute's text. *See Chevron*, 467 U.S. at 842-43 (i.e., "whether Congress has directly spoken to" or "directly addressed" "the precise question at issue," "if the statute is silent or ambiguous with respect to the specific issue"). In so doing, however, the Court fortuitously suggested the hyperliteral interpretive rule that the D. C. Circuit applied here.

[8] *See also* Edwin E. Huddleson, *Chevron Under Siege*, 58 U. Louisville L. Rev. 17, 22 n.15 (2019) ("Justice Stevens has commented that his opinion in *Chevron* was simply a fair summary of well-settled common law principles of administrative law.").

[9] *See* Part I(E) of the Argument, below.

1901 (2019). Those tools give primacy to the ordinary meaning of a statute's text, and to reasonable inferences that a court can draw from statutory context. "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731,1738 (2020). *See also Brown v. Gardner*, 513 U.S. 115, 120 (1994) (Souter, J., for Court) ("[T]he [statutory] text and *reasonable inferences from it* give a clear answer against the Government, and that, as we have said [in *Chevron*], is 'the end of the matter.'") (cleaned up) (invalidating agency regulation under *Chevron* step one, while quoting *Chevron*, 467 U.S. at 842) (emphasis added).

And yet, the misleading language from *Chevron* does invite the misinterpretation that the lower court applied here, under which Congress must go out of its way to withhold a regulatory power in order to avoid remaining fatally "silent" on that issue. "Of course, that is not the world we know[,]" *Kisor*, 139 S. Ct. at 2419, whether in this Court, in the halls of Congress, or even in the Constitution itself. *See Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.,* 29 F.3d 655, 671 (D.C. Cir. 1994) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (emphasis in original).

Such a presumption is insupportable, of course, because, among other things, an agency is a creature of Congress and can only exercise those powers that Congress has actually 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)).

Moreover, a court's application of such a hyperliteral and unreal interpretive rule would only confound Congress's efforts to draft legislation with an understanding of the chosen text's legal consequences. "What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley v. United States*, 490 U.S. 545, 556 (1989), *superseded by statute on other grounds*, *as stated in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005).

Indeed, both Congress and the citizenry need to know the legal effect of the language that Congress adopts, primarily by relying on the text's ordinary meaning. *See Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting) ("[T]he 'linchpin of statutory interpretation is *ordinary meaning*, for that is going to be most accessible to the citizenry

desirous of following the law *and* to the legislators and their staffs drafting the legal terms of the plans launched by statutes *and* to the administrators and judges implementing the statutory plan.'") (quoting William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 81 (2016) (emphasis in original)). *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) ("[W]e . . . begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (cleaned up); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of *our basic rules* of statutory construction[.]") (emphasis added).

Perhaps most importantly, this misinterpretation of *Chevron* would eviscerate independent judicial review, as it did here, by causing a court to throw in the interpretive towel as soon as it sees a purported "silence" on the face of a statute. *See Buffington v. McDonough*, No. 21-972, 2022 WL 16726027, at *18-19 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from denial of certiorari) ("Under a [mistakenly] broad reading of *Chevron*, . . . we place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else."). Because the lower court could not find statutory language that literally prohibited the regulation, the court concluded that its interpretive job was done, and that the agency could take over from there.[10]

[10] See n.5, above.

C. The Lower Court's Hyperliteral Reading of *Chevron* Caused It To Repudiate The Statute's Ordinary Meaning And Traditional Interpretive Tools That Draw Reasonable Inferences From Statutory Context To Explain A Purported Silence.

The lower court, laboring under its hyperliteral reading of *Chevron*'s "directly speaking" requirement, lost sight of the ordinary meaning of the disputed statutory language. The text provides that the Government may require that federal observers "be carried on board" domestic commercial fishing vessels during their fishing trips. 16 U.S.C. § 1853(b)(8).[11] This laconic phrase, "carried on

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[11] Section 1853(b)(8) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1884, provides, in full:

> (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

board," conveys only one possible meaning. Fishing vessels may be required to suffer the presence of at-sea observers during their fishing trips, and nothing more. Indeed, the same statutory section refers to the "quartering of an [at-sea] observer." *Id.*[12]

Therefore, the text leaves nothing to the Government's imagination, and it certainly has nothing to do with the Government's regulation requiring certain commercial fishing vessels to *pay* federal observers' daily wages.[13] "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." *SAS Inst.*, 138 S. Ct. at 1355. *See also Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) ("[T]he Court need not resort to *Chevron* deference, as [the] lower court[ ] ha[s] done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand.").

And yet the lower court concluded that this simple statutory phrase, "carried on board," was too vague and porous to satisfy *Chevron*'s purported requirement that Congress "directly" forbid the

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> safety of the observer or the safe operation of the vessel would be jeopardized[.]

16 U.S.C. § 1853(b)(8).

[12] *See* n.11, above.

[13] *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").

Government from imposing an industry-funding requirement.[14] The court's misreading of *Chevron* blinded it to the text's inescapably clear meaning.

Even so, should a court have any conceivable doubts about what a statute's text means, a proper application of *Chevron* would instruct that court to remove from its legal toolkit "the fundamental canon of statutory construction that the words of a statute must be read in their *context* and with a view to their place in the *overall statutory scheme*." *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (cleaned up) (emphasis added). Again, the lower court dropped the ball, because it repudiated traditional interpretive tools that draw reasonable inferences from statutory context--namely, the *expressio unius* canon,[15] and the "specific governs the general" canon[16]--in order to explain a purported statutory silence.

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[14] *See* n.5 above (quoting App. at 6, 12).

[15] *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) ("[T]he interpretive canon, *expressio unius est exclusio alterius,* [means,] "expressing one item of [an] associated group or series excludes another left unmentioned.") (cleaned up).

[16] *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("It is a commonplace of statutory construction that the specific governs the general. . . . [T]he canon has full application . . . to statutes such as the one here, in which a general authorization and a more limited, specific authorization exist side-by-side. There the canon avoids . . . the *superfluity of a specific provision* that is swallowed by the general one, violating the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.") (cleaned up) (emphasis added).

Relying on its own precedent, the court dismissed, categorically, the *expressio unius* canon as being too weak and indirect a tool to establish that Congress "directly spoke" to the regulatory issue under *Chevron*. *See* App. at 9. *See also Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014) ("The *expressio unius* canon is a *feeble helper* in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions *that it has not directly* resolved. . . . [The rule] offers *too thin a reed* to support the conclusion that Congress has *clearly resolved* an issue.") (cleaned up).

The lower court, having made up its mind that the *expressio unius* canon was no match for *Chevron*'s strict interpretive rule, then engaged in a doomed application of the canon anyway. *See* App. at 9-12. Significantly, the statute contains three detailed sections, inapplicable here, that either allow or require certain commercial fisheries to pay for at-sea observers, in certain narrowly defined contexts.[17]

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[17] *See* 16 U.S.C. § 1862(a)(2) (North Pacific fishery), § 1853a(e)(2) (limited access privilege programs), and § 1821(h)(4) (foreign fishing vessels in U.S. waters). Moreover, in two of these three statutory sections, pertaining to domestic fishing vessels, Congress has limited the extent to which industry funding can deplete a fishing vessel's revenues. *See* 16 U.S.C. § 1862(b)(2)(E) (for North Pacific fishery, if observer fees are set as fixed percentage, they cannot exceed 2% of value of vessel's catch); § 1854(d)(2)(B) (under limited access privilege programs, observer fees cannot exceed 3% of catch value). These express statutory limits contrast markedly with the Government's concession that its regulation would deplete approximately *20%* of the annual returns of the affected Atlantic herring fishery. *See* 85 Fed. Reg. at 7,418.

Unsurprisingly, the court went out of its way, with hair-splitting zeal, to show that those three other statutory sections "do[ ] not *speak directly* to this [regulatory] point, nor do[ ] [they] . . . say anything about who may fund observers." App. at 9 (emphasis added). Similarly, the court concluded that "'the specific governs the general' [canon] . . . is unhelpful to appellants in this context because there is no relevant 'conflict' between statutory terms that *do not address the same subject*[.]" *Id.* (emphasis added).

However, a court unhindered by the lower court's hyperliteral reading of *Chevron* would surely have applied these interpretive tools to reach the opposite conclusion. Congress's inclusion of industry-funding language in certain narrow statutory sections must mean that its omission of any such language in the broadly worded section in dispute was a deliberate policy choice, signaling "the end of the matter." *Chevron*, 467 U.S. at 842. *See also Badgerow v. Walters*, 142 S. Ct. 1310, 1318 (2022) ("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, we generally take the choice to be deliberate.") (cleaned up).

In other words, a correct application of these interpretive tools would show that Congress did not permit the Government to treat industry funding of at-sea observers as an implied cost of complying with that inspection regime, contrary to the views of the Government and the D. C. Circuit alike.[18] After all,

[18] *See* 85 Fed. Reg. at 7,422 ("The requirement to carry observers [at sea], along with many other requirements under

Congress deemed it necessary to address that very funding issue, and in some detail, in those three other sections. Therefore, the Government was not at liberty to tease an industry-funding requirement out of the statute's spare "carried on board" language. "[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) (emphasis added). Any reading to the contrary would render those three other statutory sections superfluous. "[T]he cardinal principle of interpretation [is] that courts must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (cleaned up).

What's more, the lower court's hyperliteral reading of *Chevron* caused it to miss the big picture. If allowed to stand, the Government's (mis)interpretation of Congress's "carried on board" language would allow the Government to take the extreme step of requiring potentially *all* domestic commercial fishing vessels within its jurisdiction to fund its inspection regime. This is because the statute permits the Government to require "*[a]ny* fishery management plan which is prepared by *any* [Regional Fishery Management] Council, or by the Secretary [of Commerce], with respect to *any*

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the Magnuson-Stevens Act, includes compliance costs on industry participants."); App. at 7-8 ("When an agency establishes regulatory requirements, regulated parties generally bear the costs of complying with them.").

fishery," to carry on board a federal observer. 16 U.S.C. § 1853(b)(8) (emphasis added).[19]

While the regulation applies only to the Atlantic herring fishery,[20] a decision upholding that regulation's injection of a funding requirement into the statutory "carried on board" language would permit the Government to require potentially "any fishery" falling under the statute to pay for at-sea observers. But if Congress had really wanted to delegate such a vast and unusual power to the Government, it would have said so, plainly and distinctly, and in the statutory section itself, as it did in those three other, far narrower sections of the statute that *did* authorize industry funding.[21] Congress would not have concealed such a monolithic power in stray and obscure textual "clues," scattered here and there in the statute, as the lower court essentially concluded here.[22] *See*

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[19] *See* n.11, above, for the full text of this provision.

[20] *See* n.13, above.

[21] *See* n.17, above.

[22] For example, the lower court relied erroneously on the general, catch-all "necessary and appropriate" clause, appearing at 16 U.S.C. § 1853(b)(14) (fishery management plan may "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery."). *See* App. at 6-8. This "necessary and appropriate" clause follows the specific listing of the discretionary components of a fishery management plan, including the at-sea observer provision in dispute. However, none of those discretionary elements has anything to do with industry funding. Under traditional tools of statutory interpretation, then, the "necessary and appropriate" clause cannot include an

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, *hide elephants in mouseholes*.") (emphasis added).

D. Contrary To The Lower Court's Misreading Of *Chevron*, Not Every Purported Statutory Silence Creates A Genuine Ambiguity For The Agency To Resolve.

The lower court apparently concluded that, under *Chevron*, every purported statutory silence creates a genuine ambiguity for the agency to resolve.[23] This is incorrect. Not every purported silence is ambiguous. The two words are not necessarily synonymous. As with any other issue of statutory construction, a *court* must interpret a purported silence to decide what it means, if it means anything at all. "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Burns v. United States*, 501 U.S. 129, 136 (1991), *abrogated*

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industry-funding requirement. *See Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) ("[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (cleaned up).

[23] *See* n.5, above.

on other grounds, *as recognized in Dillon v. U.S.*, 560 U.S. 817, 820 (2010).

If the lower court had properly emptied its legal toolkit, unburdened by its misunderstanding of *Chevron*, it would have seen that the purported silence carried only one plausible meaning. Congress was *limiting* the Government's powers. "A statutory [silence] that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Util. Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 321 (2014) (cleaned up).

Sometimes, however, as in *Chevron* itself, a court engages thoroughly with a statute and uncovers a genuine ambiguity. *See Chevron*, 467 U.S. at 845 ("[W]e agree with the Court of Appeals that Congress did not have a specific intention on [the interpretive issue.]"). When the *Chevron* Court referred, loosely and imprecisely, to a "silent or ambiguous" statute, *id.* at 843, the Court was apparently generalizing from its own conclusion that the statutory silence it confronted, concerning a definitional gap in a technical statutory term, was truly ambiguous.[24] "We find that the legislative [text and] history as a whole [are] silent on the precise issue before us." *Id.*, 467 U.S. at 862. But that was not the case here.

[24] *See* n.7, above, for a more detailed discussion of *Chevron*.

Nonetheless, the lower court misinterpreted *Chevron* to equate every purported silence with a genuine ambiguity for the agency to resolve.[25] In its erroneous view, *Chevron* instructed it to relinquish interpretive authority to the Government as soon as it saw a purported gap in the statutory words "carried on board," with respect to the industry-funding issue.

E. This Court Does Not Invoke *Chevron*'s Misleading Language, Or The Pro-Agency Interpretive Rule That It Suggests, When The Court Undertakes Or Discusses A Step-One Analysis Of An Administrative Statute.

Notably, this Court does not invoke *Chevron*'s misleading language, or the pro-agency interpretive rule that it suggests, when the Court undertakes or discusses a step-one analysis of a statute. Instead, the Court invokes "traditional tools of statutory construction" in order to resolve a purported statutory ambiguity against the Government.[26]

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[25] *See* n.5, above.

[26] *See Kisor*, 139 S. Ct. at 2415 (quoting "traditional tools of statutory construction" language from *Chevron* n.9 when discussing step one of related *Auer* deference); *SAS Inst.*, 138 S. Ct. at 1358 (quoting same language from *Chevron* n.9, while applying traditional interpretive canons to conclude that statute unambiguously prohibited agency regulation); *Brown v. Gardner*, 513 U.S. at 120 (engaging in *Chevron* step-one analysis to conclude that "the text and reasonable inferences from it give a clear answer against the Government, and that, as we have said [in *Chevron*], is 'the end of the matter.'") (cleaned up) (quoting *Chevron*, 467 U.S. at 842).

Perhaps the best evidence of *Chevron* step one's limited and traditional meaning is a nearly contemporaneous opinion of the Court, written by Justice Stevens himself, the author of *Chevron*. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In that case, Justice Stevens concluded, for the Court, that the statute at issue unambiguously prohibited the agency's regulation.[27] He gave effect to the statute's plain meaning, and he applied the *expressio unius* canon, to conclude that the agency had wrongfully read language into the disputed statutory provision that Congress had included in another, related provision.[28] Notably, Justice Stevens ended the opinion by quoting *only* from *Chevron* n.9, in full, to reinforce a federal court's independent and exclusive duty to apply traditional tools of statutory construction, in order to determine a regulation's validity.[29]

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[27] In *Cardoza-Fonseca*, the Immigration and Naturalization Service had interpreted the version of 8 U.S.C. § 1158(a) then in effect, which gave the Attorney General the discretion to grant asylum to an alien who has "a [subjective] well-founded fear of persecution," as requiring an alien to satisfy the more demanding, objective showing required under a related provision then in effect, 8 U.S.C. § 1253(h) (requiring Attorney General to delay the deportation of an alien who can show his "life or freedom would be threatened."). *See Cardoza-Fonseca*, 480 U.S. at 423-24.

[28] *See Cardoza-Fonseca*, 480 U.S. at 431-32.

[29] *See id.* at 446–48 ("The question whether Congress intended the two standards to be identical is a *pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction*, we have concluded that Congress did not intend the two standards to be identical. In *Chevron*

Other decisions of the Court also indicate the Court's apparent disavowal of *Chevron*'s misleading language. Indeed, the Court's opinions in *SAS Inst.* and *Brown*, cited in n.26 above, are each a master class in how a federal court should undertake a proper *Chevron* step-one inquiry.[30] In each of those opinions, the Court rolled up its sleeves and engaged rigorously with the text, context, and structure of the disputed statute, while applying traditional canons of statutory construction, to conclude that the statute unambiguously precluded the agency regulation.[31] And, unlike the lower court in this

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[n.9], we explained that '[t]he judiciary is the final authority on issues of statutory construction . . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.'") (cleaned up) (quoting *Chevron*, 467 U.S. at 843 n.9) (emphasis added).

[30] In *Brown*, the Court had to decide whether a veteran's statutory right of recovery for an "injury" resulting from treatment by the Bureau of Veterans Administration (VA), under the version of 38 U.S.C. § 1151 then in effect, allowed the VA to require the claimant to show fault on the part of the VA in causing the injury. *See Brown*, 513 U.S. at 116. In *SAS Inst.*, the Court had to decide whether a section of the statute creating a right of *inter partes* review before the Patents and Trademarks Office (PTO), 35 U.S.C. § 318(a), gave the PTO the discretion to decide only certain claims raised by a claimant, or whether, instead, the text required adjudication of all claims. *See SAS Inst.*, 138 S. Ct. at 1352-53.

[31] *See Brown*, 513 U.S. at 118 (applying presumption that the same word should have the same meaning throughout a statute); *id.* (considering consistent use of word "injury" without fault in analogous statutes); *id.* (applying rule of *ejusdem generis* where term "injury" appeared, in veterans benefits statutes, in series with other terms that also precluded a showing of fault on part of the VA); *SAS Inst.*, 138 S. Ct. at

case, the Court in each of those cases applied the *expressio unius* canon to conclude that Congress's purported "silence" on the disputed interpretive issue must have been a deliberate policy choice, which the agency must honor.[32]

This case would allow the Court to make express what it has apparently already done in practice, by disavowing the lower court's hyperliteral misinterpretation of *Chevron*'s misleading language, or by disavowing that misleading language altogether. Either way, the Court could put a stop to erroneous decisions, like this one, and reinforce a lower court's crucial gatekeeping role, under *Chevron* step one, to ensure that the Government has not 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.

1354-55 (adhering to statute's plain meaning); *id*. at 1355-57 (examining statute as a whole to identify several other ways in which Congress consistently gave priority to claimant's petition, and not to PTO's prosecutorial discretion).

[32] S*ee Brown*, 513 U.S. at 120 (noting that "reference to claimant's fault in a statute keeping silent about any fault on the VA's part invokes the rule [of *expressio unius*]") *SAS Inst.*, 138 S. Ct. at 1355 (contrasting *inter partes* statute with earlier *ex parte* reexamination statute, which gives PTO prosecutorial discretion, and observing that "Congress's choice to depart from the model of a closely related statute is a choice neither we nor the agency may disregard.").

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the judgment of the Court of Appeals for the D. C. Circuit.

Respectfully submitted,

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