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

BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM; CENTER FOR POLITICAL RENEWAL; CHRISTIANS ENGAGED; EAGLE FORUM; FRONTLINE POLICY COUNCIL; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; MISSOURI CENTER-RIGHT COALITION; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; PROJECT 21 BLACK LEADERSHIP NETWORK; STUDENTS FOR LIFE OF AMERICA; AND YOUNG AMERICA'S FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

This case is important to *amici* Advancing American Freedom; Center for Political Renewal; Christians Engaged; Eagle Forum; Frontline Policy Council; International Conference of Evangelical Chaplain Endorsers; Missouri Center-Right Coalition; National Center for Public Policy Research; Project 21 Black Leadership Network; Students For Life Of America; and Young America's Foundation 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.

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.

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[1] 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.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It is an historic fact that the citizens of New England stood their ground against King George III because he "erected" "New Offices and sent hither swarms of Officers to harass" them "and eat out their substance." See The Declaration of Independence para. 12 (U.S. 1776). Here, a New England fishing business is threatened with insolvency because a Federal agency seeks to swarm the industry with bureaucrats to consume the proceeds of some 20% of the daily catch. Bureaucracies that have grown smug and fat through *Chevron* deference should reacquaint themselves with their country's history.

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 goal of the *Chevron* doctrine was to provide consistent statutory construction in cases litigating the regulatory deluge flowing out of 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 nonetheless to be a "useful monster" that "[was] 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 courts trying to make it work, *Chevron* deference has earned its

reputation as unconstitutional in both application and effect. Its legacy is the erosion of individual liberties the Constitution was framed to protect, thus touching the lives of those who 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; Scombrus One LLC; Relentless Inc.; or Huntress Inc. 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 will have to make room on an already crowded vessel to carry a monitor who takes up precious working space and complicates safety protocols. Pet. at 24. What is more, 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 overrule *Chevron*.

ARGUMENT

I. Congressional Silence Is Not Congressional Delegation.

Does anyone really believe that Congress has "silently" authorized the National Marine Fisheries Service (NMFS) under *Chevron* deference 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] This Court must

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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[.]

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 whopper of a conclusion 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 implausibly claims 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

16 U.S.C. § 1853(b)(8).

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, thus allowing NMFS to require 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 enters dangerous waters with its assertion that Congressional silence is tantamount to a delegation of one of its core powers. 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 doctrine's many problems 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 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. U.S. Const. art I, § 9, cl. 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, it is not free to go on regulatory pirate raids to meet budgetary shortfalls. The decision below inexplicably perceives ambiguity in statutory silence, the logical explanation of which is a clear absence of Congressional intent 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. Here, 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). In Constitutional jurisprudence, silence is golden: 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. Instead, they seem irresistibly drawn to the siren song of increased regulatory power where none was granted. *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 an agency sails into court statutory ambiguity 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 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

Chevron should be overruled.

Respectfully submitted,

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