No. 22-451

In the Supreme Court of the United States

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

v.

GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL.

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

BRIEF FOR INDEPENDENT WOMEN'S LAW CENTER AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Small businesses and the female entrepreneurs who run many of them are critical to the American economy. According to a 2017 report from the Small Business Administration, women are the primary source of income in over 40% of households.[2] It is therefore not surprising that, as of 2019, women owned 42% of American businesses.[3] Yet most enterprises owned by women are small businesses,[4] which are disproportionately burdened by federal regulations like the rules issued here by the National Marine Fisheries Service. And here, although the statutory provision governing Petitioners' fisheries is at best silent on whether the Service can require them to host and pay for federally-required monitors, the court of appeals believed it was required to defer to the Service's regulations under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

[2] Michael J. McManus, *Women's Business Ownership: Data from the 2012 Survey of Business Owners*, U.S. Small Bus. Admin. Office of Advocacy Issue Brief 1 (May 31, 2017) https://tinyurl.com/39mb992u.

[3] Ventureneer & CoreWoman for Am. Express, *The 2019 State of Women-Owned Businesses Report* 3 (2019), https://tinyurl.com/yc32d347 [hereinafter "*Women-Owned Businesses Report*"].

[4] McManus, *supra* note 2, at 2.

That kind of unbridled deference to the executive branch cannot be squared with the separation of powers demanded by the United States Constitution. It is particularly problematic in cases like this one, where an agency has used its alleged authority to create an independent source of funding for its regulatory mission. And it can have devastating consequences for the small and new enterprises that are forced to shoulder the costs of a larger regulatory agenda. This in turn imposes a heavy burden on female entrepreneurs, who own smaller businesses, and in recent years have opened more new businesses, than men.

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

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law.

IWLC and WLF agree with Petitioners that the courts' current application of *Chevron* violates the separation of powers demanded by the Constitution. *Amici* write to explain further the constitutional and practical dangers *Chevron* poses, particularly to small businesses and female entrepreneurs. Those dangers provide ample additional reason for the Court to reverse the decision below and return agencies to their rightfully limited place in our constitutional scheme.

SUMMARY OF ARGUMENT

In approving the Service's rules, the court of appeals joined a long line of decisions in which courts have reflexively deferred to erroneous and aggressive agency interpretations of federal law. Those decisions should stop here. The Service's end-run around its limited statutory authority is both unlawful and devastating for the small businesses that bear the brunt of federal regulation. If the federal government is going to issue company-ending mandates, those dictates must come from Congress, not an executive agency.

ARGUMENT

I. *Chevron* Facilitates Agency Overreach.

This case raises fundamental questions about the proper separation of powers among the legislative, executive, and judicial branches of our federal government. Courts of appeals have consistently applied this Court's decision in *Chevron* to permit federal agencies to exceed the mandates Congress has enacted and to impose significant burdens on the

American people—including, more recently, the burden of financing the overreaching agencies' own overhead costs. Those decisions cannot be squared with the Constitution.

A. Under *Chevron*, Agencies Routinely Encroach on the Legislative and Judicial Powers.

As Justice Thomas recently observed, "[t]o the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 118 (2015) (THOMAS, J., concurring in the judgment) (citation omitted). Unfortunately, the administrative state has blurred—if not eviscerated—the separation of powers the Framers established to protect liberty. The result is that, today, Americans are most often governed not by Congress but by the "hundreds of federal agencies poking into every nook and cranny of daily life." *City of Arlington* v. *FCC*, 569 U.S. 290, 314-315 (2013) (ROBERTS, C.J., dissenting) (citation omitted).

Indeed, rule by administrative agency is the order of our day.[5] Each year, agency administrators issue thousands upon thousands of regulations, while Congress usually enacts fewer than two hundred statutes.[6] As one report noted, "[o]ver the last 60

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

[6] See *ibid.*

years, the U.S. population increased by 98% while the federal regulatory code increased by 850%, including some 6,081 final rules published between 2015 and 2016."[7]

There is no question, moreover, that *Chevron* has emboldened agency decision-makers. Under the aegis of that decision, federal agencies routinely promulgate jaw-dropping regulations that make significant demands of the American people. During the pandemic, for example, the Centers for Disease Control and Prevention issued a *nationwide* moratorium on evictions, even though its mandate has little to nothing to do with housing, and even though Congress had expressly rejected extending such a moratorium. See *Alabama Ass'n of Realtors* v. *Department of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021) (per curiam) (reversing stay of judgment holding moratorium unlawful). Similarly, the Occupational Safety and Health Administration, an agency supposedly limited to regulating workplace safety, issued a *nationwide* vaccine mandate on some eighty million workers—something this Court found to be an extraordinary and unlawful assertion of agency power. See *National Fed'n of Indep. Bus.* v. *Department of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 664-665 (2022) (per curiam).

Or take the Clean Power Plan. Under that administrative action, the Environmental Protection Agency took it upon itself to impose a nationwide cap

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[7] Sean Hackbarth, U.S. Chamber of Com., *How Regulations at Every Level Hold Back Small Business* (Mar. 28, 2017), https://tinyurl.com/4dhrpn23.

and trade program to change the national energy grid—again, something Congress had voted *not* to do. See *West Virginia* v. *Environmental Prot. Agency*, 142 S. Ct. 2587, 2614 (2022). And in *Biden* v. *Nebraska*, the Court was forced to step in after the Department of Education relied on statutory authority to "modify" provisions of student financial assistance programs to "create[] a novel and fundamentally different loan forgiveness program"—an act that "'modif[ied]' the [relevant provisions] only in the same sense that the French Revolution 'modified' the status of the French nobility." 143 S. Ct. 2355, 2369 (2023) (some internal quotation marks omitted).

In short, agencies operating against the backdrop of *Chevron* regularly engage in comprehensive regulation that is far afield of their statutory mandate and even contrary to what Congress itself has directed. In doing so, they take power both from Congress and the judiciary, which the Constitution provides the ultimate authority to say what the law is. See *Perez*, 575 U.S. at 118 (THOMAS, J., concurring in the judgment).

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

Besides exceeding statutory mandates, executive agencies have also increasingly sought to break free from one of the few remaining constraints on their authority: congressional limitations on agency funding. Agencies no longer limit themselves to fees that offset the costs of services the federal government provides the general public—for example, setting

entrance fees for national parks—but seek to charge regulated parties fees that are designed to cover the agencies' own overhead costs and fund the performance of the agencies' statutory mandates.[8] And, as this case confirms, agencies may attempt to do so even when Congress has chosen not to fund them in that manner.

Some agencies view this self-funding as a workaround for what they see as Congress's "underfunding" of activities the agencies believe provide "benefits [that] clearly exceed costs."[9] In this case, for example, the Service forced Petitioners to assume the cost of federal monitors only after the agency faced budgetary shortfalls in recent years. See Pet. 7-8.

The Constitution, however, squarely places all spending decisions in the hands of the legislature. U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). This "power over the purse" is "one of the most important authorities

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[8] See James MacDonald et al., Econ. Rsch. Serv., U.S. Dep't of Agric., Agric. Econ. Rep. No. 775, User-Fee Financing of USDA Meat and Poultry Inspection 6 (1999), https://tinyurl.com/ywvye5x7 ("Overhead may be paid for out of general tax revenues, but it is frequently recovered through user fees."); Christopher C. DeMuth & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 Geo. Mason L. Rev. 555, 556-557 (2017).

[9] MacDonald, *supra* note 8, at iv. ("Interest in user-fee financing frequently arises from concerns that general revenue financing can lead to underfunding of some activities whose benefits clearly exceed costs.").

allocated to Congress in" the Constitution. *U.S. Dep't of Navy* v. *Federal Lab. Rels. Auth.*, 665 F.3d 1339, 1346-1347 (D.C. Cir. 2012) (Kavanaugh, J.). Congress knows how to authorize specific user fees when it believes they are warranted.[10] When Congress fails to provide for that type of funding, the executive should not be given the authority to overrule the legislature's choice.

II. Increased Regulatory Costs Are Devastating for Small Businesses.

All of the regulatory costs imposed by executive agencies—including both increased regulation and agency decisions to self-fund at regulated parties' expense—are not only constitutionally problematic but also financially devastating for small businesses.

A. Regulation Disproportionately Burdens Small Businesses.

While some large corporations may have the resources necessary to take on agency overhead or increased regulatory requirements as a cost of doing business, that financial burden can be crushing for a small enterprise. The court of appeals majority here, for instance, did not dispute that the $710-per-day monitoring cost the Service imposed on fishers can "reduce annual returns by approximately 20 percent."

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

Pet. App. 4 (citation and internal quotation marks omitted). That is a significant burden, particularly in an industry where profit margins are often slim in the first place.[11]

1. Despite Congress's attempts to alleviate the regulatory burden on small businesses through legislation like the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et seq*., it is well established that "regulations often harm startups more than large and established businesses in at least three ways: disproportionate cost burdens, economies of scale in compliance, and entry barriers."[12] Compliance activities—such as filing paperwork, purchasing certain equipment to meet regulatory guidelines, or consulting an attorney to comply with regulatory demands—"may have economies of scale that allow large businesses to navigate the regulatory landscape more easily than small businesses."[13] For example, large enterprises may be able to afford to keep

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[11] See Bob Egelko, *Court taking another look at higher fishing fees for nonresidents*, sfgate.com (Feb. 26, 2016, 7:05 PM), https://tinyurl.com/nhz2tv82 (discussing limitation on non-residents fishing in California and noting that "in the herring business * * * the profit margin is usually slim"); see also App. Vol. II at A293, *Loper Bright Enters., Inc.* v. *Raimondo,* 45 F.4th 359 (D.C. Cir. 2022) (No. 21-5166) (Service's recognition that imposition of monitoring fees would be a "highly sensitive issue" in light of the "socioeconomic conditions of the fleets that must bear the cost[s]").

[12] Chris Edwards, *Entrepreneurs and Regulations: Removing State and Local Barriers to New Businesses* 7, Cato Inst. (May 5, 2021), https://tinyurl.com/hbjakf7r.

[13] Dustin Chambers et al., *Regulation, Entrepreneurship, and Firm Size*, 61 J. of Regul. Econ. 108, 109 (2022).

attorneys on their payrolls who can provide legal advice at lesser cost than the legal contractors on whom small businesses rely.[14] Large businesses are also "able to spread fixed costs over a larger volume of output," benefiting from economies of scale.[15]

It is thus unsurprising that small, family-owned businesses like Petitioners often struggle under the weight of compliance regimes. The "regulatory costs of federal economically significant rules to small businesses amount to over $40 billion per year."[16] Indeed, "[s]mall businesses pay on average $11,700 per year per employee in regulatory costs."[17] One study of environmental compliance regulations determined that "[f]irms with fewer than 50 employees pay nearly 75% more per year per employee to comply with environmental compliance standards than larger companies."[18] And "[i]n manufacturing," economists have found that "the per employee regulatory costs for small businesses were 152 percent

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[14] *Ibid.*

[15] *Ibid.*

[16] Hackbarth, *supra* note 7; see also, *e.g.*, Steve Eder, *When Picking Apples on a Farm With 5,000 Rules, Watch Out for the Ladders*, N.Y. Times (Dec. 27, 2017), https://tinyurl.com/3c9jxwhn (describing extensive regulation of fifth-generation family-owned apple orchard governed by approximately 5,000 federal restrictions).

[17] Hackbarth, *supra* note 7.

[18] Cindy Ryoo, *Environmental Regulation: Reducing the Burden on Small Business and Entrepreneurs*, Rice Univ. Baker Inst. for Pub. Pol'y: Baker Inst. Blog (Aug. 1, 2019), https://tinyurl.com/4csu55xy.

higher than the costs for large businesses."[19] Increased regulation thus burdens small businesses far more than large enterprises.

2. Regulatory accumulation also has a compounding effect that is particularly detrimental to small companies. One recent study determined that increases in industry-specific regulations decreased the number of both small and large firms but decreased employment levels in small firms only.[20] Furthermore, the economists observed, the "declines in the number of small firms and their associated employment levels [we]re amplified when they follow[ed] previous years of high regulation growth, implying that prior regulatory increases spill over and disproportionately burden small businesses."[21] Large businesses did not appear to experience any such compounding effect.[22]

3. Along with burdening established companies, federal regulation can create barriers to entry that stunt the growth of new businesses. Economists have long recognized that existing firms can benefit from new regulation precisely because it deters other companies from entering the market.[23] Such barriers are especially daunting for small enterprises. One

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[19] Edwards, *supra* note 12, at 8 (citation omitted).

[20] Chambers et al., *supra* note 13, at 132.

[21] *Ibid.*

[22] *Ibid.*

[23] James B. Bailey & Diana W. Thomas, *Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment*, 52 J. Reg. Econ. 237, 238, 243-244 (2017).

2015 study observed that, "as complication in regulation grew, there was a decline in the number of new firms. This decline, however, came in the number of small firms; the increase in complication of regulation had no effect on large firms."[24] Federal regulation thus makes it more difficult for small companies to join the field.

B. Increased Federal Regulation Burdens Women, Who Overwhelmingly Own Small Businesses and Frequently Start New Companies.

The toll regulation takes on small businesses is particularly problematic for female entrepreneurs, who own smaller businesses—and in recent years have opened more new businesses—than men.

One reason for the disparity is that female entrepreneurs are unlikely to run the type of large company that can accommodate a heavy regulatory burden. According to one 2017 estimate, "[a]lmost all (99.9%) of women-owned businesses are small businesses."[25] Furthermore, "there is a significant size disparity between [women-owned] businesses and others": Women-owned businesses tend to employ fewer workers than other businesses generally.[26] As a result, female-owned businesses are less likely to have

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[24] Patrick McLaughlin et al., Mercatus Ctr., Geo. Mason U., *Regulatory Accumulation and Its Costs: An Overview* 4 (Nov. 2018), https://tinyurl.com/3d3t795m.

[25] McManus, *supra* note 2, at 2.

[26] *Women-Owned Businesses Report*, *supra* note 3, at 9, 15.

the size and scale that permit larger companies to better absorb regulatory costs.

Female entrepreneurs also suffer disproportionately from the barriers to entry that burden up-and-coming enterprises. Women across the country are actively engaged in starting new companies. From 2017 to 2018, for example, women started an average of 1,821 new businesses per day.[27] Research confirms that "women are often more likely than business owners in general to see a need in the market and to start a company to fill it."[28]

That has proven especially true since the pandemic. One study found that, between March 2020 and the summer of 2021, women started more new businesses than men, and were more likely to start their own business than join an existing enterprise.[29]

For many women, the turn to entrepreneurship is necessitated by the twin demands of their personal and professional lives. To take just one example, "[m]iddle aged women nationwide are often the primary caregivers of their elderly parents. Having a full-time corporate job, a full-time family life and caregiving of their parents puts an inordinate amount

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[27] *Id.* at 4.

[28] *Id.* at 2.

[29] Liz Elting, *More And More Women Are Starting Businesses. Why Is That So Surprising?*, Forbes (July 23, 2021) (citing Next Ins., *The Next Small Business Guide: How to Thrive From Day One* (July 13, 2021)), https://tinyurl.com/2jfbkcvz.

of stress" on these workers and their families.[30] Even before the pandemic, therefore, "53% of stay-at-home mothers sa[id] flexible hours or work schedules [we]re a 'major factor' in their ability to take a job."[31] A 2021 survey likewise found that sixty percent of women would rather "look for a new job" than stay with a company that did not allow them to continue to work remotely.[32]

Given the intense demands some employers place on their workers, many women have felt compelled to start their own businesses to secure the type of working environment they and their families need.[33] The increased regulation *Chevron* permits makes it more difficult to do so.

CONCLUSION

There can be no doubt that many entrepreneurs face significant difficulties as they seek to provide for their families both emotionally and economically. Unlegislated federal regulation should not be one of them. Yet this is precisely what *Chevron* allows. That

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[30] Linda N. Edwards & Elizabeth Field-Hendrey, *Home-Based Work and Women's Labor Force Decisions*, 20 J. Lab. Econ. 170, 196-197 (2002) (quoting S. Comm. on Small Bus. & Entrepreneurship, Panel 2, 105th Cong. (1997) (testimony of M. Carol Wiedorfer)).

[31] Adam Hickman & Jennifer Robison, *Is Working Remotely Effective? Gallup Research Says Yes*, Gallup (Jan. 24, 2020), https://tinyurl.com/bm44sbtv.

[32] Rachel Pelta, *Survey: Men & Women Experience Remote Work Differently*, FlexJobs, https://tinyurl.com/2p8vkzzh (accessed July 4, 2023).

[33] Elting, *supra* note 29.

doctrine has had devastating consequences for small businesses and cannot be squared with the separation of powers the Constitution requires. As Justice Frankfurter once warned, "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions" imposed by the Constitution. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

In short, the time has come to limit the agency overreach that has run rampant under *Chevron*. The decision below should be reversed.

Respectfully submitted,

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