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

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BRIEF FOR PETITIONERS

RYAN P. MULVEY
ERIC R. BOLINDER
R. JAMES VALVO, III
CAUSE OF ACTION INSTITUTE
1310 N. Courthouse Rd.
Suite 700
Arlington, VA 22201

PAUL D. CLEMENT
Counsel of Record
ANDREW C. LAWRENCE*
CHADWICK J. HARPER*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioners

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QUESTION PRESENTED

The Magnuson-Stevens Act (MSA) governs fishery management in federal waters and provides that the National Marine Fisheries Service (NMFS) may require vessels to "carry" federal observers onboard to enforce the agency's myriad regulations. Given that space onboard a fishing vessel is limited and valuable, that alone is an extraordinary imposition. But in three narrow circumstances not applicable here, the MSA goes further and requires vessels to pay the salaries of the federal observers who oversee their operations—although, with the exception of foreign vessels that enjoy the privilege of fishing in our waters, the MSA caps the costs of those salaries at 2-3% of the value of the vessel's haul. The statutory question underlying this petition is whether the agency can also force a wide variety of domestic vessels to foot the bill for the salaries of the monitors they must carry to the tune of 20% of their revenues. Under well-established principles of statutory construction, the answer would appear to be no, as the express grant of such a controversial power in limited circumstances forecloses a broad implied grant that would render the express grant superfluous. But a divided panel of the D.C. Circuit answered yes under *Chevron* on the theory that statutory silence produced an ambiguity that justified deferring to the agency.

The question presented is:

Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellants below) are Loper Bright Enterprises, Inc.; H&L Axelsson, Inc.; Lund Marr Trawlers LLC; and Scombrus One LLC.

Respondents (defendants-appellees below) are Gina Raimondo, in her official capacity as Secretary of Commerce; the Department of Commerce; Richard Spinrad, in his official capacity as Administrator of the National Oceanic and Atmospheric Administration (NOAA); NOAA; Chris Oliver, in his official capacity as Assistant Administrator for NOAA Fisheries; and the National Marine Fisheries Service.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporations, and no shareholders own 10% or more of their stock.

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INTRODUCTION

Almost forty years ago, a six-Justice Court—the bare minimum for a quorum, *see* 28 U.S.C. §1—issued *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which announced a novel two-step procedure for examining whether an administrative agency's interpretation of a statute is lawful. At step one, a court must assess whether the statutory language is "clear" and, if so, give effect to the clear terms. But if the statutory language is "silent or ambiguous," then—at step two—a court is prohibited from resolving the legal question itself as it would in any other case, and instead must defer to the agency's interpretation. That remains true even if the court does not view the agency's interpretation as the best one and even if the agency's interpretation is a 180-degree reversal of its prior views.

Ever since, judges, litigants, and scholars have struggled not only to apply *Chevron*, but to reconcile it with the Constitution, the Administrative Procedure Act (APA), and the historical record. This Court is no exception. The Court has spent years issuing decisions that sought to resolve the *Chevron* debate *du jour*, but those efforts generated only more debates and more confusion, leading many Justices to question the whole enterprise. Today, the Court seemingly has such intense misgivings about *Chevron* that it no longer cites it even when it would seem to govern.

Because *Chevron* remains on the books, however, administrative agencies continue to churn out regulations premised on aggressive, newfound

readings of statutes, and lower courts continue to feel obligated to afford agencies "*Chevron* deference" unless and until this Court explicitly says otherwise. This case is a prime example. In the statute at issue, Congress authorized the National Marine Fisheries Service (NMFS) to require commercial fishing vessels to "carry" federal observers onboard to enforce agency regulations. But, recognizing that requiring fishermen to pay observer salaries is extraordinary, Congress expressly sanctioned such payments only in three narrow circumstances and capped the payment obligations for domestic vessels at 2-3% of the value of their hauls. Nonetheless, seizing on the statute's "silence" and purported "ambiguity," NMFS declared that domestic vessels in the Atlantic herring fishery would have to cede upwards of 20% of their returns to pay observer salaries. Although the D.C. Circuit unanimously agreed that Congress never explicitly authorized this crushing regulation, and although it unanimously acknowledged this Court's reluctance to apply *Chevron*, a panel majority upheld it under *Chevron* anyway.

That result is intolerable, and the Court should jettison *Chevron* altogether—or at least narrow its scope. Indeed, while *Chevron*'s interpretive methodology does not trigger ordinary *stare decisis* analysis, every *stare decisis* consideration favors overruling it. At a bare minimum, the Court should clarify that statutory silence does not trigger *Chevron*, least of all when the silence concerns the grant of a controversial power that Congress has explicitly but narrowly conferred elsewhere. Either way, this Court should reverse the decision below, as there is no basis to regulate herring fishermen out of business once the

statute is given a fair reading without the tie going to the agency.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 45 F.4th 359. Pet.App.1-37. The district court's opinion is reported at 544 F.Supp.3d 82. Pet.App.38-114.

JURISDICTION

The D.C. Circuit issued its opinion on August 12, 2022. Petitioners timely filed a petition for certiorari on November 10, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are included in the appendix.

STATEMENT OF THE CASE

A. Historical Background

Before 1875, federal courts lacked general federal-question jurisdiction. Accordingly, parties alleging that an executive official violated federal law had to seek an extraordinary writ (such as mandamus) or otherwise pursue a common-law action or relief under one of the limited pockets of federal-question jurisdiction. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 948 (2017) (Bamzai); Michael B. Rappaport, Chevron *and Originalism: Why* Chevron *Deference Cannot Be Grounded in the Original Meaning of the Administrative Procedure Act*, 57 Wake Forest L. Rev. 1281, 1286 (2022) (Rappaport). In mandamus cases, federal courts declined to grant

relief "unless the executive officer was acting plainly beyond the scope of his authority." *United States v. Mead Corp.*, 533 U.S. 218, 242 (2001) (Scalia, J., dissenting). But in cases unburdened by the demanding mandamus standard, federal courts applied "*de novo* review." Bamzai 958. Once Congress conferred general federal-question jurisdiction, judicial review became more common, and "agencies did not receive deference." Rappaport 1287. Courts simply interpreted statutes in cases involving agency action the same way that they did in other cases.

This longstanding judicial tradition of actually interpreting statutes, rather than merely ascertaining their clarity and deferring to the executive branch in close cases, prevailed until the 1940s, when this Court "steadily expanded the zone of interpretive discretion given to administrative agencies." Bamzai 976-77. In 1946, however, Congress responded by enacting the APA, which declared that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. §706.

For decades, "federal courts seem to have understood that under the APA"—and consistent with earlier historical practice—"legal interpretations were for independent judicial resolution." 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, 791 (2010) (Beerman). But in 1984, a severely depleted six-

Justice Court decided *Chevron*,[1] which applied a different methodology for "court review[]" of "an agency's construction of the statute which it administers" in the course of resolving the meaning of the term "stationary source" under the Clean Air Act. 467 U.S. at 840, 842. Although the decision initially generated little notice and zero fanfare, *see* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 Admin. L. Rev. 253, 276 (2014), it eventually took on a life of its own as a two-step methodology for addressing statutory-interpretation questions arising in the context of agency action. First, "employing traditional tools of statutory construction," a reviewing court must determine "whether Congress has directly spoken to the precise question at issue," and "[i]f the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842-43 & n.9. Second, if the reviewing court determines that "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 court must decide "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

"*Chevron*'s justification for choosing deference was spare." Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 455 (1989). The Court suggested that statutory silence and ambiguity amount to an "implicit" delegation to

[1] Justice Marshall and then-Justice Rehnquist did not participate in *Chevron* at all, and Justice O'Connor recused herself after oral argument. *See* 467 U.S. at 866.

an agency to "interpret[]" and "construe[]" a "statute which it administers" and that the "political branch[es]" are better suited to make "policy choices" as compared to the judicial branch. *Chevron*, 467 U.S. at 843-44 & nn.9, 11, 865-66. The Court further suggested that history and precedent supported the "principle of deference to administrative interpretations." *Id.* at 844.

As the *Chevron* two-step began to take hold, criticism mounted. For example, some argued that *Chevron* is inconsistent with the Constitution's separation of powers; others argued that *Chevron* contradicted the APA; and others expressed skepticism about *Chevron*'s workability. *See, e.g.*, *CSX Transp. v. United States*, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) ("*Chevron*'s mandate is perplexing, because the rule of the case appears to violate separation of powers principles[.]"); Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. Rev. 757, 773-74 (1991) ("[*Chevron*] upsets the balance created by the Supreme Court in its nondelegation doctrine."); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 Admin. L.J. 255, 266 (1988) ("[T]he *Chevron* model may not be as simple to administer as its literal terms suggest."); Cass R. Sunstein, et al., *Judicial Review of Administrative Action in a Conservative Era*, 31 Admin. L. Rev. 353, 367-68 (1987) ("Courts, not administrative agencies, are supposed to say what the law is," and "[t]he Administrative Procedure Act … can hardly be understood as a proclamation in

favor of judicial deference to administrative agency interpretations of law.").

With the passage of time, the full scale of the "problems" with *Chevron* "have become widely appreciated" by members of this Court. *Buffington v. McDonough*, 143 S.Ct. 14, 21 (2022) (Gorsuch, J., dissenting from the denial of certiorari); *see, e.g.*, *Baldwin v. United States*, 140 S.Ct. 690 (2020) (Thomas, J., dissenting from the denial of certiorari); *Pereira v. Sessions*, 138 S.Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); *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) (Kavanaugh); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109-10 (2015) (Scalia, J., concurring in the judgment); *City of Arlington v. FCC*, 569 U.S. 290, 312-28 (2013) (Roberts, C.J., dissenting). As a result, "*Chevron* has been unmentionable" in this Court for years. Ryan D. Doerfler, *Late-Stage Textualism*, 2021 Sup. Ct. Rev. 267, 297 (2021). Instead, consistent with traditional practice and its assigned constitutional role, the Court has definitively resolved questions of law itself. *See, e.g.*, *Am. Hosp. Ass'n v. Becerra*, 142 S.Ct. 1896 (2022); *Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr.*, 142 S.Ct. 2354 (2022).

B. Statutory Background

This case concerns the interpretation of the 1976 Magnuson-Stevens Act (MSA). *See* 16 U.S.C. §§1801

et seq.[2] The MSA is administered by the Commerce Secretary, who has delegated her responsibilities to NMFS. §§1802(39), 1855(d).

The MSA divides the Nation's federal fisheries into eight regions, each governed by a "fishery management council" overseen by NMFS. §1852(b)-(c). Those councils propose "fishery management plans" and amendments to them. *See* §§1852(h), 1854. After NMFS examines each such proposal, it must provide a public-comment period and decide whether to approve or disapprove the proposal. §1854(a). If NMFS approves the proposal, the agency promulgates it as a final regulation. *See* §1854(b)(3).

The MSA sets forth various "required provisions" that fishery-management plans "shall" contain, as well as "discretionary provisions" that they "may" contain. §1853(a)-(b). Among the required provisions, plans "shall contain the conservation and management measures" that are "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." §1853(a)(1)(A). Among the discretionary provisions, plans "may require that one or more observers be carried on board a vessel …, for the purpose of collecting data necessary for the conservation and management of the fishery." §1853(b)(8). Plans also "may prescribe such other measures, requirements, or conditions and restrictions as are determined to be

[2] Further statutory references are to Title 16 of the U.S. Code unless otherwise noted.

necessary and appropriate for the conservation and management of the fishery." §1853(b)(14).

Space onboard a commercial fishing vessel is a scarce and precious resource. Thus, displacing someone engaged in active fishing to make way for a federal observer is already an enormous imposition. Making the fishing vessels foot the bill for that imposition adds insult to injury. Hence, when Congress determined that the fishing industry either could or must cover the cost of federally mandated observers, it said so expressly in the MSA. It did so just three times.

First, the MSA provides that the North Pacific Council—whose jurisdiction encompasses Alaska, Washington, and Oregon and many of the largest and most successful commercial fishing enterprises, §1852(a)(1)(G)—"may" establish a "plan" that "requires that observers be stationed on fishing vessels" and "may … establish[] a system … of fees" "to pay for the cost of implementing the plan." §1862(a). Those fees are expressly capped and "not to exceed 2 percent[] of the unprocessed ex-vessel value of fish and shellfish harvested." §1862(b)(2)(E).

Second, for "limited access privilege programs"—*i.e.*, programs where persons are permitted to harvest a specific quantity of the total allowable catch for the fishery, *see* §1802(26), and thus where the need for regulatory compliance is particularly acute—the MSA provides that regional councils "shall … include an effective system for enforcement, monitoring, and management of the program, including the use of observers or electronic monitoring systems," and "shall … provide … for a program of fees paid by

limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities." §1853a(c)(1)(H), (e)(2). Again, those fees are capped and "shall not exceed 3 percent of the ex-vessel value of fish harvested under any such program." §1854(d)(2)(B).

Finally, the MSA understandably expresses an especial concern that authorized "foreign fishing"—*i.e.*, fishing involving foreign rather than U.S. vessels, *see* §1802(19)—not deplete offshore resources within our exclusive economic zone. The MSA thus requires that "a United States observer will be stationed aboard each foreign fishing vessel while that vessel is engaged in fishing within the exclusive economic zone" and that NMFS "shall impose … a surcharge in an amount sufficient to cover all the costs of providing a United States observer aboard that vessel." §1821(h)(1)(A), (4). Furthermore, to guard against the possibility that "insufficient appropriations" would allow foreign fishing to proceed unmonitored, the MSA provides that NMFS shall certify a cadre of private contractors to serve as observers as part of a "supplementary observer program" and that NMFS "shall … establish a reasonable schedule of fees that certified observers or their agents shall be paid by the owners and operators of foreign fishing vessels for observer services." §1821(h)(6)(A), (C); *see* 50 C.F.R. §600.506(h)-(j) (referring to supplementary observers as "contractors").

The MSA backs these three limited and express authorizations for industry-funded observers with provisions authorizing the imposition of penalties on noncompliant vessels. Most saliently, the MSA

authorizes "sanctions" on vessels that fail to make "any payment required for observer services provided to or contracted by an owner or operator." §1858(g)(1)(D). But beyond these provisions, the MSA is silent with respect to forcing the fishing industry to pay for the cost of inspectors.

C. Factual and Procedural Background

1. The New England Council is responsible for the fishery-management plan applicable to, *inter alia*, the Atlantic herring fishery. *See* §1852(a)(1)(A). Unlike the express authorizations for industry-funded monitoring in the three limited contexts discussed above, nothing in the MSA expressly provides that vessels participating in the herring fishery could or should foot the bill for federal inspection efforts. As a consequence, and because Congress has declined to appropriate funds to NMFS for such inspection efforts in recent years, the agency has spent the better part of a decade attempting to develop a workaround. *See, e.g.*, 79 Fed. Reg. 8,786, 8,793 (Feb. 13, 2014) ("Budget uncertainties prevent NMFS from being able to commit to paying for increased observer coverage in the herring fishery.").

In 2013, the New England Council began developing the attempted workaround at issue here: an "omnibus amendment" to all New England fishery-management plans that would empower the Council to require "the fishing industry to pay its costs for additional monitoring, when Federal funding is unavailable." CADC.App.273. After the New England Council submitted this amendment, NMFS opened a comment period before promulgating a final rule approving it. *See* 83 Fed. Reg. 55,565 (Nov. 7, 2018);

83 Fed. Reg. 47,326 (Sept. 19, 2018). In February 2020, NMFS published that final rule, thus establishing a process to introduce forced industry-funded monitoring across all New England fisheries. *See* 85 Fed. Reg. 7,414 (Feb. 7, 2020). NMFS took that action notwithstanding industry warnings that it would impose an "impossible financial burden" on small businesses, CADC.App.46, and even as it conceded that "[i]ndustry-funded monitoring is a complex and highly sensitive issue" due to the "socioeconomic conditions of the fleets that must bear the cost" and because "it involves the Federal budgeting and appropriations process," CADC.App.293.

For the Atlantic herring fishery, the final rule creates an industry-funded-monitoring program that aims to cover 50% of herring trips undertaken by vessels with a Category A permit (authorizing fishing in all Atlantic herring management areas) or a Category B permit (authorizing fishing in all those areas except the Gulf of Maine). 85 Fed. Reg. at 7,417. More precisely, "[p]rior to any trip declared into the herring fishery, representatives for vessels with Category A or B permits are required to notify NMFS for monitoring coverage." *Id.* If NMFS determines that an observer is required on a particular vessel, but NMFS does not assign a government-paid observer, the vessel must contract with and pay for a government-approved third party that provides monitoring services. *Id.* at 7,417-18. If the vessel refuses to foot the bill, it is "prohibited from fishing for, taking, possessing, or landing any herring." *Id.* at 7,418. And the bills are hefty: NMFS estimates that "industry's cost responsibility associated with

carrying an at-sea monitor" is "$710 per day," which would "reduce" annual returns-to-owner by "approximately 20 percent." *Id.*

2. Petitioners are four family-owned and family-operated companies that participate in the Atlantic herring fishery. Pet.App.4. In February 2020, petitioners filed suit alleging, as relevant here, that the MSA did not authorize NMFS to mandate industry-funded monitoring in the herring fishery. Petitioners moved for summary judgment, and NMFS cross-moved for summary judgment. In resolving those motions, the district court explained that its analysis was "governed by *Chevron*." Pet.App.60. And, remarkably, the court found for NMFS at step one, holding that the MSA unambiguously authorizes industry-funded monitoring in the herring fishery. *See* Pet.App.59-69.

3. A divided D.C. Circuit panel affirmed. Writing for the majority, Judge Rogers likewise applied the "two-step *Chevron* framework."[3] Pet.App.5. The majority acknowledged that this Court "has not applied th[at] framework" in "recent cases," but it emphasized that only this Court can "overrul[e] its own decisions." Pet.App.15. Applying *Chevron*, the majority stated at step one that the MSA "suggests" that NMFS may impose industry-funded monitoring in the Atlantic herring fishery after noting that the statute allows NMFS to require vessels to "carry" at-sea monitors, that it includes two "necessary and appropriate" provisions, and that it contains a

[3] Now-Justice Jackson heard oral argument below, but Chief Judge Srinivasan subsequently replaced her.

"penalty" provision. Pet.App.5-13. But the majority did not rest its decision on *Chevron* step one, as it ultimately found statutory "silence" such that the MSA leaves "unresolved" whether NMFS "may require industry to bear the costs of at-sea monitoring." Pet.App.6, 12. The majority explained that "it behooves the court to proceed to Step Two," where it declared NMFS' "interpretation" of the MSA "reasonable." Pet.App.5, 13-16.

Judge Walker dissented. After reiterating that this Court has ceased invoking *Chevron* and that some Justices had called for its reconsideration, he explained that "Congress unambiguously did not" "authorize [NMFS] to make herring fishermen in the Atlantic pay the wages of federal monitors who inspect them at sea." Pet.App.21. Judge Walker explained that "it is not usual to require a regulated party to pay the wages of its monitor when the statute is silent"—indeed, that NMFS "ha[d] identified no other context in which an agency, without express direction from Congress, requires an industry to fund its inspection regime." Pet.App.29. Judge Walker also observed that NMFS' theory "could lead to strange results" and "undermine Congress's power of the purse." Pet.App.31-32. And Judge Walker noted that, "if Congress had wanted to allow industry funding of at-sea monitors in the Atlantic herring fishery, it could have said so," but it "instead chose to expressly provide for it in only certain *other* contexts." Pet.App.32-33. In short, Judge Walker determined, nothing authorizes NMFS to require herring fishermen to "spend a fifth of their revenue on the wages of federal monitors embedded by regulation onto their ships." Pet.App.37.

SUMMARY OF ARGUMENT

The decision below relied on *Chevron* to reach the extraordinary conclusion that NMFS may leverage statutory silence to require herring fisherman to foot the bill for federal overseers to the tune of 20% of the fishermen's annual returns. That decision exemplifies all that is wrong with *Chevron*. The Court should either abandon *Chevron* for good or at least substantially cabin its scope.

This Court can discard the *Chevron* two-step without analyzing the *stare decisis* factors applicable when the Court revisits its substantive statutory or constitutional holdings. What everyone knows as "*Chevron*" is not the decision's substantive holding about stationary sources under the Clean Air Act, but the decision's methodology for interpreting statutes. Such interpretive methodologies do not enjoy the same kind of *stare decisis* as substantive decisions.

In any event, the *stare decisis* considerations applicable in substantive statutory and constitutional cases only confirm that *Chevron* must go. First, *Chevron* is egregiously wrong several times over. As a constitutional matter, *Chevron* impermissibly transfers both Article III judicial power and Article I legislative power to Article II executive agencies, and it runs afoul of the Due Process Clause by requiring courts to systematically place a thumb on the scale against the citizenry. As a statutory matter, *Chevron* flouts the plain text of the APA, which makes clear that courts, not agencies, are supposed to interpret statutes—as a majority of the Court has already concluded. And *Chevron* is entirely ahistorical, as it purported to draw support for deference from a

historical record that actually confirms that courts traditionally discharged their responsibility to interpret statutes even in cases involving executive agencies.

Chevron has also proved unworkable and engendered significant negative consequences. It is no secret that courts have struggled to apply the *Chevron* methodology in a principled way, and the Court's manifold efforts to tweak the methodology have only added to the confusion. The best evidence that *Chevron* is unworkable is the fact that this Court no longer deigns to apply it. More troublingly, *Chevron* has seriously distorted how the political branches operate. Thanks to *Chevron*, Congress does far less than the Framers envisioned and the executive branch does far more, as roughly half of Congress can count on friends in the executive branch to tackle controversial issues via executive action without the need for compromise, bicameralism, or presentment. That creates a dynamic where the "law" on important and divisive issues changes radically with every change of administration, with the latest executive action predictably challenged in a hand-picked jurisdiction with an attendant emergency petition to this Court. Moreover, as baleful as the consequences are for the separation of powers, *Chevron*'s primary victim is the citizenry, as *Chevron* literally gives the tie to their regulators in every close case.

There are no concrete reliance interests that counsel in favor of preserving *Chevron*. Indeed, *Chevron* is a reliance-destroying doctrine. It enables agencies to change the import of the U.S. Code and empowers every new administration to change the

rules on issues of fundamental importance. Moreover, any claim of reliance on *Chevron* is especially hard to take seriously when this Court has declined to apply the doctrine for years and expressed misgivings about it for even longer. But even assuming that private parties could have legitimately relied on a particular application of *Chevron* in a particular case, discarding *Chevron*'s interpretive methodology would not *ipso facto* upset the substantive results in those cases. Even the substantive result in *Chevron* would survive the overruling of *Chevron*'s methodology. And while some government officials will no doubt complain about the inconvenience of losing *Chevron*, their interests carry no weight in the *stare decisis* analysis.

The case for a clean break with *Chevron* is thus overwhelming. But, at a minimum, this Court should make clear that the doctrine is not triggered by statutory silence, especially silence concerning a controversial power expressly but narrowly conferred elsewhere in the statute. A rule requiring courts to construe silence as an agency-empowering delegation is at odds with the bedrock administrative-law rule that agencies enjoy only the power that Congress has affirmatively conferred, and it promotes excessive delegation of Article I power to Article II agencies. Beyond all that, sensible rules of statutory interpretation confirm that silence is not consent for executive agencies to wield a controversial power that Congress has expressly conferred, only in narrow circumstances and subject to equally express limits, elsewhere in the statute.

Once misguided notions of deference are eliminated, it is plain that the decision below cannot

stand. By far the best reading of the MSA is that Congress did not *sub silentio* authorize NMFS to impose an industry-funded-monitoring program that could deprive vessels in the Atlantic herring fishery of upwards of one-fifth of their annual returns. The Court thus should reverse rather than remand and bring an end to NMFS' overreaching effort to regulate the herring industry into nonexistence.

ARGUMENT

I. The Court Should Overrule *Chevron*.

A. *Chevron* Is Entitled to Little, If Any, *Stare Decisis* Effect.

This Court's "precedents on precedent" teach that *stare decisis* has greater or lesser force depending on the nature of the challenged precedent. *Ramos v. Louisiana*, 140 S.Ct. 1390, 1412 (2020) (Kavanaugh, J., concurring in part). Thus, "[c]onsiderations of *stare decisis* have special force" when it comes to substantive interpretations of statutes because "the legislative power is implicated, and Congress remains free to alter what [the Court] has done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). By contrast, *stare decisis* is "weak[er]" when the Court "interpret[s] the Constitution" because that "interpretation can be altered only by constitutional amendment." *Franchise Tax Bd. v. Hyatt*, 139 S.Ct. 1485, 1499 (2019). And *stare decisis*' "role" is "reduced" further when the precedent involves a "procedural rule," which "does not serve as a guide to lawful behavior." *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

The methodology employed in *Chevron* is not entitled to even the weakest of these forms of *stare*

decisis. To be sure, *Chevron*'s specific result regarding the term "stationary source" under the Clean Air Act, *see* 467 U.S. at 866, may call for standard *stare decisis* analysis, as that discrete holding involves the interpretation of a particular statutory provision and thus implicates "statutory *stare decisis*," *Allen v. Milligan*, 2023 WL 3872517, at *20 (U.S. June 8, 2023). Ironically, it is only the *Chevron* methodology that creates any doubt about whether this Court's interpretation of the Clean Air Act is entitled to full *stare decisis* effect. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-82 (2005). But to state the obvious, this is not a Clean Air Act case, and what the question presented seeks to have overruled is *Chevron*'s interpretive methodology. That has significant consequences for the *stare decisis* analysis.

"Unlike ordinary statutory precedents, 'the Court's precedents … pronouncing the Court's own interpretive methods and principles typically do not fall within that category of stringent statutory *stare decisis*.'" *Allen*, 2023 WL 3872517, at *21 n.1 (Kavanaugh, J., concurring). In fact, "there is broad agreement" that "interpretive methodologies" and "canons" "do not" "receive *stare decisis* effect" *at all*. Kristin E. Hickman & R. David Hahn, *Categorizing* Chevron, 81 Ohio St. L.J. 611, 653 (2020); *see also, e.g.*, Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 Harv. L. Rev. F. 167, 178 (2021) ("Under our current system of statutory interpretation, there is no methodological *stare decisis*[.]"); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 Tex. L. Rev. 339, 389 (2005) ("[T]he Court's actual cases make clear that

when the Court issues opinions interpreting statutes, *stare decisis* effect attaches to the ultimate holding as to the meaning of the particular statute interpreted, but not to general methodological pronouncements, no matter how apparently firm."). To pick just two examples, this Court has moved away from creating new implied causes of action or new *Bivens* actions without overruling *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). That near-consensus makes sense, as "[a]sking a Justice to give presumptive fidelity to a wide-ranging methodology with which she disagrees is asking too much." Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 Tex. L. Rev. 1125, 1127 (2019) (Kozel).

There is no basis for a *Chevron* exception to this general rule. Indeed, if the *Chevron* methodology enjoyed ordinary *stare decisis* effect, it would be clear error for this Court to simply ignore *Chevron* and its methodology in case after case. But this Court has repeatedly done just that in all manner of cases since 1984. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1121 (2008) ("Of the 1014 [Supreme Court] cases included in our study, *Chevron* (or a *Chevron* precedent) was cited in only 120. In only 84 cases (8.3% of the population) did the Court apply the *Chevron* two-step test."). And that trend has only accelerated in recent years, to the point where it is widely recognized that *Chevron* has "expired at the Court." Richard M. Re, *Personal Precedent at the Supreme Court*, 136 Harv. L. Rev.

824, 847-48 (2023). None of this would be explicable if *Chevron*'s methodology carried any meaningful *stare decisis* force.

At most, *Chevron* could claim the kind of weak or "reduced" *stare decisis* effect afforded to procedural rules. *Gaudin*, 515 U.S. at 521. *Pearson v. Callahan*, 555 U.S. 223 (2009), provides an instructive example of that limited form of *stare decisis*. There, the Court unanimously overruled a "two-step procedure" for resolving qualified-immunity claims. *See id.* at 232-35. In doing so, the Court observed that the *stare decisis* "standards" that apply when a "constitutional or statutory precedent is challenged"—*e.g.*, whether the precedent "was 'badly reasoned' or … has proved to be 'unworkable'"—are "out of place" in this context. *Id.* at 234. Instead, the Court declared it "appropriate" to "depart[]" from the challenged precedent simply because doing so "would not upset expectations" vis-à-vis "property and contract rights," the challenged precedent "consist[ed] of a judge-made rule," and "experience ha[d] pointed up the precedent's shortcomings." *Id.* at 233.

Those same considerations overwhelmingly support overruling *Chevron*'s two-step procedure. In general, procedural rules do not engender reliance interests because they "merely govern how courts will go about their own business when deciding disputes many years later that parties often cannot foresee when arranging their affairs," and it is "particularly hard to see how *Chevron* might have engendered serious reliance interests" when its "very point" is to allow agencies to *change* the law. *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring); *see also*

pp.40-42, *infra*. Second, *Chevron* is undeniably a judge-made rule. Finally (and to put it mildly), *Chevron* has "been questioned by Members of the Court in later decisions" and has "defied consistent application by the lower courts" (whose members have likewise questioned the decision).[4] *Pearson*, 555 U.S. at 235; *see* pp.6-7, *supra*; pp.26-29, *infra*. If anything, this Court's task is even more straightforward here than in *Pearson*, as *Chevron*'s procedural rule "has often been disregarded in [this Court's] own practice." *Hohn v. United States*, 524 U.S. 236, 252 (1998); *cf. Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2427 (2022) ("[T]his Court long ago abandoned *Lemon*[.]"). Accordingly, applying the reduced *stare decisis* considerations applicable to procedural decisions, the case for discarding *Chevron* is overwhelming.

B. In All Events, Every *Stare Decisis* Consideration Militates in Favor of Overruling *Chevron*.

While the stronger form of *stare decisis* is inapplicable here, the factors relevant to that analysis are still amply satisfied. *Stare decisis* is never an "inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Instead, this Court evaluates "three broad considerations": (1) "is the prior decision not

[4] *See, e.g.*, *Mexican Gulf Fishing v. U.S. Dep't of Com.*, 60 F.4th 956, 976 (5th Cir. 2023) (Oldham, J., concurring in part); *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 524-25 (6th Cir. 2019) (Kethledge, J., dissenting); *Aqua Prod., Inc. v. Matal*, 872 F.3d 1290, 1334 (Fed. Cir. 2017) (Moore, J., concurring); *Waterkeeper All. v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring); *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278-83 (3d Cir. 2017) (Jordan, J., concurring in the judgment).

just wrong, but grievously or egregiously wrong?"; (2) "has the prior decision caused significant negative jurisprudential or real-world consequences?"; and (3) "would overruling the prior decision unduly upset reliance interests?" *Ramos*, 140 S.Ct. at 1414-15 (Kavanaugh, J., concurring in part). All of those considerations strongly support overruling *Chevron*.

1. *Chevron* is egregiously wrong.

"*Chevron* barely bothered to justify its rule of deference, and the few brief passages on this matter pointed in disparate directions." David J. Barrron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212-13 (2001) (Barron & Kagan). *Chevron* principally suggested that deference is appropriate because a statutory ambiguity is an "implicit" delegation to an agency to "interpret[]" and "constru[e]" a "statute which it administers," as Article III judges are not "experts" in "policy-making." 467 U.S. at 843-44 & nn.9, 11, 865-66. *Chevron* further suggested that "the principle of deference to administrative interpretations" is supported by history and precedent. *Id.* at 844-45 & n.14. In reality, *Chevron*'s rule of judicial deference to the executive's interpretation of statutes is flatly inconsistent with Constitution, the APA, and centuries of tradition. *Chevron* thus is the poster child of a case that was "egregiously wrong when decided." *Ramos*, 140 S.Ct. at 1415 (Kavanaugh, J., concurring in part).

Chevron is at odds with the basic division of labor in the first three Articles of the Constitution. As the Framers recognized, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same

hands … may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003). And the separation of powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021). Thus, "to preserve the liberty of all the people," *Collins v. Yellen*, 141 S.Ct. 1761, 1780 (2021), the Constitution established a tripartite system of government that separated the federal government's powers into three branches. Article I therefore vests "all Legislative powers" in Congress, U.S. Const. Art. I, §1; Article II vests "[t]he Executive power" in the President, U.S. Const. Art. II, §1; and Article III vests "[t]he judicial power" in the courts, U.S. Const. Art. III, §1.

Chevron poses a triple threat to this constitutional design. As the Court declared early on in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. That includes saying what the law is in close cases, even when the authorities at issue are murky or silent. Indeed, most cases and controversies arise precisely because the applicable authorities have a sufficient degree of ambiguity for reasonable parties to differ and then litigate. Some Framers viewed such ambiguity as nearly ubiquitous: "*All new laws*" are "more or less obscure and equivocal," as "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas." The Federalist No. 37, at 225 (James Madison) (emphasis added); *see*

also, e.g., Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 526-27 (2003). But even as they recognized that ambiguity is prevalent, the Framers agreed that the power to "ascertain" the "meaning" of not only "the Constitution" but also "any particular act proceeding from the legislative body" must "belong[]" to "the judges" alone. The Federalist No. 78, at 466 (Alexander Hamilton); *see id.* ("The interpretation of the laws is the proper and peculiar province of the courts."); Bamzai 938-41.

Chevron is impossible to square with this understanding. As one scholar concisely put it, *Chevron* is the "counter-*Marbury*" for "the administrative state." Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2075 (1990). Instead of requiring a court to authoritatively declare the meaning of "ambiguous" statutory text as Article III demands, *Chevron* requires a court to defer to the "interpretation[s]" and "constructions" offered by an executive agency, even if the court concludes that the agency does *not* have the best reading of the text. 467 U.S. at 843-44 & n.11. To the extent that the *Chevron* Court believed that Congress "implicitly" desired this result, *but see* Barron & Kagan 212 ("*Chevron* doctrine at most can rely on a fictionalized statement of legislative desire[.]"), that only makes matters worse. Congress plainly lacks the power to delegate the judicial power to a different branch regardless of whether that desire is implicit or explicit. *See, e.g.*, *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.* (1792); *see also Stern v. Marshall*, 564 U.S. 462, 484 (2011) ("Article III could neither serve its purpose in the system of checks and balances

nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III."). And this Court would be duty-bound to resist that kind of diminishment. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-40 (1995) (invalidating congressional effort to reopen final judgments). Simply put, by "wrest[ing] from Courts the ultimate interpretative authority to 'say what the law is'" and "hand[ing] it over to the Executive," *Chevron* constitutes a grievous separation-of-powers violation. *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring); *see Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.").

To the extent that *Chevron* also characterized agency interpretations of statutes as the "formulation of policy," 467 U.S. at 843, that just relocates the separation-of-powers violation. Article I's Vesting Clause gives all legislative power to Congress, and the text of that Clause "permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). While this Court's precedent treats a certain degree of congressional delegation of legislative power to executive agencies as permissible, that is because the line between making the law and executing it can be murky. *See, e.g.*, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825); *Gutierrez-Brizuela*, 834 F.3d at 1154 (Gorsuch, J., concurring). It is not because affirmatively delegating the power to make policy to the executive branch is consistent with our constitutional scheme, let alone something to be encouraged or facilitated via judicial deference. *See*

Mistretta v. United States, 488 U.S. 361, 371-72 (1989). Accordingly, conceptualizing *Chevron* as a tool that promotes agency policymaking succeeds only in confirming that *Chevron* "is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch," Kavanaugh 2150—and an authorization for the kind of concentration of power that the entire constitutional structure seeks to guard against, *see* The Federalist No. 47, at 298 (James Madison) ("[T]he preservation of liberty requires that the three great departments of power should be separate and distinct.").

Chevron's constitutional infirmities run deeper and extend to undermining due process. As this Court has long explained, "[a] fair trial in a fair tribunal is a basic requirement of due process," and "no man can be a judge in his own case." *In re Murchison*, 349 U.S. 133, 136 (1955); *see Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("[A] law that makes a man a Judge in his own cause … is against all reason and justice[.]"); *see also* The Federalist No. 10, at 74 (James Madison) (similar). *Chevron* plainly "runs up against" that "mainstay of our system of government." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 428 (1995). As in this case, the government is generally a party in cases in which courts apply *Chevron*, and that doctrine requires courts to make a "precommitment" to favor the government's "judgments about the law." Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1212 (2016) (Hamburger). Rather than having neutral umpires call balls and strikes, *Chevron* adjusts the strike zone to favor the home team. "How is it fair in a court of justice for judges to defer to one of the litigants," *United States v. Havis*, 907 F.3d 439,

451 (6th Cir. 2018) (Thapar, J., concurring), *rev'd en banc*, 927 F.3d 382 (per curiam), especially when that litigant is not advancing the best interpretation of the law and is "the most powerful of parties, the government"? Hamburger 1212; *see Egan*, 851 F.3d at 281 (Jordan, J., concurring in the judgment) ("We would never allow a private litigant the power to authoritatively reinterpret the rules applicable to a dispute, yet we routinely allow the nation's most prolific and powerful litigant, the government, to do exactly that.").

While *Chevron*'s constitutional flaws are manifold and sufficient, *Chevron* is also egregiously wrong as a matter of statutory construction. *Chevron* was a case about the proper procedures for assessing the statutory interpretations embodied in administrative action. The salience of the APA to that question would seem self-evident. Quite remarkably, however, *Chevron* "did not even bother to cite" the APA. *Mead*, 533 U.S. at 241 (Scalia, J., dissenting); *see Perez*, 575 U.S. at 109 (Scalia, J., concurring in the judgment) (describing *Chevron* as "[h]eedless of the original design of the APA"). Had *Chevron* grappled with the APA, the error of its methodology would have been immediately apparent.

Section 706 of the APA straightforwardly provides that "the reviewing court *shall decide all* relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. §706 (emphasis added). As five members of this Court have now recognized, that language indicates that courts must interpret statutes "*de*

novo." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2433 (2019) (Gorsuch, J., concurring in the judgment); *see United States v. Texas*, 2023 WL 4139000, at *14 (U.S. June 23, 2023) (Gorsuch, J., concurring in the judgment). That understanding is reinforced by the fact that §706 "places the court's duty to interpret statutes on an equal footing with its duty to interpret the Constitution," John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 194 (1998), and "constitutional provisions ha[ve] been subject to *de novo* review" "[s]ince at least *Marbury*," Bamzai 985; *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 923 (1995) (citing *Marbury* and explaining that "we think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the [government's] interpretation of the [statute]"). If any doubt about §706's meaning remained, other subsections of §706 demonstrate that Congress knew how to instruct courts to defer to agencies—and that it deliberately declined to do so when it came to questions of statutory (or constitutional) interpretation. *See, e.g.*, 5 U.S.C. §706(2)(A) ("The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). It thus is beyond debate that *Chevron* "flout[s] the language of the [APA]." Kavanaugh 2150 n.161.

Chevron just as clearly flouts the historical record. While it is true that, before the 1875 grant of general federal-question jurisdiction, courts often gave "great leeway to executive discretion in interpreting legal text," that is only because "many statutory questions could be resolved *only* in the context of a mandamus

action brought against an executive official," and a mandamus action "carried with it a deferential standard of review." Bamzai 947, 958; *see* Rappaport 1287 ("[T]he apparent deference conferred on agencies was the result of the limited remedies available in federal court."). But in non-mandamus cases, "no comparable interpretive deference" existed—only "*de novo* review." Bamzai 917, 958.

This Court's decision in *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840), provides a clear example. There, the Court declined to grant mandamus relief in a case involving an executive official's discretionary act, but at the same time, the Court admonished that, "[i]f a suit should come before this Court, which involved the construction of any of these laws"—*i.e.*, in a non-mandamus posture—"the Court certainly would not be bound to adopt the construction given by the head of a department." *Id.* at 515. To the contrary, if the Justices "supposed his decision to be wrong, they would, of course, so pronounce their judgment." *Id.* That much followed from "their duty to interpret the Act of Congress, in order to ascertain the rights of the parties in the cause before them." *Id.* And once Congress conferred general federal-question jurisdiction, this Court "interpreted agency statutes … without conferring deference." Rappaport 1288.

To be sure, when conducting *de novo* review, this Court traditionally gave "respect" to "certain executive interpretations of legal text" when executive officers proffered those interpretations "contemporaneous[ly] with enactment" or held them "continuously … for a long time," Bamzai 944—as the cases cited in *Chevron* demonstrate, *see, e.g.*, *Edwards' Lessee v. Darby*, 25

U.S. 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."); *United States v. Moore*, 95 U.S. 760, 762-63 (1877) (similar); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932) (similar). But that is just a standard principle of textual interpretation, not a principle of deference, much less a rule of abdication in cases of ambiguity. *See* Rappaport 1291. Indeed, this Court gives respect to contemporaneous and longstanding legal interpretations when examining constitutional text too, *see id.* at 1291-92, and no one characterizes that practice as deference, *see Baldwin*, 140 S.Ct. at 693 (Thomas, J., dissenting from the denial of certiorari) (explaining that giving "respect to certain contemporaneous, consistent interpretations of statutes by executive officers" is akin to "the more general principle of 'liquidation,' in which consistent and longstanding interpretations of an ambiguous text could fix its meaning").

However one characterizes the practice of respecting contemporaneous and longstanding interpretations of legal text, it could not possibly justify *Chevron* (let alone *Brand X*). *Chevron* and its progeny demand deference to an agency's *non-contemporaneous and inconsistent* interpretations of a statute—a rule without any historical pedigree. *See Chevron*, 467 U.S. at 863 ("The fact that the agency has from time to time changed its interpretation … does not … lead us to conclude that no deference should be accorded the agency's interpretation of the statute."); *Brand* X, 545 U.S. at

981 ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."); *accord* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 551 n.137 (2003) ("[T]he terms of the delegation inferred by *Chevron* give administrative agencies substantially more freedom to depart from settled understandings than the Madisonian concept of 'liquidation.'").

In sum, all constitutional, statutory, and historical roads lead to the same conclusion: *Chevron* is "not just wrong"; it is "grievously [and] egregiously wrong." *Ramos*, 140 S.Ct. at 1415 (Kavanaugh, J., concurring in part).

2. *Chevron* has caused significant negative jurisprudential and real-world consequences.

Chevron "is the most talked about, most written about, most cited administrative law decision of the Supreme Court. Ever." Ronald A. Cass, Chevron—*Complicated, Start to Finish*, 23 Federalist Soc'y Rev. 265 (2022). What drives all that conversation is that *Chevron* has not only proven unworkable but enormously damaging to our system of government. The genius of our Constitution is its separation of government powers to the end of protecting individual liberty. By reallocating power away from the courts and Congress and concentrating it in the executive, *Chevron* has tinkered with that basic framework. Forty years later, the superiority of the Framers' design and the baleful consequences for individual liberty from *Chevron*'s tinkering are unmistakable.

Chevron's workability problems were present early on, have grown over time, and have become so acute that this Court has simply stopped trying to apply it. Even Justices who partially defended *Chevron* recognized early on that the imprecision of its threshold test for triggering deference was the doctrine's Achilles' heel. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 520-21 (1989) (warning that "battles … will be fought" over the "ambiguity" of the *Chevron* test). The "fundamental problem" is that "different judges have wildly different conceptions of whether a particular statute is clear or ambiguous," which generates inconsistency in *Chevron*'s application that is "antithetical to the neutral, impartial rule of law." Kavanaugh 2152-54. Many judges declare ambiguity readily and engage in "reflexive deference" to the agency. *Pereira*, 138 S.Ct. at 2120 (Kennedy, J., concurring); *see* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 33-34 (2017) (sampling over 1,000 cases and concluding that courts of appeals find ambiguity at *Chevron* step one 70% of the time). By contrast, other judges literally never find ambiguity. *See, e.g.*, Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017) ("I personally have never had occasion to reach *Chevron*'s step two in any of my cases[.]").

Even the litigant with the most *Chevron* experience of all—the federal government—has conceded (as it must) that there is no good answer to how much ambiguity is enough to get to step two. *See, e.g.*, Tr. of Oral Arg. 72, *Am. Hosp. Ass'n*, No. 20-1114

(Justice Gorsuch: "So the government can't tell us how much ambiguity is enough?" Assistant to the Solicitor General: "I'm not sure anybody's answered that question."). It is hard to see how a two-step test is worth its salt, or worth keeping, if no one can agree what triggers the second step.

This case brings *Chevron*'s unworkability into stark relief. The district court thought the MSA unambiguously favored NMFS at *Chevron* step one. The D.C. Circuit majority found that same statute ambiguous at step one and deferred to NMFS' interpretation at step two. And in dissent, Judge Walker determined that the same statute unambiguously favored petitioners at step one.

Worse still, *Chevron*'s unworkability has only grown as the doctrine has become more "elaborate," *Perez*, 575 U.S at 109 (Scalia, J., concurring in the judgment), via failed efforts to redress its workability problems. In *Mead*, for instance, the Court declared that a court must undertake a so-called "step zero" to determine whether the *Chevron* framework even applies. But "*Mead* has proven just as confusing and controversial as *Chevron*." Kristin E. Hickman, *The Three Phases of* Mead, 83 Fordham L. Rev. 527, 528 (2014). In practice, that threshold test provides no more guidance than "that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test." *Mead*, 533 U.S. at 241 (Scalia, J., dissenting).

Nor is that all. In a string of cases, the Court has eschewed *Chevron* altogether when "major questions" are presented. *See, e.g.*, *King v. Burwell*, 576 U.S. 473,

485-86 (2015). That injects yet another threshold question of "how major must the questions be for *Chevron* not to apply?" (and "why is it still appropriate for cases involving less major but still important questions?"). Kavanaugh 2152. Other perplexing questions wait in the wings if *Chevron* is not discarded. *See, e.g.*, *Cargill v. Garland*, 57 F.4th 447, 468 (5th Cir. 2023) (en banc) (discussing circuit splits over whether *Chevron* is waivable and whether *Chevron* applies when a statute has criminal and not just civil applications); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 22-1222 (U.S. pet. for cert. filed June 14, 2023) (asking Court to decide whether *Chevron* trumps the rule of lenity if *Chevron*'s fate is unresolved in this case). As judges and commentators thus have explained, "whether *Chevron* applies is often contested and unclear," *Aposhian v. Wilkinson*, 989 F.3d 890, 897 (10th Cir. 2021) (Tymkovich, J., dissenting), which forces everyone involved to devote "inordinate resources" to extraneous issues, Beerman 784.

Of course, the best evidence of *Chevron*'s unworkability is this Court's consistent declination to apply it in cases where the lower courts and parties labored extensively to document that they were on this or that side of *Chevron*'s hazy doctrinal lines. *See, e.g.*, *Am. Hosp. Ass'n*, 142 S.Ct. 1896. With the greatest respect, this Court has already voted with its feet, just as it did with *Lemon*, by refusing to apply a test that has proven too incoherent or imprecise to serve any function beyond occasionally adding makeweight to a decision reached by other means. *Cf. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 750 (1994) (Scalia, J., dissenting) (noting Court

invokes *Lemon* "only when useful"). Lower courts and litigants do not have that luxury, and this Court should free them from the continued burden of wrestling with a thoroughly unworkable methodology. *Cf. id.* at 751 (noting lower courts and litigants "are not free to ignore Supreme Court precedent at will").

The destruction that *Chevron* has wrought, however, is hardly confined to the courtroom. To the contrary, *Chevron* has also undermined how the political process is supposed to operate. "The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty," so they "insist[ed] that two houses of Congress must agree to any new law and the President must concur or a legislative supermajority must override his veto." *West Virginia v. EPA*, 142 S.Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

Chevron obliterates this careful design. "*Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints." Kavanaugh 2150; *see* David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 2 (2010) (noting that, "in both Republican and Democratic administrations," there are "often" cases where "it looks for all the world like agencies choose their policy first and then later seek to defend its legality"). And given the potential political costs of reaching compromises, Congress is "all too happy to stay out of the business of governing." *Overruling* Chevron *Could Make Congress Great Again*, The Reg.

Rev. (Sept. 12, 2018), https://perma.cc/7HEZ-EDJH. After all, if roughly half of those in Congress can accomplish their policy objectives in full by calling up their friends in the executive branch, there is precious little incentive for elected policymakers to "compromise," which is "need[ed]" if legislation is to pass via the constitutionally prescribed course. *West Virginia*, 142 S.Ct. at 2618 (Gorsuch, J., concurring); *see Egan*, 851 F.3d at 279 (Jordan, J., concurring in the judgment) (explaining that, because of *Chevron*, Congress refuses to "undertak[e] the difficult work of reaching consensus on divisive issues").

The net effect is that *Chevron* incentivizes a dynamic where Congress does far less than the Framers anticipated, and the executive branch is left to do far more by deciding controversial issues via regulatory fiat. Major policy disagreements that should be settled by legislative compromise are instead resolved temporarily by executive actions that change with every administration. The new executive actions precipitate challenges by skeptical states in hand-picked forums that promptly find their way to this Court's emergency docket. And this whole cycle repeats itself "every few years" as new presidential administrations make "radical changes in the meaning of numerous laws." Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 Duke L.J. Online 91, 92 (2021) (Pierce). There is a far better way—the one that the Framers designed. Discarding *Chevron* is a critical step to restoring that design. *Cf.* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1501

(2009) ("A no-deference rule … creates desirable incentives for Congress to resolve a greater number of policy matters itself, leaving fewer to agencies and the courts.").

But as damaging as *Chevron* is for the judiciary and Congress, the real loser is the citizenry. At one level, that is obvious. In a liberty-loving Republic, one would expect that, whenever there is doubt about whether the executive has authority over the governed, the tie would go to the citizenry—as is true in other contexts. *Cf. United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (rule of lenity). But *Chevron* quite literally erects the opposite rule for breaking not only ties, but anything deemed "ambiguous"—and, again, "no definitive guide exists for determining whether statutory language is … ambiguous." Kavanaugh 2138.

The difficulties for the citizenry take more subtle forms as well. It is perhaps a tolerable fiction that the citizenry can master the various provisions of the U.S. Code. But under *Chevron*, the citizenry is "charged with an awareness of *Chevron*," and the full range of discretionary executive lawmaking it empowers. *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). That means that citizens are "required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared 'reasonable'; and to guess *again* whether a later and opposing agency interpretation will *also* be held 'reasonable.'" *Guedes v. Bureau of Alcohol, Tobacco, Firearms &*

Explosives, 140 S.Ct. 789, 790 (2020) (Gorsuch, J., dissenting from the denial of certiorari). All of that "make[s] it impossible for Americans to be able to rely on any stable legal regime as the basis for their decisionmaking in many important contexts." Pierce 92.

And while *Chevron* certainly impacts the Chevrons of the world, "[t]he administrative state … 'touches almost every aspect of daily life,'" *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting), and thus the *Chevron* doctrine has destabilizing consequences for smaller enterprises too.

This case is Exhibit A. Petitioners are small, family-owned businesses that have operated for decades in a fishery where margins are exceedingly tight. *See, e.g.*, Dep't of Com., *Secretary of Commerce Issues Fishery Disaster Determination for 2019 Atlantic Herring Fishery* (Nov. 22, 2021), https://perma.cc/HP3P-L48E. For most of that time, no one ever hinted that petitioners would have to surrender any of their returns to pay the salaries of federally mandated observers—because that mandate appears exactly nowhere in the MSA. But feeling "sufficiently emboldened" by *Chevron*, *Michigan*, 576 U.S. at 763 (Thomas, J., concurring), NMFS recently dusted off decades-old MSA provisions to promulgate a rule that would require petitioners to fork over some *20% of their annual returns* to pay those salaries—all because Congress did not deem the monitoring project worthy of federal appropriations. *See* 85 Fed. Reg. at 7,418. Although the D.C. Circuit unanimously agreed that the MSA nowhere clearly authorized such oppressive regulation, a majority nevertheless

thought that *Chevron* tipped the scales in NMFS' favor, thus placing petitioners' businesses and those of other herring fishermen at risk of extinction. It thus cannot seriously be disputed that *Chevron* exacts negative "real-world effects on the citizenry, not just … on the law and the legal system." *Ramos*, 140 S.Ct. at 1415 (Kavanaugh, J., concurring in part).

3. Overruling *Chevron* would not upset reliance interests.

There are no serious reliance interests requiring the Court to preserve *Chevron*. This Court's precedents emphasize the relevance of concrete reliance interests in the *stare decisis* analysis, such as those that develop "in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions." *Citizens United v. FEC*, 558 U.S. 310, 365 (2010). But "no one rationally orders their affairs in reliance on *Chevron* deference." Beerman 785. Indeed, no one could. After all, *Chevron*'s *raison d'être* "is to permit agencies to upset the settled expectations of the people by changing policy direction depending on the agency's mood at the moment." *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring); *see, e.g.*, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (upholding FCC's fourth inconsistent interpretation of a single statute over fifteen years). And it is especially hard to imagine how anyone could claim reliance on *Chevron* when they "have been on notice for years regarding this Court's misgivings about [it]," *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 31*, 138 S.Ct. 2448, 2484 (2018)—to the point where the Court no longer cites the case and treats it like a "doctrinal

dinosaur," *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).

In all events, to the extent that anyone has attempted to rely on a concrete application of *Chevron* in a particular case notwithstanding the looming threat of a *Brand X*-style switcheroo, abandoning *Chevron*'s methodology would not necessarily disturb that *substantive* precedent. Any case decided under step one will be unaffected by *Chevron*'s overruling. And any case decided under step two cannot generate *justifiable* reliance given the executive's ability revisit matters under *Brand X*. If anything, those judicial decisions will be entitled to more respect in a post-*Chevron* world. As this Court has explained, "[p]rinciples of *stare decisis* … demand respect for precedent whether judicial methods of interpretation change or stay the same." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008). It follows that "[c]oncrete applications of *Chevron*" will continue to "carry a presumption of durability independent of the decision-making approaches that yielded them"—*i.e.*, even if *Chevron* is overruled. Kozel 1161; *see* Beerman 786 (similar).

Any reliance by government officials does not affect the calculus. To be sure, some administrative agencies (like NMFS) have relied on *Chevron* over the years to advance "adventurous statutory interpretations" that test the limits of the English language and common sense. Beerman 842. *But cf. Buffington*, 143 S.Ct. at 21 (Gorsuch, J., dissenting from the denial of certiorari) ("The federal government itself now often waives or forfeits arguments for *Chevron* deference before this Court."). But "*stare*

decisis accommodates only legitimate reliance interests," *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2098 (2018) (quotation marks and brackets omitted), and this Court "has never suggested that the convenience of government officials should count in the balance of *stare decisis*, especially when weighed against the interests of citizens in a fair hearing before an independent judge and a stable and knowable set of laws," *Kisor*, 139 S.Ct. at 2447 (Gorsuch, J., concurring in the judgment).

Finally, nothing in *Kisor* detracts from this straightforward analysis. Most obviously, Kisor never argued that *Auer/Seminole-Rock* deference was unworkable, *id.* at 2423, while *Chevron* is unworkable in the extreme. At the same time, *Auer/Seminole-Rock* deference was not an innovation of the Eighties, but pre-dated the APA and was not honored only in the breach, *see id.* at 2422, as has been the case with *Chevron*. Nor did *Kisor* fully grapple with the distinct *stare decisis* factors applicable to methodological decisions (perhaps because most of the majority seemed to consider *Auer* and *Seminole Rock* correctly decided, *see id.* at 2418-20 (plurality op.)); it did not, for example, cite *Pearson* and its abandonment of a different, rigid two-step test. But most important, deferring to an agency's interpretation of its own regulations does not involve the grave separation-of-powers problem posed by *Chevron*. After all, *Auer/Seminole-Rock* deference assumes that the agency had sufficient authority from Congress to address the matter at hand via regulations and then gives weight to a *post hoc* clarification of those regulations in an amicus brief or other agency document. Thus, while *Auer/Seminole-Rock*

deference may risk the health of the notice-and-comment process, *Chevron* endangers our entire structure of separated and delimited government. Finally, it bears emphasis that the combined force of *Auer/Seminole-Rock* deference and *Chevron* poses a double threat to the citizenry, so if *Auer/Seminole-Rock* deference is here to stay, that is all the more reason to jettison *Chevron*.

* * *

Chevron is slated to turn forty in June 2024. The best celebration for our system of government and our citizenry would be to mark that milestone with an overruling. *Chevron* is both profoundly wrong and profoundly disruptive, and overruling it would not disturb any legitimate reliance interests. "[T]he whole project deserves a tombstone no one can miss." *Buffington*, 143 S.Ct. at 22 (Gorsuch, J., dissenting from the denial of certiorari).

II. At A Bare Minimum, The Court Should Clarify That *Chevron* Is Not Triggered By Statutory Silence.

If the Court chooses not to discard *Chevron* entirely, it should at least narrow the doctrine and clarify that it does not apply merely because the statute is silent on a given issue, especially when the purported silence involves an extraordinary power that Congress expressly conveyed elsewhere in the statute. Even apart from the considerations that support *Chevron*'s overruling *in toto*, *see* pp.18-43, *supra*, the proposition that statutory silence is a deference-empowering delegation of authority to an agency is particularly dubious. And narrowing *Chevron* does not implicate *stare decisis*

considerations, as the Court has previously done just that. *See, e.g.*, Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 Duke L.J. 931, 996 (2021) ("[T]he Court has already narrowed *Chevron*'s scope, in *Mead* and *King*, without raising *stare decisis* concerns.").

Affording deference based on statutory silence is ultimately a substantive canon of construction: If the statute is silent, the government wins. Not every substantive canon is legitimate, *see, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010) (Barrett), and applying *Chevron* to statutory silence falls on the illegitimate side of the dividing line by a sizable margin. It is bedrock administrative law that "[a]dministrative agencies are creatures of statute" and "accordingly possess only the authority that Congress has provided." *NFIB v. OSHA*, 142 S.Ct. 661, 665 (2022) (per curiam). As a result, "an agency *literally has no power to act* … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (emphasis added). A rule requiring courts to interpret statutory *silence* as an agency-empowering delegation "stand[s] this ancient and venerable principle nearly on its head." *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring). Given this bedrock and liberty-protecting principle, the far more obvious inference from statutory silence is that Congress withheld a power from the agency, rather than handing it a blank check.

The problems do not end there. Although applying a substantive canon to break ties may make sense when it "promotes constitutional values,"

Barrett 181; *see West Virginia*, 142 S.Ct. at 2616-17 (Gorsuch, J., concurring), applying *Chevron* to statutory silence undermines those values. After all, delegation of law-making power to the executive is never a good thing and always runs counter to the Constitution's design. Article I, §1 of the Constitution vests "*all*" of the federal government's "legislative powers" in Congress, U.S. Const. Art. I, §1 (emphasis added), not just some of them, and there is no such thing as a salutary amount of delegation. The difficulty, of course, is finding a workable test for identifying impermissible delegations. *See Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) ("[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."). But whether or not this Court can fashion an administrable test for separating wheat from chaff in this context, there is no justification whatsoever for a doctrine that rewards delegation by finding rulemaking authority in the absence of statutory text. The sensible principles all run in the opposite direction. If Congress "does not … hide elephants in mouseholes," *Whitman*, 531 U.S. at 468, it surely does not empower agencies to conjure elephants, or even mice, out of nothing at all.

But even assuming that there are some circumstances when a court may construe statutory silence as an implicit delegation of authority to an agency, those circumstances certainly do not include a dynamic where the statutory silence implicates a controversial power and the silence is in contradistinction to an express grant of the power elsewhere in the very same statute. Indeed,

construing *that* type of silence as an implicit delegation to an agency is wildly out-of-step with the sensible rules of statutory interpretation that this Court applies in other contexts. For example, this Court has frequently reiterated that, "[w]hen 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." *Bartenwerfer v. Buckley*, 143 S.Ct. 665, 673 (2023) (quotation marks omitted). That strongly suggests that the power to make the regulated pay for onboard regulators is limited to the three specific instances where Congress granted that extraordinary power. The Court has also frequently reiterated that it is "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Republic of Sudan v. Harrison*, 139 S.Ct. 1048, 1058 (2019). That strongly favors finding that the limits on the burdens the agency can impose on domestic fisheries foreclose imposing unlimited burdens on other domestic fisheries.

Finally, all these principles apply *a fortiori* when the power at issue is as dangerous as the authority of an executive agency to impose what to all the world, and certainly to petitioners, looks like a prohibitive tax. When a statute is silent as to a power that dangerous, the only reasonable inference is that Congress withheld that power altogether. *See Maine Lobstermen's Ass'n v. NMFS*, 2023 WL 4036598, at *11 (D.C. Cir. June 16, 2023) ("We may reasonably expect the Congress at least to speak, not to be silent, when it delegates this power to destroy.").

III. In Either Event, The Court Should Reverse Rather Than Remand.

Regardless of whether the Court overrules or merely narrows *Chevron*, the Court should reverse the decision below rather than remand in order to bring a definitive end to this dispute and to provide an example of what statutory interpretation should look like in a post-*Chevron* (or *Chevron*-lite) world. Doing so would also illustrate the stark difference between statutory interpretation distorted by *Chevron* and the kind of statutory interpretation that is the bread and butter of Article III courts in every other context. While the D.C. Circuit majority posited that the MSA "suggests" that NMFS acted properly here, Pet.App.8, statutory text, context, and history, along with this Court's precedent, all confirm the opposite.

Starting with the text, there is none that explicitly authorizes NMFS' asserted power. That omission is telling given that that Congress specifically addressed industry-funded monitoring in other contexts. In particular, the MSA provides that the North Pacific Council "may" impose an industry-funded-monitoring program, §1862(a), and that such programs "shall" exist in the contexts of both a "limited access privilege program," §§1853a(c)(1)(H), 1853a(e)(2), and "foreign fishing," §1821(h)(4), (6).

Those express and limited authorizations make perfect sense. The North Pacific Council oversees some of the largest and most commercially successful enterprises that can more easily absorb the costs of federal monitoring. *Compare* NOAA Fisheries, *Alaska*, https://perma.cc/4WEC-328H (last visited July 17, 2023) ("Alaska produces more than half the

fish caught in waters off the coast of the United States, with an average wholesale value of nearly $4.5 billion a year."), *with* Jessica Hathaway, "Feds Declare East Coast Herring Fishery a Disaster," *National Fisherman* (Nov. 23, 2021), https://perma.cc/BU5B-6JJ4 (NOAA economist estimating value of Atlantic herring fishery at $6.77 million in 2020). Even still, the authority is permissive and subject to strict limits to prevent overburdening the regulated. Furthermore, when vessels are given a special "limited access privilege" to operate in restricted areas subject to strict catch limits, both the need for observation and the reasonableness of making special-privilege holders foot the bill are at their apex. And when foreign vessels are allowed to operate within our exclusive economic zone, there is no reason why taxpayers should pay for monitoring costs. *See* §1801(a)(3) (congressional finding that "massive foreign fishing fleets" contributed to overfishing and "interfered with domestic fishing efforts"). No comparable justification exists for garden-variety domestic fishing operations.

It thus is more than "fair to suppose that Congress considered the unnamed possibility" here—authorizing industry-funded monitoring in the Atlantic herring fishery—"and meant to say no to it." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013). That conclusion is especially appropriate given that Congress has authorized *both* the permissive use of industry-funded observers (in one context) *and* the mandatory use of industry-funded observers (in two separate contexts). If Congress had simply mandated the use of industry-funded observers in two limited contexts, perhaps one could say that Congress never

considered the possibility of granting permissive authority. But here, Congress considered both distinct authorities and conveyed neither in this context.

The MSA's statutory evolution reinforces that Congress intentionally declined to authorize permissive industry-funded-monitoring programs outside the North Pacific. Congress explicitly granted the North Pacific Council the discretion to establish an industry-funded observer program as part of the Fishery Conservation Amendments of 1990. *See* Pub. L. No. 101-627, §118(a), Nov. 28, 1990, 104 Stat. 4436, 4447. In the very same amendments, Congress added the MSA provision authorizing the "carrying" of observers on vessels, which supplemented NMFS' preexisting authority to include other "necessary and appropriate" measures. *See id.* §109(b)(2), 104 Stat. 4436, 4448 (codified at §1853(b)(8)); *see also* Pub. L. No. 94-265, §303(a)(1)(A), (b)(7), Apr. 13, 1976, 90 Stat. 331, 351-52. If NMFS truly had discretionary authority to impose industry-funded monitoring in any fishery as a result of the combination of the "carrying" and "necessary and appropriate" provisions, there would have been no need for a specific grant of authority to the North Pacific Council. *But see Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S.Ct. 768, 779 (2020) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

That NMFS lacks its asserted power is further confirmed by the fact that, in the only two instances where Congress has expressly authorized industry-funded observer programs for domestic vessels, it has

placed strict caps on fees to ensure that the fishing enterprise is not overburdened. *See* §1862(b)(2)(E) (2% cap in the North Pacific); §1854(d)(2)(B) (3% cap for limited-access-privilege programs). In the absence of any congressional authorization, NMFS has shown no such restraint. NMFS itself estimates that the levies imposed on the Atlantic herring fishery could extract 20% of annual returns. 85 Fed. Reg. at 7,418. And all this under a statute (the MSA) enacted with a specific finding that "[c]ommercial … fishing constitutes a major source of employment and contributes significantly to the economy of the Nation," with "[m]any coastal areas … dependent upon fishing and related activities." §1801(a)(3).

And there is more. Across several decades, Congress has considered multiple proposed amendments that, if enacted into law, would have provided expanded authority for industry-funded observer programs. *See, e.g.*, H.R. 5018, 109th Cong. §9(b) (2006); H.R. 39, 104th Cong. §9(b)(4) (1995); H.R. 1554, 101st Cong. §2(a)(3) (1989). But "the most noteworthy action" that Congress has taken vis-a-vis those proposals is to *reject* them. *NFIB*, 142 S.Ct. at 666; *see also West Virginia*, 142 S.Ct. at 2614; *Ala. Ass'n of Realtors v. HHS*, 141 S.Ct. 2485, 2486 (2021) (per curiam). Those rejections have left NMFS attempting to divine from statutory silence a power that is literally unprecedented. Indeed, NMFS "has identified no other context in which an agency, without express direction from Congress, requires an industry to fund its inspection regime." Pet.App.29 (Walker, J., dissenting). As this Court has admonished, that kind of "prolonged reticence" to exercise a power so dangerous to the citizenry and

attractive to the executive is powerful evidence that the power is non-existent or "constitutionally proscribed." *Plaut*, 514 U.S. at 230; *accord Printz v. United States*, 521 U.S. 898, 905 (1997).

This is the very last context where it is appropriate to ignore that warning sign. The appropriations process is a primary constitutional mechanism by which Congress keeps the executive branch in "check[]." *Texas*, 2023 WL 4139000, at *9; *see U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) ("The Appropriations Clause … is particularly important as a restraint on Executive Branch officers[.]"). Whatever the permissibility of congressional action expressly exempting agencies from the appropriations process, interpreting statutory silence to empower agencies to free themselves from such shackles is wholly untenable and would raise serious separation-of-powers concerns. As already explained, one of the principal defects with *Chevron* is that it violates the separation of powers. There is no need to introduce new separation-of-powers problems while leaving old ones behind. *Cf. United States v. Hansen*, 2023 WL 4138994, at *10 (U.S. June 23, 2023) (applying canon of constitutional avoidance).

* * *

For all these reasons, the answer to the statutory question here should have been obvious. In the face of statutory silence, an agency asserted a controversial and dangerous power that imposed serious hardships on the citizenry while evading the appropriations process. That silence was not ambiguity but a congressional decision not to grant the agency powers

that it had expressly granted and expressly cabined elsewhere in the statute. That the court below nonetheless sided with the agency is a testament to the dangers of *Chevron*. The right result here is clear: *Chevron* should be overruled, and the decision below should be reversed so that the liberty of the small businesses that pursued this matter all the way to this Court is secured.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

RYAN P. MULVEY
ERIC R. BOLINDER
R. JAMES VALVO, III
CAUSE OF ACTION INSTITUTE
1310 N. Courthouse Rd.
Suite 700
Arlington, VA 22201

PAUL D. CLEMENT
Counsel of Record
ANDREW C. LAWRENCE*
CHADWICK J. HARPER*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioners

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