No. _____

In The
Supreme Court of the United States

PACIFIC CHOICE SEAFOOD COMPANY,
SEA PRINCESS, LLC, AND PACIFIC FISHING, LLC,

Petitioners,

v.

WILBUR L. ROSS, U.S. SECRETARY OF COMMERCE,
AND NATIONAL MARINE FISHERIES SERVICE,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Ninth Circuit below applied deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to a statutory interpretation that was not made by a federal agency. The Pacific Fishery Management Council—an entity that advises the Secretary of Commerce on the management of fisheries under the Magnuson-Stevens Fishery Conservation and Management Act—adopted an interpretation of the statutory term "excessive share" to mean a limit on the fishery quota that guarantees every fishery participant "a chance at generating a reasonable profit." The Pacific Fishery Management Council then proposed regulations setting the excessive share limit at 2.7% based on that interpretation, and the Secretary adopted the 2.7% limit without discussing the statutory interpretation underlying that percentage. The Ninth Circuit then deferred to the Pacific Fishery Management Council's "excessive share" interpretation. Petitioners, who collectively owned approximately 5% of the quota, were forced to divest their quota shares to meet this excessive share limit.

The question presented is whether a court should defer, under *Chevron*, to an interpretation made by an advisory council that is not itself a federal agency, as part of that court's review of regulations issued by the Secretary of Commerce.

RULES 14.1 AND 29.6 STATEMENT

Plaintiffs-Appellants below and Petitioners here are Sea Princess, LLC, Pacific Fishing, LLC, and Pacific Choice Seafood Company. Plaintiff-Appellant Sea Princess, LLC is wholly owned by Plaintiff-Appellant Pacific Fishing, LLC. Plaintiff-Appellant Pacific Fishing, LLC is wholly owned by Frank Dulcich. Plaintiff-Appellant Pacific Choice Seafood Company is now Pacific Seafood—Eureka, LLC (d/b/a Pacific Choice Seafood Company). Pacific Seafood—Eureka, LLC is wholly owned by Pacific Seafood Processing, LLC. Pacific Seafood Processing, LLC is wholly owned by Dulcich, Inc. Dulcich, Inc. is wholly owned by Frank Dulcich.

RELATED CASES

- *Pacific Choice Seafood Company v. Ross*, No. 4:15-cv-005572-HSG, U.S. District Court for the Northern District of California. Judgment entered February 21, 2018.
- *Pacific Choice Seafood Company v. Ross*, No. 18-15455, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 25, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINION BELOW

The Ninth Circuit's opinion below is available at 976 F.3d 932 (9th Cir. Sept. 25, 2020), and is reproduced in the Appendix ("App.") at 1-27. The district court's opinion is available at 309 F. Supp. 3d 787 (N.D. Cal. Feb. 21, 2018), and is reproduced at App. 28-60.

JURISDICTION

On February 21, 2018, the district court granted summary judgment to the defendants. That decision was appealed to the Ninth Circuit, which affirmed on September 25, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

Section 303A of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1853a, provides:

(a) In general

After January 12, 2007, a Council may submit, and the Secretary may approve, for a fishery that is managed under a limited access system, a limited access privilege program to harvest fish if the program meets the requirements of this section.

. . . .

(c) Requirements for limited access privileges

. . . .

(5) Allocation

In developing a limited access privilege program to harvest fish a Council or the Secretary shall—

(A) establish procedures to ensure fair and equitable initial allocations, including consideration of—

(i) current and historical harvests;

(ii) employment in the harvesting and processing sectors;

(iii) investments in, and dependence upon, the fishery; and

(iv) the current and historical participation of fishing communities;

(B) consider the basic cultural and social framework of the fishery, especially through—

(i) the development of policies to promote the sustained participation of small owner-operated fishing

vessels and fishing communities that depend on the fisheries, including regional or port-specific landing or delivery requirements; and

(ii) procedures to address concerns over excessive geographic or other consolidation in the harvesting or processing sectors of the fishery;

(C) include measures to assist, when necessary and appropriate, entry-level and small vessel owner-operators, captains, crew, and fishing communities through set-asides of harvesting allocations, including providing privileges, which may include set-asides or allocations of harvesting privileges, or economic assistance in the purchase of limited access privileges;

(D) ensure that limited access privilege holders do not acquire an excessive share of the total limited access privileges in the program by—

(i) establishing a maximum share, expressed as a percentage of the total limited access privileges, that a limited access privilege holder is permitted to hold, acquire, or use; and

(ii) establishing any other limitations or measures necessary to prevent an inequitable concentration of limited access privileges. . . .

STATEMENT OF THE CASE

This case involves a dispute between (1) commercial fishing companies and (2) the Secretary of

Commerce (the "Secretary") and the National Marine Fisheries Service (the "Fisheries Service") regarding quota shares for the Pacific groundfish fishery under the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act").[1] The Magnuson-Stevens Act allows the Secretary to establish quota share programs, subject to limitations ensuring that no person is able to "acquire an excessive share" of the fishery. 16 U.S.C. § 1853a(c)(5)(D). To that end, the Magnuson-Stevens Act requires every quota program to establish "a maximum share, expressed as a percentage of the total limited access privileges, that a limited access privilege holder is permitted to hold, acquire, or use." *Id*. This "excessive share" limitation has commonly and historically been understood in terms of avoiding conditions of market control, like monopoly or oligopoly. *See* 60 Fed. Reg. 61,200 (Nov. 29, 1995).

Petitioners are three related fishing entities with common ownership who operate in the Pacific groundfish fishery along the West Coast. Petitioners collectively owned a quota share of approximately 5% of the "non-whiting" sector of the Pacific groundfish fishery based on their historical catch records and other factors. Petitioners were then forced to divest almost half of that quota based on rules approved by the Fisheries Service that determined that any share over

[1] The Secretary has delegated responsibility under the Magnuson-Stevens Act to the Fisheries Service.

2.7% of that fishery was an "excessive share" under the Magnuson-Stevens Act.

The Ninth Circuit upheld that decision by applying the familiar two-step framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). App. 14. The Ninth Circuit concluded that the statutory term "excessive share" was ambiguous under *Chevron*, and that the Fisheries Service could reasonably conclude that "excessive share" meant a limit that guarantees every fishery participant a "chance at generating a reasonable profit." App. 14-18. But that interpretation was *not* made by the Secretary or the Fisheries Service. Rather, it was made by an advisory group to the Pacific Fishery Management Council (the "Pacific Council"). The Pacific Council adopted the advisory group's interpretation of the statutory term, and the Fisheries Service proceeded to approve regulations establishing, without further explanation, a 2.7% excessive share limit based solely on that interpretation.

1. The Magnuson-Stevens Act. The Magnuson-Stevens Act is the primary domestic legislation governing management of federal fisheries. 16 U.S.C. §§ 1801-1891d. Congress enacted the Magnuson-Stevens Act "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States," and to "promote domestic commercial and recreational fishing under sound conservation and management principles." *Id.* § 1801(b)(1), (3). The Magnuson-Stevens Act recognizes that these fisheries are "valuable and renewable natural resources" that

"contribute to the food supply, economy, and health of the Nation." *Id*. § 1801(a)(1).

The Magnuson-Stevens Act creates eight regional fishery management councils ("Council(s)") that are charged with the initial responsibility for developing fishery management plans and plan amendments for each federal fishery (*i.e.*, fisheries occurring in the U.S. Exclusive Economic Zone), along with developing proposed regulations to implement those plans. *Id.* § 1852(a)(1). Council members are predominately state bureaucrats (not federal employees), including the "principal State official with marine fishery management responsibility," and state employees that "reflect the expertise and interest of the several constituent states in the ocean area over which such Council is granted authority." *Id.* § 1852(a)(2), (b)(1). A Council, "is not an 'agency' as that term is defined under the Administrative Procedure Act," *Flaherty v. Ross*, 373 F. Supp. 3d 97, 100 (D.D.C. 2019), and a Council "has no 'authority' to do anything," *J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138, 1159 (E.D. Va. 1995). Rather, a Council simply *advises* the Secretary and the Fisheries Service as to recommended proposals for management.

The proposed plans and implementing regulations must be reviewed and approved by the Secretary, who, acting through the Fisheries Service, issues the proposed plans and regulations for public comment and ultimately decides whether they should be approved. *See* 16 U.S.C. § 1854(a); *see also id.* § 1852(h)(1)(B); *id.* § 1854(b). The Secretary must review "proposed regulations to determine whether they are consistent with

the fishery management plan, plan amendment, this [Act] and other applicable law." *Id*. § 1854(b)(1). The Secretary, however, cannot make changes to the proposed regulations other than "technical changes as may be necessary for clarity." *Id*. § 1854(b)(1)(A). If the Secretary finds inconsistencies with applicable requirements, the Secretary sends the regulations back to the Council with recommended revisions. *Id*. § 1854(b)(1)(B).

2. Limited Access Programs Under the Magnuson-Stevens Act. The Magnuson-Stevens Act authorizes the Secretary to set up limited access privilege programs (essentially quota programs) as part of a fishery management plan to help ensure an orderly and effective fishery and prevent overfishing. *Id*. § 1853(b)(6). Councils and the Fisheries Service began using this authority in the 1990s to develop so-called "individual fishing quota" programs. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1087 (9th Cir. 2012) (discussing history of such programs). In 1996, Congress enacted a temporary moratorium on new quota programs pending study of their impacts and efficacy. *Id*. at 1087-88 (citing Pub. L. No. 104-297, § 108(f), 110 Stat. 3559, 3577-79 (1996)).

In 2007, Congress lifted the quota moratorium, and added Magnuson-Stevens Act section 303A, 16 U.S.C. § 1853a, which establishes specific requirements for "limited access privilege programs." *Pac. Coast*, 693 F.3d at 1088 (quoting Pub. L. No. 109-479, § 106, 120 Stat. 3575, 3586 (2007)). Generally, these limited access programs ration a fishery by dividing

fishing privileges for specific species (or groups of fish species) and issuing "quota" to these privilege holders. *Id*. This "individual fishing quota" is granted to privilege holders and represents a portion of the total allowable catch of the fishery. 16 U.S.C. § 1802(26)(A)-(B). Quota shares are valuable property that may be bought, sold, and leased among private parties. *See id*. § 1853a(c)(7); *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998) (quota share permit is "property"). Owners of quota invest substantial long-term resources in vessels and equipment to harvest that quota.

When setting up limited access privilege programs, the statute requires the Fisheries Service to "establish procedures to ensure fair and equitable initial allocations" after considering "current and historical harvests"; "employment in the harvesting and processing sectors"; "investments in, and dependence upon, the fishery"; and "the current and historical participation of fishing communities." 16 U.S.C. § 1853a(c)(5)(A). The Fisheries Service must also "ensure that limited access privilege holders do not acquire an excessive share of the total limited access privileges in the program." *Id.* § 1853a(c)(5)(D). Specifically, the Fisheries Service must do so by establishing "a maximum share, expressed as a percentage of the total limited access privileges, that a limited access privilege holder is permitted to hold, acquire, or use." *Id.* § 1853a(c)(5)(D)(i). The Fisheries Service may also "establish[] any other limitations or measures

necessary to prevent an inequitable concentration of limited access privileges." *Id.* § 1853a(c)(5)(D)(ii).

3. The Pacific Groundfish Trawl Fishery Quota Share Program. The Pacific groundfish trawl fishery includes more than 80 species, and consists of the geographic area of the U.S. Exclusive Economic Zone (200 nautical miles from the coastline) that lies between the U.S.-Canada border and the U.S.-Mexico border. *See* 42 Fed. Reg. 12,937, 12,937-98 (Mar. 7, 1977). The trawl fishery consists of two segments, one targeting Pacific whiting and another targeting non-whiting species. *Pac. Coast*, 693 F.3d at 1088. This case involves only the non-whiting component of the fishery.

The Pacific Council's process for developing the quota system at issue in this case occurred over a few years, and involved input from multiple Council subcommittees and stakeholder groups (including stakeholders opposed to fishing). The primary discussion of the "excessive share" standard was developed in a report (the "Groundfish Report" or "Report") produced by a advisory team. *See* Ninth Cir. ECF No. 33-3 (Excerpts of Record vol. 3, pp. 555-78).

The Groundfish Report reviews the statutory text of the Magnuson-Stevens Act related to the "excessive share" requirement. Report at 2-3. The Report notes that the plain language of "excessive" means "exceeding what is usual, proper, necessary, or normal," but decides that the text "affords the Council broad discretion to define what might be 'excessive' or 'inequitable' in terms of the overall management objectives" for

the fishery, and that the "excessive share" limit is just "a tool for balancing the Council's social objectives." *Id*. at 3. The Report then recommends using a "revenue-based" framework to set the excessive share limit based on revenue levels that would provide "a single vessel a chance at generating a reasonable profit in the [groundfish] fishery." *Id*. at 4-6. The Report then proceeds to chart hypothetical vessel *revenues* expected to occur at maximum share percentages ranging from 1.25% to 3.8%. *Id*. at 23.

This revenue approach was then carried through the Pacific Council process without further discussion of the Report's statutory interpretation. App. 7. The Groundfish Report was reviewed by the Groundfish Advisory Committee, which issued a three-page recommendation to the Pacific Council to set the excessive share limit at 2.7%, which was a "mid-range" of the data presented in the Report. App. 7-8. The Pacific Council then adopted the recommended 2.7% maximum share without meaningful discussion or explanation. App. 8.

The Fisheries Service published proposed rules, including the 2.7% maximum share, and then adopted final rules using the 2.7% maximum share. App. 8; 75 Fed. Reg. 53,380 (Aug. 31, 2010); 75 Fed. Reg. 32,994 (June 10, 2010); 75 Fed. Reg. 78,344 (Dec. 15, 2010). Although the proposed rule (and preamble) and the final rule (and preamble) span hundreds of pages in the Federal Register, there is no explanation for the decision to set the maximum share at 2.7%, why the "reasonable profit" rationale is an appropriate

interpretation of "excessive share," what level of profit is "reasonable," or how a 2.7% maximum share achieves that result. Instead, the "2.7%" limit appears on a table setting "accumulation limits" for various stocks of fish, including the non-whiting segment. 75 Fed. Reg. at 78,395. That table is now codified at 50 C.F.R. § 660.140(d)(4)(i)(C).

4. Implementation of the Program and Legal Challenge. After numerous delays in implementation, the Fisheries Service sent notice to Petitioners that because of their common ownership, they collectively owned at least 3.8%[2] of the quota share, and ordered divestiture down to 2.7%. App. 9. The final rule requiring divestiture was implemented on November 9, 2015. App. 9.

Petitioners complied with the divestiture order, and then filed suit challenging the rule. App. 9. Petitioners argued to the district court that the Pacific Council's interpretation of excessive share was wrong, and that the Secretary (or the Fisheries Service) improperly adopted the 2.7% excessive share limit without providing its own interpretation of the terms "excessive share" and "inequitable concentration" used as part of setting the 2.7% excessive share limit. App. 9, 28. The district court resolved the case on cross-motions for summary judgment based on the administrative record in favor of the Secretary and the Fisheries Service. App. 28.

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[2] This actual percentage was closer to 5%.

The Ninth Circuit affirmed, applying "the framework of *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)." App. 14. The Ninth Circuit explained that this framework applies when "an agency is authorized by Congress to issue regulations interpreting a statute it enforces" and requires the court to give deference "if the statute is ambiguous and the agency's interpretation is reasonable." *Id*. (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016)).

The Ninth Circuit applied the "first step" of *Chevron* to determine whether Congress has "directly addressed the issue." App. 14. The court concluded that Congress had not, because the statute "defines neither 'excessive share' nor 'maximum share' and contains no reference to market power." App. 15. The panel recognized prior guidance from the Fisheries Service interpreting "excessive share" to "imply conditions of monopoly or oligopoly," but found that prior guidance does not show that Congress directly addressed the issue. App. 16.

Instead, the Ninth Circuit concluded that the Magnuson-Stevens Act was "ambiguous as to what factors [the agency] must consider in setting a maximum share," and proceeded to "step two of the *Chevron* framework." App. 16. The Ninth Circuit then reviewed whether "the Service has adopted a 'reasonable interpretation' of the statute." App. 17. The Ninth Circuit concluded that the Pacific Council's interpretation that the excessive share limit could be set based on allowing "a chance at generating a reasonable profit" was

reasonable and therefore entitled to deference under *Chevron*. App. 17.

REASONS FOR GRANTING THE WRIT

The decision below illustrates ongoing problems with the application of this Court's *Chevron* framework. Despite cautions that a court does not owe *Chevron* deference automatically, or "merely because [a] statute is ambiguous and an administrative official is involved," *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006), that is precisely what the Ninth Circuit did in this case. It extended *Chevron* deference to a statutory interpretation *made by an advisory team to the Pacific Council* because a federal agency ultimately approved a regulatory limit based on that interpretation—without explanation or any original interpretation. This pushes *Chevron* deference too far.

The issue presented by this case is typical of recurring problems with the reflexive application of the *Chevron* doctrine throughout the lower courts, both in cases involving the Magnuson-Stevens Act and other contexts. *Chevron* was intended to aid interpretation when the "legal toolkit is empty and the interpretive question still has no single right answer." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). But instead, *Chevron* deference all too often becomes the presumed framework and a convenient shortcut to avoid difficult questions of statutory interpretation. This case provides the Court the opportunity to provide clear

guidance limiting application of *Chevron* to the narrower set of circumstances originally contemplated by this Court in developing this interpretive tool.

A. The Ninth Circuit's Decision Unreasonably Expands *Chevron* by Applying Deference to a Council Interpretation.

Both scholars and this Court's teachings confirm that *Chevron* should not apply to the Pacific Council's interpretation of a statute.

1. The basic premise of *Chevron* deference is that when Congress delegates authority to an agency, it expects the agency to resolve ambiguities in the provisions of the statute that the agency is charged with implementing. *See Smiley v. Cititbank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996) (describing the "presumption that Congress . . . left ambiguity in a statute" to delegate to the agency the power to resolve that ambiguity). This results in the doctrine's familiar two-step process. First, courts look to the text of the statute to determine whether it is ambiguous. *Chevron*, 467 U.S. at 842-43. If the meaning of the statute's text is clear, that meaning controls, no matter whether the agency or courts think it reflects the best policy. Only if the text is ambiguous do courts ask whether the agency charged with implementing the statute has resolved that ambiguity in a reasonable way. *See Michigan v. EPA*, 576 U.S. 743, 754 (2015) (explaining that *Chevron* "allows agencies to choose among competing reasonable interpretations of a statute").

2. But the *Chevron* framework is not always applicable to an agency interpretation. In *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001), the Court addressed the appropriate level of deference that courts should give to a legal interpretation included in a tariff classification ruling. The Court reasoned that "the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law." *Id*. at 231-32. Accordingly, in *Mead*, the Court declined to apply the two-step *Chevron* framework to the legal interpretations at issue.

Following the decision in *Mead*, a number of courts and scholars have discussed that decision as adding a *Chevron* "step zero"—"the initial inquiry into whether the *Chevron* framework applies at all." Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 191 (2006). "Step zero" is "the threshold requirement that an agency interpretation be of the sort that warrants *Chevron* analysis in the first instance." *Martin v. Soc. Sec. Admin., Comm'r*, 903 F.3d 1154, 1159 (11th Cir. 2018).

Unfortunately, the Court has provided little guidance on how or when "step zero" should apply. Shortly after *Mead* was decided, then-Professor Elena Kagan and Professor David J. Barron suggested that the *Mead* step zero analysis should focus on "who" makes the decision, rather than "how" the decision is made. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 204 (2001). In this view, the *Chevron* framework applies when the

interpretation is made by the statutory designee, not otherwise. *Id*.

In the intervening decades, the *Chevron* step zero concept has generated more confusion than clarity. As then-judge Neil Gorsuch explained when previously writing for the Tenth Circuit, the *Mead* test "requires courts to employ a multi-factor balancing test to decide whether to proceed to apply *Chevron* to a civil statute," without a "great deal of guidance on how to" do so. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring). The result is today courts will "*sometimes* apply *Chevron* deference to ambiguous civil statutes," and sometimes not, with little explanation for the difference. *Id*. There is no uniformity or agreement as to what factors should be considered at *Chevron* step zero. Mary Holper, *Failing Chevron Step Zero*, 76 Brook. L. Rev. 1241, 1264 (2011).

3. These problems are manifest in this case. Here, the Ninth Circuit did not carefully consider whether the *Chevron* framework was applicable. Rather, the court reflexively presumed that because the Secretary has statutory authority to approve regulations under the Magnuson-Stevens Act the *Chevron* framework should apply. App. 14.

This result extends *Chevron* deference too far. Although the Fisheries Service has the authority under the Magnuson-Stevens Act to approve or reject fishery regulations, the regulation at issue here simply set the excessive share limit at 2.7%. The regulation itself does not articulate an interpretation of "excessive

share" or even discuss that interpretation in the preamble to the regulation. Thus, even assuming the Fisheries Service has been delegated congressional authority to interpret "excessive share," there is no evidence that the Fisheries Service actually exercised that authority.

Instead, the interpretation appears in the Groundfish Report. The authors of that Report are not even federal employees, and neither are many of the members of the Pacific Council who accepted and acted upon the Report. *See J.H. Miles & Co.*, 910 F. Supp. at 1158-59 ("members of regional councils are not employed by the Federal Government" and "the Council is not an 'agency' " (internal quotation marks and citation omitted)). The fact that the Fisheries Service approved the 2.7% excessive share limit does not mean that a court should apply deference to the underlying interpretation of the statute that was not even made by a federal agency or federal employees. "*Chevron* . . . is about interpretive deference only for federal agencies, and there is no analogue for when Congress delegates interpretive work to the states." Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 Yale L.J. 534, 557 (2011).

Put another way, the Ninth Circuit improperly focused on "how" the decision was made, rather than "who" made the interpretive decision. *See* Barron & Kagan, *supra*, 2001 Sup. Ct. Rev. at 204. The interpretation at issue here (the meaning of "excessive share") was not made by the statutory designee (the Secretary

or Fisheries Service), but by an advisory team assembled by the Pacific Council, which is itself an advisory panel and not a federal agency. Council-developed interpretations should not receive *Chevron* deference. *See* Charles T. Jordan, *How* Chevron *Deference Is Inappropriate in U.S. Fishery Management and Conservation*, 9 Seattle J. Envtl. L. 177, 219-21 (2019).

4. Even when applied in areas of clear congressional delegation, *Chevron* deference raises significant concerns because "the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in judgment). By forcing judges to reject what they believe is "the best reading of an ambiguous statute" in favor of the agency construction, *Michigan*, 576 U.S. at 761 (Thomas, J., concurring) (citing *Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)), *Chevron* "wrests from Courts the ultimate interpretive authority to 'say what the law is,' " and hands that authority "over to the Executive," *id.* (quoting *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803)).

The Ninth Circuit's opinion in this case takes these concerns past the breaking point, handing that statutory interpretive authority over to an advisory council, most of whose members are state bureaucrats, and not even federal employees. The decision in *Chevron* "rests on the fiction that silent or ambiguous statutes are an implicit delegation from Congress to agencies." *Baldwin v. United States*, 140 S. Ct. 690, 691

(2020) (Thomas, J., dissenting from the denial of certiorari). That fiction cannot hold, when, as here, the interpretation was not made by the federal agency. Even if Congress had intended to vest the Fisheries Service or the Secretary with discretion to interpret the statutory requirement to set the "excessive share" as a requirement that every vessel in the fishery have "a chance at generating a reasonable profit," there is no indication that Congress intended to vest that discretion in non-federal entities or individuals.

Nor could Congress have done so. Delegation of the interpretive function of the Court to federal agencies under *Chevron* already raises significant separation of powers concerns. As Justice Thomas has explained, "[t]he Constitution carefully imposes structural constraints on all three branches, and the exercise of power free of those accompanying restraints subverts the design of the Constitution's ratifiers." *Id.* (Thomas, J., dissenting from the denial of certiorari). The Constitution shields "judges from both the 'external threats' of politics and 'the "internal threat" of "human will"' by providing tenure and salary protections during good behavior and by insulating judges from the process of writing the laws they are asked to interpret." *Id*. at 691-92 (Thomas, J., dissenting from the denial of certiorari) (quoting *Perez*, 575 U.S. at 120 (Thomas, J., concurring in judgment)). By contrast, the "Executive is not insulated from external threats, and it is by definition an agent of will, not judgment." *Id*. Even assuming that delegation of interpretive functions to federal agencies under *Chevron* remains

within the confines of the separation of powers, delegation to an advisory council *outside* the executive branch does not.

5. The problems of applying *Chevron* deference to an interpretation rendered by the Pacific Council are especially stark in this case, where the Council's interpretation of "excessive share" is actually in conflict with previously adopted regulatory guidelines by the Fisheries Service, explaining that "[a]voidance of excessive shares" requires that "[a]n allocation scheme must be designed to deter any person or other entity from acquiring an excessive share of fishing privileges, and to avoid creating conditions fostering inordinate control, by buyers or sellers, that would not otherwise exist." 50 C.F.R. § 600.325(c)(3)(iii). This is consistent with longstanding Fisheries Service guidance that "the allocation scheme should not encoura[g]e control by one or more buyers or sellers, thereby addressing the concepts of monopoly or oligopoly in fishery markets." 48 Fed. Reg. 7402, 7405 (Feb. 18, 1983). The court below recognized that prior *agency* guidance (App. 15-16) but proceeded to defer to the new Pacific Council interpretation that "excessive share" should instead ensure that every vessel has a chance for attaining a "reasonable profit." This cannot be squared with the delegation-based foundation of *Chevron*.

In sum, there is no indication that Congress intended to delegate authority to a fishery council to fill in gaps in statutory interpretation, as the Pacific Council did here. *Chevron* cannot be stretched so far, and neither can the separation of powers mandated by

the U.S. Constitution. Certiorari is therefore necessary and appropriate to limit this expansive use of the *Chevron* framework.

B. This Case Allows the Court to Settle Recurring Issues of National Importance.

This case presents recurring issues with national ramifications both under the Magnuson-Stevens Act and as a matter of administrative law.

1. Courts applying the Magnuson-Stevens Act commonly and reflexively apply the *Chevron* two-step framework to interpretations made by Councils. The Ninth Circuit routinely applies the *Chevron* framework to Council interpretations that, as is the case here, make their way into final fishery regulations. *See*, *e.g.*, *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1117 (9th Cir. 2006) (applying *Chevron* deference to Pacific Council interpretation of "stock of fish"); *Glacier Fish Co. LLC v. Pritzker*, 832 F.3d 1113, 1121 (9th Cir. 2016) (applying *Chevron* deference to regulations proposed by Pacific Council and adopted by the Fisheries Service); *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 837 F.3d 1055, 1061-62 (9th Cir. 2016) (applying *Chevron* framework to Council interpretation of need for fishery management plan, but rejecting at step one). The Fifth Circuit has also reflexively applied the *Chevron* framework to Council-proposed regulations. *See Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 459 (5th Cir. 2020), as revised (Aug. 4, 2020). So has the D.C. Circuit. *See Nat.*

Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000).

These cases show how courts have utilized *Chevron* to analyze, and in some cases defer to, interpretations made by the Council as if they were made by the Fisheries Service or the Secretary. The application of *Chevron* should be reflective, not reflexive. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) ("The type of reflexive deference exhibited in some of these cases is troubling."). Statutory interpretations made by fishery management councils do not warrant the deference afforded interpretations by federal agencies.

This extension of *Chevron* to Council interpretations is not harmless. Sometimes the Council interpretations are so implausible that they cannot survive *Chevron* step one. *See*, *e.g.*, *United Cook Inlet Drift Ass'n*, 837 F.3d at 1061-62. Absent such circumstances, application of the *Chevron* framework to interpretations of Councils results in courts deferring to the judgment of individuals who are not part of a federal agency. Certiorari is necessary and appropriate to curb this practice, and eliminate this overly expansive use of the *Chevron* framework.

Nor is this risk limited to the Magnuson-Stevens Act. Other statutes allow for the establishment of advisory councils. For example, the Federal Land Policy and Management Act allows the Secretary of Interior to establish advisory councils to assist in the management of public lands. 43 U.S.C. § 1739. Similarly, the

Federal Advisory Committee Act provides broad authority for agencies to establish advisory committees, and agencies have created a multitude of such committees to advise on a wide range of issues, from toxic exposure levels, *Fertilizer Inst. v. U.S. E.P.A.*, 938 F. Supp. 52, 53 (D.D.C. 1996), to practices for integrating drones into U.S. airspace, *Elec. Privacy Info. Ctr. v. Drone Advisory Comm.*, 369 F. Supp. 3d 27, 30 (D.D.C. 2019). These advisory committees are not entitled to deference from a court on matters of statutory interpretation either. Yet this is precisely the result endorsed by the Ninth Circuit by its reflexive application of *Chevron* to an advisory council's policy driven interpretation in this case.

2. As a matter of administrative law, it is also critical that the Court curb the reflexive practice of applying the *Chevron* framework every time an agency is involved in a decision. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 1 Cranch at 177. "The rise of the modern administrative state has not changed that duty." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 317 (2013) (Roberts, J., dissenting). To the contrary, the Administrative Procedure Act (the "APA"), governing judicial review of most agency actions, instructs reviewing courts to decide "all relevant questions of law." 5 U.S.C. § 706.

"*Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power . . . in a way that seems more than a little difficult to square with the Constitution of the framers'

design." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). *Chevron* replaces "an independent decisionmaker seeking to declare the law's meaning as fairly as possible" with "an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day." *Id*. at 1153 (Gorsuch, J., concurring). Before ceding a portion of that interpretive role to the executive branch under the *Chevron* framework, courts must assure themselves that Congress "has in fact delegated to the agency lawmaking power over the ambiguity at issue." *City of Arlington, Tex.*, 569 U.S. at 317.

All too often, however, courts reviewing agency action under the APA are quick to retreat to the *Chevron* framework, without any analysis of whether it should even apply. This is problematic because in the great majority of cases, courts find a statute to be ambiguous. *See* Kent Barnett & Cristopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 33-34 (2017) (concluding that circuit courts find ambiguity at *Chevron* step one 70% of the time based on a sample of over 1,000 cases). This immediately puts a thumb on the scales, favoring agency interpretations over that of the judicial branch. The grant of certiorari here would give essential guidance to lower courts on the rigor necessary to evaluate whether *Chevron* should even apply at all.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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