No. 22-1219

In the Supreme Court of the United States

RELENTLESS, INC., ET AL.,
Petitioners,

v.

DEPARTMENT OF COMMERCE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

This Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires Article III courts to set aside their own independent judgment as to the best interpretation of ambiguous statutes administered by federal agencies. Instead, courts interpreting those statutes must apply any reasonable interpretation preferred—even on pure policy grounds—by the Executive Branch.

The question presented is whether this Court should overrule or clarify the *Chevron* doctrine.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners (plaintiffs-appellants below) are Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC.

Respondents (defendants-appellees below) are U.S. Department of Commerce; Gina M. Raimondo, in her official capacity as Secretary of Commerce; National Oceanic and Atmospheric Administration ("NOAA"); Richard Spinrad, in his official capacity as Administrator of NOAA; National Marine Fisheries Service, a/k/a NOAA Fisheries; and Janet Coit, in her official capacity as Assistant Administrator for NOAA Fisheries.

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JURISDICTION

The First Circuit issued its opinion on March 16, 2023. Petitioners timely filed a petition for certiorari on June 14, 2023. This Court granted certiorari on October 13, 2023. It has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the addendum to this brief.

INTRODUCTION

The Constitution of the United States vests all judicial power in the Article III courts—including, most importantly, the power "to say what the law is" when resolving cases or controversies. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Yet *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), holds that when exercising this interpretive authority, courts must abdicate their independent judgment and defer to the federal government's interpretation of ambiguous statutes. Courts must defer even when they believe that their own interpretation—not the government's—more faithfully reflects the statute's original meaning and congressional intent. They must defer even when their precedent has already embraced a different interpretation, and even when the government's construction is novel and reverses its own prior official position.

The *Chevron* deference doctrine is deeply flawed and should be overruled for all the reasons petitioners have set forth in *Loper Bright Enterprises v. Raimondo*, No. 22-451. Petitioners in this case focus on *Chevron*'s two most significant constitutional shortcomings.

First, *Chevron* directly interferes with judges' Article III duty to apply their own independent judgment when saying what the law is. The Constitution makes judges independent of the political branches precisely because their core function—exercising *judgment* as to the meaning of legal rules—is fundamentally distinct from making policy choices. Applying independent judgment requires judges to consider the text, history, purpose,

and precedent of the federal law at hand, and to faithfully give effect to what they determine is the *best* interpretation of that law. The Administrative Procedure Act (APA) reinforces this constitutional obligation, mandating that judges "decide all relevant questions of law," "interpret constitutional and statutory provisions," and "hold unlawful and set aside" agency action exceeding the government's authority. *Chevron* traduces these principles: It compels courts to abandon their own independent judgment and interpret ambiguous statutes by instead deferring to the agency's policy-driven assertions of what the law should be.

Second, *Chevron* violates constitutional due process of law. It is patently unfair for a court to defer to an agency's interpretation in cases where the agency *itself* is a litigant, before that same court, in the actual case at hand. Doing so empowers the agency to act as judge in its own case and deprives citizens challenging official action of the right to adjudication by an impartial decisionmaker. This violates the Constitution. Judges are supposed to be impartial arbiters of law—not home-team umpires for the Executive Branch.

The government's defenses of *Chevron* cannot overcome these defects. The argument that Congress has impliedly delegated interpretive authority to agencies not only rests on a widely acknowledged fiction, but also conflates judicial interpretive authority—which can never be delegated—with mere policymaking. Judges regularly apply their own best legal judgment when interpreting ambiguous constitutional or statutory provisions in other contexts, and they are not making policy when doing so. They can and should take the same approach

when interpreting statutes governing federal agencies.

The government's *stare decisis* defense of *Chevron* is equally flawed. *Stare decisis* typically promotes stability, consistency, and the rule of law. But *Chevron*—by its very nature—undermines these values: It allows agencies to unilaterally redefine the meaning of federal law and forces courts to rubber-stamp their decisions. *Chevron* thus creates instability and inconsistency, replacing the rule of law with rule by agency fiat.

This case exemplifies *Chevron*'s many flaws. Here, the Department of Commerce unilaterally imposed massive costs on New England commercial fishermen like petitioners, making them pay for federal agents performing federal functions on their vessels. It did so without any explicit authority in the relevant statute—the Magnuson-Stevens Act (MSA)—which elsewhere specifically sets forth the limited circumstances in which such cost-shifting is permitted. Nonetheless, the courts below applied *Chevron* to uphold the agency's implausible and self-serving interpretation.

This Court should seize the opportunity to overturn *Chevron* and restore the proper role of Article III courts in saying what the law is. The Court should then apply its independent judgment and set aside the Department's unlawful cost-shifting regulation.

STATEMENT OF THE CASE

A. The *Chevron* Doctrine

"In 1984, a bare quorum of six Justices decided *Chevron*." *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of

certiorari). *Chevron* established a rule for interpreting statutes administered by federal agencies. In close cases, courts must defer to an agency's reasonable interpretation of a statute.

Chevron has two steps. At Step One, a court must "employ[] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842-43 & n.9. "If the intent of Congress is clear, that is the end of the matter," and the court must enforce the clear meaning. *Id.* at 842-43.

But if instead "the statute is silent or ambiguous with respect to the specific issue," then the court proceeds to Step Two. *Id.* at 843. There, the court must defer to the agency's interpretation so long as it reflects a "permissible construction of the statute." *Id.* Such deference must be granted even if the agency adopts its interpretation entirely on policy grounds. *Id.* at 843-45. It does not matter whether the agency itself believes that a different interpretation better reflects the statute's true meaning. Nor does it matter if the agency's interpretation is contemporaneous with the statute or consistent with prior agency interpretations. *Id.* at 863-64. Deference trumps everything.

This Court has elaborated on the *Chevron* doctrine in subsequent cases. Perhaps most importantly, in *National Cable & Telecommunications Association v. Brand X Internet Services*, the Court clarified that a court must defer to the agency's interpretation at Step Two even if the court had itself already adopted a different interpretation without applying *Chevron*. 545 U.S. 967, 982 (2005).

Over the years, the *Chevron* doctrine has been among the most debated—and most criticized—in federal law. *See* Loper Br. 7 (citing examples). This Court has not applied *Chevron* since 2016, despite multiple opportunities to do so.

B. The Magnuson-Stevens Act

The MSA establishes the federal government's "fishery management authority over all fish … within the exclusive economic zone" of the United States. 16 U.S.C. § 1811(a); *see also id.* § 1802(11). The Secretary of Commerce is responsible for administering the MSA. *Id.* § 1802(39). Traditionally, the Secretary has delegated MSA administrative authority to the National Oceanic and Atmospheric Administration (NOAA) and its line office, the National Marine Fisheries Service, known as "NMFS" or "NOAA Fisheries."

NMFS works with eight Regional Fishery Management Councils. 16 U.S.C. § 1852(a)-(c). These councils submit proposed "fishery management plans" and implementing regulations to NMFS. *Id.* §§ 1853, 1854(a)-(b). NMFS can then approve the plan and promulgate the regulations. *Id.* § 1854(a)(3), (b)(3). The MSA states that plans "may … require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery." *Id.* § 1853(b)(8).

MSA fishery observers are federal agents in every relevant sense. All observers must complete NMFS-certified training, 50 C.F.R. § 648.11(h)(5)(vi), and they receive a "noaa.gov e-mail account," which "is considered government property," NOAA Fisheries

Observers Program, *Handbook for Fisheries Observers and Providers* 51, 54 (Aug. 2019), https://repository.library.noaa.gov/view/noaa/22728 (Aug. 2019) (NOAA Handbook). Every observer is also "deemed" by law "to be a Federal employee for the purpose of compensation under the Federal Employee Compensation Act." 16 U.S.C. § 1881b(c).

The NMFS website describes observers as the government's "eyes and ears on the water."[1] Their role is to "represent the Federal Government" on each voyage.[2] They must bring regulatory permits and government forms (as well as a NMFS identification badge), and collect data relating to fishing gear, catch weights, trip costs, and the like. *See* NOAA Handbook 53, 55; 50 C.F.R. § 648.11(m)(1)(i)(A)-(B). After each trip, they must promptly report that data to NMFS and "remain[] available to NMFS … for debriefing for at least 2 weeks following" the trip. 50 C.F.R. § 648.11(h)(5)(vii)(D). Throughout, observers are subject to NMFS's "Standards of Conduct."[3] Interfering with observers' work for NMFS is a federal crime. 16 U.S.C. § 1857(1)(L).

The MSA does not generally command commercial fishermen to pay fees to hire the federal observers carried on their vessels. Instead, it identifies three

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[1] NOAA Fisheries, Fishery Observers, https://www.fisheries.noaa.gov/topic/fishery-observers (last visited Nov. 14, 2023).

[2] Northeast Fisheries Science Center, *Observer Operations Manual* 28 (2021), https://www.nafo.int/Portals/0/PDFs/fc/proc/USA_2021ObserverOperationsManual.pdf.

[3] NOAA Fisheries, Master Appendix 104-05, https://repository.library.noaa.gov/view/noaa/22727 (Aug. 2019) (follow "Appendices A-B" link).

narrow groups of vessels that must cover observer costs: (1) "foreign fishing vessel[s]" operating within the exclusive economic zone of the United States, 16 U.S.C. § 1821(a), (h); (2) fishing vessels in the Alaskan fisheries managed by the North Pacific Council, *id.* § 1862(a)-(b); and (3) fishing vessels participating in certain "limited access privilege program[s]" established by regional councils, *id.* § 1853a(a). In the latter two instances, the MSA explicitly caps the relevant fees at a modest 2 or 3 percent of the "value of fish harvested" on the vessels. *Id.* §§ 1862(b)(2)(E), 1854(d)(2)(B).

C. The 2020 Final Rule

As early as 2013, the New England Fishery Management Council and NMFS faced "[b]udget uncertainties." 79 Fed. Reg. 8786, 8793 (Feb. 13, 2014). Though observer coverage in the Atlantic herring fishery was at that time "fully funded by NMFS," its "annual appropriations for observer coverage" were "not guaranteed." *Id.* at 8792.

Due to funding shortages, the Council decided it "would like the option" of forcing "the fishing industry to pay" for monitoring "when Federal funding is unavailable." CA1.App.191; 79 Fed. Reg. at 8792. So the Council submitted an "omnibus amendment" to the New England herring fishery management plan and corresponding regulations to NMFS giving it that option. 83 Fed. Reg. 47,326 (Sept. 19, 2018); 83 Fed. Reg. 55,665 (Nov. 7, 2018).

Petitioners and other commercial fishermen strongly objected, worrying that the amendment "would impose a tremendous economic burden on the fishing industry that could lead to the elimination of small-scale fishing." 85 Fed. Reg. 7414, 7424 (Feb. 7,

2020); *see, e.g.*, CA1.App.234-39 (petitioners' comments emphasizing unlawfulness and disproportionate impact of rule); CA1.App.274-75 (noting "concern" of New England fishermen that "they cannot afford industry-funded monitoring [and] "[r]ecent changes in the herring fishery have exacerbated [those] concerns.").

Recognizing its proposal was "contentious" and "controversial," NMFS nevertheless forged ahead. CA1.App.193; CA1.App.274. In February 2020, NMFS finalized the regulation. 85 Fed. Reg. at 7414 ("Final Rule"). The Final Rule established general guidelines to develop future industry-funded monitoring across all New England fisheries and created an industry-funded monitoring program specifically for the Atlantic herring fishery.

As to the herring fishery, the industry-funded program seeks to place observers on 50% of trips taken by vessels with certain permits, including "Category A" permits. *Id.* at 7417. The Final Rule grants NMFS discretion to decide whether to forgo monitoring coverage on any specific trip, to cover the trip with a government-paid observer, or to force the vessel to "obtain and pay for" a government-certified "monitor." *Id.* at 7417-18. If NMFS decides to require an industry-funded monitor, it is "unlawful" for the fishermen to "[r]efuse monitoring coverage." 50 C.F.R. § 648.14(e)(2).

NMFS acknowledged that forcing such vessels to pay would have "direct economic impacts" on the livelihoods of commercial fishermen. 85 Fed. Reg. at 7418. By NMFS's own estimates, the "industry's cost responsibility" would be "$710 per day," which could reduce annual financial returns to the owner by "up to approximately 20 percent." *Id.*

D. This Litigation

1. Petitioner Seafreeze Fleet LLC wholly owns petitioners Relentless Inc. and Huntress Inc., which vocally opposed the Final Rule. CA1.App.136-41, 165-67, 175-81, 188, 223-30, 234-39, 288-92, 302-06. Petitioners operate two fishing vessels, the F/V *Relentless* and the F/V *Persistence*, and hold Category A permits to fish in the Atlantic herring fishery. CA1.App.13. These vessels use small-mesh bottom-trawl gear and can freeze fish at sea. Pet.App.8a. They are likely the "only two small-mesh bottom trawl vessels" to which the Final Rule's industry-funded monitoring requirements apply. 85 Fed. Reg. at 7424.

Petitioners' unique style of fishing allows their vessels to make longer trips than other herring vessels—typically spending 10-14 days at sea instead of 2-4 days. Pet.App.8a. As a result, petitioners generally declare into multiple fisheries—herring, mackerel, butterfish, and squid. Doing so preserves their flexibility "to catch whatever they encounter," *id.*, but also means that petitioners sometimes end up harvesting fewer herring than other vessels—or even no herring at all. *See* CA1.App.288-91.

In March 2020, petitioners challenged the Final Rule under the APA. As relevant here, petitioners alleged that the rule exceeded NMFS's statutory authority under the MSA, which does not authorize NMFS to mandate industry-funded monitoring in the herring fishery.

The district court granted summary judgment to the government. Pet.App.35a-65a. Accepting that "*Chevron* is binding precedent that cannot be ignored" by lower courts, it held that "*Chevron* deference

applies" because "Congress delegated authority to make rules implementing the MSA to the Secretary, who in turn assigned that power to [NOAA] and NMFS." Pet.App.48a-49a. After finding the MSA ambiguous, the court concluded that NMFS's decision to force fishermen to pay for the observers "satisfie[d] *Chevron*'s deferential review." Pet.App.42a.

2. The First Circuit affirmed, concluding that the rule was "a permissible exercise of the agency's authority" under *Chevron*. Pet.App.3a.

After setting forth "the familiar *Chevron* two-step analysis," Pet.App.10a, the court rejected petitioners' argument that NMFS lacks authority to require fishermen to pay for the government's at-sea monitors. It emphasized a purported "default norm" that "the government does not reimburse regulated entities for the cost of complying with properly enacted regulations." Pet.App.13a. Because the MSA allows observers to "be carried on board a vessel," the court reasoned, Congress "presumed" that vessels would also pay for those observers. Pet.App.11a, 14a.

The First Circuit also rejected petitioners' argument that the MSA's three express authorizations of industry-funded monitors implied that in other scenarios NMFS was *not* authorized to force fishermen to pay. Pet.App.17a-21a. The court found these express authorizations "inapt, or at least insufficient" to displace its "default presumption." Pet.App.18a.

The First Circuit ultimately held that NMFS's interpretation of the MSA "did not exceed[] the bounds of the permissible" under *Chevron*, noting that the agency's interpretation was "at the very least … certainly reasonable." Pet.App.22a. Given that

holding, the court stated that it "need not decide whether [to] classify this conclusion as a product of *Chevron* step one or step two." *Id.*

SUMMARY OF ARGUMENT

For nearly 40 years, *Chevron* deference has distorted judicial decisionmaking and deprived citizens of a fair hearing in disputes against the government. This Court should overrule *Chevron* and invalidate the Final Rule.

I. *Chevron* violates the Constitution by compromising judges' independence when interpreting the law. Article III vests the judicial power exclusively in the federal courts. Central to that power is the duty of judges to use their independent judgment when "say[ing] what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Constitution establishes the independence of the judiciary from the political branches to ensure that judges will exercise this core interpretive function impartially, without fear or favor. This Court has reaffirmed that core judicial duty time and again. And Congress has agreed: The APA requires judges to "decide all relevant questions of law," "interpret constitutional and statutory provisions," and "hold unlawful and set aside" agency action exceeding the government's authority. 5 U.S.C. § 706(2).

Chevron defies these principles by telling judges to defer to inferior-but-tenable agency interpretations of ambiguous federal statutes. Acquiescence is mandatory so long as the agency's interpretation falls within an ill-defined zone of reasonableness—even if the judge believes the agency's interpretation is

wrong. *Chevron* thereby forces judges to abdicate their most important duty: to faithfully apply the law.

Chevron also violates the Fifth Amendment's guarantee of due process of law. By requiring courts to resolve ambiguities in favor of the government—our Nation's most powerful litigant—it introduces systematic bias into the adjudication of cases. *Chevron* further offends due process by empowering the government to act as a judge in its own case, contravening basic notions of fair play.

The government's substantive defense of *Chevron* rests on a fictional presumption that Congress deliberately delegated the power to interpret ambiguous statutes. That fiction is just that—a *fiction*—and it cannot be allowed to distort our constitutional structure. The government's delegation theory also holds that agencies can exercise their *Chevron*-granted "interpretive authority" by imposing their preferred policy outcomes. That conflates legal *interpretation* with *policymaking*. But law and policy are different. Determining the meaning of the words enacted by Congress requires legal judgment, focused on a close analysis of text, structure, history, precedent, and traditional tools of construction. It is not an exercise in policymaking. Article III judges are free to respectfully consider the views of federal agencies, but they may not defer, even in hard cases.

The government's case for upholding *Chevron* under *stare decisis* is just as flawed. *Stare decisis* aims to foster consistency and stability in the development of law. But *Chevron* is a singularly destabilizing influence: It allows agencies to overrule courts and the agencies' own prior interpretations, thereby leaving key questions of federal law

perpetually unresolved. *Chevron* has hindered the orderly development of law, and attempts to reform it have proven complicated and unworkable. Worst of all, *Chevron* deeply undermines the proper functioning of our constitutional framework of separated powers. *Chevron* is egregiously wrong and should be overruled.

II. Whatever this Court does with *Chevron*, it should invalidate the Final Rule. The MSA authorizes federal observers on fishing vessels, but it does not provide general authorization for NMFS to require cash-strapped fishermen to pay for those observers—and certainly not to the tune of 20 percent of their annual profits. The MSA was clear and precise where it wanted to let NMFS shift observer costs to the fishing industry. Yet the statute is devoid of any language authorizing the Final Rule's approach. There is no basis, express or implied, for the broad authority the agency has arrogated to itself. The Final Rule should be set aside.

ARGUMENT

I. THE *CHEVRON* DOCTRINE SHOULD BE OVERRULED

The *Chevron* doctrine is egregiously wrong and should be overruled. *Chevron* contravenes Article III of the Constitution, the Fifth Amendment's guarantee of due process of law, and the APA. It has also proven unworkable for the courts and harmful to the public. For the reasons advanced by the *Loper* petitioners—and further elaborated below—the Court should reject *Chevron* once and for all.

A. *Chevron* Violates The Judicial Duty To Exercise Independent Judgment When Saying What The Law Is

Article III vests the "judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Inherent in this judicial power—and reaffirmed in the APA—is the duty of federal judges to apply their own independent judgment when determining what federal statutes mean. Granting *Chevron* deference to agency interpretations is inconsistent with that solemn duty.

1. Article III Requires Judges To Apply Their Own Best Interpretation Of Federal Law

a. The Framers of the Constitution "lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). Drawing on that experience, and "centuries of political thought," they crafted the Constitution's "particular blend of separated powers." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 116 (2015) (Thomas, J., concurring in the judgment). The Framers thus divided the government's core functions—legislative, executive, and judicial—into three branches established in Articles I, II, and III.

The Constitution vests each branch with separate and exclusive forms of power. As Chief Justice Marshall later explained, the constitutional structure ensures that "the legislature makes, the executive executes, and the judiciary construes the law." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46

(1825); *see Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

In Federalist No. 78, Alexander Hamilton explained how this separation of powers drew on ancient concepts about the faculties of individuals: force, will, and judgment. "Will and judgment were understood to be faculties of the soul, and alongside these two mental faculties—or powers of the mind—was the physical power of the body." Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1232 & n.147 (2016) (Chevron *Bias*) (citing Philip Hamburger, Law and Judicial Duty 148-78 (2008) (Law and Judicial Duty)). In the Founders' view, the legislative power represented will; the executive, force; and the judiciary, judgment.

Hamilton's discussion of judicial power emphasized its "distinct" character in precisely those terms. *See* The Federalist No. 78, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Under the Constitution, he wrote, Article III courts "may truly be said to have neither FORCE nor WILL, but merely judgment." *Id.* at 433.

Courts were understood to exercise such judgment—untainted by force or will—when performing their most important task of conclusively interpreting federal law. As Hamilton explained, "[t]he interpretation of the laws is the proper and peculiar province of the courts." *Id.* at 435. Indeed, "[a] constitution … belongs to [judges] to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body." *Id.*; *see also*, *e.g.*, The Federalist No. 22, at 118 (Alexander Hamilton) (explaining that the "true import" of "all" this Nation's laws "must … be ascertained by judicial determinations").

These core features of Article III judicial power were famously encapsulated by Chief Justice Marshall in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803). Or as Justice Story later declared, "the judicial department has imposed upon it by the constitution, the solemn duty to interpret the laws, in the last resort." *United States v. Dickson*, 40 U.S. 141, 162 (1841). "[H]owever disagreeable that duty may be," the judiciary is "not at liberty to surrender, or to waive it." *Id.*

b. Independent judgment has long been considered one of "the defining characteristics of Article III judges." *Stern v. Marshall*, 564 U.S. 462, 483 (2011). The judicial power was "originally understood" to require judges "to exercise [their] independent judgment in interpreting and expounding upon the laws." *Perez*, 575 U.S. at 119 (Thomas, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring). That meant applying the judge's best understanding of the law as it was, not his (or the government's) preferences as to what the law should be. Chevron *Bias* 1206-12; Law and Judicial Duty 148-78, 316-26 (collecting sources).

The judicial duty of independent judgment is an essential safeguard of individual liberty and the rule of law. Because judgment is conceptually distinct from the force or will exercised by the other branches of government, it checks the ability of those branches to impose their policy preferences on the citizenry. As Hamilton wrote, quoting Montesquieu, "there is no liberty if the power of judging be not separated from the legislative and executive powers." The Federalist

No. 78, at 434. Indeed, an independent judicial check is crucial to ensuring that "ours is a government of laws, and not of men." *Dickson*, 40 U.S. at 162 (Story, J.).

The Constitution's text and structure reflect this understanding and establish crucial protections for judicial independence. Most notably, Article III guarantees judges life tenure and bars Congress from diminishing their compensation. U.S. Const. art. III, § 1. By creating these protections, "the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the '[c]lear heads … and honest hearts' deemed 'essential to good judges.'" *Stern*, 564 U.S. at 484 (alterations in original) (quoting 1 *Works of James Wilson* 363 (J. Andrews ed., 1896)). As Hamilton recognized, judicial independence is necessary "to secure a steady, upright, and impartial administration of the laws" and to prevent judges from being "overpowered, awed, or influenced" by the political branches. The Federalist No. 78, at 433-34.

Justices of this Court have repeatedly embraced independent judgment as inherent to the judicial function. *See* Law and Judicial Duty 505-35. Chief Justice Marshall described one of his rulings as flowing from the "dictate of my own judgment," emphasizing that "in the performance of my duty I can know no other guide." *United States v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (No. 14,692a). Justice Story likewise explained that it was his "duty to exercise [his] own judgment, and to decide [cases] accordingly." *The Friendship*, 9 F. Cas. 822, 825 (C.C.D. Mass. 1812) (No. 5,124). Justice Iredell proclaimed that he was "bound to decide" cases

"according to the dictates of my own judgment." *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 415, 416 (1793) (Iredell, J., dissenting). And Chief Justice Hughes emphasized that due process of law requires cases to be brought before "a judicial tribunal for determination *upon its own independent judgment* as to both law and facts." *Crowell v. Benson*, 285 U.S. 22, 60 (1932) (emphasis added) (citation omitted); *see also St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936) (Brandeis, J., concurring).

Modern Justices have embraced the same vision of the judicial role. At her nomination hearing, for example, Justice Ginsburg explained to the Senate that "because you are considering my capacity for independent judging, my personal views on how I would vote on a publicly debated issue were I in your shoes—were I a legislator—are not what you will be closely examining."[4] Justice Jackson echoed these points, emphasizing her "duty to be independent," to "decide cases from a neutral posture," and to "interpret and apply the law" without "fear or favor."[5]

And Chief Justice Roberts famously analogized the judicial function to umpiring a fair baseball game:

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[4] *The Nomination of Ruth Bader Ginsburg, To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 52 (1993) (statement of Hon. Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States).

[5] U.S. Senate Comm. on the Judiciary, *The Nomination of Ketanji Brown Jackson to be an Associate of the Supreme Court of the United States* at 4:48:28 (Mar. 21, 2022), https://www.judiciary.senate.gov/committee-activity/hearings/the-nomination-of-ketanji-brown-jackson-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states.

> Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.[6]

That commonsense description of the judicial role fully captures Hamilton's insights. When making tough calls, umpires—like judges—must "exercise independent judgment." *Major League Baseball Umpire Manual*, § I.[7]

c. Consistent with this established view of the judicial role, courts after the Founding reviewed legal questions de novo in cases arising under their federal question jurisdiction. *Baldwin v. United States*, 140 S. Ct. 690, 693 (2020) (Thomas, J., dissenting from denial of certiorari). In doing so, they applied traditional tools of statutory interpretation, including semantic canons focused on the text and substantive canons focusing on its historical understanding. They "did not apply anything resembling *Chevron* deference." *Id.*[8]

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[6] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearings before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr. Nominee to be Chief Justice).

[7] https://baseballrulesacademy.com/mlb-umpire-manual/ (last visited Nov. 14, 2016).

[8] *See generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L. J. 908, 930-65 (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, 1283 (2022) (Rappaport).

In *Dickson*, for example, the Court addressed an interpretive question in a statute pertaining to the salaries for receivers of public money. The Court conducted de novo review, refusing to defer to the Treasury Department's interpretation. 40 U.S. at 161-62. As Justice Story explained, while the government's interpretation was entitled to respect, "if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice." *Id.* at 161.

In *Johnson v. Towsley*, the Court addressed a federal land patent dispute that turned on the "construction of an act of Congress." 80 U.S. (13 Wall.) 72, 81 (1871); *see id.* at 91. The Secretary of the Interior had construed the statute one way, and "it [wa]s clear that but for his construction of the statute on that subject" the losing party would have prevailed and received the patent. *Id.* at 87-88. In resolving the case, the Court merely "inquire[d] whether the statute, rightly construed, defeated [the respondent's] otherwise perfect right to the patent." *Id.* at 88. In other words, it applied de novo review without deference to the Secretary of the Interior, ultimately ruling that he had adopted a "misconstruction of the law." *Id.* at 90.

In conducting de novo review, the Court relied on "traditional tools of statutory interpretation," including canons giving "respect" to *contemporaneous* and *continuous* agency interpretations of a statutory provision. Thomas Merrill, The *Chevron* Doctrine 36-37, 51-52 (2022) (Merrill); Bamzai 930-47. That is not a form of deference, but rather a standard approach to textual interpretation that courts apply across a broad range of legal issues, including when

conducting de novo review of constitutional questions. *See* Bamzai 943-44; Merrill 34-37. Indeed, Justice Story acknowledged those canons in *Dickson*—noting the agency's "uniform construction given to the act of 1818, ever since its passage"—but *still* ruled against the agency because its position was simply "not in conformity" to the law's "true" meaning. 40 U.S. at 161. Like other canons, these canons were considered useful only to the extent they helped courts discern—for themselves—the best reading of the statute.

To be sure, not all cases involving federal officers required courts to resolve the meaning of the underlying statute. Before receiving general federal question jurisdiction in 1875, many of the Court's cases arose in the context of writs of mandamus. Mandamus "carried with it a deferential standard of review," and would issue only if the petitioner could show that an executive official had violated a nondiscretionary, ministerial legal duty. Bamzai 947; *see Marbury*, 5 U.S. (1 Cranch) at 170-71. Although some mandamus cases invoked notions of deference to executive officials, the deference resulted from the nature of the extraordinary writ, not deference to an agency's interpretation of a statute or the Constitution. *See* Bamzai 947; Rappaport 1287 (deference afforded to agencies was a result of "the limited remedies available in federal court," not deference with respect to legal interpretations).

This Court made clear that upholding an agency determination in mandamus cases is not the same as adopting the agency's construction of the underlying statute. For example, in *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840), the Court denied mandamus relief regarding an executive official's discretionary act, but flagged that the outcome could be different if

it later ruled on the meaning of the statute outside of the mandamus context: "If a suit should come before this Court, which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department." *Id.* at 515. Rather, if the Justices disagreed with the agency's interpretation, "they would, of course, so pronounce their judgment," because "their judgment upon the construction of a law must be given in a case in which … it is their duty to interpret the act of Congress." *Id.*; *see also, e.g.*, *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 48 (1888) ("Whether, if the law were properly before us for consideration [outside a mandamus context], we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case.").

Beyond mandamus, in tort or contract cases where courts were called upon to determine the meaning of a statute, "no deference was conferred on agency legal interpretations." Rappaport 1287; *see also* Bamzai 917. Instead, courts conducted their customary independent review of legal questions, just as Article III requires.

2. The APA Reinforces The Judicial Duty To Exercise Independent Interpretive Judgment

Courts continued to faithfully follow the traditional understanding of the judicial power—exercising independent judgment when interpreting federal law—well into the mid-twentieth century. But the New Deal and the emergence of powerful administrative agencies threatened to erode that practice. Bamzai 947-49, 952, 958, 965-81. During

this period, a handful of judicial decisions began deferring to agencies on mixed questions of law and fact, in ways that seemed inconsistent with de novo judicial review of legal questions. *Id.* This trend in statutory interpretation paralleled a broader shift of power to federal agencies in matters of adjudication and rulemaking.

In 1946, Congress responded by passing the APA. Long opposed by the Roosevelt Administration, the statute was designed as "a check upon [agency] administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950). As relevant here, Congress sought to "revive the traditional [interpretive] methodology and instruct courts to review legal questions using independent judgment and the canons of construction." Bamzai 977, 985. The APA's text reflects that goal, as acknowledged by legislators and commentators at the time.

a. Section 704 of the APA authorizes judicial review of agency action. 5 U.S.C. § 704. Section 706 then uses *Marbury*-like language to describe the judicial role in such cases: "[T]he 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." *Id.* § 706. It further states that the court "shall … hold unlawful and set aside agency action" found to be, inter alia, (1) "contrary to constitutional right," (2) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or (3) "otherwise not in accordance with law." *Id.* § 706(2).

On its face, this language "unequivocally" directs courts "to apply independent judgment on all questions of law." Merrill 47. Indeed, "Congress explicitly required that reviewing courts determine whether an agency is acting within the scope of its delegated authority." *Id.* But a court cannot perform that checking function unless it enforces its own best understanding of what the law requires. As Justice Scalia explained, Section 706 thus "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." *Perez*, 575 U.S. at 109 (concurring in the judgment).

Other features of the APA reinforce that conclusion. For example, Section 706 repeatedly gives courts the same instructions when interpreting the Constitution and federal statutes: As to each, courts must "interpret" the relevant provision, "decide" the relevant question of law, and "hold unlawful" any conflicting agency action. It is well-settled that courts interpreting the Constitution must adopt the *best* construction of the relevant provisions, exercising independent judgment. *See Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). Section 706 puts statutory interpretation on equal footing and requires the same approach. *See* Bamzai 985.

The APA also makes clear that Congress knew how to establish deferential forms of review when it wanted to. For example, Section 706(2)(A) instructs courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion." But the APA does not apply these self-consciously deferential standards of review—which govern factfinding and policymaking—to review of agency legal interpretations.

Finally, although the APA generally requires agency legislative rules to go through notice-and-comment rulemaking, it contains an *exception* for "interpretative rules" setting forth the agency's views on the meaning of federal statutes. 5 U.S.C. § 553. That exception was based on Congress's "assumption that questions of law would always be decided de novo by the courts." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514 (1989) (Scalia). After all, if agency legal interpretations were meant to bind courts, Congress surely would not have exempted them from the procedural requirements governing substantive agency policymaking. *See also Perez*, 575 U.S. at 110-11 (Scalia, J., concurring in the judgment).

b. The APA's history confirms that Section 706 was designed to reaffirm the core judicial duty to interpret statutes according to judges' independent judgment, without deference to agencies. For example, Congress rejected proposed language in an earlier draft that would have required a reviewing court assessing the legality of agency action to give "due weight" to the agency's "legislative policy," "technical competence," "specialized knowledge," and "experience," as well as to "the discretionary authority conferred upon it." *Final Report of The Attorney General's Committee on Administrative Procedure*, S. Doc. No. 77-8, at 246-47 (1941); *see* Bamzai 986.

Moreover, the Senate Judiciary Committee justified Section 553's interpretive-rule exemption from notice-and-comment requirements by noting that an agency's "mere[] interpretations of statutory provisions … *are subject to plenary judicial review*." S. Doc. No. 79-248, at 18 (2d Sess. 1946) (emphasis

added); *see also id.* at 313. The Committee likewise indicated that judicial review of questions of law was "the minimum requisite under the Constitution." *Id.* at 39. In doing so, it cited *ICC v. Illinois Central Railroad Co.*, 215 U.S. 452, 470 (1910), which had described judicial review of an agency's legal power to act as "the essence of judicial authority" which "may not be curtailed … [or] avoided," further noting that an agency's policy discretion extended only to "lawful" administrative orders.

Prominent APA proponents explained that Section 706 "requires courts to determine independently all relevant questions of law"—"including the interpretation of constitutional or statutory provisions." 92 Cong. Rec. 5654 (1946) (statement of Rep. Francis E. Walter, Chairman of the House Subcommittee on Administrative Law). Senator Pat McCarran, Chairman of the Senate Judiciary Committee, wrote that "Questions of Law Are for the Courts," noting that the APA "simply and expressly provides" that courts shall themselves determine the meaning of legal provisions. Pat McCarran, *Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A. J. 827, 831 (1946).

The House and Senate Reports echoed these points, emphasizing that "questions of law are for courts rather than agencies to decide." H.R. Rep. No. 79-1980, at 44 (1946); S. Rep. No. 79-752, at 28 (1945). And a prominent academic (and former New Deal administrator) likewise acknowledged that Section 706 provided a "clear mandate" that a court should decide questions of law "for itself, and in the exercise of its own independent judgment." John Dickinson, *Administrative Procedure Act: Scope and Grounds of*

Broadened Judicial Review, 33 A.B.A. J., 434, 516 (1947); *see* Bamzai 992-94 (citing additional sources).

c. Consistent with the APA's text and history, five Justices of this Court have already concluded that Section 706 requires courts to conduct "de novo" review of the statute in question. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., joined in part by Thomas, Alito & Kavanaugh, JJ., concurring in the judgment); *see United States v. Texas*, 599 U.S. 670, 697 (2023) (Gorsuch, J., joined by Thomas & Barrett, JJ., concurring in the judgment). Numerous commentators agree.[9] This approach is faithful not only to the APA, but also to the constitutional core of judicial duty.

3. *Chevron* Requires Judges To Abandon Independent Judgment In Close Cases

Chevron directly contradicts the duty of Article III courts to exercise independent judgment when interpreting federal law. It does so by telling judges to enforce what Justice Barrett has called "inferior-but-tenable" agency pronouncements of what the law means, even when the judge believes the agency is wrong and the law means something different. *Biden v. Nebraska*, 143 S. Ct. 2355, 2377, 2381 (2023) (concurring).

Consider this case as an example. Imagine a judge applies traditional rules of construction to the MSA at Step One and concludes—with a 60% level of confidence—that the best interpretation does *not* authorize NMFS to force commercial herring

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[9] *See, e.g.*, Bamzai 985-995; Rappaport 1295; Chevron *Bias* 1187; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 193-95 (1998).

fishermen to pay for on-vessel government monitors. Under standard approaches to *Chevron*, the judge would nonetheless be required to endorse the agency's interpretation of the MSA and uphold the Final Rule. *See* Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2137-38 (2016) (Kavanaugh) (suggesting that on the D.C. Circuit, he typically required 65% certainty to resolve a case at Step One without deference, whereas some colleagues required as much as 90% certainty to avoid deference).

That result defies Article III and the judicial duty to exercise independent judgment. By "forcing [judges] to abandon what they believe is the best reading of an ambiguous statute in favor of an agency's construction," *Chevron* "wrests from Courts the ultimate interpretative authority to say what the law is." *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (citations omitted). That is a massive "judicially orchestrated shift of power" to federal agencies, and it is unconstitutional. Kavanaugh 2150; *see also Stern*, 564 U.S. at 483; Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2075 (1990) (calling *Chevron* the "counter-*Marbury*").

Forcing our hypothetical judge to substitute the agency's inferior interpretation of the MSA for his own also violates the APA. Section 706 requires courts to "interpret … statutory provisions," "decide all relevant questions of law," and "hold unlawful and set aside" regulations found to be "in excess of statutory authority." 5 U.S.C. § 706(2). But under *Chevron*, the judge would be required to *uphold* the Final Rule, even if his own "interpret[ation]" deemed the rule illegal.

Nor does *Chevron* deference square with Chief Justice Roberts's baseball-inspired theory of judging: An umpire who is 60% sure the runner is safe cannot legitimately call him out. (And he certainly cannot do so just because the opposing manager tells him to.)

The judiciary has neither force nor will, but "merely judgment." The Federalist No. 78, at 434. Judges exercise such judgment when saying what the law is based on their best reading of the law. Without independent judgment, there is nothing left of the judiciary's constitutionally prescribed role. By forcing judges to abandon that judgment at the behest of executive officers, *Chevron* defeats the very purpose of the independent Article III judiciary.

B. *Chevron* Violates Constitutional Due Process Of Law

Chevron also violates the Fifth Amendment's guarantee of due process of law. In most cases involving *Chevron* deference, the government is on one side as a party. *See* Chevron *Bias* 1211. *Chevron* violates due process by (1) injecting systematic pro-government bias into those proceedings, and (2) empowering the government to act as a judge in its own case. These defects flout the most basic due process requirement of unbiased judging and provide further reasons to reject the doctrine.

The Fifth Amendment bars the government from depriving persons of "life, liberty, or property without due process of law." U.S. Const. amend. V. A fundamental element of due process is having one's case adjudicated by a neutral court: "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). And

"[f]airness of course requires an absence of actual bias in the trial of cases." *Id.*

Chevron denies due process by requiring judges to resolve statutory ambiguity in a manner that systematically sides with one party—the government—even when that party's interpretation is not the best reading of the statute. *See* Chevron *Bias* 1211-13. That is patently unfair. Judges are supposed to resolve cases by applying the law of the land, not an inferior interpretation advanced by a single powerful litigant. But *Chevron* requires just that, imposing "systematic deference to one of the parties and its judgments about the law"—and therefore a "precommitment" to that party. *Id.* at 1212. Indeed, *Chevron* requires courts to "place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else." *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of certiorari).

By requiring deference to federal agencies, *Chevron* also empowers the government to adjudicate its own rights and obligations—a violation of basic principles of fairness. This Court has recognized and reaffirmed the time-honored rule that "no man can be a judge in his own case." *Williams v. Pennsylvania*, 579 U.S. 1, 8-9 (2016). That principle was well-established at common law in England, *see Bonham's Case* (1610) 77 Eng. Rep. 646, 652; 8 Co. 114a, 118a, and was recognized by this Court in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (explaining that it would be "against all reason" to "entrust a Legislature" with the power to "make[] a man a Judge in his own cause" (opinion of Chase, J.)); *see also Morrissey v. Brewer*,

408 U.S. 471, 489 (1972) (due process requires neutral and detached decision-maker).

Yet *Chevron* enables just that classic unfairness. So long as Executive Branch officials can identify a statutory ambiguity or silence, judges must sacrifice their judgment on the best meaning of the statute in favor of the agency's views. But "virtually any phrase can be rendered ambiguous" if a judge or lawyer "tries hard enough." Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 826 (1990). Here, for example, the agency claims the right to force fishermen to pay government agents to perform government functions on their vessels with no express authorization in the MSA, and in the face of other provisions showing the opposite. *Infra* 47-52. If *this* statute is sufficiently ambiguous to trigger *Chevron*, anything goes.

Even worse is that agency officials need not conduct impartial legal analysis when issuing their *Chevron*-eligible interpretations. Unlike judges, their offices do not impose a duty to exercise independent legal judgment. *Perez*, 575 U.S. at 122 (Thomas, J., concurring in the judgment) ("The Framers made the opposite choice for legislators and the Executive. Instead of insulating them from external pressures, the Constitution tied them to those pressures."); *Buffington*, 143 S. Ct. at 19 (Gorsuch, J., dissenting from denial of certiorari). On the contrary, *Chevron* itself empowers agencies to make interpretive decisions based on the agency's views of *policy*—not just law—so long as they are within a vaguely defined zone of reasonableness. 467 U.S. 837, 843-45 (1984); OSG *Loper* Br. 7, 11, 19-21; *supra* 5.

By requiring deference to agency policy preferences, *Chevron* deprives citizens of fair

adjudications governed by law. Imagine a statute that can be interpreted to mean X or Y, and that both the court and the agency agree that (1) X is the better interpretation as a pure legal matter applying traditional tools of construction, but (2) both X and Y are reasonable interpretations. If the agency exercises its *Chevron* authority to choose Y on policy grounds (or, as here, to save money), then the court must adopt Y as the correct interpretation and give it "the force of law." Kavanaugh 2151-52. This is true even though "every relevant actor"—*including the agency itself*—"agree[s] that" Y "is not the best." *Id.* at 2151. That result is truly "[a]mazing" (and not in a good way). *Id.*

For all these reasons, *Chevron* is incompatible with due process. Citizens are entitled to have their cases resolved by judges exercising unbiased judgment under the law of the land, not by the evolving policy whims of agency bureaucrats reflected in inferior-but-tenable interpretations of federal law.

C. The Government's Delegation-Based Defense Of *Chevron* Is Baseless

The government defends *Chevron* based on a theory of congressional intent. In the government's view, *Chevron* honors Congress's "implicit[]" delegation of authority to administrative agencies to "give content" to ambiguous statutory terms. OSG *Loper* Br. 38. The government describes this as a delegation of "interpretive authority" to the agency, *id.* at 11, 17, while elsewhere making clear that the agency may exercise that interpretive authority through raw "policy determinations," *id.* at 19. And it argues that discarding *Chevron* would undermine Congress's ability to empower expert agencies to

administer complex statutory schemes, and force courts into the business of policymaking. These defenses of *Chevron* fail at every turn.

1. To state the obvious, neither the Constitution nor the APA expressly authorizes agencies to conclusively interpret ambiguous statutes based on their policy preferences. *Chevron* avoids that problem by resting on a theory of *implied* delegation: Where a "statute is silent or ambiguous with respect to [a] specific issue," such silence or ambiguity should be understood as an "implicit" congressional "delegation" of power to "elucidate [that] specific provision." *Chevron*, 467 U.S. at 843-44; *see* OSG *Loper* Br. 39.

No logic or evidence supports that presumed delegation. Most ambiguities in legal drafting are unintentional. Antonin Scalia & Bryan A. Garner, *Reading Law* 32 (2012). There is no reason to believe every ambiguity in every statute is created with the hope that it would be resolved by an agency. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation From The Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 996-98 (2013) (rejecting this premise based on empirical research).

In reality, as many Justices have acknowledged, the presumption of implicit congressional delegation is "fictional"—i.e., made up.[10] That should be enough

[10] *See, e.g.*, *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 286 (2016) (Thomas, J., concurring) (calling *Chevron*'s "implicit delegation" rationale a "fiction"); *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring) ("fiction" requiring "a pretty hefty suspension of disbelief"); David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212

to condemn it. Why should the meaning of vast swaths of federal law be determined under a doctrine that rests on a phony premise?

Chevron's implied-delegation rationale also contradicts the "commonsense principle[]" underlying the Major Questions Doctrine and many other canons of construction. *Nebraska*, 143 S. Ct. at 2380 (Barrett, J., concurring). When Congress takes an "extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 120 (2010) (quoting Antonin Scalia, *A Matter of Interpretation* 29 (1997)); *see West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (requiring clear statement for delegation to agency of power over major questions). *Chevron* violates this principle by shifting interpretive authority from courts to agencies based only on an *implied* delegation—triggered by mere *ambiguity*—that is concededly *fictional*. This is not how statutory interpretation should work.

2. More fundamentally, Article III interpretive authority cannot be delegated at all. The government argues otherwise by conflating two distinct forms of authority: the authority to *interpret* statutes, which properly belongs to judges; and the authority to exercise *policy discretion* when implementing statutes, which belongs to Executive Branch officers. The government's *Loper* brief—like *Chevron* itself—

(2001) ("fictionalized statement of legislative desire"); Scalia 517 ("fictional, presumed intent"); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("a kind of legal fiction").

assumes that the two are one and the same. *See* OSG *Loper* Br. 7, 11, 19-21. They are not.

Reading and interpreting a statute is a legal exercise calling for legal expertise. The Constitution provides for experts versed in this work: "Judges," whose "Power shall extend to all Cases, in Law and Equity, arising under … the Laws of the United States," U.S. Const. art. III, §§ 1-2, and who are "selected for their knowledge of the laws, acquired by long and laborious study." The Federalist No. 81, at 451 (Alexander Hamilton); *see also* Kavanaugh 2154 (noting that "[j]udges are trained" to determine "the best reading of the statutory text"). As explained above, the Constitution does not permit anyone other than those judges to resolve questions of statutory construction when properly presented to Article III courts. *See supra* 14-30.

The government asserts that Congress's (fictional) delegation of interpretive authority to Executive Branch officials is permitted and even desirable in cases of statutory ambiguity because the construction of an ambiguous statute is "often more a question of policy than of law." OSG *Loper* Br. 19 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)). In the government's view, *Chevron* makes sense because such "policy determinations" are "properly made by the political Branches, rather than courts." *Id.* Indeed, the government even ventures that allowing courts to resolve statutory ambiguities would improperly "shift policymaking power to the Judiciary." *Id.* at 21.

The government is wrong. Even with respect to the most ambiguous statutes, interpretation remains a legal act, not a policy act. "Those who ratified the Constitution knew that legal texts would often

contain ambiguities," and "the judicial power was understood to include the power to resolve these ambiguities over time." *Perez*, 575 U.S. at 119 (Thomas, J., concurring in judgment). As James Madison recognized, statutory ambiguity is unavoidable, and "[a]ll new laws" are "more or less obscure and equivocal" in various respects. The Federalist No. 37, at 197 (James Madison).

If anything, it is precisely when statutes are ambiguous that the judges' craft of legal interpretation is most valuable. To a layperson untrained in the traditional tools of construction—for whom terms like *ejusdem generis*, *noscitur a sociis*, or *in pari materia* are truly foreign—choosing between competing interpretations of an ambiguous statute might often seem like it requires a policy judgment about the most desirable result. But judges who spend their whole careers studying and refining their understanding of legal texts will readily see that the standard "tools" of interpretation unearth *more correct* and *less correct* readings of statutes that to others might appear undecipherable on their face. Those tools explain why this Court—composed of nine Justices whose policy views may differ widely—can often unanimously decide intricate questions of statutory interpretation.

To be sure, traditional interpretive tools may not always deliver perfectly clear answers about statutory meaning. But judges remain fully capable of reaching "a conclusion about the best interpretation" through these purely legal tools. *Wooden v. United States*, 595 U.S. 360, 377 (2022) (Kavanaugh, J., concurring). Indeed, that is precisely what judges do, every day, when interpreting ambiguous constitutional or statutory provisions

outside the *Chevron* context. When they issue such interpretations, they are exercising legal judgment—not making policy.

So *Chevron* cannot be justified as a delegation of policymaking authority to the politically accountable Executive Branch. Rather, it involves the transfer of pure *interpretive* authority. That constitutional authority belongs only to Article III courts. Congress cannot delegate what it never possessed in the first place. *Supra* 15-17.

3. Ultimately, the government's delegation-based theory of *Chevron* rests on the assumption that agencies—not courts—should be allowed to determine the meaning of federal law because they have greater expertise, such that agency deference will promote better policy outcomes. OSG *Loper* Br. 17; *Chevron*, 467 U.S. at 843, 864-66. This argument also fails.

First, expertise is not a basis for ignoring Article III's grant of interpretive authority to the judiciary. No one thinks Congress could force courts to defer to the U.S. Chamber of Commerce in business cases, or to the NAACP in race-discrimination cases, or to the American Medical Association in public-health cases, simply because these groups have expertise in each subject area.

Even if *Chevron* were (mis)understood as a delegation of pure policymaking authority, Article I requires Congress—not the Executive Branch—to make policy choices, and those choices must be effected through legislation. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the

application of those rules to individuals in society would seem to be the duty of other departments.").

If *Chevron* gives agencies the power to resolve the meaning of ambiguous statutes solely on the basis of their policy expertise, as the government candidly puts it, OSG *Loper* Br. 17, then it reflects a profoundly flawed conception of the roles allocated to Congress and the Executive. And those non-delegation concerns are only heightened when (as is usually the case) the ambiguity or "gap" is unintentional: In those instances, *Chevron*'s premise is that Congress has made no policy choice, so it can hardly be said to have provided an "intelligible principle" by which to guide the Executive's filling of the gap. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

Second, there is an obvious mismatch between the agency-expertise rationale and *Chevron*'s broad scope. After all, *Chevron* requires courts to defer *whenever* a statute is "silent or ambiguous," 467 U.S. at 843—even if agency expertise is not implicated in the slightest. Here, for example, the government demands deference to its view that Congress authorized it to force commercial fishermen to pay for federal monitors on their vessels. But the answer to that funding question turns simply on analysis of the MSA's text, structure, and history, *see* Pet.App.10a-22a; *infra* 47-52; agency expertise has nothing to do with it. If expertise provides the justification for *Chevron*, then why is deference required even when expertise is irrelevant?

Finally, the government incorrectly assumes that overturning *Chevron* would deprive courts and the public of agency expertise in matters of "a scientific or technical nature." *Kisor*, 139 S. Ct. at 2413. Even apart from those instances in which Congress

expressly confers policy (not interpretive) discretion on an agency, the agency's familiarity with its authorizing statute and expertise in the real-world problems it is designed to address would properly inform a court's interpretation of statutory terms. As this Court recognized in *Skidmore v. Swift & Co.*, the agency's administrative actions and interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. 134, 140 (1944).

But in matters of legal interpretation concerning the meaning of statutes, the agency's views must have only a "power to persuade," not a "power to control." *Id.* "One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010).

D. *Chevron* Undermines The Values That *Stare Decisis* Is Meant To Protect

The government also urges this Court to uphold *Chevron* as a matter of *stare decisis*. OSG *Loper* Br. 27-37. That doctrine has no role to play here. As the government concedes, *Chevron* provides a method for "resolving … interpretive questions" across various "areas of federal law." *Id.* at 17. And interpretive methods—as distinct from substantive holdings applying those methods to particular statutes—are not entitled to *stare decisis* effect. Petitioners therefore agree with the *Loper* petitioners that the government's invocation of *stare decisis* fails at the threshold. Loper Br. 18-22.

In any event, *stare decisis* does not support *Chevron* for a more fundamental reason: *Chevron* is

incompatible with the rule-of-law values that doctrine is supposed to protect. What *stare decisis* seeks to settle—the meaning of federal law—*Chevron* leaves perpetually *un*settled. It should not be preserved on *stare decisis* grounds.

1. Following precedent makes sense as a default rule because it usually "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018) (citation omitted). But that is not always true. This Court has long recognized that precedents should be overruled in appropriate circumstances, based on a careful assessment of factors like the quality of the precedent's reasoning, its workability, and the effect overruling the precedent would have on reliance interests and rule-of-law values. *See, e.g.*, *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019).

Stare decisis is therefore not "an end in itself." *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). Rather, it is a "principle of policy" and "the means by which we ensure that the law will not … change erratically, but will develop in a principled and intelligible fashion." *Id.* (citations omitted). That orderly development ultimately "serve[s] a constitutional ideal—the rule of law." *Id.* And "in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it," this Court "must be more willing to depart from that precedent." *Id.*

2. These principles mean *Chevron* must fall. Since it was decided in 1984, no case has more clearly

disabled the principled development of federal law. Renouncing *Chevron* will vindicate the rule-of-law values that *stare decisis* is meant to serve.

a. *Chevron* openly subverts the "evenhanded, predictable, and consistent development of legal principles." *Janus*, 138 S. Ct. at 2478 (citation omitted). It tells judges to resolve the closest and most difficult questions of statutory interpretation not through careful attention to legal precedent or through the judges' finely honed legal judgment, but through obeisance to the policy-driven judgments of Executive Branch officials. Yet those officials generally have no obligation to protect the predictable and consistent development of the Article III courts' case law and could hardly be expected to do so. *Chevron* nevertheless puts them in the driver's seat.

Chevron also undermines predictability and consistency by telling courts to *avoid* definitively declaring what an ambiguous law means, thus ensuring that the law remains ill-defined and subject to politically expedient agency reinterpretations. Indeed, *Brand X* makes clear that *Chevron* also requires courts "to overrule" the courts' "own declarations about the meaning of existing law in favor of interpretations dictated by executive agencies." *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring). Courts must actually acquiesce to agency defiance of judicial precedent.

For essentially the same reasons, reliance interests "count *against* retaining *Chevron*." *Id.* at 1158 (Gorsuch, J., concurring) (emphasis added). *Chevron* lets agencies change their minds about what statutes mean and requires courts to flip-flop along with them. By allowing federal law to fluctuate according to agency whims, *Chevron* creates

uncertainty about the law. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790-91 (2020) (statement of Gorsuch, J., respecting denial of certiorari); *see also Garfias-Rodriguez v. Holder*, 702 F.3d 504, 522-23 (9th Cir. 2012) (noting weakness of litigant's reliance interest in circuit precedent because precedent was "subject to revision by the [agency] under *Chevron* and *Brand X*"). Citizens should be able to rely on the *best* interpretation of federal statutes—and on the judiciary's willingness to enforce that interpretation.

Chevron-imposed uncertainty is exacerbated by modern "political polari[zation]," which makes the doctrine "a source of extreme instability in our legal system." Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 Duke L.J. Online 91, 92 (2021) (Pierce). No one familiar with controversies over hot-button issues like net neutrality, immigration, and climate change can seriously argue that *Chevron* plays a *stabilizing* role as to these matters, on which agency policies "will change dramatically every four to eight years" depending on who wins the White House. *Id.* at 96-103 (discussing agency flip-flops).

Chevron's flaws are uniquely pernicious because of the doctrine's broad, cross-cutting scope. Because *Chevron* sets forth a method of statutory interpretation potentially applicable to *all* statutes implemented by federal agencies, its ill effects are not confined to any single law but instead threaten to shape—and distort—the interpretation of virtually *all* regulatory regimes, in perpetuity. Whereas the cost of retaining any particular precedent misinterpreting a single statutory provision is

comparatively low, the cost of retaining the *Chevron* methodology is enormous.

b. *Chevron* is also internally unworkable and unwieldy, and has become only more so over time. Its key threshold question—whether a statute is sufficiently "ambiguous" to warrant deference at Step Two—is a source of endless uncertainty across different courts. "[N]o definitive guide exists for determining whether statutory language is clear or ambiguous," and different judges have "wildly different conceptions of whether a particular statute is clear or ambiguous." Kavanaugh 2138, 2152. This indeterminacy inevitably produces arbitrary and inconsistent results "antithetical to the neutral, impartial rule of law." *Id.* at 2154.

Moreover, this Court has repeatedly tinkered with *Chevron*'s basic structure, *see United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (adding Step Zero), or cabined its reach, *see King v. Burwell*, 576 U.S. 473, 485-86 (2015) (restricting *Chevron* to non-major questions). And there is considerable confusion over other issues, like whether *Chevron* is mandatory or waivable by the government, and how *Chevron* relates to the emerging Major Questions Doctrine.

Given all this uncertainty, it's no wonder forests have been sacrificed to accommodate the apparently endless scholarly output on these and other developments in the doctrine.[11] The *Chevron* doctrine

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[11] *See, e.g.*, Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 Ohio St. L.J. 565 (2021); Peter L. Strauss, Essay, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 Colum. L. Rev. 1143 (2012); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 Va. L. Rev. 597 (2009).

has become an impenetrable tangle of divergent case law, commentary, and commentary on the commentary that is of little aid in resolving real-world questions of statutory interpretation.

c. Perhaps due to these workability problems, this Court appears to have *sub silentio* abandoned the *Chevron* framework in a great many cases to which it arguably applies. As a leading treatise observes, the Court sometimes "gives *Chevron* powerful effect," sometimes "ignores *Chevron*," and sometimes "characterizes the *Chevron* test in strange and inconsistent ways." Kristin Hickman & Richard Pierce, Jr., *Administrative Law Treatise* §§ 3.5.6, 3.6.10 (6th ed. 2023); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) ("I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.").

At a minimum, *Chevron* remains "hotly contested," such that it "cannot reliably function as a basis for decision in future cases." *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring). The government itself seems to recognize this: Recent Solicitors General have seemed reluctant—almost apologetic—when invoking *Chevron* in this Court. *See also BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908 (2019) (Gorsuch, J., joined by Thomas, J., dissenting) (noting private-party petitioner's reticence in relying on *Chevron*).

Chevron should not continue to govern lower courts while this Court shuns it. The Court's "frequent disregard" of *Chevron* supports overruling it. *Hohn v. United States*, 524 U.S. 236, 252-53 (1998).

3. The most important practical consideration bearing on *stare decisis* is *Chevron*'s transformation

of the federal government—and the damage that change has done to the rule of law. Despite the government's breezy references to *Chevron*'s empowerment of the "political Branches," OSG *Loper* Br. 19, *Chevron* has actually empowered only one branch: the Executive Branch. And aggrandizement of the Executive has come at the distinct expense of Congress and the judiciary.

Given the "obstacles to legislating that are built into the federal legislative process, including bicameralism and the Presidential veto," *Chevron*'s assignment of interpretive authority to agencies has given them "running room" to serve as the lead agents of policymaking at the federal level. *Krzalic v. Republic Title Co.*, 314 F.3d 875, 878 (7th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003). Unsurprisingly, agencies have taken full advantage of that space, "be[coming] extremely aggressive in seeking to squeeze [their] policy goals into ill-fitting statutory authorizations and restraints." Kavanaugh 2150.

Over the years, *Chevron* has distorted the basic constitutional scheme of our government—the Madisonian scheme of legislative policymaking, executive implementation, and judicial interpretation—and bequeathed government by executive fiat and nationwide injunction instead. In doing so, *Chevron* has contributed to the pervasive public sense that *every* question of law and policy is up for grabs every four years, as political appointees plan "radical changes in the meaning of numerous [existing] laws" under *Chevron*'s aegis. Pierce 92. In that world, political actors have little incentive to labor over legislative compromises in Congress; far better to hope for the presidency and swing for the fences. The result is an end run around the legislative

system that the Founders designed to control the "mischiefs of faction." The Federalist No. 10, at 46 (James Madison).

If ever there were a clear-cut case where "fidelity to any particular precedent does more to damage [the rule of law] than to advance it," *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring), this is the one. *Chevron* should go.

II. THE FINAL RULE SHOULD BE SET ASIDE

No matter whether this Court overrules or narrows *Chevron*, the judgment below should be reversed because the Final Rule violates any sensible reading of the MSA. *See* Loper Br. 47-52; *Loper* Pet.App.21a-37a. The Final Rule compels domestic fishing vessels to pay for government agents who are placed aboard those vessels to carry out the government's business. The MSA does not authorize that arrangement.[12]

1. The MSA permits the Secretary of Commerce to "require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to" a federal fishery management plan. 16 U.S.C. § 1853(b)(8). These observers carry out work essential to the government's management of fisheries—the collection of "data necessary for the conservation and management of [a] fishery." *Id.*

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[12] Petitioners agree with the *Loper* petitioners that statutory silence does not trigger *Chevron* deference. *See* Loper Br. 43-46. Petitioners have not focused on that issue because the First Circuit's opinion here, unlike the D.C. Circuit's opinion in *Loper*, did not turn primarily on statutory silence. *Compare* Pet.App.10a-22a, *with Loper* Pet.App.6a, 12a-16a.

Fishery observers are essentially government agents: They have government email addresses and government badges; they receive government training; the government describes them as its "eyes and ears on the water"; they collect data and send it to the government; and government officials "debrief[]" them after their trips. *Supra* 6-7. The agency itself says observers "represent the Federal Government" on the vessels they accompany. *Id.*

Given that observers are federal officials in every relevant sense, the MSA's silence as to who pays for them can mean only one thing: The *government* pays. No one expects individual citizens to fund the salaries of IRS agents auditing their accounts, and the observers here are no different. The absence of express authority to impose costs on the fishing industry renders the Final Rule unlawful. After all, federal agencies have "no power to act … unless and until Congress confers power upon [them]." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Here, Section 1853(b)(8) only authorizes the agency to require fishermen to carry federal observers—it does not add insult to injury by also requiring them to pay for those observers.

2. Other MSA provisions confirm that when Congress wanted to impose the costs of observers' wages on the fishing vessels themselves, it said so *expressly*. The MSA's silence here shows that Congress deliberately chose not to give the agency authority to shift costs to fishermen.

The MSA expressly authorizes the Secretary to compel fishing vessels to pay for observers in just three specific instances. First, with respect to *foreign* fishing vessels, Congress authorized the Secretary to "impose … a surcharge in an amount sufficient to

cover all the costs of providing a United States observer aboard [each] vessel." 16 U.S.C. § 1821(h)(4). Congress also provided that when there are "insufficient appropriations" for the government's foreign-vessel observer program, the Secretary may establish a "supplementary observer program" whereby "certified observers or their agents shall be paid by the owners and operators of foreign fishing vessels for observer services." *Id.* § 1821(h)(6)(C).

Second, with respect to domestic fishing vessels in the North Pacific, Congress expressly provided that the North Pacific Council may "establish[] a system … of fees" to cover the cost of "stationing observers … on board fishing vessels and United States fish processors." *Id.* § 1862(a)(2), (b)(2)(A). Such fees are limited to the "actual observer costs" or a "percentage, not to exceed 2 percent, of the unprocessed ex-vessel value of fish and shellfish" harvested in the North Pacific fisheries. *Id.* § 1862(b)(2)(E).

Third, Congress authorized regional fishery councils and the Secretary to promulgate "limited access privilege programs" (LAPPs), each of which "shall … include … the use of observers." *Id.* § 1853a(c)(1)(H). Congress expressly provided for observer fees to be assessed against individual vessel owners, *id.* § 1853a(e)(2), this time subject to a "3 percent" cap, *id.* § 1854(d)(2)(B).

These detailed provisions clearly show that "when Congress wants to" allow the Secretary to force fishing vessels to pay for observers, "it knows exactly how to do so." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626 (2018); *see also Jama v. ICE*, 543 U.S. 335, 341 (2005). But Congress did nothing comparable to authorize the sort of broad cost-shifting imposed by the Final Rule.

Especially notable is that Congress went out of its way to cap the fees fishermen could be forced to pay for observers at two or three percent of the value of the fish harvested. By contrast, under the government's theory of implied authorization to shift costs under Section 1853(b)(8), there are *no* caps on fee shifting—which is why the estimated costs of the Final Rule could run as high as *20* percent of that value. It is highly implausible that Congress would have *impliedly* given the Secretary a *broad* authority to force onerous observer fees on domestic vessels generally, when it has otherwise *expressly* given the Secretary only *narrow* channels of authority to impose capped fees on certain classes of vessels. This just confirms that the Final Rule exceeds NMFS's statutory authority.

3. The MSA's history is in accord. Congress enacted Section 1853(b)(8)—the purported authority for the Final Rule's cost-shifting mandate—as part of the Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 109, 104 Stat. 4436, 4448 (1990). But that exact same statute *also* contained the provision expressly authorizing the North Pacific Fishery Management Council to impose observer fees on vessels in the North Pacific fisheries. *Id.* § 118, 104 Stat. at 4457-58 (codified at 18 U.S.C. § 1862(a), (b)(2)(E), (d)).

Under the government's theory of the Final Rule, the 1990 law's express authorization of North Pacific Council fees in Section 1862 was unnecessary and superfluous, because the Secretary could have used implied authority under Section 1853(b)(8) to impose the same result. But "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Corley v.*

United States, 556 U.S. 303, 314 (2009) (alteration in original).

Furthermore, the Senate report on the 1990 law noted the economic burden that would fall on "vessel owners, vessel operators, and fish processors" in the "North Pacific," but it identified no such economic impact on vessel owners in other fishery regions. S. Rep. No. 101-414, at 14 (1990). This history confirms that Congress intended to authorize the imposition of observer costs *only* as to vessels in the North Pacific. Section 1853(b)(8) provides no additional authorization for cost-shifting.

3. The First Circuit nevertheless upheld the Final Rule on the theory that the MSA may reasonably be understood to reflect a "default norm" that companies must typically bear their own costs of complying with federal regulations. Pet.App.13a. That is mistaken. There is no "default norm" under which regulated parties must—in the absence of an express statutory command—pay for federal agents who do the *government's* work. Moreover, any "default norm" is easily overcome here, given the powerful textual and historical evidence that Congress chose *not* to push observer costs onto fishing vessels generally. *Supra* 47-50.

The First Circuit also emphasized that the MSA authorizes the revocation of fishing licenses for any vessels that fail to make "payment[s] … for observer services." Pet.App.15a-16a (quoting 16 U.S.C. § 1858(g)(1)(D)). The court asserted that this provision would "make no sense" if vessels were not generally obliged to pay for observers. *Id.* But in fact it makes perfect sense: Vessels that are subject to MSA-authorized observer fees (such as foreign vessels or North Pacific vessels) may have their fishing

licenses revoked if they do not pay the fees. Vessels that do not bear such fees in the first place are not subject to Section 1858(g)(1)(D)'s penalty for failure to pay. The penalty provision does not justify the Final Rule either.

Ultimately, the First Circuit's analysis exemplifies *Chevron*'s hazards. The court did not apply any of the traditional canons of construction to the statutory language before it. *See* Pet.App.11a-22a. It upheld the Final Rule by asking whether "Congress intended to preclude" the rule—not whether Congress authorized the rule. Pet.App.19a. In doing so, the court blessed the agency's scheme to expand its regulatory functions at the expense of fishermen.

For too long, *Chevron* has facilitated similar agency power grabs. This Court should overrule *Chevron* and invalidate the Final Rule.

CONCLUSION

The First Circuit's judgment should be reversed.

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November 20, 2023

ADDENDUM

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U.S. Const. art. III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall

be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * *

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, 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. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited

by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C. § 1821

§ 1821. Foreign fishing

* * *

(h) Full observer coverage program

(1)(A) Except as provided in paragraph (2), the Secretary shall establish a program under which a United States observer will be stationed aboard each foreign fishing vessel while that vessel is engaged in fishing within the exclusive economic zone.

(B) The Secretary shall by regulation prescribe minimum health and safety standards that shall be maintained aboard each foreign fishing vessel with regard to the facilities provided for the quartering of, and the carrying out of observer functions by, United States observers.

(2) The requirement in paragraph (1) that a United States observer be placed aboard each foreign fishing vessel may be waived by the Secretary if he finds that—

(A) in a situation where a fleet of harvesting vessels transfers its catch taken within the exclusive economic zone to another vessel, aboard which is a United States observer, the stationing of United States observers on only a portion of the harvesting vessel fleet will provide a representative sampling of the by-catch of the fleet that is sufficient for purposes of determining whether the requirements of the applicable management plans for the by-catch species are being complied with;

(B) in a situation where the foreign fishing vessel is operating under a Pacific Insular Area fishing agreement, the Governor of the applicable Pacific Insular Area, in consultation with the Western

Pacific Council, has established an observer coverage program or other monitoring program that the Secretary, in consultation with the Western Pacific Management Council, determines is adequate to monitor harvest, bycatch, and compliance with the laws of the United States by vessels fishing under the agreement;

(C) the time during which a foreign fishing vessel will engage in fishing within the exclusive economic zone will be of such short duration that the placing of a United States observer aboard the vessel would be impractical; or

(D) for reasons beyond the control of the Secretary, an observer is not available.

(3) Observers, while stationed aboard foreign fishing vessels, shall carry out such scientific, compliance monitoring, and other functions as the Secretary deems necessary or appropriate to carry out the purposes of this chapter; and shall cooperate in carrying out such other scientific programs relating to the conservation and management of living resources as the Secretary deems appropriate.

(4) In addition to any fee imposed under section 1824(b)(10) of this title and section 1980(e) of title 22 with respect to foreign fishing for any year after 1980, the Secretary shall impose, with respect to each foreign fishing vessel for which a permit is issued under such section 1824 of this title, a surcharge in an amount sufficient to cover all the costs of providing a United States observer aboard that vessel. The failure to pay any surcharge imposed under this paragraph shall be treated by the Secretary as a failure to pay the permit fee for such vessel under section 1824(b)(10) of this title. All surcharges

collected by the Secretary under this paragraph shall be deposited in the Foreign Fishing Observer Fund established by paragraph (5).

(5) There is established in the Treasury of the United States the Foreign Fishing Observer Fund. The Fund shall be available to the Secretary as a revolving fund for the purpose of carrying out this subsection. The Fund shall consist of the surcharges deposited into it as required under paragraph (4). All payments made by the Secretary to carry out this subsection shall be paid from the Fund, only to the extent and in the amounts provided for in advance in appropriation Acts. Sums in the Fund which are not currently needed for the purposes of this subsection shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(6) If at any time the requirement set forth in paragraph (1) cannot be met because of insufficient appropriations, the Secretary shall, in implementing a supplementary observer program:

(A) certify as observers, for the purposes of this subsection, individuals who are citizens or nationals of the United States and who have the requisite education or experience to carry out the functions referred to in paragraph (3);

(B) establish standards of conduct for certified observers equivalent to those applicable to Federal personnel;

(C) 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; and

(D) monitor the performance of observers to ensure that it meets the purposes of this chapter.

* * *

16 U.S.C. § 1853

§ 1853. Contents of fishery management plans

(a) Required provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall—

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are—

(A) 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;

(B) described in this subsection or subsection (b), or both; and;

(C) consistent with the national standards, the other provisions of this chapter, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify—

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3),

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States;

(5) specify the pertinent data which shall be submitted to the Secretary with respect to commercial, recreational,[1] charter fishing, and fish processing in the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, economic information necessary to meet the requirements of this chapter, and the estimated

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[1] So in original. Probably should be followed by “and”.

processing capacity of, and the actual processing capacity utilized by, United States fish processors,[2]

(6) consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fishery; except that the adjustment shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery;

(7) describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 1855(b)(1)(A) of this title, minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat;

(8) in the case of a fishery management plan that, after January 1, 1991, is submitted to the Secretary for review under section 1854(a) of this title (including any plan for which an amendment is submitted to the Secretary for such review) or is prepared by the Secretary, assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan;

(9) include a fishery impact statement for the plan or amendment (in the case of a plan or amendment thereto submitted to or prepared by the Secretary after October 1, 1990) which shall assess,

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[2] So in original. The comma probably should be a semicolon.

specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for—

(A) participants in the fisheries and fishing communities affected by the plan or amendment;

(B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; and

(C) the safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery;

(10) specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery;

(11) establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority—

(A) minimize bycatch; and

(B) minimize the mortality of bycatch which cannot be avoided;

(12) assess the type and amount of fish caught and released alive during recreational fishing under catch and release fishery management programs and the mortality of such fish, and include conservation and management measures that, to the extent practicable, minimize mortality and ensure the extended survival of such fish;

(13) include a description of the commercial, recreational, and charter fishing sectors which participate in the fishery, including its economic impact, and, to the extent practicable, quantify trends in landings of the managed fishery resource by the commercial, recreational, and charter fishing sectors;

(14) to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, allocate, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery and;[3]

(15) establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

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[3] So in original. Probably should be "fishery; and".

(b) Discretionary provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may—

(1) require a permit to be obtained from, and fees to be paid to, the Secretary, with respect to—

(A) any fishing vessel of the United States fishing, or wishing to fish, in the exclusive economic zone or for anadromous species or Continental Shelf fishery resources beyond such zone;

(B) the operator of any such vessel; or

(C) any United States fish processor who first receives fish that are subject to the plan;

(2)(A) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(B) designate such zones in areas where deep sea corals are identified under section 1884 of this title, to protect deep sea corals from physical damage from fishing gear or to prevent loss or damage to such fishing gear from interactions with deep sea corals, after considering long-term sustainable uses of fishery resources in such areas; and

(C) with respect to any closure of an area under this chapter that prohibits all fishing, ensure that such closure—

(i) is based on the best scientific information available;

(ii) includes criteria to assess the conservation benefit of the closed area;

(iii) establishes a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and

(iv) is based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to: users of the area, overall fishing activity, fishery science, and fishery and marine conservation;

(3) establish specified limitations which are necessary and appropriate for the conservation and management of the fishery on the—

(A) catch of fish (based on area, species, size, number, weight, sex, bycatch, total biomass, or other factors);

(B) sale of fish caught during commercial, recreational, or charter fishing, consistent with any applicable Federal and State safety and quality requirements; and

(C) transshipment or transportation of fish or fish products under permits issued pursuant to section 1824 of this title;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this chapter;

(5) incorporate (consistent with the national standards, the other provisions of this chapter, and any other applicable law) the relevant fishery conservation and management measures of the

coastal States nearest to the fishery and take into account the different circumstances affecting fisheries from different States and ports, including distances to fishing grounds and proximity to time and area closures;

(6) establish a limited access system for the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—

(A) present participation in the fishery;

(B) historical fishing practices in, and dependence on, the fishery;

(C) the economics of the fishery;

(D) the capability of fishing vessels used in the fishery to engage in other fisheries;

(E) the cultural and social framework relevant to the fishery and any affected fishing communities;

(F) the fair and equitable distribution of access privileges in the fishery; and

(G) any other relevant considerations;

(7) require fish processors who first receive fish that are subject to the plan to submit data which are necessary for the conservation and management of the fishery;

(8) require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery; except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that

the health or safety of the observer or the safe operation of the vessel would be jeopardized;

(9) assess and specify the effect which the conservation and management measures of the plan will have on the stocks of naturally spawning anadromous fish in the region;

(10) include, consistent with the other provisions of this chapter, conservation and management measures that provide harvest incentives for participants within each gear group to employ fishing practices that result in lower levels of bycatch or in lower levels of the mortality of bycatch;

(11) reserve a portion of the allowable biological catch of the fishery for use in scientific research;

(12) include management measures in the plan to conserve target and non-target species and habitats, considering the variety of ecological factors affecting fishery populations; and

(14)[4] prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

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4 So in original. No par. (13) has been enacted.

16 U.S.C. § 1853a

§ 1853a. Limited access privilege programs

* * *

(c) Requirements for limited access privileges

(1) In general

Any limited access privilege program to harvest fish submitted by a Council or approved by the Secretary under this section shall—

(A) if established in a fishery that is overfished or subject to a rebuilding plan, assist in its rebuilding;

(B) if established in a fishery that is determined by the Secretary or the Council to have over-capacity, contribute to reducing capacity;

(C) promote—

(i) fishing safety;

(ii) fishery conservation and management; and

(iii) social and economic benefits;

(D) prohibit any person other than a United States citizen, a corporation, partnership, or other entity established under the laws of the United States or any State, or a permanent resident alien, that meets the eligibility and participation requirements established in the program from acquiring a privilege to harvest fish, including any person that acquires a limited access privilege solely for the purpose of perfecting or realizing on a security interest in such privilege;

(E) require that all fish harvested under a limited access privilege program be processed on vessels of the United States or on United States soil (including any territory of the United States);

(F) specify the goals of the program;

(G) include provisions for the regular monitoring and review by the Council and the Secretary of the operations of the program, including determining progress in meeting the goals of the program and this chapter, and any necessary modification of the program to meet those goals, with a formal and detailed review 5 years after the implementation of the program and thereafter to coincide with scheduled Council review of the relevant fishery management plan (but no less frequently than once every 7 years);

(H) include an effective system for enforcement, monitoring, and management of the program, including the use of observers or electronic monitoring systems;

(I) include an appeals process for administrative review of the Secretary's decisions regarding initial allocation of limited access privileges;

(J) provide for the establishment by the Secretary, in consultation with appropriate Federal agencies, for an information collection and review process to provide any additional information needed to determine whether any illegal acts of anti-competition, anti-trust, price collusion, or price fixing have occurred among regional fishery associations or persons receiving limited access privileges under the program; and

(K) provide for the revocation by the Secretary of limited access privileges held by any person found to have violated the antitrust laws of the United States.

* * *

(e) Cost recovery

In establishing a limited access privilege program, a Council shall—

(1) develop a methodology and the means to identify and assess the management, data collection and analysis, and enforcement programs that are directly related to and in support of the program; and

(2) provide, under section 1854(d)(2) of this title, 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.

* * *

16 U.S.C. 1854

§ 1854. Action by Secretary

* * *

(d) Establishment of fees

(1) The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 1853(b)(1) of this title. The Secretary may enter into a cooperative agreement with the States concerned under which the States administer the permit system and the agreement may provide that all or part of the fees collected under the system shall accrue to the States. The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits.

(2)(A) Notwithstanding paragraph (1), the Secretary is authorized and shall collect a fee to recover the actual costs directly related to the management, data collection, and enforcement of any—

(i) limited access privilege program; and

(ii) community development quota program that allocates a percentage of the total allowable catch of a fishery to such program.

(B) Such fee shall not exceed 3 percent of the ex-vessel value of fish harvested under any such program, and shall be collected at either the time of the landing, filing of a landing report, or sale of such fish during a fishing season or in the last quarter of the calendar year in which the fish is harvested.

(C)(i) Fees collected under this paragraph shall be in addition to any other fees charged under this chapter and shall be deposited in the Limited Access

System Administration Fund established under section 1855(h)(5)(B) of this title.

(ii) Upon application by a State, the Secretary shall transfer to such State up to 33 percent of any fee collected pursuant to subparagraph (A) under a community development quota program and deposited in the Limited Access System Administration Fund in order to reimburse such State for actual costs directly incurred in the management and enforcement of such program.

* * *

16 U.S.C. § 1862

§ 1862. North Pacific fisheries conservation

(a) In general

The North Pacific Council may prepare, in consultation with the Secretary, a fisheries research plan for any fishery under the Council's jurisdiction except a salmon fishery which—

(1) requires that observers be stationed on fishing vessels engaged in the catching, taking, or harvesting of fish and on United States fish processors fishing for or processing species under the jurisdiction of the Council, including the Northern Pacific halibut fishery, for the purpose of collecting data necessary for the conservation, management, and scientific understanding of any fisheries under the Council's jurisdiction; and

(2) establishes a system, or system,[1] of fees, which may vary by fishery, management area, or observer coverage level, to pay for the cost of implementing the plan.

(b) Standards

(1) Any plan or plan amendment prepared under this section shall be reasonably calculated to—

(A) gather reliable data, by stationing observers on all or a statistically reliable sample of the fishing vessels and United States fish processors included in the plan, necessary for the conservation, management, and scientific understanding of the fisheries covered by the plan;

(B) be fair and equitable to all vessels and processors;

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[1] So in original.

(C) be consistent with applicable provisions of law; and

(D) take into consideration the operating requirements of the fisheries and the safety of observers and fishermen.

(2) Any system of fees established under this section shall—

(A) provide that the total amount of fees collected under this section not exceed the combined cost of (i) stationing observers, or electronic monitoring systems, on board fishing vessels and United States fish processors, (ii) the actual cost of inputting collected data, and (iii) assessments necessary for a risk-sharing pool implemented under subsection (e) of this section, less any amount received for such purpose from another source or from an existing surplus in the North Pacific Fishery Observer Fund established in subsection (d) of this section;

(B) be fair and equitable to all participants in the fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(C) provide that fees collected not be used to pay any costs of administrative overhead or other costs not directly incurred in carrying out the plan;

(D) not be used to offset amounts authorized under other provisions of law;

(E) be expressed as a fixed amount reflecting actual observer costs as described in subparagraph (A) or a percentage, not to exceed 2 percent, of the unprocessed ex-vessel value of fish and shellfish harvested under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(F) be assessed against some or all fishing vessels and United States fish processors, including those

not required to carry an observer or an electronic monitoring system under the plan, participating in fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(G) provide that fees collected will be deposited in the North Pacific Fishery Observer Fund established under subsection (d) of this section;

(H) provide that fees collected will only be used for implementing the plan established under this section;

(I) provide that fees collected will be credited against any fee for stationing observers or electronic monitoring systems on board fishing vessels and United States fish processors and the actual cost of inputting collected data to which a fishing vessel or fish processor is subject under section 1854(d) of this title; and

(J) meet the requirements of section 9701(b) of title 31.

* * *

(d) Fishery Observer Fund

There is established in the Treasury a North Pacific Fishery Observer Fund. The Fund shall be available, without appropriation or fiscal year limitation, only to the Secretary for the purpose of carrying out the provisions of this section, subject to the restrictions in subsection (b)(2) of this section. The Fund shall consist of all monies deposited into it in accordance with this section. Sums in the Fund that are not currently needed for the purposes of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(e) Special provisions regarding observers

(1) The Secretary shall review—

(A) the feasibility of establishing a risk sharing pool through a reasonable fee, subject to the limitations of subsection (b)(2)(E) of this section, to provide coverage for vessels and owners against liability from civil suits by observers, and

(B) the availability of comprehensive commercial insurance for vessel and owner liability against civil suits by observers.

(2) If the Secretary determines that a risk sharing pool is feasible, the Secretary shall establish such a pool, subject to the provisions of subsection (b)(2) of this section, unless the Secretary determines that—

(A) comprehensive commercial insurance is available for all fishing vessels and United States fish processors required to have observers under the provisions of this section, and

(B) such comprehensive commercial insurance will provide a greater measure of coverage at a lower cost to each participant.

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