No. 22-1219

# In the Supreme Court of the United States

RELENTLESS, INC., ET AL.,
*Petitioners*,

v.

U.S. DEPARTMENT OF COMMERCE, ET AL.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF OF THE NEW ENGLAND FISHERMEN'S STEWARDSHIP ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS CURIAE[1]

The New England Fishermen's Stewardship Association is a recently formed fishing advocacy group that represents wild harvesters in all fisheries within the New England Communities. Founded in the Spring of 2023, the Association boasts more than six-hundred members across New England. It is dedicated to educating the public about how best to manage our seafood resources through sound science and best practices at conservation used by fishermen, with a view toward economic well-being, ecosystem sustainability, and U.S. food security.

The Association has deep familiarity with the Magnuson-Stevens Fishery Conservation and Management Act of 1976. 16 U.S.C. §§ 1801 *et seq*. Their members have been subject to it since it was enacted in 1976, and they remain affected by the final rule at issue in this case. For these reasons, the Association offers the following to assist the Court as it addresses the questions presented here.

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[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part. No person or entity other than Amicus Curiae and the counsel below contributed the costs associated with the preparation and submission of this brief.

## INTRODUCTION & SUMMARY OF THE ARGUMENT

The Petitioners in this case (as well as those in *Loper Bright Enterprises v. Raimondo*, No. 22-451) have thoroughly demonstrated why the deference principle from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), cannot be squared with fundamental judicial-power principles, separation of powers, due process, or the plain terms of the Administrative Procedure Act. From an abstract legal perspective, the case for overturning the *Chevron* doctrine has been thoroughly established.

What should not be lost on the Court is how *Chevron* deference has resulted in the absurd result at which both the D.C. Circuit and the First Circuit have arrived. That absurdity is deeply illustrative of the evils that *Chevron* produces. Here, by finding in purported ambiguity (i.e., statutory silence) the power to force fishing crews to include, and pay for, at-sea federal monitors, the National Oceanic and Atmospheric Administration and its line office, the National Marine Fisheries Service, missed (or ignored) no fewer than three obvious points that should have counseled against concocting this sort of authority.

First, the Agency should have concluded that Congress's decision not to appropriate money for the number of observers the Agency desired meant that Congress did not intend for the Agency to foist these costs on the fishing industry. Second, it entirely looked past legislative context and history that renders wholly unreasonable the notion that Congress

would have wanted the Agency to have this sort of power. And third, although it (purportedly) contemplated (and summarily dismissed) the economic cost that its rule might have on the fishing industry, it failed entirely to consider that these at-sea monitors receive no meaningful seafaring preparation before they are dropped onto commercial fishing boats, which prompts a terrific hazard for both the monitors and the crews that are expected to account for their wellbeing. The real-world consequences of *Chevron* deference here are akin to forcing fisherman to pay, feed, and board Agency observers whose competence for seafaring enterprises of any kind would frequently make the Keystone Cops blush.

Although the Agency failed to consider (or irrationally considered) these points, both the First Circuit and the D.C. Circuit considered themselves compelled to agree with the Agency's bottom line due to the deference commanded by the *Chevron* doctrine. That inexorably leads to the conclusion that the *Chevron* doctrine itself is deeply and fundamentally flawed. For this reason (and all those set out by the Petitioners here and in *Loper Bright Enterprises*), the Court should dispense with the *Chevron* doctrine and reverse the patently erroneous lower-court opinions.

## ARGUMENT

### I. CONGRESS'S DECISION NOT TO FUND THE NUMBER OF OBSERVERS THE AGENCY WANTED DOES NOT PROVIDE IT WITH AUTHORITY TO CHARGE THOSE COSTS TO THE FISHING INDUSTRY.

According to Government (as reflected in the *Loper Bright Enterprises* Respondent's Brief), the Act imposes a duty on the Agency to collect fishing-industry data, and "[t]o collect necessary data, [it] provides that a fishery management plan may 'require that one or more observers be carried on board' any domestic vessel 'engaged in fishing for species that are subject to the plan.'" *Loper Bright Enters.* Resp't Br. at 3 (quoting 16 U.S.C. § 1853(b)(8)). The regulatory plan at issue here "established a 50% 'coverage target' for monitoring on certain herring fishing trips"; in other words, the Agency decided for itself that it would prefer to have an at-sea monitor on half the herring fishing boats. *Id.* at 4 (quoting 85 Fed. Reg. 7414, 7417 (Feb. 7, 2020)). But because the Agency did not have the funding to employ enough monitors to reach its self-imposed 50% goal, it decided that "third[-]party monitoring would fill the gap, . . .with a vessel's owner 'arrang[ing] for monitoring by' an approved service provider and "pay[ing]" the provider for services rendered." *Id.* (quoting 50 C.F.R. §§ 648.11(m)(4)(i) and (iii)) (some alteration in original)).

Stated more succinctly, the Agency concocted its own goal, realized that Congress had not given the necessary funding to reach the Agency's self-devised goal the Agency, and then passed those costs along to the regulated industry by forcing the industry to hire

its own at-sea monitors. These costs, in turn, are not nominal. The final rule acknowledged that imposing these at-sea monitor costs on fishing vessels could reduce annual returns-to-owner by "up to 20 percent." 85 Fed. Reg. at 7420.[2]

The Agency's fundraising workaround underscores how far the *Chevron* doctrine can warp the Constitution's finally calibrated separation of powers. The biggest stick wielded by the Article I branch is the power to appropriate. Indeed, this is one of the most effective and powerful checks that Congress possesses for reigning in over-zealous executive-branch agencies. "[C]ontinu[ed] monitor[ing] of the wisdom and soundness of Executive action" is a "role . . . appropriate for the Congress acting through its committees and the 'power of the purse.'" *Laird v. Tatum*, 408 U.S. 1, 15 (1972). Lest there be any doubt as to the Founder's intent, Madison made clear in Federalist 58 that "[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon, with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." THE FEDERALIST No. 58 (James Madison).

The rule at issue here transgresses entirely the power-of-the-purse line drawn between the executive and legislative branch. The Agency, a creature of Article II, wants to do something. But Congress has

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[2] To be certain, the Agency's estimated economic cost is likely to be far higher for small vessels like those operated by Petitioners here and in *Loper Bright* due to federal permitting restrictions.

not appropriated the funds that would allow the Agency to do what it wants—and has chosen not to do so on a yearly basis now for *decades*. Rather than take Congress's unsubtle hint from its refusal to fund Agency activities at the level that the (inherently self-aggrandizing) Agency desires, the Agency decided to concoct a workaround, and in a way that it predicted would pilfer 20 percent of the regulated vessels' take-home pay.

Obtuse to this political reality—which reflects our Constitutional design working as it is *designed* to do—the court of appeals instead blessed the Agency "workaround" to bedrock separation-of-powers principles based overwhelmingly on *Chevron*. In the First Circuit's view, *Chevron* commanded that the purported ambiguity in the Act made it so that the job of the Judiciary—calling balls and strikes between the other two coordinate branches—was actually outsourced to the Executive, subject only to defanged-by-*Chevron* judicial review. Because this result is anathema to the original understanding of our constitutional structure, and because it neutralizes the Article I branch's strongest check, *Chevron* must go.

## II. LEGISLATIVE CONTEXT AND HISTORY SHOW THAT CONGRESS NEVER INTENDED FOR THE AGENCY TO POSSESS THE AUTHORITY TO TAX THE FISHING INDUSTRY IN THIS MANNER.

The appropriation problem is not the only one at issue in this case. To the extent that the Court below looked to legislative context and history to ascertain Congressional intent, it bungled that analysis. That

too suggests that the Court here should reverse, even if it declines to disrupt the *Chevron* doctrine.

According to the First Circuit (and the district court's opinion that it affirmed), "before the 1990 amendments to the Act, the Secretary had operated a North Pacific monitoring program in which vessel operators directly paid third-party monitors." *Relentless Inc. v. United States DOC*, 561 F. Supp. 3d 226, 238 (D.R.I. 2021); *accord Relentless, Inc. v. United States DOC*, 62 F.4th 621, 633 (1st Cir. 2023). In the lower courts' view, "[b]y enacting § 1853(b)(8), Congress arguably ratified [the Agency's] usage of industry-funded monitoring programs," and "[m]oreover, in the years since, '[c]ongressional committees have continued to take note of such industry-funded programs.'" *Relentless Inc.*, 561 F. Supp. 3d at 238.

The problem with the lower courts' legislative-history analysis is twofold. First, Congress's enactment of Section 1853(b)(8) says nothing at all about "*industry-funded*" monitoring; rather, that statutory provision gives the Agency discretion to "require that one or more observers be carried on board a vessel . . . engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery." 16 U.S.C. § 1853(b)(8). Providing the Agency with discretion to compel the *carrying and lodging* of at-sea monitors is worlds away from allowing the Agency to force vessels to pay for the *salaries* of those at-sea monitors. Nor could Section 1853(b)(8) conceivably be interpreted as a *sub silencio* ratification of the North Pacific's industry-funded approach as appropriate for *all* vessels, wherever

located anywhere on any one of Earth's oceans. Because Congress *expressly* provided that the North Pacific Council "may" establish a "plan" that "requires that observers be stationed on fishing vessels" and "may . . . establish[] a system . . . of fees" "to pay for the cost of implementing the plan," *id.* § 1862(a), logic dictates that Congress only ratified the practice for that one region, which is a literal continent away from the region in which the Petitioners operate. *See*, *e.g.*, *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) ("The enumeration presupposes something not enumerated.").

Second, the court's observation that "'[c]ongressional committees have continued to take note of such industry-funded programs'" demonstrates nothing whatsoever. *Relentless Inc.*, 561 F. Supp. 3d at 238 (quoting *Loper Bright Enters. v. Raimondo*, 544 F. Supp. 3d 82, 107 (D.D.C. 2021)). Most relevant is the House report demonstrating that Congress understood Section 1862's funding mechanism to be "specific to the North Pacific Fishery Management Council," which means that it provides no basis to expand the Agency's authority in other regions. *See* H.R. Rep. No. 101-393, at 31 (1989). Relevant, also, is the fact that Congress has considered at least three times, and rejected every time, amendments to the Act that would expressly authorize the sort of blanket third-party funding authority that the Agency now claims it has. *See, e.g.*, H.R. 5018, 109th Cong. § 9(b) (2006); H.R. 39, 104th Cong. § 9(b)(4)(1995); H.R. 1554, 101st Cong. § 2(a)(3) (1989).

In sum, the relevant legislative history underscores that, when Congress wanted to provide

the Agency with the ability to conduct industry-funded monitoring, it explicitly told the Agency that it could conduct industry-funded monitoring. It *expressly* ratified the practice for the region that had already been undertaking it, and the House Reports presumed that it had not gone further. Three times, moreover, it considered expanding industry-funded monitoring throughout the regulated fishing industry, and three times it declined to do so.

This context and history powerfully demonstrate the ills that *Chevron* has occasioned. Here, Congress's limited grant of authority in a particular region (the North Pacific) and particular manner (the carrying and boarding of at-sea monitors) was transformed under *Chevron* into blanket authority for the Agency to regulate *anywhere* on Earth in a *far-more expansive* manner that what Congress actually provided (i.e., paying salaries that the Agency would otherwise be required to pay itself from funds approved by Congress). Under *Chevron*, Congress's provision of an inch blessed an Agency power grab spanning every single mile of every ocean on Earth. This history thus tilts decidedly in favor of the Petitioners.

## III. AT-SEA MONITORS ARE A TREMENDOUS HAZARD TO THEMSELVES AND THE CREWS OPERATING THE FISHING VESSELS.

Underscoring the unreasonableness of the Agency's approach is the wholesale disconnect between its funding scheme and the dangers that the third-party, industry-funded, at-sea monitoring program inflicts on the monitors themselves. According to the Act "observer" means "*any person* required or authorized to be carried on a vessel for

conservation and management purposes," 16 U.S.C. § 1802(31), including private parties hired to collect data, *see* 16 U.S.C. § 1802(36) (defining "person"). Absent from this statutory definition is any semblance of the sort of training these observers may need.

The Agency has since produced a "Handbook for Fisheries Observers and Providers" for the Northeast Region (where the Petitioners operate).[3] According to that document, a person can become an at-sea monitor with a high-school diploma and *twelve days* of training. *Id*. "Safety and survival training" is but one of *seven* topics covered over those twelve days. *Id*. Not included among those seven topics is training in how to work on specialized ships, including those operated by the Petitioners.

Commercial fishing in the North Atlantic is both immensely complicated and replete with danger. Both the complexity and the hazards increase with the amount of time spent on the ocean and the difficulty inherent in a particular ship. According to the Petitioners in this case, they operate 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, and their unique style of fishing allows their vessels to make longer trips than other herring vessels—typically spending ten-to-fourteen days at sea instead of two-to-four. And the *Loper Bright Enterprises* Petitioners

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[3] NATIONAL MARINE FISHERIES SERVICE, NORTHEAST FISHERIES SCIENCE CENTER NORTHEAST FISHERIES OBSERVER PROGRAM, HANDBOOK FOR FISHERIES OBSERVERS AND PROVIDERS (2019), *available at* https://repository.library.noaa.gov/view/noaa/22728.

are "four family-owned and family-operated companies." *Loper Bright Enters.* Pet'r's Br. at 13.

The Association is aware, more so than most Amici, that removing one well-trained, well-prepared, experienced crewmember from a small, complex vessel designed to spend more than a week on the North Atlantic means that safety decreases precipitously. Replacing that one person with an at-sea monitor who might be fresh out of high school with all of *twelve* days of training spirals the risk of a catastrophe into the stratosphere. To begin with, the Agency has no reason to believe—and certainly does not attempt to require or observe—whether their at-sea observers have any sea legs whatsoever. Instead, those typically land-bound observers routinely suffer from sea sickness, often cripplingly so. They may also get called on to help in an emergency—and either freeze, or (blessed with but twelve days of training) make the situation worse. They might fall overboard, which is a risk that the vessels' regular crew must try to prevent, thereby stealing their attention from their own safety and their attempt to bring home a good catch. Or they might panic, having never been through the sort of experience that a well-seasoned North Atlantic fishing-vessel crew knows all about.

None of these concerns troubled the Agency when it promulgated this final rule. Indeed, the Agency—possessed with the sort of bureaucratic, all-knowing arrogance that *Chevron* characteristically enables—made no mention of them in the administrative record. And as serious as the rule's economic costs are to the fishing industry, safety remains a paramount concern to all who work in this field, and it should be readily apparent to (and accounted for by) the Agency

that this sort of requirement is likely to make the situation for the individuals serving the fishing industry far more treacherous. That the Agency neglected to do so underscores neatly the problem with its approach, and it further counsels in favor of overruling *Chevron*.

## CONCLUSION

For all these reasons, the Court should reverse the First Circuit's opinion.

Respectfully submitted,

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