No. 22-451

IN THE

Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, et al.,

Petitioners,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce, et al.,

Respondents.

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

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF FOR *AMICI CURIAE* DAVID GOETHEL AND JOHN HARAN IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Amici curiae David Goethel and John Haran respectfully move the Court for leave to file the attached brief in support of the petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022). Due to the timing of engagement, counsel for *amici* notified counsel of record for the parties to this case of *amici*'s intention to file this brief on December 9, 2022. While this notice was less than the ten days in advance of the due date required by Rule 37.2(a), both parties have consented to the filing of this brief. Accordingly, *amici* do not believe that either party will suffer any prejudice because of the untimely notice.

As detailed below, Messrs. Goethel and Haran are participants in New England's commercial fishing industry. They are concerned with the Department of Commerce's authority to mandate that small commercial fishermen foot the bill for federal at-sea monitors on fishing vessels. *Amici* seek to inform the Court of the practical, on-the-ground consequences of the regulatory mandate at issue in this case and the structural circumstances that facilitated its adoption.

Accordingly, *amici* respectfully move the Court for leave to file the accompanying brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether, under a proper application of *Chevron*, the Magnuson-Stevens Act implicitly grants the National Marine Fisheries Service the power to force domestic vessels to pay the salaries of the monitors they must carry.

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

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae David Goethel and John Haran are participants in New England's commercial fishing industry whose livelihoods have been threatened by the same kind of monitoring mandate, imposed under the same statutory scheme, at issue in this case. Mr. Goethel has plied New England's groundfish fishery for decades, and Mr. Haran, a former commercial fisher, has served since 2010 as a sector manager for vessels working that fishery. Groundfish include cod, flounder, and other fish that live and feed on or near the seabed. Groundfish have been the bedrock of New England's fishing industry since the early sixteenth century, providing generations of families with a livelihood. And the fleet of small, family-owned vessels working that fishery has been decimated over the past decade, due in part to the burden and expense of carrying and paying for federal monitors.

After National Marine Fisheries Service (NMFS) began requiring groundfish vessels to pay for monitors, Mr. Goethel challenged the rule imposing that requirement as exceeding the agency's authority under the Magnuson-Stevens Act (MSA). His suit was dismissed as untimely on the basis that the regulatory scheme had been imposed years before NMFS announced that vessel-owners would have to pay for monitoring. *See generally Goethel v. United States Dep't. of Com.*, 854 F.3d 106 (1st Cir. 2017).

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of the filing of this brief and provided written consent to its filing.

Amici's interest in this case is preserving the heritage of their industry and the viability of the small, family-owned enterprises that have been its backbone for centuries.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a case presenting questions of statutory interpretation and agency-deference doctrines, it is all too easy to lose sight of the people and communities affected by the resolution of those questions. In this case, they are not hypothetical. The NMFS regulatory mandate that commercial fishing-vessel owners pay for ride-along government monitors threatens the livelihoods of countless small, family-owned fishing enterprises. That mandate serves as a stark illustration of the way that regulatory overreach can have serious consequences for individuals, families, and communities—consequences that Congress, accountable to the people, would never have accepted.

Small fishing enterprises operate on tight margins and face the risk of disaster, financial and otherwise, with every trip to sea. On a given day, the weather may shift to storm, forcing the vessel to shore. Sometimes the catch is light. Prices at the pier can drop following a large catch. Equipment failures may cut a trip short. Lately, fuel prices have been on the rise, squeezing margins. And there are, as with most any small business, a million more risks and contingencies. Add to all that the requirement to carry a government monitor abord an already cramped vessel, which may barely have room for the working crew. And then add to that the NMFS's regulatory invention of making the owners of fishing vessels engaged

in garden-variety commercial fishing foot the bill for the monitor, at a cost that may even exceed their own take for a trip. Little surprise, that funding mandate threatens the continued viability of small fishing enterprises. In so doing, it threatens a way of life that predates the Founding.

As is often the case with regulatory overreaches, not every boat has been forced aground. While smaller players are being squeezed, private-equity has edged into their longtime fisheries, accelerating the displacement of family-owned businesses that have plied those waters for generations. Big businesses, after all, are better able to bear the cost of regulatory compliance. The NMFS's drive to expand industry-paid monitoring is a factor changing the face of the industry, in a way that no one seriously argues Congress intended. This is just one more example of the way that agency-empowering legal doctrines disproportionately injure small business.

The reason for that disparate impact is the different accountability structures that apply to Congress and to regulators. Congress is accountable to the people through the ballot box and so strives to avoid policy choices that might displace Members' constituencies. Regulators, by contrast, do not face that political check. They are only subject to weak oversight on most matters by the President and Congress, but then also the constant attention of well-organized special interests. The decision below, by deriving agency power from statutory silence, effectively shifts an important policy question from one accountability regime, which is solicitous of small business, to a different one that often favors the larger and more powerful regulated parties who interact directly with the

agency. That is, by all appearances, what happened here.

The Court should grant the petition and reverse.

ARGUMENT

I. At-Sea Monitoring Costs Are Pushing Small Fishing Enterprises Out of Business

Fishing can be a rewarding profession, but it is a difficult business, especially for those operating small fishing enterprises. Their vessels are cramped and in constant need of maintenance, hours are long, and the sea can be dangerous. Profit margins are low and highly dependent on fate, with the outcome of any trip uncertain at the outset. Many plying this trade are carrying out a family tradition going back generations. And yet today, many small, family-owned fishing enterprises face the plank of failure, as the older generation retires, the younger pursues more lucrative opportunities, and the costs and regulatory burdens of going to sea only wax and never wane.

On top of all that stands a new burden: paying for federally-imposed monitors. In recent years, the NMFS and the regional fishery management councils established under the MSA have increasingly embraced open-ended monitoring requirements not limited to a particular fishery. In the past, such requirements targeted only the largest fisheries, particularly those worked by large ships, and restricted fisheries subject to catch limits. The new requirements, by contrast, reach down to small

vessels, often family-owned, working ordinary fisheries.

That has a special impact on small, family-owned fishing businesses. Space is at a premium on small vessels, and carrying a monitor who does not contribute to the catch often displaces a working fisherman or, at the least, gets in the way of fishing operations. And that was bad enough. But the real blow came when NMFS began making fishing vessels foot the bill for the monitors. That financial burden is more than many small fishing enterprises could bear.

Amici's experiences are unfortunate illustrations. In 2010, the New England Fishery Management Council and NMFS amended the Northeast Multispecies Fishery Management Plan to require commercial vessels to give the agency advanced notice of fishing trips so that it could assign an at-sea observer. 75 Fed. Reg. 18,262, 18,272, 18,278 (Apr. 9, 2010). The amendment was justified, in part, by the expectation that monitor coverage would be funded by NMFS, *id*. at 18,272, although the amendment also provided for industry funding of monitoring "to the extent not funded by NMFS," *id*. at 18,342. For the first five years, the agency picked up the cost of enforcement. *Goethel*, 854 F.3d at 110. Only in 2015 did it announce that it might soon "expect that sector vessels will be responsible for paying at-sea costs associated with the ASM program." 80 Fed. Reg. 12,380, 12,385 (Mar. 9, 2015). Ultimately, the agency required vessels to pay for at-sea monitoring beginning in mid-February 2016. 854 F.3d at 111.

The financial hit was immediate and substantial. If Mr. Goethel's vessel was selected for an at-sea monitor, he would have to pay $700 to $800 for the privilege of hosting a tagalong regulator, in addition to bearing the other costs and inconveniences of carrying an additional non-worker on the trip. *Id*. at 109; *Goethel v. Pritzker*, No. 15-CV-497-JL, 2016 WL 4076831, at *1 (D.N.H. July 29, 2016). And that expense was enough to make a trip a money-loser. At the time, Mr. Goethel feared that the expense of paying for federally-imposed at-sea monitors would force him to sell his boat and abandon his longtime profession. And that is, in the end, what he did, after his 2016 lawsuit challenging the funding mandate was dismissed as untimely. *See* 854 F.3d at 116. The First Circuit upheld that ruling, even while calling for "clarification from Congress" to help "balance[] the competing goals of conservation and the economic vitality of the fishery." *Id*.

Mr. Haran, as a sector manager in the same fishery, has seen first-hand that the costs of monitoring threaten to drive small fishing enterprises out of business by making trips uneconomical. For example, one sector vessel's October 2022 trip would have been uneconomical if the vessel owner had been required to carry and pay for a monitor. Over a week of work at sea brought in revenue of $39,218.50. But expenses, including high fuel costs (nearly $25,000), left only $12,000 for the vessel's owner and his four-man crew—who were working or stood on watch the entire time, day and night. At current rates, having to pay for a monitor would have reduced that by $7,065.

Crew are typically paid out of net revenue, and the cost of monitoring would cut crew income to the point that the vessel's owner could not hire crew members. Without crew, the vessel cannot take to the water.

These experiences are representative. The number of vessels plying New England's groundfish fishery, which has historically been dominated by small players, has plunged in the years since the monitoring mandate came into force. Will Sennott, How Foreign Private Equity Hooked New England's Fishing Industry, ProPublica (July 6, 2022).[2] Indeed, the size of the fleet is now at a historic low. New England Fishery Management Council, Northeast Multispecies (Groundfish) Catch Share Review ii (May 2021).[3] So too are trips and industry employment. *Id*. at v, vii.

While the legal issues presented by the petition are consequential, so are the practical consequences of forcing vessel owners to pay for their own ride-abord regulators. At stake is nothing less than the continued existence of a storied industry and way of life.

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[2] *Available at* https://www.propublica.org/article/fishing-new-bedford-private-equity.

[3] *Available at* https://s3.amazonaws.com/nefmc.org/Sector-Program-Review_Final-May2021.pdf.

II. By Contrast, Large Enterprises Are Reaping the Rewards of the Monitoring Mandate

The plight of small, family-owned fishing enterprises has been a boon to their larger competitors, which can more easily bear the cost of regulatory compliance, in general, and at-sea monitors, in particular. New Bedford Mayor Jon Mitchell recently observed that the harms to small fishermen are "being driven by the largest companies on the East Coast….Small businesses will go out of business…." gCaptain, U.S. Justice Department Probes Private Equity Fishery Deals (Oct. 16, 2022).[4]

While small players are being pushed out of the industry, big business is taking advantage of the situation to gain turf. Over the past decade, "companies linked to private equity firms and foreign investors have taken over much of New England's fishing industry." Sennott, *supra*. That includes the groundfish fishery, which private equity-backed business now "dominates." *Id*.

This rapid shift in the industry's composition is due in part to regulatory mandates like the requirement to foot the bill for at-sea monitors. In general, larger enterprises are better able to bear the cost of regulatory compliance than their smaller competitors. *See* C. Steven Bradford, Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation, 8 J. of Small & Emerging Bus. L. 1,

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[4] *Available at* https://gcaptain.com/us-justice-department-probes-private-equity-fishery-deals/.

7–11 (2004) (discussing basis in economic theory); W. Mark Crain & Nicole V. Crain, The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business, Nat'l. Assn. of Mfrs. (2014) (surveying studies finding that regulatory compliance costs "fall disproportionately on small businesses").[5] In particular, larger vessels can better bear the burden and expense of monitors than smaller vessels, which have less space and lower revenues. Larger enterprises may also have multiple vessels and salaried crews, and so may have lower per-vessel overhead and do not face the prospect that a single unprofitable trip may spell the end of their business.

The regional councils' and NMFS's drive to expand industry-paid monitoring likely reflects the familiar phenomenon known as "agency capture." The simple point is that agencies are often responsive to the positions and interests of well-organized interest groups, including those whom they regulate. *See* Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1, 5 (1998). In the case of the MSA, it has been observed that "industrial fishing interests are more overrepresented than any other stake holder" in the process of establishing fishery management plans. Charles T. Jordan, How *Chevron* Deference is Inappropriate in U.S. Fishery Management and Conservation, 9 Seattle J. Envtl. L. 177, 197 (2019) (citing Thomas A. Okey, Membership in the Eight Regional Fishery Management Councils

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[5] *Available at* https://www.nam.org/wp-content/uploads/2019/05/Federal-Regulation-Full-Study.pdf.

in the United States: Are Special Interests Over-Represented?, 27 Mar. Policy 193, 194 (2003)).

That, in turn, explains why the New England Council and NMFS proceeded with the industry-funding mandate at issue here, notwithstanding that it was opposed by over 90 percent of commenters. *See* Pet.8. Those commenters were obviously not the ones who had the Council's and the agency's ear. Instead, as agencies often do, they listened to "the well-financed and well-organized." Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 21 (2010).

Because the cost of regulation falls disproportionately on small business, legal doctrines that expand regulators' powers will tend to disproportionately injure small business. The impact of imposing monitoring costs on small, family-owned fishing enterprises—a policy imposed by regulatory fiat, not congressional command—is a clear example of the phenomenon.

III. Permitting Agencies to Seize Power From Statutory Voids Undermines Public Accountability

While it is well-understood that "[w]ealthy interests [] shape regulatory outcomes," Kate Andrias, Separations of Wealth: Inequality and the Erosion of Checks and Balances, 18 U. Pa. J. Const. L. 419, 459 (2015), their doing so presupposes that Congress authorized the regulatory outcome. Deference to an agency on that question extends the reach of agency capture beyond regulation to legislation, circumventing Congress's electoral accountability to the public.

The Constitution makes Congress accountable to the people for exercising the legislative power and making the fundamental policy choices for government programs. "[T]he framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'" *West Virginia v. EPA*, 142 S.Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (quoting The Federalist No. 11, at 85 (Alexander Hamilton) (C. Rossiter ed., 1961)). "[B]y vesting the law-making power in the people's elected representatives, the Constitution sought to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be kept in dependence on the people.'" *Id*. (quoting The Federalist No. 37, at 227 (James Madison) (C. Rossiter ed., 1961)).

Regarding statutory silence as ambiguity entrusted to the agency to "interpret," as the court below did, cuts the chain of accountability to the people. That approach empowers agencies to arrogate to themselves decisions regarding their own powers that are properly conferred, or denied, by Congress. It speaks volumes that Congress, facing different lines of accountability than the NMFS, declined to expressly authorize industry-funded monitoring across the board, but did so only for specific regions and circumstances—those that it adjudged reasonably able to bear the cost. Deferring to the agency in these circumstances allows it to venture where Congress, subject to an electoral check, was unwilling to go.

Moreover, crediting an agency's claim to power in the face of statutory silence brings with it all the pathologies that flow from breach of the constitutional separation of powers. Should a New Bedford resident concerned about the future of a local industry and way of life regard the industry-funded-at-sea-monitoring mandate as Congress's error or NMFS's? Either is plausible. In the view of the court below, Congress authorized it, or at least implicitly delegated the power to decide to the agency. Pet.App.14–16. On the other hand, the agency's action cannot fairly be described as merely executing the statute. This "diffusion of power carries with it a diffusion of accountability." *Free Enter. Fund v. Pub. Co. Acctg. Oversight Bd.*, 561 U.S. 477, 497 (2010). And so "the public cannot 'determine on whom the blame or the punishment of a pernicious measure…ought really to fall.'" *Id.* at 498 (quoting The Federalist No. 70, at 476 (Alexander Hamilton) (C. Rossiter ed., 1961)).

Finally, the precise nature of the power claimed by NMFS in this instance raises special separation-of-powers concerns. That power is not merely to impose certain regulatory requirements on vessel owners, but to *make them pay* for operation of the regulatory scheme. The appropriations power is, of course, Congress's alone, U.S. Const., art. I, § 9, cl. 7, and it is among Congress's most important tools for conducting oversight of agencies and controlling their execution of the law. As Judge Walker observed, the decision below threatens to "undermine" exercise of that

congressional power, Pet.App.32 (Walker, J., dissenting), removing yet another political check against agency overreach.

At a minimum, the Court should take the opportunity to clarify that Congress's silence is not agency-empowering ambiguity.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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