No. 22-___

IN THE

Supreme Court of the United States

RELENTLESS, INC., *et al.*,

Petitioners,

v.

U.S. DEPARTMENT OF COMMERCE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Magnuson-Stevens Act ("MSA") governs fishery management in federal waters. It states that, with the approval of the Secretary of Commerce, the National Marine Fisheries Service ("NMFS") may require fishing vessels to carry federal observers who enforce the agency's regulations. Congress appropriates funds for these observers. In three circumstances absent here, but not elsewhere, the MSA allows federal observers to be paid in some manner by the regulated party. Deeming annual Congressional appropriations for the federal observers insufficient, the agency asserted a right to force the fishing vessels into contracts to pay the federal observers. The First Circuit approved this practice without stating whether its conclusion was a "product of *Chevron* step one or step two." It held the mere fact that the MSA provides for federal observers gave the agency *carte blanche* to charge the regulated party for those observers. Neither *Chevron* nor the MSA provision allowing measures "necessary and appropriate" to enforce the statute allows this result.

The questions presented are:

1. 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.[1]

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[1] This is the question already accepted by the Court in *Loper Bright Enterprises, et al. v. Raimondo, Secretary of Commerce, et al.*, No. 22-451, *certiorari granted* (May 1, 2023) concerning the same statute and regulation.

2. Whether the phrase "necessary and appropriate" in the MSA augments agency power to force domestic fishing vessels to contract with and pay the salaries of federal observers they must carry.

PARTIES TO THE PROCEEDING

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; Janet Coit, in her official capacity as Assistant Administrator for NOAA Fisheries.

CORPORATE DISCLOSURE STATEMENT

Petitioners Relentless Inc. and Huntress Inc. are wholly owned by Petitioner Seafreeze Fleet LLC. Petitioner Seafreeze Fleet LLC is a limited liability company with no parent corporation, and no publicly held corporation holds 10% or more of its stock.

RELATED PROCEEDINGS

1. *Relentless, Inc., et al. v. United States Department of Commerce, et al.*, No. 21-1886 (1st Cir.), judgment entered March 16, 2023;

2. *Relentless Inc. et al. v. U.S. Department of Commerce, et al.*, No. 1:20-cv-108-WES (D.R.I.) judgment entered September 20, 2021.

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PETITION FOR A WRIT OF CERTIORARI

The people of New England famously rebelled against George III because he "erected" "New Offices and sent hither swarms of Officers to harass" them "and eat out their substance." *See* The Declaration of Independence para. 12 (U.S. 1776). Respondents have revived cause for similar grievance by promulgating a regulation that requires at-sea monitors ("ASMs") to be paid for by the very fishing vessels forced to carry them. They have thereby supplemented the federal observers provided by statute and funded by appropriations, created a new federal office without statutory authority, and imposed the cost of such on the small businesses they regulate. Not only has Congress failed to explicitly grant this authority to Respondents, but in analogous circumstances Congress has capped such costs well below those being imposed by the agency here.

The Magnuson-Stevens Act ("MSA") requires Petitioners Relentless Inc. ("Relentless") and Huntress Inc. ("Huntress") to periodically carry federal observers on their vessels. Petitioners provide berths and space for these observers to perform their work for the federal government. Respondents never protested nor brought suit against this burden, even though their method of fishing keeps them at sea longer than the average fishing fleet vessel and thus incurs a greater imposition. But nothing in the MSA hints that such federal observers will be paid by the regulated vessels of New England's herring fishery. Respondents promulgated the New England Fishery Management Council's Industry-Funded Monitoring Omnibus Amendment ("IFM Amendment") through the February 7, 2020 Final Rule (the "Final Rule")

implementing the IFM Amendment. That rule created industry-funded monitors (the at-sea monitors ("ASMs")) to supplement the government funded observers in the herring fishery. In so doing, it exceeded the powers the MSA granted to those agencies.

The MSA was clear that industry funding was only available in three specific circumstances inapplicable to Petitioners. Notably, each of those circumstances caps the amount domestic fishing vessels need pay for government observers. The Final Rule was implemented with no such caps. Moreover, contracting to pay the ASMs is a substantial cost for Petitioners. The Final Rule estimated the cost to carry an ASM to be $710 per day—an amount that can exceed the profits from a day's fishing for herring.

The district court held the statute is ambiguous. After applying *Chevron* deference, it found that the Respondents could impose these enormous costs, validating these agencies' seizure of power. Notably, the district court, at Respondents' urging, also relied on the MSA phrase "necessary and appropriate" to conclude that industry-funded monitoring was lawful under the MSA. The district court cited the language repeatedly in its opinion, including in its closing paragraph upholding the Final Rule.

The First Circuit cited the "necessary and appropriate" language and purported to perform *Chevron*'s two-step analysis, but it stated that the "default norm" was for industry to pay the costs of regulation. It also relied heavily on the D.C. Circuit's opinion in *Loper Bright*, which this Court's grant of *certiorari* has already vacated. The First Circuit did not state whether it was deciding the issue at *Chevron*

step one or step two but blithely stated that the agencies' interpretation did not exceed "the bounds of the permissible." Merely because the MSA requires carrying federal observers allows an agency—in the face of statutory silence—to charge the regulated party the observers' salaries by contract. The First Circuit affirmed the district court in all respects.

The danger of these decisions is manifest. Any time a statute allows an inspector of any kind, even if Congress appropriates no money for such inspectors, the application of *Chevron* and the mere existence of "necessary and appropriate" language in a statute will allow an agency to escape much of the "power of the purse," which is Congress's main check against the Executive branch. Neither the district court nor the First Circuit explained what "necessary and appropriate" means. The approach taken below endangers liberty for every citizen. How were Petitioners to know that government-paid federal observers, which they did not oppose, could be transformed into ASMs paid for by Petitioners? Certainly not by reading the statute.

C*hevron* deference coupled with an interpretation of the "necessary and appropriate" phrasing works many evils. On the questions of how *Chevron* deference and "necessary and appropriate" are to be interpreted under the MSA, there is a Circuit split. The Fifth Circuit takes the proper approach to both questions, and the First Circuit has misapplied this Court's precedent on both *Chevron* and statutory interpretation. By eliminating or limiting *Chevron* and/or by illuminating the meaning of "necessary and appropriate," this Court should grant review to curtail administrative overreach and to clarify a statute that

governs fishing in all federal waters that this Court has not interpreted in almost 40 years.

OPINIONS BELOW

The First Circuit's opinion is reported at *Relentless, Inc., et al. v. United States Dep't of Commerce*, 62 F.4th 621 and reproduced at 1a. The district court's opinion is reported at *Relentless Inc., et al. v. U.S. Dep't of Commerce*, 561 F. Supp.3d 226 and reproduced at 35a.

JURISDICTION

The First Circuit issued its opinion on March 16, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the MSA are reproduced at 66a-80a.

STATEMENT OF THE CASE

I. LEGAL FRAMEWORK OF THE MSA

Recognizing the economic importance of commercial and recreational fishing, the MSA was adopted in 1976 to protect, manage, and grow the United States' fishery resources. To achieve these goals, the MSA delineates scientific and conservation-based statutory obligations to sustainably manage fishery resources for the benefit of the fishing industry and the environment. 16 U.S.C. § 1801 *et seq*.[2] The MSA entrusts those goals to the Secretary of

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

Commerce, who in turn has delegated the administration of the statute to the National Marine Fisheries Service ("NMFS"). §§ 1802(39), 1855(d).

The MSA grants the Dep't of Commerce the ability to exercise "sovereign rights" to conserve and manage fisheries resources "for the purposes of exploring, exploiting, conserving, and managing all fish" in the Exclusive Economic Zone ("EEZ"). §§ 1801(b)(1), 1811(a). Generally, the EEZ extends from the seaward boundary of each of the coastal States to 200 nautical miles offshore. § 1802(11).

The MSA provides for the development and implementation of fishery management plans ("FMPs") for fisheries. § 1801(b)(4). FMPs are implemented with the goal of continually achieving and maintaining optimum yield within fisheries. *Id.*

The MSA establishes eight Regional Fishery Management Councils ("Councils"). § 1852(a)(1). The Councils share fishery conservation, management, and regulatory responsibilities with the Dep't of Commerce and National Oceanic and Atmospheric Administration ("NOAA"). Two of the Councils, the New England Fishery Management Council ("NEFMC") and the Mid-Atlantic Fishery Management Council ("MAFMC") were involved in the Final Rule. *Id*.

The MSA prescribes the required and discretionary provisions of FMPs. § 1853(a)(b). Section 1853(b) includes discretionary functions which may include "requirements for carrying observers on board to collect conservation and management data." *Id.*

The MSA does not use the term "at-sea monitor." A key duty of each regional council, including NEFMC and MAFMC, is to prepare an FMP for each of the region's fisheries. § 1852(h).

When such a plan is prepared or amended, the council must seek approval from NMFS. § 1854. After NMFS reviews the plan or an amendment for consistency with applicable legal requirements, it must provide a period for public comment and eventually decide whether to approve or disapprove the proposal. § 1854(a). If approved, NMFS promulgates it as a final regulation. *See* § 1854(b)(3).

The MSA sets forth various "required provisions" that fishery management plans "shall" contain, as well as "discretionary provisions" that they "may" contain. § 1853(a)-(b). Among the required provisions, fishery management plans "*shall* … contain the conservation and management measures" that are "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery[.]" § 1853(a)(1)(A) (emphasis added). Among the discretionary provisions, fishery management 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." § 1853(b)(8). The "necessary and appropriate" language is also contained in § 1853 (b)(14) , a catch-all provision which states that FMPs "may … 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."

The MSA permits information collections that are beneficial for developing, implementing, or revising FMPs. § 1881a(a)(1). If a Council determines such information collection is necessary, it may request that the Secretary implements the collection. *Id.* If the Secretary determines that the collection is justified, then the Secretary has the duty to promulgate regulations implementing the collection program. *Id.* If determined necessary, the Secretary may also initiate an information collection. § 1881a(a)(2). The MSA explicitly authorizes the collection of fees or cost shifting of other kinds for observers, but only in closely circumscribed conditions for specific purposes and with protections for domestic producers on costs.

The MSA authorizes the Secretary to collect fees to cover actual costs directly related to the management, of, data collection for, and enforcement of limited access privilege programs ("LAPPs")[3] and certain community development quota programs. § 1854(d). Fees for monitoring are required because of the nature of the fisheries quota system. *See* § 1853a(c)(1)(H), (e)(2) ("shall" include observers and "shall" provide for a program of fees). Such fees are nonetheless capped at 3 percent of the ex-vessel value of fish harvested under those programs. § 1854(d)(2)(B).

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[3] LAPPs allow a permitted individual to harvest a certain quantity of the total allowable catch of the fishery, essentially a quota system and so must be closely monitored. *See* § 1802(26).

The MSA explicitly permits the North Pacific Fishery Management Council ("NPFMC") to establish a system of fees to pay for the cost of implementing fisheries research plans, including mandated observers, for certain fisheries under its jurisdiction. § 1862(a). There is no such provision for the NEFMC- or MAFMC-managed fisheries. The NPFMC includes Alaska and the largest and most lucrative fishing region in the United States. Nonetheless the fees allowed by the MSA in that fishery are also capped so as "not to exceed 2 percent, of the unprocessed ex-vessel value" of the catch harvested under that council. § 1862(b)(2)(E).

The MSA has explicit provisions for cost shifting to foreign fishing vessels to either pay a fee or contract directly for observer services. There is an observer fund supplied by a fee on foreign fishing vessels but controlled by appropriations of Congress. If at any time the fund cannot cover the cost of observers, the Secretary may require foreign vessels to contract directly with observers. *See* § 1821(h)(4)(5) (setting up Foreign Fisher Observer Fund) and § 1821(h)(6)(C) (requiring foreign vessels to pay observers directly); *and see* § 1827(c)(d)(f)(1)(B) (observer fees for taking of billfish and refusing to pay for such coverage when requested to do so by the Secretary).

These provisions are enforced by allowing sanctions on vessels that do not pay the observers when required to do so. § 1858(g)(1)(D). In addition, it is unlawful to assault or otherwise molest or interfere with any federal observer or data collector. § 1857(1)(L).

Not until the 1990 amendment to the MSA was section 1853(b)(8) added to make clear that the

agencies could require observers on permitted fishing vessels. That section also delineates what regulatory costs Congress expects the regulated entity to carry; the berths and space for the observer to work. The MSA provides that observers may be placed on commercial vessels. § 1853(b)(8). The statute explicitly excludes observers from vessels with inadequate berths or inadequate places to carry out observer functions. *Id.* The MSA has been reauthorized three times since then, and Congress has not altered where cost shifting to industry is allowed outside the three exceptions.

II. FACTUAL BACKGROUND

Atlantic herring, or *Culpea harengus*, are small schooling fish from the family *Clupeidae*. Atlantic herring are found across the North Atlantic, but in the western North Atlantic they are distributed from Labrador, Canada to Cape Hatteras, North Carolina. *See* NOAA Fisheries, *Atlantic Herring*, https://www.fisheries.noaa.gov/species/atlantic-herring (last visited June 9, 2023).

In federally managed waters, the Atlantic herring population is concentrated from New England to New Jersey. *See* NOAA Fisheries, *Atlantic Herring Regulated and Closed Areas*, https://www.fisheries.noaa.gov/new-england-mid-atlantic/sustainable-fisheries/atlantic-herring-regulated-and-closed-areas (last visited June 9, 2023). Atlantic herring is a biologically important species as it is vital to the marine food chain, but it is also

economically important in its own right.[4] The commercial herring fishery has operated in New England for hundreds of years.

Petitioners Relentless and Huntress are small businesses whose primary industry is commercial fishing. Their annual gross receipts are less than or equal to $11 million. CA1.App.162 ¶ 5. They are subject to the IFM Amendment and the Final Rule. Both Relentless and Huntress are corporations organized under Rhode Island law and operating out of North Kingstown, Rhode Island. Relentless owns the pseudonymous F/V *Relentless* and Huntress owns the F/V *Persistence*. Both vessels are high-capacity freezer trawlers that alternatively, but sometimes simultaneously, harvest Atlantic herring, Loligo and Illex squids (*Doryteuthis* (*Amerigo*) *pealeii*, and *Illex illecebrosus*, respectively), Butterfish (*Peprilus triacanthus*), and Atlantic mackerel (*Scomber scombrus*). *See* CA1.App.288.

Both ships use a unique at-sea freezing technique that allows the vessels to stay at sea longer than other vessels in the Atlantic herring fishery and provides each vessel flexibility in what catch it harvests during fishing trips. *Id.* Both vessels hold several permits and operate across the jurisdictional boundaries of the NEFMC and the MAFMC. Petitioners typically declare[5] into herring, squid, and mackerel fisheries on the trips they take from late November through April

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[4] The "'silver darlings' of song and folklore." *Western Sea Fishing Co. v. Locke*, 722 F. Supp. 2d 126, 130 (D. Mass. 2010).

[5] "Declaring" means informing regulatory authorities of what species a vessel intends to pursue on any given trip.

because they harvest all those species alternatively but sometimes simultaneously during the season. *See* CA1.App.288. That is, they may take each species, some, or all species during any given trip. This flexible style of fishing allows Petitioners to cover operating costs by switching over to a different species based on what they encounter.

Petitioners' trips typically last 7-14 days at sea, compared to 2-3 days for other vessels in the herring fleet. *Id.* Because ASMs are paid per day, the costs to these Petitioners are higher per trip than they are for the rest of the fishing fleet. *Id.* This regulatory inequity threatens Petitioners' use of the flexible style of fishing they have developed and even the use of their vessels with enormous sunk costs. The Final Rule could result in some fishing trips losing rather than making money.

The IFM Amendment and Final Rule are the culmination of almost seven years of design and development by the NEFMC, MAFMC, and NMFS. *See* NEFMC, *Observer Policy Committee (Industry-Funded Monitoring)*, https://www.nefmc.org/committees/observer-policy-committee (last visited June 9, 2023). Part of this design and development was explicitly to elide Congressional prohibitions on burdening fishers in the New England fisheries and were expressed as dissatisfaction with Congressional appropriations for the observer program. *See*, *e.g.*, 79 Fed. Reg. 8,786, 8,793 (Feb. 13, 2014) ("Budget uncertainties prevent NMFS from being able to commit to paying for increased observer coverage in the herring fishery."). Respondents were clear that the entire scheme of the Final Rule was implemented because the agencies

wanted more monitoring than Congress would fund and to get around the strictures of LAPPs and the other constraining statutes. CA1.App.173 (Pub. Hearing Summaries); CA1.App.191–197 (Memorandum to GARFO's Regional Administrator Chris Oliver discussing previous denials of industry funding) ("Oliver Mem."). The IFM Amendment and Final Rule allow industry-funded monitoring in NEFMC FMPs, except for those under joint management with MAFMC, *e.g.*,[6] mackerel. *See* CA1.App.240. On or about April 20, 2017, the NEFMC finalized its preferred alternatives and adopted the IFM Amendment. *See id*. A year later, on April 19, 2018, the NEFMC "refined" its industry-funded monitoring recommendations. *Id.* On September 19, 2018, the NEFMC published a Notice of Availability for the IFM Amendment in the Federal Register. *See* NOAA, Industry-Funded Monitoring, 83 Fed. Reg. 47,326 (Sept. 19, 2018). The Notice of Availability permitted interested parties to submit comments regarding adoption of the IFM Amendment for a 60-day period ending on November 18, 2018. *Id.* On November 7, 2018, while the IFM Amendment comment period was still open, the proposed rule implementing the IFM Amendment was published in the Federal Register. NOAA, Industry-Funded Monitoring Proposed Rule, 83 Fed. Reg. 55,665 (Nov. 7, 2018) ("Proposed Rule"). The Proposed Rule permitted interested parties to submit comments regarding the implementing rule for a 47-day period

[6] "CA1.App." refers to the appendix filed with the First Circuit.

ending on December 24, 2018. *Id.* Petitioners submitted comments criticizing the rule. The IFM Amendment was contentious and controversial. CA1.App.193 (Oliver Mem.). The current government-funded observer rate was what *Congress* funded; the new requirement was imposed because the regulators wanted more monitoring than Congress would fund. *See* CA1.App.173.

On February 7, 2020, NMFS and NOAA adopted the Final Rule implementing the IFM Amendment, which was substantially the same as the Proposed Rule. *See* CA1.App.248. Congress had amended the MSA to allow placing observers on permitted fishing vessels in 1990. § 1853(b)(8). Thirty years later the Respondents had transmogrified this requirement into making the industry pay for a similar government functionary.

The Respondents acknowledged in the Final Rule that its costs were great and that ASMs had somewhat different duties than "federal observers." And of course, were industry *not* government funded. The IFM Amendment and the Final Rule project that, for vessels like F/Vs *Relentless* and *Persistence* that cannot use electronic monitoring, implementing the IFM Amendment will reduce Returns to Owners by almost ***20 percent***. *See* CA1.App.244, CA1.App.251. The Final Rule states that the ASMs are not "observers" and have different functions from that office. *See id.* It states "in contrast to observers, ASM[s] would not collect whole specimens, photos or biological samples …" *Id.* The $700-800 per day cost of ASMs proposed in the Final Rule is twice as high as the cost in the high-value Alaskan fishery, which is

where the MSA authorizes industry-funded ASMs. *See* CA1.App.246. Although, the ASMs do not have the same duties as "observers" according to the regulation, they are federal agents performing federal, not industry, tasks and interfering with their duties is a federal crime. *See* § 1857; 50 C.F.R. § 648.14(e).

III. PROCEEDINGS BELOW

On March 4, 2020, Plaintiffs-Petitioners timely filed a Complaint challenging the Final Rule in the district court. While the matter was pending, the Defendants-Respondents attempted to have the matter transferred to the District of Columbia and consolidated with the case of *Loper Bright Enterprises, Inc. v. Raimondo*, 544 F. Supp. 3d 82 (D.D.C. 2021) ("*Loper Bright*"). On August 25, 2020, the district court denied the motion. *Relentless Inc. v. U.S. Dep't of Commerce*, 2020 WL 5016923 (D.R.I. Aug. 25, 2020). The parties then cross-moved for summary judgment, and on September 20, 2021, the district court denied Petitioners' motion for summary judgment on all counts and granted it on behalf of Respondents. 35a-65a.

The district court's opinion shows great deference to the executive at every step. First, it recites a presumption of validity of the Secretary's action and deemed the Administrative Procedure Act's ("APA") review standard as deferential. 40a-41a. The district court first looked at the text of the MSA. 41a-42a. It stated "[a]s explained below, the Court concludes that Congress has not spoken unambiguously on the subject, and that the Secretary's interpretation satisfies *Chevron*'s deferential review." 42a (citations omitted). The district court noted that the Secretary

relied on the "necessary and appropriate" language in § 1853(a) to uphold the Final Rule. 43a. The district court relied on the district court's decision in *Loper Bright* to distinguish the requirement to contract with ASMs from statutorily authorized fee-based programs. 44a (citing *Loper Bright*, 544 F. Supp. 3d at 106). The Court rejected the Respondents' position that the MSA unambiguously provided for industry-funded monitoring, stating: "With statutory currents running in all directions, the Court concludes the Congress's intent regarding industry-funded monitoring is ambiguous, and the inquiry cannot end at step one." 47a. The district court then concluded that given the nature of monitoring fish catches, and that some industry-funded monitoring happened in the North Pacific before the 1990 amendment, it was reasonable for the Secretary to interpret the MSA to allow it. 50a-51a.[7] The district court also cited the "necessary and appropriate" phrase in the MSA many times in supporting its decision. 37a, 43a, 50a-51a, 64a.

The Petitioners timely filed an appeal on October 28, 2021. On March 7, 2023, subsequent to full briefing and oral argument below, Respondents' counsel submitted a F.R.A.P. 28(j) letter informing the court below that a petition for *certiorari* in *Loper Bright* had been filed, as well as the Fifth Circuit's opinion on the meaning of "necessary and appropriate" in interpreting the MSA. *Mexican Gulf*

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[7] Of course, Congress amended the MSA to allow industry funded monitoring in the North Pacific. So only that, if anything, was approved by Congress, which did this in no other fishery.

Fishing Co. v. Dep't of Commerce, 60 F.4th 956 (5th Cir. 2023). Nine days after that 28(j) letter, the First Circuit issued its opinion. That opinion did not acknowledge that there was a petition for *certiorari* in *Loper Bright*, nor did it grapple with the *Mexican Gulf* authority on the meaning of "necessary and appropriate" in the MSA.

The First Circuit quoted the "necessary and appropriate" language of the MSA. 3a. It determined, "At issue here, principally, is the interpretation of the MSA." 10a. The court continued, "Plaintiffs challenge the Agency's *authoritative* interpretation of the statute as granting it the power to enact the Rule." *Id.* (emphasis added). It then stated the now-familiar two-step *Chevron* test, whether the statute spoke directly to the question, and if not, whether the agency had a "permissible construction of the statute." *Id.* (citations omitted). It then noted the standard of statutory interpretation requiring use of the "ordinary tools of statutory construction." *Id.* (citations omitted). It recognized that if, after using these tools, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (citing *Bais Yaakov of Spring Valley v. Act, Inc.*, 12 F.4th 81, 86 (1st Cir. 2021) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984)).

The court then turned to Petitioners' arguments. It held that industry-funded ASMs were simply a subset of statutorily identified observers despite the Final Rule giving them different names, different qualifications and duties, and different funding than "observers." 11a-12a.

It then reduced Petitioners' argument to "Congress somehow conditioned the Agency's right to require monitors on the Agency paying the cost of the monitors." 12a. It then equated paying the salaries of government functionaries without statutory authorization as equivalent to requiring the purchase of fishing equipment. It called this the "default norm" and wrote, "When [C]ongress says that an agency may require a business to do "X," and is silent as to who pays for "X," one expects that the regulated parties will cover the cost of "X." 13a. That sentence has no citation. The sentence before it cites a concurring opinion by the same author in a previous case also conflating paying the salaries of government functionaries with ordinary regulatory costs. *Id.* (citing *Goethel v. U.S. Dep't of Commerce*, 854 F.3d 106, 117-18 (1st Cir. 2017)). *Goethel* itself only ruled on the statute of limitations. The circuit court again conflated ASMs with fishing gear and noted the Government received no funds from this transaction. 13a-14a. It held that the specific provisions of the MSA that required foreign vessels to pay observer fees and even contract with observers were there because of the sensitivities of foreign governments and treaty rights stating, "With treaties, international agreements, and foreign relations at stake, it makes sense that Congress would have opted for extra specificity." 20a n.6.

The Court relied on legislative history and the fact that the funding schemes in the other portions of the MSA were not apples to apples comparisons. 21a-22a; *and* 20a n.6 (stating that § 1821(h)(6) is different because foreign relations are sensitive and need more specificity). The court below then said, "We need not

decide whether we classify this conclusion as a product of *Chevron* step one or step two. Congress expressly authorized NMFS to require vessels to carry monitors. And at the very least, it is certainly reasonable for the Agency to conclude that its exercise of that authority is not contingent on its payment of the costs of compliance." 22a.[8]

REASONS FOR GRANTING THE WRIT

As to the *Chevron* issue, this case travels with *Loper Bright*. While the vessels differ, the statute and the regulation at issue are the same. The wrongful application of *Chevron* is also the same. In fact, the application of *Chevron* by the First Circuit was even worse and more sweeping than what the D.C. Circuit did. With the Petitioners in *Loper Bright*, Petitioners here make up the bulk of the herring fishers in the affected fisheries. The Final Rule and the decision of the Court below make a mockery of this Court's repeated refrain to use *Chevron* sparingly and carefully. The profligate use of *Chevron* in this case demonstrates how it strips citizens of their right to control their government at every stage. First, in 1990 when Congress decided to statutorily require permitted vessels to carry observers, no citizen of New England could tell from reading the proposed statute that the fishing vessels would have to pay for these officers doing work for the government. Even though it would require valuable space on a vessel for both berths and a place for observers to do their work,

[8] As the district court was affirmed in full, it appears the Final Rule was deemed "reasonable" under step two.

neither Petitioners nor apparently any fishing vessel owner opposed that legislation.

But as the comments on the Final Rule demonstrate, there was plenty of opposition to paying for these observers. The ability to oppose that proposal was absent because Congress did not make that proposal. When such proposals were made legislatively in the context of LAPPs and the North Pacific, protections to the regulated on the cost of such observers was factored in and capped legislatively. Nowhere do they approach the huge numbers required by the Final Rule. Congress alone provided funds for observers for decades before the Final Rule was implemented. The Respondents admitted they designed the whole program to get around Congressional prohibitions on charging the fishing industry in these fisheries. CA1.App.191-197 (Oliver Mem.). The application of *Chevron*, particularly the First Circuit's unsupported assertion that "[w]hen [C]ongress says that an agency may require a business to do 'X,' and is silent as to who pays for 'X,' one expects that the regulated parties will cover the cost of 'X.'", 13a, creates an expansion and overreach of the regulatory state and its burdens beyond anything this Court has ever countenanced. By rejecting any analysis of costs in its assessment of "reasonableness" under *Chevron*, the First Circuit and the district court stretched that term beyond the breaking point. The opinion below, if not corrected, will allow the administrative state unprecedented leeway to use silence, ambiguity and a default finding of "reasonableness" to get any regulation upheld.

The decision below is a perfect vehicle to assess *Chevron* deference, because it demonstrates its abuse

so starkly. Congress was not silent. It stated clearly when observers could be paid for by industry. *Chevron* cannot be used to grant that power throughout the statute at the fiat of an agency simply because implementing regulations were allowed. The Court should grant *certiorari* on that issue.

The Second question presented is also important. The MSA, like many federal statutes, admonishes agencies to perform acts "necessary and appropriate" in the service of the statutorily authorized powers. Unfortunately, rather than analyze that language as a limit on what the agencies can do, many courts including the court below, have regarded it as augmenting the powers Congress has provided the agency. The Circuits are split on what that language does with respect to the MSA, so the Court should take up the question to resolve the matter.

I. THE FIRST CIRCUIT'S OPINION BELOW REJECTS PRECEDENT AND DEMONSTRATES THE FUTILITY OF "REFINING" *CHEVRON*

A. The Opinion Below Failed to Use All the Traditional Statutory Construction Tools and Created Two to Expand Deference

This Court has repeatedly placed limits on when courts must defer to federal agencies when construing statutes and regulations under *Chevron*, 467 U.S. 837, and *Auer v. Robbins*, 519 U.S. 452 (1997). Among the most important such limits has been a rigorous enforcement of the comprehensive step one inquiry into whether the relevant statute or regulation is truly ambiguous and thus eligible for deference. As this Court originally made clear in footnote 9 of *Chevron* itself, courts must apply all "traditional tools

of statutory construction" in conducting the ambiguity analysis at step one. 467 U.S. at 843 n.9. The Court has repeatedly reaffirmed that principle ever since. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612,1630 (2018); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348,1358 (2018).

The court below ignored these admonitions. Instead of rigorous analysis, it airily stated, "We need not decide whether we classify this conclusion as a product of *Chevron* step one or step two." 22a. But that is exactly what the court had to do. It appears it affirmed the Final Rule at Step 2. It should not have.

When Congress added the provision in the MSA that provides that observers may be placed on commercial vessels, it explicitly excluded observers from vessels with inadequate berths or inadequate places to carry out observer functions. § 1853 (b)(8). It acknowledged by doing so that the regulatory cost to the fishing vessels without those spaces would be too high to provide them, so Congress exempted vessels that lacked such spaces and berths from having to comply with the statute. The court below ignored the issue along with Congress's clear statement of what it was requiring of domestic fishing vessels in regard to shouldering regulatory costs.

Second, it disregarded the MSA's carve out for fee shifting of observer costs only in the case of the North Pacific fishery, LAPPs, and foreign fishing vessels. It claimed they were not the same as the Final Rule's requirement of contracting with ASMs, rather than addressing why the MSA specifically allowed cost shifting in three circumstances but nowhere else. This approach violated this Court's constant admonition to analyze the statute as a whole.

The court below then made up two canons of statutory construction that are novel and devasting to any attempt to cabin *Chevron* deference. First, it claimed without citation that "[w]hen [C]ongress says that an agency may require a business to do 'X,' and is silent as to who pays for 'X,' one expects that the regulated parties will cover the cost of 'X.'" This default rule would badly damage Congress's ability to control agencies through the power of the purse. 13a. The dissent in *Loper Bright* is particularly powerful here. NMFS "has identified no other context in which an agency, without express direction from Congress, requires an industry to fund its inspection regime." *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 376 (D.C. Cir. 2022) (J. Walker, dissenting). The First Circuit's invention of a "default rule" that requires regulated entities to pay for government inspectors when Congress does not is novel and destroys many of the guardrails this Court has placed around *Chevron*. The court analogized equipment required by a regulation to the payment of the salaries of government workers. 14a. But obviously the power plant owns the scrubbers. They have value and can be transferred. That is not the case with government agents performing government tasks. It has been observed that the appropriations power is a powerful tool in Congress's efforts to control the executive. *U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) ("The Appropriations Clause is … a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers[.]"); *Cmty. Fin. Servs. Ass'n of*

America, Ltd. v. CFPB, 51 F.4th 616, 637 (5th Cir. 2022), *cert. granted* 215 L. Ed. 2d 104, 143 S. Ct. 978 (2023), and *cert. denied sub nom.* 215 L. Ed. 2d 106, 143 S. Ct. 981 (2023) ("The Appropriations Clause thus does more than reinforce Congress's power over fiscal matters; it affirmatively obligates Congress to use that authority to 'maintain the boundaries between the branches and preserve individual liberty from the encroachments of executive power.'") (internal citations omitted)). The Circuit below erred grievously in creating this unsupported rule in its *Chevron* analysis.

Second, this Court has been firm that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). In this case, Petitioners pointed out not only the cost-shifting in LAPPs and the North Pacific, but also foreign fishing vessel cost shifting, which had the exact same cost-shifting device as the Final Rule ("forced contracting with observers"). The First Circuit explained this away. "With treaties, international agreements, and foreign relations at stake, it makes sense that Congress would have opted for extra specificity." 20a; *and see* 20a n.6 (stating that 1821(h)(6) is different because foreign relations are sensitive and need more specificity). The court below cites no treaty nor foreign relations document that would impel Congress to clearly state for foreigners what costs will be imposed for observers but leave the matter opaque to its own citizens.

These two made-up interpretive canons: 1) allow inspection regimes to be paid for by industry as the default rule; and 2) afford foreign actors in the American economy greater specificity as to their obligations than Americans receive. The First Circuit exposes the futility of trying to cabin *Chevron* in the lower courts by admonitions to be careful and detailed in using all the traditional tools of statutory construction.

B. The Circuits Are Split on the Application of *Chevron* to the MSA and This Case Is an Excellent Vehicle to Resolve Those Differences

The problems with *Chevron* are legion, as members of both the Judiciary and academy have recognized.[9] Among these myriad problems, the two most glaring are the violation of judicial independence and the assault on due process that it presents. *First*, and most importantly, *Chevron* violates the independent judgment of the judiciary. Article III vests "[t]he judicial power of the United States"—and with it, the duty "to say what the law is"—in the independent federal courts. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). *Chevron* abdicates that duty. It forces federal courts to let executive branch agencies authoritatively interpret the law in

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[9] *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); *Michigan v. EPA*, 576 U.S. 743, 760 (2015) (Thomas, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109-10 (2015) (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016).

pending cases—even when the courts themselves disagree with what the agency says. That is nothing less than a massive "judicially orchestrated shift of power[.]" Kavanaugh, *supra*, 129 Harv. L. Rev. at 2150. Neither Congress nor the courts themselves have authority to transfer judicial power to the Executive. That approach is unjustified by the Constitution's text or structure, and unsupported by history.[10]

Second, *Chevron* upends basic principles of constitutional due process of law. It is patently unfair for a court to defer to an agency's interpretation, especially when the agency *itself* is a litigant, before that same court, in the actual case at hand. Judges are supposed to be impartial arbiters of law—not home-team umpires for the executive branch.[11]

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[10] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 128 Yale L.J. 908 (2017); Kristin Hickman & Richard Pierce, Jr., *Administrative Law Treatise* § 3.1 (6th ed. updated Nov. 1, 2021) ("In scores of cases and in every term through 1983, the Supreme Court relied on its own analysis and judgment regarding statutory meaning without regard for the administering agency.")

[11] *See, e.g.*, Hamburger, *supra*; *United States v. Havis*, 907 F.3d 439, 451 n.1 (6th Cir. 2018) (Thapar, J., concurring), *vacated on reh'g en banc*, 927 F.3d 382 (6th Cir. 2019). Underscoring the problem, the United States has taken the remarkable position that it possesses unilateral authority to turn *Chevron* deference *off* whenever it would benefit a private party invoking an agency's otherwise-binding interpretation when litigating against a different government entity. *See* Tr. of Oral Arg. at 61, *Babb v. Wilkie*, No. 18-882 (U.S. Jan. 15, 2020) (Solicitor General arguing that pro-plaintiff EEOC interpretations do not receive

Whether it decides to take this case to abandon *Chevron* entirely or modify or clarify its application, this Court should recognize that there is an effective split in the Circuits as to its use in the context of the MSA, and this case provides an excellent vehicle to resolve that divergence. The eight fishery regions are effectively now governed differently under the MSA not primarily because of the different councils but because of the divergent use of *Chevron* by the federal appellate courts.

This case and *Loper Bright* illuminate the stark difference in interpretation of the MSA under *Chevron* depending on what circuit a fishing vessel finds itself in. It was clear in *Loper Bright* that a circuit split on how to interpret the MSA in light of *Chevron* had developed. *Compare Gulf Fishermens Ass'n v. NMFS*, 968 F.3d 454, 460-61 (5th Cir. 2020) (denying *Chevron* deference when the MSA was silent on aquaculture), *with Loper Bright*, 45 F.4th at 370 (finding ambiguity and, in *Chevron* step two, granting the agencies *Chevron* deference when MSA does not explicitly preclude industry funding of at-sea monitors), *and Lovgren v. Locke*, 701 F.3d 5, 30-31 (1st Cir. 2012) (granting *Chevron* deference on interpretation of LAPPs under the MSA and creating a "strong presumption" of such deference in "notice and comment" regulation under the MSA). This Court should grant *certiorari* to ensure the MSA is interpreted uniformly in all of the nation's fisheries.

Chevron deference in discrimination litigation against federal defendants).

In both *Loper Bright* and the case below, Petitioners cited divergent Fifth Circuit precedent on the use of *Chevron* in the context of silence in the MSA, but in neither case did the majority grapple with the divergence—nor even mention the cases.

The Fifth Circuit Court of Appeals decided *Gulf Fishermens Ass'n* by rejecting agency action under *Chevron* step one. 968 F. 3d at 460-61. The D.C. Circuit in *Loper Bright* did not even mention the case (which the dissent cited). *Loper Bright*, 45 F.4th at 374 n. 4. In *Gulf Fishermens Ass'n*, the Fifth Circuit addressed the question of "whether a federal agency may create an 'aquaculture,' or fish farming, regime in the Gulf of Mexico pursuant to the Magnuson-Stevens Fishery Conservation and Management Act of 1976 …, §§ 1801-83. The answer is no." 968 F.3d at 456. The Fifth Circuit was pellucid that when the MSA "neither says nor suggests that the agency may regulate aquaculture" that "Congress [did] not delegate authority merely by not withholding it." *Id.* The same conclusion would apply to industry-funded observer monitoring in a fishery where Congress has not explicitly provided it as it has in other parts of the statute.

The Petitioners cited *Gulf Fisheries* below, but the First Circuit did not mention it in its analysis of the MSA. Nor did it mention *Mexican Gulf Fishing Co.*, which Appellants-Respondents put before it in a response to a question concerning "necessary and appropriate" language, which can, combined with *Chevron* deference, create even larger administrative overreach.

In *Gulf Fisheries* as here NMFS attempted to use the MSA's "necessary and appropriate" language and *Chevron* to urge that it had the power to impose regulations on aquaculture. *Id.* at 457. NMFS claimed that the statute's use of the word "harvesting" implied aquaculture, but the Fifth Circuit did not bite at that either. *Id.* at 456, 462-63. There was no ambiguity in the statute, and NMFS could not manufacture ambiguity by pointing to broad language. *Id.*

That route is how the agency's proposition—that Congress, without saying so in the statute, allowed the agency to create ASMs and force the industry to contract with these ASMs who solely perform a government function and do nothing for the vessel or its business—should have been addressed. The analysis should have ended at *Chevron* step one, as it would have in the Fifth Circuit, where no ASMs are currently authorized in the Gulf of Mexico. Unfortunately, a disproportionate amount of litigation regarding our country's fisheries are determined in the First, Ninth, and D.C. Circuits, which almost always resort to *Chevron* step two and allow the agencies wide latitude to do what they like to those who make their living fishing at sea.

The First Circuit not only uses *Chevron* to allow agencies to do almost anything, unchecked by searching judicial review, but it also has a presumption that *Chevron* deference is warranted whenever an agency engages in notice-and-comment rulemaking. *See Lovgren*, 701 F.3d at 30-31 (citing *Doe v. Leavitt*, 552 F.3d 75, 79 (1st Cir. 2009)). This policy leaves all those who work in the legendary New

England fishery—America's oldest, most storied—disadvantaged under *Chevron*. *Chevron* deference not only exists when an agency acts, but the Circuit has collapsed the two-step framework and created a *presumption* that it applies in notice-and-comment rulemaking. This obstacle is not in keeping with this Court's admonishments on when and how *Chevron* deference may be invoked. But it is routinely inflicted on fishermen regulated by NMFS and NOAA. *See* 42a (applying *Lovgren* and invoking *Chevron* deference to uphold the ASM regulation challenged here). The agencies have taken full advantage of the defiance predicted by Justice Kavanaugh. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016). Other circuits also routinely abuse *Chevron* under the MSA to bless agency action without textual warrant. *See, e.g., Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1116-18 (9th Cir. 2006) (citing *Chevron* and approving regulation unless the statute "compel[led]" a different result than the agency indicated); *Glacier Fish Co. v. Pritzker*, 832 F.3d 1113, 1120-21 (9th Cir. 2016) (using *Chevron* to allow fees to be imposed on industries as long as MSA is "silent or ambiguous").

Petitioners here, as in *Loper Bright*, are represented *pro bono publico* and are not the sort of business with the resources to persevere to this Court in the face of agency onslaught. The last case the Court took before *Loper Bright* meaningfully interpreting the MSA was nearly two generations ago, shortly before Justice Scalia joined the Court. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986) (interpreting amendments to the MSA regarding whaling). Significantly, that case affirmed

executive action based on the broad grant of authority under *Chevron* and determined to affirm the agency whenever a statute is "silent or ambiguous" on an issue. *Id.* at 233-34.[12]

The fishing industries situated outside the Gulf of Mexico therefore face appellate courts primed and inclined to affirm any agency action imposed on them. This is especially so when those courts deem that the MSA is "silent" on any given issue. The damage is frequent and severe. Granting *certiorari* would enable this Court to review whether those courts' servile devotion to the broadest possible application of *Chevron* is warranted. Such interpretations amount to bias against these parties. *See Buffington v. McDonough*, 143 S. Ct. 14, 18-19 (2022) (Gorsuch, J., dissenting from the denial of cert.) (citing Hamburger, *supra*).

II. INDUSTRY-FUNDED MONITORS ARE NOT "NECESSARY AND APPROPRIATE" AND THERE IS A CIRCUIT SPLIT ON HOW THAT PHRASE IS INTERPRETED UNDER THE MSA THAT THIS COURT SHOULD RESOLVE

A. The Courts Below Misapplied the MSA's "Necessary and Appropriate" Provision to Allow the Agency to Expand Its Power

The First Circuit interprets the language "necessary and appropriate" as "augment[ing] whatever existing powers have been conferred on [the

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[12] The Court mentioned the statute in *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 554 n.22 (1987), but nothing substantive regarding it was established.

agency] by Congress." *Goethel v. Pritzker*, No. 15-CV-497-JL, 2016 WL 4076831 *4 (D.N.H. July 29, 2016), *aff'd sub nom. Goethel*, 854 F.3d 106 (citing *Boston Edison Co. v. FERC*, 856 F.2d 361, 369-70 (1st Cir. 1988)). It was this view of statutory interpretation that both rulings below relied upon to uphold the Final Rule. The district court and the court below explicitly relied on the *Goethel* case that stated the "necessary and appropriate language" of §§ 1853(a)(1)(A) and 1853(b)(14) provided the power to the agencies to impose industry-funded monitoring upon the fishing industry. *See id.* (citing the statute and approving industry-funded monitoring of groundfish fishery). While *Goethel* was not affirmed on that point upon appellate review, it and the concurrence were followed by the courts here. 51a ("Thus, in keeping with the statutory text, the only two on-point decisions (*Loper* and *Goethel*), and the legislative history, the Court concludes that the Secretary reasonably interpreted the MSA to authorize the Omnibus Amendment"); *see also* 13a.

The decision below flies in the face of this Court's interpretation of such language. In *Michigan v. EPA*, 576 U.S. 743, this Court held that the Clean Air Act's requirement that regulations be "appropriate" obligated the agency to ensure a reasonable relationship between costs imposed on the industry as against air quality benefits before promulgating such a regulation. *Id.* at 752 ("One would not say that it is even rational, never mind 'appropriate,' to impose [exorbitant] economic costs in return for [marginal] health or environmental benefits."); *see also Alabama Power Co. v. OSHA*, 89 F.3d 740, 746 (11th Cir. 1996) (interpreting the same "necessary or appropriate"

language); *Nat'l Grain & Feed Ass'n v. OSHA*, 866 F.2d 717, 733 (5th Cir. 1988) ("necessary or appropriate" language "encompasses a specie of cost-benefit justification."). *Nat'l Grain* and *Alabama Power* had language that allowed regulation to be "necessary or appropriate" that is *either* of those two alternatives. The MSA requires that all regulations be *both*. Yet, in keeping with its view that such language augments agency power, the court below failed to analyze the reasonableness or "necessary and appropriate" nature of this regulation that imposed costs of $710 dollars a day and reduced ROI by up to 20%. This is an especially suspect statutory interpretation because explicit cost-shifting provisions in the MSA cap costs at no more than 3%.

B. There Is a Circuit Split Concerning the Meaning of "Necessary and Appropriate" Under the MSA

On the question of what the MSA's "necessary and appropriate" provision means, there is a circuit split. Below, the court virtually ignored the cost of the regulation even though the government, when asked to submit a 28(j) letter with the actual costs of the regulation, could not do so. The court below simply speculated the costs would not be as high as the regulation's forecast. 15a n.5.

The Fifth Circuit's decision in *Mexican Gulf Fishing Co.* contradicts the court's decision below. There, virtually the same Respondents as here implemented an electronic monitoring system rather than a human one. 60 F.4th at 962. The Secretary relied on the same "necessary and appropriate" language as here to implement it. *Id.* at 965-966. The argument was summarily rejected. The "adjectives

necessary and appropriate limit the authorization contained in this provision." *Id.* 965 (citing *Gulf Fishermens Ass'n*) (emphasis in original). According to the Fifth Circuit, this provision requires that the regulation's "benefits reasonably outweigh its costs." *See id.* ; *see also The Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147 (D.D.C. 2005) ("[NMFS's] discretion is tempered by substantive elements of the [MSA] that require all regulations to be 'necessary and appropriate[.']"); *see also Hawaii Longline Ass'n v. NMFS*, 281 F. Supp. 2d 1, 3 (D.D.C. 2003) ("[MSA's] substantive requirements demand that an FMP be 'necessary and appropriate for the conservation and management of the fishery[.]'")(quoting § 1853(a)(1)(A)); *accord Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1139-40 (W.D. Wash. 2000).

The First Circuit holds that the phrase "necessary and appropriate" augments the powers granted to the agencies under the MSA. The Fifth Circuit holds the same term limits the powers granted to the agencies. The First Circuit upheld an expensive and textually bereft grant of extraordinary power involving a human inspection regime while the Fifth Circuit struck down an expensive and textually bereft automatic inspection regime. A clearer split in the meaning of words in a statute cannot be imagined. And that difference has enormous consequences for the fishing industry which operates on every coast. The question is of enormous import as that provision, as *Goethel* noted, appears in other statutes and can be interpreted in *paria materia* in each. *See Direct Commc'ns Cedar Valley, LLC v. FCC*, 753 F.3d 1015, 1047 (10th Cir. 2014) (using "necessary and appropriate" language to bolster the FCC's

interpretation of a statute as "an implicit grant of authority"); *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013) (interpreting "necessary and appropriate" as a "broad authorization"); *Forest Guardians v. USFWS*, 611 F.3d 692, 697 n.6 (10th Cir. 2010) (interpreting "necessary and appropriate" as granting "more regulatory leeway"); *Shell v. HUD*, 355 Fed. Appx. 300, 306 (11th Cir. 2009) (interpreting "necessary and appropriate" in agency regulations as a commitment to agency discretion "by law" and stating a court "would have no meaningful standard against which to judge the agency's exercise of discretion."); *United States v. Colon Munoz*, 292 F.3d 18, 20-21 (1st Cir. 2002) (interpreting "necessary and appropriate" as "broad authority"); *United States v. District of Columbia*, 669 F.2d 738, 752-753 n.7 (D.C. Cir. 1981) (MacKinnon, J. concurring in part and dissenting in part) (interpreting "necessary and appropriate" as granting "exceptionally broad discretion").

The question of what "necessary and appropriate" means—in the MSA and more broadly—is of enormous import. This case provides a good vehicle for addressing it, and this Court should grant the petition for *certiorari* to do so.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant this petition, or grant and hold it, or combine it with *Loper Bright Enterprises, Inc., et al.*, No. 22-451, as the arguments regarding judicial independence made here have been persuasive in having other high courts abandon their own deference doctrine precedents. *See generally TWISM Enterprises, L.L.C. v. State Bd. of Registration for Pro.*

Engineers & Surveyors, — N.E. 3d —, 2022-Ohio-4677 (Ohio 2022).

Respectfully,

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