No. 22-451

In the Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL., PETITIONERS

v.

GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the National Marine Fisheries Service was acting within the scope of its delegated statutory authority under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, when the agency adopted a rule in 2020 under which certain vessels fishing in the Atlantic herring fishery may be required to hire third-party observers, who are carried on the boats to collect data for fishery conservation and management purposes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 45 F.4th 359. The opinion of the district court (Pet. App. 38-114) is reported at 544 F. Supp. 3d 82.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2022. The petition for a writ of certiorari was filed on November 10, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.*, after finding that overfishing of the fisheries off the coasts of the United States threatened "the food supply, economy, and health

of the Nation." 16 U.S.C. 1801(a)(1); see 16 U.S.C. 1801(a)(1)-(4). The Act designates the Secretary of Commerce to develop a comprehensive fishery management program to ensure conservation of finite fishery resources for continuing use. See 16 U.S.C. 1801(a)(6), 1802(39), 1854, 1855(d).

The "[k]ey to the statutory scheme is the promulgation and enforcement of 'fishery management plans,'" Pet. App. 2, which are designed "to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability" of fisheries in U.S. waters, 16 U.S.C. 1853(a)(1)(A). The Magnuson-Stevens Act establishes eight regional fishery management councils, 16 U.S.C. 1852(a), to advise the Secretary in the "preparation, monitoring, and revision of such plans," 16 U.S.C. 1801(b)(5). The fishery management plans must be consistent with certain national standards for conservation and management, but the Act also leaves discretion to the regional councils, who are knowledgeable about local conditions, to propose plans appropriate for a given fishery. 16 U.S.C. 1851(a), 1852(b), 1853(a) and (b).

When a regional council develops a plan or an amendment to a plan, the plan or amendment and any proposed implementing regulations are submitted to the Secretary for review. 16 U.S.C. 1853(c), 1854(a). The Secretary solicits public comment on a regional council's proposed plans, amendments, and regulations. 16 U.S.C. 1854(a)(1)(B) and (b)(1). The Secretary may approve, disapprove, or partially approve a plan or amendment after reviewing it and taking into account public comments. 16 U.S.C. 1854(a)(3). For proposed regulations, the Secretary must evaluate whether the

regulations are "consistent with the fishery management plan," the Magnuson-Stevens Act, and other applicable law. 16 U.S.C. 1854(b)(1). If the Secretary approves a regional council's proposed regulations, the Secretary actually promulgates them, not the regional council. 16 U.S.C. 1854(b)(3). The Secretary is responsible for enforcing any approved fishery management plan or plan amendment and may adopt "such regulations * * * as may be necessary to discharge such responsibility or to carry out any other provision" of the Magnuson-Stevens Act. 16 U.S.C. 1855(d). By delegation, the National Marine Fisheries Service (NMFS) now exercises the Secretary's authority to approve and enforce plans under the Act. See Pet. App. 2.

b. This case concerns the Magnuson-Stevens Act's provisions for the collection of scientific data. In enacting the Act, Congress found that "[t]he collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States." 16 U.S.C. 1801(a)(8). Congress also declared a policy of assuring that the fishery management practices adopted under the Act reflect "the best scientific information available." 16 U.S.C. 1801(c)(3). Accurate and reliable information about existing conditions in regulated fisheries is important both for determining the appropriate conservation measures to put in place and for ensuring that existing measures are being honored in practice. The Act provides that conservation measures in a fishery management plan must be based on "the best scientific information available," 16 U.S.C. 1851(a)(2), and that such a plan must specify "the pertinent data which shall be submitted to the Secretary" with respect to various

metrics, such as "catch by species in numbers of fish or weight," 16 U.S.C. 1853(a)(5).

"[F]or the purpose of collecting data necessary for the conservation and management" of a regulated fishery, the Magnuson-Stevens Act also provides that a fishery management plan approved by the Secretary 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." 16 U.S.C. 1853(b)(8). The Act specifies, however, that a vessel cannot be required to carry an observer "if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized." *Ibid.* The term "observer" means "any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits" under the Act, 16 U.S.C. 1802(31), and the term encompasses both governmental personnel and private parties engaged in observer functions, see 16 U.S.C. 1802(36) (defining "person").

2. In 2017, after several years of development and public consultations, the New England Fishery Management Council finalized a proposal to amend the fishery management plan for the Atlantic herring fishery to create an "industry-funded monitoring" program to collect additional data for fishery conservation and management purposes. 83 Fed. Reg. 47,326, 47,326 (Sept. 19, 2018). Specifically, the amendment proposed to "implement industry-funded monitoring in the Atlantic herring fishery * * * to better understand the frequency of discarding in the herring fishery, as well as improve the tracking of the incidental catch of haddock

and river herring/shad catch against their catch caps." *Id.* at 47,327. The proposal also included certain "omnibus" amendments to create a framework for considering whether to adopt similar industry-funded monitoring programs (in future amendments) for other fisheries, but it proposed to in fact create such a program "only * * * in the Atlantic herring fishery." *Id.* at 47,326. In 2018, NMFS solicited public comment on the proposed plan amendment. See *ibid.* NMFS also published for comment proposed regulations to implement the amendment. 83 Fed. Reg. 55,665, 55,675-55,687 (Nov. 7, 2018). NMFS approved the amendment in 2018 and issued final regulations to implement it in 2020. See 85 Fed. Reg. 7414, 7414 (Feb. 7, 2020).

The plan amendment establishes a "coverage target" for the Atlantic herring fishery of having industry-funded monitoring on 50% of declared herring fishing trips by certain categories of vessels. 85 Fed. Reg. at 7417. Each year, the coverage target could be satisfied in whole or in part by government-funded monitoring that already occurs under a separate regulatory framework known as the standardized bycatch reporting methodology. *Ibid.*; see 50 C.F.R. 648.18. But to the extent that monitoring that already occurs for those purposes does not satisfy the 50% coverage target, the amendment contemplates that industry-funded monitoring would fill that gap. 85 Fed. Reg. at 7417. Under the implementing regulations, NMFS selects which declared fishing trips must have monitoring coverage. *Id.* at 7417-7418; see 50 C.F.R. 648.11(m)(2) and (3). The vessel's owners are then required to "arrange for monitoring by an observer from a monitoring service pro-

vider approved by NMFS" and to "pay [the] service provider[]" for services rendered on a given trip. 50 C.F.R. 648.11(m)(4)(i) and (iii).[1]

NMFS, however, is responsible for paying the "administrative costs" of the industry-funded monitoring program—including the cost of training and certifying monitors, evaluating their performance, and processing the data that they collect. 85 Fed. Reg. at 7414. NMFS may pay those expenses only if and to the extent that federal funds are available to do so. *Id.* at 7415. Accordingly, the industry-funded monitoring program—including the portions actually funded by industry, rather than NMFS—is subject to the availability of federal funds. See, *e.g.*, *id.* at 7416 (explaining that, "[w]hen there is no Federal funding available to cover NMFS cost responsibilities," then "no industry-funded monitoring programs [will] operate that year").

In addition to NMFS's cost responsibilities, the 2020 regulations provide for certain waivers, exemptions, and technological alternatives designed to make any industry-funded monitoring that occurs "affordable * * * for the herring fishery." 85 Fed. Reg. at 7417. For example, vessels need not procure observer services on trips intended to land less than 50 metric tons of Atlantic herring, 50 C.F.R. 648.11(m)(1)(ii)(D), or if the vessel owner shows that monitoring services are unavailable for a particular trip, 50 C.F.R. 648.11(m)(4)(ii). In some circumstances, "midwater trawl vessels" are exempt from monitoring obligations and, if not exempt, may elect to substitute electronic monitoring and

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[1] The regulatory text quoted here reflects amendments that took effect on January 9, 2023. 87 Fed. Reg. 75,852, 75,885 (Dec. 9, 2022). The changes made by those amendments to Section 648.11(m)(4) are not material to the questions presented here.

portside sampling for at-sea monitoring to save money. 85 Fed. Reg. at 7418-7420.[2]

The agency found that those measures, which the New England Council had recommended, would appropriately "balance[] the benefit of additional monitoring with the costs associated with" it. 85 Fed. Reg. at 7425. The agency estimated that, if the 50% coverage target were achieved in a given year, covered vessels "would incur monitoring costs for an additional 19 days at sea per year, at an estimated maximum cost of $710 per sea day." *Id.* at 7428. The agency acknowledged that prior analyses had suggested that the cost of at-sea monitoring coverage could reduce annual returns-to-owner for covered vessels by "up to 20 percent." *Id.* at 7420. The agency also found, however, that per-vessel costs could be considerably lower under the various exemptions and waivers as finally promulgated. For example, the agency determined that the exemption for declared trips seeking to land less than 50 metric tons of catch "has the potential to result in a less than 5 percent reduction in annual" returns-to-owner. *Id.* at 7430.

The New England Council's monitoring program was prompted in part by concerns about overfishing. The stock in the Atlantic herring fishery was found in 2018 to be "approaching an overfished condition" and, by 2020, to be in fact "overfished"—a term of art indicating that the stock had fallen to levels jeopardizing its capacity to continue producing sustainable yields. 86 Fed. Reg. 17,081, 17,082 (Apr. 1, 2021); see 16 U.S.C.

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[2] "Midwater" trawling refers to a fishing practice in which the fishing vessel drags a trawl (a type of net) through the water column behind the boat, as opposed to near the surface of the water or along the ocean floor. See NOAA Fisheries, *Fishing Gear: Midwater Trawls* (June 1, 2021), perma.cc/RL2K-CGFF.

1802(34) (defining "overfished"). As of November 2022, the Atlantic herring remains overfished and is "[s]ignificantly below [its] target population level" for conservation and management purposes under the Act. NOAA Fisheries, *Species Directory: Atlantic Herring* (last updated Jan. 12, 2023), perma.cc/46Z2-88B8.

3. Petitioners are a "collection of commercial fishing firms headquartered in southern New Jersey," with permits to fish in the Atlantic herring fishery using vessels potentially subject to the rule. Pet. App. 44 (citation omitted). In 2020, petitioners brought this action challenging the rule in federal district court in the District of Columbia. *Id.* at 49. Petitioners invoked a provision of the Magnuson-Stevens Act authorizing judicial review of agency rulemaking under the Act, generally under the standards prescribed by the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See Compl. ¶¶ 106-107; 16 U.S.C. 1855(f)(1). As relevant here, petitioners alleged that NMFS lacked statutory authority to adopt the rule insofar as the rule requires vessel owners, rather than NMFS, to pay for the third-party monitoring services required under the rule. See Compl. ¶¶ 105-112. Petitioners brought suit before the rule had taken effect and did not allege that they would imminently be compelled to pay for monitoring services under the rule. Cf. Compl. ¶ 97.

The district court rejected petitioners' challenge to the final rule on cross-motions for summary judgment. Pet. App. 38-114. Applying the framework set forth in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), which both parties had invoked, the court determined that the Act unambiguously authorizes NMFS to adopt a rule requiring industry-funded monitoring in the Atlantic herring fishery and that, even if there were any

"ambiguity in the statutory text," the agency's understanding of the scope of its authority "is a reasonable reading" of the Act. Pet. App. 69; see *id.* at 59-69.

The district court observed that the Act "explicitly provides" that a fishery management plan may require that observers "'be carried on board a [domestic] 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.'" Pet. App. 61 (quoting 16 U.S.C. 1853(b)(8)). The court also observed that, in a neighboring provision, the Act states that a fishery management plan shall "contain the conservation and management measures * * * 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." *Id.* at 61-62 (quoting 16 U.S.C. 1853(a)(1)(A)). Emphasizing that the Act "expressly authorizes" requiring vessels to carry observers for data-collection purposes, the court concluded that the foregoing provisions "[t]aken together" also establish that vessel owners may be required to pay for those observers when doing so is necessary and appropriate to the conservation and management of the fishery. *Id.* at 62.

Petitioners had contended that the statute was "silent" about whether vessel owners could be required to pay for monitoring services. Pet. App. 63. The district court rejected that characterization. In addition to the agency's "express[]" authority under the necessary-and-appropriate provision, *id.* at 62, the court explained that a separate provision in the Act "recognizes the existence" of at-sea monitoring programs in which vessel owners are required to hire and pay monitoring service

providers, because that provision authorizes the agency to sanction vessel owners that fail to make timely payments on their contracts with such providers. *Id.* at 65; see 16 U.S.C. 1858(g)(1) (authorizing various sanctions, such as permit revocation, "[i]n any case in which * * * (D) any payment required for observer services provided to or contracted by an owner or operator * * * has not been paid and is overdue"). The court also determined that the agency's express authority to establish certain fee-based monitoring programs in other circumstances—for example, for certain foreign fishing vessels—did not create any negative inference that the agency lacked authority to adopt the final rule, noting that such "fee-based monitoring programs" are materially different from the final rule's requirement that vessel owners contract directly with monitoring service providers. Pet. App. 66-67.

The district court also rejected petitioners' various other challenges to the rule, which they do not renew in this Court. Among other things, the district court found that the final rule does not violate any "statutes governing agency expenditures and obligations," Pet. App. 69, and that the agency had appropriately considered the potential costs to regulated parties of the industry-funding program and possible alternatives, *id.* at 75-79.

4. The court of appeals affirmed, with Judge Walker dissenting. Pet. App. 1-37. As relevant here, the court agreed with the district court that the agency was acting within the scope of its statutory authority when it adopted the industry-funded monitoring program for the Atlantic herring fishery. *Id.* at 5.[3]

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[3] The panel of the court of appeals that heard argument in the case on February 8, 2022, included now-Justice Jackson. Pet. App.

The court of appeals emphasized that Section 1853(b)(8) "makes clear" that NMFS "may direct vessels to carry at-sea monitors." Pet. App. 6. In the court's view, the only issue left "unanswered" by the text of Section 1853(b)(8) itself is whether the agency "must pay for those monitors" or may instead "require industry to bear the costs." *Ibid.* The government had argued that "two additional features of the Act, when paired with Section 1853(b)(8)," demonstrate that Congress authorized NMFS to require industry-funded monitoring—pointing to the provisions, discussed above, regarding the agency's authority to prescribe necessary-and-appropriate measures to effectuate a fishery management plan and its authority to sanction vessel owners who fail to pay for monitoring services. *Ibid.*; see *id.* at 6-7; 16 U.S.C. 1853(a)(1)(A) and (b)(14), 1858(g)(1)(D).

The court of appeals explained that "these provisions of the Act signal" that NMFS "may approve fishery management plans that mandate at-sea monitoring." Pet. App. 7. The court also observed that, "[w]hen an agency establishes regulatory requirements, regulated parties generally bear the costs of complying with them." *Id.* at 7-8. But the court viewed the statutory scheme as not "wholly unambiguous" on whether "the [agency] may require fishing vessels to incur costs associated with meeting the 50-percent monitoring coverage target." *Id.* at 8. The court therefore limited its holding to the determination, at "Step Two of the *Chevron* analysis," that the agency's interpretation of the Act as authorizing the final rule is at least "reasonable." *Id.* at 13-14.

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1 n.*. She was later replaced on the panel by Chief Judge Srinivasan and "did not participate in [the panel's] opinion." *Ibid.*

Like the district court, the court of appeals was unpersuaded by petitioners' argument that three other provisions of the Act, "which create monitoring programs with some similarities" to the final rule, "give rise by negative implication to the inference that the Act unambiguously deprives [NMFS] of authority to create additional industry-funded monitoring requirements." Pet. App. 9 (discussing 16 U.S.C. 1821, 1853a(e), and 1862). After examining the other monitoring programs invoked by petitioners, see *id.* at 9-12, the court concluded that "Congress's provision for industry-funded monitoring in three unique situations" does not suggest that Congress "eliminate[d] the [agency's] authority to create industry-funded monitoring programs in any other situation," *id.* at 16.

Judge Walker dissented. Pet. App. 21-37. He acknowledged that NMFS has express statutory authority to mandate that monitors "be carried" on regulated vessels, *id.* at 28 (citation and emphasis omitted), and that "[r]egulatory mandates * * * often carry compliance costs," *id.* at 29. He nonetheless would have held that the statutory scheme "unambiguously" withholds from NMFS the authority to require regulated parties to pay for monitoring services. *Id.* at 27.

ARGUMENT

Petitioners contend (Pet. 16-28) that NMFS exceeded its authority under the Magnuson-Stevens Act when the agency adopted a rule under which the owners of certain vessels engaged in fishing in the Atlantic herring fishery may be required to hire third parties to provide onboard monitoring services to collect data for conservation and management purposes. That contention does not warrant this Court's review. As the district court correctly concluded, the Magnuson-Stevens Act

unambiguously authorizes the agency to adopt the monitoring provision at issue here; the court of appeals viewed the statute as less clear on that point but nonetheless agreed that the agency's interpretation is at least reasonable. In any event, that is the best reading of the Act, and the lower courts correctly rejected petitioners' challenge to the agency's authority. The decision below does not conflict with the decision of any other court of appeals or otherwise warrant further review. The decision below also lacks practical significance at this time. Petitioners have not identified a single fishing trip for which they have been required to pay for monitoring services under the rule. NMFS also recently announced that, due to lack of federal funding to cover NMFS's cost responsibilities, the monitoring coverage requirement established by the rule will be suspended on April 1, 2023, consistent with the provisions in the rule regarding lack of federal funding. See 50 C.F.R. 648.11(g)(4)(i).

Petitioners' alternative request (Pet. 28-33) to modify or overrule *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), also does not warrant further review. Petitioners have not carried their burden of demonstrating any special justification that could plausibly warrant such a departure from *stare decisis* principles, and this case would be an unsuitable vehicle for reconsidering *Chevron* in any event. This Court has recently and repeatedly denied petitions for writs of certiorari presenting similar *Chevron* questions. See, *e.g.*, *Buffington* v. *McDonough*, 143 S. Ct. 14 (2022) (No. 21-972); *Guedes* v. *ATF*, 140 S. Ct. 789 (2020) (No. 19-296); *Gilmore* v. *Holland*, 139 S. Ct. 2749 (2019) (No. 18-1328); *United Parcel Serv., Inc.* v. *Postal Regulatory Comm'n*,

139 S. Ct. 2614 (2019) (No. 18-853). The same course is warranted here.

1. The judgment below is correct. The text, context, and history of the relevant statutory provisions demonstrate that NMFS was acting within the scope of its delegated authority when it adopted a rule under which vessel owners may be required to retain third-party monitoring services in certain circumstances.

a. Under the Magnuson-Stevens Act, a fishery management plan "may * * * require that one or more observers be carried on board a vessel of the United States [*i.e.*, a domestic 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). By delegation, NMFS exercises the Secretary's authority to adopt such plans. Accordingly, the agency has express statutory authority to require that regulated vessels "carry" onboard "observers" to collect data for conservation and management purposes. *Ibid.* The scientific data that such observers collect can be critical to fulfilling the Act's purposes. Indeed, Congress declared in the Act that the "collection of reliable data is essential" to effective fishery conservation and management. 16 U.S.C. 1801(a)(8); see pp. 3-4, *supra*.

The observers the agency may require regulated vessels to carry need not be federal officers or employees. "[O]bserver" is a functionally defined term under the Act, referring to persons "required or authorized to be carried on a vessel for conservation and management purposes." 16 U.S.C. 1802(31); cf. 16 U.S.C. 1802(32) (defining "observer information"). By contrast, the Act uses the term "officer" elsewhere to refer to governmental personnel authorized to enforce the Act. See,

e.g., 16 U.S.C. 1857(1)(D)-(F), 1861(b); cf. 16 U.S.C. 1857(1)(L) (prohibiting assaults against "any observer on a vessel * * * *or* any data collector employed by [NMFS]") (emphasis added).

NMFS was therefore plainly acting within the scope of its statutory authority when it adopted a rule requiring regulated vessels to carry non-governmental "observer[s]" for data-collection purposes. 50 C.F.R. 648.11(m)(1)(i). Petitioners never squarely contend otherwise in the petition. Petitioners only challenge the subsidiary requirement that, when a vessel is selected for monitoring coverage under the rule (and the vessel does not qualify for an exemption or receive a waiver), the vessel owner, not NMFS, "shall pay [the] service provider[] for monitoring services" for that particular trip. 50 C.F.R. 648.11(m)(4)(iii). Petitioners' challenge lacks merit. The Act, through a number of its provisions, authorizes NMFS to adopt a requirement that the vessel owner or operator hire a monitor to provide onboard data collection on covered trips.

To start, the term "carry" in Section 1853(b)(8) is not naturally read to suggest that the government must always pay for what is carried on board a ship. 16 U.S.C. 1853(b)(8). If the statute authorized NMFS to require regulated vessels to "carry" life-preservers, *ibid.*, it would be a nonstarter for a vessel owner to contend that the government must pay for the life-preservers. Yet that is effectively petitioners' textual argument here—one they never attempt to substantiate with any analysis of the plain meaning of the term "carry."

Moreover, if Congress had merely intended to authorize the agency to require that regulated vessels *provide space* for observers that the government itself would furnish, it would have used the term "quarter" or

an equivalent—as it did later in Section 1853(b)(8). See 16 U.S.C. 1853(b)(8) (providing for an exception under which a vessel cannot be "required to *carry*" an observer if "the facilities of the vessel for the *quartering* of an observer" are so inadequate or unsafe as to jeopardize the observer's health or safety) (emphases added); cf. 16 U.S.C. 1827(b) (providing that U.S. observers must be "stationed" on foreign vessels in some circumstances). The use of such disparate language in close proximity suggests that the term "carry" in Section 1853(b)(8) connotes more than merely quartering or stationing an observer present at the government's expense. 16 U.S.C. 1853(b)(8); see *Russello* v. *United States*, 464 U.S. 16, 23 (1983). And that inference is all the stronger here because, as explained above, the statutory term "observer" encompasses non-governmental personnel.

The Act also authorizes NMFS to promulgate regulations that the agency deems "necessary or appropriate for the purposes of * * * implementing a fishery management plan." 16 U.S.C. 1853(c)(1); accord 16 U.S.C. 1853(b)(14) (providing that a fishery management plan 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 agency may reasonably conclude—and did conclude here—that it is "necessary" and "appropriate," *ibid.*, to require that regulated vessels retain monitoring services when the agency has determined that monitoring coverage is warranted on particular trips.

Petitioners contend (Pet. 24-25) that the agency's authority to adopt necessary and appropriate measures to

effectuate a fishery management plan does not encompass requiring vessel owners to pay for monitoring services, but petitioners do not identify any alternative meaning of the terms "necessary" and "appropriate" that would support such a limiting construction. Petitioners err in contending (Pet. 25) that any "surrounding" language supports their narrow view of the agency's authority. The surrounding language that is most pertinent to the question presented here is the agency's express authority to require vessels to "carry" observers. 16 U.S.C. 1853(b)(8). The industry-funding requirement is necessary and appropriate to the agency's exercise of its specific authority under Section 1853(b)(8), and sustaining the rule on that basis would not imply that, for example, the agency could require vessel owners to "drive regulators to their government offices." Pet. 26 (quoting Pet. App. 31 (Walker, J., dissenting)). Such a fanciful mandate would be neither necessary nor appropriate to effectuate the agency's authority to require carrying observers at sea.

Any lingering doubt about the agency's authority is eliminated by 16 U.S.C. 1858(g)(1)(D), which authorizes the agency to impose sanctions when "any payment required for observer services provided to or contracted by an owner or operator" of a regulated vessel "has not been paid and is overdue." That provision textually confirms that NMFS may require vessel owners to "contract[]" and "pa[y]" for "observer services." *Ibid.* It also supports a structural inference about how the statute as a whole operates. The agency may require vessel owners to pay for monitoring services under Section 1853(b)(8) and may sanction them under Section 1858(g)(1)(D) when they fail to pay for the required ser-

vices. The two provisions thus work hand-in-hand. Petitioners contend (Pet. 26) that Section 1858(g)(1)(D) merely reflects that the agency may require industry-funded monitoring under other statutory provisions, discussed below, which are not applicable here. But Section 1858(g)(1)(D) is not limited to those other provisions and instead naturally complements Section 1853(b)(8) as well. See Pet. App. 11-12.

The statutory history also supports the agency's reading. NMFS created an industry-funded monitoring program for two fishery management plans in the North Pacific region in a 1990 rulemaking. Pet. App. 68; see 55 Fed. Reg. 4839, 4840, 4848 (Feb. 12, 1990). Later that same year, Congress acted to place the agency's authority to create such programs beyond any doubt by enacting Section 1853(b)(8). Fishery Conservation Amendments of 1990 (1990 Amendments), Pub. L. No. 101-627, § 109(b)(2), 104 Stat. 4448; see S. Rep. No. 414, 101st Cong., 2d Sess. 20 (1990) (Senate Report) (explaining that adding Section 1853(b)(8) would "clarify the existing authority * * * to require that observers be carried on board").[4] Congress was plainly aware of the agency's then-recent rulemaking, which included an industry-funding requirement, and Congress acted to confirm the agency's authority—not to curtail it. Cf. H.R. Rep. No. 393, 101st Cong., 1st Sess. 28 (1989) (stating that the amendment would make "explicit" the au-

[4] In the same law, Congress also enacted an express statutory basis for certain fee-based observer programs in North Pacific fisheries. 1990 Amendments § 118(a), 104 Stat. 4457-4459; see Pet. 19. But the legislative record confirms that the new Section 1853(b)(8) was designed to provide more generalized authority for observer programs like the one in the 1990 rulemaking. Senate Report 20.

thority for observer programs "already" in place). Congress further confirmed the agency's authority by adding Section 1858(g)(1)(D) to the statutory scheme in 1996, giving the agency express authority to sanction a vessel owner that fails to pay for observer services for which the vessel owner has contracted. Sustainable Fisheries Act, Pub. L. No. 104-297, § 114(c), 110 Stat. 3599; see Pet. App. 68-69 (citing additional congressional materials).

b. Petitioners' counterarguments lack merit. Petitioners principally contend (Pet. 16) that the Act is "silent[]" about the agency's authority to require that vessel owners pay for monitoring services. As demonstrated above, however, the Act in fact speaks to that issue in multiple places—including by authorizing the agency to require that vessels carry observers onboard to collect data, by defining "observer" broadly to include non-governmental personnel, by authorizing the agency to adopt measures necessary and appropriate to carry out a fishery management plan, by emphasizing the importance of data collection, and by empowering the agency to sanction vessel owners that fail to pay for monitoring services. See pp. 14-18, *supra*.

In places, petitioners suggest (*e.g.*, Pet. 16) that the Act should be deemed to be "silent[]" on the agency's authority as long as no single provision "explicitly" states that the agency may adopt a provision for industry-based monitoring for the Atlantic herring fishery. But just as a reviewing court fails to apply this Court's *Chevron* precedents faithfully if it "find[s] ambiguity immediately and engage[s] in 'reflexive deference,'" Pet. 32 (quoting *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring)), so too it would be im-

proper to declare a statute "silent" on a key issue without first applying all of the traditional tools of statutory interpretation. And here, the application of those tools makes clear that Congress has in fact spoken and has authorized the challenged rule.

Petitioners further contend (Pet. 16-19) that three other provisions in the Act authorizing certain fee-based observer programs create a negative inference that the agency lacks authority to require industry-funded monitoring outside those specific programs. The lower courts correctly rejected that argument. See Pet. App. 9-11, 66-67. The other provisions invoked by petitioners contain separate grants of authority to establish fee-based programs to support monitoring or data-collection on foreign vessels, in certain limited-access programs, and in North Pacific fisheries. See 16 U.S.C. 1821(h)(1)(A) and (6)(C) (providing for the agency to establish a program to station federally funded "United States observer[s]" on certain foreign vessels and, in some circumstances, a supplementary observer program supported by "a reasonable schedule of fees" paid by owners of foreign vessels); 16 U.S.C. 1853a(e) (providing that a regional council may create "a program of fees paid by" regulated parties that participate in "a limited access privilege program" to cover the costs of the program, including "data collection"); 16 U.S.C. 1862(a) (providing that a fishery management plan for a North Pacific fishery may "require[] that observers be stationed on fishing vessels" and may "establish[] a system * * * of fees * * * to pay for the cost of implementing the plan") (footnote omitted). The North Pacific fisheries provision was enacted by the 1990 Amendments discussed above. See p. 18 & n.4, *supra*.

Those provisions belie any suggestion that it would be "extraordinary" (Pet. 1) for Congress to provide for regulated parties to bear the cost of at-sea monitoring. In fact, Congress has done so explicitly in multiple places in the statutory scheme. But when Congress conferred that regulatory authority in the three provisions invoked by petitioners, Congress did not implicitly disable NMFS from adopting the observer program at issue here under the agency's other grants of authority. The fee-based programs Congress authorized elsewhere in the statutory scheme are meaningfully different from this program. Fees under those programs are generally paid by regulated parties to the federal government into designated funds established in the Treasury. See 16 U.S.C. 1821(h)(5), 1862(d); see also 16 U.S.C. 1853a(e) (cross-referencing fund established under 16 U.S.C. 1854(d)(2)). Here, by contrast, to the extent that vessel owners are required to have monitoring coverage on a particular trip under the rule, vessel owners must themselves procure and pay for those monitoring services by hiring a third party.

In that respect, the rule imposes compliance costs on regulated parties that are no different from other costs clearly contemplated in the statutory scheme—as NMFS explained in rejecting the same argument about the fee-based programs during the rulemaking process. See 85 Fed. Reg. at 7422 (explaining that "industry costs are not 'fees'" as that term is used in the Act). Other agency regulations "require fishing vessels to install vessel monitoring systems for monitoring vessel positions and fishing, report catch electronically, fish with certain gear types or mesh sizes, or ensure a vessel is safe before an observer may be carried on a vessel." *Ibid.* Vessel owners frequently "pay costs to third-

parties for services or goods in order to comply" with those and other regulatory requirements. *Ibid.* The final rule is not materially different. Indeed, the rule provides that vessels may substitute electronic monitoring technology (and portside sampling) for at-sea observers in some circumstances. See *id.* at 7420.

To the extent that petitioners would analogize the rule to a requirement to pay the salaries of government inspectors (*e.g.*, Pet. 7, 14-15, 21), petitioners are mistaken. As already explained, the monitors contemplated by the final rule are not governmental personnel. See pp. 14-15, *supra*; cf. Pet. 8 n.4 (acknowledging that the monitors are "government-approved third parties with whom vessels must directly contract"). The at-sea monitors required by the rule perform an important data-collection function under the regulatory scheme, but they are not themselves authorized to enforce federal law. And requiring vessel owners to pay for the observers' services is not materially different from requiring vessel owners to pay for electronic monitoring technology or other gear to perform analogous data-collection functions.

Petitioners' constitutional arguments (Pet. 22-23) are also unavailing. Petitioners did not press any constitutional challenge to the final rule in the court of appeals, that court did not address any such challenge, and petitioners' arguments are therefore not properly before this Court. See, *e.g.*, *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1293 n.2 (2017). In any event, the final rule does not raise any separation-of-powers concerns. An agency does not "evade" the appropriations process (Pet. 23) when it exercises its statutory authority to impose requirements that cause regulated parties to incur compliance costs, including costs associated with hiring data

collectors—or accountants or lawyers or myriad other professionals whose services may be required to comply with federal law.

c. The court of appeals took the view that the statutory scheme is not "wholly unambiguous" with respect to NMFS's authority to adopt a rule requiring vessel owners to hire onboard monitoring services for certain trips. Pet. App. 8. The court instead ultimately upheld the final rule as reflecting at least a "reasonable" construction of the Act under *Chevron*. *Id.* at 16; see *id.* at 5 ("Although the Act may not unambiguously resolve whether [NMFS] can require industry-funded monitoring, the Service's interpretation of the Act as allowing it to do so is reasonable."). For the reasons set forth above, the court erred to the extent it perceived the Magnuson-Stevens Act as ambiguous about the agency's authority to adopt the final rule. But any analytical error in that regard does not warrant this Court's further review. The court of appeals' bottom-line conclusion accords with the best reading of the Act and, in any event, was an unremarkable application of settled *Chevron* principles.

2. Petitioners do not identify any substantial basis for further review. The decision below does not conflict with the decision of any other court of appeals. The agency's authority to adopt rules requiring analogous monitoring has been challenged in two other cases and upheld each time (with one appeal still pending in the First Circuit). See *Relentless Inc.* v. *U.S. Dep't of Commerce*, 561 F. Supp. 3d 226, 233-238 (D.R.I. 2021) (upholding the same rule's provisions for industry-funded monitoring as reflecting a reasonable interpretation of the Act under *Chevron*), appeal pending, No. 21-1886 (1st Cir. argued Sept. 13, 2022); *Goethel* v. *Pritzker*, No.

15-cv-497, 2016 WL 4076831, at *4-*6 (D.N.H. July 29, 2016) (upholding an earlier program because the Act "authorize[s] industry funding of monitors"), aff'd on other grounds, 854 F.3d 106 (1st Cir. 2017), cert. denied, 138 S. Ct. 221 (2017). Petitioners would discount (Pet. 34-35) those prior cases as procedurally infirm, but in fact the district courts in both *Relentless* and *Goethel* reached the merits and rejected comparable challenges to the agency's authority. And at all events, the lack of any current division of authority is reason enough to deny the petition. Cf. Sup. Ct. R. 10.

Petitioners also fail to show that their first question presented is "exceptionally important." Pet. 14. Petitioners repeatedly invoke (*e.g.*, Pet. 16, 33) the specter of being compelled to pay 20% of their financial returns for monitoring services. But the 20% figure discussed in the rulemaking was explicitly an upper boundary of the agency's estimate of the potential impacts of the rule. See 85 Fed. Reg. at 7420 ("Analysis in the [environmental assessment] estimates that at-sea monitoring coverage associated with the 50-percent coverage target has the potential to reduce annual [returns-to-owner] for vessels with Category A or B herring permits up to 20 percent."). The agency also explained that the final rule's waiver provisions could result in impacts on returns-to-owner of "less than 5 percent" for qualifying vessels, *id.* at 7425, and that the rule contains a number of other provisions to "minimize the impact of paying for additional [monitoring] coverage," *id.* at 7430. Among other things, NMFS is responsible for the "administrative costs" of the industry-funded monitoring program, such as training and certification of monitoring service providers. *Id.* at 7415; see pp. 5-7, *supra*.

In practice, the financial impact of the program has been limited. Petitioners have not identified, to date, a single vessel trip for which they have been required to pay for monitoring services under this rule. The agency granted numerous waivers when observers were unavailable to work safely for public-health reasons during the COVID-19 pandemic. See 50 C.F.R. 648.11(m)(4)(ii) (vessel owner may request waiver "due to the unavailability of monitoring"); cf. 85 Fed. Reg. 17,285, 17,286 (Mar. 27, 2020) (temporary rule regarding waivers in all observer programs). And on November 2, 2022, the agency announced that any monitoring coverage that would have been required by the rule will not be assigned from April 1, 2023, onwards, because the agency lacks federal funding to pay the administrative costs of the program beyond that date. NOAA Fisheries, *Atlantic Herring Industry-Funded Monitoring Program Suspended Beginning in April 2023* (Nov. 2, 2022), perma.cc/H7RU-BUQY; see 50 C.F.R. 648.11(g)(4)(i) ("If there is no available Federal funding in a given year to cover NMFS [industry-funded monitoring] cost responsibilities, then there shall be no [industry-funded monitoring] coverage during that year."). That development not only undercuts any suggestion (cf. Pet. 22-23, 28) that the program is somehow beyond the reach of Congress's appropriations powers, but also deprives the decision below of any current practical significance. It is unclear at this time if and when monitoring coverage under the rule will resume.

There are additional reasons for uncertainty regarding the program's future scope. The regulation provides for the New England Council to examine the program's results two years after implementation and to consider adjusting the monitoring-services coverage

target. 50 C.F.R. 648.11(m)(1)(ii)(F); see 85 Fed. Reg. at 7417, 7420, 7425, 7430. The regulation also provides for future consideration of expanded use of electronic monitoring and portside sampling as an alternative to at-sea monitors for additional types of vessels. 50 C.F.R. 648.11(m)(1)(ii)(A). In light of those provisions and the current uncertainty about when, if ever, NMFS will have the funding required for monitoring coverage requirements under the rule to resume, petitioners identify no compelling reason for this Court to address their challenge to the program now.

3. Petitioners alternatively request (Pet. 28-33) that the Court grant review to overrule or modify the *Chevron* framework. Petitioners have not satisfied their "heavy burden," *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986), of demonstrating that such a sharp departure from precedent is warranted, particularly in this case.

a. "Although 'not an inexorable command,' *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop 'in a principled and intelligible fashion.'" *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) (citations omitted); see *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015). Adherence to precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennes*see, 501 U.S. 808, 827-828 (1991). "For that reason, this Court has always held that any departure from the doctrine demands special justification." *Bay Mills*, 572 U.S. at 798 (citation and internal quotation marks omitted). *Stare decisis* carries "'special force'" in areas where "Congress exercises primary authority * * * and 'remains free to alter what

[the Court] ha[s] done.'" *Id.* at 799 (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)). That is true not only of decisions that interpret specific statutory language, but also of a decision "announc[ing] a 'judicially created doctrine' designed to implement a federal statute," which "effectively become[s] part of the statutory scheme, subject (just like the rest) to congressional change." *Kimble*, 576 U.S. at 456 (citation omitted). For many of those reasons, this Court in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), refused to disturb its prior holdings that agency interpretations of ambiguous regulations should receive deference so long as certain preconditions are satisfied. See *id.* at 2422-2423.

Petitioners bear an especially heavy burden in asking this Court to overrule *Chevron*, which stands at the head of "a long line of precedents" reaching back decades. *Bay Mills*, 572 U.S. at 798. The Court in *Chevron* described its approach not as an innovation, but as the application of "well-settled principles" concerning the respective roles of agencies and courts in resolving statutory ambiguities. 467 U.S. at 845; see *id.* at 842-845. Federal courts have invoked *Chevron* in thousands of reported decisions, and Congress has repeatedly legislated against its backdrop. Regulated entities and others routinely rely on agency interpretations that courts have upheld under the *Chevron* framework. By centralizing interpretive decisions in agencies supervised by the President, *Chevron* also promotes political accountability, national uniformity, and predictability, and it respects the expertise agencies can bring to bear in administering complex statutory schemes.

Petitioners offer no persuasive "special justification" for overruling *Chevron*, let alone the type of "particularly special justification" that would be required to overturn such a deeply ingrained part of administrative law. *Kisor*, 139 S. Ct. at 2423 (internal quotation marks omitted). Petitioners principally contend that *Chevron* improperly transfers the authority to "say what the law is" from the Judicial Branch to the Executive Branch. Pet. 30 (citation omitted). But this Court has explained that the *Chevron* framework rests on a presumption that "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Thus, when a reviewing court sustains an agency's interpretation of an ambiguous statute as reasonable under *Chevron*, the court is exercising the judicial power to interpret the law as having conferred authority on the agency to resolve the matter within reasonable bounds. See *City of Arlington* v. *FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting); cf. Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 27-28 (1983). In deciding legal questions, a court must take account of that statutory foundation.

Petitioners assert (Pet. 31) that *Chevron* fosters excessive regulation, makes legislating more difficult, and harms "the citizenry." Petitioners cite no evidence for those assertions, nor do petitioners make any effort to compare those speculations against the concrete benefits of *Chevron* that this Court has identified. See p. 27, *supra*. Petitioners likewise fail to substantiate their assertion (Pet. 32) that the *Chevron* framework is difficult to apply in practice. Petitioners do not suggest that this Court has had any trouble applying the doctrine, and

the lower courts have decades of experience with the "familiar *Chevron* framework." *Cuomo* v. *Clearing House Ass'n, LLC*, 557 U.S. 519, 525 (2009). That some judges may perceive ambiguity in a particular statutory provision where others do not (see Pet. 32) does not make *Chevron* "unworkable." *Payne*, 501 U.S. at 827. It is not uncommon for courts to disagree on a question of statutory interpretation. Thus, that reasonable minds may disagree about the application of *Chevron* in a particular context does not call into question the workability of the framework itself.

b. Petitioners' alternative request (Pet. 29) that the Court grant review to "clarify that silence is not ambiguity" for *Chevron* purposes should be rejected. That issue is not properly presented here. As explained above (at p. 19), this statutory scheme is not "silent" about the agency's authority to adopt a rule requiring vessel owners to include monitoring services in their operations on certain trips; the Act as a whole speaks to that issue and authorizes the agency to adopt the final rule. And even if this were an instance of statutory silence, petitioners' request to "clarify" how *Chevron* applies in those circumstances cannot be squared with *Chevron* itself. The Court stated in *Chevron* that the principles identified in that case can apply "if the statute is *silent or ambiguous* with respect to the specific issue." 467 U.S. at 843 (emphasis added). Thus, under *Chevron*, statutory silence on a particular or subsidiary point can be properly viewed, in the context of the statute as a whole, as an implicit delegation to the agency—a "gap for the agency to fill," *ibid.*—just as a statutory ambiguity can be so viewed. See, *e.g.*, *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 326 (2014) (stating

that "[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity").

c. In any event, this case would be an unsuitable vehicle in which to modify or overrule *Chevron* because doing so would make no difference to the correct disposition of this case. Petitioners maintained in the lower courts that their interpretation of the Act should prevail even under the existing *Chevron* framework, which they affirmatively invoked. See, *e.g.*, Pet. C.A. Br. 49-59. The lower courts held otherwise, and petitioners now seek to jettison the framework itself. But petitioners identify no reason to think that their interpretation would have prevailed in the absence of *Chevron*. Neither the court of appeals nor the district court suggested that petitioners have the better reading of the statute, and they do not. Petitioners therefore fail to show that the result below would be any different without *Chevron*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2023