No. 22-451

In the
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, et al.,

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Without express authority from Congress, the National Marine Fisheries Service (NMFS) has declared that it may force herring vessels to cede 20% of their annual returns to pay the salaries of federally mandated at-sea monitors. A divided D.C. Circuit panel sustained that action for only one reason: It thought that statutory silence entitled NMFS to *Chevron* deference—even though Congress expressly authorized that kind of extraordinary imposition only in narrow circumstances and subject to strict caps, and thus every tool in the statutory-construction toolkit and basic separation-of-powers principles pointed in the opposite direction. As Judge Walker demonstrated in dissent, and an armada of amici have confirmed, that decision is egregiously wrong and has immense real-world consequences.

NMFS defends that judgment largely by running away from the majority's reasoning. Although NMFS accepts that its victory hinged entirely on *Chevron*'s second step, it spends page after page arguing that it really should have won at step one. The panel below unanimously disagreed for good reason. And once NMFS belatedly turns to the majority's actual reasoning, it endorses it as an "unremarkable" application of *Chevron*. But if *Chevron* really allows an agency to supplement its enforcement resources by forcing the regulated to fund additional regulators without express authorization or appropriations from Congress, then *Chevron* is in desperate need of some additional remarks from this Court, either to clarify that silence is not ambiguity or to inter this agency-empowering doctrine once and for all.

I. The D.C. Circuit's Split Decision Applying *Chevron* Deference Is Indefensible.

A. Congress Did Not Silently Empower NMFS to Require Herring Fishermen to Cede 20% of Their Annual Returns to Pay the Salaries of Government Monitors.

NMFS acknowledges that the "holding" below is "limited" to "Step Two of the *Chevron* analysis." BIO.11. But although NMFS ultimately embraces the step-two holding as "unremarkable," it devotes the bulk of its submission to contending that the majority committed an "analytical error" by not ruling for it at step one. BIO.23, 29. NMFS' step-one arguments failed to persuade a single panel member below, and they remain unpersuasive.

NMFS first suggests that the term "carry" in §1853(b)(8) suffices to authorize industry-funded monitoring.[1] BIO.15. "If the statute authorized NMFS to require regulated vessels to 'carry' life-preservers," NMFS posits, "it would be a nonstarter for a vessel owner to contend that the government must pay for the life-preservers." BIO.15. Setting aside that not even the district court (whose reasoning NMFS prefers) assigned dispositive force to "carry," *see* BIO.9, 12-13, and that the Magnuson-Stevens Act (MSA) conspicuously declines to use "carry" when discussing required gear, *see* §1853(b)(4), NMFS' argument suffers from a more fundamental defect: Chattels and people, especially people performing monitoring functions for the federal government, are,

[1] Statutory references are to Title 16 of the U.S. Code.

in fact, "materially different." *Contra* BIO.22. No one expects the government to foot the bill for every piece of equipment that it requires a regulated vessel to have onboard, because those tangible objects belong to the vessel owner, can be transferred to third parties, and have independent value. By contrast, everyone expects the federal government to pay the salaries of federal agents (from appropriated funds, no less), and federal monitoring services have no independent value to the governed.[2] Thus, the "natural[]" way, BIO.18, to understand the term "carry" in §1853(b)(8) is simply "transport," *Merriam-Webster's Online Dictionary*, *Carry*, bit.ly/3YTa1RT—not to transport and pay salaries, as the panel below unanimously agreed, *see* Pet.App.6 ("carry" leaves the payment question "unanswered"); Pet.App.29 (Walker, J., dissenting) ("[T]here is no inherent, or even intuitive, connection between paying a monitor's wage and providing him passage.").

That much is confirmed by the MSA provisions that expressly authorize vessels to foot the bill for government observers. None does so simply by authorizing their carriage. Instead, those provisions authorize the "stationing" or "use" of observers on vessels, *see* §§1862(a)(1), 1853a(c)(1)(H), 1821(h)(1)(A), and then use *separate* language in *separate* provisions to authorize cost recovery or

[2] NMFS quibbles that the industry-funded-monitoring program is not "analag[ous]" to a requirement to pay the salaries of "governmental personnel" because, while some observers are federal employees, the observers here are not. BIO.22. But NMFS never denies that these observers are government-mandated and concedes that they perform the same "data-collection function" as federal-employee observers. BIO.22.

payment for those observers, *see* §§1862(a)(2), 1853a(e)(2), 1821(h)(4)-(6).

NMFS observes that §1853(b)(8) uses the term "quartering" in addition to "carry," and this "disparate language" allegedly means that "carry" means more than "provid[ing] space." BIO.15-16 (emphasis omitted). No such argument occurred to NMFS below, presumably because while "carrying" and "quartering" are not co-extensive, neither has anything to do with payment. Fishing trips can "last 3-4 days." Buckeye.Amicus.Br.15. Accordingly, carrying observers often requires "quartering" them too. Both are extraordinary impositions that demand express congressional authorization, but paying the salaries of those who must be carried and quartered is an altogether different and greater intrusion. The framing generation was vexed enough by being forced to quarter British soldiers, *see* U.S. Const. amend. III, but not even the British forced the unlucky homeowner to personally pay the redcoat's salary.

Perhaps recognizing that "carry" has nothing to do with payment, NFMS turns to the MSA's necessary-and-appropriate provisions. BIO.16-17; §§1853(a)(1)(A), (b)(14). But the government's felt need to rely on "the last, best hope of those who defend ultra vires [agency] action" all but concedes that the statute provides no express authorization for this extraordinary imposition. *Printz v. United States*, 521 U.S. 898, 923 (1997) (discussing Necessary and Proper Clause). Like their constitutional counterparts, those authorizations for minor and complementary regulatory actions cannot imply "a great substantive and independent power." *McCulloch v. Maryland*, 17

U.S. (4 Wheat.) 316, 411 (1819); *accord Bond v. United States*, 572 U.S. 844, 879 (2014) (Scalia, J., concurring in the judgment).

That principle, nearly as old as the Republic, has especial force when the great power the agency claims to have received implicitly was granted expressly elsewhere and only subject to strict caps that limit the burdens on the regulated. NMFS concedes that Congress "explicitly" addressed industry-funded monitoring "in multiple places" in the MSA, BIO.21—*i.e.*, only for certain North Pacific fisheries, limited access privilege programs, and foreign fishing, §§1862(a), 1853a(c)(1)(H), (e)(2), 1821(h)(4), (6)(C)—and does not dispute that Congress imposed industry-protecting caps on that authority vis-à-vis domestic vessels. While NMFS insists that these "explicit[]" authorizations do not "disable" it from imposing industry-funded monitoring in other contexts, BIO.21, "[t]his argument flips the rule that [w]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, we generally take the choice to be deliberate," *Bartenwerfer v. Buckley*, 2023 WL 2144417, at *6 (U.S. Feb. 22, 2023) (quotation marks omitted). And whereas the industry-funded-monitoring programs expressly addressed in the MSA limit the payment obligations for domestic vessels at 2-3% of the value of their hauls, *see* §§1854(d)(2)(B), 1862(b)(2)(E), the agency is attempting to impose a payment obligation orders of magnitude larger.

NMFS protests that the MSA's three narrow, express carve-outs for industry-funded monitoring are "materially different" because "[f]ees under those

programs are *generally* paid by regulated parties to the federal government," whereas owners of herring vessels "must themselves procure and pay for … monitoring services by hiring a third party." BIO.21 (emphasis added). NMFS never explains the relevance of this distinction, and as the word "generally" gives away, the distinction is illusory. Supplementary observers on foreign vessels are "contractors" who are directly "paid by the owners and operators of foreign fishing vessels." §1821(h)(6); 50 C.F.R. §600.506(h)-(j). That the MSA expressly contemplates such third-party contractors readily explains why the MSA's "sanctions" provision—§1858(g)(1)(D)—authorizes sanctions on vessel owners or operators who fail to pay contractors for "observer services." *Contra* BIO.17-18.

NMFS thus is left relying on "statutory history," BIO.18, like congressional reports. Such legislative history, of course, is "not the law." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1631 (2018). Moreover, NMFS' legislative history merely explains that the 1990 amendments to the MSA "clarify" that §1858(b)(8) authorizes NMFS to "require that observers be carried on board." S. Rep. No. 414, 101st Cong., 2d Sess. 20 (1990); *see* H.R. Rep. No. 393, 101st Cong., 1st Sess. 28 (1989). Those statements do not address funding and hardly "confirm" that NMFS has "generalized" authority to impose industry-funded monitoring. BIO.18 & n.4. Indeed, a grant of such "generalized" authority would render superfluous the specific authorization in the "same" 1990 amendments for the North Pacific Council to impose industry-funded monitoring. BIO.18 n.4. There is simply no avoiding the superfluity problems created by the agency's

reading, which ignores that Congress understood that forcing vessels not just to carry observers, but to pay their salaries, was a separate and distinct imposition that demanded a separate and distinct authorization.

And NMFS ignores inconvenient aspects of the legislative record. As NMFS does not dispute, whenever Congress has entertained proposals to expand industry-funded monitoring in the past, the proposed authorizations were express, and Congress *rejected* them. *See* H.R. 5018, 109th Cong. §9(b) (2006); H.R. 39, 104th Cong. §9(b)(4) (1995); H.R. 1554, 101st Cong. §2(a)(3) (1989). Furthermore, despite having months-on-end to search, NMFS *still* "has identified no other context in which an agency, without express direction from Congress, requires an industry to fund its inspection regime." Pet.App.29 (Walker, J., dissenting).

NMFS has no adequate answer to the constitutional problems its interpretation creates.[3] One of the few practical constraints that protect the governed from overregulation is the need for Congress to appropriate sufficient funds to enforce all those burgeoning regulations. Here, NMFS' claim to be able to force the regulated to foot the bill for government inspectors without authorization or appropriations

[3] NMFS suggests that constitutional concerns are "not properly before the Court" because petitioners "did not press any constitutional challenge to the final rule" below. BIO.22. But the constitutional-avoidance argument is just another argument in favor of petitioners' statutory interpretation, which is the central issue here. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005). Moreover, based on the arguments presented below, Judge Walker well understood that NMFS' interpretation poses a palpable threat to "Congress's power of the purse." Pet.App.32.

from Congress would eviscerate that vital practical constraint. NMFS insists that it "d[id] not 'evade' the appropriations process" because it merely "exercise[d] its statutory authority" in a way that generated "compliance costs"—akin to an IRS requirement that "may" require taxpayers to hire "accountants." BIO.22-23. Wrong again. The Code's complexity may prompt many to seek outside advice, but it is not mandatory. And if the IRS tried to require taxpayers to pay for "in-home tax examiners" because appropriated funds could not supply enough IRS personnel to police the prolix Code, the threat to the appropriations process and the reality of over-regulation would both be undeniable.

NMFS' action here parallels the latter unconstitutional course. NMFS itself characterizes observers as its "eyes and ears on the water." NOAA Fisheries, *Fishery Observers*, bit.ly/3XYDI2K. And NMFS imposed industry-funded monitoring on the herring fleet specifically to counteract "budget uncertainties," 79 Fed. Reg. 8,786, 8,793 (Feb. 13, 2014)—all while describing its action as "highly sensitive" precisely because "it involves the Federal budgeting and appropriations process," CADC.App.293. NMFS' theory thus raises grave separation-of-powers problems, confirming that every tool in the statutory-construction toolkit, including the constitutional-avoidance canon, favors petitioners' reading.

B. If *Chevron* Tolerates the Result Below, the Court Should Overrule It.

Unable to overcome the D.C. Circuit's unanimous conclusion that it does *not* prevail at *Chevron* step one,

NMFS is left defending—in all of one paragraph—the *actual* step-two reasoning on which it prevailed as "an unremarkable application of settled *Chevron* principles." BIO.23. That terse defense lays bare why certiorari is urgently required. When a statute that is silent as to the grant of an admittedly "highly sensitive" power is construed to allow agencies to demand that regulated parties hand over 20% of their returns to pay for government monitors, that is either a vast overreading of *Chevron* or a clear reason for its overruling. Either way, this Court's review is imperative.

NMFS contends that any request to "clarify that silence is not ambiguity" is "not properly presented" because the MSA is "not 'silent'" on its asserted power. BIO.29. But that is just another effort to fight the decision below, which deferred to NMFS only after finding the MSA "silen[t] on the issue of cost of at-sea monitoring" in the herring fishery. Pet.App15-16. NMFS claims that *Chevron* itself authorizes deference "if the statute is *silent or ambiguous* with respect to the specific issue." BIO.15. But there is a vast difference between a statute that expressly authorizes regulation while remaining silent on the details (*i.e.*, the bubble concept), and a statute that is silent about authorizing a controversial power and the silence is in contradistinction to an express grant of that power elsewhere, albeit subject to strict limits protecting the governed.

If *Chevron* really requires deference in the face of that kind of silence, then it must be overruled. In its ode to *stare decisis*, NMFS waxes poetic about the "predictability" associated with *Chevron*, BIO.27—

apparently not recognizing that "*Chevron*'s very point is to permit agencies to" change positions and thus "upset … settled expectations," *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring). NMFS insists that *Chevron* is not "unworkable" because "this Court" has not had "any trouble applying the doctrine," BIO.28-29—apparently forgetting that this Court has avoided such trouble only by omitting mention of the doctrine altogether. The lower courts do not enjoy the same luxury, and they have found the doctrine anything but workable, disagreeing on everything from whether silence equals ambiguity, *see* Pet.13-14, 32-33, to whether to continue applying the doctrine given the considerable judicial writing on the wall, *see infra.* NMFS prefers to ignore all that writing, but numerous members of this Court do not share its conviction that there is no case for revisiting *Chevron*. Pet.29. In the end, though, the proper place to resolve this debate is not in certiorari-stage briefing or the law reviews; it is at the merits stage of this case.

II. This Case Is An Ideal Vehicle To Resolve Exceptionally Important Issues.

As the fourteen amicus briefs underscore, this case is enormously important to both the fishing industry and the rule of law. NMFS disagrees as to the "first question presented." BIO.24. Although NMFS does not deny that industry-funded monitoring could cost herring fishermen 20% of their revenues (since that is an agency-generated number), it speculates that costs "could" drop to around 5% for vessels with relatively small catches. BIO.7, 24. But that does not describe petitioners' vessels, and the cost

drops only because NMFS waives the monitoring requirements altogether for small catches. Moreover, even that *best-case scenario* involves a far greater financial hit than Congress allowed when it explicitly addressed industry-funded monitoring for domestic vessels. *See* §§1862(b)(2)(E), 1854(d)(2)(B).

NMFS tries a different tack, arguing that the "financial" and "practical" impact is "uncertain[]" moving forward because the agency currently cannot pay the "administrative costs of the program." BIO.25. But while the absence of administrative-cost funding provides what amounts to a stay, it does not moot the controversy. NMFS does not argue otherwise. And the effective stay is essential, since as amici who have experienced industry-funded monitoring firsthand in other Northeast fisheries explain, once such a program begins, small fishing enterprises are quickly driven out of business. *See* Goethel.Amicus.Br.5-7. Moreover, deferring a challenge to subsequent years when NMFS has greater funding is not an option given the MSA's unforgiving 30-day statute of limitations. *See Goethel v. U.S. Dep't of Com.*, 854 F.3d 106, 114-16 (1st Cir. 2017) (holding challenge untimely under §1855(f)(1)). For the herring fleet, it is now or never.

Not even the agency can deny the importance of the second question presented. It just briefly lodges a "vehicle" objection that simply reprises its misguided merits arguments—*i.e.*, it thinks this is a bad vehicle to reconsider *Chevron* because it thinks it should win at step one. *See* BIO.30. In reality, this is a perfect vehicle to reconsider *Chevron*, because it vividly illustrates the human costs of agency overreach. This

is not a case where multinational corporations or well-heeled trade associations, with ample resources to lobby the agency and Congress, are the ones whose oxen are being gored. The operators here who face the extraordinary double hit of yielding precious on-vessel space to government-mandated monitors who do not contribute to the haul and then footing the bill for those unwelcome guests are quintessential small businesspeople who can ill-afford the impositions.

As the numerous amici underscore, the costs of both executive overreach and the uncertainties over whether and how courts apply *Chevron* extend well beyond petitioners. As NMFS acknowledges, "[f]ederal courts have invoked *Chevron* in thousands of reported decisions." BIO.27. While this Court has refrained from invoking (or clarifying) *Chevron*, that has only added to the confusion. Most lower courts view themselves as duty-bound to continue to apply *Chevron* even while recognizing that it "has become something of the-precedent-who-must-not-be-named" in this Court. *Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 2023 WL 2182268, at *3 n.3 (5th Cir. Feb. 23, 2023). Other judges disagree, *see id.* at *14 (Oldham, J., concurring in part) (refusing to apply "the Lord Voldemort of administrative law"), just adding to the confusion and the need for this Court's review.

As eighteen states have underscored, "this confusion carries heavy costs," and the Court should resolve this "untenable" state of affairs in this case. States.Amicus.Br.2-3. This case is the "[m]ost notabl[e]" *Chevron* case to recently emerge from the D.C. Circuit, "which sees more *Chevron*-prompting cases than any other court." Donald L.R. Goodson,

The Supreme Court Has Not Turned Out the Lights on Chevron*, and Lower Courts Should Continue to Apply It*, Yale J. on Reg.: Notice & Comment (Dec. 21, 2022). This Court thus will not see a better case to resolve what is perhaps the single most important question in administrative law.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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