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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

This Court granted the petition for a writ of certiorari "limited to Question 2 presented by the petition." 143 S. Ct. 2429. As stated in the petition, Question 2 is as follows:

> Whether the Court should overrule *Chevron* [*U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984),] 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.

Pet. i-ii.

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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, and granted on May 1, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent statutes and regulations are reprinted in the appendix to this brief. App., *infra*, 1a-67a.

STATEMENT

A. Statutory Background

1. Commercial fishing vessels have long been subject to "comprehensive federal regulation." *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 272 (1977). Before 1976, however, that regulation consisted of a "patchwork" of statutes and international agreements, Warren G. Magnuson, *The Fishery Conservation and Management Act of 1976*, 52 Wash. L. Rev. 427, 432 (1977), which had failed to prevent "massive overfishing" in U.S. coastal waters, S. Rep. No. 515, 94th Cong., 1st Sess. 4 (1975).

Congress responded by enacting what is now known as the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.* The Act declares that a "national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing" and "to realize the full potential of the Nation's fishery resources." 16 U.S.C. 1801(a)(6). The Secretary of Commerce, and by delegation, the National Marine Fisheries Service (NMFS), administer this national program, with input from eight regional fishery management councils that advise the Secretary in preparing and revising "fishery management plan[s]." 16 U.S.C. 1852(h)(1); see 16 U.S.C. 1802(39), 1852(a) and (b), 1854, 1855(d). Among other things, plans must contain the measures "necessary and appropriate * * * to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. 1853(a)(1)(A); see 16 U.S.C. 1853(b)(14).

A regional council's plan and any proposed implementing regulations are submitted to NMFS and pub-

lished for public comment. See 16 U.S.C. 1853(c) (council may propose regulations "necessary or appropriate" to implement a plan); 16 U.S.C. 1854 (agency's role). NMFS's approval is generally required for any plan or amendment, and NMFS promulgates and enforces any implementing regulations. 16 U.S.C. 1854(a)(3) and (b)(3); see 16 U.S.C. 1855(d) (authorizing the agency to adopt "such regulations * * * as may be necessary" to carry out a plan or "any other provision" of the Act).

2. This case concerns the Magnuson-Stevens Act's provisions for the collection of reliable data, which Congress found "essential" to the conservation and management of fishery resources. 16 U.S.C. 1801(a)(8); see 16 U.S.C. 1851(a)(2), 1853(a)(5). To collect necessary data, the Act provides that a fishery management plan may "require that one or more observers be carried on board" any domestic vessel "engaged in fishing for species that are subject to the plan." 16 U.S.C. 1853(b)(8). The Act defines "observer" to mean "any person required or authorized to be carried on a vessel for conservation and management purposes," 16 U.S.C. 1802(31), including private parties hired to collect data, see 16 U.S.C. 1802(36) (defining "person"); cf. 16 U.S.C. 1857(1)(D)-(F) and (L) (distinguishing "observer[s]" from "officer[s]"). When "any payment required for observer services provided to or contracted by [a vessel] owner * * * has not been paid," the Act authorizes NMFS to impose sanctions on the owner. 16 U.S.C. 1858(g)(1).

B. Regulatory Background

In 2017, after years of development and public consultation, the New England Fishery Management Council proposed to amend the Atlantic herring fishery management plan to require regulated vessels to procure the services of third-party monitors on some fish-

ing trips to collect data. 83 Fed. Reg. 47,326, 47,326 (Sept. 19, 2018). After notice and comment, NMFS approved the amendment in 2018 and issued final implementing regulations in 2020. 85 Fed. Reg. 7414, 7414 (Feb. 7, 2020).

The plan amendment established a 50% "coverage target" for monitoring on certain herring fishing trips. 85 Fed. Reg. at 7417. That target could be satisfied by government-funded monitoring that already occurs under a separate program. *Ibid.* But if existing government-funded monitoring did not meet the 50% target, third-party monitoring would fill the gap, *ibid.*, with a vessel's owner "arrang[ing] for monitoring by" an approved service provider and "pay[ing]" the provider for services rendered, 50 C.F.R. 648.11(m)(4)(i) and (iii).

NMFS is responsible for paying the program's "administrative costs"—including the cost of training and certifying monitors, evaluating their performance, and processing collected data. 85 Fed. Reg. at 7414. In addition, the 2020 rule provides for waivers, exemptions, and alternatives designed to make any third-party monitoring "affordable." *Id.* at 7417. For example, observer services are not required for trips intended to land less than 50 metric tons of Atlantic herring or when monitors are unavailable. 50 C.F.R. 648.11(m)(1)(ii)(D) and (4)(ii).

NMFS found that those measures "balance[d]" the costs and "benefit[s] of additional monitoring." 85 Fed. Reg. at 7425. The agency acknowledged that prior analyses had suggested that monitoring costs could reduce annual returns-to-owner for covered vessels by "up to 20 percent." *Id.* at 7420. But the agency found that costs per vessel were expected to be considerably lower under the rule's exemptions and waivers as promulgated. See, *e.g.*, *id.* at 7425-7426, 7430.

In practice, the 2020 rule's monitoring provisions have had no financial impact on regulated vessels. NMFS began operating the program in July 2021 and ceased monitoring coverage under it in April 2023, when the agency no longer had available funds for program costs. Br. in Opp. 25. Although not required to do so, NMFS had allowed the owners of affected vessels to seek federal reimbursement for the monitoring costs they had incurred when the program was operational, and NMFS had ultimately "reimburse[d] 100 percent of the industry's at-sea monitoring costs" incurred under the rule. NOAA Fisheries, *Status of Industry Cost Reimbursement for Atlantic Herring Industry-Funded Monitoring* (Sept. 7, 2023), perma.cc/8J62-3376; see 50 C.F.R. 648.11(g)(4)(iii)(A).

C. The Present Controversy

1. Petitioners are commercial fishing ventures with permits to fish in the Atlantic herring fishery. Pet. App. 44; see Compl. ¶¶ 11-18. They challenged the rule, alleging as relevant here that NMFS lacked authority to require vessel owners to pay for third-party monitoring services. Compl. ¶¶ 105-112.

2. The district court rejected petitioners' challenge at summary judgment. Pet. App. 38-114. Applying *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court determined that the Magnuson-Stevens Act authorizes NMFS to require vessel owners to pay for third-party monitoring. Pet. App. 59-69. The court emphasized that the Act empowers the Secretary to sanction owners who have contracted for required third-party observer services but failed to timely pay—a provision that "would be unnecessary if the [Act] prohibited" such industry-funded monitoring. *Id.* at 65 (citation omitted). And the court rejected petitioners' invi-

tation to draw a negative inference from the Act's provisions authorizing "the collection of fees or surcharges to cover the cost of three monitoring programs elsewhere in the statute." *Id.* at 66 (discussing 16 U.S.C. 1821, 1853a(e), 1862). The court explained that those programs "differ[] from the industry-funded observer measures at issue here, in which the fishing vessels contract with and make payments directly to third-party monitoring service providers" instead of paying fees to the agency. *Id.* at 67.

3. The court of appeals affirmed. Pet. App. 1-37. The court observed that the Magnuson-Stevens Act "makes clear" that NMFS "may direct vessels to carry at-sea monitors." *Id.* at 6. The court further observed that, "[w]hen an agency establishes regulatory requirements, regulated parties generally bear the costs of complying with them." *Id.* at 7-8. The court declined to draw a negative inference from the provisions authorizing fee-based monitoring in other circumstances. *Id.* at 9-12. The court identified substantial differences in those programs, including that "money collected from regulated parties passes through government coffers." *Id.* at 10. And any negative inference was "offset" by the Act's provision authorizing sanctions for untimely payments owed to third-party observers, which is "broadly applicable" and specifically "recognize[s] the possibility of industry-contracted and funded observers." *Id.* at 11-12. But the court ultimately viewed the Act as not "wholly unambiguous," *id.* at 8, and determined at "Step Two of the *Chevron* analysis" that NMFS's interpretation is at least "reasonable," *id.* at 13-14.

Judge Walker dissented. Pet. App. 21-37. He acknowledged that NMFS has express authority to mandate

that monitors "be carried" on regulated vessels, *id.* at 28 (emphasis omitted), and that "[r]egulatory mandates * * * often carry compliance costs," *id.* at 29. He nonetheless would have held that the statute "unambiguously" withholds from NMFS the authority to require owners to pay for third-party monitoring. *Id.* at 27.

SUMMARY OF ARGUMENT

I. The Court should not overrule *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

A. *Chevron* is a bedrock principle of administrative law that provides an appropriately tailored framework for judicial review of an agency's interpretation of a statute it administers. Under *Chevron*, Congress is generally presumed to have allocated interpretive authority to the agency to resolve a statutory ambiguity or fill a gap, within reasonable bounds. Before any deference under *Chevron* is appropriate, a reviewing court must exhaust the traditional tools of statutory construction to determine if Congress has spoken to the issue. *Chevron* come into play only when a court determines that Congress has not itself clearly answered an interpretive question. In that circumstance, it is entirely sensible to presume that Congress intended its vesting of authority in the agency—and the agency's reasonable exercise of that authority—to be given effect by the courts.

Chevron gives appropriate weight to the expertise, often of a scientific or technical nature, that federal agencies can bring to bear in interpreting federal statutes. *Chevron* also promotes national uniformity in the administration of federal law and greater political accountability for regulatory policy. When a statutory provision is genuinely susceptible of multiple reasonable readings, choosing among those readings often turns on a policy judgment that Congress has vested in

the agency and that is properly left to the political Branches.

Contrary to petitioners' suggestion, *Chevron* is also rooted in a long tradition of judicial deference to reasonable Executive interpretations. That tradition preceded the enactment of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and continued after it. At no point in American history have courts applied an invariable rule of de novo resolution of all questions of law.

B. *Stare decisis* principles weigh heavily in favor of adhering to *Chevron*, which has been a cornerstone of administrative law reflected in thousands of judicial decisions—and which has provided a stable background rule against which Congress has legislated—for 40 years.

Because Congress could alter or eliminate the *Chevron* framework at any time but has declined to do so, *Chevron* is entitled to the particularly strong form of *stare decisis* that this Court affords to decisions that Congress could override by legislation. Petitioners' contrary theories for giving *Chevron* little or no precedential weight lack merit and directly contradict the Court's decision in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019).

Chevron is workable and remains vitally important. Overruling it would upset the reliance interests of regulated parties and the public in the many agency rules and orders that have been upheld under *Chevron*. Petitioners contend that different judges have different thresholds for finding ambiguity. But reasonable jurists may disagree under any interpretive framework, and replacing *Chevron* with a regime of de novo review would draw federal courts into resolving policy questions and exacerbate the potential for inconsistent results.

C. *Chevron* respects the separation of powers and due-process principles. When an Article III court applies *Chevron* to uphold an agency's interpretation of a statute, the court is exercising the judicial power while also respecting Congress's Article I decision to vest authority in the agency to resolve an ambiguity or fill a gap within reasonable bounds. *Chevron* is also consistent with 5 U.S.C. 706, which states that courts shall resolve questions of law but does not specify the standard of review they should use. And petitioners' policy arguments against *Chevron* are unsound and, in any event, are properly addressed to Congress.

II. The Court should reject petitioners' alternative request to narrow *Chevron* so that it would no longer apply when a statute is purportedly "silent" as opposed to merely ambiguous. Petitioners offer no workable line for distinguishing between silence and ambiguity, as this case illustrates. The Magnuson-Stevens Act is not silent about the agency's authority to require owners of regulated vessels to retain and pay for third-party monitoring services, but in fact confirms the agency's authority in several provisions. And there is nothing controversial about requiring regulated parties to bear the costs of retaining the services of third parties—like lawyers or accountants—to comply with federal law.

III. If the Court revisits *Chevron*, it should remand for the court of appeals to apply whatever new approach the Court adopts. But given the force of *stare decisis* and *Chevron*'s importance to all three Branches of government, the judgment below should be affirmed.

ARGUMENT

I. THE COURT SHOULD NOT OVERRULE *CHEVRON*

The framework for judicial review set forth in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), is a

cornerstone of administrative law. For 40 years, *Chevron* has provided a sensible and workable way to determine whether federal agencies are operating within the scope of the authority that Congress has conferred when they interpret statutes in rulemaking or adjudication.

Petitioners' request to jettison that established framework falls far short of this Court's standards for departing from *stare decisis*. Petitioners' lead argument (Br. 18-22)—that *Chevron* should be given no *stare decisis* effect at all, despite having provided the governing framework for dozens of this Court's decisions and thousands of lower court decisions—is untenable under first principles and flatly inconsistent with *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019). Like the *Auer* deference doctrine to which the Court adhered in *Kisor*, see *id.* at 2408 (citing *Auer* v. *Robbins*, 519 U.S. 452 (1997)), *Chevron* is entitled to the strongest form of *stare decisis* because Congress remains free to alter it at any time but has declined to do so. Overruling *Chevron* would therefore require "a particularly 'special justification,'" *id.* at 2423, which petitioners fail to provide.

Far more than *Auer*, overruling *Chevron* would be a convulsive shock to the legal system. All three Branches of government, regulated parties, and the public have arranged their affairs for decades with *Chevron* as the backdrop against which Congress legislates, agencies issue rules and orders, and courts resolve disputes about those agency actions. Given its central importance, overruling *Chevron* would threaten settled expectations in virtually every area of conduct regulated by federal law. And if *Chevron* were overruled, the federal courts would inevitably be required to resolve policy questions properly left to the "political branch[es]." *Chevron*, 467

U.S. at 865. The Court should reject that profoundly destabilizing result.

A. *Chevron* Is A Bedrock Principle Of Administrative Law That Sets Clear Ground Rules For All Three Branches

Chevron provides an appropriately tailored framework to identify when courts are to give effect to a federal agency's interpretive determinations. When a court properly applies *Chevron* to uphold an agency's reasonable interpretation of a statute that the agency administers, the court has determined through its independent application of traditional tools of construction that Congress left a gap or ambiguity in the statute for the agency to resolve. By respecting Congress's allocation of interpretive authority to the agency in that circumstance, including when the allocation is implicit in the statute, *Chevron* gives due weight to the expertise that agencies bring to bear, promotes national uniformity in the administration of federal law, and ensures greater political accountability for the policy judgments that often inhere in the interpretation of a statute. *Chevron* is also rooted in a long tradition of deference reaching back to the earliest years of the Republic.

1. Chevron *provides a clear and appropriately bounded framework for judicial review*

a. In *Chevron*, this Court set forth a "two-part framework" for resolving disputes about an agency's interpretation of a statute it administers. *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 52 (2011). Initially, the reviewing court must determine whether Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congress has done so, "that is the end of the matter; for the court, as well as the agency, must give effect to the

unambiguously expressed intent of Congress." *Id.* at 842-843. But "if the statute is silent or ambiguous with respect to the specific issue," then the reviewing court proceeds to ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The relevant inquiry is whether the agency has adopted "a reasonable interpretation," not whether the court would have adopted the same interpretation "in the absence of an administrative interpretation." *Id.* at 843-844. And a reviewing court may conclude—as the court of appeals did here—that the agency's interpretation is reasonable under *Chevron* without needing to resolve whether it is the "*most* reasonable" one, or whether some other interpretation also would have been reasonable. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); see Pet. App. 13-14.

Chevron illustrates these principles. The question there concerned the term "stationary source," as used in 1977 amendments to the Clean Air Act, 42 U.S.C. 7401 *et seq.* See *Chevron*, 467 U.S. at 848-851. The amendments directed States to require permits to modify or construct "stationary sources" of emissions in certain areas. *Id.* at 850 (citation omitted); see *id.* at 848-851. Congress did not define "stationary source" for those purposes. In 1980, the Environmental Protection Agency (EPA) issued regulations defining the term to encompass both whole facilities and certain discrete pieces of equipment within facilities. *Id.* at 857. "In 1981 a new administration took office," and EPA issued new regulations with a "plantwide definition" of "'source.'" *Id.* at 857-858. That approach meant that modifications of equipment that resulted in increased emissions could be offset by reductions elsewhere in the plant to avoid triggering the permitting requirement.

This Court unanimously upheld EPA's interpretation as "a reasonable construction of the statutory term 'stationary source.'" *Chevron*, 467 U.S. at 840. The Court first articulated the principles of review summarized above. See *id.* at 842-845. After examining the statutory language and history, see *id.* at 845-853, 859-864, the Court concluded that Congress did not "inflexibly * * * command a plantwide definition" or "forbid such a definition," instead leaving the matter to the agency's judgment. *Id.* at 864. And the Court found that EPA's choice to adopt a plantwide definition in this "technical and complex" scheme was reasonable and "entitled to deference." *Id.* at 865.

b. *Chevron* rested in part on an inference of legislative intent—namely, a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996). As the Court explained in *Chevron*, Congress may of course "explicitly" direct an agency to define a statutory term, and the agency's regulations or orders carrying out that directive must be given effect "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-844; see *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977); see, *e.g.*, 42 U.S.C. 7522(a) ("clean alternative fuel vehicle (as defined by rule by the Administrator)").

Chevron recognized that Congress's "delegation of authority to the agency to elucidate a specific provision of [a] statute" may also be "implicit rather than explicit." 467 U.S. at 843-844. The Court explained that a

statute is appropriately understood to embody an implicit delegation if it "is silent or ambiguous with respect to [a] specific issue" and Congress has given the agency rulemaking or adjudicatory authority to carry the statute into effect. *Id.* at 843. Petitioners describe that presumption of implicit authorization as resting on a "fictionalized statement of legislative desire." Pet. Br. 25 (citation omitted). But it is entirely sensible to presume that when Congress has not itself clearly answered an interpretive question in a statute, it intends for its vesting of rulemaking or adjudicatory authority in an agency—and the agency's reasonable statutory interpretation in the exercise of that authority—to be respected by the courts. And whatever one might think of *Chevron*'s legislative-intent rationale as an original matter, the decision has long provided a "stable background rule against which Congress can legislate." *City of Arlington* v. *FCC*, 569 U.S. 290, 296 (2013). For 40 years, Congress has been on notice that "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *Ibid.*

c. This Court has articulated several significant limits on *Chevron* that are equally part of its governing framework. Four points bear particular emphasis.

First, and most importantly, in discerning whether Congress has spoken directly to a question, a reviewing court must apply the "traditional tools of statutory construction," without deference to the agency. *Chevron*, 467 U.S. at 843 n.9. If the application of those traditional tools reveals a firm answer, "there is, for *Chevron* purposes, no ambiguity * * * for an agency to resolve." *INS* v. *St. Cyr*, 533 U.S. 289, 320 n.45 (2001). This Court has also instructed that courts should not "wave the am-

biguity flag" merely because a statute appears to be "impenetrable on first read." *Kisor*, 139 S. Ct. at 2415 (discussing parallel considerations under *Auer*). "[H]ard interpretive conundrums * * * can often be solved," and it is the reviewing court's duty to use the traditional interpretive tools to try before deference is appropriate under *Chevron*. *Ibid.* (citing *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting) (deference not required simply because "interpretation requires a taxing inquiry")); see *id.* at 2448 (Kavanaugh, J., concurring in the judgment) (similar).

Second, even when a court finds a statute ambiguous, the agency's interpretation will be sustained under *Chevron* only if it falls "within the bounds of reasonable interpretation." *City of Arlington*, 569 U.S. at 296. And reasonableness "is a requirement an agency can fail." *Kisor*, 139 S. Ct. at 2416. Thus, a court's application of the traditional interpretive tools "establish[es] the outer bounds of permissible interpretation" even when those tools do not resolve an ambiguity. *Ibid.*

Third, *Chevron* does not apply unless the agency has used sufficiently formal or otherwise statutorily proper procedures to resolve a matter entrusted to its judgment. See *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001). The "overwhelming number of [this Court's] cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." *Ibid.* Use of those procedures is not an inflexible prerequisite for *Chevron* to apply, see *id.* at 231 & n.13, but they are nonetheless "significant * * * in pointing to *Chevron* authority," *id.* at 230-231. When Congress authorizes an agency to speak with "the effect of law" through rulemaking or adjudication, upholding the agency's interpretation under *Chevron* honors Con-

gress's choice to allocate "'primary interpretational authority'" to the agency. *Id.* at 230 & n.11 (citation omitted). Conversely, *Chevron* does not apply at all if the procedures an agency employed are found to be "defective." *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 221 (2016).

Fourth, this Court has held that *Chevron* does not apply in certain "extraordinary cases" involving interpretive questions of vast "economic and political significance" that Congress cannot fairly be presumed to have delegated to an agency. *King* v. *Burwell*, 576 U.S. 473, 485-486 (2015) (citations omitted). In those cases, the Court has presumed that Congress generally "intends to make [such] major policy decisions itself." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2609 (2022) (citation omitted). When a case implicates this type of "major question[]," the agency must identify "'clear congressional authorization'" to resolve the question and cannot rely on *Chevron*'s background rule. *Ibid.* (citation omitted).

2. **Chevron** ***gives appropriate weight to agency expertise, encourages national uniformity in federal law, and keeps the courts out of policymaking***

Chevron ensures that certain decisions calling for interpretive discretion are made by the Executive Branch, if not clearly resolved by Congress. Federal agencies can draw on their accumulated expertise and specialized technical and scientific knowledge that judges lack. Federal agencies can also provide authoritative interpretations on a nationwide basis, ensuring a degree of uniformity that piecemeal litigation of the issue cannot match. And federal agencies, unlike federal courts, are politically accountable to the American people through the President. Those considerations illustrate why Con-

gress prefers for statutory gaps or ambiguities to be addressed "first and foremost[] by the agency." *Smiley*, 517 U.S. at 741.

a. *Chevron* respects the "'unique expertise,' often of a scientific or technical nature," that federal agencies can bring to bear when adopting gap-filling measures or otherwise resolving a statutory ambiguity. *Kisor*, 139 S. Ct. at 2413 (plurality opinion) (citation omitted). Federal judges are frequently "not experts in the field," *Chevron*, 467 U.S. at 865, and they lack the experience, resources, and procedures available to agencies. "Agencies (unlike courts) can conduct factual investigations, can consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory program." *Kisor*, 139 S. Ct. at 2413 (plurality opinion). Thus, as *Chevron* observed, the decision to leave an ambiguity for an agency to resolve may reflect a principled congressional judgment "that those with great expertise * * * would be in a better position" to "strike the balance" for a particular issue. 467 U.S. at 865.

Chevron has played a critical role in resolving many interpretive questions in complex and technical areas of federal law—such as the regulation of nuclear energy, see, *e.g.*, *Environmental Def. Fund* v. *NRC*, 902 F.2d 785, 788-789 (10th Cir. 1990) (applying *Chevron* to agency's "regulation of uranium and thorium mill tailings"), or the development of new drugs, see, *e.g.*, *Otsuka Pharm. Co.* v. *Price*, 869 F.3d 987, 993-995 (D.C. Cir. 2017) (applying *Chevron* to uphold agency's interpretation that one drug's three-year marketing exclusivity period does not bar approval of another drug with a different "active moiety"). Congress's decision to vest agencies with interpretive authority to resolve ambigu-

ities or gaps in such schemes reflects "the comparative advantages of agencies over courts in making" those judgments. *Kisor*, 139 S. Ct. at 2413 (plurality opinion).

b. *Chevron* also promotes national uniformity in federal law by giving effect to a federal agency's reasonable interpretation of a statute and avoiding the potentially conflicting views of the different courts in which review might be sought. See *Kisor*, 139 S. Ct. at 2413 (plurality opinion) (discussing this "well-known benefit[]" in the context of *Auer* and noting "Congress's frequent 'preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation'") (citation omitted). *Chevron* thus reduces the frequency of circuit conflicts and helps to ensure that federal law applies in a uniform manner across the country. See Barnett & Walker Br. 29 (discussing empirical evidence). Although review by this Court can likewise ensure national uniformity, the lower courts apply *Chevron* to many more disputes each year than this Court could feasibly review. Overruling *Chevron* would invite a patchwork of conflicting interpretations of the same federal statute in different parts of the country and would "render the binding effect of agency rules unpredictable." *City of Arlington*, 569 U.S. at 307.

c. Regulated parties and members of the public also benefit from the centralized procedures that agencies, but not courts, can use to interpret federal law. Notice-and-comment rulemaking, in particular, affords the public an opportunity to participate in the agency's adoption of an interpretation. In the rulemaking process, interested parties can comment about whether a proposed rule is consistent with the underlying statute and whether it is wise as a policy matter—and agencies must "respond to significant comments." *Perez* v. *Mort-*

gage Bankers Ass'n, 575 U.S. 92, 96 (2015). Those procedures give the public greater and less costly opportunities to be heard than piecemeal litigation of the same issues in different courts.

d. Finally—and of critical importance—*Chevron* "reflects a sensitivity to the proper roles of the political and judicial branches." *Pauley*, 501 U.S. at 696. When a statute is genuinely susceptible of multiple reasonable readings, selecting among them may involve "reconciling conflicting policies," *Chevron*, 467 U.S. at 865, and indeed is "often more a question of policy than of law," *Pauley*, 501 U.S. at 696. Such policy determinations are properly made by the political Branches, rather than courts. An agency may and often must rely on its "views of wise policy to inform its judgments" about how to interpret a statute. *Chevron*, 467 U.S. at 865. By contrast, it would be an abuse of the judicial power for courts to resolve statutory ambiguities "on the basis of the judges' personal policy preferences." *Ibid.* "And agencies (again unlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public." *Kisor*, 139 S. Ct. at 2413 (plurality opinion). If the American people are dissatisfied with an agency's choices, the President and his party may be held accountable at the ballot box. Federal judges have no analogous "constituency" to check them democratically and "have a duty to respect legitimate policy choices made by those who do." *Chevron*, 467 U.S. at 866.

The two-step *Chevron* framework maps onto those principles. At the first step, the Judicial Branch must determine whether Congress has "directly spoken" to the interpretive question, thus giving effect to Congress's own policy judgments. *Chevron*, 467 U.S. at 842.

But if Congress has not done so, then *Chevron* properly recognizes that the "formulation of policy" inherent in choosing among multiple reasonable readings of a statute is primarily for the Executive. *Id.* at 843 (citation omitted). The Judicial Branch's "natural role" at that second step, "like that of referees in a sports match, is to see that the ball stays within the bounds of the playing field and that the game is played according to its rules. It is not for courts themselves to play the game." Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 Colum. L. Rev. 1143, 1145 (2012); see Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515 ("Under our democratic system, policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it must be answered by the Executive.").

Empirical scholarship shows that *Chevron* has been effective at "remov[ing] politics from judicial decisionmaking." Kent Barnett et al., *Administrative Law's Political Dynamics*, 71 Vand. L. Rev. 1463, 1466 (2018). A study of "every published circuit court decision that involved *Chevron* * * * from 2003 through 2013," *id.* at 1467, found that *Chevron* "powerfully * * * constrain[s] ideology in judicial decisionmaking," *id.* at 1468. In particular, the study demonstrated that the composition of a three-judge panel matters far less to the outcome of an appeal when *Chevron* governs the panel's analysis than when various alternatives apply, including de novo review. *Id.* at 1502; cf. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. Pa. L. Rev. 1639, 1654 (2003).

Those considerations apply with special force to agency interpretations of statutory provisions phrased in "broad and open-ended terms." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 (2016); see, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 167 (2007) (applying *Chevron* and explaining that the statute "instructs the agency to work out the details of th[e] broad definitions" at issue). Congress frequently relies on agencies to spell out how general or broad statutory language should apply in more concrete terms. See *Chevron*, 467 U.S. at 865; *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496-497 (1979). In those circumstances, the agency's interpretation "is a policy decision" and "courts should be leery of second-guessing that decision." Kavanaugh 2152. A reviewing court's role under *Chevron* is instead to ensure that the agency uses the proper procedures and stays within the bounds set by Congress.

Petitioners assert (Br. 27) that *Chevron*'s respect for "agency policymaking" represents an unjustified shift in power from Congress to the Executive. But the alternative when a statute is genuinely ambiguous would be to shift policymaking power to the Judiciary. When a court instead upholds an agency's reasonable interpretation under *Chevron*, the court respects the policy judgment Congress made in vesting the agency with authority to implement the statute through rulemaking or adjudication. Moreover, *Chevron* respects the prerogatives of Congress by providing a "stable background rule" against which to legislate. *City of Arlington*, 569 U.S. at 296. Under *Chevron*, "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Ibid.* And subject to outer constitutional bounds

(see p. 40, *infra*), whether and to what extent to authorize an agency to resolve questions of policy is an Article I question for Congress. It is not for petitioners or courts to second-guess the "wisdom" of vesting an agency with such authority. *Chevron*, 467 U.S. at 866.

3. Chevron *is rooted in a long tradition of deference to the views of the Executive*

Although *Chevron* was an important development in key respects, it drew on a long tradition of judicial deference to Executive interpretations. Petitioners' selective account (Br. 3-5, 29-31) of what preceded *Chevron* cannot be squared with the historical record.

a. This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844. The Court identified numerous examples in *Chevron* itself, see *id.* at 844 n.14, including *Edwards' Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206 (1827). In that case, the Court accorded significant weight to state officials' interpretation of a state law they were charged with implementing: "In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Id.* at 210. Two decades earlier, Chief Justice Marshall similarly wrote for the Court that if the construction of a federal customs statute had been "doubtful," then the Court "would have respected the uniform construction" which similar laws had been given "by the treasury department of the United States." *United States* v. *Vowell*, 9 U.S. (5 Cranch) 368, 372 (1809); see, *e.g.*, *United States* v. *Macdaniel*, 32 U.S. (7 Pet.) 1, 14-15

(1833); *United States* v. *State Bank of N.C.*, 31 U.S. (6 Pet.) 29, 39-40 (1832).

The Court thus "gave early sanction to deference principles," and "judicial expressions of deference" increased as federal administrative law developed. Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 14-15 (1983). The Court stated in *United States* v. *Moore*, 95 U.S. 760 (1878), for example, that the "construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration." *Id.* at 763. Often, the Court expressed those principles in terms of upholding the agency's interpretation in the face of doubt or ambiguity. See, *e.g.*, *National Lead Co.* v. *United States*, 252 U.S. 140, 145-146 (1920) (describing as "settled" the principle that "great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and to carry its provisions into effect," when "uncertainty or ambiguity * * * is found in a statute"); *Jacobs* v. *Prichard*, 223 U.S. 200, 214 (1912) (referring to the "rule which gives strength to the construction of the officers who are directed to execute the law" if "ambiguity exist[s]"); *United States* v. *Alabama Great S. R.R.*, 142 U.S. 615, 621 (1892) ("decisive" weight for agency construction "in case of ambiguity"); *Schell's Executors* v. *Fauché*, 138 U.S. 562, 572 (1891) ("controlling" weight in "all cases of ambiguity"); *Brown* v. *United States*, 113 U.S. 568, 570-571 (1885) ("entitled to weight" and "in a case of doubt ought to turn the scale").

Petitioners contend (Br. 31) that such cases merely reflect a canon of construction giving weight to "contemporaneous and longstanding interpretations" of a legal text. The Court emphasized those factors in some

instances, see, *e.g.*, *National Lead*, 252 U.S. at 145-146; *Jacobs*, 223 U.S. at 213-214, but did not frame its reasoning in terms of any canon as such. Petitioners also miss the distinctive separation-of-powers dimension that runs through the cases. It was the settled understandings *of the Executive* to which this Court afforded deference in cases of statutory ambiguity, and the Court did so precisely because the Executive was "charged with the duty of executing" the ambiguous provision. *Moore*, 95 U.S at 763; see Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 Geo. Wash. L. Rev. 654, 683 (2020).

Moreover, many administrative actions in the early Republic were reviewable only via mandamus, and the writ of mandamus "generally would not issue unless the executive officer was acting plainly beyond the scope of his authority." *Mead*, 533 U.S. at 242 (Scalia, J., dissenting). Petitioners focus (Br. 30) on the Court's observation in *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497 (1840), that in a proper case outside of mandamus the Court "would not be bound to adopt the construction" of a statute "given by the head of a department." *Id.* at 515. But at the same time, the Court emphasized that it would not "revise [an executive officer's] judgment in any case where the law authorized him to exercise discretion, or judgment." *Ibid.*; see, *e.g.*, *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610-614 (1838). Justice Scalia reasonably viewed that tradition, which afforded Executive officials significant discretion to interpret federal law, as an additional forerunner of *Chevron*. At a minimum, the mandamus cases demonstrate that Article III itself was never understood to compel de novo review of all questions of law.

b. A tradition of deference to agency interpretations continued into the 20th century, both before and after the APA's enactment in 1946. In *Gray* v. *Powell*, 314 U.S. 402 (1941), for example, the Court deferred to an agency's interpretation of the term "producer" as used in a statutory exemption from price controls, *id.* at 411. The Court observed that Congress "could have legislated specifically as to" individual exemptions, but had instead "delegate[d] that function" to agency officials "whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests." *Id.* at 411-412. And given that vesting of authority by Congress, the Court concluded that it was "not the province of a court to absorb the administrative functions" or "substitute its judgment for that of the" agency. *Id.* at 412. The court's role was instead to ensure the agency had followed the proper procedures and applied the statute in a "reasoned manner." *Id.* at 411; see *NLRB* v. *Hearst Publ'ns, Inc.*, 322 U.S. 111, 130-131 (1944); see also Kenneth Culp Davis, *Administrative Law* § 246, at 882-883 (1951) (describing *Gray* as a "leading case" showing that the "test on review may be reasonableness and not rightness").

Any suggestion (*e.g.*, Pet. Br. 5) that this Court radically changed course after the APA is mistaken. Time and again, the Court stated that "great deference" was appropriate to the interpretation of a statute by those charged with administering it, particularly in doubtful cases. *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 83-84 (1980) (citation omitted); see, *e.g.*, *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978) ("To sustain an agency's application of a statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached

had the question arisen in the first instance in judicial proceedings.") (quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)) (brackets omitted); *Mitchell* v. *Budd*, 350 U.S. 473, 480 (1956) ("The Administrator fulfills his role when he makes a reasoned definition."); see also *Chevron*, 467 U.S. at 843 n.11 (citing additional examples).

c. To be sure, the Court's pre-*Chevron* precedents calling for deference to agency interpretations existed alongside other cases that could be read as "sanctioning free substitution of judicial for administrative judgment" on particular interpretive questions. *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976) (Friendly, J.) (collecting examples), aff'd, 432 U.S. 249 (1977). Before *Chevron*, the Court lacked any "unifying theory for determining when to defer to agency interpretations of statutes." Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 972 (1992). The result was considerable uncertainty about the degree of deference that any particular agency interpretation would receive in litigation. See *id.* at 974-975 (describing the mix of factors courts considered as lacking "predictive or constraining power," "manipulable," and not based on any "coherent doctrine"). In *Chevron* and its progeny, the Court supplanted that case-by-case approach with an "across-the-board presumption that, in the case of ambiguity, agency discretion is meant." Scalia 516; see Scalia 517 (observing that *Chevron* "is unquestionably better than what preceded it").

Chevron thus provided a more coherent and consistent framework than some of the Court's prior decisions, but it was rooted in traditions of deference reaching back to the Marshall Court. And at no point in American history have the federal courts applied an in-

variable rule of "independent judicial resolution" for all questions of law. Pet. Br. 4 (citation omitted).

B. *Stare Decisis* Principles Weigh Heavily In Favor Of Adhering To *Chevron*

Petitioners frame (Br. i) the principal question presented as whether to "overrule *Chevron*." But in truth, petitioners seek to overturn not merely that single case "but a 'long line of precedents,'—each one reaffirming the rest." *Kisor*, 139 S. Ct. at 2422 (quoting *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). This Court has invoked *Chevron* to uphold an agency's reasonable interpretation of a statute at least 70 times. See App., *infra*, 68a-72a. Justices with diverse jurisprudential views have regularly authored opinions for the Court applying *Chevron*, often unanimously.[1] If *Chevron* were truly the "poster child of a case that was 'egregiously wrong when decided,'" Pet. Br. 23 (citation

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[1] See, *e.g.*, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 158 (2013) (Ginsburg, J.); *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591 (2012) (Kagan, J.); *Mayo Found.*, 562 U.S. at 58 (Roberts, C.J.); *United States* v. *Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Souter, J.); *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 673 (2007) (Alito, J.); *Long Island Care*, 551 U.S. at 165-168 (Breyer, J.); *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 242 (2004) (Thomas, J.); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (Kennedy, J.); *Smiley*, 517 U.S. at 744 (Scalia, J.); *Pauley*, 501 U.S. at 696-699 (Blackmun, J.); *Rust* v. *Sullivan*, 500 U.S. 173, 184 (1991) (Rehnquist, C.J.); *Massachusetts* v. *Morash*, 490 U.S. 107, 116-119 (1989) (Stevens, J.); *NLRB* v. *United Food & Commercial Workers Union,* 484 U.S. 112, 123-125 (1987) (Brennan, J.); *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-409 (1987) (White, J.); *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 980-981 (1986) (O'Connor, J.); *United States* v. *City of Fulton*, 475 U.S. 657, 667-668 (1986) (Marshall, J.); *United States* v. *Boyle*, 469 U.S. 241, 246 n.4 (1985) (Burger, C.J.).

omitted), surely that would not have escaped the Court's attention over such a long period of applying, refining, and reiterating the doctrine many times over.

Petitioners would need to identify an extraordinary justification to dispense with that whole line of cases, but they "offer[] nothing of that ilk." *Kisor*, 139 S. Ct. at 2423. Instead, all relevant *stare decisis* considerations weigh against the radical step petitioners ask this Court to take. First, the bar to overruling *Chevron* is particularly high because Congress has legislated against the backdrop of the doctrine for 40 years and "remains free to alter" it at any time, either with respect to a specific statute or as a general matter. *Id.* at 2422 (citation omitted). Second, overruling *Chevron* would threaten the settled expectations of parties who have relied on agency rules or orders upheld under it. And third, the *Chevron* framework is both workable and sound. Overruling it now would render federal law less "even-handed, predictable, and consistent," and would undermine "the actual and perceived integrity of the judicial process." *Bay Mills*, 572 U.S. at 798 (citation omitted).

1. Congress has legislated against the backdrop of* Chevron *for decades and could alter it at any time

a. As explained above (at pp. 13-14), *Chevron* rests in part on a presumption that Congress intends an agency, rather than a court, to exercise whatever judgment and discretion is left open when a statute "is silent or ambiguous with respect to [a] specific issue." 467 U.S. at 843. Congress has legislated against that "background rule" for 40 years. *City of Arlington*, 569 U.S. at 296. Thus, Congress is by now "well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency" in accordance with *Chevron*. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366,

397 (1999). Indeed, *Chevron* could hardly have escaped Congress's notice; it is "one of the most cited cases in all of American law," Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 289 (5th ed. 2002), and has been the subject of numerous bills and congressional hearings, discussed below.

Congress has enacted and amended countless statutes since 1984 for which a federal agency is authorized to engage in rulemaking or adjudication—including the Magnuson-Stevens Act provisions at issue here. Br. in Opp. 18-19. Those legislative actions all occurred with *Chevron* in place and thus against an "understanding that the [*Chevron*] framework" would apply. Cass R. Sunstein, Chevron *As Law*, 107 Geo. L.J. 1613, 1672 (2019). Congress has also prescribed alternatives to *Chevron* in limited instances, or has specified which of several agencies is entitled to any deference. See Barnett & Walker Br. 8-11 (examples). Thus, in myriad ways, *Chevron* is woven into federal law.

b. Congress "remains free to alter" *Chevron*, or any judicial decisions applying it, at any time. *Bay Mills*, 572 U.S. at 799 (citation omitted); see *Kisor*, 139 S. Ct. at 2422 (describing the Court's "deference decisions" as "'balls tossed into Congress's court, for acceptance or not as that branch elects'") (quoting *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015)). For any particular statute, Congress can foreclose *Chevron* deference by using precise language to circumscribe agency discretion, by restricting or eliminating the scope of deference, or by specifying an alternative framework for judicial review. Congress is also free to modify or abolish *Chevron* for all federal statutes, and Congress could make those changes on a prospective basis in order to preserve settled law and protect reliance interests. But

Congress has "spurned multiple opportunities" to revisit *Chevron* despite proposals to do so, which only reinforces that any substantial changes should be left to Congress. *Kimble*, 576 U.S. at 456.

Indeed, one such proposal—which would amend the APA to require a reviewing court to "decide de novo all relevant questions of law, including the interpretation of * * * statutory provisions"—is pending in the current Congress. Separation of Powers Restoration Act of 2023, H.R. 288, 118th Cong. § 2(3) (as passed by House, June 15, 2023). Similar measures have been introduced in prior Congresses.[2] In considering those bills, Congress has heard from a variety of stakeholders, many of whom opposed the proposed changes. See, *e.g.*, H.R. Rep. No. 622, 114th Cong., 2d Sess. 21 (2016) (minority views) (noting that "more than 150 consumer, labor, research, faith, and other public interest groups" had "strongly oppose[d]" the proposal, which they viewed as "'allowing for judicial activism at the expense of agency expertise'") (citation omitted). And Congress has so far declined to make any wholesale changes.

c. Petitioners contend (Br. 18-22) that *Chevron* is entitled to little or no *stare decisis* effect for various reasons. The petitioner in *Kisor* made all of the same kinds of arguments four years ago, to no avail. See Pet. Br. at 49-50, *Kisor*, *supra* (No. 18-15). Remarkably, petitioners barely acknowledge—and fail to persuasively

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[2] See, *e.g.*, Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 202 (2017); Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. § 2 (2016). Congress has also considered countervailing proposals to codify *Chevron* in whole or part, including one by then-Senator Robert Dole. See Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong. § 2(a), at 24-25 (as introduced in Senate, Feb. 2, 1995).

distinguish—the Court's extensive articulation and application of *stare decisis* principles in *Kisor*.

Under no sensible conception of *stare decisis* could one of this Court's most oft-invoked decisions be essentially worthless as precedent. To the contrary, *Chevron* is entitled to the powerful form of *stare decisis* this Court applies to precedents that Congress could override by legislation. Petitioners' theories for watering down or wholly dispensing with the *stare decisis* analysis lack merit.

Petitioners principally argue (Br. 19) that *Chevron* is merely an "interpretive methodology," akin to a statement in an opinion about the relative weight to be given to legislative history. If that were true, then the lower courts would not have been obligated to adhere to the *Chevron* framework as a governing rule of law for the last 40 years, but of course they have been—as petitioners acknowledge (Br. 36), and as this Court's decisions confirm. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 383 (1999). Petitioners also miss the mark in asserting (Br. 20) that this Court has undermined *Chevron* in recent years by failing to apply it. The Court has relied on *Chevron* to uphold an agency's reasonable interpretation of a statute at least 70 times, has cited it approvingly many more times, and has often described it as a "rule" or the required approach. *E.g.*, *National R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 503 U.S. 407, 421-422 (1992). On the other side of the ledger, petitioners at best identify some decisions in which the Court arguably could have applied *Chevron* but did not, sometimes without explaining why—*e.g.*, because the Court found the statute clear, such that applying *Chevron* would have made no difference to the

outcome. Petitioners do not identify a single case in which the Court found a statute ambiguous but nonetheless refused to give effect to an agency's reasonable interpretation of it, in contravention of *Chevron*.

Petitioners alternatively contend (Br. 21-22) that *Chevron* is a "procedural" rule entitled to less respect as precedent. *Stare decisis* concerns are less significant for the "procedural and evidentiary rules" that structure judicial proceedings, *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991), because those rules "do not govern primary conduct," *Alleyne* v. *United States*, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring). But *Chevron* is not such a rule. Indeed, petitioners themselves contend (Br. 38-40) that *Chevron* impacts the lives of ordinary citizens by empowering agencies to issue interpretations of federal law that courts must respect if reasonable. Petitioners also predict (Br. 36-37) that overruling *Chevron* would alter how Congress legislates, which presupposes that Congress is relying on the current framework in making legislative judgments. *Chevron* is thus unlike the qualified-immunity precedent this Court overruled in *Pearson* v. *Callahan*, 555 U.S. 223 (2009), which affected the analytical sequence in which a court was required to decide two legal questions but did not affect the answers to those questions.

2. Overruling Chevron *would upset reliance interests*

a. Considerations of *stare decisis* are "at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828. This is such a case. *Chevron* has been invoked in thousands of decisions to uphold an agency's reasonable interpretation of a statute. Private parties have ordered their affairs in reasonable reliance on that settled body of law, making investment decisions and entering into

contracts informed by agency interpretations upheld under *Chevron*. Overruling *Chevron* would thus create "an upheaval," Sunstein 1670, potentially unsettling both interpretations sustained under *Chevron* and the downstream agency programs and interpretations that build upon or presuppose them. In rejecting calls to overrule *Auer*, this Court observed that doing so would have "cast doubt on many settled constructions of rules," and that it would be "the rare overruling that introduces so much instability into so many areas of law, all in one blow." *Kisor*, 139 S. Ct. at 2422. Overruling *Chevron* would be far more disruptive.

This Court and the lower courts have regularly applied *Chevron* in litigation between private parties, where one or the other litigant relies on an agency's interpretation. See, *e.g.*, *Long Island Care*, 551 U.S. at 162-164 (employee's suit against former employer). And many *Chevron* disputes involve agency interpretations that benefit regulated parties, often against challenges by interest groups that the statutory language required more stringent or demanding regulatory requirements. *Chevron* itself addressed a challenge by environmental groups to EPA's decision to revise its definition of "stationary source" in a way that benefited industry and gave States additional flexibility. See 467 U.S. at 859; see also, *e.g.*, *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 978-979 (1986) (applying *Chevron* to sustain agency's interpretation of statute as conferring discretion not to impose "tolerance levels" for certain toxins in food).

Overruling *Chevron* would invite litigants to argue that existing and future rules and orders that benefit regulated parties are inconsistent with arguably more demanding statutory language—a prospect particularly

likely to cause disruption in the context of complex schemes with private-enforcement mechanisms, such as the Clean Air Act, 42 U.S.C. 7604, the Clean Water Act, 33 U.S.C. 1365, and the Endangered Species Act of 1973, 16 U.S.C. 1540(g). At the same time, important measures that were adopted to protect members of the public would be thrown into doubt.

Petitioners assert that "concrete application[s] of *Chevron*" would still have a "'presumption of durability'" if *Chevron* were overruled. Pet. Br. 41 (citation omitted). But when a court upholds an agency's interpretation as reasonable under *Chevron*, the holding is frequently limited to reasonableness. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005). Overruling *Chevron* would invite litigants to argue that, even if an agency's interpretation was already sustained as reasonable in a prior case, the court should nonetheless adopt some other purportedly better interpretation—or that the agency's interpretation must be set aside as arbitrary because the agency's reasoning was based in part on its understanding of the interpretive latitude afforded under *Chevron*. And even if specific prior decisions applying *Chevron* could somehow be retained, petitioners fail to address the numerous agency rules and orders that have built upon those decisions but were not themselves challenged in litigation. The prospect of cascading uncertainty is yet another reason to leave any substantial changes to Congress, which could act prospectively.

b. Petitioners contend (Br. 41) that *Brand X* deprives regulated parties of any "*justifiable* reliance" interests. But relying upon the established precedent of this Court "is *always* justifiable reliance." *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 320

(1992) (Scalia, J., concurring in part and concurring in the judgment). Moreover, the APA and this Court's precedents require agencies to take reliance interests into account when appropriate. See *Brand X*, 545 U.S. at 981 (agency must "adequately explain[] the reasons for a reversal of policy"); *Smiley*, 517 U.S. at 742 (agency change that "does not take account of legitimate reliance on prior interpretation" would be arbitrary). And the "space" that *Chevron* creates "for the exercise of continuing agency discretion" is itself a virtue of the framework. *Mead*, 533 U.S. at 247 (Scalia, J., dissenting). Some changes in interpretation may reflect new data, or market developments, or the agency's accumulated experience in administering the statute under a prior interpretation. Others, as in *Chevron*, may reflect the new policies of an incoming Administration. Overruling *Chevron* would prevent agencies from taking reasonable steps to respond to new information or changed circumstances and would contribute to the "ossification" of federal regulatory policy. *Ibid.* At a minimum, petitioners fail to show that agencies change course with such frequency under *Chevron* as to make any private reliance on existing law unreasonable.

3. As refined by this Court,* Chevron *is a workable and familiar framework that remains vitally important

Chevron has not "proved unworkable" in practice. *Kimble*, 576 U.S. at 459. To the contrary, *Chevron* is a "familiar * * * framework" that the lower courts have applied thousands of times since 1984. Pet. App. 5. This Court grants plenary review of only a small fraction of those decisions, frequently focusing on the most difficult questions that have divided the courts of appeals. In the mine run of cases, *Chevron* sets forth a clear and

administrable approach to resolving disputes about agency statutory interpretations.

Petitioners identify two purported workability problems with *Chevron*, but neither provides a reason to overrule it. First, petitioners contend (Br. 33) that different judges have different thresholds for finding ambiguity, leading to inconsistent approaches in applying *Chevron*. But some disagreement among reasonable jurists is inevitable under any interpretive methodology. And overruling *Chevron* would exacerbate, not ameliorate, any concerns about inconsistency among reviewing courts. Judges are more likely to find agreement when asked to decide whether an agency's interpretation of a statute is reasonable than they would be if forced also to decide whether the agency's interpretation is the *most* reasonable one. Cf. Barnett & Walker Br. 30-31 (discussing empirical evidence that *Chevron* fosters agreement "across ideologically varied courts of appeals and panels"). And in circumstances where "the law runs out" to resolve an interpretive question "and policy-laden choice is what is left over," *Kisor*, 139 S. Ct. at 2415 (plurality opinion), *Chevron* provides a consistent rule of decision that is more likely to yield common ground among judges with diverse perspectives, while also respecting the role of the political Branches in making federal regulatory policy.

Second, petitioners contend (Br. 34-35) that *Chevron* has become unworkable through subsequent decisions specifying limits on the doctrine. Arguing that those limits are a reason to discard *Chevron* gets things backwards. The Court has already taken steps to appropriately circumscribe *Chevron*'s domain, and it could reinforce or elaborate on those limits if necessary (as in *Kisor*). In any event, petitioners overstate any practical

difficulty in applying the precedents they invoke. For example, many applications of *Chevron* involve notice-and-comment rules or formal adjudications, for which no elaborate "step zero" inquiry is necessary under *Mead*. Pet. Br. 34.

* * * * *

Any fair evaluation of *Chevron*'s workability or the wisdom of overruling it must account for the many benefits of the doctrine that this Court has recognized. As discussed above (at pp. 16-22), *Chevron* permits courts and the public to benefit from the specialized expertise that federal agencies can bring to bear, while also ensuring greater uniformity in the administration of federal law and greater political accountability for regulatory policy. And if *Chevron* were overruled, the federal courts would inevitably be drawn into resolving what are often, at bottom, questions of policy that arise in the administration of statutes by Executive agencies. Taking that step would be antithetical to *stare decisis*. Like *Chevron* itself, *stare decisis* serves in part to safeguard the "actual and perceived integrity of the judicial process" as an undertaking distinct from mere politics. *Bay Mills*, 572 U.S. at 798 (citation omitted). The Court should reject petitioners' effort to erode that distinction.

C. Petitioners' Remaining Arguments Lack Merit

Petitioners' remaining attacks on *Chevron* lack merit. *Chevron* respects the separation of powers, accords with due process, and is consistent with both the text and history of the APA.

1. Chevron *does not violate the separation of powers or due process*

a. Petitioners contend (Br. 23-26) that *Chevron* violates Article III by requiring federal courts to subordinate their independent judgment about the meaning of a statute to an agency's reasonable interpretation. But as with *Auer*, reviewing courts "retain a firm grip on the interpretive function" when applying *Chevron*. *Kisor*, 139 S. Ct. at 2421 (plurality opinion). First and foremost, it is for the court to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. And even when Congress has not, *Chevron* still requires the court to determine whether the agency's interpretation falls within the zone that Congress has left open for the exercise of judgment and discretion. See *Kisor*, 139 S. Ct. at 2416.

Petitioners' Article III argument is also inconsistent with Congress's recognized authority to expressly authorize an agency to define a statutory term. See p. 13, *supra*. When a statute contains an "express and clear conferral of authority" on an agency to define a term's meaning, *Cuozzo Speed Techs., LLC* v. *Lee*, 579 U.S. 261, 286 (2016) (Thomas, J., concurring), Article III does not empower a federal court to disregard Congress's command and supplant the agency's definition with the court's own. The same result should follow if, as *Chevron* presumes, Congress has implicitly delegated authority to an agency to give content to the same term. Article III draws no distinction between an express or implied legislative command. "[I]n both cases, the underlying question is exactly the same," *City of Arlington*, 569 U.S. at 299 (emphasis omitted)—namely, did Congress, in the exercise of its Article I powers, al-

locate to the agency the authority to flesh out a particular statutory provision within reasonable bounds?

Chevron is thus fully consistent with the "duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). When a court applies *Chevron* to sustain an agency's reasonable interpretation of an ambiguous statute, the court has determined that Congress meant for the agency "to possess whatever degree of discretion the ambiguity allows." *Smiley*, 517 U.S. at 741. The court is not "abdicating its constitutional duty to 'say what the law is' by deferring to agency interpretations of law." Monaghan 27-28. Instead, the court is properly recognizing that the "most faithful reading" of the law is that Congress vested the agency with the authority to resolve an ambiguity or fill a gap within reasonable boundaries. Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 21 (1985).

Accepting petitioners' contrary view of Article III could have radical consequences. Federal courts routinely defer when a constitutional or statutory provision vests responsibility or discretion in another Branch, as the Court contemplated in *Marbury* itself. See 5 U.S. (1 Cranch) at 170 ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."); see also, *e.g.*, *NLRB* v. *Noel Canning*, 573 U.S. 513, 550 (2014); *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009). Federal courts also regularly evaluate whether a given interpretation or understanding of federal law is unreasonable. A court may, for example, need to determine whether a litigant's legal position lacked any good-faith basis in evaluating sanctions, or whether a lower court committed

plain error during a criminal trial. Congress itself has prescribed a similarly deferential approach in imposing limits on federal habeas corpus. See 28 U.S.C. 2254(d)(1) (federal-court review limited to asking whether state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law"). An Article III court does not surrender its authority to say what the law is when it answers legal questions that are themselves framed in terms of reasonableness.

b. Petitioners further err in contending (Br. 25-27) that *Chevron* improperly grants Executive agencies Article I legislative powers. Congress must provide "an intelligible principle" to guide the agency's discretion, *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (citation omitted), but may authorize an agency to fill in the details of the statutory scheme by rulemaking or adjudication. Agencies have engaged in such actions "since the beginning of the Republic." *City of Arlington*, 569 U.S. at 304 n.4. "These activities take 'legislative' and 'judicial' forms, but they are exercises of * * * the 'executive Power.'" *Ibid.* (quoting U.S. Const. Art. II, § 1, Cl. 1); see *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986); *INS* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983).

c. Petitioners' due-process arguments (Br. 27-28) are likewise without merit. This Court's due-process precedents address the possibility of "actual bias on the part of [a] judge." *Caperton* v. *A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 877 (2009) (citation omitted). But a judge does not evince any bias towards a litigant when she applies *Chevron* to evaluate whether an agency's interpretation is reasonable. So too a judge does not evidence such bias when she follows the APA's command

to review agency factfinding deferentially, 5 U.S.C. 706(2)(E). Petitioners liken (Br. 27) *Chevron* to "adjust[ing] the strike zone to favor the home team." But judges applying *Chevron* are just following the rules of the game that this Court established decades ago, not demonstrating any personal desire to see a favored team win.

More broadly, petitioners' view (Br. 15, 27-28, 38-39) that *Chevron* unfairly advantages the federal government in disputes with the citizenry is misguided. The Executive Branch is controlled by the President, who is chosen by the American people. When a court applies *Chevron*, it is giving effect to choices the American people made as an exercise of self-government. Additionally, many agency rules and orders do not simply define a regulated party's obligations *to the government*, but also balance and protect the competing interests of other private parties—as when EPA's interpretation of "stationary source" affects both facilities subject to the Clean Air Act and anyone who might inhale the emissions released from such sources. The government represents those citizens' interests, too, when it defends an agency's interpretation.

2. Chevron *is consistent with the APA*

Petitioners briefly contend (Br. 28-29) that *Chevron* is inconsistent with the APA provision in 5 U.S.C. 706, which states that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. 706. That provision traces its roots to Section 10(e) of the APA as originally enacted in 1946, see Administrative Procedure Act, ch. 324, § 10(e), 60 Stat. 243-244, and

it does not forbid the deference doctrines that this Court developed before 1946 and continued to develop and apply afterwards, including *Chevron*.

As a textual matter, Section 706 provides that the reviewing court "shall decide all relevant questions of law," 5 U.S.C. 706, but it does not "specify the standard of review a court should use" and thus does not foreclose reviewing an "agency's reading for reasonableness," *Kisor*, 139 S. Ct. at 2419 (plurality opinion). When a court gives effect to an agency's interpretation under *Chevron*, it has decided the "relevant questions of law," 5 U.S.C. 706, by determining that Congress authorized the agency to resolve an ambiguity within reasonable bounds and that the agency's interpretation falls within those bounds. See *City of Arlington*, 569 U.S. at 317 (Roberts, C.J., dissenting) ("We do not ignore [Section 706's] command when we afford an agency's statutory interpretation *Chevron* deference; we respect it."); John F. Manning, Chevron *and the Reasonable Legislator*, 128 Harv. L. Rev. 457, 459 (2014) ("[T]he reviewing court fulfills its duty to 'interpret' the statute by determining whether the agency has stayed within the bounds of its assigned discretion.").

The history of the statute points in the same direction. "Section 706 was understood when enacted to 'restate the present law as to the scope of judicial review,'" and "nothing in the law of that era required all judicial review of agency interpretations to be *de novo*." *Kisor*, 139 S. Ct. at 2419-2420 (plurality opinion) (quoting U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947)) (brackets omitted); see *Administrative Procedure Act: Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 39 (1946) (describing Section 10(e) as a "restatement of the scope

of review"); S. Rep. No. 752, 79th Cong., 1st Sess. 38, 44 (1945) (similar). The exhaustive study of administrative procedures that preceded the APA's enactment confirmed that judicial review was, "in some instances at least, * * * limited to the inquiry whether the administrative construction is a permissible one." *Final Report of Attorney General's Committee on Administrative Procedure* (1941), *reprinted in Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 78 (1941); see *id.* at 90-91 ("[W]here the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body."); cf. pp. 22-25, *supra* (discussing pre-APA case law). And "[i]f Section 706 did not change the law of judicial review," as this Court has "long recognized," then it also "did not proscribe a deferential standard then known and in use." *Kisor*, 139 S. Ct. at 2420 (plurality opinion).

Petitioners are therefore wrong to suggest that the APA was understood when enacted to require "independent judicial resolution" of all questions of law. Pet. Br. 4 (citation omitted). Although one commentator expressed that view, see John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 516 (1947), his "completely isolated" understanding of the APA's judicial-review provisions contradicted the great weight of "contemporary scholarship," Ronald M. Levin, *The APA and the Assault on Deference*, 106 Minn. L. Rev. 125, 181 (2021) (citing the views of "leading voices in administrative law scholarship, including Kenneth Culp Davis, [and] Louis L. Jaffee") (footnote omitted); see, *e.g.*, Davis 885. And in the years after the APA's enactment, this Court never "suggest[ed] that [the APA] prohibited

deference to agency interpretations." Sunstein 1656; see Sunstein 1650, 1653 (describing the lack of any compelling evidence that the APA was understood before or immediately after its enactment to require de novo review of agency interpretations as "a dog who did not bark in the night—a probative silence").

Petitioners contend that Section 706 places review of statutory and constitutional questions on "equal footing." Pet. Br. 29 (citation omitted). But in neither case does Section 706's text specify the applicable standard of review. By contrast, Section 706 expressly refers elsewhere to "de novo" factfinding by the reviewing court. 5 U.S.C. 706(2)(F). The presence of the "de novo" modifier in that provision suggests that its absence from the portion of Section 706 on which petitioners rely was deliberate. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

In any event, Section 706 and *Chevron* existed together for decades, with no suggestion by this Court of any inconsistency. Section 706 cannot supply a persuasive basis for overruling *Chevron* at this late date.

3. Petitioners' policy concerns are unfounded and, in any event, better addressed to Congress

Petitioners' remaining arguments (Br. 36-39) sound in policy—for example, that *Chevron* creates undesirable incentives for agencies to push the boundaries of statutes, that *Chevron* has undermined the legislative process, or that *Chevron* makes the law more difficult to ascertain for ordinary citizens. Petitioners do not provide any empirical evidence to substantiate those claims, and there are many reasons to doubt them. To reiterate, *Chevron* comes into play only when a reviewing court cannot discern any clear answer to a given question in the statutory text after exhausting the tra-

ditional tools of interpretation. Agencies, Congress, and individuals all benefit from having *Chevron*'s clear background rule for resolving such disputes. Petitioners also offer no reason to think that their policy concerns would be addressed by overruling *Chevron*. Doing so could easily make "legislative compromise" (Pet. Br. 37) more difficult to achieve, not easier. In any event, Congress itself is in a far better position than this Court to evaluate such claims. Petitioners' policy complaints are therefore "more appropriately addressed to Congress." *Kimble*, 576 U.S. at 464 (citation omitted).

II. THE COURT SHOULD ALSO REJECT PETITIONERS' ALTERNATIVE REQUEST TO NARROW *CHEVRON*

As a fallback, petitioners ask (Br. 43) the Court to "clarify" that *Chevron* "does not apply merely because the statute is silent on a given issue." That purported clarification would contravene *Chevron*'s holding that an agency's interpretation should be reviewed for reasonableness "if the statute is *silent or ambiguous* with respect to the specific issue." 467 U.S. at 843 (emphasis added). Of course, as petitioners emphasize (Br. 44), an agency cannot fill the interstitial silences in a statute except as authorized by Congress. But *Chevron* generally applies only if Congress has authorized the agency to implement a statute through rulemaking or adjudication. See *City of Arlington*, 569 U.S. at 306-307; *Chevron*, 467 U.S. at 843-844. Petitioners fail to explain what more Congress must say.

Petitioners also offer no workable line to distinguish between statutory "silence" and ambiguity for *Chevron* purposes, as this case illustrates. The central dispute here is whether the Magnuson-Stevens Act authorizes NMFS to require regulated vessels to procure and pay for third-party monitoring services. To say that the

statute is "silent" on that issue begs the very question that the parties are disputing. The government maintains that the statute is *not* silent but rather speaks to the agency's authority in multiple ways. See Br. in Opp. 14-19. Among other things, the Act permits the agency to require vessels to "carr[y]" onboard "observers" for data collection, 16 U.S.C. 1853(b)(8); defines "observer" to include non-governmental personnel, 16 U.S.C. 1802(31); and empowers the agency to impose sanctions on vessel owners that fail to timely pay for third-party observer services, 16 U.S.C. 1858(g)(1)(D).

The court of appeals identified several textual considerations supporting the agency's construction of the statute and ultimately determined that the rule reflects at least a "reasonable" interpretation. Pet. App. 8, 16; accord *Relentless, Inc.* v. *United States Dep't of Commerce*, 62 F.4th 621, 633-634 (1st Cir. 2023), petition for cert. pending, No. 22-1219 (filed June 14, 2023). Petitioners offer no reason to think that the court would have reached a different result if it had been required to decide whether the statute is best characterized as silent rather than ambiguous, or that the *Chevron* framework would be improved in other cases by engrafting that additional step onto it.

Petitioners further contend (Br. 45-46) that the *Chevron* inquiry should be different for "controversial" agency rules. That characterization is in the eye of the beholder and would not furnish a stable or principled basis for judicial review—which already presupposes a controversy between the parties. Petitioners' only proffered ground (*ibid.*) for deeming this rule to be controversial is that the Act expressly authorizes NMFS to establish fee-based monitoring programs in certain other contexts. But whether those other provisions sup-

port a negative inference about the agency's authority to adopt this rule is a run-of-the-mill question of statutory interpretation. The D.C. and First Circuits both considered that argument and correctly rejected it. Pet. App. 16; *Relentless*, 62 F.4th at 631-633.

At any rate, there is nothing controversial or unusual about requiring regulated parties to bear the costs of complying with federal regulatory requirements. To the contrary, that is the "default norm." *Relentless*, 62 F.4th at 629. If a statute required a party to submit "independently audited financials," it would be a non-starter for a regulated party to claim that the government is responsible for paying the costs of retaining a third-party auditor. *Id.* at 630. But if a dispute nonetheless arose about that issue, it would be anomalous to treat the statute as "silent" merely because Congress did not spell out the default expectation that a regulated party, not the government, pays when that party must procure the services of third parties—like accountants, lawyers, or recordkeepers—to comply with federal law. By the same token, if a statute required regulated parties to open their books for inspection by *government* auditors, one would expect Congress to speak clearly before regulated parties could be expected to bear the cost of paying those employees for their time. But as already explained, the observers at issue here are not federal employees or officers. Requiring regulated parties to pay to procure the services of those third parties is not materially different from requiring them to pay the other costs they routinely incur to meet their legal obligations. See 85 Fed. Reg. at 7422.

III. THE JUDGMENT SHOULD BE AFFIRMED

The decision below was an unremarkable application of this Court's settled precedent. The court of appeals

applied the traditional tools of statutory construction and found the agency's interpretation to be "reasonable" and therefore entitled to deference under *Chevron*. Pet. App. 2. If the Court were to revisit *Chevron*, it would be appropriate to remand the case to the court of appeals for application of any new approach the Court adopts. The Court limited its grant of certiorari to the question whether *Chevron* should be overruled or modified and specifically declined to grant review of the separate question whether the Magnuson-Stevens Act authorizes the rule. 143 S. Ct. 2429.

But as petitioners do not dispute, if this Court declines to overrule or modify *Chevron*, the judgment below should be affirmed. And adhering to *Chevron* is the proper course here, given principles of *stare decisis* and *Chevron*'s continuing importance to all three Branches of government.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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APPENDIX A

1. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. 16 U.S.C. 1801 provides:

Findings, purposes and policy

(a) Findings

The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) Certain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially reduced in number that they could become similarly threatened as a consequence of (A) increased fishing pressure, (B) the inadequacy of fishery resource conservation and management practices and controls, or (C) direct and indirect habitat losses which have resulted in a diminished capacity to support existing fishing levels.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many

coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the Nation's fishery resources.

(7) A national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska, is necessary to assure that our citi-

zens benefit from the employment, food supply, and revenue which could be generated thereby.

(8) The collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States.

(9) One of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats. Habitat considerations should receive increased attention for the conservation and management of fishery resources of the United States.

(10) Pacific Insular Areas contain unique historical, cultural, legal, political, and geographical circumstances which make fisheries resources important in sustaining their economic growth.

(11) A number of the Fishery Management Councils have demonstrated significant progress in integrating ecosystem considerations in fisheries management using the existing authorities provided under this chapter.

(12) International cooperation is necessary to address illegal, unreported, and unregulated fishing and other fishing practices which may harm the sustainability of living marine resources and disadvantage the United States fishing industry.

(13) While both provide significant cultural and economic benefits to the Nation, recreational fishing and commercial fishing are different activities. Therefore, science-based conservation and manage-

ment approaches should be adapted to the characteristics of each sector.

(b) Purposes

It is therefore declared to be the purposes of the Congress in this chapter—

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by exercising (A) sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone established by Presidential Proclamation 5030, dated March 10, 1983, and (B) exclusive fishery management authority beyond the exclusive economic zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles, including the promotion of catch and release programs in recreational fishing;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States;

(6) to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska, and to that end, to ensure that optimum yield determinations promote such development in a non-wasteful manner; and

(7) to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat.

(c) Policy

It is further declared to be the policy of the Congress in this chapter—

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this chapter;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and

management of fishery resources, as provided for in this chapter;

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; considers efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; considers the effects of fishing on immature fish and encourages development of practical measures that minimize bycatch and avoid unnecessary waste of fish; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this chapter;

(5) to support and encourage active United States efforts to obtain internationally acceptable agreements which provide for effective conservation and management of fishery resources, and to secure agreements to regulate fishing by vessels or persons beyond the exclusive economic zones of any nation;

(6) to foster and maintain the diversity of fisheries in the United States; and

(7) to ensure that the fishery resources adjacent to a Pacific Insular Area, including resident or migratory stocks within the exclusive economic zone adjacent to such areas, be explored, developed, conserved, and managed for the benefit of the people of such area and of the United States.

3. 16 U.S.C. 1802 provides in pertinent part:

Definitions

As used in this chapter, unless the context otherwise requires—

* * * * *

(31) 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 this chapter.

* * * * *

(36) The term "person" means any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

* * * * *

4. 16 U.S.C. 1821(h) provides:

Foreign fishing

(h) Full observer coverage program

(1)(A) Except as provided in paragraph (2), the Secretary shall establish a program under which a United States observer will be stationed aboard each foreign fishing vessel while that vessel is engaged in fishing within the exclusive economic zone.

(B) The Secretary shall by regulation prescribe minimum health and safety standards that shall be maintained aboard each foreign fishing vessel with regard to the facilities provided for the quartering of, and the carrying out of observer functions by, United States observers.

(2) The requirement in paragraph (1) that a United States observer be placed aboard each foreign fishing vessel may be waived by the Secretary if he finds that—

(A) in a situation where a fleet of harvesting vessels transfers its catch taken within the exclusive economic zone to another vessel, aboard which is a United States observer, the stationing of United States observers on only a portion of the harvesting vessel fleet will provide a representative sampling of the by-catch of the fleet that is sufficient for purposes of determining whether the requirements of the applicable management plans for the by-catch species are being complied with;

(B) in a situation where the foreign fishing vessel is operating under a Pacific Insular Area fishing agreement, the Governor of the applicable Pacific Insular Area, in consultation with the Western Pacific Council, has established an observer coverage program or other monitoring program that the Secretary, in consultation with the Western Pacific Management Council, determines is adequate to monitor harvest, bycatch, and compliance with the laws of the United States by vessels fishing under the agreement;

(C) the time during which a foreign fishing vessel will engage in fishing within the exclusive eco-

nomic zone will be of such short duration that the placing of a United States observer aboard the vessel would be impractical; or

(D) for reasons beyond the control of the Secretary, an observer is not available.

(3) Observers, while stationed aboard foreign fishing vessels, shall carry out such scientific, compliance monitoring, and other functions as the Secretary deems necessary or appropriate to carry out the purposes of this chapter; and shall cooperate in carrying out such other scientific programs relating to the conservation and management of living resources as the Secretary deems appropriate.

(4) In addition to any fee imposed under section 1824(b)(10) of this title and section 1980(e) of title 22 with respect to foreign fishing for any year after 1980, the Secretary shall impose, with respect to each foreign fishing vessel for which a permit is issued under such section 1824 of this title, a surcharge in an amount sufficient to cover all the costs of providing a United States observer aboard that vessel. The failure to pay any surcharge imposed under this paragraph shall be treated by the Secretary as a failure to pay the permit fee for such vessel under section 1824(b)(10) of this title. All surcharges collected by the Secretary under this paragraph shall be deposited in the Foreign Fishing Observer Fund established by paragraph (5).

(5) There is established in the Treasury of the United States the Foreign Fishing Observer Fund. The Fund shall be available to the Secretary as a revolving fund for the purpose of carrying out this subsection. The Fund shall consist of the surcharges deposited into

it as required under paragraph (4). All payments made by the Secretary to carry out this subsection shall be paid from the Fund, only to the extent and in the amounts provided for in advance in appropriation Acts. Sums in the Fund which are not currently needed for the purposes of this subsection shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(6) If at any time the requirement set forth in paragraph (1) cannot be met because of insufficient appropriations, the Secretary shall, in implementing a supplementary observer program:

(A) certify as observers, for the purposes of this subsection, individuals who are citizens or nationals of the United States and who have the requisite education or experience to carry out the functions referred to in paragraph (3);

(B) establish standards of conduct for certified observers equivalent to those applicable to Federal personnel;

(C) establish a reasonable schedule of fees that certified observers or their agents shall be paid by the owners and operators of foreign fishing vessels for observer services; and

(D) monitor the performance of observers to ensure that it meets the purposes of this chapter.

5. 16 U.S.C. 1853 provides:

Contents of fishery management plans

(a) Required provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall—

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are—

(A) 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;

(B) described in this subsection or subsection (b), or both; and

(C) consistent with the national standards, the other provisions of this chapter, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of

foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify—

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3),

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States;

(5) specify the pertinent data which shall be submitted to the Secretary with respect to commercial, recreational,[1] charter fishing, and fish processing in the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, economic information necessary to meet the requirements of this chapter, and the esti-

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[1] So in original. Probably should be followed by "and".

mated processing capacity of, and the actual processing capacity utilized by, United States fish processors,[2]

(6) consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fishery; except that the adjustment shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery;

(7) describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 1855(b)(1)(A) of this title, minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat;

(8) in the case of a fishery management plan that, after January 1, 1991, is submitted to the Secretary for review under section 1854(a) of this title (including any plan for which an amendment is submitted to the Secretary for such review) or is prepared by the Secretary, assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan;

(9) include a fishery impact statement for the plan or amendment (in the case of a plan or amendment thereto submitted to or prepared by the Secre-

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[2] So in original. The comma probably should be a semicolon.

tary after October 1, 1990) which shall assess, specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for—

(A) participants in the fisheries and fishing communities affected by the plan or amendment;

(B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; and

(C) the safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery;

(10) specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery;

(11) establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority—

(A) minimize bycatch; and

(B) minimize the mortality of bycatch which cannot be avoided;

(12) assess the type and amount of fish caught and released alive during recreational fishing under catch and release fishery management programs and the mortality of such fish, and include conservation and management measures that, to the extent practicable, minimize mortality and ensure the extended survival of such fish;

(13) include a description of the commercial, recreational, and charter fishing sectors which participate in the fishery, including its economic impact, and, to the extent practicable, quantify trends in landings of the managed fishery resource by the commercial, recreational, and charter fishing sectors;

(14) to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, allocate, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery and;[3]

(15) establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

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[3] So in original. Probably should be "fishery; and".

(b) Discretionary provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may—

(1) require a permit to be obtained from, and fees to be paid to, the Secretary, with respect to—

(A) any fishing vessel of the United States fishing, or wishing to fish, in the exclusive economic zone or for anadromous species or Continental Shelf fishery resources beyond such zone;

(B) the operator of any such vessel; or

(C) any United States fish processor who first receives fish that are subject to the plan;

(2)(A) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(B) designate such zones in areas where deep sea corals are identified under section 1884 of this title, to protect deep sea corals from physical damage from fishing gear or to prevent loss or damage to such fishing gear from interactions with deep sea corals, after considering long-term sustainable uses of fishery resources in such areas; and

(C) with respect to any closure of an area under this chapter that prohibits all fishing, ensure that such closure—

(i) is based on the best scientific information available;

(ii) includes criteria to assess the conservation benefit of the closed area;

(iii) establishes a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and

(iv) is based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to: users of the area, overall fishing activity, fishery science, and fishery and marine conservation;

(3) establish specified limitations which are necessary and appropriate for the conservation and management of the fishery on the—

(A) catch of fish (based on area, species, size, number, weight, sex, bycatch, total biomass, or other factors);

(B) sale of fish caught during commercial, recreational, or charter fishing, consistent with any applicable Federal and State safety and quality requirements; and

(C) transshipment or transportation of fish or fish products under permits issued pursuant to section 1824 of this title;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this chapter;

(5) incorporate (consistent with the national standards, the other provisions of this chapter, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery and take into account the different circumstances affecting fisheries from different States and ports, including distances to fishing grounds and proximity to time and area closures;

(6) establish a limited access system for the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—

(A) present participation in the fishery;

(B) historical fishing practices in, and dependence on, the fishery;

(C) the economics of the fishery;

(D) the capability of fishing vessels used in the fishery to engage in other fisheries;

(E) the cultural and social framework relevant to the fishery and any affected fishing communities;

(F) the fair and equitable distribution of access privileges in the fishery; and

(G) any other relevant considerations;

(7) require fish processors who first receive fish that are subject to the plan to submit data which are necessary for the conservation and management of the fishery;

(8) 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; except that such a vessel shall not be required to carry an observer on board 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;

(9) assess and specify the effect which the conservation and management measures of the plan will have on the stocks of naturally spawning anadromous fish in the region;

(10) include, consistent with the other provisions of this chapter, conservation and management measures that provide harvest incentives for participants within each gear group to employ fishing practices that result in lower levels of bycatch or in lower levels of the mortality of bycatch;

(11) reserve a portion of the allowable biological catch of the fishery for use in scientific research;

(12) include management measures in the plan to conserve target and non-target species and habitats, considering the variety of ecological factors affecting fishery populations; and

(14)[4] prescribe such other measures, requirements, or conditions and restrictions as are deter-

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[4] So in original. No par. (13) has been enacted.

mined to be necessary and appropriate for the conservation and management of the fishery.

(c) Proposed regulations

Proposed regulations which the Council deems necessary or appropriate for the purposes of—

(1) implementing a fishery management plan or plan amendment shall be submitted to the Secretary simultaneously with the plan or amendment under section 1854 of this title; and

(2) making modifications to regulations implementing a fishery management plan or plan amendment may be submitted to the Secretary at any time after the plan or amendment is approved under section 1854 of this title.

6. 16 U.S.C. 1853a provides in pertinent part:

Limited access privilege programs

(a) In general

After January 12, 2007, a Council may submit, and the Secretary may approve, for a fishery that is managed under a limited access system, a limited access privilege program to harvest fish if the program meets the requirements of this section.

* * * * *

(e) Cost recovery

In establishing a limited access privilege program, a Council shall—

(1) develop a methodology and the means to identify and assess the management, data collection and analysis, and enforcement programs that are directly related to and in support of the program; and

(2) provide, under section 1854(d)(2) of this title, for a program of fees paid by limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities.

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7. 16 U.S.C. 1854(a) and (b) provides:

Action by Secretary

(a) Review of plans

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall—

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law; and

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(2) In undertaking the review required under paragraph (1), the Secretary shall—

(A) take into account the information, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 1853(a)(6) of this title.

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify—

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

(4) If the Secretary disapproves or partially approves a plan or amendment, the Council may submit a revised plan or amendment to the Secretary for review under this subsection.

(5) For purposes of this subsection and subsection (b), the term "immediately" means on or before the 5th day after the day on which a Council transmits to the Secretary a fishery management plan, plan amendment, or proposed regulation that the Council characterizes as final.

(b) Review of regulations

(1) Upon transmittal by the Council to the Secretary of proposed regulations prepared under section 1853(c) of this title, the Secretary shall immediately initiate an evaluation of the proposed regulations to determine whether they are consistent with the fishery management plan, plan amendment, this chapter and other applicable law. Within 15 days of initiating such evaluation the Secretary shall make a determination and—

(A) if that determination is affirmative, the Secretary shall publish such regulations in the Federal Register, with such technical changes as may be necessary for clarity and an explanation of those changes, for a public comment period of 15 to 60 days; or

(B) if that determination is negative, the Secretary shall notify the Council in writing of the inconsistencies and provide recommendations on revisions that would make the proposed regulations consistent with the fishery management plan, plan amendment, this chapter, and other applicable law.

(2) Upon receiving a notification under paragraph (1)(B), the Council may revise the proposed regulations and submit them to the Secretary for reevaluation under paragraph (1).

(3) The Secretary shall promulgate final regulations within 30 days after the end of the comment period un-

der paragraph (1)(A). The Secretary shall consult with the Council before making any revisions to the proposed regulations, and must publish in the Federal Register an explanation of any differences between the proposed and final regulations.

8. 16 U.S.C. 1855 provides in pertinent part:

Other requirements and authority

* * * * *

(d) Responsibility of Secretary

The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this chapter. The Secretary may promulgate such regulations, in accordance with section 553 of title 5, as may be necessary to discharge such responsibility or to carry out any other provision of this chapter.

* * * * *

(f) Judicial review

(1) Regulations promulgated by the Secretary under this chapter and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable; except that—

(A) section 705 of such title is not applicable, and

(B) the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

(2) The actions referred to in paragraph (1) are actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.

(3)(A) Notwithstanding any other provision of law, the Secretary shall file a response to any petition filed in accordance with paragraph (1), not later than 45 days after the date the Secretary is served with that petition, except that the appropriate court may extend the period for filing such a response upon a showing by the Secretary of good cause for that extension.

(B) A response of the Secretary under this paragraph shall include a copy of the administrative record for the regulations that are the subject of the petition.

(4) Upon a motion by the person who files a petition under this subsection, the appropriate court shall assign the matter for hearing at the earliest possible date and shall expedite the matter in every possible way.

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9. 16 U.S.C. 1862(a)-(e) provides:

North Pacific fisheries conservation

(a) In general

The North Pacific Council may prepare, in consultation with the Secretary, a fisheries research plan for any

fishery under the Council's jurisdiction except a salmon fishery which—

(1) requires that observers be stationed on fishing vessels engaged in the catching, taking, or harvesting of fish and on United States fish processors fishing for or processing species under the jurisdiction of the Council, including the Northern Pacific halibut fishery, for the purpose of collecting data necessary for the conservation, management, and scientific understanding of any fisheries under the Council's jurisdiction; and

(2) establishes a system, or system,[1] of fees, which may vary by fishery, management area, or observer coverage level, to pay for the cost of implementing the plan.

(b) Standards

(1) Any plan or plan amendment prepared under this section shall be reasonably calculated to—

(A) gather reliable data, by stationing observers on all or a statistically reliable sample of the fishing vessels and United States fish processors included in the plan, necessary for the conservation, management, and scientific understanding of the fisheries covered by the plan;

(B) be fair and equitable to all vessels and processors;

(C) be consistent with applicable provisions of law; and

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[1] So in original.

(D) take into consideration the operating requirements of the fisheries and the safety of observers and fishermen.

(2) Any system of fees established under this section shall—

(A) provide that the total amount of fees collected under this section not exceed the combined cost of (i) stationing observers, or electronic monitoring systems, on board fishing vessels and United States fish processors, (ii) the actual cost of inputting collected data, and (iii) assessments necessary for a risk-sharing pool implemented under subsection (e) of this section, less any amount received for such purpose from another source or from an existing surplus in the North Pacific Fishery Observer Fund established in subsection (d) of this section;

(B) be fair and equitable to all participants in the fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(C) provide that fees collected not be used to pay any costs of administrative overhead or other costs not directly incurred in carrying out the plan;

(D) not be used to offset amounts authorized under other provisions of law;

(E) be expressed as a fixed amount reflecting actual observer costs as described in subparagraph (A) or a percentage, not to exceed 2 percent, of the unprocessed ex-vessel value of fish and shellfish harvested under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(F) be assessed against some or all fishing vessels and United States fish processors, including those not required to carry an observer or an electronic monitoring system under the plan, participating in fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(G) provide that fees collected will be deposited in the North Pacific Fishery Observer Fund established under subsection (d) of this section;

(H) provide that fees collected will only be used for implementing the plan established under this section;

(I) provide that fees collected will be credited against any fee for stationing observers or electronic monitoring systems on board fishing vessels and United States fish processors and the actual cost of inputting collected data to which a fishing vessel or fish processor is subject under section 1854(d) of this title; and

(J) meet the requirements of section 9701(b) of title 31.

(c) Action by Secretary

(1) Within 60 days after receiving a plan or plan amendment from the North Pacific Council under this section, the Secretary shall review such plan or plan amendment and either (A) remand such plan or plan amendment to the Council with comments if it does not meet the requirements of this section, or (B) publish in the Federal Register proposed regulations for implementing such plan or plan amendment.

(2) During the 60-day public comment period, the Secretary shall conduct a public hearing in each State represented on the Council for the purpose of receiving public comments on the proposed regulations.

(3) Within 45 days of the close of the public comment period, the Secretary, in consultation with the Council, shall analyze the public comment received and publish final regulations for implementing such plan.

(4) If the Secretary remands a plan or plan amendment to the Council for failure to meet the requirements of this section, the Council may resubmit such plan or plan amendment at any time after taking action the Council believes will address the defects identified by the Secretary. Any plan or plan amendment resubmitted to the Secretary will be treated as an original plan submitted to the Secretary under paragraph (1) of this subsection.

(d) Fishery Observer Fund

There is established in the Treasury a North Pacific Fishery Observer Fund. The Fund shall be available, without appropriation or fiscal year limitation, only to the Secretary for the purpose of carrying out the provisions of this section, subject to the restrictions in subsection (b)(2) of this section. The Fund shall consist of all monies deposited into it in accordance with this section. Sums in the Fund that are not currently needed for the purposes of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(e) Special provisions regarding observers

(1) The Secretary shall review—

(A) the feasibility of establishing a risk sharing pool through a reasonable fee, subject to the limitations of subsection (b)(2)(E) of this section, to provide coverage for vessels and owners against liability from civil suits by observers, and

(B) the availability of comprehensive commercial insurance for vessel and owner liability against civil suits by observers.

(2) If the Secretary determines that a risk sharing pool is feasible, the Secretary shall establish such a pool, subject to the provisions of subsection (b)(2) of this section, unless the Secretary determines that—

(A) comprehensive commercial insurance is available for all fishing vessels and United States fish processors required to have observers under the provisions of this section, and

(B) such comprehensive commercial insurance will provide a greater measure of coverage at a lower cost to each participant.

10. 50 C.F.R. 648.11 provides in pertinent part:

Monitoring coverage.

(a) *Coverage*. The Regional Administrator may request any vessel holding a permit for Atlantic sea scallops, NE multispecies, monkfish, skates, Atlantic mackerel, squid, butterfish, scup, black sea bass, bluefish, spiny dogfish, Atlantic herring, tilefish, Atlantic surfclam, ocean quahog, or Atlantic deep-sea red crab; or a moratorium permit for summer flounder; to carry a NMFS-certified fisheries observer. A vessel holding a permit for Atlantic sea scallops is subject to the addi-

tional requirements specific in paragraph (g) of this section. Also, any vessel or vessel owner/operator that fishes for, catches or lands hagfish, or intends to fish for, catch, or land hagfish in or from the exclusive economic zone must carry a NMFS-certified fisheries observer when requested by the Regional Administrator in accordance with the requirements of this section. The requirements of this section do not apply to vessels with only a Federal private recreational tilefish permit.

(b) *Facilitating coverage*. If requested by the Regional Administrator or their designees, including NMFS-certified observers, monitors, and NMFS staff, to be sampled by an observer or monitor, it is the responsibility of the vessel owner or vessel operator to arrange for and facilitate observer or monitor placement. Owners or operators of vessels selected for observer or monitor coverage must notify the appropriate monitoring service provider before commencing any fishing trip that may result in the harvest of resources of the respective fishery. Notification procedures will be specified in selection letters to vessel owners or permit holder letters.

(c) *Safety waivers*. The Regional Administrator may waive the requirement to be sampled by an observer or 632 Fishery Conservation and Management monitor if the facilities on a vessel for housing the observer or monitor, or for carrying out observer or monitor functions, are so inadequate or unsafe that the health or safety of the observer or monitor, or the safe operation of the vessel, would be jeopardized.

(d) *Vessel requirements associated with coverage*. An owner or operator of a vessel on which a NMFS-certified observer or monitor is embarked must:

(1) Provide accommodations and food that are equivalent to those provided to the crew.

(2) Allow the observer or monitor access to and use of the vessel's communications equipment and personnel upon request for the transmission and receipt of messages related to the observer's or monitor's duties.

(3) Provide true vessel locations, by latitude and longitude or loran coordinates, as requested by the observer or monitor, and allow the observer or monitor access to and use of the vessel's navigation equipment and personnel upon request to determine the vessel's position.

(4) Notify the observer or monitor in a timely fashion of when fishing operations are to begin and end.

(5) Allow for the embarking and debarking of the observer or monitor, as specified by the Regional Administrator, ensuring that transfers of observers or monitors at sea are accomplished in a safe manner, via small boat or raft, during daylight hours as weather and sea conditions allow, and with the agreement of the observers or monitors involved.

(6) Allow the observer or monitor free and unobstructed access to the vessel's bridge, working decks, holding bins, weight scales, holds, and any other space used to hold, process, weigh, or store fish.

(7) Allow the observer or monitor to inspect and copy any the vessel's log, communications log, and records associated with the catch and distribution of fish for that trip.

(e) *Vessel requirements associated with protected species.* The owner or operator of a vessel issued a sum-

mer flounder moratorium permit, a scup moratorium permit, a black sea bass moratorium permit, a bluefish permit, a spiny dogfish permit, an Atlantic herring § 648.11 permit, an Atlantic deep-sea red crab permit, a skate permit, or a tilefish permit, if requested by the observer or monitor, also must:

(1) Notify the observer or monitor of any sea turtles, marine mammals, summer flounder, scup, black sea bass, bluefish, spiny dogfish, Atlantic herring, Atlantic deep-sea red crab, tilefish, skates (including discards) or other specimens taken by the vessel.

(2) Provide the observer or monitor with sea turtles, marine mammals, summer flounder, scup, black sea bass, bluefish, spiny dogfish, Atlantic herring, Atlantic deep-sea red crab, skates, tilefish, or other specimens taken by the vessel.

(f) *Coverage funded from outside sources*. NMFS may accept observer or monitor coverage funded by outside sources if:

(1) All coverage conducted by such observers or monitors is determined by NMFS to be in compliance with NMFS' observer or monitor guidelines and procedures.

(2) The owner or operator of the vessel complies with all other provisions of this part.

(3) The observer or monitor is approved by the Regional Administrator.

(g) *Industry-funded monitoring programs*. Fishery management plans (FMPs) managed by the New England Fishery Management Council (New England Council), including Atlantic Herring, Atlantic Salmon,

Atlantic Sea Scallops, Deep-Sea Red Crab, Northeast Multispecies, and Northeast Skate Complex, may include industry-funded monitoring programs (IFM) to supplement existing monitoring required by the Standard Bycatch Reporting Methodology (SBRM), Endangered Species Act, and the Marine Mammal Protection Act. IFM programs may use observers, monitors, including at-sea monitors and portside samplers, and electronic monitoring to meet specified IFM coverage targets. The ability to meet IFM coverage targets may be constrained by the availability of Federal funding to pay NMFS cost responsibilities associated with IFM.

(1) *Guiding principles for new IFM programs*. The Council's development of an IFM program must consider or include the following:

(i) A clear need or reason for the data collection;

(ii) Objective design criteria;

(iii) Cost of data collection should not diminish net benefits to the nation nor threaten continued existence of the fishery;

(iv) Seek less data intensive methods to collect data necessary to assure conservation and sustainability when assessing and managing fisheries with minimal profit margins;

(v) Prioritize the use of modern technology to the extent practicable; and

(vi) Incentives for reliable self-reporting.

(2) *Process to implement and revise new IFM programs*. New IFM programs shall be developed via an amendment to a specific FMP. IFM programs implemented in an FMP may be revised via a framework ad-

justment. The details of an IFM program may include, but are not limited to:

(i) Level and type of coverage target;

(ii) Rationale for level and type of coverage;

(iii) Minimum level of coverage necessary to meet coverage goals;

(iv) Consideration of waivers if coverage targets cannot be met;

(v) Process for vessel notification and selection;

(vi) Cost collection and administration;

(vii) Standards for monitoring service providers; and

(viii) Any other measures necessary to implement the industry-funded monitoring program.

(3) *NMFS cost responsibilities*. IFM programs have two types of costs, NMFS and industry costs. Cost responsibilities are delineated by the type of cost. NMFS cost responsibilities include the following:

(i) The labor and facilities associated with training and debriefing of monitors;

(ii) NMFS-issued gear (e.g., electronic reporting aids used by human monitors to record trip information);

(iii) Certification of monitoring service providers and individual observers or monitors; performance monitoring to maintain certificates;

(iv) Developing and executing vessel selection;

(v) Data processing (including electronic monitoring video audit, but excluding service provider electronic video review); and

(vi) Costs associated with liaison activities between service providers, and NMFS, Coast Guard, New England Council, sector managers, and other partners.

(vii) The industry is responsible for all other costs associated with IFM programs.

(4) *Prioritization process to cover NMFS IFM cost responsibilities.* (i) Available Federal funding refers to any funds in excess of those allocated to meet SBRM requirements or the existing IFM programs in the Atlantic Sea Scallop and Northeast Multispecies FMPs that may be used to cover NMFS cost responsibilities associated with IFM coverage targets. If there is no available Federal funding in a given year to cover NMFS IFM cost responsibilities, then there shall be no IFM coverage during that year. If there is some available Federal funding in a given year, but not enough to cover all of NMFS cost responsibilities associated with IFM coverage targets, then the New England Council will prioritize available Federal funding across IFM programs during that year. Existing IFM programs for Atlantic sea scallops and Northeast multispecies fisheries shall not be included in this prioritization process.

(ii) Programs with IFM coverage targets shall be prioritized using an equal weighting approach, such that any available Federal funding shall be divided equally among programs.

(iii) After NMFS determines the amount of available Federal funding for the next fishing year, NMFS shall provide the New England Council with the estimated IFM coverage levels for the next fishing year. The estimated IFM coverage levels would be based on the

equal weighting approach and would include the rationale for any deviations from the equal weighting approach. The New England Council may recommend revisions and additional considerations to the Regional Administrator and Science and Research Director.

(A) If available Federal funding exceeds that needed to pay all of NMFS cost responsibilities for administering IFM programs, the New England Council may request NMFS to use available funding to help offset industry cost responsibilities through reimbursement.

(B) [Reserved]

(iv) Revisions to the prioritization process may be made via a framework adjustment to all New England FMPs.

(v) Revisions to the weighting approach for the New England Councilled prioritization process may be made via a framework adjustment to all New England FMPs or by the New England Council considering a new weighting approach at a public meeting, where public comment is accepted, and requesting NMFS to publish a notice or rulemaking revising the weighting approach. NMFS shall implement revisions to the weighting approach in a manner consistent with the Administrative Procedure Act.

(5) *IFM program monitoring service provider requirements.* IFM monitoring service provider requirements shall be consistent with requirements in paragraph (h) of this section and observer or monitor requirements shall be consistent with requirements in paragraph (i) of this section.

(6) *Monitoring set-aside.* The New England Council may develop a monitoring set-aside program for indi-

vidual FMPs that would devote a portion of the annual catch limit for a fishery to help offset the industry cost responsibilities for monitoring coverage, including observers, at-sea monitors, portside samplers, and electronic monitoring.

(i) The details of a monitoring set-aside program may include, but are not limited to:

(A) The basis for the monitoring set-aside;

(B) The amount of the set-aside (e.g., quota, days at sea);

(C) How the set-aside is allocated to vessels required to pay for monitoring (e.g., an increased trip limit, differential days at sea counting, additional trips, an allocation of the quota);

(D) The process for vessel notification;

(E) How funds are collected and administered to cover the industry's costs of monitoring; and

(F) Any other measures necessary to develop and implement a monitoring set-aside.

(ii) The New England Council may develop new monitoring set-asides and revise those monitoring set-asides via a framework adjustment to the relevant FMP.

(h) *Monitoring service provider approval and responsibilities*—(1) *General.* An entity seeking to provide monitoring services, including services for IFM Programs described in paragraph (g) of this section, must apply for and obtain approval from NMFS following submission of a complete application. Monitoring services include providing NMFS-certified observers, monitors (at-sea monitors and portside samplers), and/or

electronic monitoring. A list of approved monitoring service providers shall be distributed to vessel owners and shall be posted on the NMFS Fisheries Sampling Branch (FSB) website: *https://www.fisheries.noaa.gov/resource/data/observer-providers-northeast-and-mid-atlantic-programs*.

(2) [Reserved]

(3) *Contents of application*. An application to become an approved monitoring service provider shall contain the following:

(i) Identification of the management, organizational structure, and ownership structure of the applicant's business, including identification by name and general function of all controlling management interests in the company, including but not limited to owners, board members, officers, authorized agents, and staff. If the applicant is a corporation, the articles of incorporation must be provided. If the applicant is a partnership, the partnership agreement must be provided.

(ii) The permanent mailing address, phone and fax numbers where the owner(s) can be contacted for official correspondence, and the current physical location, business mailing address, business telephone and fax numbers, and business email address for each office.

(iii) A statement, signed under penalty of perjury, from each owner or owners, board members, and officers, if a corporation, that they are free from a conflict of interest as described under paragraph (h)(6) of this section.

(iv) A statement, signed under penalty of perjury, from each owner or owners, board members, and officers, if a corporation, describing any criminal convic-

tion(s), Federal contract(s) they have had and the performance rating they received on the contracts, and previous decertification action(s) while working as an observer or monitor or monitoring service provider.

(v) A description of any prior experience the applicant may have in placing individuals in remote field and/or marine work environments. This includes, but is not limited to, recruiting, hiring, deployment, and personnel administration.

(vi) A description of the applicant's ability to carry out the responsibilities and duties of a monitoring service provider as set out under paragraph (h)(5) of this section, and the arrangements to be used.

(vii) Evidence of holding adequate insurance to cover injury, liability, and accidental death for observers or monitors, whether contracted or employed by the service provider, during their period of employment (including during training). Workers' Compensation and Maritime Employer's Liability insurance must be provided to cover the observer or monitor, vessel owner, and observer provider. The minimum coverage required is $5 million. Monitoring service providers shall provide copies of the insurance policies to observers or monitors to display to the vessel owner, operator, or vessel manager, when requested.

(viii) Proof that its observers or monitors, whether contracted or employed by the service provider, are compensated with salaries that meet or exceed the U.S. Department of Labor (DOL) guidelines for observers. Observers shall be compensated as Fair Labor Standards Act (FLSA) non-exempt employees. Monitoring service providers shall provide any other benefits and

personnel services in accordance with the terms of each observer's or monitor's contract or employment status.

(ix) The names of its fully equipped, NMFS/FSB certified, observers or monitors on staff or a list of its training candidates (with resumes) and a request for an appropriate NMFS/FSB Training class. All training classes have a minimum class size of eight individuals, which may be split among multiple vendors requesting training. Requests for training classes with fewer than eight individuals will be delayed until further requests make up the full training class size.

(x) An Emergency Action Plan (EAP) describing its response to an "at sea" emergency with an observer or monitor, including, but not limited to, personal injury, death, harassment, or intimidation. An EAP that details a monitoring service provider's responses to emergencies involving observers, monitors, or monitoring service provider personnel. The EAP shall include communications protocol and appropriate contact information in an emergency.

(4) *Application evaluation.* (i) NMFS shall review and evaluate each application submitted under paragraph (h)(3) of this section. Issuance of approval as a monitoring service provider shall be based on completeness of the application, and a determination by NMFS of the applicant's ability to perform the duties and responsibilities of a monitoring service provider, as demonstrated in the application information. A decision to approve or deny an application shall be made by NMFS within 15 business days of receipt of the application by NMFS.

(ii) If NMFS approves the application, the monitoring service provider's name will be added to the list of approved monitoring service providers found on the NMFS/FSB website and in any outreach information to the industry. Approved monitoring service providers shall be notified in writing and provided with any information pertinent to its participation in the observer or monitor programs.

(iii) An application shall be denied if NMFS determines that the information provided in the application is not complete or the evaluation criteria are not met. NMFS shall notify the applicant in writing of any deficiencies in the application or information submitted in support of the application. An applicant who receives a denial of his or her application may present additional information to rectify the deficiencies specified in the written denial, provided such information is submitted to NMFS within 30 days of the applicant's receipt of the denial notification from NMFS. In the absence of additional information, and after 30 days from an applicant's receipt of a denial, a monitoring service provider is required to resubmit an application containing all of the information required under the application process specified in paragraph (h)(3) of this section to be re-considered for being added to the list of approved monitoring service providers.

(5) *Responsibilities of monitoring service providers*—(i) *Certified observers or monitors*. A monitoring service provider must provide observers or monitors certified by NMFS/FSB pursuant to paragraph (i) of this section for deployment in a fishery when contacted and contracted by the owner, operator, or vessel manager of a fishing vessel, unless the monitoring service

provider refuses to deploy an observer or monitor on a requesting vessel for any of the reasons specified at paragraph (h)(5)(viii) of this section.

(ii) *Support for observers or monitors*. A monitoring service provider must provide to each of its observers or monitors:

(A) All necessary transportation, lodging costs and support for arrangements and logistics of travel for observers and monitors to and from the initial location of deployment, to all subsequent vessel assignments, to any debriefing locations, and for appearances in Court for monitoring-related trials as necessary;

(B) Lodging, per diem, and any other services necessary for observers or monitors assigned to a fishing vessel or to attend an appropriate NMFS/FSB training class;

(C) The required observer or monitor equipment, in accordance with equipment requirements, prior to any deployment and/or prior to NMFS observer or monitor certification training; and

(D) Individually assigned communication equipment, in working order, such as a mobile phone, for all necessary communication. A monitoring service provider may alternatively compensate observers or monitors for the use of the observer's or monitor's personal mobile phone, or other device, for communications made in support of, or necessary for, the observer's or monitor's duties.

(iii) *Observer and monitor deployment logistics*. Each approved monitoring service provider must assign an available certified observer or monitor to a vessel upon request. Each approved monitoring service pro-

vider must be accessible 24 hours per day, 7 days per week, to enable an owner, operator, or manager of a vessel to secure monitoring coverage when requested. The telephone or other notification system must be monitored a minimum of four times daily to ensure rapid response to industry requests. Monitoring service providers approved under this paragraph (h) are required to report observer or monitor deployments to NMFS for the purpose of determining whether the predetermined coverage levels are being achieved in the appropriate fishery.

(iv) *Observer deployment limitations*. (A) A candidate observer's first several deployments and the resulting data shall be immediately edited and approved after each trip by NMFS/FSB prior to any further deployments by that observer. If data quality is considered acceptable, the observer would be certified.

(B) For the purpose of coverage to meet SBRM requirements, unless alternative arrangements are approved by NMFS, a monitoring service provider must not deploy any NMFS-certified observer on the same vessel for more than two consecutive multi-day trips, and not more than twice in any given month for multi-day deployments.

(C) For the purpose of coverage to meet IFM requirements, a monitoring service provider may deploy any NMFS-certified observer or monitor on the same vessel for more than two consecutive multi-day trips and more than twice in any given month for multi-day deployments.

(v) *Communications with observers and monitors*. A monitoring service provider must have an employee

responsible for observer or monitor activities on call 24 hours a day to handle emergencies involving observers or monitors or problems concerning observer or monitor logistics, whenever observers or monitors are at sea, stationed portside, in transit, or in port awaiting vessel assignment.

(vi) *Observer and monitor training requirements*. A request for a NMFS/FSB Observer or Monitor Training class must be submitted to NMFS/FSB 45 calendar days in advance of the requested training. The following information must be submitted to NMFS/FSB at least 15 business days prior to the beginning of the proposed training: A list of observer or monitor candidates; candidate resumes, cover letters and academic transcripts; and a statement signed by the candidate, under penalty of perjury, that discloses the candidate's criminal convictions, if any. A medical report certified by a physician for each candidate is required 7 business days prior to the first day of training. CPR/First Aid certificates and a final list of training candidates with candidate contact information (email, phone, number, mailing address and emergency contact information) are due 7 business days prior to the first day of training. NMFS may reject a candidate for training if the candidate does not meet the minimum qualification requirements as outlined by NMFS/FSB minimum eligibility standards for observers or monitors as described on the National Observer Program website: *https://www.fisheries.noaa.gov/topic/fishery-observers#become-an-observer.*

(vii) *Reports and Requirements (A) Deployment reports*. The monitoring service provider must report to NMFS/ FSB when, where, to whom, and to what vessel an observer or monitor has been deployed, as soon as

practicable, and according to requirements outlined by NMFS. The deployment report must be available and accessible to NMFS electronically 24 hours a day, 7 days a week. The monitoring service provider must ensure that the observer or monitor reports to NMFS the required electronic data, as described in the NMFS/FSB training. Electronic data submission protocols will be outlined in training and may include accessing government websites via personal computers/ devices or submitting data through government issued electronics. The monitoring service provider shall provide the raw (unedited) data collected by the observer or monitor to NMFS at the specified time per program.

(B) *Safety refusals*. The monitoring service provider must report to NMFS any trip or landing that has been refused due to safety issues (e.g., failure to hold a valid USCG Commercial Fishing Vessel Safety Examination Decal or to meet the safety requirements of the observer's or monitor's safety checklist) within 12 hours of the refusal.

(C) *Biological samples*. The monitoring service provider must ensure that biological samples, including whole marine mammals, sea turtles, sea birds, and fin clips or other DNA samples, are stored/handled properly and transported to NMFS within 5 days of landing. If transport to NMFS/FSB Observer Training Facility is not immediately available then whole animals requiring freezing shall be received by the nearest NMFS freezer facility within 24 hours of vessel landing.

(D) *Debriefing*. The monitoring service provider must ensure that the observer or monitor remains available to NMFS, either in-person or via phone, at NMFS' discretion, including NMFS Office for Law Enforce-

ment, for debriefing for at least 2 weeks following any monitored trip. If requested by NMFS, an observer or monitor that is at sea during the 2-week period must contact NMFS upon his or her return. Monitoring service providers must pay for travel and land hours for any requested debriefings.

(E) *Availability report*. The monitoring service provider must report to NMFS any occurrence of inability to respond to an industry request for observer or monitor coverage due to the lack of available observers or monitors as soon as practicable if the provider is unable to respond to an industry request for monitoring coverage. Availability report must be available and accessible to NMFS electronically 24 hours a day, 7 days a week.

(F) *Incident reports*. The monitoring service provider must report possible observer or monitor harassment, discrimination, concerns about vessel safety or marine casualty, or observer or monitor illness or injury; and any information, allegations, or reports regarding observer or monitor conflict of 638 Fishery Conservation and Management interest or breach of the standards of behavior, to NMFS/FSB within 12 hours of the event or within 12 hours of learning of the event.

(G) *Status report*. The monitoring service provider must provide NMFS/FSB with an updated list of contact information for all observers or monitors that includes the identification number, name, mailing address, email address, phone numbers, homeports or fisheries/ trip types assigned, and must include whether or not the observer or monitor is "in service," indicating when the observer or monitor has requested leave and/or is not currently working for an industry-funded program.

Any Federally contracted NMFS-certified observer not actively deployed on a vessel for 30 days will be placed on Leave of Absence (LOA) status (or as specified by NMFS/FSB according to most recent Information Technology Security Guidelines. Those Federally contracted NMFS-certified observers on LOA for 90 days or more will need to conduct an exit interview with NMFS/FSB and return any NMFS/FSB issued gear and Common Access Card (CAC), unless alternative arrangements are approved by NMFS/FSB. NMFS/FSB requires 2-week advance notification when a Federally contracted NMFS-certified observer is leaving the program so that an exit interview may be arranged and gear returned.

(H) *Vessel contract.* The monitoring service provider must submit to NMFS/ FSB, if requested, a copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the monitoring service provider and those entities requiring monitoring services.

(I) *Observer and monitor contract.* The monitoring service provider must submit to NMFS/FSB, if requested, a copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the monitoring service provider and specific observers or monitors.

(J) *Additional information.* The monitoring service provider must submit to NMFS/FSB, if requested, copies of any information developed and/or used by the monitoring service provider and distributed to vessels, observers, or monitors, such as informational pamphlets,

payment notification, daily rate of monitoring services, description of observer or monitor duties, etc.

(viii) *Refusal to deploy an observer or monitor*. (A) A monitoring service provider may refuse to deploy an observer or monitor on a requesting fishing vessel if the monitoring service provider does not have an available observer or monitor within the required time and must report all refusals to NMFS/FSB.

(B) A monitoring service provider may refuse to deploy an observer or monitor on a requesting fishing vessel if the monitoring service provider has determined that the requesting vessel is inadequate or unsafe pursuant to the reasons described at § 600.746.

(C) The monitoring service provider may refuse to deploy an observer or monitor on a fishing vessel that is otherwise eligible to carry an observer or monitor for any other reason, including failure to pay for previous monitoring deployments, provided the monitoring service provider has received prior written confirmation from NMFS authorizing such refusal.

(6) *Limitations on conflict of interest*. A monitoring service provider:

(i) Must not have a direct or indirect interest in a fishery managed under Federal regulations, including, but not limited to, a fishing vessel, fish dealer, and/or fishery advocacy group (other than providing monitoring services);

(ii) Must assign observers or monitors without regard to any preference by representatives of vessels other than when an observer or monitor will be deployed for the trip that was selected for coverage; and

(iii) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who conducts fishing or fishing related activities that are regulated by NMFS, or who has interests that may be substantially affected by the performance or nonperformance of the official duties of monitoring service providers.

(7) *Removal of monitoring service provider from the list of approved service providers*. A monitoring service provider that fails to meet the requirements, conditions, and responsibilities specified in paragraphs (h)(5) and (6) of this section shall be notified by NMFS, in writing, that it is subject to removal from the list of approved monitoring service providers. Such notification shall specify the reasons for the pending removal. A monitoring service provider that has received notification that it is subject to removal from the list of approved monitoring service providers may submit written information to rebut the reasons for removal from the list. Such rebuttal must be submitted within 30 days of notification received by the monitoring service provider that the monitoring service provider is subject to removal and must be accompanied by written evidence rebutting the basis for removal. NMFS shall review information rebutting the pending removal and shall notify the monitoring service provider within 15 days of receipt of the rebuttal whether or not the removal is warranted. If no response to a pending removal is received by NMFS, the monitoring service provider shall be automatically removed from the list of approved monitoring service providers. The decision to remove the monitoring service provider from the list, either after reviewing a rebuttal, or if no rebuttal is submitted, shall be the final decision of NMFS and the De-

partment of Commerce. Removal from the list of approved monitoring service providers does not necessarily prevent such monitoring service provider from obtaining an approval in the future if a new application is submitted that demonstrates that the reasons for removal are remedied. Certified observers and monitors under contract with observer monitoring service provider that has been removed from the list of approved service providers must complete their assigned duties for any fishing trips on which the observers or monitors are deployed at the time the monitoring service provider is removed from the list of approved monitoring service providers. A monitoring service provider removed from the list of approved monitoring service providers is responsible for providing NMFS with the information required in paragraph (h)(5)(vii) of this section following completion of the trip. NMFS may consider, but is not limited to, the following in determining if a monitoring service provider may remain on the list of approved monitoring service providers:

(i) Failure to meet the requirements, conditions, and responsibilities of monitoring service providers specified in paragraphs (h)(5) and (6) of this section;

(ii) Evidence of conflict of interest as defined under paragraph (h)(6) of this section;

(iii) Evidence of criminal convictions related to:

(A) Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(B) The commission of any other crimes of dishonesty, as defined by state law or Federal law, that would

seriously and directly affect the fitness of an applicant in providing monitoring services under this section; and

(iv) Unsatisfactory performance ratings on any Federal contracts held by the applicant; and

(v) Evidence of any history of decertification as either an observer, monitor, or monitoring service provider.

(i) *Observer or monitor certification*—(1) *Requirements*. To be certified, employees or sub-contractors operating as observers or monitors for monitoring service providers approved under paragraph (h) of this section. In addition, observers must meet NMFS National Minimum Eligibility Standards for observers specified at the National Observer Program website: *https://www.fisheries.noaa.gov/topic/fishery-observers#become-an-observer.*

(2) *Observer or monitor training*. In order to be deployed on any fishing vessel, a candidate observer or monitor must have passed an appropriate NMFS/FSB Observer Training course and must adhere to all NMFS/FSB program standards and policies. If a candidate fails training, the candidate and monitoring service provider shall be notified immediately by NMFS/FSB. Observer training may include an observer training trip, as part of the observer's training, aboard a fishing vessel with a trainer. Contact NMFS/FSB for the required number of program specific observer and monitor training certification trips for full certification following training.

(3) *Observer requirements*. All observers must:

(i) Have a valid NMFS/FSB fisheries observer certification pursuant to paragraph (i)(1) of this section;

(ii) Be physically and mentally capable of carrying out the responsibilities of an observer on board fishing vessels, pursuant to standards established by NMFS. Such standards shall be provided to each approved monitoring service provider.

(iii) Have successfully completed all NMFS-required training and briefings for observers before deployment, pursuant to paragraph (i)(2) of this section;

(iv) Hold a current Red Cross (or equivalence) CPR/First Aid certification;

(v) Accurately record their sampling data, write complete reports, and report accurately any observations relevant to conservation of marine resources or their environment; and

(vi) Report unsafe sampling conditions, pursuant to paragraph (m)(6) of this section.

(4) *Monitor requirements*. All monitors must:

(i) Hold a high school diploma or legal equivalent;

(ii) Have a valid NMFS/FSB certification pursuant to paragraph (i)(1) of this section;

(iii) Be physically and mentally capable of carrying out the responsibilities of a monitor on board fishing vessels, pursuant to standards established by NMFS. Such standards shall be provided to each approved monitoring service provider.

(iv) Have successfully completed all NMFS-required training and briefings for monitors before deployment, pursuant to paragraph (i)(2) of this section;

(v) Hold a current Red Cross (or equivalence) CPR/First Aid certification if the monitor is to be employed as an at-sea monitor;

(vi) Accurately record their sampling data, write complete reports, and report accurately any observations relevant to conservation of marine resources or their environment; and

(vii) Report unsafe sampling conditions, pursuant to paragraph (m)(6) of this section.

(5) *Probation and decertification.* NMFS may review observer and monitor certifications and issue observer and monitor certification probation and/or decertification as described in NMFS policy.

(6) *Issuance of decertification.* Upon determination that decertification is warranted under paragraph (i)(5) of this section, NMFS shall issue a written decision to decertify the observer or monitor to the observer or monitor and approved monitoring service providers via certified mail at the observer's or monitor's most current address provided to NMFS. The decision shall identify whether a certification is revoked and shall identify the specific reasons for the action taken. Decertification is effective immediately as of the date of issuance, unless the decertification official notes a compelling reason for maintaining certification for a specified period and under specified conditions. Decertification is the final decision of NMFS and the Department of Commerce and may not be appealed.

(j) *Coverage.* In the event that a vessel is requested by the Regional Administrator to carry a NMFS-certified fisheries observer pursuant to paragraph (a) of this section and is also selected to carry an

at-sea monitor as part of an approved sector at-sea monitoring program specified in § 648.87(b)(1)(v) for the same trip, only the NMFS-certified fisheries observer is required to go on that particular trip.

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(m) *Atlantic herring monitoring coverage*—(1) *Monitoring requirements*. (i) In addition to the requirement for any vessel holding an Atlantic herring permit to carry a NMFS-certified observer described in paragraph (a) of this section, vessels issued a Category A or B Herring Permit are subject to industry-funded monitoring (IFM) requirements on declared Atlantic herring trips, unless the vessel is carrying a NMFS-certified observer to fulfill Standard Bycatch Reporting Methodology requirements. An owner of a midwater trawl vessel, required to carry a NMFS-certified observer when fishing in Northeast Multispecies Closed Areas at § 648.202(b), may purchase an IFM high volume fisheries (HVF) observer to access Closed Areas on a trip-by-trip basis. General requirements for IFM programs in New England Council FMPs are specified in paragraph (g) of this section. Possible IFM monitoring for the Atlantic herring fishery includes NMFS-certified observers, at-sea monitors, and electronic monitoring and portside samplers, as defined in § 648.2.

(A) IFM HVF observers shall collect the following information:

(*1*) Fishing gear information (e.g., size of nets, mesh sizes, and gear configurations);

(*2*) Tow-specific information (e.g., depth, water temperature, wave height, and location and time when fishing begins and ends);

(*3*) Species, weight, and disposition of all retained and discarded catch (fish, sharks, crustaceans, invertebrates, and debris) on observed hauls;

(*4*) Species, weight, and disposition of all retained catch on unobserved hauls;

(*5*) Actual catch weights whenever possible, or alternatively, weight estimates derived by sub-sampling;

(*6*) Whole specimens, photos, length information, and biological samples (e.g., scales, otoliths, and/or vertebrae from fish, invertebrates, and incidental takes);

(*7*) Information on interactions with protected species, such as sea turtles, marine mammals, and sea birds; and

(*8*) Vessel trip costs (i.e., operational costs for trip including food, fuel, oil, and ice).

(B) IFM HVF at-sea monitors shall collect the following information:

(*1*) Fishing gear information (e.g., size of nets, mesh sizes, and gear configurations);

(*2*) Tow-specific information (e.g., depth, water temperature, wave height, and location and time when fishing begins and ends);

(*3*) Species, weight, and disposition of all retained and discarded catch (fish, sharks, crustaceans, invertebrates, and debris) on observed hauls;

(*4*) Species, weight, and disposition of all retained catch on unobserved hauls;

(*5*) Actual catch weights whenever possible, or alternatively, weight estimates derived by sub-sampling;

(*6*) Length data, along with whole specimens and photos to verify species identification, on retained and discarded catch;

(*7*) Information on and biological samples from interactions with protected species, such as sea turtles, marine mammals, and sea birds; and

(*8*) Vessel trip costs (i.e., operational costs for trip including food, fuel, oil, and ice).

(*9*) The New England Council may recommend that at-sea monitors collect additional biological information upon request. Revisions to the duties of an at-sea monitor, such that additional biological information would be collected, may be done via a framework adjustment. At-sea monitor duties may also be revised to collect additional biological information by considering the issue at a public meeting, where public comment is accepted, and requesting NMFS to publish a notice or rulemaking revising the duties for at-sea monitors. NMFS shall implement revisions to at-sea monitor duties in accordance with the APA.

(C) IFM Portside samplers shall collect the following information:

(*1*) Species, weight, and disposition of all retained catch (fish, sharks, crustaceans, invertebrates, and debris) on sampled trips;

(*2*) Actual catch weights whenever possible, or alternatively, weight estimates derived by sub-sampling; and

(*3*) Whole specimens, photos, length information, and biological samples (i.e., scales, otoliths, and/or vertebrae from fish, invertebrates, and incidental takes).

(ii) Vessels issued a Category A or B Herring Permit are subject to IFM at-sea monitoring coverage. If the New England Council determines that electronic monitoring, used in conjunction with portside sampling, is an adequate substitute for at-sea monitoring on vessels fishing with midwater trawl gear, and it is approved by the Regional Administrator as specified in paragraph (m)(1)(iii) of this section, then owners of vessels issued a Category A or B Herring Permit may choose either IFM at-sea monitoring coverage or IFM electronic monitoring and IFM portside sampling coverage, pursuant with requirements in paragraphs (h) and (i) of this section. Once owners of vessels issued a Category A or B Herring Permit may choose an IFM monitoring type, vessel owners must select one IFM monitoring type per fishing year and notify NMFS of their selected IFM monitoring type via selection form six months in advance of the beginning of the SBRM year (October 31). NMFS will provide vessels owners with selection forms no later than September 1 in advance of the beginning of the SBRM year.

(A) In a future framework adjustment, the New England Council may consider if electronic monitoring and portside sampling coverage is an adequate substitute for at-sea monitoring coverage for Atlantic herring vessels that fish with purse seine and/or bottom trawl gear.

(B) IFM coverage targets for the Atlantic herring fishery are calculated by NMFS, in consultation with New England Council staff.

(C) If IFM coverage targets do not match for the Atlantic herring and Atlantic mackerel fisheries, then the

higher IFM coverage target would apply on trips declared into both fisheries.

(D) Vessels intending to land less than 50 mt of Atlantic herring are exempt from IFM requirements, provided that the vessel requests and is issued a waiver prior to departing on that trip, consistent with paragraphs (m)(2)(iii)(B) and (m)(3) of this section. Vessels issued a waiver must land less than 50 mt of Atlantic herring on that trip.

(E) A wing vessel (i.e., midwater trawl vessel pair trawling with another midwater trawl vessel) is exempt from IFM requirements on a trip, provided the wing vessel does not possess or land any fish on that trip and requests and is issued a waiver prior to departing on that trip, consistent with paragraphs (m)(2)(iii)(C) and (m)(3) of this section.

(F) Two years after implementation of IFM in the Atlantic herring fishery, the New England Council will examine the results of any increased coverage in the Atlantic herring fishery and consider if adjustments to the IFM coverage targets are warranted.

(iii) Electronic monitoring and portside sampling coverage may be used in place of at-sea monitoring coverage in the Atlantic herring fishery, if the electronic monitoring technology is deemed sufficient by the New England Council. The Regional Administrator, in consultation with the New England Council, may approve the use of electronic monitoring and portside sampling for the Atlantic herring fishery in a manner consistent with the Administrative Procedure Act, with final measures published in the FEDERAL REGISTER. A vessel electing to use electronic monitoring and portside

sampling in lieu of at-sea monitoring must develop a vessel monitoring plan to implement an electronic monitoring and portside sampling program that NMFS determines is sufficient for monitoring catch, discards and slippage events. The electronic monitoring and portside sampling program shall be reviewed and approved by NMFS as part of a vessel's monitoring plan on a yearly basis in a manner consistent with the Administrative Procedure Act.

(iv) Owners, operators, or managers of vessels issued a Category A or B Herring Permit are responsible for their vessel's compliance with IFM requirements. When NMFS notifies a vessel owner, operator, or manager of the requirement to have monitoring coverage on a specific declared Atlantic herring trip, that vessel may not fish for, take, retain, possess, or land any Atlantic herring without the required monitoring coverage. Vessels may only embark on a declared Atlantic herring trip without the required monitoring coverage if the vessel owner, operator, and/or manager has been notified that the vessel has received a waiver for the required monitoring coverage for that trip, pursuant to paragraphs (m)(2)(iii)(B) and (C) and (m)(3) of this section.

(v) To provide the required IFM coverage aboard declared Atlantic herring trips, NMFS-certified observers and monitors must hold a high volume fisheries certification from NMFS/FSB.

(2) *Pre-trip notification.* (i) At least 48 hr prior to the beginning of any trip on which a vessel may harvest, possess, or land Atlantic herring, the owner, operator, or manager of a vessel issued a limited access herring permit (*i.e.*, *Category A*, *B*, *or C*) or a vessel issued an open access herring permit (Category D or E) fishing

with midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined in § 648.200(f)(1) and (3), or a vessel acting as a herring carrier must notify NMFS/FSB of the trip.

(ii) The notification to NMFS/FSB must include the following information: Vessel name or permit number; email and telephone number for contact; the date, time, and port of departure; trip length; and gear type.

(iii) For vessels issued a Category A or B Herring Permit, the trip notification must also include the following requests, if appropriate:

(A) For IFM NMFS-certified observer coverage aboard vessels fishing with midwater trawl gear to access the Northeast Multispecies Closed Areas, consistent with requirements at § 648.202(b), at any point during the trip;

(B) For a waiver of IFM requirements on a trip that shall land less than 50 mt of Atlantic herring; and (C) For a waiver of IFM requirements on trip by a wing vessel as described in paragraph (m)(1)(ii)(E) of this section.

(iv) Trip notification must be provided no more than 10 days in advance of each fishing trip. The vessel owner, operator, or manager must notify NMFS/FSB of any trip plan changes at least 12 hr prior to vessel departure from port.

(3) *Selection of trips for monitoring coverage*. NMFS shall notify the owner, operator, and/or manager of a vessel with an Atlantic herring permit whether a declared Atlantic herring trip requires coverage by a NMFS-funded observer or whether a trip requires IFM coverage. NMFS shall also notify the owner, operator,

and/or manager of vessel if a waiver has been granted, either for the NMFS-funded observer or for IFM coverage, as specified in paragraph (m)(2) of this section. All waivers for monitoring coverage shall be issued to the vessel by VMS so that there is an on-board verification of the waiver. A waiver is invalid if the fishing behavior on that trip is inconsistent with the terms of the waiver.

(4) *Procurement of monitoring services by Atlantic herring vessels*. (i) An owner of an Atlantic herring vessel required to have monitoring under paragraph (m)(3) of this section must arrange for monitoring by an individual certified through training classes operated by the NMFS/FSB and from a monitoring service provider approved by NMFS under paragraph (h) of this section. The owner, operator, or vessel manager of a vessel selected for monitoring must contact a monitoring service provider prior to the beginning of the trip and the monitoring service provider will notify the vessel owner, operator, or manager whether monitoring is available. A list of approved monitoring service providers shall be posted on the NMFS/FSB website: *https://www.fisheries.noaa.gov/resource/data/observer-providers-northeast-and-mid-atlantic-programs*.

(ii) An owner, operator, or vessel manager of a vessel that cannot procure monitoring due to the unavailability of monitoring may request a waiver from NMFS/FSB from the requirement for monitoring on that trip, but only if the owner, operator, or vessel manager has contacted all of the available monitoring service providers to secure monitoring and no monitoring is available. NMFS/FSB shall issue a waiver, if the conditions of this paragraph (m)(4)(ii) are met. A vessel without moni-

toring coverage may not begin a declared Atlantic herring trip without having been issued a waiver.

(iii) Vessel owners shall pay service providers for monitoring services within 45 days of the end of a fishing trip that was monitored.

(5) *Vessels working cooperatively*. When vessels issued limited access herring permits are working cooperatively in the Atlantic herring fishery, including pair trawling, purse seining, and transferring herring at-sea, each vessel must provide to observers or monitors, when requested, the estimated weight of each species brought on board and the estimated weight of each species released on each tow.

(6) *Sampling requirements for NMFS-certified observer and monitors*. In addition to the requirements at § 648.11(d)(1) through (7), an owner or operator of a vessel issued a limited access herring permit on which a NMFS-certified observer or monitor is embarked must provide observers or monitors:

(i) A safe sampling station adjacent to the fish deck, including: A safety harness, if footing is compromised and grating systems are high above the deck; a safe method to obtain samples; and a storage space for baskets and sampling gear.

(ii) Reasonable assistance to enable observers or monitors to carry out their duties, including but not limited to assistance with: Obtaining and sorting samples; measuring decks, codends, and holding bins; collecting bycatch when requested by the observers or monitors; and collecting and carrying baskets of fish when requested by the observers or monitors.

(iii) Advance notice when pumping will be starting; when sampling of the catch may begin; and when pumping is coming to an end.

(iv) Visual access to the net, the codend of the net, and the purse seine bunt and any of its contents after pumping has ended and before the pump is removed from the net. On trawl vessels, the codend including any remaining contents must be brought on board, unless bringing the codend on board is not possible. If bringing the codend on board is not possible, the vessel operator must ensure that the observer or monitor can see the codend and its contents as clearly as possible before releasing its contents.

(7) *Measures to address slippage.* (i) No vessel issued a limited access herring permit may slip catch, as defined at § 648.2, except in the following circumstances:

(A) The vessel operator has determined, and the preponderance of available evidence indicates that, there is a compelling safety reason; or

(B) A mechanical failure, including gear damage, precludes bringing some or all of the catch on board the vessel for inspection; or

(C) The vessel operator determines that pumping becomes impossible as a result of spiny dogfish clogging the pump intake. The vessel operator shall take reasonable measures, such as strapping and splitting the net, to remove all fish which can be pumped from the net prior to release.

(ii) Vessels may make test tows without pumping catch on board if the net is re-set without releasing its contents provided that all catch from test tows is availa-

ble to the observer to sample when the next tow is brought on board for sampling.

(iii) If a vessel issued any limited access herring permit slips catch, the vessel operator must report the slippage event on the Atlantic herring daily VMS catch report and indicate the reason for slipping catch. Additionally, the vessel operator must complete and sign a Released Catch Affidavit detailing: The vessel name and permit number; the VTR serial number; where, when, and the reason for slipping catch; the estimated weight of each species brought on board or slipped on that tow. A completed affidavit must be submitted to NMFS within 48 hr of the end of the trip.

(iv) If a vessel issued a Category A or B Herring permit slips catch for any of the reasons described in paragraph 648 Fishery Conservation and Management (m)(7)(i) of this section when an observer or monitor is aboard, the vessel operator must move at least 15 nm (27.78 km) from the location of the slippage event before deploying any gear again, and must stay at least 15 nm (27.78 km) away from the slippage event location for the remainder of the fishing trip.

(v) If a vessel issued a Category A or B Herring permit slips catch for any reason on a trip selected by NMFS for portside sampling, pursuant to paragraph (m)(3) of this section, the vessel operator must move at least 15 nm (27.78 km) from the location of the slippage event before deploying any gear again, and must stay at least 15 nm (27.78 km) away from the slippage event location for the remainder of the fishing trip.

(vi) If catch is slipped by a vessel issued a Category A or B Herring permit for any reason not described in

paragraph (m)(7)(i) of this section when an observer or monitor is aboard, the vessel operator must immediately terminate the trip and return to port. No fishing activity may occur during the return to port.

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APPENDIX B

- *Cuozzo Speed Techs., LLC* v. *Lee*, 579 U.S. 261 (2016)
- *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302 (2014)
- *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41 (2014)
- *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489 (2014)
- *City of Arlington* v. *FCC*, 569 U.S. 290 (2013)
- *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013)
- *Holder* v. *Martinez Gutierrez*, 566 U.S. 583 (2012)
- *Astrue* v. *Capato ex rel. B.N.C.*, 566 U.S. 541 (2012)
- *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44 (2011)
- *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208 (2009)
- *United States* v. *Eurodif S.A.*, 555 U.S. 305 (2009)
- *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644 (2007)
- *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158 (2007)
- *Zuni Pub. Sch. Dist. No. 89* v. *Department of Educ.*, 550 U.S. 81 (2007)
- *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007)

- *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005)
- *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232 (2004)
- *Barnhart* v. *Thomas*, 540 U.S. 20 (2003)
- *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371 (2003)
- *Meyer* v. *Holley*, 537 U.S. 280 (2003)
- *Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36 (2002)
- *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73 (2002)
- *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467 (2002)
- *Barnhart* v. *Walton*, 535 U.S. 212 (2002)
- *New York* v. *FERC*, 535 U.S. 1 (2002)
- *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327 (2002)
- *NLRB* v. *Kentucky River Cmty. Care*, 532 U.S. 706 (2001)
- *Lopez* v. *Davis*, 531 U.S. 230 (2001)
- *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000)
- *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999)
- *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, 525 U.S. 449 (1999)
- *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999)
- *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U.S. 382 (1998)

- *Regions Hosp.* v. *Shalala*, 522 U.S. 448 (1998)
- *United States* v. *O'Hagan*, 521 U.S. 642 (1997)
- *Auer* v. *Robbins*, 519 U.S. 452 (1997)
- *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996)
- *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996)
- *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392 (1996)
- *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995)
- *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995)
- *Interstate Commerce Comm'n* v. *Transcon Lines*, 513 U.S. 138 (1995)
- *PUD No. 1 of Jefferson Cnty.* v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994)
- *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402 (1993)
- *Reiter* v. *Cooper*, 507 U.S. 258 (1993)
- *United States* v. *Alaska*, 503 U.S. 569 (1992)
- *National R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 503 U.S. 407 (1992)
- *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680 (1991)
- *Rust* v. *Sullivan*, 500 U.S. 173 (1991)
- *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633 (1990)
- *Fort Stewart Sch.* v. *FLRA*, 495 U.S. 641 (1990)

- *Sullivan* v. *Everhart*, 494 U.S. 83 (1990)
- *Massachusetts* v. *Morash*, 490 U.S. 107 (1989)
- *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281 (1988)
- *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107 (1988)
- *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987)
- *Lukhard* v. *Reed*, 481 U.S. 368 (1987)
- *Wright* v. *City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987)
- *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987)
- *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986)
- *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221 (1986)
- *Atkins* v. *Rivera*, 477 U.S. 154 (1986)
- *Young* v. *Community Nutrition Inst.*, 476 U.S. 974 (1986)
- *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426 (1986)
- *United States* v. *City of Fulton*, 475 U.S. 657 (1986)
- *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)
- *Cornelius* v. *Nutt*, 472 U.S. 648 (1985)
- *Connecticut Dep't of Income Maint.* v. *Heckler*, 471 U.S. 524 (1985)

- *Chemical Mfrs. Ass'n* v. *NRDC, Inc.*, 470 U.S. 116 (1985)
- *United States* v. *Boyle*, 469 U.S. 241 (1985)