Nos. 24-966 & 24-971

In the Supreme Court of the United States

RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE, A D.C. NONPROFIT CORPORATION,
Petitioner,

v.

DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents.

SEAFREEZE SHORESIDE, INC., *et al.*,
Petitioners,

v.

DEPARTMENT OF INTERIOR,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals For The First Circuit

BRIEF OF AMERICA FIRST POLICY INSTITUTE & THE INDEPENDENT WOMEN'S FORUM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the First Circuit's decision conflicts with *Loper Bright Enters v. Raimondo*, 603 U.S. 369 (2024), which requires courts to independently determine the meaning of federal statutes rather than deferring to agency interpretations.

2. Whether the First Circuit's decision conflicts with *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), which held that "an agency literally has no power to act . . . unless and until Congress confers power upon it."

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

America First Policy Institute ("AFPI") is a 501(c)(3) non-profit, non-partisan research institute dedicated to advancing policies that put the American people first. Its guiding principles are liberty, free enterprise, the rule of law, America-first foreign policy, and a belief that American workers, families, and communities are the key to our country's success.

AFPI's leadership includes many former leaders of the United States government. AFPI's leaders and members alike appreciate that bedrock principles of separation of powers, enshrined in the Nation's constitutional design from its birth, produce critical checks on government power while promoting accountability to the American people.

The Independent Women's Forum ("IWF") is a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes access to free markets and the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit the reach of government.

Recent developments in administrative law have made significant improvements providing for government accountability. Specifically, this Court's overturning of *Chevron* reinstated a vital check on

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[1] Petitioner's and Respondent's counsel were provided timely written notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or in part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

federal agencies, preventing unelected bureaucrats from writing law themselves through the judicial deference they have enjoyed over the course of fifty years. In order to ensure the durability of this decision, AFPI writes in support of the petition for writ of certiorari.

SUMMARY OF ARGUMENT

Loper Bright is clear: "Courts **must** exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024) (*emphasis added*). While other circuit courts have taken heed of this reinstated judicial responsibility and conducted *Loper Bright* analysis in their decisions—even when the result of that analysis is that agency discretion is appropriate—the First Circuit concluded that their independent statutory interpretation is not always necessary. Sometimes, the lower court reasoned, an agency must be allowed to strike a reasonable "balance" between statutory requirements and perceived Congressional intent, apparently regardless of whether such discretion is afforded to the agency under the "best" reading of a statute. *Seafreeze Shoreside, Inc. v. U.S. Dept. of the Int.,* 123 F.4th 1, 26 (1st Cir. 2024) (citing *Loper Bright*, 603 U.S., at 400). In fact, the lower court did not determine the "best" interpretation of 43 U.S.C. § 1337 at all. This judicial reasoning defies *Loper Bright* and must be addressed by this Court to make clear what is expected of courts across the land post-*Chevron*.

ARGUMENT

I. This Court Should Grant Review to Clarify That Courts Must Conduct Independent Statutory Analysis post-*Chevron*

The issue before the Court is critical to the lasting impact of *Loper Bright*. The First Circuit's ruling allows an agency to define the scope of its own statutory authority without independent statutory interpretation from the judiciary, contrary to *Loper Bright's* instructions. *See* 603 U.S. 369. Other circuit courts have approached their role in statutory interpretation differently since *Loper Bright*, creating a split in authority. This Court should grant certiorari to resolve this split and provide clear guidance on the standard lower courts must follow post-*Chevron*.

Congress, through 43 U.S.C. § 1337, delegated two key prerogatives to the Department of the Interior ("DOI") relevant to this case: the authority to issue permits for offshore wind-energy farms, and the mandate that all activities conducted under that subsection "ensure" compliance with twelve specific criteria. 43 U.S.C. § 1337(p)(4). However, there is ambiguity as to whether the requirement to "ensure" those twelve criteria functions as a strict prerequisite to the Secretary's permitting authority, or whether those criteria should be weighed against the broader interests Congress may have had in empowering the Secretary to issue leases in the first place. Petitioners contend that the criteria outlined in § 1337(p)(4) must be satisfied for a lease to be lawful. The lower court, acknowledging the challenges that most, if not all,

offshore wind projects would face in meeting these requirements, deferred to the Secretary's judgment in concluding that the twelve criteria were reasonably met, thus justifying the agency's exercise of power. *Seafreeze Shoreside, Inc.,* 123 F.4th at 26. However, this "reasonable" standard is based solely on the agency's own interpretation of the statute. *See* U.S. Dept. of Interior, M-37067, Secretary's Duties under Subsection 8(p)(4) of the Outer Continental Shelf Lands Act When Authorizing Activities on the Outer Continental Shelf (April 9, 2021). The lower court did not conduct any independent statutory analysis to determine the "best" interpretation of 43 U.S.C.A. § 1337.

Even if the agency's interpretation were correct, which remains doubtful, *Loper Bright* requires the court to nevertheless conduct its own analysis to determine the "best" reading of a statute. 603 U.S., at 400. The First Circuit failed to perform this necessary analysis, and for that reason, this Court should grant certiorari and remand.

A. *Loper Bright*'s Statutory Analysis Framework

In *Loper Bright*, this Court decisively rejected the longstanding presumption established by *Chevron* that statutory ambiguity constitutes an implicit delegation of interpretive authority to administrative agencies. *See Loper Bright*, 603 U.S. 369; *see also, Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984). In doing so, the Court reaffirmed that courts—not agencies—must "decide

all relevant questions of law and interpret statutory provisions." *In re MCP No. 185*, 124 F.4th 993, 1002 (6th Cir. 2025) (citing *Loper Bright*, 603 U.S., at 372). Now, when faced with an ambiguous statute that has been interpreted by an agency, a court must exercise its own independent judgment, deploying every interpretive tool at its disposal to determine the best reading of the statute. *In re MCP No.* 185, 124 F.4th at 2273; *see Loper Bright*, 603 U.S. 369. An agency's plausible interpretation is no longer satisfactory.

This shift requires courts to take an active role in defining the limits of agency authority. *Loper Bright* prescribes a guide for courts to follow when doing so:

- (1) determine whether Congress has delegated authority to an agency—for example, by using language in a statute stating that an agency may act "in its judgment" or "upon finding" that a certain standard has been met. *See Loper Bright* 603 U.S., at 395. Then, (2) determine the precise scope of that delegation; and

- If a statute lacks explicit language conferring discretion, the agency's interpretation carries no special weight—courts must independently assess the "single, best meaning" of the statute at the time of its enactment. *Id* at 400.

B. Deference is Warranted Only if it Comes from the "Best" Reading of a Statute

The overruling of *Chevron* does not mean that agencies cannot be given deferential authority. Deference to agency interpretations can be

appropriate, but only when Congress has made a clear and explicit delegation of that authority.

A court conducting the above *Loper Bright* analysis will come to one of two conclusions: (1) the best reading of a statute, as determined by the judiciary, is that an agency *was* granted deference to interpret an ambiguous term, and so the agency interpretation controls; or (2) the best reading of a statute, as determined by the judiciary, is that it does *not* delegate interpretive authority to an agency, in which case the court must determine an ambiguous term's "single, best meaning" using all the tools available to it. *Loper Bright*, 603 U.S., at 400. Therefore, even in instances where agency discretion is appropriate, a reviewing court must independently assess the statutory basis for that discretion and determine the scope of the agency's authority to ensure it does not exceed lawful boundaries. *Id.* at 395, 413.

When the "best reading of a statute is one which delegates discretionary authority to an agency," it will not be so due to any ambiguity, but the product of "broad and open-ended" grants of authority under the heading of "terms like 'reasonable,' 'appropriate,' 'feasible,' [and] 'practicable.'" *Pickens v. Hamilton-Ryker IT Sols., LLC,* No. 24-5407, 2025 WL 972526, at *8 (6th Cir. Apr. 1, 2025) (unpublished) (quoting *Kisor v. Wilkie*, 588 U.S. 558, 632 (2019) (Kavanaugh, J., concurring)). Thus, agency deference shall not be presumed—it must be a finding made by the court based on its own independent interpretation of statutory language.

II. Loper *Bright* Analysis Conducted by the Sixth Circuit Reveals a Circuit Split Over the Judiciary's Interpretive Role post-*Chevron*

The Sixth Circuit has applied *Loper Bright*'s new framework in multiple recent cases, demonstrating how courts must analyze statutes to determine whether agency discretion is appropriate.

A. Two Examples of *Loper Bright* Analysis in the Sixth Circuit

In *Pickens v. Hamilton-Ryker IT Sols., LLC,* No. 24-5407, 2025 WL 972526 (6th Cir. Apr. 1, 2025) (unpublished), the Sixth Circuit Court of Appeals remanded to the lower court after considering the Fair Labor Standards Act ("FLSA") under the new *Loper Bright* framework. 29 U.S.C. Ch. 8. The FLSA includes a statutory provision allowing an exemption for employees working in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The statute also explicitly authorized the Secretary of Labor to "define and delimit" these terms. *Id.* In analyzing this language, the court noted that the power to "define" a term is distinct from the power to "delimit" it—the former involves determining meaning, while the latter involves setting boundaries for its application. *Pickens,* 2025 WL 972526, at *9. By granting both powers to the Secretary, the court reasoned that Congress delegated discretion over how to apply the exemption to the agency. Crucially, however, the court did not simply defer to the agency's interpretation that it likely has discretion without

supplying its own analysis confirming such discretion was warranted. *See id*.

Similarly, in *Moctezuma-Reyes v. Garland*, the Sixth Circuit examined whether the Board of Immigration Appeals was entitled to deference in interpreting the phrase "exceptional and extremely unusual hardship" under the Immigration and Nationality Act. 124 F.4th 416 (6th Cir. 2024); 8 U.S.C. § 1229b(b)(1). While the phrase itself is broad, the court emphasized that imprecise terms do not justify deference according to *Loper Bright*. *Moctezuma-Reyes*, 124 F.4th at 421. For example, the court noted that *Loper Bright* pointed to provisions of the Clean Water Act and Clean Air Act that not only used broad language but also explicitly empowered agencies to regulate based on their "judgment," or when they "find" that certain conditions exist. *Id* at 420; *Loper Bright* 603 U.S. at 395; 33 U.S.C. § 1312(a). The statute at issue in *Moctezuma-Reyes* contained no such express delegation of interpretative authority. Unlike the statute at issue in *Pickens*, the relevant provisions of the Immigration and Nationality Act—although granting the Secretary the power to act under certain conditions—do not define those conditions and, critically, do not confer the agency any authority to define the standard itself. *See Moctezuma-Reyes*, 124 F.4th 416; *see also*, *Pickens,* 2025 WL 972526 (2025).

A statute granting an agency authority to exercise delegated power does not necessarily grant that agency the authority to determine under what circumstances that power can be used. *See id*. The

court cannot simply accept the Secretary's judgment as reasonable when faced with ambiguous criteria: it must determine if the Secretary was empowered by law to determine what is "reasonable" at all.

B. By Failing to Conduct Any Independent Statutory Analysis, the First Circuit Created a Circuit Split Over the Application of *Loper Bright*

This Court must address the circuit split over the application of *Loper Bright*. In *Pickens* and *Moctezuma-Reyes*, the Sixth Circuit undertook a careful analysis of the statutory text, examining whether Congress included language explicitly granting interpretive authority to the agency. *See* 124 F.4th 416. The First Circuit failed to conduct a similar analysis. Instead, it accepted the agency's interpretation without independently evaluating the statute's meaning. That is an error. "Courts **must** exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright,* 603 U.S. at 412. (*emphasis added*).

III. 43 U.S.C § 1337 Contains Ambiguous Terms Which the First Circuit Failed to Interpret the "Best" Meaning Of

The statute at issue provides the following:

> The Secretary shall ensure that any activity under this subsection is carried out in a manner that provides for:

> (A) safety;
> (B) protection of the environment;
> (C) prevention of waste;
> …
> (H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;
> (I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;
> …

43 U.S.C.A. § 1337 (p)(4). Similar to *Moctezuma-Reyes*, where the court held that the Immigration and Nationality Act allowed the Secretary to act when specific preconditions were met, but did not grant the Secretary authority to define those broad conditions, § 1337(p)(4) requires the Secretary to "ensure" certain ambiguous criteria (such as "safety" and "fair return"), but contains no explicit provision deferring to the Secretary's interpretation of those conditions. *See* 124 F.4th 416.

A. The Secretary Was Not Granted Express Interpretive Authority by § 1337

While the Secretary, through the Bureau of Ocean Energy Management ("BOEM"), considered various studies, reports, and scientific documents to determine that authorizing Vineyard Wind 1 would fulfill the Secretary's responsibilities under 43 U.S.C. § 1337(p)(4), that determination is not automatically

entitled to deference. The lower court should have conducted an independent statutory analysis to determine the meaning of the twelve criteria and the extent to which the Secretary must "ensure" their fulfillment. It failed to do so.

Take "safety," for example. Vineyard Wind 1's Environmental Impact Statement admits that the presence of many wind turbines in this region of the outer Continental Shelf will pose "major" adverse impacts on the navigation of shipping vessels, commercial fishing boats, and military warcraft.

> The addition of up to 795 foundations within the geographic analysis area between 2021 and 2030 would incrementally change navigational patterns and increase navigational complexity for vessels and aircraft operating in the region around wind energy projects. During construction periods between 2021 and 2030, use of stationary lift vessels in the lease areas and cranes at port locations would further increase navigational complexity in areas immediately around these tall structures. Increased navigational complexity would increase the risk of allisions for military and national security vessels as discussed above, and for military and national security aircraft… As multiple projects are built, changing navigation patterns could concentrate vessels around the edges of

> the cumulative WDA, potentially causing space use conflicts and increasing the risk of collisions between military/national security and civilian vessels.

U.S. Department of the Interior Bureau of Ocean Energy Management, Vineyard Wind 1 Offshore Wind Energy Supplement to the Draft Environmental Impact Statement at 3-119 (June 2020).

Given these risks, the question remains whether the Secretary's approval of Vineyard Wind 1 satisfies the statutory requirement to "provide for" "safety." Perhaps it does. However, the discretion to determine whether the criteria of § 1337(p)(4) were "ensured" was not granted to the Secretary—it is the role of the courts to independently interpret what this statutory requirement is, then find whether it was satisfied.

Loper Bright is clear: for an agency to have discretion, a statute must either "expressly delegate" authority to an agency to define a term or empower an agency to prescribe rules to "fill up the details" of a statutory scheme or regulate the limits imposed by a term or phrase such as through the words "appropriate" or "reasonable," "feasible," [and] "practicable." *Kisor v. Wilkie*, 588 U.S. 558, 632 (Kavanaugh, J., concurring). *See Loper Bright* 603 U.S. 369. *None* of these phrases are found in 43 U.S.C. § 1337.

This would suggest that the Secretary does not have discretion to determine the meaning of "safety" or other criteria or what it means for them to be

"ensured." The statute is ambiguous, as two memoranda from two different administrations evince. *See* U.S. Dept. of Interior, M-37067, Secretary's Duties under Subsection 8(p)(4) of the Outer Continental Shelf Lands Act When Authorizing Activities on the Outer Continental Shelf (April 9, 2021); *see also,* U.S. Dept. of Interior, M-37059, Secretary's Duties to Prevent Interference with Reasonable Uses of the Exclusive Economic Zone, the High Seas, and the Territorial Seas in Accordance with Outer Continental Shelf Lands Act Subsection 8(p), *Alternate Energy-related Uses on the Outer Continental Shelf* (December 14, 2020). Therefore, it is the duty of the judiciary to determine the statute's meaning, and the parameters of the Secretary's authority under it.

The lower court, by failing to conduct their own analysis, did not satisfy that "elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment." *Loper Bright*, 603 U.S., at 371.

B. The "Best" Interpretation of § 1337

There is Supreme Court precedent supporting the view that § 1337(p)(4) *should* be interpreted as a highly restrictive barrier Congress placed on the agency's ability to permit energy projects under the subsection. Although the lower court appealed to common sense by reasoning "a statute encouraging the development of offshore wind projects but obligating the BOEM to ensure that such projects be carried out in a manner that provides for safety, for

example, cannot be read to prohibit project approval simply because one could imagine the project being involved in an accident," this Court has long affirmed that when a statute's language is clear, courts must enforce and interpret the statute as written, even if doing so results in unfavorable or counterproductive outcomes. *Seafreeze Shoreside, Inc.*, 123 F.4th at 26; *see Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978).

In *Tennessee Valley Authority*, the Supreme Court stated:

> The court's appraisal of the wisdom or unwisdom of a particular course consciously selected by Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.

437 U.S. at 173.

In *Tennessee Valley Auth.*, the Supreme Court interpreted § 7 of the Endangered Species Act, which contained a provision that all federal agencies must "ensure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species. *Id.* at 153 (citing 16 U.S.C. § 1536 (1976 ed.)). The court found no exceptions in the statute's provisions, and highlighted the rhetoric used by members of Congress advocating the supreme importance of biological diversity. *Tennessee Valley Auth.*, 437 U.S., at 177 ("The legislative proceedings in

1973 are, in fact, replete with expressions of concern over the risk that might lie in the loss of *any* endangered species."). This Court felt obligated to uphold the plain meaning of the words selected by Congress, even if doing so resulted in the permanent halting of a virtually completed dam for which Congress had already spent than $100 million, for the sake of "a relatively small number of three-inch fish." *Tennessee Valley Auth.*, 437 U.S. at 172.

The Court in *Tennessee Valley Auth.*, a pre-*Chevron* case, did not allow the agency to employ a "reasonable" standard to satisfy legislative directives when its independent statutory interpretation found no such discretion. *See id*. at 195. Perhaps the lower court in this matter should have come to a similar conclusion. Reasonable as it may be to allow the Secretary to employ a balancing test to weigh the broad requirements of 43 U.S.C. § 1337 against other legislative interests, if that is not the "best" interpretation of a statute, then such discretion ought not be allowed. Section 1337, on its face, appears to impose a high bar for project approval, just like the Endangered Species Act the Court grappled with in *Tennessee Valley Auth.*. *See* 437 U.S. 153. When a statute plainly states that the Secretary "shall ensure" that specified criteria are "provided for," it is not the judiciary's role to evaluate the wisdom of Congress' requirements—it is to determine and apply the law as it is written.

CONCLUSION

For the foregoing reasons, the Petition should be GRANTED.

Respectfully submitted,

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