No. 22-1219

In the Supreme Court of the United States

RELENTLESS, INC., ET AL.,
Petitioners,
v.
DEPARTMENT OF COMMERCE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

Brief Of Amici Curiae Advancing American Freedom, American Values; E. Calvin Beisner, Ph.D. (President, Cornwall Alliance For the Stewardship of Creation); Center For Political Renewal (CPR); Christians Engaged; International Conference Of Evangelical Chaplain Endorsers; Tim Jones (Former Speaker, Missouri House; Chairman, Missouri Center-Right Coalition); National Center For Public Policy Research; Eagle Forum; Frontline Policy Council; Project 21 Black Leadership Network; Setting Things Right; Students For Life Of America; The Family Action Council of Tennessee, Inc.; Yankee Institute; and Young America's Foundation In Support Of Petitioners

J. Marc Wheat
Counsel of Record
Advancing American Freedom, Inc.
801 Pennsylvania Avenue, N.W., Suite 930
Washington, D.C. 20004
(202) 780-4848
MWheat@advancingamericanfreedom.com
Counsel for Amici Curiae

November 27, 2023

QUESTION PRESENTED

Whether *Chevron v. NRDC,* 467 U.S. 837 (1984), should be overruled.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Regulations

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE[1]

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness. American freedom has created the greatest and most prosperous country in the history of the world, and if future generations are going to enjoy those blessings, we must secure individual rights in our own time.

This case is important to amici AAF, Advancing American Freedom; American Values; E. Calvin Beisner, Ph.D. (President, Cornwall Alliance for the Stewardship of Creation); Center for Political Renewal (CPR); Christians Engaged; International Conference Of Evangelical Chaplain Endorsers; Tim Jones (Former Speaker, Missouri House; Chairman, Missouri Center-Right Coalition); National Center For Public Policy Research; Eagle Forum; Frontline Policy Council; Project 21 Black Leadership Network; Setting Things Right; Students For Life Of America; The Family Action Council of Tennessee, Inc.; Yankee Institute; and Young America's Foundation because it presents to this Court the opportunity to overrule *Chevron v. NRDC*, 467 U.S. 837 (1984), which for too long has permitted the confusion of powers of the

---

[1] Counsel for amicus curiae authored this brief in whole. No person or entity other than amicus curiae, its members or counsel, made a monetary contribution to the preparation or submission of this brief.

several branches of the Federal government. The genius of the Constitution is its structure, dividing power against itself into three coequal branches and thereby protecting the liberties of its citizens from Leviathan.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

An anchoring principle for over two hundred years of judicial review was articulated by Chief Justice John Marshall: "[i]t is emphatically the province and duty of the judicial department to say what the law is." *See Marbury v. Madison*, 1 Cranch 137, 177 (1803). The goal of the Chevron doctrine was to provide consistent statutory construction in cases litigating the regulatory deluge flowing out of agencies established in the New Deal and afterwards. *See Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984); *Buffington v. McDonough*, No. 21–972, slip op. at 8 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from denial of cert). Perhaps never loved, thirty years ago *Chevron* was nonetheless thought to be a "useful monster" that "[was] worth keeping around." *Lamb's Chapel v. Central Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

Now, after nearly four decades of courts trying to make it work, *Chevron* deference has earned its reputation as unconstitutional in both application and effect. Its legacy is the erosion of individual liberties the Constitution was designed to protect, thus touching the lives of those who live in fishing communities with names like Atlantic, Cape May, Portsmouth, Ocean, and Monmouth or work for fishing companies like Loper Bright Enterprises, Inc.;

H&L Axelsson, Inc.; Lund Marr Trawlers LLC; and Scombrus One LLC. Petitioners Relentless Inc. and Huntress Inc., (small businesses organized under Rhode Island law whose primary industry is commercial fishing, whose gross receipts are less than or equal to $11 million, CA1.App.162 ¶ 5, and whose catch is primarily Atlantic herring, Loligo and Illex squids, Butterfish, and Atlantic mackerel. *See* CA1.App.288.) and Seafreeze Fleet LLC (a limited liability company with no parent corporation, it is the parent company of Relentless Inc., and Huntress Inc.) seek redress for over-reaching Federal regulations that misguided *Chevron* deference has caused. Petitioners in this case are herring fishermen who face unfair financial hardships under new regulations promulgated under the putative authority of the Magnuson-Stevens Act ("MSA").

The MSA divided the nation's fisheries into regions, each with a "fishery management council" tasked with creating a "fishery management plan" for that region. *Id.* at 3–4. The MSA stated that these "fishery management plans 'may require that one or more observers be carried on board a [fishing] vessel.'" *Id.* at 4; 16 U.S.C. § 1853(b)(8) (1996). In 2020, the National Marine Fisheries Service ("NMFS") invoked this authority to promulgate a regulation requiring "industry funded monitoring" of catch amounts for vessels fishing in New England waters. 85 Fed. Reg. 7,414 (Feb. 7, 2020) ("bureaucrats on boats regulation").

This bureaucrats on boats regulation is costly to petitioners, but is burdensome in others ways as well. First, petitioners are "gonna need a bigger boat"

(Jaws, Universal Pictures, 1975), or will have to make room on an already crowded vessel to carry a monitor who takes up precious working space and complicates safety protocols. What's more, the bureaucrats on boats regulation demands that the vessels must pay the monitor's wages. Pet. at 3, 17. This can cost up to $710 a day and paying for monitors is expected to reduce the fishermen's profits by 20%. *Id.* at 32. The petitioners sued, and the district court upheld the agency's regulation as a proper interpretation of MSA's "may require" language. *Id.* at 2-4, 19, 22. The court of appeals for the First Circuit upheld that decision. The panel concluded that the statute was ambiguous as to whether fishing operations could be forced to pay the cost of their own monitoring. But it concluded that NMFS's interpretation of the statute did not exceed "the bounds of the permissible," and therefore held for the government. *Id.* at 3.

This case presents the question of *Chevron* deference dead on without any need to tack, offering an excellent opportunity to abandon this sinking ship and to offer lower courts a more seaworthy vessel for judicial review. *Chevron* deference has long been persuasively criticized as unconstitutional, both for violating Article III's vesting of all judicial powers in the judiciary and for violating due process. See *Michigan v. E.P.A.*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring); Charles J. Cooper, The Flaws of Chevron Deference, 21 Tex. Rev. L. & Pol'y 307, 310–11 (2016); Douglas H. Ginsburg & Steven Menashi, Our Illiberal Administrative Law, 10 NYU J.L. & Liberty 475, 507 (2016); Philip Hamburger, Chevron Bias, 84 Geo. Wash. L. Rev. 1187, 1211 (2016); Jack M. Beerman, End the Failed Chevron Experiment

Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 779, 817 (2010).

This Court should rule for petitioners and overrule *Chevron*.

ARGUMENT

I. Congressional Silence Is Not Congressional Delegation.

This Court should rule for petitioners and find that Congress did not "silently" authorize the National Marine Fisheries Service (NMFS) to exercise the power of the purse reserved for Congress in Article I of the Constitution. The agency may not make up for a lack of appropriations in this area by compelling commercial fishing boats under its jurisdiction to pay the daily wages of NMFS's at-sea inspectors, known as "observers," under § 1853(b)(8) of the Magnuson-Stevens Fishery Conservation and Management Act 16 U.S.C. §§ 1801-1884 (Act)?[2] Ruling for the

---

[2] Section 1853(b)(8) of the Act provides:

(b) Any fishery management plan which is prepared by any [Regional Fishery Management Council], or by the Secretary [of Commerce], with respect to any fishery, may…

(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

Petitioners is also warranted to clarify, once and for all, that "*Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts." *Buffington v. McDonough*, No. 21- 972, 2022 WL 16726027, at *7 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from denial of certiorari)

This Court has noted that, "an agency literally has no power to act. . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Congress clearly gave the agency discretion in § 1853(b)(8) of the Act for the fish management plan to 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." 16 U.S.C. § 1853(b)(8). But the silence of Congress on who is to pay for the monitors in no way authorized a whopper of a conclusion by the agency – that commercial fishing vessels themselves would be forced to pay for the bureaucrats on boats scheme. *See* 85 Fed. Reg. 7,414, 7,422 (Feb. 7, 2020) ("Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry-Funded Monitoring Final Rule"). NMFS implausibly claims that mandating payment

---

that the health or safety of the observer or the safe operation of the vessel would be jeopardized[.]

16 U.S.C. § 1853(b)(8).

for the at-sea monitors is an implied cost of compliance for "carry[ing] [an observer] on board a vessel," under § 1853(b)(8). "The requirement to carry observers [at sea], along with many other requirements under the Magnuson-Stevens Act, includes compliance costs on industry participants." 85 Fed. Reg. at 7,422. As a result, NMFS promulgated a final rule requiring certain fishing vessels within the Atlantic herring fishery to pay the daily wages of at-sea observers. See 85 Fed. Reg. at 7,430. The First Circuit Court of Appeals applied its understanding of *Chevron* and concluded that the statute was ambiguous as to whether fishing operations could be forced to pay the cost of their own monitoring, but that NMFS's interpretation of the statute did not exceed "the bounds of the permissible." *Relentless Inc. v. U.S. Dep't of Commerce*, 62 F.4th 621, 634 (1st Cir. 2023) (internal quotation marks omitted) (quoting *Barnhart v. Walton*, 535 U.S. 2112, 218 (2002)).

Notably, and disturbingly, the First Circuit emphasized that Congress, by remaining silent on the issue, somehow delegated its Constitutional duty to oversee the power of the purse, thus allowing NMFS to require fishing vessels to pay for at-sea observers in § 1853(b)(8): "When Congress says that an agency may require a business to do 'X,' and is silent as to who pays for 'X,' one expects that the regulated parties will cover the cost of 'X.'" *Id.* at 15. The lower court's opinion displays a fishy interpretation of the protean *Chevron* doctrine, and it also turns the Constitution's separation of powers on its head. "*Chevron* did not undo, and could not have undone," the foundational principle that an Executive Branch agency is entirely a creature of Congress. The agency can only exercise

those powers that Congress has given it. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) (cleaned up). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) ("'When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.'") (quoting *Stark v. Wickard*, 321 U.S. 288, 309 (1944)).

The First Circuit's opinion enters dangerous waters with its assertion that Congress's silence is tantamount to a delegation of one of its core powers. Here, there is no plain language of delegation. "[W]hen a statute's language is plain, the sole function of the courts . . . is [generally] to enforce it according to its terms." *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013). Silence does not create ambiguity when the claimed delegation of power from Congress is granted expressly elsewhere in the statute. "[S]tatutory silence, when viewed in context, is [here] best interpreted as limiting agency discretion," and not expanding that discretion. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009).

It is regrettable that this Court has declined to mention *Chevron* even in cases where it is directly at issue (See, e.g., *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022)) given the doctrine's many problems as recognized by members of this Court. *See*, *e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); *Michigan v. EPA.*, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109-10 (2015) (Scalia, J.,

concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring); Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150-54 (2016). But, as this case well illustrates, lower courts continue to feel obligated to apply *Chevron* because the Court has yet to clearly overrule it.

II. Under *Chevron*, A Federal Court Must Decide If An Administrative Agency Has Exceeded Its Authority.

One of the most important powers reserved to Congress in the Constitution is the power of the purse, specifically the Appropriations Clause. U.S. Const. art I, § 9, cl. 7. One of the few practical constraints on agency overregulation is congressionally appropriated funds – to turn on the spigot to provide the resources to enforce the agency's regulations, or to turn off the spigot when the agency has gone overboard. As James Madison recognized, "[t]his power over the purse, may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people." The Federalist No. 58 (James Madison). But the court below made a whale of an error in finding that Congressional silence allowed the agency to freeboot at the expense of its regulated community: "Federal agencies may not resort to nonappropriation financing because their activities are authorized only to the extent of their appropriations." Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1356 (1988); *see also Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015); *Chamber of Commerce of U.S. v. NLRB*, 721

F.3d 152, 160 (4th Cir. 2013) (similar); *Bayou Lawn & Landscape Servs. v. Sec'y of Lab.*, 713 F.3d 1080, 1085 (11th Cir. 2013) (similar); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) (similar). Thus, where an agency lacks statutory authority to procure its own funds, it is not free to go on regulatory pirate raids to meet budgetary shortfalls. The decision below inexplicably perceives ambiguity in statutory silence, the logical explanation for which is an absence of Congress intent to grant the agency such a dangerous, roving authority.

Far from suggesting any unwarranted deference to agency action, *Chevron* reinforces the crucial role of an independent Federal Judiciary to determine congressional intent, in order to decide whether an agency has exceeded its statutorily delegated powers. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9.3 Indeed, Article III of the Constitution requires a federal court "'to protect justiciable individual rights against administrative action fairly beyond the granted powers,'" by "'adjudicat[ing] cases and controversies as to claims of infringement of individual rights . . . by the exertion of unauthorized administrative power.'" *Defenders of Wildlife*, 504 U.S. at 577 (quoting *Stark*, 321 U.S. at 310). "The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It [allows the agency] to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe [the Act's] silence as exactly that: silence." *E.E.O.C. v. Abercrombie & Fitch Stores,*

Inc., 575 U.S. 768, 774 (2015) (interpreting Title VII) (emphasis added). Instead, *Chevron* instructs a court, as always, to "employ[] traditional tools of statutory construction" before deciding whether a statute is genuinely "silent or ambiguous with respect to the specific issue" of agency power. *Chevron*, 467 U.S. at 843 & n.9. See also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

III. A Federal Court Must Enforce The Plain Language Of A Statute.

"When a statute's language is plain, the sole function of the courts . . . is [generally] to enforce it according to its terms." *Sebelius*, 569 U.S. at 38. Here, the simple statutory language makes clear Congressional intent and the lower court's error. Congress permitted NMFS to require fishing vessels to "to carry an observer on board." 16 U.S.C. § 1853(b)(8). "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020). The ordinary public meaning of the phrase "carried on board" certainly does not suggest "a bureaucrat on a boat at your expense." "[T]he Court need not resort to *Chevron* deference, as [this] lower court[] ha[s] done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018). In Constitutional jurisprudence, silence is golden, in that it limits agency power. "[S]tatutory silence, when viewed in context, is [here] best interpreted as limiting agency discretion." *Entergy Corp.*, 556 U.S. at 223. *See also City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296

(2013) ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.") (emphasis added). "In other words, not all statutory silences are created equal. But you would never know that from the majority's opinion." *Oregon Restaurant and Lodging Ass'n v. Perez*, 843 F.3d 355, 360 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing en banc) (contrasting statutory silence that precludes agency action with statutory silence that creates ambiguity for agency to resolve. "If the intent of Congress is clear, 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." *Chevron*, 467 U.S. at 842-43 (emphasis added). *See also SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) ("Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer.").

For four decades, *Chevron* deference has been a menace in the land, and now on the sea. Perhaps the bureaucrats on boats regulation will finally capsize this leaky doctrine, now close to its final watch. Justice Gorsuch recently warned this court on the dangers of this drifting hulk: "No measure of silence (on this Court's part) and no number of separate writings (on my part and so many others) will protect [Americans]. At this late hour, the whole [Chevron] project deserves a tombstone no one can miss." *Buffington v. McDonough*, 2022 WL 16726027, at *7 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from the denial of certiorari).

Whatever hopeful benefits might have been countenanced when *Chevron* was decided in 1984, nearly four decades of experience and navel gazing have done little to bind agencies to the Constitutional mast. Instead, they seem irresistibly drawn to the siren song of increased regulatory power where none was granted. *Chevron* "wrests from Courts the ultimate interpretative authority to 'say what the law is'" and places it in the executive's hands. *Michigan*, 576 U.S. at 761 (Thomas, J., concurring). Happy is the law that is truly unambiguous, for there is no need for inquiry into statutory interpretation. But when an agency sails into court asserting statutory ambiguity like Blackbeard hoisting the Jolly Roger: surrender is the customary and pusillanimous response. The first hint of ambiguity often leads to an abject "abdication of the judicial duty" *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) when a double-charged full broadside is called for. America expects that every judge will do his duty, for it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). This case presents the Court with the perfect opportunity to free lower courts to carry out that basic constitutional duty, unencumbered by the weight of *Chevron*.

CONCLUSION

The Court should rule for petitioner's and overturn *Chevron*.

Respectfully submitted,

J. Marc Wheat
Counsel of Record
Advancing American Freedom, Inc.
801 Pennsylvania Avenue, N.W. Suite 930
Washington, D.C. 20004
(202) 780-4848
mwheat@advancingamericanfreedom.com

Counsel for Amici Curiae