No. 22-451

In the Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, INC., ET AL.,
Petitioners,
v.
GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA AND 17 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Magnuson-Stevens Act (MSA) governs fishery management in federal waters and provides that the National Marine Fisheries Service (NMFS) may require vessels to "carry" federal observers onboard to enforce the agency's myriad regulations. Given that space onboard a fishing vessel is limited and valuable, that alone is an extraordinary imposition. But in three narrow circumstances not applicable here, the MSA goes further and requires vessels to pay the salaries of the federal observers who oversee their operations—although, with the exception of foreign vessels that enjoy the privilege of fishing in our waters, the MSA caps the costs of those salaries at 2-3% of the value of the vessel's haul. The statutory question underlying this Petition is whether the agency can also force a wide variety of domestic vessels to foot the bill for the salaries of the monitors they must carry to the tune of 20% of their revenues. Under well-established principles of statutory construction, the answer would appear to be no, as the express grant of such a controversial power in limited circumstances forecloses a broad implied grant that would render the express grant superfluous. But a divided panel of the D.C. Circuit answered yes under *Chevron* on the theory that statutory silence produced an ambiguity that justified deferring to the agency.

The questions presented are:

1. Whether, under a proper application of *Chevron*, the MSA implicitly grants NMFS the power to force domestic vessels to pay the salaries of the monitors they must carry.

2. Whether the Court should overrule *Chevron* 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.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Doctrinal change often comes slow, particularly for decades-engrained theories like agency deference. And so far, the Court has "le[ft] for another day" the recurring question "whether *Chevron* should remain" on the books. *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1358 (2018). But letting uncertainty fester has real costs, so that day should be today.

The *amici* States of West Virginia, Alabama, Alaska, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, Texas, Utah, and Virginia agree with Petitioners that the D.C. Circuit majority got *Chevron* wrong. It should have looked to all the canons of construction before calling the statute ambiguous and resorting to deference to break the tie. If the court had truly "empt[ied] [its] interpretive toolkit," Pet.App.25, it would have seen that the National Marine Fisheries Service lacks the authority it claims to unilaterally tax an industry. Sometimes statutory silence might mean statutory uncertainty, but not always. Certainly not here, where Congress said "yes" to measures like the ones the agency deployed in some parts of the statute—but not in those the agency relied on to justify its work.

The Court should grant the Petition to say at least that much. At a minimum, it should resolve the sustained confusion over whether and how *Chevron* applies. It should favor a judicially robust version of deference that takes seriously the courts' responsibility to ensure that Congress actually delegated the powers an agency

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[*] Under Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

asserts. But it should also go further. The lower court believed that despite this Court's recent ambivalence to agency deference, the still-operative *Chevron* doctrine required its (atextual) result. Pet.App.15. If that view is right, then the misguided outcome it shaped is all the more reason to reconsider *Chevron* wholesale.

The *amici* States urge the Court to take up that task now. The confused status quo has real costs for the people who live and work within our borders. Because the problems with *Chevron* keep multiplying, no one really knows whether it is still viable or how courts should apply its teachings. Here, four federal judges reached three different conclusions after applying the same two-step doctrine to one statutory text. That outcome reflects the most common result of the uncertainty: The lower courts uphold even highly burdensome, novel, and textually suspect rules. And with the "hundreds of federal agencies poking into every nook and cranny of daily life," *City of Arlington* v. *FCC*, 569 U.S. 290, 313, 315 (2013) (Roberts, C.J., dissenting) (cleaned up), the cost of that state of affairs is high.

So letting *Chevron* die a long death from neglect is the wrong approach. The States, our residents, and our industries are hurt along the way. The Court should intervene now to limit *Chevron* in a way that is consistent with the separation of powers and the principles of federalism. Otherwise, it's time to toss it.

SUMMARY OF THE ARGUMENT

I. The uncertainty in current agency deference doctrine is untenable. After almost forty years, courts are unable to apply *Chevron* with any consistency. Though the doctrine purports to defer only on the basis that Congress delegated gap-filling authority to an agency,

Chevron's confused state makes it difficult to ensure that courts do more than assume that delegation premise. Lower courts have real questions about whether *Chevron* remains viable and how to apply it if it does. The result is widespread confusion and wildly different approaches as courts suss out ambiguity.

The Court should grant the Petition because this confusion carries heavy costs. Lower courts struggling to apply *Chevron* virtually always rule for the agency, which means that the economy labors under a potentially unjustified pro-regulatory default. *Chevron* also gives agencies wide latitude to interpret statutes aggressively and shift course dramatically when administrations change. Regulation is costly; over-regulation and mercurial regulation even more so. Waiting longer to intervene forces painful tradeoffs, and they hurt the States and our residents. The Court should restrain or reconsider *Chevron* now.

II. This case is an ideal vehicle to address *Chevron*'s confusion and deficiencies. Beyond the reasons Petitioners explain, the decision below underscores two other problems from a too-broad agency deference regime. For one thing, the majority blessed the agency's burdensome rule based on statutory silence. Particularly when Congress spoke to the same matter in *other* parts of the statute, the lower court should have found clarity in its choice not to speak here. For another, the majority allowed silence to support the agency's decision to tax private parties to fund its enforcement efforts. But bypassing Congress's power of the purse in this way short-circuits an important form of constitutional accountability. Thus, even if the Court does not reconsider *Chevron* entirely in this case, granting the Petition would still rectify both of these egregious errors.

REASONS FOR GRANTING THE PETITION

I. Confusion Over Whether *Chevron* Remains Viable And How To Apply It Hurts The States And The Regulated Public.

Chevron has confused regulated parties, litigants, and lower courts—and undermined democratic accountability and responsible rulemaking—for long enough to warrant wholesale review. It has failed to provide the kind of "stability [and] predictability" that might defuse the "compelling justification" against scrapping an embedded doctrine. *Vasquez* v. *Hillery*, 474 U.S. 254, 265-66 (1986). Short of reconsidering *Chevron*, even stepping in to narrow its reach would be an important step toward "more predictable and consistent application." Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 939 (2021). But either way, the Court should speak directly to *Chevron*'s limits instead of forcing courts to wonder whether the doctrine still has life and leaving them to their own devices to figure out how to apply it. The confused state of affairs we are in now hurts the people and businesses of our States. We urge the Court to end it.

A. Most everyone is seriously confused whether *Chevron* remains a doctrinal contender—and if it is, how lower courts should apply it.

Chevron is not a tool to outsource statutory interpretation to the Executive Branch. The Court built the doctrine on the idea that agencies may sometimes fill in statutory blanks, but Congress must actually delegate that power to them. "It is axiomatic" that agency power is "limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). So Congress's choice to delegate "administrative

authority" is "[a] precondition to deference under *Chevron*." *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990) (cleaned up). The theory goes that ambiguity means Congress left the agency something to do: It "constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). What *Chevron* does *not* suggest, however, is that courts should take a back seat whenever a law "is ambiguous and an administrative official is involved." *Gonzales* v. *Oregon*, 546 U.S. 243, 258 (2006) (cleaned up). Whether Congress delegated power and how much are judicial questions—deferring "to the agency's reasonable gap-filling decisions" does not mean that "courts should cease to mark the bounds of delegated agency choice." *Negusie* v. *Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part). Properly understood, *Chevron*'s two-step framework thus supports—not erases—the judiciary's responsibility to wrestle with statutory meaning.

Whether the Court can pull *Chevron* back to those limits remains an open question. What is more than evident, though, is that the doctrine has "turned out to be unstable and difficult to apply"—lacking a "solid basis" from the beginning "virtually guaranteed" inconsistency, with "conflicting principles pull[ing] decision makers with disparate views in different directions." Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 796 (2010). That observation is important, but not new. In one of his final decisions, Justice Kennedy explained that the Court should revisit both "the premises that underlie *Chevron* and how courts have implemented" it. *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

Other members of the Court have said much the same. See, *e.g.*, *Michigan* v. *EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (critiquing the way *Chevron* shifts interpretive power from courts to the executive); *Buffington* v. *McDonough*, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from denial of certiorari) (wondering if "*Chevron* maximalism has died of its own weight and is already effectively buried").

And the situation has recently gotten worse. For one thing, although lower courts are still applying *Chevron* until instructed otherwise, many are starting to ask aloud whether the Court is "distancing itself," *ITServe All., Inc.* v. *United States*, 161 Fed. Cl. 276, 282 n.3 (2022), from a framework that has "fallen out of favor," *Texas* v. *Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525, at *19 n.11 (N.D. Tex. Aug. 23, 2022). Case in point: In two decisions last Term, the Court "seemed to silently adopt diluted versions" of *Chevron* without citing it—even though the lower courts had engaged the doctrine head-on. William Yeatman, *The* Becerra *Cases: How Not to Do* Chevron, CATO SUP. CT. REV., 2021-2022, at 98-100 (2022); see also *Texas*, 2022 WL 3639525, at *19 n.11 (commenting that both decisions involved circumstances "where *Chevron* could have applied," but "received no reference, let alone deference"). This case shows that first-order confusion, too. The majority recognized the "recent cases in which the Supreme Court has not applied the [*Chevron*] framework," but correctly understood that only this Court can revisit its own precedent. Pet.App.15; see also *id.* at 25 n.16.

Second-order questions are even more prolific. The on-the-ground reality is that "different judges have wildly different conceptions of whether a particular statute is clear or ambiguous." Brett M. Kavanaugh, *Fixing*

Statutory Interpretation, 129 HARV. L. REV. 2118, 2152 (2016); see *Buffington*, 143 S. Ct. at 20 (Gorsuch, J., dissenting from denial of certiorari) (highlighting the "ambiguity about ambiguity"). Some courts are increasingly finding ways to skip robust analyses under *Chevron* and its progeny. See Daniel S. Brookins, *Confusion in the Circuit Courts: How the Circuit Courts Are Solving the* Mead-*Puzzle by Avoiding It Altogether*, 85 GEO. WASH. L. REV. 1484, 1497-99 (2017) (citing holdings from several circuits). If not the whole story, "incomprehensible criteria for *Chevron* deference" must be at least part of the reason why. *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring in part and concurring in the judgment).

Indeed, all sorts of differences brew when it comes to deciding whether a statute is ambiguous. Courts use a plethora of tests at Step 1, such as asking whether Congress has spoken directly to the issue, deploying the traditional tools of statutory construction, or (somewhere in the middle) taking on a search for "plain meaning." Beermann, *supra*, at 817. The role, or not, of legislative history is another question mark. Kristin Hickman & David Hahn, *Categorizing* Chevron, 81 OHIO ST. L.J. 611, 632 (2020) (collecting cases illustrating how courts are "divided" on this and other ambiguity-resolving questions). So is how many steps are in the test: Lower courts have adopted at least "three substantively distinct versions of *Chevron*." Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605, 609, 634 (2014); see also, *e.g.*, Matthew Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 597 (2009); Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 624-25 (2009); Beermann, *supra*, at 832 ("*Chevron* may have three

steps"). Emphasis on "at least": Another scholar suggests a potential "four step test" has replaced the original. William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer Is* Chevron *Step Two, Not* Christensen *or* Mead, 54 ADMIN. L. REV. 719, 725 (2002). And even if courts could agree on the number, the order of the steps is up for debate, too. See Richard Murphy, *The Last Should Be First—Flip the Order of the* Chevron *Two-Step*, 22 WM. & MARY BILL RTS. J. 431, 434 (2013) (arguing that the "odd ordering" of the steps has contributed to *Chevron* confusion).

Add to all that uncertainty over the myriad "exceptions and caveats" to *Chevron* and when (if?) they apply. *Buffington*, 143 S. Ct. at 20 (Gorsuch, J., dissenting from denial of certiorari) (citing cases concerning missing delegation of agency authority to "make rules with force of law" (cleaned up)). The Court has "never held," for example, whether "the Government's reading of a criminal statute is entitled to any deference." *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari) (cleaned up). So too for cases "when liberty is at stake." *Id.*; see also, *e.g.*, Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 495 (2019) (noting that the Court has seemed to exempt from *Chevron* certain agency interpretations implicating fundamental liberties). And what about rules that intrude into areas of traditional state authority? The lower courts agree that agencies do not get deference for *implied* regulatory preemption. See *Grosso* v. *Surface Transp. Bd.*, 804 F.3d 110, 116 (1st Cir. 2015). But beyond that, courts run the gamut from requiring merely a "reasonable" preemption explanation from the agency, *Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 319 (2d Cir. 2005), to insisting on a clear statement in the governing

statute greenlighting preemption, see, *e.g.*, *Tennessee* v. *FCC*, 832 F.3d 597, 610-12 (6th Cir. 2016).

Finally, no one agrees on how strong a hand *Chevron* requires when it does apply. Even champions of broad agency deference are "split" over whether *Chevron* is "an inexorable command" or "'a rule of thumb, guiding courts … to respect that leeway which Congress intended the agencies to have.'" Jonathan H. Adler, *Shunting Aside* Chevron *Deference*, REGUL. REV. (Aug. 7, 2018), https://bit.ly/2Ou4vAv (quoting *SAS Inst., Inc.*, 138 S. Ct. at 1364 (Breyer, J., dissenting)). Relatedly, lower courts are conflicted whether *Chevron* is a waivable doctrine or a mandatory rule; the D.C. Circuit is even divided within itself on this point. See Jamie G. Judefind, *Trouble in the Tribunals: Exploring the Effects of* Chevron *One "Step" at A Time*, 27 WIDENER L. REV. 63, 72 (2021) (collecting cases). The federal government is able to capitalize on the confusion—increasingly seeking a favorable *Chevron* ruling below, only to turn around and "waive[] or forfeit[] arguments for *Chevron* deference" once the case reaches the Court. *Buffington*, 143 S. Ct. at 21 (Gorsuch, J., dissenting from denial of certiorari). This Court has dealt with situations like these, where the government is "of two minds about the result it prefers," *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., statement regarding denial of certiorari) (cleaned up), by "declin[ing] to consider whether any deference is due," *HollyFrontier Cheyenne Refin., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021). But the lower courts don't know whether they can take that tack, too.

B. The uncertain state of play has practical consequences that merit the Court's attention: It harms

real people. The Court should not wait for the next case to step in, but reconsider or rein in *Chevron* now.

It would be one thing if we were dealing with a rarely invoked doctrine. But quite the opposite: *Chevron* "is the most cited administrative law case in history." Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us about the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 612 (2014). Almost a decade ago, cases and scholarship had already referred to it tens of thousands of times. *Id.*

Since then, this Court has increasingly approached these issues by engaging more closely with the relevant statutes on their own terms—even fifteen years ago *Chevron*'s prominence was "fading." Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 727 (2007); see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1125 (2008) (explaining that the Court did not "apply the *Chevron* framework in nearly three-quarters of the cases where it would appear applicable"). But the lower courts cannot take off ill-fitting doctrines at will. So *they* deal with the confusion by finding ambiguity in the "vast majority" of cases before them—and then deferring to the agency. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 33 (2017). Around 70% of agency-interpretation challenges make it past Step 1, and courts go on to uphold the agency's view over 93% of the time. *Id.*

In other words, thanks to *Chevron*, the federal government usually wins. The problem with that is when victory follows unearned deference—when courts defer too quickly, presuming agencies may fill in the statutory

gaps instead of rigorously testing whether Congress delegated that power. Indeed, pervasive "uncertainty in the lower courts" makes it "all too often" the case that "courts abdicate th[eir] duty by rushing to find statutes ambiguous, rather than performing a full interpretive analysis." *Arangure* v. *Whitaker*, 911 F.3d 333, 336, 339 (6th Cir. 2018). So as it exists now, *Chevron* gives a strong default in favor of regulation with not enough confidence Congress intended that result.

This problem is not academic. Right or wrong, the lower courts treat *Chevron* as a heavy thumb on the federal government's side of the scale. The real-world result? Agencies have all the incentives to push expansive constructions of their governing statutes. After all, if agencies—and the administrations most of them answer to—know that lower courts will almost certainly defer to a plausible interpretation, it is hard to hold the line on a more restrained view of agency power. See Kavanaugh, *supra*, at 2150 (broad deference doctrines "encourage[] the Executive Branch ... to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints").

Even more when administrations change and the next set of officials come in to "undo the ambitious work of their predecessors" by "proceed[ing] in the opposite direction with equal zeal." See *Buffington*, 143 S. Ct. at 20 (Gorsuch, J., dissenting from denial of certiorari). Changed agency priorities are not inherently wrong, of course—and we have seen a lot of them as presidents ask federal agencies to enact "partisan policy agendas" that are otherwise "stymied by congressional stalemate." Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1742 (2015). But by encouraging ever-more-ambitious theories of agency

power, *Chevron* expands the range. Now, waffling from one aggressive construction to its opposite becomes a whipsaw.

That's a bad place to be. Litigation is expensive and can take years; the countless challenges involving *Chevron* seem a poor investment when lower courts virtually always defer to the work of another Branch. More to the point, regulation is expensive. And when the uncertainty in the law favors *over*-regulation, not under, our residents and businesses pay the higher price.

In this case, the agency estimated the costs to herring fishers at $710 a day, "which in the aggregate could reduce annual returns by approximately 20 percent." Pet.App.4 (cleaned up). More broadly, small businesses shell out an annual average of $11,700 *per employee* in federal regulatory costs, with the smallest among them paying almost 20% more "than the average for all firms." U.S. CHAMBER OF COM. FOUND., UNDERSTANDING SMALL BUSINESS IN AMERICA 6 (2017), *available at* https://bit.ly/2MaFaOC. This amounts to "over $40 billion per year" in direct spending on "federal economically significant rules." *Id.* "[T]hat's billion with a b." *White Stallion Energy Ctr., LLC* v. *EPA*, 748 F.3d 1222, 1259 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd sub nom.*, *Michigan*, *supra*. Adding in "lost productivity" and "higher prices," the total charge federal regulators foist on the American economy is more like $1.9 trillion a year. U.S. CHAMBER OF COM. FOUND., *supra*, at 4, 8. And that figure counts only front-end efforts: Depending on the statute, even "inadvertent violations" of a regulation can trigger "crushing" "criminal penalties and steep civil fines." *Cnty. of Maui* v. *Haw.*

Wildlife Fund, 140 S. Ct. 1462, 1489 (2020) (Alito, J., dissenting).

All this gets worse when rules governing investment-heavy decisions change more often and more dramatically. Regulatory uncertainty can "threaten[] existing investments in regulatory compliance" and discourage potential investors—especially "if they foresee a substantial risk that" policy shifts will "reduce or eliminate their return." Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 99 (2021). Investment chill sets in because "change in the background regulatory rules governing an industry is likely to upset the settled expectations of the firms and interested groups," causing "disruptions and increased costs as pre-existing programs become unworkable and new projects become necessary." Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1041 (2007). In other words, "stability encourages investment." Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 90, 122 (2018). So in a real sense, companies might prefer even a burdensome but static rule to wide regulatory swings. Some, in fact, have ultimately *won* challenges to agency regulations, only to ask that the challenged limit stay "in effect to protect the investments [they] had made … to comply with" it. Pierce, *supra*, at 99-100.

Next come notice concerns. Stable legal doctrine provides "non-judicial actors" with critical "guidance … in predicting future judicial behavior." Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 62 (1993). But the many ways courts approach *Chevron* mean that different judges often reach different outcomes—"even though

they may actually *agree* on what is the best reading of the statutory text." Kavanaugh, *supra*, at 2153 (emphasis in original). So regulated people and businesses have to do more than "conform their conduct to the fairest reading of the law that a detached magistrate can muster." *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). They have "to guess whether the statute will be declared 'ambiguous'" against a flurry of competing legal theories, and then guess "whether an agency's interpretation will be deemed 'reasonable.'" *Id.* All while also "remain[ing] alert to the possibility that the agency will reverse its current view 180 degrees anytime" and "*still* prevail." *Id.* (emphasis in original).

These costs would be weighty even if the States' representatives in Congress had chosen to impose them through legislation. But when the muddled state of *Chevron* deference lets agencies slip them through in ways that exceed Congress's mandate, the price climbs too high. The Court should intervene.

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A final note. Though the costs of staying *Chevron*'s current course are real, the Court need not take an entirely uncharted path to avoid them. Some States have watched the federal *Chevron* doctrine develop over time—and opted out.

Michigan's high court, for example, emphasized how "very difficult" "*Chevron*['s] inquiries are" "to apply," and concluded that "[t]he vagaries of *Chevron* jurisprudence d[id] not provide a clear road map" to justify "import[ing]" it into state law. *In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259, 271-72 (Mich. 2008). Michigan is not alone. See, *e.g.*, *Pub. Water Supply Co.* v.

DiPasquale, 735 A.2d 378, 382 (Del. 1999) ("Statutory interpretation is ultimately the responsibility of the courts."). In fact, "no state expressly adopts the '*Chevron* two-step.'" Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977, 986 (2008). That reality is not that surprising: Many States realize that the "deference doctrines … are discordant with the separation of powers in their respective state constitutions." Luke Phillips, Chevron *in the States? Not So Much*, 89 MISS. L.J. 313, 365 (2020). In fact, "the states that apply no deference or a lesser form of deference outnumber the *Chevron*-type of deference standards by a ratio of greater than 2-to-1." *Id.* at 364.

Those States and their agencies appear to be doing just fine, even with an "upsurge in declarations of de novo review for agency interpretations of statutes." Phillips, *supra*, at 365. So if the Court jettisons *Chevron*, federal law can adjust in the same ways, too.

II. The Decision Below Is A Strong Vehicle To Correct *Chevron*'s Confusion.

Any number of cases in any Term would let the Court take on the serious problem of *Chevron* confusion. This one is a particularly good option: It highlights even more of the troubling aspects of unchecked agency deference. Here, the National Marine Fisheries Service insists that statutory silence gives it power not only to regulate with a heavy hand, but to force the industry to fund its enforcement. Both lower courts accepted this suspect view of ambiguity to bless this novel brand of self-funding. So taking up this case offers value even if the Court ultimately leaves *Chevron* to live another day. The Court

still can—and should—clarify that deference has no place under circumstances like these.

First, the D.C. Circuit majority should not have deferred to the agency's power grab from silence. As the dissent explained, "[a]ll else equal, silence indicates a lack of authority." Pet.App.26. Courts have a "duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Va. Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1900 (2019) (plurality op.); see also, *e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) ("It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." (cleaned up)). So when a statute "says nothing" on an issue," courts generally do not "conclude that what Congress omitted from the statute is nevertheless within its scope." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 353 (2013). That rule has particular resonance here, where Congress was not silent in other parts of the statute, but authorized industry-funded monitors in three particular circumstances—and in two of them, protected regulated parties through express financial caps. 16 U.S.C. § 1821(h)(1)(A), (4); *id.* §§ 1853a(c)(1)(H), (d)(2)(B), (e)(2); *id.* § 1862(a). When it comes to *other* circumstances like those the agency chose to address, the *expressio unius* canon confirms that Congress's silence controls. Pet.30.

Matters of delegation are no different on this score than statutory construction more generally: "Congress does not delegate authority merely by withholding it." *Gulf Fishermens Ass'n* v. *Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 456 (5th Cir. 2020). Otherwise, gap-filling power could effectively flip the rule that agencies can do only what Congress allows into a license to do whatever

Congress does not forbid. "That theory has it backwards." *Bais Yaakov of Spring Valley* v. *FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017). It is also dangerous. More often than others, agency actions promulgated through silence amount to attempts to assert more or new power. See Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1559 (2009). And they tend to affect larger classes of people or greater segments of an industry instead of only "a few discrete players." See *id.* at 1559-60.

The Court should make clear that if *Chevron* applies, it does not allow a court to find ambiguity from silence in a case like this.

Second, deferring to a rule forcing regulated parties to bear the costs of enforcement dilutes Congress's power of the purse when it comes to agency accountability. The dissent homes in on the problem: An expansive view of the "necessary and appropriate" language at the heart of this case could "undermine" financial accountability by allowing an "agency [to] continue to operate" through "independent contractors" in the event Congress were to "entirely defund" the agency's "compliance components." Pet.App.32. Here, the agency pointed to "no other context in which an agency, without express direction from Congress, requires an industry to fund its inspection regime." Pet.App.29. Its novel approach should have caught the majority's eye. Copied elsewhere, just about every federal agency could unilaterally expand its reach by imposing direct levies on any regulated entities before it.

The Appropriations Clause, U.S. CONST. art. I, § 9, cl. 7, may be "the most complete and effectual weapon with which any constitution can arm the immediate

representatives of the people." THE FEDERALIST NO. 58 (James Madison). Through it, Congress—and only Congress—can fund or defund any part of an agency's activity or personnel. This power is a crucial check on administrative authority. Even though Congress may greenlight agency action generally through a statute, if appropriations don't follow, neither does rulemaking or enforcement. Congress has acted on this latent threat before. See, *e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 66-67 (2010) (discussing cuts to Consumer Product Safety Commission funding that reduced the agency's ability to conduct investigations and enforce new regulatory scheme). When it comes to agency accountability, then, the Appropriations Clause is a way to ensure that "[f]oxes [do] not guard henhouses." Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446 (1989). Deferring to an agency's purported power to self-fund lets the fox both build the henhouse and buy the hens.

Here, it was bad enough that the majority allowed the agency to fund its own enforcement efforts without any "straightforward and explicit command" from Congress. *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990). Worse still, it signed off even though the agency is not self-appropriating public dollars, but requiring private parties to foot the bill. The majority should have been especially cautious before deferring to an agency's assertion of quasi-taxation power—particularly when, again, the most it had in support was statutory silence.

Over the years, the Court has confirmed what has been true from the beginning of our Republic: "Taxation is a legislative function," and Congress "is the sole organ for levying taxes." *Nat'l Cable Television Ass'n, Inc.* v.

United States, 415 U.S. 336, 340 (1974). In James Madison's words, "the legislative department alone has access to the pockets of the people." THE FEDERALIST NO. 48. And the Court has already "wondered aloud" whether an agency's attempt to "charg[e] for the protective services it offered the public" "could pass constitutional muster." *Am. Fed'n of Lab. & Cong. of Indus. Orgs.* v. *Kahn*, 618 F.2d 784, 811-12 (D.C. Cir. 1979) (MacKinnon, J., dissenting) (citing *Nat'l Cable Television Ass'n, Inc.*, 415 U.S. at 340-41). This case is ripe to tackle the question directly. Taking it up and resolving the length of *Chevron*'s reach can provide needed clarity on this critical issue, too. After all, in this as in so many other ways, the "slow eclipse of Congress by … mounting Executive power," *Cal. Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 91 (1974) (Douglas, J., dissenting), is as serious for the States as it gets.

So the Court should grant the Petition regardless whether it decides that *Chevron*'s number is up. At a minimum, it should give the lower courts clear direction "to put greater effort into the textual investigation at step one before they rush on to the (easier) task of deciding whether to defer to the agency at step two." Yeatman, *supra*, at 101-02. Either way, we urge the Court to start down a better path now.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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