No. 22-451

In The
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL.,

Petitioners,

v.

GINA RAIMONDO, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

HERBERT L. FENSTER
3800 Fox Ridge
Longmont, CO 80503
(303) 834-9673

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution, Statutes, & Regulations

Other Authorities

INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * * * *

Respect for the separation of powers is fundamental to the limited and responsible form of government that the Constitution embodies and ALF long has advocated as an *amicus curiae* in numerous cases before this Court—most recently in *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited*, No. 22-448 and *Biden v. Nebraska* No. 22-506.

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[1] No counsel for a party authored this brief in whole or 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.

The far-reaching question that the Court will be addressing here—whether *Chevron* deference should be overruled or at least clarified—implicates the separation of powers. *See, e.g., Buffington v. McDonough*, 143 S. Ct. 14, 18 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (*Chevron* "pose[s] a serious threat to some of our most fundamental commitments as judges and courts"); *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1482 (2020) (Thomas, J., dissenting) ("[D]eference under *Chevron* . . . likely conflicts with the Vesting Clauses of the Constitution."); *Baldwin v. United States*, 140 S. Ct. 690, 692 (2020) (Thomas, J., dissenting from the denial of certiorari) ("*Chevron* deference undermines the ability of the Judiciary to perform its checking function on the other branches."); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 n. 114 (2019) (Gorsuch, J., concurring in the judgment) ("[T]here are serious questions . . . about whether [the *Chevron*] doctrine comports with the . . . Constitution."); *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions.).

Regardless of whether *Chevron* deference offends the separation of powers categorically, it does so in this case if federal courts are required to accept an Executive Branch agency's statutory interpretation that itself violates the separation of powers. At the very least, a federal agency should not be able to hide behind *Chevron* while arrogating to itself a pivotal power—here, the "power of the purse"—that the Constitution assigns exclusively to Congress. Indeed,

"[a]mong Congress's most important authorities is its control of the purse." *Biden v. Nebraska*, No. 22-506, slip op., at 24 (U.S. June 30, 2023).

As Circuit Judge Walker's dissenting opinion in this case explains, Respondent National Marine Fisheries Service (NMFS) "had trouble affording its preferred monitoring with just its congressionally appropriated funds" so it "attempted a workaround." App-22-23. The agency's scheme—"forc[ing] the fishermen to pay the wages of federally mandated monitors," App-24—violates the purpose of the Appropriations Clause, U.S. Const., art. I, § 9, cl. 7, and in so doing, the separation of powers.

The Appropriations Clause "embodies a fundamental separation of powers principle—subjugating the executive branch to the legislature's power of the purse." *CFPB v. All Am. Check Cashing, Inc.* 33 F.4th 218, 221 (5th Cir. 2022) (en banc) (Jones, J., concurring). It assigns to Congress alone the power to decide whether, and to what extent, an Executive Branch program or activity, even if otherwise authorized by statute, should be funded.

The NMFS-imposed "industry-funded monitoring" program underlying this case is entirely a creature of regulation. *See* 50 C.F.R. § 648.11(g); 85 Fed. Reg. 7,414 (Feb. 7, 2020). It hijacks the critical check on Executive Branch power that the Constitution, through the Appropriations Clause, vests exclusively in Congress. The Service's attempt to "workaround" the lack of congressional funding for the Atlantic herring fishery at-sea compliance monitoring program

that it wishes to conduct is a serious breach of the separation of powers.

In addressing the viability and/or scope of *Chevron* deference, the Court should use this case as an opportunity to correct, or at least admonish, the Service's brazen disrespect for the Appropriations Clause. Over the course of many decades, both the Executive Branch and Congress, often in concert, have violated the letter and/or purpose of the Appropriations Clause in too many ways to catalog here. Only this Court can begin to restore the Appropriations Clause's crucial constitutional check against abuse of Executive Branch power.

SUMMARY OF ARGUMENT

The Court has limited its review to the second question presented by the petition for a writ of certiorari: whether *Chevron* should be overruled, or at least clarified so that courts do not equate statutory silence with statutory ambiguity for purposes of deferring to an agency's assertion of controversial powers under a statute that it administers.

This question, of course, cannot be addressed in a vacuum. It arises here because NMFS, in an effort to utilize at-sea government inspectors for whom Congress has appropriated no funds, has read into the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1884, authority to shift the cost to the regulated fishing vessel owners. Invoking *Chevron*, NMFS contends that courts (including this Court) must accept its self-serving interpretation—a statutory construction that

squarely conflicts with the purpose of the Appropriations Clause.

Judge Walker noted in his dissent that the rulemaking record establishes that the Service's efforts to impose industry-funded at-sea monitoring were motivated by the lack of congressional appropriations for federally paid at-sea observers in the Atlantic herring fishery and other New England fisheries. *See* App-23 n.11. To circumvent the lack of funding, NMFS has interpreted the Act to silently authorize imposition of a requirement that fishing vessels regulated by the New England Fishery Management Council hire and pay the wages of NMFS-approved at-sea "monitors." *See* 50 C.F.R. §§ 648.11(g) & (h). Just like federally paid at-sea "observers," these monitors are government agents "carried on board a vessel . . . for the purpose of collecting data necessary for the conservation and management of [a] fishery." 16 U.S.C. § 1853(b)(8). The many types of reports that industry-funded at-sea regulatory compliance monitors are required to generate for and provide to NMFS are listed at 50 C.F.R. § 648.11(h)(5)(vii).

The small-business-crippling cost for these intrusive at-sea monitors—"more than $ 700 per day" per monitor and "the opportunity cost of giving to the monitor a bunk that would be otherwise occupied by a working fisherman"—"could reduce financial returns to the fishermen by twenty percent." App-24, 29 (Walker, J., dissenting.).

The D.C. Circuit panel majority held at *Chevron* "Step One" that "[n]either Section 1853(b)(8) nor any

other provision of the Act explicitly allows the Service to pass on to industry the costs of monitoring requirements included in fishery management plans." App-13. But asserting that "the Act may not unambiguously resolve whether the Service can require industry-funded monitoring," App-5, the majority proceeded to *Chevron* "Step Two" and held that deference to the Service's statutory interpretation is required. According to the majority, "Section 1853(b)(8)'s silence on the issue of cost of at-sea monitoring provides no basis for applying different standards of review here." App-15-16.

In contrast, Judge Walker indicated in his dissent that "Congress's silence on a given issue does not automatically create such ambiguity or give an agency carte blanche to speak in Congress's place. In fact, all else equal, silence indicates a lack of authority." App-26.

Even assuming that the Act's silence on New England fishery industry-funded monitoring—in contrast to the Act's "specific provisions for industry funding elsewhere," App-33—should be viewed as an ambiguity, the majority opinion nowhere considers whether *Chevron* deference should be afforded if the Service's interpretation of its own authority is *unconstitutional*. Here, the Service's interpretation facilitates a violation of a fundamental separation-of-powers provision, the Appropriations Clause, U.S. Const., art. I, § 9, cl. 7, and therefore, should be afforded no deference.

The Service's contention that it has authority under the Magnuson-Stevens Act to impose industry-

funded at-sea monitoring in the absence of sufficient congressionally appropriated funds to pay for that governmental function violates the Appropriations Clause. The Framers included the Appropriations Clause in Article I of the Constitution as a check against abuse of otherwise authorized Executive Branch activities. The Service's industry-funded monitoring program is a transparent attempt to circumvent the constitutionally mandated congressional appropriations process. By requiring diversion of nongovernmental funds to pay for a governmental function, the Service's monitoring program divests Congress of the control that the Appropriations Clause requires it to exercise through its power of the purse. The industry-funded program, therefore, breaches the separation of powers.

If *Chevron* deference excludes anything, it should be the Service's unconstitutional power grab here. An agency interpretation cannot be reasonable, or permissible, or consistent with congressional intent, if it conflicts with the Constitution.

ARGUMENT

Chevron Deference Should Not Enable a Federal Agency To Violate the Separation of Powers

"[T]his is a case about one branch of government arrogating to itself power belonging to another. . . . [I]t is the Executive seizing the power of the Legislature." *Biden v. Nebraska*, slip op., at 21.

A. An agency interpretation that violates the separation of powers is not "reasonable" for *Chevron* deference purposes

"*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." *Michigan v. EPA*, 576 U.S. at 751; *see Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). "Even under this deferential standard, however, 'agencies must operate within the bounds of reasonable interpretation.'" *Michigan v. EPA*, 576 U.S. at 751 *(*quoting *Util. Air Regulatory Group v. EPA*, 573 U.S. 382, 392 (2014)).

"No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 297 (2013). When an agency has "strayed far beyond those bounds," *id.*, its statutory interpretation is "unreasonable," *id.* at 759, and "does not merit deference." *Util. Air*, 573 U.S. at 393.

An agency interpretation purporting to authorize regulatory activity that conflicts with the Constitution, particularly with the powers and duties that Article I assigns exclusively to Congress—such as the power of the purse—is out of bounds. Any such interpretation must be viewed as "unreasonable—*i.e.*, something Congress would never have allowed."

Michigan v. EPA, 576 U.S. at 771 (Kagan, J., dissenting). It "does not merit deference." *Util. Air*, 573 U.S. at 393.

The criteria that *Chevron* establishes for deference confirm what seems apparent: An agency's statutory interpretation of its own regulatory authority should not be deemed reasonable, much less entitled to deference, if it violates the Constitution.

"The second step of *Chevron* comes in three layers." Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1221 n.104 (2016). More specifically, the question of whether an agency's interpretation of its own statutory authority is "reasonable" is "framed by the initial question of whether the agency interpretation is permissible and by the follow-up question of whether it goes beyond congressional intent." *Id*; *see Chevron*, 467 U.S. at 843 (an agency's interpretation must be based on "a permissible construction of the statute"); *id.* at 843 n.9, 845 (a court "must reject administrative constructions which are contrary to clear congressional intent," or "not one[s] that Congress would have sanctioned") (internal quotation marks omitted).

Where, as here, an agency interpretation breaches the separation of powers by effectively annulling the Constitution's allocation of a particular power to Congress, *e.g.*, the power of the purse, it should not be viewed as "permissible" for *Chevron* deference purposes. Nor should a court infer that Congress would have silently intended to cede such an exclusive and foundational legislative power to an Executive Branch agency.

Indeed, *Chevron* "rests on the fiction that silent or ambiguous statutes are an implicit delegation from Congress to agencies." *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from the denial of certiorari). Congress, however, "may not delegate . . . powers which are strictly and exclusively legislative." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). Decisions concerning the funding for Executive Branch agencies and their activities, a profound and sweeping responsibility that the Appropriations Clause assigns entirely to Congress, fits squarely within this nondelegable category.

A statutory interpretation that enables an agency to engage in regulatory activity that conflicts with the Constitution's separation of powers also is "plainly erroneous" and should not be afforded deference. *See generally Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring in the judgment) ("[D]eference is not an inexorable command in all cases, because (for example) it does not apply to plainly erroneous interpretations.") (internal quotation marks omitted).

Dissenting from the denial of certiorari, Justice Gorsuch recently explained in *Buffington v. McDonough*, 143 S. Ct. at 20, that "[o]verreading *Chevron* . . . encourages executive officials to write ever more ambitious rules on the strength of ever thinner statutory terms, all in the hope that some later court will find their work to be at least marginally reasonable." The Court should put an end to such Executive Branch overreading. The Service's

attempt here to circumvent the Appropriations Clause by imposing industry-funded monitoring for the Atlantic herring fishery, and potentially for all New England fisheries, *see* 85 Fed. Reg. at 7,414, does not even pass a "marginally reasonable" test.

B. The NMFS-imposed, industry-funded at-sea monitoring program violates the separation-of-powers embodied by the Appropriations Clause

1. "[T]he separation of powers principle enshrined in the Appropriations Clause" is "subjugating the executive branch to the legislature's power of the purse." *All Am. Check*, 33 F.4th at 221 (Jones, J., concurring). "And separation of powers is at the heart of our constitutional government in order to preserve the people's liberty and the federal government's accountability to the people." *Id.*

"The Constitution places the power of the purse in Congress: 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .' This empowerment of the legislature is at the foundation of our constitutional order." Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1344 (1988) (quoting U.S. Const., art. I, § 9, cl. 7); *see also U.S. House of Rep. v. Burwell*, 185 F. Supp. 3d 165, 165 (D.D.C. 2016) ("[A]ppropriations are an integral part of our constitutional checks and balances insofar as they tie the Executive Branch to the Legislative Branch via purse strings.")

The Appropriations Clause is not only "a bulwark of the Constitution's separation of powers," but also

"particularly important as a restraint on Executive Branch officers." *U.S. Dept. of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012). Its pivotal role in maintaining the separation of powers, and controlling Executive Branch programs through the power of the purse, "has been repeatedly affirmed." *Cmty. Fin. Servs. Ass'n of Am., Ltd., v. CFPB*, 51 F.4th 616, 637 (5th Cir. 2022), *cert. granted*, No. 22-448 (U.S. Feb. 27, 2023); *see id.* at 637-38 (collecting cases).

2. The "fundamental and comprehensive purpose" of the Appropriations Clause "is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990); *see also PHH Corp. v. CFPB*, 881 F.3d 75, 197 n.19 (2018) (Kavanaugh, J., dissenting) ("As those who have labored in Washington well understand, the regular appropriations process brings at least some measure of oversight by Congress.").

> It is not mere happenstance that Congress is the chief guardian of the purse strings. Drawing on the British experience, the Framers placed the national government's fiscal powers in Congress's hands to check the propensity for aggrandizement and consequent loss of liberty endemic to a powerful executive branch.

All Am. Check, 33 F.4th at 225 (Jones, J., concurring); *see id.* at 225-32 (discussing "[t]he historical origins of Congress's control over the purse strings").

> [T]he Framers carefully separate[d] the "purse" from the "sword" by assigning to Congress and Congress alone the power of the purse. The Framers' reasoning was twofold. First, they viewed Congress's exclusive "power over the purse" as an indispensable check on the overgrown prerogatives of the other branches of the government. . . . The Framers also believed that vesting Congress with control over fiscal matters was the best means of ensuring transparency and accountability to the people.

Cmty. Fin. Servs. Ass'n, 51 F.4th at 635-36 (cleaned up).

3. The industry-funded monitoring program being challenged in this case is an effort by NMFS to sever Congress's purse strings, or at least avoid entanglement in them. This attempt at constitutional circumvention obstructs the purpose of the Appropriations Clause.

There can be no doubt that the so-called third-party at-sea "monitors" whom NMFS is requiring Atlantic herring fishery vessel owners to quarter and compensate are acting as government agents performing governmental functions—the same data collection and compliance monitoring duties as federally paid at-sea "observers." *See* 16 U.S.C. § 1853(b)(8); 50 C.F.R. § 648.11; Pet. for Writ of Cert. at 8 n.4. But insofar as the Magnuson-Stevens Act authorizes NMFS to require at-sea observers or monitors, there is a "distinction between authorizing

legislation and appropriating legislation." *Burwell*, 185 F. Supp. at 168-69. "A law alone does not suffice." *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 640. NMFS readily admits that vessel owners are being required to foot the bill for Atlantic herring fishery at-sea monitoring because Congress has not appropriated funds to cover it. *See* App-22-23 & n.11 (Walker, J., dissenting).

NMFS "knows a good deal" about fish, "but nothing special about the separation of powers." *Axon Ent., Inc. v. FTC*, No. 21-86, slip op., at 17-18 (U.S. Apr. 14, 2023). According to NMFS, however, its industry-funded monitoring program is "consistent with legal requirements" because "government cost responsibilities are paid by the government and the government's costs are differentiated from the industry's cost responsibilities." 85 Fed. Reg. at 7,414. This assertion misses the point. Although the Service's regulations state that its own "cost responsibilities" include, for example, "[t]he labor and facilities associated with training and debriefing of monitors," 50 C.F.R. § 648.11(g)(3)(i), the regulations also make clear that "[t]he industry is responsible for all other costs associated with [industry-funded monitoring] programs." *Id.* § 648.11(g)(3)(viii).

Shifting to vessel owners the direct cost of hiring at-sea government inspectors violates the Appropriations Clause because it divests Congress of its purse strings. It deprives Congress of the control

that the Appropriations Clause provides as a check against the Executive Branch.[2]

> If the Executive could avoid limitations imposed by Congress in appropriations legislation by independently financing its activities with private funds . . . this would vitiate the foundational constitutional decision to empower Congress to determine what actions shall be undertaken in the name of the United States.
>
> Federal agencies may not resort to nonappropriation financing because their activities are authorized only to the extent of their appropriations.

Stith, *supra* at 1356.

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[2] Insofar as the Magnuson-Stevens Act authorizes industry-funded monitoring under limited circumstances not applicable here, *see* App-33 (Walker, J., dissenting), we question the constitutionality of those provisions, but recognize that would be a case for another day.

CONCLUSION

If the Court decides to retain *Chevron* deference in some form, agency interpretations purporting to authorize regulatory activity that violates the Constitution—especially foundational separation-of-powers provisions such as the Appropriations Clause—should be expressly excluded.

Respectfully submitted,

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

HERBERT L. FENSTER
3800 Fox Ridge
Longmont, CO 80503
(303) 834-9673

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