No. 22-451

IN THE
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL.,

Petitioners,

v.

GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE MAGNUSON-STEVENS ACT HAS "SILENTLY" AUTHORIZED THE NATIONAL MARINE FISHERIES SERVICE TO REQUIRE POTENTIALLY ALL DOMESTIC COMMERCIAL FISHING VESSELS TO PAY FOR AT-SEA OBSERVERS. 6

A. Under *Chevron,* As Always, Congress's Omission Of Any Textual Reference To A Disputed Agency Power Generally Means That Congress Has Not Delegated That Power To The Agency. 6

B. Under *Chevron,* As Always, A Federal Court Must Decide *De Novo* Whether An Administrative Agency Has Exceeded Its Statutorily Delegated Powers. 11

C. *Under Chevron*, As Always, A Federal Court Must Enforce The Plain Language Of A Statute, Which In This Case Does Not Authorize NMFS To Require Potentially All Domestic Fishing Vessels To Pay For At-Sea Observers. 13

D. Under *Chevron*, As Always, A Federal Court Should Consider The Statute As A Whole, Which In This Case Confirms That Congress Has Not Authorized NMFS To Require Potentially All Fishing Vessels To Pay For At-Sea Observers. 16

II. CERTIORARI IS ALSO WARRANTED TO CLARIFY THAT, UNLIKE IN THIS CASE, THE STATUTORY SILENCE IN *CHEVRON* CONCERNED AN OPEN-ENDED TERM OF ART THAT CREATED A GAP IN MEANING FOR THE AGENCY TO FILL. 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Badgerow v. Walters,
142 S. Ct. 1310 (2022) 17

Bostock v. Clayton Cnty., Georgia,
140 S. Ct. 1731 (2020) 12, 14

Buffington v. McDonough, No. 21-972,
2022 WL 16726027 (U.S. Nov. 7, 2022) 7, 11

Chevron U.S.A., Inc. v. Nat. Res. Def. Council,
467 U.S. 837 (1984) .....*passim*

City of Arlington, Tex. v. F.C.C.,
569 U.S. 290 (2013) 15

E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,
575 U.S. 768 (2015) 13

Entergy Corp. v. Riverkeeper, Inc.,
556 U.S. 208 (2009) 11, 15, 19

Gen. Dynamics Land Sys., Inc. v. Cline,
540 U.S. 581 (2004) 14

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 13

Loughrin v. United States,
573 U.S. 351 (2014) 17

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 10, 12

Marbury v. Madison,
1 Cranch 137 (1803) 12

Merck Sharp & Dohme Corp. v. Albrecht,
139 S. Ct. 1668 (2019) 10

Oregon Restaurant and Lodging Ass'n v. Perez,
843 F.3d 355 (9th Cir. 2016) 15

Pereira v. Sessions,
138 S. Ct. 2105 (2018) 15

SAS Inst., Inc. v. Iancu,
138 S. Ct. 1348 (2018) 16

Sebelius v. Cloer,
569 U.S. 369 (2013) 10, 13

Stark v. Wickard,
321 U.S. 288 (1944) 10, 12

Sturgeon v. Frost,
577 U.S. 424 (2016) 16

Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler,
537 U.S. 371 (2003) 18

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 18

STATUTES

5 U.S.C. § 706 ..... 2, 3, 12

16 U.S.C. §§ 1801-1884 6

16 U.S.C. § 1821(h)(4) 16

16 U.S.C. § 1853(b)(8) .....*passim*

16 U.S.C. § 1853(b)(14) 18

16 U.S.C. § 1853a(e)(2) 16

16 U.S.C. § 1854(d)(2)(B) 17

16 U.S.C. § 1862(a)..... 16

16 U.S.C. § 1862(b)(2)(E) 17

OTHER AUTHORITIES

U.S. Const. art. III 2, 3, 12

85 Fed. Reg. 7,414 (Feb. 7, 2020)..... 1, 7, 8, 17

INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (NELF) is interested in this case because an administrative agency, acting without any identifiable statutory authority, has required certain fishing vessels within the already beleaguered New England herring fishery to pay the daily wages of federal inspectors, whom the fishing vessels must quarter and accommodate during their fishing trips.[1] *See* 85 Fed. Reg. 7,414 (Feb. 7, 2020). In the agency's final rule, the National Marine Fisheries Service (NMFS) estimated that an at-sea "monitor" would cost a herring boat $710 per day and would reduce a boat's annual financial return by approximately 20%. 85 Fed. Reg. at 7,418. While the final rule singles out the Atlantic herring fishery, that same rule also paves the way for NMFS to require potentially *all* of the several other New England fisheries to fund at-sea inspectors. *See id.* at 7,414-417. Moreover, NFMS's interpretation of its industry-funding powers, if left standing, would allow the agency to require potentially *all* commercial fisheries under its jurisdiction to pay for at-sea inspectors.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored NELF's proposed amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.2(a), NELF states that counsel of record for each party received timely notice of NELF's intent to file this brief, and that counsel of record for both parties have provided their written consent to the filing of this brief.

NELF is committed to upholding the Constitution's separation of powers, in which an independent Federal Judiciary must say what the law is and decide whether an administrative agency has exceeded its statutorily delegated authority. To fulfill its duty under both Article III of the Constitution and § 706 of the Administrative Procedure Act, a federal court must review a federal statute *de novo*, while adhering to the statute's plain language, in order to determine Congress's intent and thereby hold an administrative agency accountable to that intent. Nothing in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), is to the contrary.

NELF is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding whether to grant certiorari in this case.

SUMMARY OF ARGUMENT

Certiorari should be granted to decide whether Congress has "silently" authorized the National Marine Fisheries Service (NMFS) to

require potentially any domestic commercial fishing vessel under its jurisdiction to pay for NMFS's at-sea observers, under 16 U.S.C. § 1853(b)(8) of the Magnuson-Stevens Fishery Conservation and Management Act. Certiorari is also warranted to clarify that *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), is entirely consistent with a federal court's independent duty, under both Article III of the Constitution and § 706 of the Administrative Procedure Act, to decide whether an administrative agency has exceeded its statutorily delegated powers.

Under § 1853(b)(8), Congress has only authorized NMFS to require that at-sea observers "be carried on board" domestic fishing vessels. The ordinary public meaning of this simple language is that fishing vessels must suffer the presence of at-sea observers, and nothing more. Under *Chevron*, as always, an administrative agency can only exercise those powers that Congress has given it. And under *Chevron*, as always, a federal court must enforce the plain language of a statute according to its terms, in order to ensure that an administrative agency has not exceeded those limited powers.

Chevron leaves undisturbed the necessary starting point for interpreting statutory "silence." By omitting any textual reference to industry funding in § 1853(b)(8), Congress has not delegated that unusual power to the agency in that section of the Act. And there is nothing in the Act to indicate otherwise. *Chevron* does not suggest, nor could it, that statutory silence on an issue pertaining to an agency's power devolves to the presumptive benefit

of the agency, and to the presumptive detriment of the private industry seeking judicial relief from that agency's action. Due process would not countenance such a skewed interpretative scheme.

Contrary to the views of NMFS and the lower court in this case, industry funding of at-sea observers cannot be an implied cost of compliance under § 1853(b)(8). The ordinary meaning of "carried on board" does not include anything so remote and unexpected as the payment of an observer's daily wages. *Chevron* does not direct a federal court to defend an agency action at all costs, by engaging in a strained interpretation of a so-called statutory "silence," while sacrificing the statute's plain language and common sense.

Unlike § 1853(b)(8), the Act contains three other detailed sections, inapplicable here, which either allow or require the commercial fishing industry to pay for at-sea observers in certain narrow contexts. Congress's inclusion of clear industry-funding language in these other statutory sections must mean that its omission of any such language in § 1853(b)(8) was a deliberate policy choice, which an agency cannot override and a court must enforce. Any notion to the contrary would render those three other statutory sections superfluous.

If Congress had really wanted to permit NMFS to take the extreme step of requiring potentially *all* domestic fishing vessels to fund its inspection regime, Congress would have said so, plainly and distinctly, as it did in those three other

sections of the Act. Congress would not have concealed such a broad intent in stray and obscure textual "clues" that it scattered throughout the Act, as the D.C. Circuit apparently concluded in this case.

Unlike in this case, the statutory "silence" at issue in *Chevron* was an open-ended statutory term of art, which created a gap in meaning for the agency to fill with its delegated rulemaking powers. It makes no sense to treat statutory silence the same way here. Section 1853(b)(8) does not contain a porous term of art that affords more than one reasonable interpretation. The meaning of the prosaic phrase, "carried on board," is clear on its face, and within the larger context of the Act as a whole. Its meaning leaves nothing to NMFS's imagination.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE MAGNUSON-STEVENS ACT HAS "SILENTLY" AUTHORIZED THE NATIONAL MARINE FISHERIES SERVICE TO REQUIRE POTENTIALLY ALL DOMESTIC COMMERCIAL FISHING VESSELS TO PAY FOR AT-SEA OBSERVERS.

A. Under *Chevron,* As Always, Congress's Omission Of Any Textual Reference To A Disputed Agency Power Generally Means That Congress Has Not Delegated That Power To The Agency.

This Court should grant certiorari to decide whether Congress has "silently" authorized the National Marine Fisheries Service (NMFS) to exercise the extraordinary power of requiring potentially all domestic commercial fishing vessels subject to 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] Certiorari is also warranted to

[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--
> . . .

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) (emphasis added).

In § 1853(b)(8) of the Act, Congress has allowed a 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) ("Contents of fishery management plans, discretionary provisions") (emphasis added). NMFS has interpreted this plain statutory language to authorize the agency to require potentially any domestic commercial fishing vessel under its jurisdiction to *pay* for these at-sea observers. *See* 85

> (8) require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery; except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized[.]

16 U.S.C. § 1853(b)(8).

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").

According to NMFS, industry funding of at-sea observers is merely 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. While the final rule singles out the Atlantic herring fishery, that same rule also paves the way for NMFS to require potentially all of the several other New England fisheries to fund at-sea observers. *See id.* at 7,414-417. And, while the final rule focuses on the New England fisheries only, NMFS's interpretation of § 1853(b)(8), if left standing, would permit it to require potentially *all* domestic fisheries falling under the Act to pay for at-sea observers.

A divided panel of the federal court of appeals for the District of Columbia upheld NMFS's final rule. Appendix (App.) at 5. The court applied its understanding of *Chevron* and concluded that § 1853(b)(8) was ambiguous as to whether industry funding was an implied cost of compliance, and that NMFS's resolution of this purported ambiguity in its final rule was reasonable. App. at 6-15.

Notably, and disturbingly, the D.C. Circuit emphasized several times throughout its opinion that Congress, by remaining silent on the issue, *failed to prohibit* NMFS from requiring fishing vessels to pay for at-sea observers in § 1853(b)(8):

> [Section 1853(b)(8)] makes clear [NMFS] may direct vessels to carry at-sea monitors but *leaves unanswered* whether [NMFS] . . . may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan. When Congress has not 'directly spoken to the precise question at issue,' the agency may fill this gap with a reasonable interpretation of the statutory text.

App. at 6 (quoting *Chevron*, 467 U.S. at 842) (emphasis added). *See also* App. at 8 ("[N]either Section 1853(b)(8) nor any other provision of the Act *imposes a funding-related restriction* on [NMFS's] authority to require monitoring in a plan. That also suggests the Act permits [NMFS] to require industry-funded monitoring.") (emphasis added); App. at 12 ("Section 1853(b)(8) expressly envisions that monitoring programs will be created and, *through its silence*, leaves room for agency discretion as to the design of such programs. . . . [T]he Act *contains no bar* on industry-funded monitoring programs . . . .") (emphasis added).

This revealing language from the lower court's opinion displays a gross misunderstanding of *Chevron*, 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)).

Contrary to the D.C. Circuit's opinion, Congress does not have to go out of its way to prohibit NMFS from imposing an industry-funding requirement. To the contrary, Congress must affirmatively grant NMFS that power. And Congress has not done that in the spare "carried on board" language of § 1853(b)(8). "[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).

Chevron leaves undisturbed this necessary constitutional starting point for interpreting statutory "silence." By omitting any textual reference to the disputed agency power (here, the power to require potentially any domestic commercial fishery to pay for at-sea observers), Congress has not delegated that power, unless an independent judicial review of the statute uncovers a genuine ambiguity that Congress has authorized the agency to resolve. *See Chevron*, 467 U.S. at 842-43

& n.9. Here, there is no ambiguity whatsoever because the meaning of "carried on board" is clear and finite. "[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) (emphasis added).

Put otherwise, nothing in *Chevron* suggests, or could suggest, that statutory silence on an issue pertaining to an agency's power devolves to the presumptive benefit of the agency, and to the presumptive detriment of the regulated private industry seeking judicial relief from that agency's action. Due process would not countenance such a skewed interpretative scheme. *See Buffington*, 2022 WL 16726027, at *5 ("[I]t is a basic requirement of due process that no man can be a judge in his own case. . . . Yet a [mistakenly] broad reading of *Chevron* requires us to presume exactly that. So long as Executive Branch officials can identify a statutory ambiguity or silence, we must assume that the law permits them to judge the scope of their own powers and duties--at least so long as their decisions can be said to be 'reasonable.'") (cleaned up).

B. Under *Chevron*, As Always, A Federal Court Must Decide *De Novo* Whether An Administrative Agency Has Exceeded Its Statutorily Delegated Powers.

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) (emphasis added).

In short, *Chevron* does not, and could not, direct a lower federal court to defend a challenged agency action at all costs, by engaging in a strained interpretation of a so-called statutory "silence," while sacrificing the statute's plain language and common sense. "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*

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[3] *De novo* judicial review of a statute under *Chevron* flows from Article III of the Constitution and § 706 of the Administrative Procedure Act, 5 U.S.C. § 706. *See Marbury v. Madison,* 1 Cranch 137, 177 (1803) (Under Article III, "[i]t is emphatically the province and duty of the judicial department to say what the law is."); 5 U.S.C. § 706 ("[T]he reviewing court *shall decide all relevant questions of law*, *interpret* constitutional and *statutory provisions* . . . . The reviewing court shall . . . (2) hold unlawful and set aside agency action . . . found to be . . . (C) *in excess of statutory* jurisdiction, *authority*, or limitations, or short of statutory right[.]") (emphasis added).

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) (federal court must "empty its toolkit" of rules of statutory interpretation in order to engage in independent determination of congressional intent).

C. *Under Chevron*, As Always, A Federal Court Must Enforce The Plain Language Of A Statute, Which In This Case Does Not Authorize NMFS To Require Potentially All Domestic Fishing Vessels To Pay For At-Sea Observers.

The essential tool of statutory construction in this case, which the lower court apparently failed to apply, is that "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 381. In § 1853(b)(8), Congress has permitted a regional 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 regulated by the Act. *Id.* (emphasis added).

Even a passing judicial glance at this simple statutory language, unencumbered by mistaken notions of *Chevron* "deference," makes clear both Congress's intent and the lower court's error. Congress has only allowed NMFS to require fishing vessels to "to carry an observer on board," i.e., to *suffer the presence of* an observer, during their fishing trips. 16 U.S.C. § 1853(b)(8). In fact, Congress refers to "the quartering of an observer" in the very same section of the Act. "[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 . . . ." *Id.* (emphasis added).

Indeed, is there any other meaning that this simple phrase, "carried on board," could possibly convey to the ordinary reader? "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) (emphasis added).[4] The ordinary public meaning of the phrase "carried on board" certainly does not suggest the inclusion of anything so remote and surprising as the payment of the at-sea observer's daily wages. "[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

[4] *See also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 591 (2004) ("Congress used the phrase 'discrimination because of an individual's age' [in the ADEA] the same way that *ordinary people in common usage* might speak of age discrimination any day of the week.") (cleaned up) (emphasis added).

question at hand." *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018). The lower court should have readily concluded that the clear language in § 1853(b)(8) leaves nothing to NMFS's imagination and, therefore, precludes its industry-funding requirement.

Therefore, to the extent § 1853(b)(8) can be characterized as remaining "silent" on this issue, that silence can only mean that Congress did not authorize NMFS to exercise such an unusual 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).

A proper application of *Chevron*, then, should have ended the matter in the petitioners' favor, because the plain language of § 1853(b)(8) tells us that Congress has authorized NMFS to require fishing vessels to quarter and accommodate the observers--a substantial imposition in itself--and nothing more. "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.").

D. Under *Chevron*, As Always, A Federal Court Should Consider The Statute As A Whole, Which In This Case Confirms That Congress Has Not Authorized NMFS To Require Potentially All Fishing Vessels To Pay For At-Sea Observers.

Lest a court have any conceivable doubts about NMFS's limited powers under § 1853(b)(8), *Chevron* would instruct that court to remove from its toolkit "the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (cleaned up). Significantly, the Act contains three detailed sections, inapplicable here, which either allow or require the commercial fishing industry to pay for at-sea observers in certain narrow contexts.[5] Congress's inclusion of clear

[5] *See* Petition for Certiorari at 5-6 (discussing 16 U.S.C. § 1862(a)(2) (North Pacific fishery), § 1853a(e)(2) (limited access privilege programs), and § 1821(h)(4) (foreign fishing vessels in U.S. waters). Moreover, in two of these three statutory sections, pertaining to domestic fishing vessels, Congress has severely limited the extent to which industry funding can deplete a fishing vessel's revenues. *See* 16 U.S.C.

industry-funding language in these other statutory sections must mean that its omission of any such language in § 1853(b)(8) was a deliberate policy choice, which an agency cannot override and a court must enforce. "When Congress includes particular language in one section of a statute but omits it in another section of the same Act, we generally take the choice to be deliberate." *Badgerow v. Walters*, 142 S. Ct. 1310, 1318 (2022) (cleaned up).

In short, those three sections of the Act show that Congress did *not* treat industry funding of at-sea observers as an implied cost of compliance. After all, Congress deemed it necessary to address that very issue, and in some detail, in those three other sections. Therefore, NMFS was not at liberty to tease an industry-funding requirement out of the spare "carried on board" language of § 1853(b)(8). Any notion to the contrary would render those three other statutory sections superfluous. "[T]he cardinal principle of interpretation [is] that courts must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (cleaned up).

Put otherwise, if Congress had really intended, in § 1853(b)(8), to permit NMFS to take

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§ 1862(b)(2)(E) (for North Pacific fishery, if observer fees are set as fixed percentage, they cannot exceed 2% of value of vessel's catch); § 1854(d)(2)(B) (under limited access privilege programs, observer fees cannot exceed 3% of catch value). These express statutory limits contrast markedly with NMFS's own concession that its final rule would deplete approximately *20%* of the annual returns of the affected Atlantic herring fishery. *See* 85 Fed. Reg. at 7,418.

the extreme step of requiring potentially *all* domestic fishing vessels under its jurisdiction to fund its inspection regime, Congress would have said so, plainly and distinctly, as it did in those three other sections of the Act. Congress would not have concealed such a broad and surprising intent in stray and obscure textual "clues" that it scattered throughout the Act, as the D.C. Circuit apparently concluded in this case.[6] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, *hide elephants in mouseholes*.") (emphasis added).

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[6] For example, the lower court relied erroneously on the general, catch-all "necessary and appropriate" clause, appearing at 16 U.S.C. § 1853(b)(14) (fishery management plan may "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery."). *See* App. at 6-8. This "necessary and appropriate" clause follows the specific listing of the discretionary components of a fishery management plan, including the at-sea observer provision in dispute. However, none of those discretionary elements has anything to do with industry funding. Under traditional tools of statutory interpretation, then, the "necessary and appropriate" clause cannot include an industry-funding requirement. *See Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) ("[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (cleaned up).

II. CERTIORARI IS ALSO WARRANTED TO CLARIFY THAT, UNLIKE IN THIS CASE, THE STATUTORY SILENCE IN *CHEVRON* CONCERNED AN OPEN-ENDED STATUTORY TERM OF ART THAT CREATED A GAP IN MEANING FOR THE AGENCY TO FILL.

Finally, it is worth noting that, unlike in this case, the statutory "silence" at issue in *Chevron* itself was an open-ended statutory term of art, which created a gap in meaning for the agency to fill with its delegated rulemaking powers. *See Chevron*, 467 U.S. at 843-48 (EPA had delegated authority to interpret statutory term "major stationary sources" of air pollution, in Clean Air Act, either broadly or narrowly). *See also Entergy Corp.*, 556 U.S. at 219-20, 222-23 (statutory language, in Clean Water Act, instructing EPA to set standards for cooling water intake structures that reflect "the best technology available for minimizing adverse environmental impact," was sufficiently porous to permit EPA to consider cost-benefit analysis).

Specifically, in *Chevron*, unlike here, Congress provided a generally defined term of art--"major stationary sources" of air pollution--and the EPA had the delegated authority, under the Clean Air Act, to interpret that term broadly when promulgating standards for States' permit programs. *See Chevron*, 467 U.S. at 840 (EPA could "treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single [major stationary source]."). In that case, it made sense to treat statutory silence as creating an ambiguity for the agency to resolve with its delegated rulemaking powers.

But it makes no sense to treat statutory silence the same way here. Unlike in *Chevron*, Congress has not provided a porous term of art in § 1853(b)(8) of the Act, which could support more than one reasonable interpretation. Instead, the meaning of the prosaic statutory phrase, "carried on board a vessel," is clear on its face, and within the larger context of the Act as a whole. This statutory language leaves nothing to NMFS's imagination.

In sum, certiorari is warranted to clarify that *Chevron* reinforces a federal court's independent duty to enforce the plain language of a statute, in order to decide, in this case, whether Congress "silently" authorized NMFS to require any domestic fishing vessel to pay for at-sea observers.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant the petitioners' petition for certiorari.

Respectfully submitted,

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