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 CIRCUIT

BRIEF OF *AMICI CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE AND THE MANHATTAN INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Court should grant certiorari and supplement the questions that the Petitioner presented with an additional question:

> Whether an agency that is assigned rulemaking authority under the Property Clause may also exercise the separate congressional power to impose duties without express legislative authorization.

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INTEREST OF *AMICI CURIAE*[1]

The Competitive Enterprise Institute ("CEI") is a nonprofit 501(c)(3) organization incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation.

The Manhattan Institute ("MI") is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting economic freedom and opposing arbitrary regulations. MI recently hired Ilya Shapiro to direct its constitutional studies program, which aims to restore individual liberty and limited government.

This case concerns *amici* because agencies' use of rulemaking authority to bypass Congress' power of the purse is constitutionally problematic: more precisely, it threatens constitutionally limited government by merging legislative and executive powers. *Amici* agree with James Madison that allowing such a mechanism would "justly be pronounced the very definition of tyranny." Federalist No. 47.

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[1] Rule 37 Statement: No party's counsel authored any part of this brief; no person other than *amici*, their members, or their counsel funded its preparation or submission. All parties were timely notified and consented to the filing of this brief.

SUMMARY OF ARGUMENT

A recent rule issued by the National Marine Fisheries Service ("the agency") is out of constitutional bounds. When the agency issued that rule, it tried to exercise a constitutionally enumerated power that Congress never gave it: namely, the power to impose duties. That exercise of power is categorically distinct from the exercise of the incidental powers Congress necessarily assigns to agencies that allow them to function. The agency's attempt to exercise this never-assigned power not only goes beyond the authority Congress gave it; it goes beyond any authority that Congress could legitimately give it.

Congress decided to regulate coastal sea fisheries under the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." See U.S. Const. Art. VI, § 3. Through statute, Congress gave the agency the authority to write rules that are "necessary and appropriate for the conservation and management of the fishery." 16 U.S.C. § 1853(a)(1)(A). To put it another way, the agency's rulemaking authority rests on statutory text, while Congress' authority rests on constitutional text.

Congress never invoked its power to "To lay . . . Duties . . . for the . . . general Welfare of the United States," U.S. Const. Art. I, § 8, to require fishermen to pay for government monitors or give the agency rulemaking authority under that power. That is, the statute never mentions any grant of Congress' taxing power for this purpose.

Despite such statutory silence, the D.C. Circuit allowed the agency to lay duties on fisheries without

Congress' involvement. According to the lower court, the statutory "text makes clear the Service may direct vessels to carry at-sea monitors but leaves unanswered whether the Service must pay for those monitors or may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan." *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 365 (D.C. Cir. 2022). The court found that, because Congress was silent, "the agency may fill this gap with a reasonable interpretation of the statutory text." *Id.* In so doing, the court approved the agency's use of its rulemaking authority so as to include the use of an entirely different power of Congress.

But the D.C. Circuit's method inverts what the Constitution requires. The agency lacks inherent legislative power: it may only use the powers that Congress gives it. Once Congress invokes a power and sets a policy, it can authorize an agency to implement necessary and proper regulations to fill in the interstices of how that power may be used. But an agency may not use any power that Congress has not assigned to it. Only Congress can decide if a power given to it by the Constitution should be exercised.

Indeed, the agency attempted to use one of Congress' basic powers: the power of the purse. "That the governmental power of the purse is a great one is not now for the first time announced. Every student of the history of government and economics is aware of its magnitude." *United States v. Butler*, 297 U.S. 1, 86 (1936). If an agency can force private individuals to pay duties despite congressional refusal to assign this great power, the executive power merges with the legislative.

Such a state of affairs strikes at the separation of powers at the heart of our constitutional structure. The Court should thus grant the petition and add an additional question: Whether an agency that is assigned rulemaking authority under the Property Clause may also exercise the separate congressional power to impose duties without express legislative authorization.

ARGUMENT

I. THIS CASE SHOWS THE DISTINCTION BETWEEN CONGRESS' INCIDENTAL POWERS (WHICH CAN BE ASSIGNED TO THE EXECUTIVE) AND ITS GREAT AND ENUMERATED POWERS (WHICH CANNOT)

A. Congress' Enumerated Powers Are Great Powers, Which Are Fundamentally Different from the Incidental Powers That Derive from Those Great Powers

"[T]he government of the United States is one of limited and enumerated powers." *Myers v. United States*, 272 U.S. 52, 183–84 (1926) (quoting Joseph Story, *Commentaries on the Constitution* § 426); *See also, Gibbons v. Ogden*, 9 Wheat. 1, 187, 6 L. Ed. 23 (1824). One aspect of these limits is illuminated by the distinction between great powers, which are substantive and independent—and, typically, enumerated—and incidental powers, which are derivative from great powers and are merely the means by which great powers are exercised.

In *McCulloch v. Maryland* (1819), this Court held, that "[t]he power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating

commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them." 17 U.S. 316, 409. This Court forthrightly identified this important distinction shortly after the founding. *McCulloch* distinguished "great substantive and independent power[s]" from those powers that are "implied as incidental to other powers, or used as a means of executing them." *Id.*

Notably, the Federalist Papers had drawn the same distinction between the "general powers" and the "particular powers," defining the latter as "the means of attaining the object of the general power." Federalist No. 44. *See also*, Letter from Joseph Jones to James Madison (June 24, 1789) (describing the "personal rights of the people so far as declarations on paper can effect the purpose, leaving unimpaired the great Powers of the government.").

There are deep parallels here to the common law of agency, which distinguished between "principal" powers given to an agent and "incidental" powers that were implied even if not enumerated. *See*, *e.g.*, Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in *The Origins of the Necessary and Proper Clause* 52, 60 (Gary Lawson et al. eds., 2010). The operation of the Constitution, a grant of power from the people to government officials, was understood as an analogue to such private agency assignments.

This Court recently reaffirmed that distinction:

> The power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers enumerated in the

> Constitution, Art. I, § 8, cl. 18, vests Congress with authority to enact provisions "incidental to the [enumerated] power, and conducive to its beneficial exercise," *McCulloch*, 4 Wheat., at 418. Although the Clause gives Congress authority to "legislate on that vast mass of incidental powers which must be involved in the constitution," it does not license the exercise of any "great substantive and independent power[s]" beyond those specifically enumerated. *Id.*, at 411, 421

NFIB v. Sebelius, 567 U.S. 519, 559 (2012).

NFIB's distinction between great and incidental powers helps to explain the operation of the Necessary and Proper Clause. That Clause's authority is confined to incidental powers; as the constitutional text explains, it controls only those incidental powers used "for carrying into Execution the foregoing Powers." U.S. Const. Art I, § 8. Those unenumerated powers are limited in nature to the execution of the great and independent powers; all of this underscores how the federal government is "one of limited and enumerated powers." *See* Joseph Story, *Commentaries on the Constitution* § 426.

B. Only Incidental Powers Can Be Assigned by Congress to the Executive Branch, Because the Use of Those Incidental Powers Is Confined to the Execution of the Great Powers

"In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he

thinks wise and the vetoing of laws he thinks bad." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). But "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (*citing Dixon v. United States*, 81 U.S. 68, 74 (1965) (*quoting Manhattan General Equipment Co. v. Comm'r*, 297 U.S. 129, 134 (1936)). In other words, the executive rulemaking power is constitutionally constrained: an agency's role is merely to execute the express policy choices Congress made in fulfilling its exclusive lawmaking function.

The President ensures "that the Laws be faithfully executed." U.S. Const. Art. II, § 3. The incidental powers under the Necessary and Proper Clause are "for carrying into execution the foregoing [congressional] powers." U.S. Const. Art. II, § 8. As explained just below, the constitutional default is that the authority for "carrying [laws] into execution" is placed in the hands of the President, although Congress can exercise authority in this sphere through the Necessary and Proper Clause.

The Necessary and Proper Clause gives Congress authority not only over its own powers but "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8. Congress can thus write the rules that govern how executive and judicial officers exercise their non-legislative powers.

When executing the law, the executive must interpret statutes as they apply to facts that may

never have been contemplated by the legislature. Making such interpretations public through rulemaking ensures consistency of application, thus strengthening the rule of law. This non-legislative authority is already vested in the president; congressional assignments to inferior executive officers to perform such tasks do not violate the Vesting Clauses.

But Congress' major powers cannot be delegated, as this Court held in *Gibbons v. Ogden* (1824): "[T]he regulation of commerce was exclusively delegated to Congress; for the power which is exclusively delegated to Congress, can only be exercised by Congress itself, and *cannot be sub-delegated by it."* 22 U.S. 1 (1824) (emphasis added). "Accompanying [the Vesting Clause's] assignment of power to Congress is a bar on its further delegation." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019); *id.* at 2130 ("The Constitution confers on Congress certain 'legislative [p]owers,' Art. I, § 1, and does not permit Congress to delegate them to another branch of the Government.") (Alito, J., concurring).

In *Wayman v. Southard* (1825), this Court rejected "that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." 23 U.S. 1, 42 (1825). That is yet another reference to Congress' great and non-delegable powers. But Congress legitimately exercised its power to enact laws "for carrying into execution all the judgments which the judicial department has power to pronounce," *Id.* at 22, and to "invest the Courts with the power of altering the modes of proceeding of their own officers." *Id.* at 47. A court might properly exercise such incidental powers as

"altering the modes of proceeding of their own officers"; such powers could be exercised either by courts or by Congress.

In *A.L.A. Schechter Poultry Corp. v. United States* (1935), this Court similarly held that the Constitution vests all legislative powers in Congress and that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." 295 U.S. 495, 529 (1935). The Court still allowed the assignment of executive power in the "making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." *Id.* at 530. Congress must thus first exercise one of its enumerated powers and set policy; only then can rulemaking occur. Because policymaking was delegated in *Schechter Poultry*, the Court found the statute to be "a delegation of legislative power [that] is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id* at 537.

In sum, Congress can instruct executive officials *how* they may execute the powers that Congress invokes and assigns, such as through subordinate rulemaking authority. But congressional decisions must come first: the legislature must make the policy choices, but an agency's derivative and interstitial authority cannot then be exercised outside the boundaries that Congress sets.

II. IF THIS COURT DENIES CERTIORARI, IT WILL HAVE DIRE EFFECTS FOR THE SEPARATION OF POWERS

A. The Agency Here Improperly Exercised the Great Power of Laying Duties Even Though Congress Did Not, and Could Not, Assign It

This Court has recognized congressional authority over the coastal seas. *United States v. California*, 332 U.S. 19, 35 (1947). In 1953, "Congress declared that the United States owned all submerged land in the continental shelf seaward of the lands granted to the States." *United States v. California*, 381 U.S. 139, 148 (1965). Then in the Magnuson-Stevens Fishery Conservation and Management Act of 1976, Congress asserted "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources" extending 200 miles from shore. 16 U.S.C. § 1811(a).

Congress then exercised its authority under the Property Clause to write rules and regulations governing the coastal seas owned by the Federal Government. This allowed agencies in the Department of Commerce to create fishery management plans which are "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. § 1853(a)(1)(A).

The statutory phrase "necessary and appropriate" has a parallel function to the constitutional phrase "necessary and proper" that governs congressional authority to assign incidental powers to executive officials. But such assignment can only "carry into

execution" the power Congress exercised—in this case, the Property Clause.

Nonetheless, the agency did not confine itself to the exercise of incidental powers that had been assigned to it and that were within the ambit of executive decisions. On the contrary, the agency developed a fishery management plan that required private fishermen to pay for agency-mandated monitors. Creation of this plan through rule was an attempt by the agency to exercise the great power of Congress to lay duties. U.S. Const. Art. I, § 8, clause 1.

A duty is a broad term for any kind of financial extraction other than a direct tax. Historical examples abound: one is a proposed duty in Virginia upon "vessels coming to, or using the public wharves." Va. Sen. Jour. at 56 (Dec. 9, 1789). The Constitution prohibits states from laying a "Duty of Tonnage," U.S. Const. Art. I, § 10, clause 3, which is a duty on the import of goods, but all financial extractions that are not direct taxes are included in the definition of "duty." A Farmer, *Phila. Freeman's J.*, Apr. 16 & 23, 1788, reprinted in *The Documentary History of the Ratification of the Constitution* 133, 139–40 (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino eds., 1976–2013). Blackstone gave examples of the "excise duty, or inland imposition, on a great variety of commodities," "the salt duty," "duty for the carriage of letters," "the stamp duty on paper," "the duty on houses and windows," "the duty on licenses for hackney coaches and chairs," and "the duty on offices and pensions." 1 William Blackstone, *An Analysis of the Laws of England* 20 (1756).

Notably, even if the Court understood the fishery management plan as imposing something other than a

duty—a tax, say—the plan would still be barred by the same constitutional problem. No matter what label is used for the powers that the fishery management plan implies—including the power to tax and the power to spend the resultant funds—their exercise necessarily requires the use of at least one, and perhaps more, of the Constitution's "great substantive and independent power[s]." A review of the statutory text demonstrates something important: there is nothing in the agency's rulemaking authority for "conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery," 16 U.S.C. § 1853(a)(1)(A), that even hints at an agency power to impose duties on private individuals. Every one of the tasks given to the agency falls under the umbrella of protecting and caring for the property owned by the federal government. The lawful scope of agency authority must be based on the power Congress has given to the agency to execute.

The court below held that statutory "text makes clear the Service may direct vessels to carry at-sea monitors but leaves unanswered whether the Service must pay for those monitors or may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan." *Loper Bright Enter., Inc.*, 45 F.4th at 365. In other words, the D.C. Circuit asked who was to pay the bill and found that the question was "unanswered." It follows that Congress declined to exercise its power to impose duties here—and if Congress declines to exercise its power, the agency certainly can't exercise a power derivative of Congress'. *See Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 357 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers

power upon it."). Nonetheless, the court interpreted the agency's authority as including both the incidental power to write rules so as to execute Congress' exercise of the Property Clause and to allow the agency to exercise a separate great power: the power of the purse.

The D.C. Circuit justified its opinion by arguing that "regulated parties generally bear the costs of complying" with regulations. *Loper Bright Enter., Inc.*, 45 F.4th at 366. As a justification for shoehorning the authority to lay duties into a regulatory program to protect fisheries, this argument fails. It's true that a regulation requiring certain safety equipment, for instance, is one in which the industry may bear the burden of acquiring and using such equipment. But such requirements typically allow the regulated parties to design, engineer, and administer their own compliance programs. Those consequences are quite distinct from a requirement of direct payments to third parties; a program of financial extraction, resting as it does on the use of a great and unassigned power, removes broad spectra of choice from the regulated parties and therefore implies a failure of the constitutional goal of requiring Congress to choose to exercise its powers.

The lower court's decision then emphasizes the statutory requirement to "minimize costs" and "'minimize adverse economic impacts' of such measures 'on [fishing] communities'"; according to that decision, the statute would "seem to presume that the Service may impose some cost" on fishing communities. *Id.* That is the same non sequitur in different garb. It ignores the difference between compliance costs—such as the cost of purchasing

safety equipment, which might fit into regulatory requirements under the Property Clause or Commerce Clause powers—and a direct financial extraction paid to third parties for enforcement of federal law.

The rulemaking authority assigned to agencies by Congress is the "making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 530. Subordinate agency rules cannot exist outside the Constitution's central framework: the congressional exercise of legislative power, followed by congressional assignment to agencies of incidental rulemaking powers. In cases where Congress has declined to speak, there is no power for any agency to execute.

Not only does the statute not give the agency authority to extract such duties from the fishermen, but Congress also cannot assign this great power to the agency. Congress must decide that duties should be imposed and for what purpose; only then can the details be assigned to the agency. Under our constitutional system, which justly prizes self-government and public accountability, it is impossible for Congress to assign the authority to impose duties without bearing the responsibility for doing so. Agencies cannot have the authority of raising taxes or spending money without Congress' direction. In short, because Congress did not exercise its great power of laying duties for monitors, the agency did not have the power to do so on its own.

One more point about constitutional limits deserves elaboration: *NFIB v. Sebelius*, in which the government argued that private individuals could be compelled to purchase health insurance under the

Commerce Clause, 567 U.S. 519 (2012), is instructive here. There, this Court noted that "Congress has never [before] attempted to rely on that [Commerce] power to compel individuals not engaged in commerce to purchase an unwanted product." *Id.* at 549. This "logic would justify a mandatory purchase to solve almost any problem." *Id.* at 553. But "[t]hat is not the country the Framers of our Constitution envisioned." *Id.* at 554. "The Commerce Clause is not a general license to regulate an individual from cradle to grave." *Id.* at 557. The Court declined to give the Affordable Care Act's individual mandate a constitutional green light, but instead permitted a tax on the non-purchase of insurance under the taxing power. Such "exactions not labeled taxes nonetheless were authorized by Congress's power to tax." *Id.* at 564.

The agency's rule here presents certain parallels to *NFIB*, except that (one might say) the taxing power provides no safe harbor for the fishing imposition. Although the Property Clause allows the agency to regulate fisheries, its levying of duties to pay for on-board monitors would have to rest on the taxing power—which lies beyond the agency's rulemaking authority.

B. It Would Violate the Constitutional Separation of Powers for Agencies to Be Able to Force People to Pay Duties Without Congressional Authorization

If the decision below stands, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." *See* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213–14 (1833). Any private individual could be faced with

financial obligations created through executive action in the absence of any congressional policy decisions.

The Constitution requires that the "House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government." Federalist No. 58. The court below said otherwise. Many agencies have been assigned rulemaking authority that contain no express limits that might prohibit financial extraction from the public. The implication of the lower court's decision—that any of those agencies can require private individuals to provide "supplies requisite for the support of government" policies without any consideration by Congress—is, quite literally, radical.

The agency's rule also avoided the political accountability that, under our system, is attached to the congressional appropriation of agency funds. If Congress had appropriated money for the agency to hire fishing monitors, a future Congress would have the option of defunding the program. But by forcing others to fund these monitors directly, the agency sidesteps the congressional accountability that our system of self-government requires.

Consider this example: for decades, the Securities and Exchange Commission ("SEC") has asked Congress to give it the ability to "self-fund" through fees on regulated entities. Commissioner Luis A. Aguilar, *Creating Reform That Is Sustainable for Investors*, 10 J. Int'l Bus. & L. 115, 121 (2011); Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 Nova L. Rev. 233, 259 (2004). In recent months, it appears that the SEC has instead decided that it has the independent authority to raise such revenues: apparently, the Commission's

leadership has concluded that congressional silence and its preexisting rulemaking authority are all that is needed to engineer a new funding stream. The SEC is now planning to require private companies to pay outside entities it selects to ensure compliance with its mandates. Notice of Proposed Rulemaking, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 FR 21334, 21399 (April 11, 2022) (requiring "assurance of GHG emissions disclosure by independent service providers should also improve the reliability of such disclosure.").

Courts have seen that deferring to agency actions implies significant risk, in that it allows an end run around the constitutional requirements imposed by the congressional power of the purse. *Bell Atl. Tel. Companies v. F.C.C.*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("*Chevron* deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen."). Yet here the lower court simply deferred to the agency's assumption of the awesome taxing power. *Cf. Nicol v. Ames*, 173 U.S. 509, 515 (1899) ("The power to tax is the one *great power* upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.") (emphasis added).

In short, it is important that the Court take this case and consider the additional question proposed so as to protect the Constitution's enduring balance of powers. *See also* Joe Biden, S. Rep. No. 104-5, at 27 (1995) ("The founders also intended the power of the

purse to be one of the legislative branch's strongest bulwarks against incursions by the executive, and the key to maintaining an enduring balance of powers.").

III. CONSIDERING AN ADDITIONAL QUESTION WILL AID THE COURT IN RESOLVING THE ISSUES RAISED BY PETITIONER

The Petitioners have preserved important issues by directly challenging the authority of the agency to rely upon silence when justifying the requirement it has imposed upon private fishermen to pay for government monitors. Petitioner seeks the overturning of this Court's decision in *Chevron U.S.A., Inc. v. NRDC* (1984). Should the Court grant the petition, the Court will almost certainly have to consider the proposed additional question in any event: its deliberations would have to explore various assignments of authority to agencies. That is because the "question presented is deemed to comprise every subsidiary question fairly included therein." Rules of the Supreme Court 11 (April 18, 2019). Accordingly, the Court would consider this in the first question presented by the petition: "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."

Adding the additional question suggested here—namely, "Whether an agency that is assigned rulemaking authority under the Property Clause may also exercise the separate congressional power to impose duties, without express legislative authorization"—will aid the Court by shedding light on that first question. First, the briefing will further illuminate the textual foundations of the rulemaking

authority held by agencies. Ideally, any such discussion would focus on constitutional text.

Second, the proposed additional question focuses on the limits of such assignments of authority. The limits that it highlights are directly relevant to this case and the first question presented by the Petitioner, in which the agency attempted to exercise an enumerated power of Congress in a context in which Congress had never done so. By asking the parties to brief and argue this additional question, the Court will be well-positioned to rest its decisions on the text of the Constitution and to determine the appropriate limits of agency authority in this area.

Finally, the proposed additional question could provide a helpful avenue for deciding the case. If, after considering the arguments, the Court were to find that the stronger argument was that agencies could not exercise a great power in the absence of congressional action, it could decide this case solely on that ground and leave complex matters involving *Chevron* deference to some future day. Petitioners would still get what they asked for, but this Court would thereby have more discretion to determine the appropriate jurisprudential playing field. Of course, this suggestion is not meant to foreclose the possibility that this court would find it most appropriate to explore the relevance of *Chevron* here as well.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and add the additional question of "Whether an agency that is assigned rulemaking authority under the Property Clause may also exercise

the separate congressional power to impose duties, without express legislative authorization."

Respectfully submitted,

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