No. 22-451

In the Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, *et al.*,

Petitioners,

v.

GINA RAIMONDO, Secretary of Commerce, *et al.*,

Respondents.

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

BRIEF OF THE DRI CENTER FOR LAW AND PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS

The DRI Center for Law and Public Policy[1] is the public policy "think tank" and advocacy voice of DRI, Inc.—an international organization of approximately 14,000 attorneys who represent businesses in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as an amicus curiae in this Court, federal courts of appeals, and state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system.

The instant case is appropriate for the Center's amicus participation. The *Chevron* doctrine was at the core of the D.C. Circuit's decision, and recent case law has suggested a potential for tension between that doctrine and the major questions doctrine. *See, e.g., Biden v. Nebraska*, 2023 U.S. Lexis 2793; *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022). DRI members' clients that are subject to federal regulation have a keen interest in knowing the relationship between the two doctrines, and this case will provide the Court an opportunity to help bring about needed clarification. That, in turn,

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

will allow DRI members to provide better advice to their clients.

SUMMARY OF ARGUMENT

For a court evaluating the authority conferred by enabling legislation upon an administrative agency, the major questions doctrine under *West Virginia* serves as a threshold consideration prior to application of the *Chevron* doctrine, derived from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Where the authority assumed by the agency is highly consequential in nature, *West Virginia* requires clear congressional authorization, rather than authority based on routine or gap-filler type statutory provisions, as may be permissible under *Chevron*.

Here, without clear authority conferred by the Magnuson-Stevens Fishery Conservation and Management Act of 1976 ("MSA"), the administrative agency assumed the power to prescribe at-sea monitoring programs. The monitors' salaries were to be paid for by industry fisheries, potentially resulting in a 20 percent drop in returns by the affected fisheries. On its face, the agency's assumed power constitutes a highly consequential result. The agency's action, moreover, has not only economic but also political significance. It is based on "long-extant" statutory language only recently interpreted to provide the power sought to be exercised. And the parts of the statute put in play by the agency amount to "little-used backwater" provisions and, in one instance, actually cut against the agency's interpretation.

Accordingly, the amicus urges this Court to decide this appeal in accordance with the major questions doctrine, rather than the *Chevron* doctrine, and reverse the judgment below. In so doing, the Court need not reach the question of whether *Chevron* should be overruled.

ARGUMENT

As recently as this past June 30, this Court recognized that "major questions cases have arisen from all corners of the administrative state." *Biden v. Nebraska*, 2023 U.S. Lexis 2793, at *41, *quoting West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022). In *West Virginia* itself, the Court articulated the parameters of the "major questions doctrine." It observed that when a court tests the authority of an administrative agency, certain "extraordinary cases . . . call for a different approach," *i.e.*, different from the "routine statutory interpretation" afforded by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* 142 S.Ct. at 2608-09. Such a case involves an agency "asserting highly consequential power beyond what Congress could reasonably be understood to have granted" in the absence of "clear congressional authorization." 142 S.Ct. at 2609. *West Virginia* was a "major questions case" because, among other reasons, the EPA there sought to "substantially restructure the American energy market." *Id.* at 2610. Likewise in *Nebraska*, the Court found a major question of authority when the Secretary of Education invoked the Higher Education Relief Opportunities for Students Act of 2003 to cancel some $430 billion of federal student loan

balances without consent of Congress. 2023 U.S. Lexis 2793, at *40-42.

In the instant case, the D.C. Circuit accorded the major questions doctrine brief mention. It found that, in promulgating a regulation for implementing industry-funded monitoring programs in New England fisheries, the actions of the administrative agency, the National Marine Fisheries Service ("Service"), were "distinct" and confined within "a specific industry." *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 365 (D.C. Cir. 2022). The court therefore limited its review to the familiar questions under *Chevron* "of whether Congress has spoken clearly, and if not, whether the implementing agency's interpretation is reasonable." *Id.*

The parameters of the major questions doctrine, however, are not so readily disregarded. As defined by this Court, the doctrine squarely addresses overreach inherent in the Service's regulation seeking to standardize industry-funded monitoring in fishery management plans under the MSA. Because the major questions doctrine is dispositive, no occasion arises for review under *Chevron*.

I. In expanding industry-funded monitoring beyond what the MSA clearly allows, the Service's regulation implicates the major questions doctrine.

West Virginia described the major questions doctrine as involving matters of an "extraordinary" or "highly consequential" nature – as distinguished from "routine" or "ordinary" – such that Congress could be understood to have conferred the power upon an

administrative agency to act only through "clear congressional authorization." 142 S. Ct. at 2607-09. Under the doctrine, an agency's power to act in regard to such matters will not be inferred from "modest words," a mere "plausible textual basis," an "ancillary provision" or a "gap filler" in the statute. *Id.* at 2609-10.

This Court uses impact on the business or industry being regulated as one measure of the extraordinary nature of the agency action under consideration. In *West Virginia*, for example, the Court found that the government's own projections of the impact of Environmental Protection Agency rules on the electric power generation industry entailed billions of dollars in compliance costs. *Id.* at 2604. In *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), cited repeatedly in *West Virginia* as an example of application of the major questions doctrine, the Court considered not so much an economic impact but the consequences of a major change in rate regulation on the long-distance telephone industry. 512 U.S. at 231-32. Again the impact of rate regulation on an industry, this time the railroad industry, was the major question at issue in *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U.S. 479 (1897), cited in Justice Gorsuch's concurrence in *West Virginia*. *See also Merck & Co., Inc. v. United States Department of Health and Human Services*, 962 F.3d 531, 540-41 (D.C. Cir. 2020) (finding that HHS's regulation requiring drug manufacturers to disclose cost information had "major significance" beyond the authority of HHS, largely due to the consequences for drug companies).

In the case currently before the Court, the Service's industry-funded monitoring program has no less an extraordinary impact on the fishing industry. Although the Atlantic herring fishery is the immediate target, the regulation is much broader in that it "standardize[s] future industry-funded monitoring programs in New England fishery management plans" in general. 85 Fed. Reg. 7414. Thus, the Service intends for the program to include "the Atlantic Herring FMP [fishery management plan], the Atlantic Sea Scallop FMP, the Deep-Sea Red Crab FMP, the Northeast Multispecies FMP, and the Northeast Skate FMP." *Id.* Where implemented, moreover, the cost is likely to be devastating. The regulation itself discloses "that the cost of the proposed at-sea monitoring coverage may reduce the annual RTO [returns to owner] . . . up to approximately 20 percent." *Id.* at 7418. Any business would reasonably regard as extraordinary a 20 percent drop in returns when caused by a single exercise of agency regulatory authority.[2]

In assessing the extraordinary nature of the matter, moreover, this Court considers not just the agency power directly at issue, but also the implications of the authority claimed by the agency. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006) (considering implications of Attorney General's prohibition on drugs used for physician-assisted suicide and potential for authority claimed to be extended to other treatments). Here, if this Court

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[2] The 20 percent estimate in the regulation is stated with respect to "Category A or B herring permits," but the regulation provides no explanation for why any other fishery would incur less cost impact.

accepts the Service's arguments, the same justifications would allow industry-funded monitoring to extend to all U.S. fisheries resulting in the same 20 percent reduction in returns, and perhaps even to other industries.

The Service's inability to identify any other context "in which any agency, without express direction from Congress, requires an industry to fund its inspection regime," further highlights the extraordinary nature of the Service's position. *See Loper Bright Enterprises*, 45 F.4th at 376 (Walker dissent).

From the perspective of the impact on the fishery industry, the Service's regulation therefore qualifies as "extraordinary" and an appropriate occasion for application of the major questions doctrine.

II. Additional factors support application of the major questions doctrine.

Other considerations likewise call for invoking the doctrine. This Court frequently stresses the doctrine's relevance when addressing agency decisions having "economic and political significance." *Biden v. Nebraska*, 2023 U.S. Lexis 2793, at *41-42 (opinion), *57-58 (Barrett, J., concurring) (2023); *West Virginia*, 142 S. Ct. at 2605, 2608 (opinion), 2616 (Gorsuch, J., concurring); *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160-61 (2000). While both are important, the absence of one factor or the other does not negate the presence of a major question. In *Gonzales*, for example, the Court effectively applied

the doctrine based on the political implications of the Attorney General seeking to use the Controlled Substances Act to prohibit physician-assisted suicide, giving no substantive attention to economic consequences. 546 U.S. at 258-69. Similarly, in *MCI Telecommunications*, the Court focused on the Federal Communications Commission's lack of authority to modify the Federal Communications Act by regulation, without addressing the economic impact of the agency's modifications. 512 U.S. at 224-34.

Nonetheless, economic and political factors both play a role here. The potential economic impact of the Service's regulation on U.S. fisheries is addressed above. (*See* pp. 6-7, *supra*.) On the political side, important questions arise concerning the separation of powers and who – *i.e.*, the nation's legislative branch or the executive branch – has authority to impose payment upon the fisheries industry for at-sea monitoring salaries incurred at the behest of the government. By allocating authority to itself, the Service may be viewed as attempting to work around the "control of the purse" by Congress and its ability to "check upon profusion and extravagance." *Nebraska*, 2023 U.S. Lexis at *41 (quoting case in part).

Even apart from payment-imposing authority, political significance may be attributed to Congress already having considered the circumstances under which industry-funded monitoring should be implemented. Congress did so by expressly authorizing its use by the North Pacific Councils subject to strict conditions. 16 U.S.C. § 1862(b)(2)(E).

The Service's attempt to expand the scope of the monitoring beyond the limitations set by Congress serves as an additional attempt to circumvent the legislative political process. *Cf. West Virginia*, 142 S. Ct. at 2620-21 (Gorsuch, J., concurrence, finding it "telling" when Congress has considered but rejected the action being proposed by the agency).

Another circumstance signaling the major questions doctrine is the Service's reliance on "a long-extant statute" to justify a "transformative expansion in its regulatory authority." *West Virginia*,142 S. Ct. at 2610, *quoting Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302, 324 (2014). *See also Nebraska*, 2023 U.S. Lexis 2793 at *60-61 (Barrett, J., concurrence). The Service here relies on a variety of the MSA's long-standing provisions in support of its interpretation. They include most prominently (a) the provision allowing fishery management plans to require an observer to "be carried on board a vessel," 16 U.S.C. § 1853(b)(8); (b) language in the same section of the statute authorizing the Service to promulgate "necessary or appropriate" regulations, *id.* § 1853(b)(14), (c)(1); (c) language authorizing the agency to impose sanctions for any payment owing an observer, *id.* § 1858(g)(1)(D); and (d) the section of the MSA providing for industry-funded monitoring in the North Pacific, *id.* § 1862(a).[3]

[3] In its Brief for the Respondents in Opposition to the grant of certiorari, the Service appears to rely principally on §§ 1853(b)(8), 1853(b)(14) & (c)(1), and 1858(g)(1)(D). *See* Brief 14-19. It also argues, however, that the fee-based program for North Pacific fisheries, § 1862(a), "belies" the extraordinary

Each of these provisions predate the Service's regulation currently at issue by decades:

MSA section	Description	First Enacted
1853(b)(8)	"carried on board"	P.L.101-627 § 109 (1990)
1853(b)(14), (c)(1)	"necessary or appropriate"	P.L. 94-265 § 303(b)(7), (c) (1976)
1858(g)(1)(D)	sanctions for nonpayment of observer	P.L. 104-297 § 114 (1996)
1862(a)	North Pacific paid observers	P.L. 101-627 § 118 (1990)

The chart reflects that, to justify its interpretation based on statutory language, the Service cobbles together a collection of MSA regulatory provisions between 24 and 44 years old. As Justice Barrett recently observed, "A longstanding want of assertion of power by those who presumably would be alert to exercise it may provide some clue that the power was never conferred." *Nebraska*, 2023 U.S. Lexis 2793, at *60 (Barrett, J., concurring, quoting authority, internal quotes omitted). *See also West Virginia*, 142 S. Ct. at 2610.

Finally, as part of the analysis for determining suitability of the major questions doctrine, this Court

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nature of the authority it seeks with respect to petitioners. Brief 21.

utilizes conventional rules of statutory interpretation to assess the clarity and strength of the language relied upon by the agency to justify a claimed grant of authority. In *West Virginia*, for example, to analyze the Clean Air Act provisions relied on by the EPA, the Court turned to 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." 142 S. Ct. at 2607. Based on its evaluation, the Court characterized the EPA's key statutory section as a "little-used backwater" provision intended as a "gap filler" and one "not plausible" as a basis for conferring the broad-ranging authority sought to be exercised by the agency. *Id.* at 2610-14, 2616.

Application of the rules of statutory interpretation results in a similar outcome here. The Service relies most heavily on the "necessary or appropriate" language of § 1853(b)(14) and (c)(1), which are obvious gap fillers, and §§ 1853(b)(8) and 1858(g)(1)(D), both of which are silent on extending industry-funded monitoring programs beyond those expressly provided for in the MSA.

Regarding the North Pacific industry-funded monitoring program created by § 1862, the D.C. Circuit essentially found that it did "not unambiguously" prohibit other forms of fee-based monitoring. 45 F.4th at 367. Under conventional rules of statutory interpretation, however, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion

or exclusion." *Sebelius v. Cloer*, 569 U.S. 369, 378 (2013) (quoting case). As recognized by Judge Walker's dissent, the express authorization in § 1862 thus should have given rise – not to ambiguity as suggested by the D.C. Circuit majority – but to the presumption that Congress intentionally declined to allow industry-funded monitoring elsewhere in the country. *See* 45 F.4th at 378. Properly applied, the rules of construction do not create an ambiguity but cut against the result argued for by the Service.

Hence, for purposes of determining whether the instant case requires major questions treatment, the rules of statutory construction, along with the extraordinary nature of the issue involved and all other considerations this Court regards as relevant, point in favor of application of the doctrine. Upon its application, moreover, the Court should find that the MSA lacks the necessary clarity to confer upon the Service the power to require industry-funded monitoring, beyond that set expressly forth in the Act itself.

CONCLUSION

The Court should reverse the judgment below and grant summary judgment in favor of Petitioners based on the major questions doctrine. In doing so the Court should find it unnecessary to reach the question whether *Chevron* should be overruled.

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Respectfully submitted,

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