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.

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

BRIEF FOR THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The U.S. House of Representatives (House)[2] has a compelling interest in this case: the heart of the dispute is whether Congress delegated regulatory authority to a federal agency through statutory silence. The agency treated that statutory silence as a grant of authority, and the court below relied on *Chevron* deference to uphold the agency's action. This case thus calls into question the foundational relationship between Congress and regulatory agencies. These agencies exist only because Congress created them, and they possess only those powers given to them by Congress. Here, relying on the *Chevron* framework, the court below held that by its silence Congress implicitly delegated regulatory authority to the agency. In other words, by failing to expressly withhold an authority from the agency, Congress allowed the agency to claim it.

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[1] Consistent with Supreme Court Rule 37.6, the House states that no counsel for a party authored this brief in whole or in part and that no person or entity other than the House or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives has authorized the filing of an *amicus* brief in this matter. The BLAG comprises the Honorable Kevin McCarthy, Speaker of the House, the Honorable Steve Scalise, Majority Leader, the Honorable Tom Emmer, Majority Whip, the Honorable Hakeem Jeffries, Minority Leader, and the Honorable Katherine Clark, Minority Whip, and it "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the U.S. House of Representatives, 118th Cong. (2023) (https://perma.cc/DK3P-55K6). The Speaker of the House, the Majority Leader, and the Majority Whip voted to support the filing of this brief; the Minority Leader and Minority Whip did not.

The House writes to explain how this Court's affirmance of the decision below would negatively impact the separation of powers between the Legislative Branch and the Executive Branch.[3] Judicial opinions and academic articles that consider separation-of-powers concerns related to *Chevron* deference focus largely on the allocation of authority between the Executive Branch and the Judicial Branch. But that is not the full story. At its core, the *Chevron* framework addresses how agencies, which are created and empowered by Congress, may interpret statutes passed by Congress. As a result, how the framework is applied can have profound effects on Congressional authority. For example, if courts permit agencies to claim additional power from statutory silence, they will allow agencies to exercise regulatory authority that Congress did not intend to delegate, thus upsetting the Constitution's careful balance of power between Congress and the Executive. Indeed, central to this dispute is an agency relying on statutory silence to end-run Congress's power of the purse. Therefore, this case will affect Congress's ability to safeguard its constitutional authorities and the separation of powers that helps ensure the liberties of the American people.

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[3] The House recently passed a bill that, if enacted, would require courts to decide all questions of law de novo. *See* 169 Cong. Rec. H2938, H2944-45 (daily ed. June 15, 2023) (noting the passage of the Separation of Powers Restoration Act of 2023). This legislation would thus prevent courts from deferring to agency interpretations of law under *Chevron*. Petitioners and other *amici* have presented comprehensive arguments on why this Court should overrule *Chevron*. The House therefore addresses the other part of the question presented, which deals with the interplay between statutory silence and *Chevron* deference.

SUMMARY OF THE ARGUMENT

Congress has empowered the National Marine Fisheries Service (Service) to require fishing vessels to carry federal observers on board for the purpose of gathering data. 16 U.S.C. § 1853(b)(8). It has not, however, expressly given the Service the general authority to require the fishing industry to cover the cost of these observers. Rather, Congress has explicitly delegated that authority to the Service only in certain situations. *Id.* §§ 1821(h)(1), (4), (6), 1853a(e)(2), 1862(a)(2).

Despite the limited scope of that mandatory-funding delegation, the Service claimed the authority to require Atlantic herring fishermen to pay federal observers' wages in a circumstance that Congress did not address. Reviewing that action, the court below treated the relevant statutory silence as a *Chevron*-triggering ambiguity and deferred to the Service's interpretation that it may, in fact, shift the cost of the observers' wages onto Atlantic herring fishermen. Pet. App. 13-14.

This case thus centers on the meaning of statutory silence and raises a question with far-reaching implications: should *Chevron* deference apply when agencies claim regulatory authority that Congress did not expressly give or withhold? It should not.

Treating such statutory silence, standing alone, as an ambiguity that triggers *Chevron* deference upends the relationship between Congress and the agencies it has created. Agencies have only the authority given to them by Congress, and courts should not presume that Congress silently delegates regulatory power to agencies. Here, for example, Congress expressly addressed the issue of observer compensation, giving

the Service the discrete authority to require fishermen to cover the cost of observers' wages in limited circumstances. But because Congress did not explicitly forbid the Service from requiring fishermen to pay observers' wages in other circumstances, the Service maintains that it has the power to do so. This position upsets the relationship between the Legislative Branch and Executive Branch. Because agencies have no authorities beyond those delegated by Congress, Congress need not spell out each regulatory authority it is withholding from an agency. Thus, for *Chevron* purposes, Congress does not leave a purported gap for an agency to fill when it is silent on whether an agency has the authority to act. Rather, if, after applying traditional methods of statutory construction, a statute is silent about whether an agency has a particular authority, a court should conclude that an agency lacks that regulatory authority. Deference to an agency's contrary determination is not warranted.

Moving from first principles to more practical concerns, treating statutory silences standing alone as delegations of power would make it extraordinarily difficult for Congress to constrain agency authority. If agencies are free to claim any authority that touches on the (often broad) subject matter they regulate—so long as it is not expressly foreclosed by the terms of a statute—then Congress must list each and every authority it intends to withhold from the agency. That is, effectively, the only way that Congress could keep an agency in check. But requiring Congress to anticipate and account for every scenario that might involve an agency's future assertion of regulatory authority is unworkable. It would unduly complicate the legislative process and place the Legislative Branch at a serious disadvantage vis-à-vis the Executive Branch.

Permitting agencies to find new authority lurking behind any statutory silence would also incentivize agencies to aggrandize their own authority at the expense of Congress's Article I powers. Self-interested agencies will leverage statutory silence to expand their regulatory footprint. Worse yet, agencies may use silence to effectively augment their appropriations, as the Service did here, usurping Congress's power of the purse. The spending power is a critical way for Congress to combat regulatory overreach. But here, the Service explicitly acknowledged that it required Atlantic herring fishermen to pay observers' wages because Congress was not appropriating enough funds to cover the Service's preferred amount of regulatory activity. In short, affirming the decision below would undermine the system of checks and balances that is a critically important safeguard against tyranny.

ARGUMENT

The House urges the Court to hold that a statute is not ambiguous and thus does not trigger *Chevron* deference when it is silent on whether an agency has the authority to take a regulatory action. Agencies exist only because Congress created them, and it is not incumbent upon Congress to expressly withhold authority from an agency. When a statute fails to address whether an agency possesses a claimed regulatory authority, the agency lacks that power.

Congress does not delegate regulatory authority to Executive Branch agencies through silence. Treating statutory silence as a delegation of such authority (1) is inconsistent with the fundamental relationship between Congress and the agencies it has created, (2) produces intractable obstacles to Congressional efforts to constrain agency power, and (3) incentivizes

agencies to usurp legislative powers vested by the Constitution in Congress, such as the power of the purse, thus diluting Congress's constitutional role in our system of government.

I. Treating statutory silence as a delegation of regulatory authority is inconsistent with the fundamental relationship between Congress and the agencies it has created

A. A bedrock principle of administrative law is that "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). "Agencies have no inherent powers. They instead are creatures of statute, and may act only because, and only to the extent that, Congress affirmatively has delegated them the power to act." *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, J., concurring); *see also INS v. Chadha*, 462 U.S. 919, 955 n.19 (1983) (noting "the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them"); *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (observing the modern administrative state "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress").

Treating statutory silence as a Congressional delegation of regulatory authority to an agency is inconsistent with this principle. "When an agency invokes a statute's silence as a basis for its authority to take a certain action—i.e., when the agency argues that Congress's simple failure to rule the action out amounts to a legislative authorization—it stands th[is] principle[] on [its] head." Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statu-*

tory Silences, 2009 U. Ill. L. Rev. 1497, 1535. Because an agency possesses only the power that Congress grants it, Congress does not need to spell out the restrictions it wishes to place on the agency's authority; "it is enough for Congress simply to decline to delegate power." *Slater*, 231 F.3d at 9 (Sentelle, J., concurring); *see also Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1094 (9th Cir. 2016) (Smith, J., dissenting) ("[T]he majority claims that, where a statute is 'silent,' administrative regulation is not prohibited. In other words, the majority suggests an agency may regulate wherever that statute does not forbid it to regulate. *This suggestion has no validity*." (emphasis added) (citation omitted)); *Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582, 599-600 (D.C. Cir. 2023) (noting that a Service regulatory action may "destroy[]" "great physical and human capital" and explaining that courts "may reasonably expect the Congress at least to speak, not to be silent, when it delegates this power to destroy").

B. This case is even more straightforward than one involving complete statutory silence. Here, the Service claimed an authority that the statute mentions; the statute expressly grants the Service that authority in three limited situations. But the statute is silent on whether the Service has such authority *in other circumstances*. It does not. The statute's silence shows where Congress was unwilling to empower the Service. It is thus a limit on, not an expansion of, the Service's regulatory authority.

1. The Magnuson-Stevens Fishery Conservation and Management Act (Act) creates a regulatory regime and, like many others, charges an agency with

implementing it. *See generally* 16 U.S.C. §§ 1854-55.[4] The regulatory scheme is meant to protect U.S. fishery resources, and, as relevant here, it does so through "fishery management plans" that set forth rules for fisheries. *See, e.g.*, *id.* §§ 1801(a)(6), 1854-55. Among other provisions, the Act states that a fishery management plan "may" "require that one or more observers be carried on board a vessel … engaged in fishing … for the purpose of collecting data necessary for the conservation and management of the fishery." *Id.* § 1853(b)(8).

The Act also specifies three situations in which the Service may require the fishing industry to cover the cost of these observers. But no provision gives the Service the authority it claimed here: the power to generally require domestic fishing vessels to pay the federal observers' wages in the Atlantic herring fishery.

First, the Act gives the Service the authority to mandate industry-funded observers when they are carried on vessels in a different area of the country from the one at issue here: fisheries governed by the North Pacific Council. *See id.* § 1862(a)(1)-(2) ("The North Pacific Council may prepare … a fisheries research plan … which[] requires that observers be stationed on fishing vessels … and establishes a system … of fees … to pay for the cost of implementing the plan.").[5] The relevant charges, however, may not

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[4] The Act charges "the Secretary of Commerce or his designee" with the implementation, and the Service is the Secretary's designee. *See id.* § 1802(39); Pet. App. 2, 21 n.4.

[5] The New England and Mid-Atlantic Councils share responsibility for the Atlantic herring fishery. *Id.* § 1852(a)(1)(A)-(B).

"exceed 2 percent[] of the unprocessed ex-vessel value of fish and shellfish harvested." *Id.* § 1862(b)(2)(E).

Congress gave the Service this authority when it amended the Act as part of the Fishery Conservations Amendments of 1990. *See* Pub. L. No. 101-627, § 118(a), 104 Stat. 4436, 4457 (codified at 16 U.S.C. § 1862(a)(2)). In that same piece of legislation, Congress *also* gave the Service the authority to require the industry to carry federal observers on board a vessel. *Id.* § 109(b)(2), 104 Stat. at 4448 (codified at 16 U.S.C. § 1853(b)(8)). Thus, when Congress expressly gave the Service the general authority to require fishing vessels to carry observers, it explicitly provided the Service with specific authority to require the industry to fund the observers' wages only in a particular area of the country and included a precise cost cap.

Second, the Act gives the Service the authority to require the industry to cover the cost of observers when regulating a specific subset of fishermen, those who participate in the limited access privilege program. 16 U.S.C. § 1853a(e)(2) ("In establishing a limited access privilege program, a Council shall … provide … for a program of fees paid by limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities."); *id.* § 1853a(c)(1)(H) (mandating "an effective system for enforcement, monitoring, and management of the program, including the use of observers or electronic monitoring systems," for any limited access program); *id.* § 1802(26) (defining "limited access privilege" as a permit to harvest a certain quantity or quota of fish). The relevant fees, however, "shall not exceed 3 percent of the ex-vessel value of fish harvested under any such program." *Id.* § 1854(d)(2)(B).

Third, the Act gives the Service this authority when regulating yet another subset of the fishing industry, foreign fishing vessels. *See* 16 U.S.C. § 1821(h)(4) (the Service "shall impose, with respect to each foreign fishing vessel …, a surcharge … sufficient to cover all the costs of providing a United States observer aboard that vessel"); *id.* § 1802(19) (defining "foreign fishing" as "fishing by a vessel other than a vessel of the United States"). The Act requires certain foreign fishing vessels to carry an observer. *Id.* § 1821(h)(1). If this requirement cannot be met because of insufficient appropriations, the Service must establish "a supplementary observer program" for such vessels. *Id.* § 1821(h)(6). As part of that program, the Service must "establish a reasonable schedule of fees that certified observers or their agents *shall be paid by the owners and operators of foreign fishing vessels for observer services*." *Id.* § 1821(h)(6)(C) (emphasis added).

2. That Congress expressly gave the Service the authority to require industry-funded observers in specific circumstances makes two things clear.

First, Congress knew how to give the Service the power to require the fishing industry to fund observers when it wanted to do so. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2).").

Second, Congress understood the authority to require the fishing industry to pay for observers to be separate and distinct from the Service's authority to require vessels to carry observers on board. Indeed, as discussed above, Congress gave the Service the authority to require industry funding—in limited

situations—at the *same time* it gave the Service the general authority to require the carrying of observers. *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("'[N]egative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" (citation omitted)). If Congress understood these authorities to be one and the same, it would've had no reason to expressly give the Service the power to require the fishing industry to fund observers in certain circumstances; providing the observer-carrying authority would have been sufficient.[6] Moreover, reading the statute as giving the Service implied authority in unenumerated situations would make the explicit grants in specified situations superfluous. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant …." (alteration in original) (citation omitted)).

Beyond these two points, it is implausible that Congress would have imposed specific limits on fees in *each* instance where it expressly authorized the Service to require the fishing industry to fund observers carried on domestic fishing vessels, *see* 16 U.S.C. §§ 1854(d)(2)(B); 1862(b)(2)(E), yet silently provided the Service the authority to generally place that financial burden on the domestic fishing industry *without any cost cap*.

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[6] Similarly, had Congress understood the Act's "necessary and appropriate" provisions, *see* 16 U.S.C. § 1853(a)(1)(A), (b)(14), to generally empower the Service to mandate industry-funded observers, there would have been no reason for it to expressly provide the Service with the discretionary authority to require industry-funded observers in the North Pacific.

All of this strongly suggests that the statute's silence on the Service's authority to require vessels in the Atlantic herring fishery to fund federal observers reflects Congress's decision *not* to give it that power. *See, e.g.*, *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) ("[I]t is fair to suppose that Congress considered the unnamed possibility and meant to say no to it …."); *Or. Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 360 (9th Cir. 2016) (O'Scannlain, J., dissenting from the denial of rehearing en banc) ("[A] statute's deliberate non-interference with a class of activity is not a 'gap' in the statute at all; it simply marks the point where Congress decided to stop authorization to regulate."); *cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2369 (2023) (noting that "[f]rom a few narrowly delineated situations specified by Congress, the Secretary has expanded forgiveness to nearly every borrower in the country" and thus rejecting the agency's interpretation).

C. Because the Act does not delegate the authority the Service claimed, this case does not involve a question of statutory interpretation where *Chevron* deference should apply. When a statute is silent regarding an agency's claimed authority, no delegation of that authority has taken place, and there is thus no authority for the agency to exercise. *See Slater*, 231 F.3d at 9 (Sentelle, J., concurring) ("[A] statute that is completely silent on the question of whether it confers a power does not vest the agency with the discretion to determine the scope of that power."); *cf.* Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 Mo. L. Rev. 983, 985 (2016) ("[I]nsofar as the Court's subsequent application and elucidation of *Chevron* have indicated that *Chevron* deference is predicated on a theory of delegation, courts should only provide such deference when the relevant power has been delegated by

Congress (even if such delegation is only implicit). Correspondingly, such deference should be withheld when such delegation is absent or cannot be presumed to have occurred.").

In reaching the opposite conclusion, the court below stated: "*Chevron* instructs that judicial deference is appropriate 'if the statute is silent *or* ambiguous with respect to the specific issue.'" Pet. App. 15 (citation omitted). But "when the Court has spoken of such silences or gaps, it has been considering undefined terms in a statute or a statutory directive to perform a specific task without giving detailed instructions." *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1163 (10th Cir. 2017). For example, *Chevron* itself dealt with how to define the term "stationary source." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

When a statute, after applying traditional methods of statutory interpretation, is silent on whether an agency has been delegated a certain regulatory authority, that silence should not trigger *Chevron* deference. "Congress's failure to grant an agency a given power is not an ambiguity as to whether that power has, in fact, been granted. On the contrary, … a statutory silence on the granting of a power is a denial of that power to the agency." *Slater*, 231 F.3d at 8 (Sentelle, J., concurring). Or, to use the *Chevron* framework terminology, statutory silence about whether an agency has been delegated a given authority is not a "gap" or "space" for the agency to fill. *See United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012) (noting that the *Chevron* framework involves "deciding whether, or when, a particular statute in effect delegates to an agency the power to fill a gap").

Several decisions from the courts of appeals have acknowledged this straightforward understanding of *Chevron*.[7] But if the Court concludes that this is not the correct interpretation of the *Chevron* framework, it should modify the doctrine accordingly. This Court must not allow an agency to use the combination of statutory silence and *Chevron* deference to seize a regulatory power. Rather, to be consistent with the principle that "an agency literally has no power to act … unless and until Congress confers power upon it,"

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[7] *See, e.g.*, *Ry. Lab. Execs'. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir.) (en banc) ("Nor is this a case in which principles of deference to an agency's interpretation come into play. Such deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.' … To suggest … that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in 'thou shalt not' terms), is … flatly unfaithful to the principles of administrative law …." (citation omitted)), *amended*, 38 F.3d 1224 (D.C. Cir. 1994); *Chamber of Com. of U.S. v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013) ("Because we do not presume a delegation of power simply from the absence of an express withholding of power, we do not find that *Chevron*'s second step is implicated 'any time a statute does not expressly *negate* the existence of a claimed administrative power.'" (citation omitted)); *Bayou Lawn & Landscape Servs. v. Sec'y of Lab.*, 713 F.3d 1080, 1085 (11th Cir. 2013) ("[I]f congressional silence is a sufficient basis upon which an agency may build a rulemaking authority, the relationship between the executive and legislative branches would undergo a fundamental change …."); *Coffelt v. Fawkes*, 765 F.3d 197, 202 (3d Cir. 2014) ("Even where a statute is 'silent' on the question at issue, such silence 'does not confer gap-filling power on an agency unless the question is in fact a gap—an ambiguity tied up with the provisions of the statute.'" (citation omitted)); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002); *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460-62 (5th Cir.), *as revised* (Aug. 4, 2020); *Marlow*, 861 F.3d at 1164.

La. Pub. Serv. Comm'n, 476 U.S. at 374, the Court should require an affirmative delegation by Congress, *see* Pet. App. 26-27 (Walker, J., dissenting) ("[A]n agency must positively demonstrate where Congress explicitly or implicitly empowered it to act.").

II. Treating statutory silence as a delegation of regulatory authority creates intractable obstacles to Congressional efforts to constrain agency power

A. This Court has maintained that the *Chevron* framework is grounded in Congressional intent. "We accord deference to agencies under *Chevron* ... because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency …." *Smiley v. Citibank (S.D.), N. A.*, 517 U.S. 735, 740-41 (1996). Therefore, "[b]ecause *Chevron* deference ultimately rests upon legislative intent, it 'should apply only where Congress would want *Chevron* to apply.'" Sales & Adler, *supra*, at 1526 (citation omitted).

When a statute is silent about whether an agency possesses a claimed authority, there is little reason to think that Congress would want that silence to be construed as a delegation of authority triggering *Chevron* deference. If that were the case, it would greatly complicate Congress's ability to meaningfully limit an agency's authority. When drafting legislation, Congress would have to utilize laundry lists of express statutory prohibitions in an attempt to predict how agencies might try to grant themselves authority from any perceived gap in the statutory framework. Congress did not intend to place such a burden on itself.

It is all but impossible for Congress to anticipate each silence that a creative agency will find lurking in a piece of legislation and insert "thou shalt not" provisions to address them. *See The* Chevron *Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing Before the Subcomm. on Regul. Reform, Com. and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 82 (2016) (Testimony of Jack M. Beermann, Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law) ("As any student of the legislative process knows, it is unrealistic to expect a legislative body to anticipate every situation to which its enactments might apply."). Therefore, it is unreasonable to expect Congress to expressly deny agencies each authority it does not want them to possess. "When Congress does not address an issue in a statute, it is much more logical to assume that Congress simply failed to think of the issue" than that it intended to delegate an unmentioned authority to the agency. *See id.* And when Congress gives an agency authority that expressly applies to specific situations, it is much more likely that Congress intended to deny the agency that authority in those situations where the statute is silent than that it wanted to provide the agency that power in all circumstances. *See Marlow*, 861 F.3d at 1164.

Consider the Act at issue here. Among other things, it authorizes the Service to require certain fishing vessels, the operators of such vessels, and certain fish processors to obtain permits from the Service. 16 U.S.C. § 1853(b)(1). But the Act does not expressly deny the Service the authority to establish other permitting requirements. So, for example, if the Service wanted to require *any boat* entering a fishery or *any grocery store* selling fish harvested from a

fishery to have a permit, should such regulations receive *Chevron* deference because Congress did not expressly prohibit the Service from adopting them?

And since the Act is silent on whether the Service may require industry-funded observers, it is necessarily silent about *the type* of compensation that the industry must provide. So, for instance, if the Service required fishermen to supplement observers' wages with a portion of their catch, should the absence of an express prohibition entitle the Service to *Chevron* deference regarding that regulation? If the *Chevron* framework is based on Congressional intent, such questions must be answered in the negative.

B. The Ninth Circuit's decision in *Perez* demonstrates how courts treating statutory silence as a delegation of authority poses problems for Congress. *See* 816 F.3d 1080. *Perez* analyzed the Fair Labor Standards Act (FLSA), which allows employers with tipped employees to pay them less than the minimum wage, so long as their tips bridge the gap between the minimum wage and the employer-paid wage. *See* 29 U.S.C. § 203(m)(2)(A). If an employer relies on tips to help cover the minimum wage, the FLSA restricts how an employer may require its employees to share tips (a practice commonly called tip pooling). *See id.* By contrast, if an employer pays its employees the minimum wage without relying on employee tips, the statute said "absolutely nothing about" whether or how the employer may require its employees to pool tips. *See Perez*, 843 F.3d at 356 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

Notwithstanding Congress's express choice to regulate employers in a specific situation (when an employer pays an employee less than minimum wage), the Department of Labor relied on "statutory silence"

to regulate tip pooling in a situation that the statute failed to address (when an employee is paid the minimum wage without relying on tips). *See Perez*, 816 F.3d at 1085. The Ninth Circuit concluded that the statute's "clear silence"—in other words, the statute's failure to expressly say that it was *not* regulating tip pooling when employers paid the minimum wage without relying on tips—coupled with *Chevron* deference empowered the agency to do the very thing that Congress had not mentioned. *See id.* at 1086-91. The silence, according to the majority opinion, was nothing more than Congress's "refusal to tie the agency's hands." *Id.* at 1090.

But the FLSA, like the statute here, was not completely silent on the question at issue. Congress did regulate tip pooling; it just limited that regulation to specific situations. *See* 29 U.S.C. § 203(m)(2)(A). Had Congress wanted the restriction to apply more broadly, it could have said so, just as it did with a different restriction on tip pooling it placed in the very next subsection after the *Perez* decision. *See id.* § 203(m)(2)(B) ("An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, *regardless of whether or not the employer takes a tip credit*." (emphasis added)).

The Ninth Circuit's decision underscores the substantial obstacles that treating statutory silence as a delegation of authority imposes on Congress's ability to constrain agency authority. With the statutory provision at issue, Congress was focused on a specific problem: the treatment of employees who rely on tips to earn at least the minimum wage. But according to the Ninth Circuit, while specifically addressing that challenge, Congress opened the door to a much

broader regulation of tip pooling. It's not enough for Congress to create restrictions that apply to *X* but not to *Y* or to delegate authority in some situations and not others. Instead, according to the Ninth Circuit and the court below, Congress must also expressly prohibit an agency from extending those restrictions to *Y* and expanding its authority to unmentioned situations.

If adopted by this Court, this approach would severely undermine Congress's ability to restrict agency authority. Refusing to expressly empower an agency would not curb an ambitious agency's power; Congress instead would be required to list all the actions it did *not* want the agency to take. There's no reason to think that Congress would want to burden itself with such an unrealistic drafting obligation. Nor is there any reason to think that Congress would want statutory silence to be treated as a *Chevron*-triggering delegation of authority to an agency.

III. Treating statutory silence as a delegation of regulatory authority incentivizes agencies to usurp and undermine legislative powers

When agencies rely on statutory silence to amass regulatory authority, they undermine the separation of powers and dilute Congressional checks on the Executive Branch.

A. The Constitution vests "[a]ll legislative [p]owers" in Congress. U.S. Const. art. I, § 1. Congress may use those powers to delegate certain authority to an agency, *cf. Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."), but that is a policy decision for Congress and Congress alone, *see* Sales & Adler, *supra*, at 1562

("[W]hether a federal agency should have certain powers is certainly a policy question, but it is a policy question that ultimately must be resolved by the legislature.").

1. When an agency claims a new authority from statutory silence, as the Service did here, it is (a) making a policy decision that only Congress may make; (b) exercising authority that Congress has not delegated to it; and (c) thus usurping legislative powers. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) ("The 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.'" (citation omitted)). The agency is aggrandizing its own authority at Congress's expense. *See* Sales & Adler, *supra*, at 1503 ("Aggrandizement not only raises the risk that an agency might wield excessive power, but that it might disrupt Congress's intended distribution of power.").

If such assertions of regulatory authority receive *Chevron* deference, it is more likely that agencies will use silence to claim power that Congress never intended to delegate to them. *Cf. Egan v. Del. River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring) (arguing that *Chevron* deference "diminishes the role of Congress," in part, because it leads to the "aggrandizement of federal executive power at the expense of the legislature"). Empirical data indicates that agencies are more willing to advance an aggressive reading of a statute when they believe *Chevron* deference will apply, *see* Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703, 723-

24 (2014), and agencies likely will use those aggressive interpretations to augment their own power. That data is consistent with the firsthand observations of those who have served in the Executive Branch. *See, e.g.*, Cass R. Sunstein, Chevron *As Law*, 107 Geo. L.J. 1613, 1666 (2019) ("From my more than five years of experience at the White House, I can confidently say that *Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints." (quoting Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014))).

Look no further than the Service. The power to require industry-funded observers for the Atlantic herring fishery is not the first power-grab it has based on statutory silence. The Service also relied on statutory silence to create a new regulatory regime for aquaculture, or fish farming, an authority that Congress did not expressly provide it. *See Gulf Fishermens Ass'n*, 968 F.3d at 458, 460. Indeed, when it comes to regulating aquaculture, the Fifth Circuit called the Act "a textual dead zone." *Id.* at 460. The Service claimed that "the chasm [w]as a mere 'gap' for it to fill," arguing that Congress gave it this power by not expressly withholding it. *Id.* The Fifth Circuit, unlike the court below, correctly rejected "[t]his nothing-equals-something argument." *Id.*

The Fifth Circuit also highlighted "a more fundamental problem with the [Service]'s position": textual evidence that Congress is familiar with aquaculture and knows how to regulate it. *Id.* at 465-66. For example, four years before Congress passed the Act, Congress gave the Environmental Protection Agency

the "authority to regulate 'aquaculture project[s].'" *Id.* at 466 (alteration in original) (citation omitted). Later, in two different sets of amendments to the Act, Congress referenced "aquaculture" and "fish farms" without empowering the Service to regulate them. *Id.* ("[W]hile these 'discrete and immaterial provisions' do not purport to empower [the Service] to regulate aquaculture, they do show that Congress knows how to legislate on the subject when it wishes.").[8]

If agencies receive deference when they interpret statutory silence as a delegation of authority, they will over time substantially expand their own power. Unless this Court steps in, it is inevitable that the Executive Branch will usurp more legislative power. Indeed, if this Court holds that statutory silence about whether an agency has a given authority is a delegation of authority to that agency, it will bring to life Simon & Garfunkel's observation: "silence like a cancer grows." Simon & Garfunkel, *The Sound of Silence*, on The Graduate (Columbia Masterworks 1968). Agencies will discover yet unearthed statutory silences—failures to expressly deny agencies specific authorities—and rely on those silences to expand their power far beyond what Congress ever intended.

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[8] The Service has also relied on statutory silence to give itself nearly unrestricted discretion to perform a statutory duty any way that it sees fit. *See Me. Lobstermen's Ass'n*, 70 F.4th at 596 ("[T]he Service argues the 'relevant text says nothing about how an agency must handle uncertainties in the data,' and this silence means the Service had discretion to do what it did here. What is not prohibited, the Service reasons, is permitted ...."). Believing that statutory silence let it choose its own path—or, rather, paths, plural—the Service chose to implement the duty in different ways without even acknowledging that it was changing course and asked for deference. *See id.* at 598-99. The D.C. Circuit recently rejected this "gambit." *Id.* at 595-601.

Cf. Perez, 843 F.3d at 361 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (arguing that the majority opinion's theory, which concluded that an agency could claim regulatory authority from statutory silence, meant that "an agency's power to regulate surges like an expansive body of water, covering everything until it bumps up against a wall erected by Congress").

2. This dynamic will erode the separation of powers as "Congress is supplanted in its role under the Constitution as lawmaker-in-chief." Sales & Adler, *supra*, at 1535; *see also Ry. Lab. Execs'. Ass'n*, 29 F.3d at 671 ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.").

To be sure, if Congress disagrees with agency action grounded in statutory silence, it can enact legislation to reverse the action or modify the agency's authority. *See, e.g.*, 5 U.S.C. §§ 801(b), 802. But this stacks the deck against those who want to constrain an agency's authority (who likely thought that Congress had *already* constrained the agency's power by not expressly delegating the regulatory authority at issue).

This is because those who want to constrain agency authority would be required to do so through affirmative Congressional action. Those who seek to preserve an agency's claimed authority, however, would simply have to block the affirmative action. This distinction is critical because "the Constitution makes it far harder to enact legislation than to block it: Under the Constitution, three different entities must agree in order to enact legislation—the House, the Senate, and the President (or two-thirds of both the House and the

Senate to override a President's veto)." *Coal. for Responsible Regul., Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *22 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from the denial of rehearing en banc). By contrast, those wishing to preserve the status quo just need to block the attempted legislative fix by preventing passage in either the House *or* the Senate *or* by securing a Presidential veto sustained by a single chamber of Congress.

Enacting legislation to "veto" an agency's expansion of its own authority is thus a "daunting task." *Egan*, 851 F.3d at 280 (Jordan, J., concurring). And if this Court defers to an agency's efforts to seize regulatory authority from statutory silence, it will put the onus of enacting legislation on those who want to limit an agency's authority rather than those who seek to delegate power to it, a burden shift fundamentally inconsistent with the separation of powers. *See id*. ("[T]he Constitutional requirements of bicameralism and presentment (along with the President's veto power), which were intended as a brake on the federal government, being 'designed to protect the liberties of the people,' are instead, because of *Chevron*, 'veto gates' that make any legislative effort to curtail agency overreach a daunting task." (citation omitted)). Here, for example, prior Congressional efforts to give the Service the general authority to require industry to fund observer programs—the authority that the Service has claimed here—failed to make it through the legislative process. *See, e.g.*, H.R. 5018, 109th Cong. § 9(b) (2006); H.R. 1554, 101st Cong. § 2(a)(3) (1989). Congress shouldn't *also* have to enact "veto" legislation to overturn the Service's unilateral adoption of this failed legislative proposal.

B. If agencies can concoct authority from statutory silence, they will utilize that power to undermine critical Congressional checks on the Executive Branch. This case is a textbook example of that phenomenon because it involves an agency attempting to evade Congress's power of the purse.

1. An agency cannot spend money unless Congress has appropriated it. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law …."); *see also OPM v. Richmond*, 496 U.S. 414, 424 (1990) ("It [the Appropriations Clause] means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." (citation omitted)); 1 U.S. Gov't Accountability Off. (GAO), GAO-16-463SP, *Principles of Federal Appropriations Law* 6 (4th ed. 2016) ("Regardless of the nature of the payment—a salary, a payment promised under a contract, a payment ordered by a court—a federal agency may not make such a payment and, indeed, may not even incur a liability for such a payment, unless Congress has made funding authority available.").

Congress controls how much an agency may spend and dictates how an agency may spend that money. *See* 31 U.S.C. § 1341(a)(1)(A) ("[A]n officer or employee of the United States Government … may not … make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation …."); *id.* § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."); *U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) ("[F]or appropriated funds to be legally available for

an expenditure, 'the purpose of the obligation or expenditure must be authorized.'" (citation omitted)). An agency thus lacks authority to spend more than Congress has appropriated or in a way that violates a Congressional condition or limit. *See, e.g.*, 1 GAO, *supra*, at 6. In fact, it's a crime to do so. *See, e.g.*, 31 U.S.C. § 1350.

2. This power of the purse is Congress's most effective check on the Executive Branch's powers. *See* 1 GAO, *supra*, at 5 (describing "the power of the purse as 'the most important single curb in the Constitution on Presidential power'" (quoting Edward S. Corwin, *The Constitution and What It Means Today* 134 (14th ed. 1978))); *U.S. Dep't of Navy*, 665 F.3d at 1347 ("The Appropriations Clause is thus a bulwark of the Constitution's separation of powers …. It is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, 'the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.'" (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213-14 (1833))). The power's significance was even noted at the time of the Founding. *See* The Federalist No. 58 (Madison) (stating that the power of the purse allows the House to "reduc[e], as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government").

Congress's ability to control both the amount of funding and the way funds are spent allows it to shape agency behavior. *Cf. CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 230 (5th Cir. 2022) (Jones, J., concurring) ("[A]t times, Congress even wields the purse strings for collateral, substantive ends."); Kate

Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1345 (1988) ("In specifying the activities on which public funds may be spent, the legislature defines the contours of the federal government."). Congress may combat regulatory overreach or other conduct of which it disapproves by reducing an agency's appropriation or denying it funding altogether. *See, e.g.*, *CFPB*, 33 F.4th at 232 (Jones, J., concurring) ("Congress has tightened the purse strings to express displeasure with an agency's nefarious activities and even to end armed combat."); *see also id.* at 232 n.49 (listing examples where Congress reduced an agency's budget and prohibited funds from being used for a specific purpose); Stith, *supra*, at 1354 ("The amount limitation of an appropriation thus may reflect more than a budget constraint; it may reflect Congress' estimation of the object's value at a given time or Congress' determination that additional financing from the public fisc is not desirable." (footnote omitted)).

3. Here, the Service resorted to requiring Atlantic herring fishermen to pay the wages of federal observers because it could not implement its preferred monitoring programs with only the money appropriated by Congress. The Service has admitted it had insufficient funding to pay for a proposal to increase observer coverage of Atlantic herring fishing vessels. *See, e.g.*, Amendment 5, 79 Fed. Reg. 8786, 8793 (Feb. 13, 2014) (to be codified at 50 C.F.R. pt. 648) ("Budget uncertainties prevent [the Service] from being able to commit to paying for increased observer coverage in the herring fishery. Requiring [the Service] to pay for 100-percent observer coverage would amount to an unfunded mandate."); *cf.* Amendment 14, 79 Fed. Reg. 10029, 10034 (Feb. 24, 2014) (to be codified at 50 C.F.R. pt. 648) (same but for mackerel fishery).

Of course, if the Service could not afford to expand its Atlantic herring observer program with its amount of appropriated funds, it could have requested additional funding from Congress. And if Congress agreed with the Service's desire to expand that regulatory activity, it could have appropriated more funds for that purpose. This is the critical role of Congress's power of the purse: if an agency wants to ramp up its regulatory efforts in a way that increases spending, it must get Congressional approval to do so.

Here, however, the Service expanded its observer program without Congress appropriating the necessary funds. Instead, it offloaded costs on the regulated industry. In doing so, the Service effectively augmented its appropriation and performed an end-run of Congress's power of the purse. *Cf. PHH Corp. v. CFPB*, 881 F.3d 75, 147 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting) (noting that an agency "free[] from appropriations" "cannot be called 'an agency of the legislative ... department[]' and the Congress cannot be called its 'master'" (second and third alterations in original) (citation omitted)).

The Service's action here is fundamentally inconsistent with the separation of powers vital to our constitutional framework. This Court should not permit an agency to rely on a combination of statutory silence and *Chevron* deference to undermine Congress's power of the purse. By allowing such authority to be delegated by silence, this Court would erode an essential check on Congress's ability to constrain agency power and take a substantial step down the road toward Executive Branch supremacy.

CONCLUSION

For these reasons, the Court should reverse the judgment below and hold that statutory silence about whether an agency has a claimed regulatory authority is not an ambiguity that triggers *Chevron* deference.

Respectfully submitted,

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