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

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

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America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. Because of this case's implications for the constitutional separation of powers, America First Legal has a substantial interest in it.[1]

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Judicial deference to agency legal interpretations sits uncomfortably with the Constitution's separation of powers. The power to make the law is vested in Congress by Article I, the power to interpret the law is vested in the judiciary by Article III, and the power to enforce the law is vested in the Executive by Article II. The legislative power was long considered the most dangerous. But increasingly, executive agencies make policy and law under the guise of interpreting statutes. When courts defer to agency interpretations, they bless a union of legislative and executive power that unhinges the Constitution, simultaneously ceding both Article I *and* Article III power to the Executive.

Several solutions have been proposed to address this problem. One—for another case—is to take seriously the Article I limits on delegating power to the Executive. Another—for this case—is to at least narrow the rule of deference by Article III courts that this Court developed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

This brief proposes three clarifications to *Chevron*. First, the Court should clarify that statutory silence does not equal ambiguity justifying *Chevron* deference. In general, statutory silence means both that the national government has not asserted its limited powers to regulate the people and that Congress has not delegated such power to an agency. Therefore, absent an affirmative delegation of authority, the presumption should be that statutory silence means that an agency has no authority to limit freedom. But the presumption increasingly used by the D.C. Circuit—departing from a long line of contrary

cases—is that broad statutory schemes let the agency regulate willy-nilly across the whole subject area, not just in the "gaps." Not only does this presumption exacerbate the tension between the Constitution and *Chevron*, it also disregards this Court's repeated instructions to use traditional tools of statutory interpretation—including canons like *expressio unius*—before finding an ambiguity to interpret or a gap to be filled by the agency. The Court should correct this error.

Second, *Chevron* should not apply outside of notice-and-comment rulemakings specifically authorized by Congress. Notice-and-comment procedures ensure the involvement of the people in lawmaking, thereby alleviating the constitutional problem of agency policymaking outside of Article I's strictures. And requiring these procedures makes sense as an interpretive matter, as Congress is more likely to have delegated authority when it knows that the agency will be required to follow adequate procedures ensuring reasoned consideration. This Court has already gone most of the way in imposing this *Chevron* prerequisite, *see United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001), and it should finish the job here.

Third, the Court should recognize that *Chevron* deference is quite different from the proper deference shown to the Executive's exercise of its traditional Article II powers over foreign affairs, the military, immigration, and the like—especially when *Chevron* enables agencies to impose policy regulations on private entities under the guise of Congress's Commerce Clause power. The Constitution assigns Congress, not the Executive, power over interstate commerce. But too often, private entities find themselves governed by agency policymaking

regulations rather than congressional statutes. The Court should clarify this important distinction and adopt a presumption against deference to agency policymaking regulations issued under Congress's Commerce Clause authority.

ARGUMENT

I. Statutory silence does not equal ambiguity.

Chevron famously addressed the tension between implementing agencies and reviewing courts over statutory interpretation by propounding a two-step test. If Congress has spoken unambiguously, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. But "if the statute is *silent or ambiguous* with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (emphasis added).

As a linguistic matter, *Chevron* does not teach that silence equals ambiguity, as it refers to statutes that are "silent *or* ambiguous." The "silence" *Chevron* contemplated was very different from the silence embraced by the decision below and many other decisions. *Chevron*'s "silence" was based on an understanding that agencies would make necessary choices in implementing the details of congressional commands. "*Chevron* deference is premised on a 'presumption that Congress, when it left ambiguity in a statute . . . desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting *Smiley v. Citibank*, 517 U.S. 735, 740–41 (1996)). These details

incident to the implementation of congressional commands are addressed by an agency when it resolves "ambiguity in the statute or fills a space in the enacted law." *Id.* (quoting *Mead*, 533 U.S. at 229). Accordingly, *Chevron*'s "silence" refers only to necessary statutory gaps about the details of the statutory scheme.

The decision below, however, read *Chevron* to mean that the lack of a prohibition on agency action amounts to a congressional grant of authority that warrants deference. According to the majority below, "[w]hen Congress has not 'directly spoken to the precise question at issue,' the agency may fill this gap with a reasonable interpretation of the statutory text." App. 6 (quoting *Chevron*, 467 U.S. at 842). Applying that rule here, the court below said that because the statute "expressly envisions that monitoring programs will be created and, through its *silence*, leaves room for agency discretion as to the design of such programs," the agency's mandate—requiring the fishery to pay for such programs—required *Chevron* deference. App. 12 (emphasis added); *see* App. 6 (explaining that the statute's "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" (emphasis added)).

This mode of analysis disregards constitutional limitations on agency authority. Any authority to fill statutory gaps does not and cannot confer authority to supply binding answers to any and all questions not raised or addressed by Congress. "[T]hat statutory silences are not *Chevron*-triggering ambiguities follows from the very nature of administrative agencies." *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 9 (D.C.

Cir. 2000) (Sentelle, J., concurring). "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *Merck Sharpe & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) (quoting *New York v. FERC*, 535 U. S. 1, 18 (2002)). "[S]tatutory 'silence' simply leaves that lack of authority untouched." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004). And when Congress *does* "pass[] an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting *Stark v. Wickard*, 321 U.S. 288, 309 (1944)). "Both their power to act and how they are to act is authoritatively prescribed by Congress." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013).

These principles, in turn, follow from the limited authority granted to the federal government to regulate the people—authority that may be exercised only according to the Constitution's strictures, including its delegation of "legislative Powers herein granted" to Congress. *See* U.S. Const. art. I, § 1. From its inception, ours has been a government of *delegated* powers. *See, e.g.*, U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring) ("The Constitution delegates limited powers to the National Government and then reserves the remainder for the States (or the people), not the other way around . . . ."); *id.* at 159 (Thomas, J., dissenting) ("Congress has no power to act unless the Constitution authorizes it to do so.") (citing *United*

States v. Morrison, 529 U.S. 598, 607 (2000)); *Albrecht*, 139 S. Ct. at 1679.

The founders recognized that unchecked government power poses a danger to the people. They responded to this danger by constraining the federal government, including through the separation of its limited powers: "The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Of the three branches, the legislative power was understood as the most potent—and most necessary to contain. *See INS v. Chadha*, 462 U.S. 919, 947 (1983) (discussing "the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed"); *see also The Federalist* No. 51 (Madison). The union of legislative with executive power was thus especially to be avoided: "[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." *Bowsher*, 478 U.S. at 721–22 (quoting *The Federalist* No. 47, at 325 (Madison) (J. Cooke ed. 1961)).

Thus, the national government's powers are limited, and Congress must exercise the lawmaking component of those powers. "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892); *id.* at 693 (describing the President's limited "discretion" which was "simply in execution of the act of Congress"). The rule of

delegated or enumerated powers, then, flows from the national government to Congress to administrative agencies. As Judge O'Scannlain explained, "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." *Oregon Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 360 (9th Cir. 2016) (dissenting from denial of rehearing en banc).

The "practice" of "accord[ing] controlling weight" to agency interpretations of statutory silence "turns on its head the principle that the United States is 'a government of laws, and not of men.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 127 (2015) (Thomas, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)) (cleaned up). It also abdicates the duty of the judiciary to "check" the other branches by "apply[ing] the law in cases or controversies properly before it." *Baldwin v. United States*, 140 S. Ct. 690, 692 (2020) (Thomas, J., dissenting from denial of certiorari). Administrative agencies do not have plenary authority over the entire subject area in which they are involved. All authority must be delegated to the agency by Congress.

Any suggestion that *Chevron* 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)" would be "flatly unfaithful to" these constitutional principles. *Ry. Lab. Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir.), amended, 38 F.3d 1224 (D.C. Cir. 1994) (en banc) (Edwards, J.). As the D.C. Circuit used to understand, "[w]ere 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." *Id.*[2]

Moreover, such an interpretation would give rise to just the sort of blank checks the court below found in this case, in which the authority to "create[]" a "monitoring program[]" to implement Congress' avowed intent became a limitless grant of power. App. 12. "After all, it is the norm for statutes to be silent on whether they grant various powers to agencies." *Slater*, 231 F.3d at 9 (Sentelle, J., concurring). If such silence is enough to trigger *Chevron* deference, agencies "become the nation's principal lawmakers." *Id.*; *contra* U.S. Const., art. I. This would only further

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[2] Other courts of appeals have agreed with the D.C. Circuit's former view. *See, e.g.*, *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.'"); *Chamber of Commerce v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013) ("[W]e do not presume a delegation of power simply from the absence of an express withholding of power.'); *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015) ("The dissent repeatedly claims that congressional silence has conferred on DHS the power to act. To the contrary, any such inaction cannot create such power." (citation omitted)), *aff'd*, 579 U.S. 547 (2016); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) ("Courts 'will not presume a delegation of power based solely on the fact that there is not an express withholding of such power.'"); *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."); *see also Oregon Rest. & Lodging*, 843 F.3d at 362–63 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("[O]ur sister circuits . . . have echoed again and again the basic reality that silence . . . often reflects Congress's decision not to regulate in a particular area at all, a decision that is binding on the agency.").

"encourage[] 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." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016). Seemingly, agencies could even obligate the U.S. Treasury within this space of silence.

The better presumption is, as Judge Walker explained below, that "silence indicates a lack of authority." App. 26 (dissenting opinion). As with "any field of statutory interpretation," the Court's "duty [is] to respect not only what Congress wrote but, as importantly, what it didn't write." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (plurality opinion). The relevant question is "whether the statutory text" sanctions "the agency's assertion of authority." *City of Arlington*, 569 U.S. at 301.

To answer this question, just as Judge Walker said, a court "empt[ies] [its] interpretive toolkit" at *Chevron*'s first step. App. 25 (dissenting opinion). Only if the court finds a legal ambiguity using its traditional statutory analysis should it proceed to *Chevron*'s reasonableness analysis. Statutory silence, however, will normally signal a lack of delegated authority. Generally "statutory silence, when viewed in context, is best interpreted as limiting agency discretion," not creating it. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (cleaned up); *see also* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1532 (2009) ("[A] statute delegates the authority it delegates, and the rest is silence."); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 Admin. L.J. Am. U.

187, 203 (1992) ("Congressional silence should, therefore, be understood to leave this power—the power to say what it is that Congress has done—with the courts, where it has always been.").

In prior decisions, the D.C. Circuit was faithful to this principle. In one case, for example, it found that the "EPA cannot rely on its general authority to make all rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area." *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995); *see also id.* ("[T]he general grant of rulemaking power to EPA cannot trump specific portions of the [Clean Air Act] and" "EPA cannot use the general rulemaking authority . . . as justification for adding new factors to a list of statutorily specified ones.").

But as the decision below shows, that interpretation of *Chevron* has become, for the D.C. Circuit anyway, a thing of the past. *See* App. 5 ("Congress has delegated *broad authority* to an agency with expertise and experience within a specific industry, and the agency action is so confined, claiming no broader power to regulate the national economy." (emphasis added)). Part of the problem is that the D.C. Circuit has abandoned "traditional tools of statutory construction" like the *expressio unius* canon. *See Chevron*, 467 U.S. at 843 n.9. In a case relied on below, writing in similarly expansive language of a "broad grant of authority contained within the same statutory scheme," the D.C. Circuit dismissed *expressio unius*, calling it "'a feeble helper in an administrative setting'" and favoring deference to the broad grant. *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014) (quoting *Cheney R.R. Co., Inc. v. I.C.C.*, 902 F.2d 66, 69 (D.C. Cir. 1990)).

Abandoning ordinary interpretive tools, including *expressio unius*, contradicts this Court's teachings. Text must be "'interpreted in its statutory and historical context,'" and "[t]he relevant 'statutory context' include[s]" the absence of "express[] authoriz[ation]" found elsewhere in the law. *Entergy*, 556 U.S. at 223 (cleaned up); *accord Biden v. Nebraska*, 600 U.S. ___, ___ (2023) (slip op., at 15) ("Congress opted to make debt forgiveness available only in a few particular exigent circumstances"). An agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001).

Under the erroneous rule of default deference to agencies' "broad authority," agencies assert an "enabling-silence" version of *Chevron* that looks less like the power to "fill gaps," and more like the power to legislate a plenary regulatory scheme. This errant interpretation requires repeated corrections. Thus, the Court was recently forced to remind the Secretary of Education, who administers the Education Act, that his authority does not allow him to "rewrite that statute from the ground up." *Biden*, 600 U.S. at ___ (slip op., at 12); *see also id.*, at ___ (slip op., at 14) ("The Secretary's new 'modifications' of these provisions were not 'moderate' . . . Instead, they created a novel and fundamentally different . . . program."). As Justice Thomas has noted, "agencies 'interpreting' ambiguous statutes typically are not engaged in acts of interpretation at all. Instead, as *Chevron* itself acknowledged, they are engaged in the 'formulation of policy.'" *Michigan*, 576 U.S. at 762 (Thomas, J., concurring) (cleaned up). Rather than contained and finite, the powers asserted by these agencies are

general and expansive. This is not the authority to "fill gaps."

So what is the appropriate domain of *Chevron*'s "silence"? To the extent *Chevron* deference is ever appropriate, the relevant statutory "gaps" must be contained and finite. *Chevron* gaps concern "interstitial lawmaking" or "how best to construe an ambiguous term in light of competing policy interests." *City of Arlington*, 569 U.S. at 304–05. The need for a mere "gap" in contradistinction to "silence" was highlighted in *Adams Fruit Co. v. Barrett*, in which this Court rejected the argument that a statute's "failure to speak directly" to a question "create[d] a statutory 'gap' within the meaning of *Chevron*." 494 U.S. 638, 649 (1990). "A precondition to deference under *Chevron*," the Court explained, "is a congressional delegation of administrative authority," and such a delegation must be "evident in the statute." *Id.* at 649–50. "Although agency determinations within the scope of delegated authority are entitled to deference," silence does not permit an agency to "bootstrap itself into an area in which it has no" delegated authority. *Id.* at 650 (cleaned up). Accordingly, an agency action must fall within the delegated authority, not just within the general subject area: there must be an authentic statutory *gap* conveying (explicitly or implicitly) congressional intent to delegate interpretive authority. "[I]t is only in the ambiguous 'interstices' *within* the statute where silence warrants administrative interpretation, not the vast void of silence on either side of it." *Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1094 (9th Cir. 2016) (Smith, J., dissenting); *accord Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1163 (10th Cir. 2017) ("[W]hen 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.").

In sum, "an agency can fill in statutory gaps where 'statutory circumstances' indicate that Congress meant to grant it such powers." *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting). And, assuming *Chevron* ever applies, it could apply to the agency's "fill[ing] up the details within the framework of the policy which the legislature has sufficiently defined." *Id.* at 2138 (cleaned up). But when the traditional tools of interpretation reveal that Congress has simply remained silent on a policy choice, the constitutional presumption must be that it did not intend to delegate power over that choice to the agency—much less intend for the courts to defer to the agency's resulting policy choice.

Here, the Magnuson-Stevens Act (MSA) in other provisions expressly authorizes the collection of costs from those regulated, while not doing so for the Atlantic herring fishery. App. 9. Congress has the means to delegate powers it wishes to delegate, and withhold other powers. *See Nat. Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) ("[I]t is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*."). Nothing in the MSA suggests a legislative intent to delegate to the National Marine Fisheries Service (NMFS) the power to bypass the appropriations process to fund its program using the fishery's money. Unlike a properly passed legislative act, "[t]he [NMFS]'s assertion of administrative authority has 'conveniently enabled [it] to enact a

program' that Congress has chosen not to enact itself." *Biden*, 600 U.S. at ___ (slip op., at 21–22) (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2596 (2022)). At a minimum, statutory context makes clear that the collection of costs from the New England herring fishery is unambiguously not authorized by the MSA. By replacing traditional statutory interpretation with a preference for agencies' "broad authority," the decision below went astray.

II. *Chevron* should not apply outside of notice-and-comment rulemaking.

To the extent the Court retains any form of *Chevron* deference, it should minimize the doctrine's constitutional implications by limiting it to rules that the public had an opportunity to weigh in on. In *Mead*, this Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference" only "when it appears that Congress delegated authority to the agency . . . to make rules carrying the force of law." 533 U.S. at 226–27. The Court thus qualified *Chevron* deference, reasoning that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230. *Mead*, however, declined to provide a bright-line rule: "[d]elegation of such authority may be shown in a variety of ways," as long as there was a sufficient "indication of" "congressional intent." *Id.* at 227. In *Christensen v. Harris County*, the Court held that "opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not

warrant *Chevron*-style deference." 529 U.S. 576, 587 (2000).

Especially given *Chevron*'s inherent constitutional liabilities, the Court should at minimum limit *Chevron* deference to notice-and-comment rulemaking. First, this limitation would reduce some of the constitutional concerns with *Chevron* by involving the people in any legislative-type rulemaking that would receive judicial deference. Second, this limitation would be consistent with the interpretive presumptions underlying *Chevron*: it would make more sense for Congress to delegate questions to an agency that the public would have a chance to answer.

A. Limiting *Chevron* to notice-and-comment rulemaking alleviates its constitutional problems.

Under Article I of the Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." § 1. The framers understood this power "to mean the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to prescribe the rules by which the duties and rights of every citizen are to be regulated, or the power to prescribe general rules for the government of society." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (cleaned up). Because "[a]ccompanying that assignment of power to Congress is a bar on its further delegation," *id.* at 2123 (majority opinion), Congress must "make[] the policy decisions when regulating private conduct," *id.* at 2136 (Gorsuch, J., dissenting). By that assignment of power, the framers protected the individual liberty "'to have a standing rule to live by . . . made by the *legislative* power,' and to be free from 'the inconstant, uncertain,

unknown, arbitrary will of another man.'" *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 75–76 (2015) (Thomas, J., concurring in the judgment) (quoting John Locke, *Second Treatise of Civil Government* 13 (J. Gough ed. 1947)).

Though this Court has largely "abandoned all pretense of enforcing a qualitative distinction between legislative and executive power," *id.* at 84, it still recognizes that agencies can only regulate pursuant to a delegation from the people's representatives in Congress. As discussed above, legislative "rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch." *Mistretta v. United States*, 488 U.S. 361, 386 n.14 (1989). "To permit an agency to expand its power . . . would be to grant to the agency power to override Congress." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374–75 (1986).

Limiting *Chevron* deference to rules promulgated after notice and comment would be "in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency." *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting). "Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'" *Perez*, 575 U.S. at 96 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–303 (1979)).

In 5 U.S.C. § 553, the Administrative Procedure Act (APA) lays out a notice and comment process that must generally be followed when an agency makes a rule with the force of law pursuant to a congressional delegation:

> First, the agency must issue a "[g]eneral notice of proposed rule making," ordinarily by publication in the Federal Register. § 553(b). Second, if "notice [is] required," the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." § 553(c). An agency must consider and respond to significant comments received during the period for public comment. Third, when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." § 553(c).

Perez, 575 U.S. at 96 (citations omitted).[3]

Thus, "[n]otice and comment gives [the public] fair warning of potential changes in the law and an opportunity to be heard on those changes." *Azar*, 139 S. Ct. at 1816. These are the "procedures by which federal agencies are accountable to the public." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020).

Limiting *Chevron* deference to rules promulgated after these notice-and-comment procedures alleviates some of the constitutional problems underlying this Court's administrative law precedents. To be sure, notice-and-comment rulemaking is no substitute for the people speaking through their representatives, and it does not resolve the constitutional problem that "a body other than Congress [would] perform a function that requires an exercise of the legislative power." *Michigan*, 576 U.S. at 762 (Thomas, J.,

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[3] Other statutes have similar procedures. *See, e.g., Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1809 (2019).

concurring). But providing the public an opportunity to weigh in on such rules takes some of the sting out of transferring to the Executive Branch the legislative power to make rules governing private conduct. Whatever rule the Executive Branch makes, the public will at least have had "an opportunity to be heard," and the agency will have to "offer[] reasoned responses to what people have to say." Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 225 (2006). "[O]ther modes of announcing agency interpretations do not offer equivalent opportunities for public participation." Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 886 (2001). Thus, when Congress has specifically directed an agency to engage in notice-and-comment rulemaking on a given issue, these procedures might partially alleviate the consequences of that delegation.

Relatedly, this public input reduces the consequences of transferring the judicial "power to resolve [statutory] ambiguities" to the Executive Branch. *Perez*, 575 U.S. at 119 (Thomas, J., concurring in the judgment). Because the judicial power is to interpret the law "in accord with the ordinary public meaning of its terms," *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020), public input through notice-and-comment rulemaking should, other things equal, lead the law in the direction of its proper public meaning. Requiring notice-and-comment rulemaking, then, would serve as a "surrogate safeguard[] for the protections in the Constitution itself." Sunstein, *supra*, at 225.

In sum, limiting *Chevron* deference to cases in which Congress has expressly granted an agency authority to issue a particular rule subject to public notice and comment procedures would promote the

separation of powers. That separation is a bulwark against tyranny. *See The Federalist* No. 47, at 324 (Madison) (J. Cooke ed. 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."). "The Constitution carefully imposes structural constraints on all three branches, and the exercise of power free of those accompanying restraints subverts the design of the Constitution's ratifiers." *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of certiorari). "When the Executive exercises judicial or legislative power," "it does so largely free of these safeguards." *Id.* at 692. Limiting *Chevron* deference to rules after notice and comment would minimize the difference between how the executive power is exercised now through the "headless fourth branch of government," *City of Arlington*, 569 U.S. at 314 (Roberts, J., dissenting), and how it should be under the Constitution's design.

B. Limiting *Chevron*'s presumption to notice-and-comment rulemaking makes interpretive sense.

If nothing else, applying *Chevron* only to rules issued after notice and comment makes sense as a matter of congressional intent. The Court has said that it "accord[s] 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*, 517 U.S. at 740–741. Put another way, *Chevron* deference "arises out of background presumptions of congressional intent." *Dunn v. CFTC*,

519 U.S. 465, 479 n.14 (1997). Of course, "*Chevron*'s attribution of a general intention to Congress that agencies be the front-line interpreters of regulatory statutes has been described by" Justice Scalia, once the doctrine's "strongest defender," "as 'fictional.'" Merrill & Hickman, *supra*, at 871–72. Still, "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington*, 569 U.S. at 306.

Mead already held that courts should only presume such authority was given to the agency if "circumstances implying such [a congressional] expectation exist." 533 U.S. at 229. "[A] very good indicator of delegation meriting *Chevron* treatment" is "express congressional authorizations to engage in the process of rulemaking." *Id.* "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230. As Professor Sunstein put it, "[t]he best reconstruction of congressional will is that agencies receive *Chevron* deference if and only if they have availed themselves of" such procedures. *Supra*, at 225; *see* Merrill & Hickman, *supra*, at 878 (arguing that "the combination of enacting an ambiguous statute and conferring powers on an agency to make legally binding decisions under that statute represents a choice to give the agency the primary power of interpretation").

This presumption echoes the presumption underlying the Court's major questions doctrine. As the Court recently explained that presumption, it will

"not assume that Congress entrusted [the interpretation of a major question] to an agency without a clear statement to that effect." *Biden*, 600 U.S. at ___ (slip op., at 24). "[S]eparation of powers principles and a practical understanding of legislative intent" form the foundation of the major questions doctrine. *West Virginia,* 142 S. Ct. at 2609. The Court presumes Congress's intent to reserve major questions to itself because "the balance of power between those in a relationship inevitably frames our understanding of their communications. And when it comes to the Nation's policy, the Constitution gives Congress the reins." *Biden*, 600 U.S. at ___ (Barrett, J., concurring) (slip op., at 10); *see also* U.S. Const. art. 1, § 1; *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting) ("[T]he 'major questions' doctrine . . . [allows] an agency [to] fill in statutory gaps where 'statutory circumstances' indicate that Congress meant to grant it such powers.").

Mead, however, declined to take the logical next step of requiring the notice and comment procedure as evidence of congressional intent. It stated that "as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case." *Mead*, 533 U.S. at 230–31. The Court in *Mead* had no need to go that far, as there were "ample reasons to deny *Chevron* deference" there. *Id.* at 231. But as the decision below makes clear, it is now time for the Court to extend *Mead's* logic and limit *Chevron* deference to rules requiring notice-and-comment procedures.

Not only would such an extension be more consistent with the presumption about congressional intent underlying *Mead* and *Chevron*, but it would also provide a more stable rule against which Congress

could legislate. This Court has pointed out the significance of having a stable background rule so that Congress's legislation can have "predictable effects." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010); *see also City of Arlington*, 569 U.S. at 296 (stating that stability allows Congress to know exactly when, "within the bounds of reasonable interpretation," an agency can resolve "[s]tatutory ambiguities"). Though the Court has said that *Chevron* "provides a stable background rule," *id.*, the uncertainty and questions surrounding the doctrine over the three decades since it was established undermine its stability. Limiting *Chevron* deference to rules requiring notice-and-comment procedures would prevent Congress from questioning whether its delegation is explicit enough. It would also prevent situations like the one that has now enveloped the New England fishing industry, in which Congress's act of explicitly allowing for a certain procedure to be established in some contexts, but not explicitly mentioning it in others, is interpreted broadly as a license to do it anywhere. *See* App. 33 (Walker, J., dissenting). Instead, Congress would have to grant rulemaking authority, subject to the notice-and-comment process, over a particular area before deference would be given to an agency's interpretation. This would render *Chevron*'s threshold determination, laid out in *Mead*, predictable and concrete by defining exactly what a rule carrying the force of law is. *See Mead*, 533 U.S. at 226–27.

After *Mead*, many lower courts have assumed that only notice-and-comment rulemaking can create a rule carrying the force of law and qualifying for *Chevron* deference. *See, e.g., Lopez v. Terrell*, 654 F.3d 176, 182–83 (2d Cir. 2011) (declining to apply Chevron

deference to a decision given in a Bureau of Prisons Administrative Remedy Program letter due to the lack of the notice-and-comment process); *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 805 (5th Cir. 2010) ("Where the agency has not used a deliberative process such as notice-and-comment rulemaking . . . the court cannot presume Congress intended to grant the interpretation the force of law"); *Bradley v. Sebelius*, 621 F.3d 1330, 1338 & n.18 (11th Cir. 2010) (rejecting HHS claim to Chevron deference for a Medicare field manual lacking approval via the notice-and-comment process).

But the D.C. Circuit has applied *Chevron* notwithstanding the lack of congressionally mandated notice-and-comment rulemaking. *See Vill. Of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 658–59 (D.C. Cir. 2011) (holding that the lack of notice and comment rulemaking did not prevent Chevron deference from applying); *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279 (D.C. Cir. 2004) (similar). At a minimum, then, the Court should clarify *Mead* to explain that the presumption of congressional intent to delegate the interpretation of ambiguities applies only where Congress has also required notice-and-comment procedures.

If such a limitation is adopted, then no deference is due to the NMFS or to other agencies governed by similar statutes. The operative section of the MSA does not explicitly authorize the NMFS to engage in rulemaking subject to public notice and comment to create this type of policy. There is no statutory text in the MSA directing the NMFS to prescribe compensation rates—to be paid by the fishermen—of mandated observers on the herring boats of New England fishermen. Rather, the MSA grants the

agency the ability to *license*, illustrated by the fact that the punishment for not paying an observer fee involves revoking, suspending, denying, or limiting the owner or operator's permit. 16 U.S.C. § 1858(g). A "license" and "licensing" under the APA are separate and distinct from a "rule" and "rulemaking." 5 U.S.C. § 551.

To give effect to *Chevron*'s underlying presumption of congressional intent—and to limit the doctrine's constitutional shortcomings—a court should not employ *Chevron* deference unless it finds an explicit congressional delegation of authority to create a particular rule subject to the public notice-and-comment process.

III. Deference to Article II powers does not translate to *Chevron* deference to agency policymaking.

Last, to the extent the Court retains any form of *Chevron* deference, it should make clear that deference does not apply to agency policymaking decisions made outside the Executive's traditional Article II powers—and particularly not regulatory decisions made under the federal government's Commerce Clause power. That power, of course, resides in Congress. U.S. Const. art. I, § 8, cl. 3. Thus, deference to agency policymaking choices issued pursuant to a Commerce Clause-justified statute is different from the (appropriate) deference shown to the Executive Branch, when it exercises core Article II power in areas like national defense, foreign affairs, and public safety and immigration. Though the courts should defer to the Executive in appropriate situations when it exercises its own power, courts should not blind themselves to the reality that agency policy regulations of businesses

are often an exercise of the legislative power. And if the Court cannot resolve that problem on non-delegation grounds, the least it can do is to decline to defer to the resulting policy choices on matters of statutory interpretation.

A. Courts appropriately defer to certain executive exercises of Article II power.

The Executive's Article II powers are "confined and defined"—but important.[4] The President "shall be Commander in Chief" of the United States' armed forces; may "grant Reprieves and Pardons" to federal offenders; may "make Treaties" and appoint public ministers, judges, and federal officers "by and with the Advice and Consent of the Senate"; may make recess appointments; shall deliver reports on the "State of the Union"; may convene and adjourn Congress; may receive ambassadors and public ministers; shall "take Care that the Laws be faithfully executed"; and shall commission all federal officers. U.S. Const. art. II, §§ 2–3; *see also* 8 U.S.C. § 1103(a) (noting the Secretary of Homeland Security's broad immigration and naturalization powers).

In many contexts, courts defer to the Executive's exercise of these powers over national security, safety, and foreign affairs. *See, e.g.*, *Dep't of Navy v. Egan*, 484 U.S. 518, 529–30 (1988) ("'As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.'" (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974))); *Regan v. Wald*, 468 U.S. 222, 243 (1984) (emphasizing "the traditional deference to executive judgment '[i]n

[4] 1 The Records of the Federal Convention of 1787 70 (Max Farrand ed., 1911) (King's Notes, June 1, 1787).

this vast external realm'" (quoting *United States v. Curtiss–Wright Exp. Corp.*, 299 U.S. 304, 319 (1936))). That deference is especially strong when it comes to "military and national security affairs," where "courts traditionally have been reluctant to intrude upon the authority of the Executive." *Egan*, 484 U.S. at 530; *see Hamdan v. Rumsfeld*, 548 U.S. 557, 623 (2006) ("assum[ing] that complete deference is owed [the President's] determination" of whether certain legal rules are practicable in a trial by military commission); *Swaim v. United States*, 165 U.S. 553 (1897) (upholding the proceedings of a court-martial convened by the President); *see generally Hamdi v. Rumsfeld*, 542 U.S. 507, 580–86 (2004) (Thomas, J., dissenting) (discussing the President's broad authority in the national security context).

Because the President acts as "the Nation's organ in foreign affairs," *Chi. & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 109 (1948), "the Court has taken care to avoid the danger of unwarranted judicial interference in the conduct of foreign policy, and declined to run interference in the delicate field of international relations without the affirmative intention of the Congress clearly expressed," *Biden v. Texas*, 142 S. Ct. 2528, 2543 (2022) (cleaned up). "That is no less true in the context of immigration law, where the dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy." *Id.* (cleaned up).

A similarly deferential approach applies to many other articulated Article II powers. The pardon power has "[s]eldom, if ever" "been subjected to review by the courts." *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950), *abrogated on other grounds by Ford v. Wainwright*,

477 U.S. 399 (1986). So too the powers to deliver reports on the State of the Union and to convene and adjourn Congress. The power to commission officers has undergone judicial review only to decide whether the officer had been commissioned. *United States v. Le Baron*, 60 U.S. (19 How.) 73, 79 (1856) (concerning the validity of a postmaster's presidential commission); *Marbury*, 5 U.S. (1 Cranch) at 151 (concerning the commissioning of an executive officer). The appointment power is similarly uncomplicated, *see Edmond v. United States*, 520 U.S. 651, 659 (1997), though the recess appointment power underwent some review to determine what period constitutes a recess, *see generally NLRB v. Noel Canning*, 573 U.S. 513 (2014) (discussing the scope of the power). The rise of independent agencies has complicated review of the removal power, but the Court is trending toward a deferential approach there as well. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191–92 (2020).

In short, the Court often and properly defers, at least to some extent, to the Executive's exercise of its Article II powers, even when that exercise implicates questions of legal interpretation.

B. *Chevron* should not apply to policymaking governing private entities under the Commerce Clause.

Some commentators have suggested that *Chevron* deference can be similarly justified as another manifestation of judicial hesitation to interfere with the Executive's exercise of its Article II powers. *E.g.*, E. Garrett West, *A* Youngstown *for the Administrative State*, 70 Admin. L. Rev. 629, 650–53 (2018). But that can only be true if the Executive is engaging in the exercise of its traditional Article II powers. And the

ordinary *Chevron* case involves no such exercise. Instead, the typical *Chevron* case—like this one—involves agency policymaking under a statute passed pursuant to Congress's Commerce Clause authority. In such cases, *Chevron* deference is improper.

As discussed above, *Chevron*'s interpretive presumption is (per Justice Scalia) "fictional." Merrill & Hickman, *supra*, at 872. It is another "fiction" that agencies setting policies to regulate private entities are just exercising the executive power to enforce the law and incidentally interpret it. (This stacking of fiction upon fiction should suggest a deeper problem with *Chevron*.) Again, "as *Chevron* itself acknowledged, [such agencies] are engaged in the '"formulation of policy"'—"formulat[ing] legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress." *Michigan*, 576 U.S. at 762 (Thomas, J., concurring). They are, in short, exercising the legislative prerogative to set policy under the power granted to Congress via (in most cases) the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

The Executive's Article II powers contain no analogue to Congress's Commerce Clause power. And generally, the enumeration of a power means the exclusion of other powers left unmentioned. *See, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (applying the "Negative-Implication Canon," defined as the principle that "[t]he expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)"). The founders were of course familiar with this maxim, and they included corresponding war powers in Articles I and II, giving the Executive and legislative some overlapping jurisdiction over military issues. U.S. Const. art. I, § 8,

cl. 11–16; *id.* art. II, § 2, cl. 1. But no Article II power hints at giving the executive authority to regulate private entities engaged in commerce. Instead, the "Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Youngstown*, 343 U.S. at 589.

Therefore, the contrast between the exercise of traditional Article II powers and agency policymaking underscores the inappropriateness of applying *Chevron* deference in cases like this one. Again, in an ideal world, agencies could not engage in Article I policymaking at all. But until the Court returns to that world, it should abandon an undue standard of deference to regulatory legislative actions by administrative agencies. "[C]ourts need not defer to an agency's interpretation, reasonable or otherwise, of a non-existent grant of power." *Slater*, 231 F.3d at 10 (Sentelle, J., concurring). *Chevron* deference should not generally apply to agency regulation of private entities under Commerce Clause statutes.

CONCLUSION

The Court should reverse.

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