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 Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation (Landmark) is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioners Loper Bright Enterprises, et al. For reasons stated below, Landmark asks the Court to overturn its decision in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc. (Chevron)*.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Executive Branch continues to dismiss the Court's authority. In a recent string of cases, the Court has carefully restored the balance of powers by restraining administrative agencies in their efforts to circumvent their legislative authority. Recognizing the fundamental principle that Article I vests "[a]ll legislative Powers" in Congress, the Court has repeatedly upheld challenges in instances where an agency has

[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. Counsel for *Amicus Curiae* provided notice to counsel for parties of its intent to file this brief on June 26, 2023. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

gone beyond its statutory authority. Yet agencies continue to promulgate and enforce rules unmoored from their enabling statutes. The Court can end this by empowering all courts to exercise their inherent Article III powers to independently determine whether an agency has overstepped its bounds when an agency's statutory authority may be ambiguous.

Efforts to ensure agencies stay in their lane arose in two recent cases, both decided in the last two terms. First, in *West Virginia v. EPA*, where the Court invoked the major questions doctrine to curtail efforts by the EPA to promulgate an enormously costly "Clean Power Plan" without clear congressional authorization. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). Second, in *Biden v. Nebraska*, the Court concluded that the President did not have authority under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to forgive over $450 billion in student loan debt. *Biden v. Nebraska*, No. 22-506, 2023 U.S. LEXIS 2793 (2023).

Both cases addressed "a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia v. EPA*, 142 S. Ct. at 2609. And the Court, under its Article III authority and consistent with a line of decisions, stopped this abuse. In short, the Constitution does not empower the Executive Branch to " 'exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond' those the people's representatives actually conferred on them." *West*

Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring, *quoting NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022)). Nor does it permit cabinet level officials like the Secretary of Education to "draft a new section of [the law] from scratch by 'waiving' provisions root and branch and then filling the empty space with radically new text." *Biden v. Nebraska*, No. 22-506, slip op. at 17, 2023 U.S. LEXIS 2793, *31 (2023).

Consistent with these decisions, the Court should overturn *Chevron* and remove the obligation still placed on lower courts to defer to an agency's interpretation of ambiguous statutory language. A reversal of *Chevron* will allow courts to exercise their constitutional authority to curb regulatory overreach when agencies "formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress." *Michigan v. EPA*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring).

ARGUMENT

Agencies continue to promulgate regulations unmoored to any statutory authority despite recent decisions from the Court. These regulatory actions "bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference." Id. And there is no end in sight. By some estimates, agencies are behaving even more aggressively than before the Court's decision in *West Virginia v. EPA*. Business leaders have put it

this way: "we've never seen this level [of regulatory actions] before. In any administration." Jay Timmons (CEO for the National Association of Manufacturers), *Biden's regulatory regime needs to stop its onslaught on manufacturers*, Fox News (June 23, 2023), https://www.foxnews.com/video/6329992430112.

Reversing *Chevron* will direct all lower courts to exercise their Article III authority and uphold challenges when administrative agencies go beyond their statutory authority. Courts will be permitted to "exercise [their] independent judgment in interpreting and expounding upon the laws." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring).

Here the Magnuson-Stevens Act (MSA) does not provide any authorization for the National Marine Fisheries Service (NMFS) to require operators of small fishing vessels to pay the salaries of government mandated monitors. In short, NMFS lacks the "colorable textual basis" present in other recent decisions. See *Biden v. Nebraska*, No. 22-506, 2023 LEXIS 2793, *61 (Barrett, J., concurring) (2023). NMFS engaged in a fundamental legislative act – using three independent provisions of the MSA to justify its regulation. And the lower court – bound by the mandates of *Chevron* – had little option but to declare the action "reasonable." Pet. App. 16. Reversing *Chevron* would allow the lower court to exercise its independent judgment to determine whether NMFS is operating within its regulatory framework – particularly when the statute in question is silent about the agency's asserted authority.

Finally, the Court should conclude that *Chevron* violates the Administrative Procedure Act (APA). The APA's text precludes deference by directing reviewing courts to "decide all relevant questions of law. . . ." 5 U.S.C. § 706. *Chevron* deference removes this directive.

A. Despite the Court's recent decisions, administrative agencies continue to promulgate regulations beyond their statutory authority.

Administrative agencies are continuing to advance regulatory actions beyond their authority. A number of recent actions suggests the Executive Branch has not muted its regulatory agenda even in light of recent decisions from the Court.

Pertaining to student loan debt forgiveness, the Department of Education proposed a rule that will institute an Income-Driven Repayment (IDR) Program. 88 Fed. Reg. 1,894 (Jan. 11, 2023) (to be codified at 34 C.F.R. § 685). This IDR Program, intended to provide debt relief for low-income borrowers, could cost between $300 and $400 billion. Katherine Knott, *Income-Driven Repayment Changes to Create 'Student Loan Safety Net,'* Inside Higher Ed (January 11, 2023), https://www.insidehighered.com/news/2023/01/11/income-driven-repayment-overhaul-draws-praise-criticism.

An administration official recognized the IDR Program as novel, describing it as "an attempt to create a safety net for student loans *for really the first time in this country*." Michael Perchick, *New student loan*

repayment proposal aims to help borrowers succeed, ABC 11 News Raleigh-Durham (Jan. 10, 2023), https://abc11.com/student-loan-forgiveness-repayment-loans-biden-administration/12685573/ (emphasis added). Legislative efforts to address student loan forgiveness indexed to income have failed and it appears Congress has decided not to act. In March 2021, Congressman Lawson of Florida proposed the "Income-Driven Student Loan Forgiveness Act," which promised to forgive federal student loans for low-income debtors, in line with the IDR Proposed Rule. But that bill failed to advance out of committee. H.R. 2034, 117th Cong. (2021). Again, Congress must speak clearly before the Executive Branch can unilaterally alter large sections of the American economy. *Biden v. Nebraska*, No. 22-506, slip op. at 25, 2023 U.S. LEXIS 2793, *43 (2023).

The EPA has proposed a bevy of regulatory actions designed to curb emissions of greenhouse gasses that appear beyond its authority under the Clean Air Act. Under one action, the EPA aims to phase out the manufacture of internal combustion engines. *Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles*, 88 Fed. Reg. 29,184 (May 5, 2023) (to be codified at 40 C.F.R. §§ 85, 86, 600, 1036, 1037, 1066). According to the EPA's own projections, this regulation could incur up to hundreds of billions in costs to industry. 88 Fed. Reg. 29,362 (May 5, 2023).[2] According to a trade group representing auto manufacturers, complying with the

[2] The EPA claims that increased industry costs will be offset by benefits from transition to electric vehicles. 88 Fed. Reg. 29,362.

regulation "requires a massive, 100-year change to the U.S. industrial base and the way Americans drive." Alliance for Automotive Innovation, *Auto perspective on coming EPA emissions rules* (April 6, 2023), https://www.autosinnovate.org/posts/communications/Auto%20Perspective%20on%20Coming%20EPA%20Emissions%20Rules.pdf. On its face, this action appears to violate the major questions doctrine.

Another EPA regulation, *New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule*, 88 Fed. Reg. 33,240 (May 23, 2023) (to be codified at 40 C.F.R. § 60) appears to be a new rendition of the Clean Power Plan declared invalid in *West Virginia v. EPA*.

Other examples of regulatory actions based on questionable statutory authority include:

- A Bureau of Land Management proposal to streamline "conservation" (i.e., bans on economic productive public use) for more than 245 million acres of public land under its purview. Conservation and Landscape Health, 88 Fed. Reg. 19,583 (Apr. 3, 2023) (to be codified at 43 C.F.R. §§ 1600, 6100).
- A Securities and Exchange Commission proposal to require publicly traded companies to measure and disclose their greenhouse gas

emissions. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. §§ 210, 229, 232, 239, 249).

- A Department of Energy proposal to severely restrict the sale of new gas stoves. Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products, 88 Fed. Reg. 12,603 (Feb. 28, 2023) (to be codified at 10 C.F.R. §§ 429, 430).

If these consequential actions are challenged, courts should be permitted to exercise their Article III authority to determine whether the agency is acting within the bounds of its statutory authority. Courts should not be obligated to reflexively defer to an agency's "reasonable" interpretation of ambiguous statutory provisions.

B. *Chevron* violates separation of powers.

Article I, § 1 of the Constitution vests "all legislative Powers herein granted . . . in a Congress of the United States." This legislative power rests solely with Congress under our constitutional system and this concept is central to the separation of powers. "By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable." *Loving v. United States*, 517 U.S. 748, 757 (1996). So, "Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure

make Congress the branch most capable of responsive and deliberative lawmaking." Id. at 757-758. Thus, "[i]ll suited to that task [of lawmaking] are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control." Id. at 758. This assignment of powers "allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." Id.

Separation of powers thus prevents accumulation of power and encroachments upon liberty. "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 Federalist No. 47* (James Madison) (C. Rossiter ed., 1961). As a result, "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," Id. (*quoting* Montesquieu, *The Spirit of the Laws*).

Application of *Chevron* limits courts in several ways that violate traditional notions of separation of powers while – at the same time – unduly empowering administrative agencies. First, *Chevron* "compels judges to abdicate the judicial power without constitutional sanction." *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of cert.). Second, it "gives federal agencies unconstitutional power" beyond the executive power conferred in

Article II, § 1. Id. Finally, it "undermines the ability of the Judiciary to perform its checking function on the other branches." Id. at 692.

In this case, NMFS's actions demand fidelity to the constitutional principle that "[T]he judicial power as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Michigan v. EPA*, 576 U.S. at 761 (Thomas, J., concurring). The judiciary's purposeful abdication of its duty to decide whether an agency has exceeded its statutory authority "is not a harmless transfer of power." *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of cert.) The structure of the Constitution shields the judiciary "from both the 'external threats' of politics and the 'internal threat' of human will by providing tenure. . . ." Id. The Framers similarly, restrict Congress, which is accountable directly to the people through biennial elections and limited in its structure as a bicameral legislature. See id. at 692. No such restrictions, however, are placed on agency personnel or the President when promulgating rules well beyond any authority delegated from Congress. NMFS can therefore promulgate a rule unmoored to any statutory text that unduly burdens small fisheries with little to no political accountability.

When agencies are emboldened to craft new laws by "reasonably" interpreting their administrative rules, and courts abdicate their responsibility by deferring to an agency's interpretation, what recourse exists for citizens who seek fair and impartial adjudication? Courts stand as a bulwark against tyranny. When

courts allow agencies' actions to go "unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Reversing *Chevron* will remove the restrictions that has resulted in courts "not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them." Id. at 1153.

Deferring wholesale to an agency's interpretation of a statute "raises serious separation-of-powers questions." *Michigan v. EPA*, 576 U.S. at 761 (Thomas, J., concurring). Deference "precludes judges from exercising [independent] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction." Id. (*quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)).

Amicus Curiae acknowledges that, at times, a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). Thus, "[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues and defeat the Framers' design of a workable National Government." *Loving v. United States*, 517 U.S. 748, 758 (1996).

But there are limits to an agency's authority – particularly in cases such as this where there is an absence of any language authorizing the given rule. In *Marshall Field & Co. v. Clark*, the Court states: "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." The Court then distinguished the actions, "[t]he first cannot be done; to the latter no valid objection can be made." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-694 (1892) (*quoting Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852)). "The legislature cannot delegate its power to make a law." *Marshall Field & Co. v. Clark*, 143 U.S. at 694.

Chevron empowered agencies to engage in legislative actions and courts have failed to fulfill "their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them." *Gutierrez-Brizuela v. Lynch*, 834 F.3d at 1153 (Gorsuch, J., concurring). *Chevron* also violates the principle that "an agency literally has no power to act . . . unless and until Congress confers power upon it." Id. (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

In practice, "[a] court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. " *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting). Thus, "[a]n agency cannot exercise interpretive authority

until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency." Id.

NMFS's actions and the continued regulatory actions by the present administration suggest concerns expressed by Chief Justice Roberts are prescient: "It would be a bit much to describe the result 'as the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." Id. at 315.

Chevron abets the accumulation of all powers, legislative, executive, and judiciary into the hands of the administrative state. In the words of the Chief Justice, "[t]he accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government." Id. at 313. This accumulation poses a danger to liberty and runs contrary to the principle of separation of powers.

C. Statutory silence should not equate to an "ambiguity" and thus trigger *Chevron* deference.

This case stands apart from recent decisions on the scope of administrative authority in at least one important respect – those cases had involved regulatory actions having at least some "colorable textual basis" where the Court "could have '[p]ut on blinders' and confined [itself] to the four corners of the statute and . . . reached a different outcome." *Biden v.*

Nebraska, No. 22-506, slip op. at 14, 2023 U.S. LEXIS at *61-62 (2023) (Barrett, J., concurring). This case, however, involves the absence of any statutory language empowering NMFS to fund its inspection regime. The lower court acknowledges this by noting that the MSA does not explicitly resolve "the question of whether the [NMFS] may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan." Pet. App. 7. And NMFS cannot point to any other instance where "an agency, without express direction from Congress, requires an industry to fund its inspection regime." Pet. App. 29. *Chevron* deference cannot extend so far as to permit an agency to unilaterally – and without any textual basis – promulgate a regulation obligating fishermen to pay the salaries of federal monitors.

There are recognized limits to *Chevron* deference as "agencies must operate within the bounds of reasonable interpretation." *Util. Air Regul. Group v. EPA*, 573 U.S. 302, 321 (2014). Additionally, while "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretative gerrymanders under which an agency keeps parts of a statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 576 U.S. at 754. Accepting statutory silence as an ambiguity, however, goes beyond bounds of reasonableness.

Congressional failure to expressly deny a power to an agency is not an ambiguity. In short, "agencies have no intrinsic authority and wield only the powers that the legislature delegates them." Nathan

Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1520.

The NMFS's actions "bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference." *Michigan v. EPA*, 576 U.S. at 762 (Thomas, J., concurring). The Court "should be alarmed that [NMFS] felt sufficiently emboldened" by past decisions to promulgate a rule absent both express authority and a general delegation of power. Id. at 763. What is to prevent other agencies from substituting their policy judgments for that of Congress? Why should an agency such as the NMFS operate within its statutory bounds when courts uphold such actions? Agencies have become so emboldened they venture beyond their statutory mandates – even in cases of statutory silence and even without any general delegation of authority.

Silence should not be interpreted as ambiguity; such a principle allows agencies to legislate without an express delegation of authority from Congress. It allows courts to defer to agencies rather than using their Article III authority to interpret the law. Indeed, "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." Alexander & Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. at 1519. Thus, "a statute delegates the authority it delegates, and the

rest is silence. Failure to disclaim agency authority to regulate is not, in itself, an ambiguity about whether an agency does or should have regulatory authority." Id. at 1532.

D. At a minimum, *Chevron* violates the Administrative Procedure Act.

Chevron deference also violates the Administrative Procedure Act (APA). The text of APA provides evidence that it does not confer deference on an agency. It states, "to the extent necessary to decision and when presented, the reviewing court *shall decide all relevant questions of law*, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (emphasis added). At the time of the APA's enactment, the meaning of a statute was considered a question of law. *Baldwin*, 140 S. Ct. at 692 (Thomas, J., dissenting from denial of certiorari). Section 706 also "places the court's duty to interpret statutes on an equal footing with its duty to interpret the Constitution, and courts never defer to agencies in reading the Constitution." Id. (*quoting* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Texas L. Rev. 113, 194 (1998). This text also precludes deference as the authority to decide "all relevant questions of law" is restricted to the courts. Michael B. Rappaport, *Chevron and Originalism: Why Chevron deference cannot be grounded in the original meaning of the Administrative Procedure Act*, 57 Wake Forest L. Rev. 1281, 1289 (2022). Finally, other portions of the APA provide for deference in other

contexts – therefore reinforcing the argument that Congress never intended to delegate deference to agencies when deciding "relevant questions of law." Id. at 1290.

CONCLUSION

For these reasons, the Court should reverse the decision of the lower court and reverse its findings in *Chevron*.

Respectfully submitted,

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