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 FOR *AMICI CURIAE* DAVID GOETHEL AND JOHN HARAN IN SUPPORT OF PETITIONERS

ANDREW M. GROSSMAN
Counsel of Record
BENJAMIN JANACEK
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for Amici Curiae

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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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae David Goethel and John Haran are participants in New England's commercial fishing industry whose livelihoods have been threatened by the same kind of monitoring mandate, imposed under the same statutory scheme, at issue in this case. Mr. Goethel has plied New England's groundfish fishery for decades, and Mr. Haran, a former commercial fisher, has served since 2010 as a sector manager for vessels working that fishery. Groundfish include cod, flounder, and other fish that live and feed on or near the seabed. Groundfish have been the bedrock of New England's fishing industry since the early sixteenth century, providing generations of families with a livelihood. And the fleet of small, family-owned vessels working that fishery has been decimated over the past decade, due in part to the burden and expense of carrying and paying for federal monitors.

After National Marine Fisheries Service (NMFS) began requiring groundfish vessels to pay for monitors, Mr. Goethel challenged the rule imposing that requirement as exceeding the agency's authority under the Magnuson-Stevens Act (MSA). His suit was dismissed as untimely on the basis that the regulatory scheme had been imposed years before NMFS announced that vessel-owners would have to pay for monitoring. *See generally Goethel v. United States Dep't. of Com.*, 854 F.3d 106 (1st Cir. 2017).

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

Amici's interest in this case is preserving the heritage of their industry and the viability of the small, family-owned enterprises that have been its backbone for centuries.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a case presenting questions of statutory interpretation and agency-deference doctrines, it is all too easy to lose sight of the people and communities affected by the resolution of those questions. In this case, they are not hypothetical. The NMFS regulatory mandate that commercial fishing-vessel owners pay for ride-along government monitors threatens the livelihoods of countless small, family-owned fishing enterprises. That mandate serves as a stark illustration of the way that deferring to agencies on the meaning of the statutes they administer disproportionately injures individuals, families, small business, and communities in ways that Congress, accountable to the people, would never have accepted. This is one pathology of deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984): it shifts important policy decisions from Congress, where representatives and senators safeguard their constituents' local interests, to agencies, where there is no check against the most powerful and concentrated interest groups getting their way at the expense of their smaller, less powerful competitors.

That is what happened here. Small fishing enterprises operate on tight margins and face the risk of disaster, financial and otherwise, with every trip to sea. On a given day, the weather may shift to storm, forcing the vessel to shore. Sometimes the catch is

light. Prices at the pier can drop following a large catch. Equipment failures may cut a trip short. Lately, fuel prices have been on the rise, squeezing margins. And there are, as with most any small business, a million more risks and contingencies. Add to all that the requirement to carry a government monitor aboard an already cramped vessel, which may barely have room for the working crew. And then add to that the NMFS's regulatory invention of making the owners of fishing vessels engaged in garden-variety commercial fishing foot the bill for the monitor, at a cost that may even exceed their own take for a trip. Little surprise, that funding mandate threatens the continued viability of small fishing enterprises. In so doing, it threatens a way of life that predates the Founding.

Of course, not every boat has been forced aground—to the contrary, monitoring requirements have been a boon for the very largest enterprises. While smaller players are being squeezed, private-equity has edged into their longtime fisheries, accelerating the displacement of family-owned businesses that have plied those waters for generations. Large enterprises, after all, are better able to bear the cost of regulatory compliance. The NMFS's drive to expand industry-paid monitoring is a factor changing the face of the industry, in a way that no one seriously argues Congress intended. This is just one more example of the way that agency-empowering legal doctrines disproportionately injure small business.

The reason for that disparate impact is the different accountability structures that apply to Congress and to regulators. Congress is accountable to the peo-

ple through the ballot box and so strives to avoid policy choices that might displace Members' constituencies. Regulators, by contrast, do not face that political check. They are subject only to weak oversight on most matters by the President and Congress, but then also the constant attention of well-organized special interests. The decision below, by deriving agency power from statutory silence, effectively shifts an important policy question from one accountability regime, which is solicitous of small business and local interests, to a different one that favors the larger and more powerful regulated parties who have the agency's ear.

Chevron rests on the cornerstone presumption that Congress "understood that the ambiguity would be resolved, first and foremost, by the agency," rather than the courts. *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740–741 (1996). Yet the circumstances of this case illustrate how *Chevron* deference systematically leads to policy outcomes that Congress never would have countenanced. *Chevron*'s central premise being false, the Court should overrule its rule of deference or, at a minimum, clarify that statutory silence is not agency-empowering ambiguity but proof that "an agency literally has no power to act." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

ARGUMENT

I. The Monitor-Funding Mandate Favors Big Businesses Over Small Ones, Contrary To Congressional Policy

The regulatory action at issue in this case imposes disproportionate costs and burdens on small, often family-owned fishing enterprises, in conflict with Congress's own policy judgments expressing sensitivity to the needs of small business in the very statute at issue. That result should not be surprising. It is a function of the very different accountability regimes that apply to Congress, which is comprised of elected representatives who advocate for their constituencies, and administrative agencies, which are staffed by cloistered bureaucrats who represent no one in particular. The effect of *Chevron* deference is to shift policy decisions from Congress to agencies and thereby from one accountability regime, which provides incentives and opportunities to protect local interests, to another, where overriding policy objectives and sterile cost-benefit analysis tend to drown out minor concerns like how a mandate might destroy family businesses in one or another locale. When policymaking authority is shifted to agencies, Congress's interest in protecting small business and local traditions often fall by the wayside. Also lost, then, is the people's will, displaced by that of the well-connected and well-funded special interests who have agencies' ear as they formulate nationwide policy.

A. At-Sea Monitoring Costs Are Pushing Small Fishing Enterprises Out of Business

The Magnuson-Stevens Act ("MSA") evinces Congress's special solicitude for the local and traditional. In 1976, Congress passed and President Gerald Ford signed the MSA into law to preserve the fishing industry well into the future. As is common in federal statutes, Congress paid particular attention to the interests of small fishing enterprises, well aware that their survival was critical to this legislative endeavor. For example, after dividing up the administration of the MSA into different regional councils, Congress limited its express authorization for charging vessels fees for on-board monitors to those regions plied by large, profitable enterprises, such as the North Pacific. 16 U.S.C. § 1862(a). To limit the burden, it capped the fees. *Id.* § 1862(b)(2)(E).

In addition to authorizing fees only where necessary and where existing businesses could afford it, the Act consistently reflects Congress's sensitivity for small fishing operations and local fishing traditions. *E.g.*, 16 U.S.C. § 1853(c)(5)(B)(i) (providing that in developing a certain fishing program, the Secretary "shall…consider the basic cultural and social framework of the fishery, especially through the development of policies to promote the sustained participation of small owner-operated fishing vessels and fishing communities"); *id.* § 1864(c)(2)(B) (providing that a Gulf hurricane assistance fund be

developed and funds be used for several areas, including "assistance for small businesses, including fishermen, fish processors, and related businesses"). And when it comes to at-sea monitoring, Congress expressed a preference for accommodating small operations. The Act requires the creation of a fund to be used for the "improvement of monitoring and observer coverage through the expanded use of electronic monitoring devices and satellite tracking systems such as VMS on *small vessels*." *Id.* § 1891(b)(1)(B) (emphasis added).

Congress took care in legislating for good reason. Fishing can be a rewarding profession, but it is a difficult business, especially for those operating small fishing enterprises. Their vessels are cramped and in constant need of maintenance, hours are long, and the sea can be dangerous. Profit margins are low and highly dependent on fate, with the outcome of any trip uncertain at the outset. Many plying this trade are carrying out a family tradition going back generations. And yet today, many small, family-owned fishing enterprises face the plank of failure, as the older generation retires, the younger pursues more lucrative opportunities, and the costs and regulatory burdens of going to sea only wax and never wane.

Where Congress tread carefully to avoid crushing these local interests, the Department's monitor-funding mandate plants a heel on traditional fishing communities, the very ones Congress sought to protect. In recent years, the NMFS and the regional

fishery management councils established under the MSA have increasingly embraced open-ended monitoring requirements not limited to a particular fishery. In the past, such requirements targeted only the largest fisheries, particularly those worked by large ships, and restricted fisheries subject to catch limits. The new requirements, by contrast, reach down to small vessels, often family-owned, working ordinary fisheries.

That has a special impact on small, family-owned fishing businesses. Space is at a premium on small vessels, and carrying a monitor who does not contribute to the catch often displaces a working fisherman or, at the least, gets in the way of fishing operations. And that was bad enough. But the real blow came when NMFS began making fishing vessels foot the bill for the monitors. That financial burden is more than many small fishing enterprises could bear.

Amici's experiences are unfortunate illustrations. In 2010, the New England Fishery Management Council and NMFS amended the Northeast Multispecies Fishery Management Plan to require commercial vessels to give the agency advanced notice of fishing trips so that it could assign an at-sea observer. 75 Fed. Reg. 18,262, 18,272, 18,278 (Apr. 9, 2010). The amendment was justified, in part, by the expectation that monitor coverage would be funded by NMFS, *id*. at 18,272, although the amendment also provided for industry funding of monitoring "to the extent not funded by NMFS," *id*. at 18,342. For the first five years, the agency picked up the cost of

enforcement. *Goethel*, 854 F.3d at 110. Only in 2015 did it announce that it might soon "expect that sector vessels will be responsible for paying at-sea costs associated with the ASM program." 80 Fed. Reg. 12,380, 12,385 (Mar. 9, 2015). Ultimately, the agency required vessels to pay for at-sea monitoring beginning in mid-February 2016. 854 F.3d at 111.

The financial hit was immediate and substantial. If Mr. Goethel's vessel was selected for an at-sea monitor, he would have to pay $700 to $800 for the privilege of hosting a tagalong regulator, in addition to bearing the other costs and inconveniences of carrying an additional non-worker on the trip. *Id*. at 109; *Goethel v. Pritzker*, No. 15-CV-497-JL, 2016 WL 4076831, at *1 (D.N.H. July 29, 2016). And that expense was enough to make a trip a money-loser. At the time, Mr. Goethel feared that the expense of paying for federally-imposed at-sea monitors would force him to sell his boat and abandon his longtime profession. And that is, in the end, what he did, after his 2016 lawsuit challenging the funding mandate was dismissed as untimely. *See* 854 F.3d at 116. The First Circuit upheld that ruling, even while calling for "clarification from Congress" to help "balance[] the competing goals of conservation and the economic vitality of the fishery." *Id*.

Mr. Haran, as a sector manager in the same fishery, has seen first-hand that the costs of monitoring threaten to drive small fishing enterprises out of business by making trips uneconomical. For example, one sector vessel's October 2022 trip would

have been uneconomical if the vessel owner had been required to carry and pay for a monitor. Over a week of work at sea brought in revenue of $39,218.50. But expenses, including high fuel costs (nearly $25,000), left only $12,000 for the vessel's owner and his four-man crew—who were working or stood on watch the entire time, day and night. At current rates, having to pay for a monitor would have reduced that by $7,065. Crew are typically paid out of net revenue, and the cost of monitoring would cut crew income to the point that the vessel's owner could not hire crew members. Without crew, the vessel cannot take to the water.

These experiences are representative. The number of vessels plying New England's groundfish fishery, which has historically been dominated by small players, has plunged in the years since the monitoring mandate came into force. Will Sennott, How Foreign Private Equity Hooked New England's Fishing Industry, ProPublica (July 6, 2022).[2] Indeed, the size of the fleet is now at a historic low. New England Fishery Management Council, Northeast Multispecies (Groundfish) Catch Share Review ii (May 2021).[3] So too are trips and industry employment. *Id.* at v, vii.

While the legal issues presented by this case are consequential, so are the practical consequences of forcing vessel owners to pay for their own ride-aboard

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[2] *Available at* https://www.propublica.org/article/fishing-new-bedford-private-equity.

[3] *Available at* https://s3.amazonaws.com/nefmc.org/Sector-Program-Review_Final-May2021.pdf.

regulators. At stake is nothing less than the continued existence of a storied industry and way of life.

B. By Contrast, Large Enterprises Are Reaping the Rewards of the Monitoring Mandate

The plight of small, family-owned fishing enterprises has been a boon to their larger competitors, which can more easily bear the cost of regulatory compliance, in general, and at-sea monitors, in particular. *See* Lloyd Dixon, et al., The Impact of Regulation and Litigation on Small Business and Entrepreneurship, p. 3 (Feb. 2006) (finding that small business's bear a "disproportionate burden" of regulatory costs "due primarily to *costs of compliance* that don't vary by firm size and that are *incurred on an on-going* (rather than one-time) basis"). New Bedford Mayor Jon Mitchell recently observed that the harms to small fishermen are "being driven by the largest companies on the East Coast.... Small businesses will go out of business...." gCaptain, U.S. Justice Department Probes Private Equity Fishery Deals (Oct. 16, 2022).[4]

While small players are being pushed out of the industry, big business is taking advantage of the situation to gain turf. Over the past decade, "companies linked to private equity firms and foreign investors have taken over much of New England's fishing industry." Sennott, *supra*. That includes the groundfish

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[4] *Available at* https://gcaptain.com/us-justice-department-probes-private-equity-fishery-deals/.

fishery, which private equity-backed business now "dominates." *Id*.

This rapid shift in the industry's composition is due in part to regulatory mandates like the requirement to foot the bill for at-sea monitors. In general, larger enterprises are better able to bear the cost of regulatory compliance than their smaller competitors. *See* C. Steven Bradford, Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation, 8 J. of Small & Emerging Bus. L. 1, 7–11 (2004) (discussing basis in economic theory); W. Mark Crain & Nicole V. Crain, The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business, Nat'l. Assn. of Mfrs. (2014) (surveying studies finding that regulatory compliance costs "fall disproportionately on small businesses").[5] In particular, larger vessels can better bear the burden and expense of monitors than smaller vessels, which have less space and lower revenues. Larger enterprises may also have multiple vessels and salaried crews, and so may have lower per-vessel overhead and do not face the prospect that a single unprofitable trip may spell the end of their business.

Regulators' drive to expand industry-paid monitoring likely reflects agency capture. Given the high costs of engaging in the regulatory process and comparative advantage large businesses enjoy in so doing, agencies are most responsive to the interests of the largest industry participants, who have the resources

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[5] *Available at* https://www.nam.org/wp-content/uploads/2019/05/Federal-Regulation-Full-Study.pdf.

and connections necessary to make themselves heard. *See* Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1, 5 (1998). That is certainly the case in this particular domain: "industrial fishing interests are more overrepresented than any other stake holder" in the process of establishing fishery management plans. Charles T. Jordan, How *Chevron* Deference is Inappropriate in U.S. Fishery Management and Conservation, 9 Seattle J. Envtl. L. 177, 197 (2019) (citing Thomas A. Okey, Membership in the Eight Regional Fishery Management Councils in the United States: Are Special Interests Over-Represented?, 27 Mar. Policy 193, 194 (2003)).

That, in turn, explains why the New England Council and NMFS proceeded with the industry-funding mandate at issue here, notwithstanding that it was opposed by over 90 percent of commenters. *See* Pet.8. Those commenters were obviously not the ones who had the Council's and the agency's ear. Instead, as agencies often do, they listened to "the well-financed and well-organized." Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 21 (2010). It is a fact of life that regulation tends to favor certain groups of producers because of "political power." Joshua D. Wright, Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC, p. 13 (Apr. 2, 2015). That is, some "sets of producers are simply better organized and more politically connected than others." *Id.*

Because the cost of regulation falls disproportionately on small business, legal doctrines that expand regulators' powers will tend to disproportionately injure small business. The impact of imposing monitoring costs on small, family-owned fishing enterprises—a policy imposed by regulatory fiat, not congressional command—is a clear example of the phenomenon.

II. As the Mandate Illustrates, *Chevron*'s Presumption of Congressional Intent Is Mistaken

This case illustrates that *Chevron*'s presumption that Congress intended agencies to decide statutory questions and thereby make policy is often at odds with Congress's own expressed intentions. While it is well-understood that "[w]ealthy interests [] shape regulatory outcomes," Kate Andrias, Separations of Wealth: Inequality and the Erosion of Checks and Balances, 18 U. Pa. J. Const. L. 419, 459 (2015), their doing so presupposes that Congress authorized the regulatory outcome. So when courts defer to an agency's interpretation, not only do they abdicate their duty to say what the law is, but they the aggrandize the agency's power to make policy, cutting out Congress and short-circuiting its Members' accountability to their local constituencies.

The accountability structures inherent in Congress and agencies could not be more different. The Constitution makes Congress accountable to the people for exercising the legislative power and making the fundamental policy choices for government programs. "[T]he framers believed that a republic—a

thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (quoting The Federalist No. 11, at 85 (Alexander Hamilton) (C. Rossiter ed., 1961)). "[B]y vesting the law-making power in the people's elected representatives, the Constitution sought to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be kept in dependence on the people.'" *Id*. (quoting The Federalist No. 37, at 227 (James Madison) (C. Rossiter ed., 1961)).

This "dependence on the people," reaffirmed every even year when all 435 members of the House of Representatives must stand for reelection before their constituents, means that Members must heed the people's will. And many of the people own or are employed by small business. In the United States, there are over 33 million small businesses, and these businesses employ nearly 62 million workers, or nearly half of all employees in this country. Kelly Main & Cassie Bottorff, Small Business Statistics of 2023, Forbes (Dec. 7, 2022).[6]

And when small business speaks, Congress listens. Members do more than simply cast majority votes on legislation. They negotiate, horse trade, and stall, often with the aim of protecting their own con-

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[6] *Available at* https://www.forbes.com/advisor/business/small-business-statistics/#sources_section.

stituents. Indeed, the U.S. Code is filled with statutory carveouts, waivers, and exceptions for small businesses and other local interests. *E.g.*, Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020) (containing a carveout for small business); 17 U.S.C. § 110(5) (containing a small business exception for copyright infringement). Whatever the policy merits of any particular carveout, this is how our system was designed to work. Particular carveouts, bargained for in the lawmaking process, allow the machinery of a national government to work by facilitating the passage of legislation while also accommodating local and specialized circumstances across a vast and diverse country.

Members' concern for local needs is driven by the electoral incentive, and it is a powerful check against large, organized interests getting their way. For example, it is common for legislation to phase in costly requirements at a certain number of employees, exempting small businesses from existence-threatening compliance costs. *E.g.*, Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4)(A)(i) (applicable to employers with at least 50 employees).

By contrast, agencies face no electoral incentive, and thus are not so solicitous of small business, local interests, and their particularized needs. Instead, agency capture "seems to explain a great deal of regulatory activity and history." Michael E. Levine & Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis, 6 J.L. Econ. & Org. 167, 171 (1990). If an industry has

a handful of big players who control a large portion of the market, that handful will be able to organize and interact with an agency in a way that the rest of the industry cannot. This is the logic of collective action. Mancur Olson, The Logic of Collective Action 53 (1965) ("The greater effectiveness of relatively small groups…is evident from observation and experience as well as from theory."). And the big players are, in any event, those the agency *wants* to engage, so as to take the largest "bite" out of any given problem it confronts. Accommodating the needs and circumstances of diverse small and local interests is, from an agency's point of view, at best a distraction from pursuing its policy objectives.

The result is that the major players are able to organize and get their way in regulatory proceedings, while their smaller competitors get shoved to the side. This is true in theory: the "organized and active interest of small groups tend to triumph over the unorganized and unprotected interests of larger groups." *Id*. at 144. And it is true, unfortunately, in fact: "well-organized interest groups [have] systematically captured the United States government and [are] strangling the American economy under the aggregated weight of their successful efforts to obtain special interest favors." Todd Zywicki, Rent-Seeking, Crony Capitalism, and the Crony Constitution, 23 S. Ct. Econ. Rev. 77, 78 (2015) (citing Mancur Olson, The Rise and Decline of Nations (1982)); *see also* Wright, *supra* (Regulation tends to favor certain groups be-

cause of "political power" where some "sets of producers are simply better organized and more politically connected than others.").

Another advantage that major players have in shaping agency outcomes is the opacity of regulatory proceedings to all but those few who can justify the expense of engagement. What small business could possibly keep up with the dozens of rulemakings underway at any time that might affect its operations, let alone evaluate them and engage? These costs further "shield[] officials from accountability to the general polity." Zywicki at 185. And they mean that the large enterprises that can afford to play ball with regulators also get a say in setting the rules of the game, often to the detriment of their smaller competitors. *See* Roy A. Childs, Big Business and the Rise of American Statism 76 (1971) ("The larger capitalists saw regulation as being in their interest, and competition as opposed to it; with the smaller businessmen, the situation was reversed."). This is nothing new. During President Theodore Roosevelt's administration, the big Chicago meatpackers advocated for more regulation "to bring the small packers under control and to aid them in their position in the export trade." Gabriel Kolko, The Triumph of Conservatism 103 (1967). They succeeded, of course: a handful of companies have controlled meatpacking ever since. *See, e.g.*, Explainer: How four big companies control the U.S. beef industry, Reuters (June 17, 2021).[7]

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[7] *Available at* https://www.reuters.com/business/how-four-big-companies-control-us-beef-industry-2021-06-17/.

The bottom line is that agencies systematically fail to account for interests and values, particularly those affecting small business and local concerns, that Congress consistently goes out of its way to protect. So when an agency enjoys discretion to decide statutory questions, it inevitably decides them in ways that are quite different from, and often opposed to, congressional intent. And that reality contradicts any presumption that Congress intended to delegate such decisions to agencies. After all, why would Congress delegate decisions to agents that are predisposed to dismiss its own central concerns? By contrast, the courts are neutral agents of Congress, charged only with discerning what it wrought through legislation. Their decisions on tough statutory questions may be right or wrong, but are not, unlike with agencies, predisposed in any direction.

The divergent accountability structures *especially* lead to wayward regulatory results when statutory silence is at issue. Regarding statutory silence as ambiguity entrusted to the agency to "interpret," as the court below did, cuts the chain of accountability to the people. It speaks volumes that Congress, facing different lines of accountability than the NMFS, declined to expressly authorize industry-funded monitoring across the board, but did so only for specific regions and circumstances—those that it adjudged reasonably able to bear the cost. Deferring to the agency in these circumstances allows it to venture where Congress, subject to an electoral check, refused to tread.

Moreover, crediting an agency's claim to power in the face of statutory silence brings with it all the pathologies that flow from breach of the constitutional separation of powers. Should a New Bedford resident concerned about the future of a local industry and way of life regard the industry-funded-at-sea-monitoring mandate as Congress's error or NMFS's? Either is plausible. In the view of the court below, Congress authorized it, or at least implicitly delegated the power to decide to the agency. Pet.App.14–16. On the other hand, the agency's action cannot fairly be described as merely executing the statute. This "diffusion of power carries with it a diffusion of accountability." *Free Enter. Fund v. Pub. Co. Acctg. Oversight Bd.*, 561 U.S. 477, 497 (2010). And so "the public cannot 'determine on whom the blame or the punishment of a pernicious measure…ought really to fall.'" *Id.* at 498 (quoting The Federalist No. 70, at 476 (Alexander Hamilton) (C. Rossiter ed., 1961)).

Whether it is small business trying to compete against their largest competitors teamed up with their regulators, or the people trying to figure out who to hold accountable for this country's laws, deep structural imbalances pervade this case. And *Chevron* deference further entrenches them. This Court should chart a new course. Special interests coopting our laws "was the animating concern of the Framers themselves when they established the Constitution." Zywicki, at 79. A concern reflected in our "elaborate system of separation of powers, checks and balances, federalism, enumerated powers, and even the Bill of Rights itself." *Id.* By deferring to regulators, this

Court undermines that system of separation of powers, putting a thumb on the scale for agencies and, in turn, the powerful special interests capable of working the regulatory process.

CONCLUSION

The Court should reverse.

Respectfully submitted,

ANDREW M. GROSSMAN
Counsel of Record
BENJAMIN JANACEK
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for Amici Curiae
David Goethel and John Haran

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