No. 22-451

IN THE

Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, *ET AL.*,
Petitioners,

v.

GINA RAIMONDO, SECRETARY OF COMMERCE, *ET AL.*,
Respondents.

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

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOSEPH D. HENCHMAN
Counsel of Record
TYLER MARTINEZ
NATIONAL TAXPAYERS
UNION FOUNDATION
122 C Street N.W., #700
Washington, D.C. 20001
jbh@ntu.org
(703) 683-5700

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

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[1] Pursuant to Supreme Court Rule 37, counsel for *Amicus* represents that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case's Question Presented is bold, asking if this Court should overturn the central holding of *Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or, in the alternative, "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." Pet. Br. at i. We write to highlight the error of deferring to agency action based on statutory silence.

The most egregious abuses of "*Chevron* deference" come when the agency is legislating out of whole cloth, based on the "silence" of the relevant statute. *Chevron's* deference rests on the theory that an agency fills gaps left by Congress. Explicit gaps are of little worry, for Congress specifically asked the agency to regulate where Congress lacked expertise. *Implicit* gaps—statutory silence—are much more worrisome, because deference to agencies in this context allows them to substantially legislate.

Taxpayers know all too well the pain of bureaucratic fiat taking the place of proper legislation. We detail recent examples. The IRS has a long history of regulating based on "silence" in the Internal Revenue Code, despite the statutory frameworks famous level of detail and Congressional attention. When the tax laws are silent, but the IRS wishes to regulate anyway, then the taxpayers suffer—all because of *Chevron*'s allowance of "silence" as a basis for agency action and judicial deference.

There is a small line of cases where the judiciary has not deferred to agency rulemaking out of statutory silence. This Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), refused to infer secondary civil liability when the relevant securities statute was silent. More importantly, both Congress and the agencies have reacted to the decisions in the *Central Bank of Denver* line. Congress reacted by enacting a specific statute regulating secondary civil liability. In another instance, when a district court applied *Central Bank of Denver*, the agency was able to repeal its offending regulation. In this way, the Court can know that if it rules for Loper Bright's fishermen, Congress and the administrative state can apply the new rules going forward.

Indeed, as a practical matter for the dispute in this case, Congress knows how to allow an agency to collect fees to help fund itself. Major agencies with this power to collect fees, like the Securities and Exchange Commission, all have specific language in their statutes allowing for the collection of fees. The National Marine Fisheries Service has no such authority to collect fees from domestic operations like Loper Bright Enterprises.

This Court should, at the very least, clarify that statutory silence cannot be used this way. Agencies need clear mandates when they can regulate and collect fees. That has not happened here, and so the regulation is *ultra vires*. The decision below should be reversed.

ARGUMENT

Despite jurisdictional differences, courts invoke *Chevron* frequently, and when they do, "agencies [win] significantly more." Kent Barnett and Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH L. REV. 1, 6 (2017). (finding the agency-win rate with *Chevron* was 77.4% and in cases without invoking *Chevron*, 53.6%). If the reviewing court gets to *Chevron* Step Two,[2] the agency almost always wins. *Id*. (finding 93.8% win rate at Step Two). That is because lower courts mechanically apply *Chevron*, deeming "reasonable" even expansive regulations promulgated by unelected agency officials.

But *Chevron* Step One, often glossed over by courts, is essential. *See id*. (only 30.0% of cases resolved at Step One). That is because much of the judicial analysis is not merely interpreting ambiguous terms or harmonizing conflicting provisions. Instead, *Chevron* decisions often bless agency *legislation*—based on the "silence" of the statute. The result is an administrative state with vast, unchecked powers that hinders the Constitution's careful balance of powers. This Court should, at the least, strengthen

[2] Under *Chevron*, courts ask if Congress spoke directly to the precise question, for then the court and agency "must give effect to the unambiguously expressed intent of Congress," but "[i]f the statute is *silent* or ambiguous" on the precise question, the court must ask "whether the agency's [interpretation] is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842–43 (emphasis added).

Chevron Step One by barring "silence" as a basis for regulatory interpretation.

I. *CHEVRON'S* CHIEF ERROR: STATUTORY SILENCE IS NOT AMBIGUITY.

A. *Chevron* Deference Ought Not Apply to Statutory Silence.

Chevron's framework rests on the theory that an agency fills gaps explicitly or implicitly left by Congress. *See Chevron*, 467 U.S. at 843. Filling in explicit gaps or resolving potentially conflicting provisions is materially different than "implicit" gaps supposedly from statutory silence. Allowing deference based on implicit silence wreaks havoc upon Americans who must contend with unelected bureaucrats acting in place of Congress.

Explicit gaps emanate "from an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," leaving agencies with restricted interpretative powers and a mandate to apply the law as written. *Id.* at 843–44. Explicit gaps come from statutes that tell agencies to use their expertise.

The examples of explicit gaps asking for rulemaking are numerous. The Secretary of Agriculture, in the effort to prevent forest fires, "may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. § 551. Congress told the Department of Health and Human Services to "promulgate regulations to establish and implement an administrative process for the resolution of claims by covered entities that they have been overcharged for drugs." 42 U.S.C. § 256b(d)(3)(A). The Federal Energy Regulatory Commission has the explicit power to "prescribe, and from time to time thereafter revise, such rules as it determines necessary" in the aid of "encourage[ing] cogeneration and small power production," and "encourage[ing] geothermal small power production facilities of not more than 80 megawatts capacity." 16 U.S.C. § 824a-3(a). And Congress can create whole new areas of regulatory responsibility for an agency. For example, Congress empowered—explicitly—the Federal Trade Commission to regulate beyond its typical jurisdiction to include protecting online consumer reviews. 15 U.S.C. § 45b(d)(2)(A).

In contrast, *implicit* gaps generated by "silence" give agencies unchecked interpretive powers so long as an interpretation is *reasonable*.[3] Vital to a court's implicit delegation inquiry is *Chevron*'s inquiry if the statute is "*silent* or ambiguous," for a finding of silence or ambiguity seemingly permits courts to proceed to Step Two. *Chevron*, 467 U.S. at 843 (emphasis added).

Much of this tension between explicit and implicit ambiguity is better characterized as a debate on the delegation doctrine. Sometimes silence might "convey… a refusal to tie the agency's hands." *Entergy Corp v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009). But statutory silence is better interpreted as Congress

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[3] Courts generally use "permissible" and "reasonable" interchangeably. *See e.g.*, *Barnhart v. Walton*, 535 U.S 212, 224 (2002) (noting that "the Agency's regulation seems a reasonable, hence permissible, interpretation of the statute").

limiting discretion. *See*, *e.g.*, *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001) (rejecting idea that "an agency can cure an unlawful delegation of legislative power by adopting in its discretion [its own] construction"); *Entergy*, 556 U.S. at 223 (applying *American Trucking)*. Fundamentally, "[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." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995). That is what we have here: an agency creating a whole fee structure based on the silence of the statute.

In the case of Loper Bright, we should not be asking if the agency fee is *reasonable*. That is a Step Two question. Instead, under Step One, a better rule is that silence "does not necessarily connote ambiguity, nor does it automatically mean that a court can proceed to… [S]tep [T]wo." *Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018). Interpretations of silence must therefore stem from specific "grant of power" to proceed to Step Two. *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, J., concurring); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986) (emphasizing that "an agency literally has no power to act... unless and until Congress confers power upon it"). By allowing for silence to be the basis for new agency action, the regulated community faces surprises from regulatory "legislation."

Loper Bright illustrates this recurring problem. In conducting its *Chevron* analysis, the D.C. Circuit read silence as ambiguity, resulting in the agency interpretation being upheld as reasonable at Step Two. App-13, App-15. But it conflated what happens with *foreign* fisheries with what happens in statute to *domestic* firms. App-10-11. In § 204 of the Magnuson-Stevens Act, Congress prescribed foreign fishing fees, *see* 16 U.S.C. § 1824(b)(10), and in Section 201, Congress established a fee schedule requiring owners and operators of foreign vessels to pay for certified observers' services, *see* 16 U.S.C. § 1821(h)(4). But nowhere in the Magnuson-Stevens Act did Congress expressly and unambiguously delegate to the Service the authority to require Regional Fishery Management Councils—regulating domestic fisheries—to pay a fee for the cost of observers required by the Service. Court approval of the agency's *ultra vires* action here, based on "silence" in the statute, is usurping Congress's core power to write laws for the Executive branch to follow.

B. Taxpayers Suffer from Regulations Based Upon Statutory Silence.

It is not only fishermen who suffer under expansive readings. *Loper Bright* is one of the numerous instances where an agency's interpretation of a "silent or ambiguous" statute exceeds the bounds erected by Congress's unambiguously expressed intent, but a court upheld the interpretation as reasonable, conflating *Chevron* Steps One and Two. Taxpayers often must battle against agency rulemaking based upon silence.

One such example is the issue of the IRS charging a fee for a regulatory program struck down under *Chevron*—even though the program was gone, nonetheless the D.C. Circuit found that the fees could still be collected. In 2010, the Internal Revenue Service created a new regulation to register tax preparers (people who prepare a client's tax return for compensation). *Montrois v. United States*, 916 F.3d 1056, 1058 (D.C. Cir. 2019). The problem: the IRS charged tax preparers a rather large fee in order to register with the IRS and attached a whole regulatory scheme in connection with getting a Preparer Tax Identification Number ("PTIN"). *Id.*

Despite the regulatory regime being mostly invalidated, the D.C. Circuit still held that the PTIN fee could be collected by the bureau. *Id.* at 1060 (discussing *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), which invalidated the regulatory scheme); *Id.* at 1062 (upholding the PTIN fee despite *Loving*'s general gutting of the regulation). To be clear, the D.C. Circuit already found that the PTIN regulations failed under *Chevron* Steps One *and* Two. *Loving*, 742 F.3d at 1022 ("Put in *Chevron* parlance, the IRS's interpretation fails at *Chevron* step 1… [the regulation] also fail at *Chevron* step 2 because it is unreasonable"). Nonetheless, the *Montrois* court still upheld the regulatory fee based upon a general grant of fee collecting authority under 31 U.S.C. § 9701 (the Internal Revenue Code itself was silent on the matter of PTINs).[4] *Montrois*, 916 F.3d at 1062.

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[4] Note that 31 U.S.C. § 9701 is a general grant of authority for government agencies to charge "service fees." The government should not rely on § 9701 in Loper Bright's case because under 31 U.S.C. § 3302(b), the revenue collected must go to the Treasury—not kept by the agency to self-fund its programs. The fees at issue in this case are also not valid "service fees" with a

The *Montrois* court found *Chevron* Step One was satisfied based on the general fee statute despite the Internal Revenue Code's silence on charging fees in this context. *Id.* at 1063-64. The D.C. Circuit then went to Step Two to find the fee requirement reasonable. *See id.* at 1067 (relying on *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016), that only "a '"satisfactory explanation for [the agency's] actions"' need be '"reasonably be discerned"') (bracket supplied).

Likewise, the Seventh Circuit has held that a Treasury regulation establishing a two-year limitations period to request equitable innocent spouse relief was *reasonable*, despite statutory silence on any deadline to ask for such relief. *See Lantz v. C.I.R.*, 607 F.3d 479, 481 (7th Cir. 2010) (applying *Chevron*). At issue were statutory procedures for an innocent spouse to be relieved from joint and several liability with their spouse who owes back taxes. *See* 26 U.S.C. § 6015(c). If the IRS is actively collecting back taxes, generally the innocent spouse has two years "after the date the Secretary has begun collection activities" to ask for relief. 26 U.S.C. § 6015(c)(3)(B) (procedures to limit liability for taxpayers no longer married or taxpayers legally separated or not living together); *cf.* 26 U.S.C. § 6015(b)(1)(E) (same, but applicable to *all* joint filers). Congress specifically provided for equitable relief *without* a deadline. 26 U.S.C. § 6015(f). But, 26 C.F.R. § 1.6015–5(b)(1)

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specific benefit to domestic fishers because the fishers do not get a specific benefit to paying for the inspectors to board their ships.

imposed, by regulation, a two-year limitation for seeking equitable relief.

The Tax Court declined to apply the regulatory deadlines, concluding that Congress created deadlines in subsection (b) and (c) but not (f), for a reason. *Lantz v. C.I.R.*, 132 T.C. 131, 139 (2009). The Seventh Circuit reversed and upheld the IRS's regulation, stating "[w]hether the Treasury borrowed the two-year limitations period from subsections (b) and (c) or simply decided that two years was the right deadline is thus of no consequence; either way it was doing nothing unusual." *Lantz*, 607 F.3d at 482. Thus, the Seventh Circuit acquiesced to agency *legislation* that denied the explicit equitable relief Congress commanded in statute.[5]

As these cases demonstrate, when the tax laws are silent and the administrative state wishes to regulate, then the taxpayers suffer.[6] All these cases

[5] *Chevron* originally reserved to the judiciary "the final authority on issues of statutory construction" and commanded courts to "reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9 (collecting cases). This has been largely ignored in later case law. *See*, *e.g.*, *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 301 (2013) (deferring to agency's own interpretation of its jurisdictional reach).

[6] But when it favors the government, the IRS tells taxpayers to not read too much into silence. *See*, *e.g.*, Chandra Wallace, *Don't Read Into Silence in Corporate AMT Notice, IRS Says*, TaxNotes (June 9, 2023) https://www.taxnotes.com/tax-notes-today-federal/corporate-alternative-minimum-tax/dont-read-silence-corporate-amt-notices-irs-says/2023/06/09/7gvl5 (noting that an IRS official recently maintained that "[i]f [IRS] is silent on an issue… [IRS officials] don't want people to infer anything").

are in direct tension with this Court's direction in *National Cable Television Association, Inc. v. United States*, 415 U.S. 336, 340 (1974), that "[t]axation is a legislative function, and Congress… is the sole organ for levying taxes."[7] Agencies should not be collecting money on their own accord.

The court below points to "necessary and appropriate" clauses as grants of authority to the Service. *See* App-7. General grants of authority to promulgate "necessary and appropriate" rules and regulations, however, cannot expand the provision's scope, nor does it mean that Congress directly spoke on the precise question at issue. In this Court's words: "silence [is] exactly that: silence." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015).

Congress's deafening silence on whether the Magnuson-Stevens Act permitted the National Marine Fisheries Service to require industry to pay the cost of monitors indicates that Congress did not authorize the agency to fix the gap. Removing *Chevron*'s blessing of agency rulemaking based on "statutory silence" for this case will help taxpayers in other cases presented with *ultra vires* regulations.

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[7] Prior to *Chevron*, this Court long held that silence is "a poor beacon to follow in discerning the proper statutory route" in deciding scope of agency authority. *Zuber v. Allen*, 396 U.S. 168, 185 (1969). A thread of this idea remains. *Burns v. United States*, 501 U.S. 129, 136 (1991) (noting that "[n]ot every silence is pregnant," quoting *State of Ill., Dep't of Pub. Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)) (bracket supplied).

C. Courts Know How to Demand Clarity Before Expanding Regulatory Reach.

In a narrow line of cases dealing with secondary civil liability, this Court has declined to uphold usurped authority when the statute was silent. This Court should expand that line of cases—covering everything from securities law to anti-terrorism statutes to campaign finance law—to apply to the rest of *Chevron*'s progeny.

In *Central Bank of Denver*, this Court held that secondary civil liability cannot be inferred when a statute is silent because, unlike federal criminal laws, there is no general secondary civil liability statute. *See Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185 (1994). And *Central Bank of Denver* has been applied under *Chevron* analyses as well. *See, e.g.*, *Fed. Election Comm'n v. Swallow*, 304 F. Supp. 3d 1113, 1118 (D. Utah 2018).

At issue in *Central Bank of Denver* was whether secondary civil liability could attach to violations of the securities laws. The Central Bank of Denver served as indenture trustee for bond issues surrounding a Colorado Springs, Colorado development. *See Central Bank of Denver*, 511 U.S. at 167. When the real estate did not meet the contractual threshold of value for the bonds and defaulted, the First Interstate Bank of Denver sued the development authority, the underwriters, and the Central Bank of Denver, claiming "violations of § 10(b) of the Securities Exchange Act of 1934." *Id.* at 168.

The *Central Bank of Denver* Court held that, "the text of the statute controls our decision," *id.* at 173, because the government "cannot… read [statutory liability] more broadly than its language and the statutory scheme reasonably permit," *id.* at 174 (quoting *Chiarella v. United States*, 445 U.S. 222, 234 (1980)) (internal quotation marks omitted). The statutory language of § 10(b) of the Securities Act did not mention aiding and abetting. *Id.* at 175. Furthermore, "[t]he federal courts have not relied on the 'directly or indirectly' language when imposing aiding and abetting liability under § 10(b), and with good reason. There is a basic flaw with this interpretation... aiding and abetting liability extends *beyond* persons who engage, even indirectly, in a proscribed activity." *Id.* at 176 (emphasis added). That is, "aiding and abetting liability reaches persons who do not engage in the proscribed activities at all." *Id.*

Therefore, this Court recognized that "Congress knew how to impose aiding and abetting liability when it chose to do so." *Id.* (collecting examples from statute). The courts are not free to "amend the statute to create liability for acts that are not themselves… within the meaning of the statute." *Id.* at 177-78. Whether or not it is good policy to allow for secondary liability is no matter—the statutory language controls. *Id.* at 188. ("Policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it."). Since the statute did not apply aiding and abetting liability, "the statute itself resolve[d] the case." *Id.* at 178.

As the dissenting justices pointed out, the holding of *Central Bank of Denver* not only applied to the *private* civil claims at issue there but claims by the Securities and Exchange Commission as well. *See id.* at 200 (Stevens, J., dissenting) ("The majority leaves little doubt that the Exchange Act does not even permit the SEC to pursue aiders and abettors in civil enforcement actions").

Congress reacted to *Central Bank of Denver* and corrected the silence by enacting a positive statute for the SEC to rely upon. *See*, *e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008) (noting legislation, codified at 15 U.S.C. § 78t(e), in response to *Central Bank of Denver*). Therefore, while *Central Bank of Denver* was a blow to agency authority, Congress decided to affirmatively react. We can expect no less in the case at bar if Congress wishes to give the National Marine Fisheries Service has the power it seeks.

Nor is *Central Bank of Denver* only applicable in the financial regulation context. Lower courts apply the rule of *Central Bank of Denver's* to other federal statutes, including statutes in the national security context. For example, the *en banc* Seventh Circuit applied *Central Bank of Denver*'s rationale to hold that statutory silence cannot imply Congressional acquiescence to creating secondary liability for those accused of helping terrorists. *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008) (*en banc*) (holding "statutory silence on the subject of secondary liability means there is none"). The Second Circuit agreed. *See*, *e.g.*, *Terrorist Attacks on September 11, 2001 v. Al Rajhi Bank*, 714 F.3d 118, 123 (2d Cir. 2013) (citing *Central Bank of Denver*, 511 U.S. at 185).

And even when statutes are complex and touch on fundamental rights, *Central Bank of Denver*'s rule is workable in the courts. For example, a district court struck down a Federal Election Commission ("FEC") regulation because it went beyond Federal Election Campaign Act's unambiguous language. In creating secondary liability by agency fiat, the *Swallow* court held, the FEC "went too far, exceeding its authority to write regulations and improperly intruding into the realm of law-making that is the exclusive province of Congress." *Swallow*, 304 F. Supp. at 1118. And just like Congress in the wake of *Central Bank of Denver*, the FEC adapted to the *Swallow* decision by removing the offending regulation. Fed. Election Comm'n, Notice 2023-09, Contributions in the Name of Another, 88 Fed. Reg. 33816 (May 25, 2023) (interim final rule removing regulation at issue in *Swallow*).

The *Central Bank of Denver* line of cases show that the judiciary can carefully review regulatory action without deferring to rulemaking in "silence." Congress demonstrated it can adapt to the rulings by giving explicit permission in statute when it so desires. Likewise, agencies can adapt and make proper rules, as happened in *Swallow*. Unlike *Chevron*'s deferral on silence, *Central Bank of Denver*'s mandating express Congressional language is in line with our Constitutional order—and practically workable in the real world.

II. CONGRESS KNOWS HOW TO GRANT THE AUTHORITY TO COLLECT FEES.

"Article I Section 1 of the Constitution vests all legislative power in 'a Congress of the United States,' which alone is authorized to make laws," and "all others, including independent government agencies, are not." *Swallow*, 304 F. Supp. 3d at 1118. The case at bar highlights the administrative state's rapid growth and blurring the line between these once separate and distinct branches of government.

At issue here is a violation of Congress' core powers over taxing and spending. Only Congress has the federal "Power To lay and collect [federal] Taxes, Duties, Imposts and Excises." U.S. Const. art. I, § 8, cl. 1. It is the role of Congress to set out the statutory framework, not the executive agencies. *See*, *e.g.*, The Federalist No. 47 (Madison) at 250 (George W. Carey and James McClellan, eds. 2001) (articulating that "the preservation of liberty requires that the three great departments of power should be separate and distinct") (comma omitted). Congress "commands the purse" and "prescribes the rules" regulating the duties and rights of each citizen. The Federalist No. 78. (Hamilton), *id*. at 402.

When the Congress wants an agency to collect money, it knows how to do so explicitly. For example, in the Securities & Exchange Acts, Congress expressly and unambiguously granted the Securities and Exchange Commission ("SEC") the authority "to collect transaction fees and assessments that are designed to recover the costs to the Government of the annual appropriation to the Commission by Congress." 15 U.S.C. § 78ee(a). In the Leahy–Smith

America Invents Act, Congress expressly and unambiguously delegated to the United States Patent and Trademark Office ("USPTO") the authority to set and adjust patent fees. 35 U.S.C. § 41 (comprehensive fee schedule). And in the Federal Deposit Insurance Act, Congress expressly and unambiguously delegated to the Federal Deposit Insurance Corporation (the "FDIC") the authority to require insured institutions "pay the Corporation any fee which the Corporation may by regulation prescribe, after giving due consideration to the need to establish and maintain the reserve ratio of the Deposit Insurance Fund." 12 U.S.C. § 1815(d)(1).

Congress also controls what government programs are funded out of the treasury, as an important check on agency action. U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). This power of appropriations is "a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation" by executive agencies. Joseph Story, Commentaries on the Constitution of the United States: With A Preliminary Review of the Constitutional History of the Colonies and State Before the Adoption of the Constitution § 1348, at 215 (4th ed. 1873);[8] *see also Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427 (1990) (quoting same). This constitutional order exists to "assure that public funds will be spent according to the letter of the

[8] *Archived online at*: https://repository.law.umich.edu/cgi/viewcontent.cgi?filename=18&article=1105&context=books&type=additional.

difficult judgments reached *by Congress* as to the common good *and not according to the individual favor of Government agents*." *Richmond*, 496 U.S. at 428 (emphasis added). Allowing, under the guise of *Chevron* deference, agencies to self-fund undermines this essential power of the Congressional purse.

In Section 204 of the Magnuson-Stevens Act, Congress prescribed foreign fishing fees. *See* 16 U.S.C. § 1824. And in Section 201, Congress established a fee schedule requiring owners and operators of foreign vessels to pay for certified observers' services. *See* 16 U.S.C. § 1821. But, nowhere in the Act did Congress expressly and unambiguously delegate to the Service the authority to collect fees from *domestic* fisheries—especially when appropriated money ran out. Instead, by a plain reading of the Act, Congress chose to be silent, and perhaps by that silence, have only those not otherwise taxed heavily—*i.e.,* those under foreign flags—pay their share. Domestic fisheries like *Loper Bright* already pay their way in taxes. The agents should not take this silence and become roving tax collectors.

Statutory silence should not be a justification for unelected agency heads to change the law. This Court should, at the very least, clarify that statutory silence cannot be used this way. Agencies need clear mandates before they can collect fees. That has not happened here, and therefore the program's fees are *ultra vires*.

CONCLUSION

For the foregoing reasons, *Amicus* requests that this Court reverse the decision below.

Respectfully submitted,

JOSEPH D. HENCHMAN
Counsel of Record
TYLER MARTINEZ
NATIONAL TAXPAYERS
UNION FOUNDATION
122 C Street N.W., #700
Washington, D.C. 20001
jbh@ntu.org
(703) 683-5700

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