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 Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF RELENTLESS INC., HUNTRESS INC., AND SEAFREEZE FLEET LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JOHN J. VECCHIONE
Counsel of Record
MARK S. CHENOWETH
KARA M. ROLLINS
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
John.Vecchione@ncla.legal

December 15, 2022

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2(b), Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC respectful request leave to submit a brief as *amici curiae* in support of the petition for writ of certiorari filed by Loper Bright Enterprises, Inc., et al. A*mici* provided notice to all parties' counsel of its intent to file this brief on December 6, 2022, and counsel for *amici curiae* requested consent from Respondents. Petitioners provided blanket consent. To date, no response has been received from Respondents despite repeated inquiries. Respondents have requested an extension of time to respond to Petitioners and will suffer no prejudice from grant of this motion.

Amici are all involved in herring fishing in New England. They are appellants in *Relentless Inc., et al. v. Dep't of Commerce, et al.,* No. 21-1886, now pending in the U.S. Court of Appeals for the First Circuit. Below, *amici* draw on their experience under the challenged program and on the experience of similarly situated members of the fishing industry in various circuit courts of appeals. This experience would provide the Court with additional insight into the scope of the challenged program and the role courts have played in granting deference to agencies administering the Magnuson-Stevens Act.

For the foregoing reasons, proposed *amici curiae* respectfully request that the Court grant its motion to file the attached proposed brief.

Respectfully submitted,

/s/ John J. Vecchione

JOHN J. VECCHIONE
Counsel of Record
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
John.Vecchione@ncla.legal

December 15, 2022

QUESTIONS PRESENTED

1. Should the Court grant *certiorari* to resolve the Circuit split between the D.C. Circuit and the Fifth Circuit on how *Chevron* deference affects agency decisions under the Magnuson-Stevens Act ("MSA")?

2. Should the Court grant *certiorari* to determine whether an agency, in the absence of a congressional appropriation or statutory grant to charge regulated industry fees, can create programs funded through forced contracting between the regulated parties and a government servant?

3. Should the Court grant *certiorari* to determine the proper scope of the MSA and its interpretation, which it has not done for almost two generations?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES...................................... iii
INTEREST OF AMICI CURIAE 1
SUMMARY OF ARGUMENT.....................................2
ARGUMENT 4

I. THERE IS A CIRCUIT SPLIT ON THE USE OF *CHEVRON* IN INTERPRETING THE MSA AND THIS COURT SHOULD RESOLVE IT 4

A. The First, D.C., and Ninth Circuits Routinely Abet Administrative Power by Using *Chevron* Deference to Approve Agency Action..5

B. *Chevron* Is Not "Rarely" Invoked 7

II. AGENCIES MUST NOT BE ALLOWED TO CIRCUMVENT CONGRESSIONAL APPROPRIATIONS BY FORCING REGULATED PARTIES TO PAY GOVERNMENT SALARIES...................................10

III. THE COURT SHOULD GRANT *CERTIORARI* TO DETERMINE THE PROPER SCOPE OF THE MSA IN LIGHT OF ITS CURRENT *CHEVRON* PRECEDENT 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Amoco Prod. Co. v. Village of Gambell,
480 U.S. 531 (1987)..14

Arrangure v. Whitaker,
911 F.3d 333 (6th Cir. 2018) 8

Atl. Fish Spotters Ass'n v. Evans,
321 F.3d 220 (1st Cir. 2003)..................................12

Buffington v. McDonough,
143 S. Ct. 14 (2022)..7, 15

Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.,
467 U.S. 837 (1984)..2

Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB,
51 F.4th 616 (5th Cir. 2022)..................................11

Glacier Fish Co. v. Pritzker,
832 F.3d 1113 (9th Cir. 2016)..................................7

Goethal v. Dep't of Com.,
854 F.3d 106 (1st Cir. 2017)..................................12

Goethal v. Pritzker,
No. 15-cv-497-JL, 2016 WL 4076831 (D.N.H. July 29, 2016)..12

Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.,
968 F.3d 454 (5th Cir. 2020) 2, 4

Japan Whaling Ass'n v. Am. Cetacean Soc'y,
478 U.S. 221 (1986)..14

Lovgren v. Locke,
701 F.3d 5 (1st Cir. 2012) 2, 5

Or. Trollers Ass'n v. Gutierrez,
452 F.3d 1104 (9th Cir. 2006)..................................7

Relentless Inc. v. Dep't of Com.,
561 F. Supp. 3d 226 (D.R.I. 2021) 6, 12

U.S. v. Cusick,
No. 11cr10066-LTS, 2012 WL 442005 (D. Mass.
Feb. 9. 2012)..13

Yates v. U.S.,
574 U.S. 528 (2015)..14

Statutes

16 U.S.C. § 1821 13

16 U.S.C. § 1827 ....11, 13

16 U.S.C. § 1854 11

16 U.S.C. § 1862 11

Other Authorities

Brett M. Kavanaugh, *Fixing Statutory Interpretation*,
129 Harv. L. Rev. 2118 (2016)..................................6

CODA (Vendôme Pictures & Pathé Films 2021) 5

Deadliest Catch (Discovery Channel) 7

Final Rule,
85 Fed. Reg. 7,414 (Feb. 7, 2020) 11

John Steinbeck, *Cannery Row*
(Cont'l Book Co. 1945) 7

Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1 (2017) 8, 9, 10

Proposed Rule, 83 Fed. Reg. 55,665 (Nov. 7, 2018) 10

The Declaration of Independence para. 12 (U.S. 1776) 11

INTEREST OF AMICI CURIAE[1]

Amici are all involved in herring fishing in New England. They are appellants in *Relentless Inc., et al. v. Dep't of Commerce, et al.,* No. 21-1886, now pending in the U.S. Court of Appeals for the First Circuit.

Specifically, both Relentless Inc. and Huntress Inc. are corporations organized and operating under the laws of the State of Rhode Island and headquartered in North Kingstown. Relentless Inc. owns and operates F/V *Relentless* (collectively, "Relentless"), a high-capacity freezer trawler that alternatively, but sometimes simultaneously, harvests Atlantic herring (*Culpea harengus*), Loligo and Illex squids (*Doryteuthis (Amerigo) pealeii* and *Illex illecebrosus*, respectively), Butterfish (*Peprilus triacanthus*), and Atlantic mackerel (*Scomber scombrus*). Huntress Inc. owns and operates F/V *Persistence* (collectively, "Huntress") and fishes in the same manner as Relentless. For Atlantic herring, Relentless and Huntress use small-mesh bottom trawl gear, and each holds a Category A permit. They are subject to the rule challenged by Petitioners here. Relentless and Huntress are small businesses whose primary industry is commercial fishing. Their annual gross

---

[1] Pursuant to Supreme Court Rule 37.6, Petitioner has granted consent and motion has been made as the position of Respondent is unknown. No counsel for a party authored this brief in whole or in part, and no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

receipts are less than or equal to $11 million. They are subject to the IFM Amendment and the Final Rule.

Seafreeze Fleet LLC ("Seafreeze") is a limited liability company organized and operating under the laws of the Commonwealth of Massachusetts. Seafreeze is headquartered in Ipswich, MA. Seafreeze owns *amici* Relentless and Huntress.

SUMMARY OF ARGUMENT

Amici urge the Court to grant *certiorari* in this case for three reasons in addition to those presented by Petitioners.

First, there is a circuit split in how agency actions under the MSA are interpreted under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Compare Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460-61 (5th Cir. 2020) (denying *Chevron* deference when the MSA was silent on aquaculture), *with* Pet. App.5-15 (finding ambiguity and, in *Chevron* step two, granting the agencies *Chevron* deference when MSA does not explicitly preclude industry funding of at-sea monitors), *and Lovgren v. Locke*, 701 F.3d 5, 30-31 (1st Cir. 2012) (granting *Chevron* deference on interpretation of Limited Access Privilege Programs ("LAPPs") under the MSA and creating a "strong presumption" of such deference in "notice and comment" regulation under the MSA). This Court should grant *certiorari* to ensure the MSA is interpreted uniformly in all of the nation's fisheries.

Second, the challenged regulation amounts to the creation of a new federal office so that the agency can avoid the appropriations constraints Congress has imposed upon it by charging fishermen for a government function for which Congress does not believe it is worth spending Americans' tax dollars. Violating this appropriations constraint, as the National Marine Fisheries Service ("NMFS") does here, presents important separation of powers and structural constraint questions.

Finally, it is not without significance that the Petitioners and *amici* here are represented *pro bono* by non-profit law firms. The small family-run businesses that make up so much of our fishing fleets, particularly in the New England and Mid-Atlantic fisheries, operate on narrow financial margins. This is unlike, for example, the energy, technology, or defense industries that are often able to engage in the expensive litigation that has a better chance to reach this Court. Indeed, the Court has not interpreted the MSA, particularly with its more searching attention to *Chevron* deference, in almost two generations. Some members of this Court were not in law school yet when the Court last interpreted the MSA. As Petitioners note, not only does the petition present the question of the continuing vitality of *Chevron*, but it also presents the question of whether America's fishers will be subject to the unchecked discretion of bureaucrats whenever Congress is silent.

ARGUMENT

I. THERE IS A CIRCUIT SPLIT ON THE USE OF *CHEVRON* IN INTERPRETING THE MSA AND THIS COURT SHOULD RESOLVE IT

The Fifth Circuit Court of Appeals decided *Gulf Fishermens Ass'n* by rejecting agency action under *Chevron* step one. 968 F. 3d at 460-61. The D.C. Circuit in *Loper Bright* did not even mention the case (which the dissent cited). Pet. App.26 n.24. In *Gulf Fishermens Ass'n*, the Fifth Circuit addressed the question of "whether a federal agency may create an 'aquaculture,' or fish farming, regime in the Gulf of Mexico pursuant to the Magnuson-Stevens Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-83. The answer is no." 968 F.3d at 456. The Fifth Circuit was pellucid that when the MSA "neither says nor suggests that the agency may regulate aquaculture" that "Congress [did] not delegate authority by not withholding it." *Id.* There, as here, defendant NMFS attempted to use the MSA's "necessary and appropriate" language to urge that it had the power to impose regulations on aquaculture. *Id.* at 457. NMFS claimed that the statute's use of the word "harvesting" implied aquaculture, but the Fifth Circuit did not bite at that either. *Id.* at 456, 462-63. There was no ambiguity in the statute, and NMFS could not manufacture ambiguity by pointing to broad language. *Id.*

That route is how the agency's proposition—that Congress, without saying so in the statute, allowed the agency to create the office at-sea monitor ("ASM") and force the industry to contract with these ASMs

who solely perform a government function and do nothing for the vessel or its business—should have been addressed. The analysis should have ended at *Chevron* step one, as it would have in the Fifth Circuit, where no ASMs are currently authorized in the Gulf of Mexico. Unfortunately, a disproportionate amount of litigation regarding our country's fisheries are determined in the First, Ninth, and D.C. Circuits, which almost always resort to *Chevron* step two and allow the agencies wide latitude to do what they like to those who make their living fishing at sea.

A. The First, D.C., and Ninth Circuits Routinely Abet Administrative Power by Using *Chevron* Deference to Approve Agency Action

The First Circuit not only uses *Chevron* to allow agencies to do almost anything, unchecked by searching judicial review, but it also has a presumption that *Chevron* deference is warranted whenever an agency engages in notice-and-comment rulemaking. *See Lovgren*, 701 F.3d at 30-31 (citing *Doe v. Leavitt*, 552 F.3d 75, 79 (1st Cir. 2009)). This policy leaves all those who work in the legendary New England fishery—America's oldest, most storied, and even Oscar-worthy[2]—disadvantaged under *Chevron*. *Chevron* deference not only exists when an agency acts, but the Circuit has collapsed the two-step framework and created a *presumption* that it applies in notice-and-comment rulemaking. This obstacle is

---

[2] CODA (Vendôme Pictures & Pathé Films 2021) received this year's Oscar for Best Picture at the Academy Awards.

not in keeping with this Court's admonishments on when and how *Chevron* deference may be invoked. But it is routinely inflicted on fishermen regulated by NMFS and the National Oceanic and Atmospheric Administration ("NOAA"). *See Relentless Inc. v. Dep't of Com.*, 561 F. Supp. 3d 226, 236-37 (D.R.I. 2021) (applying *Lovgren* and invoking *Chevron* deference to uphold the ASM regulation challenged here), *appeal argued*, No. 21-1886 (1st Cir. Sept. 13, 2022).

Unlike the First Circuit, which sits on Boston Harbor with a commanding view of fishing boats, the D.C. Circuit is not associated with any great fishery. Its bailiwick is administrative agencies. The Circuit routinely uses *Chevron* deference to imbue executive agencies with exaggerated powers. In this case, as it so often does, the Circuit reached *Chevron* step two and ruled in the agencies' favor. Pet. App.13-14. Once again, the circuit court determined that canons of construction and other methods of statutory construction were somehow inadequate to determine the meaning of statutory silence and avoid ambiguity. The agencies have taken full advantage of this defiance as predicted by Justice Kavanaugh. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016).

The other important Court for interpretation of the MSA, the Ninth Circuit, contains all of America's Pacific fisheries. The industry there has been economically and culturally significant from the days

of Steinbeck's *Cannery Row*[3] to the *Deadliest Catch.*[4] There too, *Chevron* deference is routinely cited to bless agency action under the MSA. *See, e.g., Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1116-18 (9th Cir. 2006) (citing *Chevron* and approving regulation unless the statute "compel[led]" a different result than the agency indicated); *Glacier Fish Co. v. Pritzker*, 832 F.3d 1113, 1120-21 (9th Cir. 2016) (using *Chevron* to allow fees to be imposed on industries as long as MSA is "silent or ambiguous").

The fishing industries outside of the Gulf of Mexico are therefore faced with appellate courts primed and inclined to affirm any agency action imposed on them. This is especially so when those courts deem that the MSA is "silent" on any given issue. The damage is frequent and severe. Granting *certiorari* would enable this Court to review whether those courts are warranted in such servile devotion to the broadest possible application of *Chevron*. Such interpretations amount to bias against these parties. *See Buffington v. McDonough*, 143 S. Ct. 14, 18-19 (2022) (Gorsuch, J., dissenting from the denial of cert.) (citing P. Hamburger, Chevron *Bias,* 84 Geo. Wash. L. Rev. 1187, 1212 (2016)).

B. *Chevron* Is Not "Rarely" Invoked

The suggestion has been made that "*Chevron* has more or less fallen into desuetude … ." And that it is

---

[3] John Steinbeck, *Cannery Row* (Cont'l Book Co. 1945).

[4] *Deadliest Catch* (Discovery Channel).

rarely used. *See id.* at 22.[5] But, that is not the experience of commercial fishermen in the most important circuits that interpret the MSA. It has been estimated that courts find ambiguity at *Chevron* step one 70% of the time! *See Arrangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018) (citing Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 33-34 (2017)). Judge Thapar urged that courts "must do their best to determine the statute's meaning before giving up, finding ambiguity, and deferring to the agency." *Id.* But he is not in the First, D.C., or Ninth Circuits, and his is not the controlling view there. The article *Arrangure* cites is based on a sample of over 1,000 cases. Barnett & Walker, *supra,* at 23. It explodes any notion that *Chevron* is not warping judicial analysis, particularly in those circuits that most often interpret the MSA. The analysis cited demonstrates that the First and D.C. Circuits are the two most likely to use *Chevron* to the detriment of the regulated and that the Department of Commerce ("Commerce") (under which NOAA and NMFS fall) is one of the most deferred-to agencies. Those findings are probative here:

- When circuit courts invoke *Chevron*, the matter is resolved at step one "30.0% of the time, and, of those *Chevron* step-one decisions, agencies prevailed 39.0% of the time." *Id.* at 6.
- "Of the 70.0% of the interpretations that moved to *Chevron* step two … , the agency prevailed 93.8% of the time." *Id.*
- "[T]he circuit courts varied considerably as to overall agency-win rates, application of

[5] Even Homer nods.

Chevron, and agency-win rates under *Chevron*. For overall rates, the First Circuit was the most agency friendly with an agency-win rate of 82.8%[.]" *Id.* at 7.

- "Assessing the circuits based on the frequency at which they applied the *Chevron* framework paints a somewhat different picture … As to the frequency of *Chevron*'s application, five circuits were well above the average (74.8%) and median circuit (73.2%). The D.C. Circuit led the way by applying the *Chevron* standard to 88.6% of interpretations, followed by the First (87.9%), Eighth (85.7%), Federal (84.6%), and Fourth (80.6%) Circuits." *Id.* at 45.
- The data suggest "that agencies should seek *Chevron* deference even for informal interpretations; not doing so in the D.C. Circuit borders on malpractice." *Id.* at 47.
- "But to appreciate the circuit-by-circuit effect of *Chevron* deference … one needs to compare the agency's win rate overall with its win rate when courts applied the *Chevron* framework. The average win-rate difference for the dataset is six percentage points, with an overall win rate of 71.4% compared to a win rate of 77.4% when the court applied the *Chevron* deference framework." *Id.* at 47.
- The differential between agency-win rates when *Chevron* did not apply and agency-win rates when *Chevron* did apply in the D.C. Circuit was 24 percentage points. *See Id.* at 47.
- The differential between agency-win rates when *Chevron* did not apply and agency-win rates when *Chevron* did apply in the First

Circuit was about 13 percentage points. *Id.* at 48, Figure 9.

- "Utilizing … composite scores [comprised of the 'overall agency-win rate; frequency of *Chevron* framework; and win rate when *Chevron* applied'] the First Circuit (8.38 out of 10.00) emerges as the most deferential circuit, followed by the Eighth (7.91), D.C. (7.89), Federal (7.79), and Fourth (7.74) Circuits." *Id.* at 48.
- Using the same methodology to determine composite scores for each circuit, the researchers also determined that Commerce was the fifth most deferred-to agency of the 28 agencies whose matters were reviewed. *See id.* at 54 Table 3.

This case emerges from the D.C. Circuit and *amici*'s case from the First Circuit. The incredible overinterpretation of *Chevron* in those two circuits, which is both frequent and, as demonstrated, dispositive, warrants the grant of *certiorari* here.

II. AGENCIES MUST NOT BE ALLOWED TO CIRCUMVENT CONGRESSIONAL APPROPRIATIONS BY FORCING REGULATED PARTIES TO PAY GOVERNMENT SALARIES

One of the incredible facts of this case is that the agencies admit that the regulation at issue was implemented precisely because Congress would not fund the statutorily designated "observer" program at the levels the agency desired. CADC, App. 273;Proposed Rule, 83 Fed. Reg. 55,665 (Nov. 7, 2018). The observers are statutorily mandated and are either

federally funded, or in three special cases, by statute, industry funding is allowed. *See e.g.* 16 U.S.C. § 1862(a) (Northern Pacific fishery); 16 U.S.C. § 1854(d) (establishment of fees for statutorily authorized LAPPs); 16 U.S.C. § 1827(d)(e) (observers on foreign vessels).

Not content, the agencies created a new office they called ASMs, which they admitted were different in some respects from "observers." *See* Final Rule, 85 Fed. Reg. 7,414, 7,418 (Feb. 7, 2020) ("[I]n contrast to observers, [ASMs] would not collect whole specimens, photos or biological samples…"). To get around the statutory language Congress used and the appropriations it issues yearly, the agency created a new federal office with federal duties and insisted small businesses pay for it without any statutory warrant. The people of New England famously rebelled against George III because he, "erected" "new offices and sent hither swarms of officers to harass" them "and eat out their substance." *See* The Declaration of Independence para. 12 (U.S. 1776). Here the NMFS is erecting a new office and sending the swarms of officers over the New England fisheries to exact "taxation without representation." *Certiorari* should be granted because, when an agency seeks to avoid congressional appropriations, the congressional control required by the Constitution is infringed. *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 639-40 (5th Cir. 2022), *petition for cert. filed*, No. 22-448 (U.S. Nov. 14, 2022).

On this point there is another disturbing development in this case that, if not stopped by the Court now, may further metastasize. In this area of

law, lower courts are confusing legitimate regulatory "costs," such as here, berths for observers, with the salaries of those paid to perform government functions. This error has occurred in the courts below. *See* Pet. App.8, 14 (deeming the salaries of at-sea monitors normal "compliance costs" of regulatory action); *Relentless*, 561 F. Supp 3d. at 235-36 ; *Goethal v. Pritzker*, No. 15-cv-497-JL, 2016 WL 4076831, *5 (D.N.H. July 29, 2016) (conflating at-sea monitor salaries with regulatory compliance costs), *aff'd on other grounds sub nom. Goethal v. Dep't of Com.*, 854 F.3d 106 (1st Cir. 2017). This Court should grant *certiorari* to clarify that incidental "regulatory costs" do not include the salaries of the government agents enforcing federal regulations without explicit congressional authorization. In this circumstance, *Chevron* deference is being used not only to bias the courts in favor of the executive, but also to allow the agency to escape congressional control via the power of appropriation. *Chevron* has become a weapon not only against the litigant but against congressional control of agency action through one of its core powers.

Such an interpretation violates the very structure of the congressional grants of agency power. The levels at which various government activities shall be funded is quintessentially a nondelegable legislative function. *Atl. Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 229 (1st Cir. 2003) ("Deciding what funds shall be appropriated from the public fisc and how that money is to be spent is a task that the Constitution places in the congressional domain."). Here, the agencies heeded neither the level of observers Congress was willing to fund—zero—nor the laws

that prevented them from dunning the industry. The scheme creating new federal officers, ASMs, followed. *See U.S. v. Cusick,* No. 11cr10066-LTS, 2012 WL 442005, at *3 (D. Mass. Feb. 9. 2012) (ASM was a "representative of the Federal government" and impeding its work was a crime). Commerce, NOAA, and NMFS claim the power to extract anything they like from the regulated to the extent they do not agree with the amounts Congress has appropriated for them. But as we have seen in the foreign vessel regulations, Congress explicitly allows Commerce only to use those funds in the Foreign Fishing Fund when Congress has appropriated them or to allow direct industry contracting when funds are not appropriated. *See, e.g.*, 16 U.S.C. §§ 1827(d), (e), 1821(h)(6).

If anytime a provision specifies that a government agent may inspect one's premises, that provision may also be deemed a right to force the regulated pay for that inspecting government agent directly, agencies will have been handed an awesome weapon. Hence, this Court must not allow an agency to create a new federal office, carrying out a new federal function, and then directly fund that effort without congressional authorization or appropriation.

III. THE COURT SHOULD GRANT *CERTIORARI* TO DETERMINE THE PROPER SCOPE OF THE MSA IN LIGHT OF ITS CURRENT *CHEVRON* PRECEDENT

Both *amici* here and the Petitioners are represented *pro bono publico* by 501(c)(3) law firms. Petitioners and *amici* here make up a significant

percent of the commercial herring fishing vessels in the Atlantic fishery. But the margins and profitability of fishing in these fisheries are such that plaintiffs can rarely mount the sustained litigation against their regulators that obtaining a determination from this Court usually requires. A search of the MSA in this Court reveals that it has not been significantly interpreted since before some of its current members went to law school.

The last case the Court took citing and meaningfully interpreting the MSA was nearly two generations ago. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986) (interpreting amendments to the MSA regarding whaling). Significantly, that case affirmed executive action based on the broad grant of authority under *Chevron* and determined to affirm the agency whenever a statute is "silent or ambiguous" on an issue. *Id.* at 233-34.[6] Not a single person now on the Court was on it when that case was decided. This Court has interpreted whether a fish collected by a commercial fisherman was a "tangible object" within the meaning of that phrase under the Sarbanes-Oxley Act of 2002 more recently than it has mentioned any sea creature under the chief federal statute dealing with that subject. *Yates v. U.S.*, 574 U.S. 528 (2015). Sarbanes-Oxley is a statute primarily concerned with financial regulation. That industry can well defend itself and have cases reach this Court.

---

[6] The Court mentioned the statute in *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 554 n.22 (1987), but nothing substantive regarding it was established.

This neglect of the MSA by this Court, coupled with the nature of the litigants likely to be regulated under it, bears out Justice Gorsuch's prediction of the use of *Chevron* earlier this term. He stated:

> Nor does everyone suffer equally. Sophisticated entities may be able to find their way. They or their lawyers can follow the latest editions of the Code of Federal Regulations—the compilation of Executive Branch rules that now clocks in at over 180,000 pages and sees thousands of further pages added each year. The powerful and wealthy can plan for and predict future regulatory changes. More than that, they can lobby agencies for new rules that match their preferences. Sometimes they can even capture the very agencies charged with regulating them. But what about ordinary Americans?

Buffington, 143 S. Ct. at 20-21 (Gorsuch, J., dissenting from denial of cert.). Such is the fate of Petitioners here, marooned on the *Chevron*-loving D.C. Circuit island. The last case this court took to interpret the MSA, over the dissents of Justices Brennan, Marshall, Stevens, and Rehnquist, used *Chevron* to make the MSA unfriendly to anyone challenging the Secretary of Commerce and her sub-agencies. Almost 40 years have passed, and this Court's *Chevron* jurisprudence has been altered. *Amici* agree with Petitioners that *Chevron delenda est*, but in any event, the fishermen

of New England and the Mid-Atlantic should not have to continue to bear the brunt of its most overdetermined and over-broad use against them.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant Loper Bright's petition.

Respectfully,

/s/ *John J. Vecchione*
JOHN J. VECCHIONE
Counsel of Record
KARA M. ROLLINS
MARK S. CHENOWETH
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
John.Vecchione@NCLA.legal
Counsel for Amici Curiae