No. 22-1219

In the Supreme Court of the United States

RELENTLESS, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
TODD KIM
Assistant Attorney General
RACHEL HERON
DANIEL HALAINEN
DINA B. MISHRA
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

In 2020, the National Marine Fisheries Service adopted a rule, pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.*, under which the owners of regulated vessels fishing in the Atlantic herring fishery can be required to pay for the services of third-party monitors, whom the vessels must carry onboard during particular fishing trips to collect data for fishery conservation and management purposes. In the decision below, the First Circuit held that the rule is a permissible exercise of the agency's authority under the statute, in line with a prior decision by the D.C. Circuit addressing the same rule. See *Loper Bright Enters., Inc.* v. *Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), cert. granted, 143 S. Ct. 2429 (2023) (No. 22-451). The question presented is as follows:

Whether the court of appeals correctly held that the agency's 2020 rule reflects a reasonable interpretation of the relevant provisions of the Magnuson-Stevens Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes, regulations, and rule—Continued: Page

Miscellaneous: Page

In the Supreme Court of the United States

No. 22-1219

RELENTLESS, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 62 F.4th 621. The opinion of the district court (Pet. App. 35a-65a) is reported at 561 F. Supp. 3d 226.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2023. The petition for a writ of certiorari was filed on June 14, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Statutory Background

1. Commercial fishing vessels have been subject to "comprehensive federal regulation" since "the earliest days of the Nation." *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 272 (1977). Before 1976, however, federal

regulation of fishing in coastal waters consisted of a "patchwork" of statutes and international agreements, Warren G. Magnuson, *The Fishery Conservation and Management Act of 1976*, 52 Wash. L. Rev. 427, 432 (1977), which had failed to prevent "massive overfishing off both the Atlantic and Pacific coasts," S. Rep. No. 515, 94th Cong., 1st Sess. 4 (1975).

Congress responded by enacting what is now known as the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.* The Act declares that a "national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing * * * and to realize the full potential of the Nation's fishery resources." 16 U.S.C. 1801(a)(6). The Act charges the Secretary of Commerce with responsibility for administering that national program. 16 U.S.C. 1802(39), 1854, 1855(d). But it also provides opportunities for "States, the fishing industry, consumer and environmental organizations, and other interested persons" to participate in formulating the conservation and management measures applicable to each regulated fishery. 16 U.S.C. 1801(b)(5).

The Act establishes eight regional fishery management councils that advise the Secretary in preparing and revising a "fishery management plan" for each regulated fishery. 16 U.S.C. 1852(h)(1); see 16 U.S.C. 1852(a). Among other things, plans must contain the measures "necessary and appropriate * * * to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. 1853(a)(1)(A).

A regional council's plan or plan amendment and any proposed implementing regulations are submitted to

the Secretary for review and published for public comment. See 16 U.S.C. 1853(c) (council may propose "necessary or appropriate" regulations); 16 U.S.C. 1854 (Secretary's role). The Secretary's approval is generally required for any plan or amendment, and the Secretary promulgates any implementing regulations. 16 U.S.C. 1854(a)(3) and (b)(3). The Secretary is authorized to adopt "such regulations * * * as may be necessary" to carry out a plan or any provision of the Act. 16 U.S.C. 1855(d). By delegation, the National Marine Fisheries Service (NMFS) exercises the Secretary's authority to approve and implement plans. Pet. App. 4a.

2. This case concerns the Magnuson-Stevens Act's provisions for the collection of reliable data, which Congress found "is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States." 16 U.S.C. 1801(a)(8); see 16 U.S.C. 1851(a)(2), 1853(a)(5). "[F]or the purpose of collecting data necessary for the conservation and management" of a regulated fishery, the Act provides that a plan may "require that one or more observers be carried on board" any domestic vessel "engaged in fishing for species that are subject to the plan." 16 U.S.C. 1853(b)(8). The Act defines "observer" to mean "any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits" under the Act, 16 U.S.C. 1802(31), including private parties hired to collect data, see 16 U.S.C. 1802(36) (defining "person"); cf. 16 U.S.C. 1857(1)(D)-(F) and (L) (distinguishing "observer[s]" from "officer[s]"). And when "any payment required for observer services provided to or contracted by [a vessel] owner * * * has not been paid," the Act authorizes

the Secretary to impose sanctions on the owner. 16 U.S.C. 1858(g)(1).

Observer programs are a longstanding feature of the regulation of commercial fishing. See, *e.g.*, Samantha G. Brooke, NOAA Fisheries, *Federal Fisheries Observer Programs in the United States*, 76(3) Marine Fisheries Rev. 1, 4-34 (2014) (survey of 40 years of federal observer programs under the Magnuson-Stevens Act and related federal laws). Observers lack the "incentives for misreporting" that regulated vessels have, and observers are often the most reliable source of information about catch, discards, and other biological information important to fishery management. *Id.* at 35.

B. Regulatory Background

In 2017, after years of development and public consultation, the New England Fishery Management Council proposed to amend the fishery management plan for the Atlantic herring fishery to require the owners of regulated vessels to procure the services of third-party monitors, whom the vessels must carry onboard during some fishing trips to collect data for conservation and management purposes. 83 Fed. Reg. 47,326, 47,326 (Sept. 19, 2018). After notice and comment, NMFS approved the amendment in 2018 and issued final implementing regulations in 2020. 85 Fed. Reg. 7414, 7414 (Feb. 7, 2020).

The plan amendment established a "coverage target" of having monitoring on 50% of herring fishing trips by licensed vessels in the Atlantic herring fishery. 85 Fed. Reg. at 7417. Each year, the coverage target could be satisfied by government-funded monitoring that already occurs under a separate program. *Ibid.* But if existing government-funded monitoring did not meet the 50% target, third-party monitoring would fill

the gap, *ibid.*, with the vessel's owner "arrang[ing] for monitoring by" one of the "monitoring service provider[s] approved by NMFS" and "pay[ing] [the] service provider[]" for services rendered on that trip, 50 C.F.R. 648.11(m)(4)(i) and (iii).*

NMFS is responsible for paying the "administrative costs" of the program—including the cost of training and certifying monitors, evaluating their performance, and processing collected data. 85 Fed. Reg. at 7414. In addition, the 2020 rule provides for waivers, exemptions, and alternatives designed to make any third-party monitoring "affordable." *Id.* at 7417. For example, a vessel need not procure observer services for a trip intended to land less than 50 metric tons of Atlantic herring, or if monitoring services are unavailable for a particular trip. 50 C.F.R. 648.11(m)(1)(ii)(D) and (4)(ii).

NMFS found that those measures, which the regional council had recommended, "balance[d] the benefit of additional monitoring with the costs associated with" it. 85 Fed. Reg. at 7425. The agency estimated that, if the 50% coverage target were achieved through third-party monitoring, covered vessels "would incur monitoring costs for an additional 19 days at sea per year, at an estimated maximum cost of $710 per sea day." *Id.* at 7428. The agency acknowledged that prior analyses had suggested that monitoring costs could reduce annual returns-to-owner for covered vessels by "up to 20 percent." *Id.* at 7420. But the agency found that per-vessel costs were expected to be considerably lower under the rule's exemptions and waivers as promulgated. See, *e.g.*, *id.* at 7425-7426, 7430.

---

* The regulatory text was amended during this litigation, effective January 9, 2023. 87 Fed. Reg. 75,852, 75,885 (Dec. 9, 2022).

In practice, the 2020 rule's monitoring provisions have had no financial impact on regulated vessels. NMFS began administering the program in July 2021 and ceased monitoring coverage under it in April 2023, when the agency no longer had available funds for program costs. Br. in Opp. 25. Although not required to do so, NMFS had allowed the owners of affected vessels to seek federal reimbursement for the monitoring costs they had incurred when the program was operational, and NMFS had ultimately "reimburse[d] 100 percent of the industry's at-sea monitoring costs" incurred under the rule. NOAA Fisheries, *Status of Industry Cost Reimbursement for Atlantic Herring Industry-Funded Monitoring* (Sept. 7, 2023), perma.cc/8J62-3376; see 50 C.F.R. 648.11(g)(4)(iii)(A).

C. The Present Controversy

1. This suit is a challenge to NMFS's 2020 rule, brought by petitioners—two corporations and their parent company—in the U.S. District Court for the District of Rhode Island. Petitioners own and operate vessels with permits to fish in the Atlantic herring fishery and are potentially subject to the rule's requirements regarding procuring third-party monitoring services. Compl. ¶¶ 9-11. Petitioners' complaint invoked a provision of the Magnuson-Stevens Act authorizing judicial review of agency rulemaking under the Act, generally under the standards prescribed by the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See Compl. ¶ 3; 16 U.S.C. 1855(f)(1). As relevant here, petitioners alleged that NMFS lacked statutory authority to adopt the rule insofar as the rule requires vessel owners, rather than NMFS, to pay for any third-party monitoring services that vessel owners are required to procure under the rule. See Compl. ¶¶ 79-97.

Petitioners' allegations overlapped with the allegations in a complaint filed earlier in the U.S. District Court for the District of Columbia by other vessel owners, challenging the same 2020 rule. See Compl. ¶¶ 105-113, *Loper Bright Enters., Inc.* v. *Ross*, No. 20-cv-466 (D.D.C. Feb. 19, 2020). The government moved to transfer petitioners' suit to the District of Columbia so that the two overlapping suits could be consolidated. D. Ct. Doc. 10-1, at 1-2 (Apr. 2, 2020). Petitioners opposed that motion, and the district court denied it. See 8/25/20 D. Ct. Order 3-4. Accordingly, this suit proceeded through the lower courts in parallel to *Loper Bright*.

2. The district court rejected petitioners' challenge to the 2020 rule, granting summary judgment to the government on all claims. Pet. App. 35a-65a. The court applied the framework set forth in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), for judicial review of an agency's interpretation of a statute the agency is charged with administering. See Pet. App. 42a. In the court's view, Congress "has not spoken unambiguously" to the agency's authority to require that owners of regulated vessels pay for third-party monitoring services in the Atlantic herring fishery, *ibid.*, but the agency "reasonably interpreted the [Magnuson-Stevens Act] to authorize" such a measure in its 2020 rule, *id.* at 51a.

The district court observed that NMFS "is indisputably allowed to require the presence of monitors" on regulated vessels under Section 1853(b)(8), which states that a fishery management plan may "'require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the

fishery.'" Pet. App. 43a (quoting 16 U.S.C. 1853(b)(8)). The court understood petitioners to be challenging the agency's authority only with respect to the program's "funding mechanism," *ibid.*—*i.e.*, to the requirement that vessel owners hire and pay for the services of the at-sea monitors, who are not federal employees.

With respect to that issue, the district court observed that the Magnuson-Stevens Act states that a fishery management plan must "include the 'conservation and management measures' that are 'necessary and appropriate' to 'prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.'" Pet. App. 43a (quoting 16 U.S.C. 1853(a)(1)(A)); see 16 U.S.C. 1853(c) (agency's authority to adopt regulations "necessary or appropriate" to implement a plan). The court also observed that Act authorizes NMFS to impose sanctions on vessel owners that fail to make timely payments for observer services "contracted by" the owners. Pet. App. 44a (quoting 16 U.S.C. 1858(g)(1)(D)). The court reasoned that the Act's "mention of contracts" for observer services "'would be unnecessary if the [Act] prohibited the very type of industry funding at issue in this case.'" *Ibid.* (quoting *Loper Bright Enters., Inc.* v. *Raimondo*, 544 F. Supp. 3d 82, 105 (D.D.C. 2021), aff'd, 45 F.4th 359 (D.C. Cir. 2022), cert. granted, 143 S. Ct. 2429 (2023)).

Petitioners pointed to three provisions in the Act that "expressly authorize [NMFS] to collect fees to fund observer programs," which petitioners maintained would be "superfluous" if the agency had more general authority to require vessel owners to pay for third-party monitors. Pet. App. 45a. The district court found those provisions distinguishable, however, principally

because they all involve the collection of fees by NMFS—unlike the "'measures at issue here, in which the fishing vessels contract with and make payments directly to third-party monitoring service providers.'" *Id.* at 46a (quoting *Loper Bright*, 544 F. Supp. 3d at 106); see 16 U.S.C. 1827(b)-(e), 1854(d)(2)(A), 1862.

Although the district court rejected petitioners' superfluity argument, the court nonetheless concluded "that Congress's intent regarding industry-funded monitoring is ambiguous." Pet. App. 47a. The court therefore proceeded beyond *Chevron* "step one," *ibid.*, and determined that the agency's rule on third-party monitoring reflected a "reasonable resolution" of the ambiguity the court perceived, *id.* at 48a (citation omitted). Among other things, the court emphasized that "Congress recognized that human observers could play an important role in improving the accuracy and reliability" of the data that is essential for fishery conservation and management, "as shown by the express authorization of observer requirements in fishery management plans." *Id.* at 50a. The court also explained that the agency's interpretation is bolstered by the statutory history, in that Congress amended the Act in 1990 to confirm the agency's authority to require vessels to carry at-sea observers for data collection after the agency had already begun "operat[ing] a North Pacific monitoring program in which vessel operators directly paid third-party monitors." *Id.* at 51a. The court viewed the 1990 amendment as having "arguably ratified" the agency's authority to adopt monitoring programs in which vessel owners hire and pay for third-party monitoring services. *Ibid.*

3. The court of appeals unanimously affirmed. Pet. App. 1a-34a. The court of appeals "agree[d] with the

district court that the rule is a permissible exercise of the agency's authority." *Id.* at 3a. Indeed, the court of appeals had "no trouble finding that the Agency's interpretation of its authority to require at-sea monitors who are paid for by owners of regulated vessels does not 'exceed the bounds of the permissible.'" *Id.* at 22a (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002)) (brackets omitted). The court thus held that the agency's interpretation is "at the very least * * * certainly reasonable" and found it unnecessary to classify that holding "as a product of *Chevron* step one or two." *Ibid.*

The court of appeals found "clear textual support for the Agency's lawful authority to require the vessel owners to pay for at-sea monitors." Pet. App. 17a. In particular, the court explained that "Congress expressly provided that fishery management plans may 'require that one or more observers be carried on board'" regulated vessels to collect data. *Id.* at 11a (quoting 16 U.S.C. 1853(b)(8)). The court further explained that the term "'observer[]'" is defined "broad[ly]" in the statute and encompasses the non-governmental at-sea monitors that vessels can be required to procure under the rule. *Id.* at 12a (citing 16 U.S.C. 1802(31)); see *id.* at 18a (describing the rule's requirement "to obtain and pay for a service from a non-governmental source"). And the court observed that the "default norm" reflected "in literally hundreds" of provisions of federal law is that the government is not obligated to pay the costs that regulated parties incur in "complying with properly enacted regulations." *Id.* at 13a (citation omitted).

The court of appeals acknowledged that "paying the expenses of a credentialed at-sea monitor may well seem different" to vessel owners than "paying, for example, a vendor who provides fishing gear mandated by

a regulation." Pet. App. 13a-14a. But the court perceived no "material" difference between those requirements in terms of any inference about the "default rule" of "who pays." *Id.* at 14a. Thus, the court concluded that "[w]hen Congress expressly authorized plans promulgated under the [Magnuson-Stevens Act] to require vessels to carry an observer, it presumed that the vessels' owners would bear the cost of compliance, much like an SEC requirement to submit independently audited financials imposes on the regulated entity the cost of paying an independent accountant." *Ibid.*

The court of appeals also found, however, that "this is not a case in which the agency need rely only on the default presumption that a regulated party presumably bears its own costs." Pet. App. 18a. Instead, the court determined that the "the statutory text provides affirmative confirmation that Congress presumed that vessel owners would bear the cost of complying with monitoring requirements." *Ibid.* In particular, the court determined that Section 1858(g)(1)(D) adds "belt to suspenders" by authorizing NMFS to impose sanctions on vessel owners who fail to make timely payments for observer services that the owners have "'contracted'" to receive. *Id.* at 15a-16a (quoting 16 U.S.C. 1858(g)(1)(D)). That provision, the court explained, "would make no sense" unless Congress "anticipate[d] that owners * * * of the vessels would be paying the observers." *Id.* at 16a.

Like the district court, the court of appeals saw no merit in petitioners' argument based on other provisions in the Magnuson-Stevens Act authorizing NMFS to establish programs involving "fees to be paid to the government to cover certain observer costs." Pet. App. 17a. Those provisions, the court of appeals reasoned, do

not create any negative inference about the agency's authority for the 2020 rule because they "do not present apples-to-apples comparators from which one can infer that anything mentioned in those instances but not in the general observer provision was intentionally omitted from the latter." *Id.* at 17a-18a. Among other distinctions, the court noted that "no money is paid into government coffers" under the 2020 rule, unlike in the fee-based programs, *id.* at 18a; that vessel owners must "obtain and pay for a service from a non-governmental source" under the rule, unlike situations in which the government provides observers and charges fees for doing so, *ibid.*; and that the fees collected in two of the other programs can be used to fund "more than direct observer costs," *id.* at 19a, unlike the rule's requirement that vessel owners "only pay for observers they actually carry," *id.* at 20a.

The court of appeals also rejected petitioners' contention that funds paid to third-party monitors under the 2020 rule should be treated as "actually fees paid to the Agency," emphasizing again that any monitors required under the rule are not "'federal officers'" and that the Magnuson-Stevens Act distinguishes between federal officers and non-federal observers. Pet. App. 21a (discussing 16 U.S.C. 1857(1)(D)-(F) and (L)). The court thus agreed with the D.C. Circuit's reasoning in *Loper Bright* that the fee-based programs on which petitioners rely do "not indicate that Congress intended to preclude the entirely different mechanism of industry-funded monitoring." *Id.* at 19a (citing *Loper Bright Enters., Inc.* v. *Raimondo*, 45 F.4th 359, 367-368 (D.C. Cir. 2022), cert. granted, 143 S. Ct. 2429 (2023)).

DISCUSSION

The court of appeals correctly determined that NMFS acted within the scope of its statutory authority when the agency adopted a rule under which the owners of regulated vessels can be required to procure and pay for the services of third-party monitors to be carried onboard the vessels during certain fishing trips in the Atlantic herring fishery to collect data. The court concluded that the agency's rule reflects a reasonable interpretation of the Magnuson-Stevens Act that should be upheld under the *Chevron* framework. See Pet. App. 22a.

The First Circuit entered its judgment on March 16, 2023. On May 1, 2023, this Court granted a petition for a writ of certiorari to review a judgment of the D.C. Circuit in parallel litigation involving the same 2020 rule. See *Loper Bright Enters.* v. *Raimondo*, 143 S. Ct. 2429 (2023). The Court granted review in *Loper Bright* "limited to Question 2 presented by the petition" in that case, *ibid.*, which asks the Court to overrule *Chevron* or modify its application in certain respects, see Pet. at i-ii, *Loper Bright*, *supra* (No. 22-451) (filed Nov. 10, 2022). The petition in this case was filed on June 14, 2023, and the first question presented in the petition is identical to the question on which the Court had already granted review in *Loper Bright*. See Pet. i & n.1. Under the circumstances, it would be appropriate to hold the petition in this case pending the Court's decision in *Loper Bright* and then to dispose of the petition as appropriate in light of that decision.

Petitioners agree that "this case travels with *Loper Bright*," notwithstanding their successful efforts to prevent the two cases from being consolidated in the dis-

trict court. Pet. 18; see p. 7, *supra*. To the extent petitioners seek plenary review of the same question that the Court has agreed to address in *Loper Bright* (see Pet. 19-30, 34), that request should be rejected. The issues concerning *Chevron* will be fully briefed in *Loper Bright*, and there accordingly is no reason to grant plenary review in this case as well. Moreover, briefing is already well under way in *Loper Bright*. The *Loper Bright* petitioners' opening brief was filed on July 17, 2023, and the government's response brief is being filed on September 15, 2023, the same day as this response. Although the Court has not yet set *Loper Bright* for argument, the briefing schedule in that case would permit the Court to hear argument at the Court's December session. Granting review in this case thus would be superfluous and could delay the resolution of *Loper Bright*.

The petition also contains a second question, which asks the Court to address the meaning of the phrase "necessary and appropriate" as used in the Magnuson-Stevens Act. Pet. ii. To the extent petitioners seek review of that question independently of the *Chevron* question that the Court is reviewing in *Loper Bright* (see Pet. 30-34), petitioners' second question does not warrant further review. The court of appeals did not rely on the "necessary and appropriate" language in the Act to reject petitioners' challenge to the rule; the court's decision therefore could not and does not create any conflict of authority with another court of appeals about the import of that language in this statute; and petitioners' second question does not otherwise meet this Court's traditional criteria for granting certiorari. See Sup. Ct. R. 10(a).

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
TODD KIM
Assistant Attorney General
RACHEL HERON
DANIEL HALAINEN
DINA B. MISHRA
Attorneys

SEPTEMBER 2023