No. 22-1219

IN THE

Supreme Court of the United States

RELENTLESS, INC., *et al.*,
Petitioners,

v.

U.S. DEPARTMENT OF COMMERCE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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I. THE COURT SHOULD GRANT CERTIORARI ON THE SECOND QUESTION PRESENTED TOO

The Brief for Respondents devotes a paragraph to the second question presented by Petitioners requesting that *certiorari* not be granted to it. Resp. Br. at 14. That question is: "Whether the phrase 'necessary and appropriate' in the Magnuson-Stevens Act ("MSA") augments agency power to force domestic fishing vessels to contract with and pay the salaries of federal observers they must carry." Pet. Br. at ii. The Respondents assert that the question does not meet this Court's traditional, though non-exhaustive, criteria for granting *certiorari*. *Id.* As noted, both by Petitioners and *amici curiae,* this is not so, and there are other considerations not explicitly listed in Sup. Ct. R. 10(a) that counsel such a grant. *See Brief of Amici Curiae the Southeastern Legal Foundation and the Defense of Freedom Institute in Support of Petitioners* at 9-17.

A. What "Necessary and Appropriate" Means in the MSA Is in Dispute in the Appellate Courts

The Respondents' blithe citation to Sup. Ct. R. 10(a) fails to recognize that there is a circuit split regarding the meaning and application of the MSA's "necessary and appropriate" language. That circuit split has arisen over the course of many years, and many rules. And a circuit split need not, as

Respondents' narrow view of Sup. Ct. R. 10(a) suggests, arise in an identical way to warrant this Court's discretionary grant of review. Indeed, the split here is pressing precisely because the "necessary and appropriate" language impacts *all* regulatory actions approving or implementing MSA Fishery Management Plans ("FMPs"). *See* 16 U.S.C. § 1853(a)(1)(A), 1853(b)(14). Respondents prolifically regulate in this area. Since the beginning of this year, Respondents have issued 125 final rules approving or implementing various aspects of FMPs.[1] While there is no circuit split on the outcome of this exact rule regarding at-sea monitors, there certainly is one on what the words "necessary and appropriate" mean in the statute at issue. Respondents also fail to note that the Petitioners in *Loper Bright Enters., Inc. v. Raimondo*, 143 S.Ct. 2429 (2023) did not claim that there was a circuit split in their petition that this Court has already accepted for review.[2]

1. Circuits Are Split on What "Necessary and Appropriate" Means in the MSA

Respondents did not counter the cases cited by Petitioners or by *amici curiae* demonstrating the complete one-hundred-and-eighty-degree difference

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[1] This information is derived from a search of the *Federal Register*'s database using its "Advanced Search" function for all rules promulgated by the Department of Commerce in 2023 that include the terms "Magnuson-Stevens Act" and "Fishery Management Plan."

[2] As *amici curiae* in *Loper Bright*, Petitioners noted such a split.

between how "necessary and appropriate" is defined in the MSA by the Fifth and First Circuits. Pet. Br. at 32–34. This is an important federal question that the Court should address, as how United States fishermen are regulated is diverging due to the split.

The circuit split here is on an important question of federal law on which the lower courts diverge, even if the courts do not diverge on the outcome of the rule or statute in question and in which the lower court also diverged from the precedent of this court. *See Waithaka v. Amazon.com Inc.*, WL 7028945, slip op. (W.D. Wash. Nov. 30, 2020) (noting that a circuit diverging from Supreme Court precedent or other circuits on a "broader question" than just the statute at issue could allow grant of *certiorari*). In that case the court was determining whether a stay was appropriate given a petition for *certiorari* in this Court and noted the many ways Sup. Ct. R. 10(a) functions.

In this case, not only is there a split between the First and Fifth Circuits—at least, on what the words "necessary and appropriate" mean in the making of regulations—but the First Circuit has ignored this Court's explanation of those very words as taking into account the cost of regulation. *Cf. Michigan v. EPA*, 576 U.S. 743 (2015) (not "appropriate" for a regulation under the Clean Air Act to impose exorbitant costs for marginal benefit) *with* App. 15a ("But the fact that costs of complying with one regulatory requirement are greater than the costs of complying with another regulatory requirement does not mean that the former is unlawful."). The First Circuit went out of its way to hold that costs don't matter (failing to even mention

the Fifth Circuit precedent cited to it on this point). The First Circuit further rejected this Court's ruling on similar language in the Clean Air Act and, even after requesting a 28(j) letter from Respondents on what the costs were and receiving no answer, rejected this Court's guidance on what "appropriate" means.

Under Sup. Ct. R. 10(a), there is a clear split on whether "necessary and appropriate" in the MSA expands agency power so that all the other words in the statute are meaningless, or whether it binds the agency to some measure of rationality in regulation. Worse, the First Circuit stating that costs do not matter (as industry must always pay them) and failing to address how this conclusion squares with the "necessary and appropriate" language makes this an ideal case to correct a straying circuit and realign the MSA with the statute Congress wrote.

2. The Court Has Not Addressed the MSA in Two Generations

Even were the conditions of Sup. Ct. R. 10(a) not met, as they are here, other considerations would weigh in favor of granting *certiorari* on question two. These factors add impetus to the necessity for a grant in this case. No current justice was a member of the bench when the Court last substantively addressed the MSA. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986). Statutes can become encrusted with bad rulings that, like barnacles, impede a law's proper function if not scraped off from time to time.

The MSA covers all domestic and foreign fishing in American waters, which is an immense territory with an enormous economic impact. Respondents report that commercial and saltwater fishing in the United States employed 1.7 million people, contributed 117 billion dollars in GDP, and 254 billion dollars in sales impact in 2020. *Fisheries Economics of the United States, 2020 Report*, NOAA Fisheries (Feb. 17, 2023).[3] Yet for nearly 40 years the various appellate courts have diverged in both their approach to *Chevron* deference *and* their view of the meaning of the words "necessary and appropriate."

Respondents only dispute that there is a circuit split on the narrow question of whether the agencies can require industry to pay for at-sea monitors by agency regulation in the face of the directives of the MSA. They cannot claim that the First Circuit here, with jurisdiction over the first and most storied of American fisheries (and Puerto Rico), has not strayed far afield in its interpretation of the MSA and the power it allows regulators as compared to the Fifth Circuit. For example, tuna are classified as a highly migratory species (HMS) and travel between the Atlantic Ocean, Gulf of Mexico, and the Caribbean Sea. *Atlantic Highly Migratory Species*, NOAA Fisheries (last accessed Sept. 27, 2023).[4] A tuna fisherman in Puerto Rico challenging regulation of

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[3] https://www.fisheries.noaa.gov/resource/document/fisheries-economics-united-states-2020-report

[4] https://www.fisheries.noaa.gov/topic/atlantic-highly-migratory-species

tuna fishing that is subject to the MSA's "necessary and appropriate" standard is faced with a different standard, particularly with regard to the costs the fisherman must bear, as an identically situated fisherman in the Gulf of Mexico who operates out of the State of Louisiana. Same fish. Same occupation. Same regulation. Different outcome because of the circuit split. That lack of uniformity is detrimental to fishery management and warrants this Court's review.

A fisherman in Puerto Rico bringing a challenge in the First Circuit to a new MSA regulation is faced with precedent in this case that: (1) *Chevron*, whether step one or two, allows regulators to charge him for employees who perform only service to the government; (2) The "necessary and appropriate" language of the MSA is expansive and that one regulation costs more than another has no impact on the lawfulness of that regulation; and (3) It is the stated rule of the Circuit that all costs of regulation—even the salaries of government functionaries performing a federal duty—are assumed valid. App. 14a, 15a, 22a 50a–51a. Meanwhile, a fisherman off the coast of Louisiana or Texas would find that the words "necessary and appropriate" have meaning and include an assessment of costs versus regulatory gain. *Mexican Gulf Fishing Co. v. Dep't of Commerce*, 60 F.4th 956, 965 (5th Cir. 2023).

Four decades of conflicting interpretations of the same statute have obscured its meaning. This Court should grant certiorari.

B. This Case Provides a Good Vehicle for Addressing the Question Presented

The Respondent states, without citation, that the First Circuit did not rely on the "necessary and appropriate" language for its ruling. Resp. Br. at 14. The First Circuit stated, "Because we agree with the district court that the rule is a permissible exercise of the agency's authority and is otherwise lawful, we affirm." App. 3a. It is also clear that the First Circuit did not do any analysis of the costs of the regulation because it was unclear and, in any event, the costs of the regulation did not matter to its lawfulness. App. 7a, 15a. The opinion below cited the language "necessary and appropriate" at the very start of its examination of the statute. App. 3a. Judge Kayatta cited his own concurrence in *Goethel v. Dept. of Commerce*, 854 F.3d 106, 117–118 (1st Cir. 2017), for the proposition that all cost of regulation must be borne by industry. App. at 13a. As noted in the Pet. Br. at 31, that case and the district court it affirmed stand for the First Circuit's longstanding proposition that the language "necessary and appropriate" in the MSA provides broad powers that practically supersede the necessity for exact statutory language to provide regulatory power. Moreover, the district court ruling that was affirmed in all respects by the appellate court below relied not only on that language for its ruling upholding the statute but cited the key "necessary and appropriate" language twice and noted the Respondents' dependence on it. App. 37a, 43a.

Here, the First Circuit relied on its erroneous holdings on the meaning of the MSA, buttressed by

the key wrongful interpretation of the "necessary and appropriate" language found in *Goethel*, that both sides of the contest argued, and that forms the basis of the second Question Presented. This case provides a good vehicle for taking this important question which affects an old, vibrant, and important portion of the American economy and American life.

II. THE CASE SHOULD AT LEAST BE HELD PENDING THE DECISION IN *LOPER BRIGHT*

Respondents agree that the case should at least be held awaiting the ruling in *Loper Bright*. Resp. Br. at 13. They claim delay should the cases be joined. It is amusing that, in a brief supportive of *Chevron* deference to agency interpretations of statutes, the Respondents rely on facts stating that Congress has determined not to fund any portion of the promulgated rule! Resp. Br. at 6. On the *Chevron* issue, the First Circuit made different errors regarding *Chevron* than the D.C. Circuit did. The Respondents make much of Petitioners' successfully opposing joinder at the district court level. But as the opinions and findings in the cases reveal, the manner of fishing done by the Petitioners here differs from that of the Petitioners in *Loper Bright*. The *Chevron* issues are the same, hence the identical first Question Presented.

Whether the Court joins the cases or not, both the Petitioners and Respondents have cited *Relentless* in their *Loper Bright* briefing. If the Court remands this case after ruling in *Loper Bright*, it should not allow

the First Circuit's presumption of *Chevron* deference when notice and comment rulemaking is followed, or its presumption that regulated parties pay for all government costs of regulation, or its blithe disregard of the costs of regulation in its analysis to go unremarked when doing so.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge the Court to grant this petition for *certiorari* on the second Question Presented too, and at minimum hold the petition pending *Loper Bright Enterprises, Inc., et al.*, No. 22-451, if not joined with it on the first Question Presented.

Respectfully,

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