No. 22-451

IN THE
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, ET AL.,
Petitioners,

v.

GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, ET AL.,
Respondents.

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

BRIEF OF CONSERVATION LAW FOUNDATION, OCEAN CONSERVANCY, AND SAVE THE SOUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Conservation Law Foundation, Ocean Conservancy, and Save the Sound recognize that the federal government's ability to effectively manage our fisheries is essential to preventing the collapse of those fisheries and to protecting all who depend on them.[1]

Conservation Law Foundation is a nonprofit environmental advocacy organization with offices in Maine, Massachusetts, Vermont, New Hampshire, Rhode Island, and Connecticut. Its mission is to protect New England's environment for the benefit of all people for generations to come. In order to protect and restore New England's endangered landscapes, wildlife, and waters, Conservation Law Foundation has worked for decades to end overfishing, protect ecologically important habitat, and restore key forage species that support groundfish and other marine wildlife by pushing for strong state and federal management measures.

Ocean Conservancy is a national nonprofit organization which seeks a healthier ocean protected by a more just world. For more than 50 years, it has used science-based advocacy, research, and education to tackle some of the greatest global challenges facing the ocean, including climate change, plastic pollution, and overfishing. Ocean Conservancy has a longstanding, demonstrated commitment to securing healthy fisheries which support the well-being of coastal

[1] No party has authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

communities. Its goal is to ensure the best available science is used in fisheries management, including innovations in fish catch monitoring, reporting, and data management.

Save the Sound is a nonprofit organization with over 14,000 member households and activists in Connecticut and New York. It works to protect and improve the land, air, and water of the entire Long Island Sound region. Save the Sound uses legal and scientific expertise and brings citizens together to restore ecosystem function and connectivity and ensure our waters and coastal habitats can support thriving populations of fish, shellfish, and other wildlife.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners claim the industry-funded observer program that they have challenged exists only because *Chevron* "emboldened" the New England Fishery Management Council to "dust[] off" an unused statute and interpret it in a way "no one ever hinted" at. Petrs. Br. 39. Reality belies their narrative. Before *Chevron* evolved into the settled framework it provides today, councils read the Act to authorize observer programs that require domestic vessels to bear the costs of obtaining and accommodating observers. Rather than being suspiciously new, the Council's program reflects a consistent, reasonable view that the Act allows fishery managers to collect the kind of reliable data they need to carry out the Act's data-driven approach to fishery management.

This country realized the value of effective fishery management the hard way. Early on in its history, when information about fisheries was scarce, management was impossible, and fisheries collapsed quickly

and often. Fisheries continued to fall as Congress first tried to manage fisheries itself and then left fishery management to a patchwork system of statutes and treaties. The collapses were disastrous for the fishermen and communities who relied on these fisheries.

To protect these "valuable and renewable natural resources" on a "continuous basis," the Magnuson-Stevens Fishery Conservation and Management Act enacted a comprehensive fishery management system. 16 U.S.C. § 1801(a)(1), (b)(4). The Act requires fishery managers to meet a series of data-driven requirements; for example, they must set annual catch limits at a level that avoids overfishing. As Congress has found, "[t]he collection of reliable data is essential" to effective management under the Act. *Id.* § 1801(a)(8).

Fishery managers have long relied on observer programs to obtain data they need to implement the Act. Observers are trained technicians who collect information while on board a vessel. They address a problem inherent to fisheries: Self-reported data can be unreliable, so being on a vessel is often the only way to verify certain important data—such as what types of fish were caught, or what type of gear was used.

Fishery managers have also long relied on industry-funded observer programs. The first program applied to foreign vessels, which then dominated U.S. fisheries. Though the Act did not expressly address the use of observers on domestic vessels at the time, the next industry-funded observer programs addressed domestic vessels, which by then had displaced foreign vessels in U.S. fisheries. These programs reflect a commonsense principle. Fisheries are a public resource managed for the entire public's benefit. *See The Volant*, 59 U.S. 71, 74–75 (1855). But the fishermen who

take (and profit) from fisheries see the most direct benefit from observer data. Reliable observer data allows fishery managers to keep fisheries healthy (preserving the industry's existence) and to take specific actions like raising catch limits (increasing the industry's profits). And so just as other regulated entities bear monitoring costs, 33 U.S.C. § 1318(a); 42 U.S.C. § 7410(a)(2)(F); Resps. Br. 47, the fishing industry can reasonably be asked to share the cost of obtaining this "essential" data. 16 U.S.C. § 1801(a)(8).

Congress has embraced these programs by amending the Act to confirm, and sometimes expand, fishery managers' authority to create them. In three specific contexts, Congress determined that observer data was so essential that it required industry to cover *both* the costs of obtaining observer data *and* the government's costs to administer observer programs and also set up a stable funding scheme for the programs to insulate them from appropriations lapses. For other contexts, Congress confirmed fishery managers' authority to require observers to "be carried on board . . . for the purpose of collecting data necessary for the conservation and management of the fishery." *Id.* § 1853(b)(6).

The New England Fishery Management Council's observer program for the herring fishery follows the course set by prior councils over decades. The herring fishery has collapsed before and is now in a delicate state. Its stock crashed again in 2018, and the fishery is currently overfished. The Council identified a clear need for observer data in the fishery: There is significant uncertainty around catch rates of herring (a keystone forage species) and a need to better assess bycatch rates. The Council carefully considered the burdens of requiring industry to bear the costs of obtaining and accommodating observers, and it included

measures and exceptions to minimize those costs. In the end, it found that the need for this data to keep the fishery healthy justified the remaining burdens.

If this case is "Exhibit A" of anything, Petrs. Br. 39, it is of the kind of statute under which agency interpretations deserve the respect that *Chevron* provides. Reflecting hard lessons learned from past efforts that failed to stop fishery collapses, the Magnuson-Stevens Act delegated comprehensive management authority to an administrative body. It is reasonable to presume that Congress intended for that body to resolve questions that might come up when carrying out the Act. Resps. Br. 13–14. The Act requires fishery management decisions to reflect scientific expertise. *See* 16 U.S.C. § 1851(a)(2) (requiring measures to "be based upon the best scientific information available); *id.* § 1852(b) (council membership requirements). Fishery managers' immersion in these complex issues gives them a comparative advantage when wrestling with questions that arise under the Act. Resps. Br. 17–18. And when answering interpretive questions that, in the end, require "policy determinations," fishery managers take all relevant views into account. *Id.* at 18–19. Democratic accountability is built into the Act's structure, as councils must reflect the interests of relevant communities, and decisions are made after extensive public meetings and the standard notice-and-comment process. *See* 16 U.S.C. § 1852(b), (h).

However the *Chevron* question is resolved, the Court should reject petitioners' call for it to answer the Magnuson-Stevens Act question and reverse on that basis. Petrs. Br. 47. Petitioners sought certiorari on the Magnuson-Stevens Act question, Pet. i, but it was denied. 143 S. Ct. 2429. Setting the irregularity of the request aside, it is unfounded. As this amicus brief

shows, the longstanding interpretation at issue is firmly rooted in the Act's text, context, and history. If the Court does adopt a new approach to *Chevron* deference, then it should remand the case for the court of appeals to apply that approach.

ARGUMENT

I. As Congress Has Recognized, Reliable Data Is Essential For Effective Fishery Management.

A. Before the Magnuson-Stevens Act, U.S. fisheries frequently collapsed.

Early on, this Nation lacked basic information about its fisheries. In the 1800s, we did not know when important fish matured; where they bred, spawned, traveled, and were caught; or how quickly they were being caught. *See* W. Jeffrey Bolster, THE MORTAL SEA: FISHING THE ATLANTIC IN THE AGE OF SAIL 122 (2012). Even the question whether "fishing *could* destroy" stocks was up for debate. *Id.* at 178. "Scientific regulation" of fisheries was "impossible in the absence of such knowledge." *Id.* at 122.

The result was that fisheries collapsed one after the other, wreaking "economic disaster" on communities that depended on them. *Id.* at 177. Collapses followed a "typical" sequence, shown by the menhaden's example. *Id.* at 181. In the 1850s, the fish offered a new source of oil after whale stocks collapsed. Smaller fishermen first drove the new economy that grew up around the fish, investing in gear and vessels to catch the plentiful fish. Then industrial-scale technology developed, allowing whole schools of fish to be caught at once, over and over. Vessels were soon forced to go far out to sea to search for the fish, which had once "swarm[ed] near the shore." *Id.* at 179. Within "thirty years," menhaden were overfished. *Id.* at 181; *see also*

id. at 133–139 (describing the 1850s collapse of the New England cod fishery). The small fishermen who had built the market were left with now-useless gear and vessels and no way to recover. *Id.* at 177.

In a first step towards fisheries regulation, Congress created an agency to provide it with basic information about fisheries. It tasked the U.S. Commission of Fish and Fisheries with determining "whether any and what diminution" of fisheries had occurred and "what causes the same," and then reporting its findings to Congress. H.R.J. Res. of Feb. 9, 1871, § 2, 16 Stat. 593, 594. Congress also directed the Commission to use those findings to report on "whether any protective, prohibitory, or precautionary measures should be adopted." *Id.* This was not enough to stop the fishery collapses, as Congress sometimes did not, or could not, react to the Commission's reports in time. *See, e.g.*, Bolster, *supra*, at 262.

Congress thus moved to delegate day-to-day fishery management authority to a federal agency in the 1950s. It created a Bureau of Commercial Fisheries to provide research and "management to assure the maximum sustainable production." Fish and Wildlife Act of 1956, § 2(3), 70 Stat. 1119, 1119. Given "the need for authority to execute" the "Act effectively," Congress authorized the agency to "exercise such general administrative authority . . . necessary to carry out the . . . Act." *Id.* § 3(f), 70 Stat. at 1120–121. This statute, along with other statutes and treaties, made up the patchwork of federal fishery management. Resps. Br. 2.

These early "fishery resource conservation and management practices and controls" were still not enough to safeguard fisheries. 16 U.S.C. § 1801(a)(2). In the

1970s, important stocks had "declined to the point where their survival [wa]s threatened." *Id.* Others were "so substantially reduced" that they were at risk of that same decline. *Id.* This led Congress to decide that a "national program for the conservation and management of the fishery resources" was "necessary" to stop overfishing, conserve stocks, and "realize the full potential" of fisheries. *Id.* § 1801(a)(6).

B. The Magnuson-Stevens Act created a data-driven fishery management system.

Congress enacted a comprehensive fishery conservation and management program in the Magnuson-Stevens Act to end overfishing and secure sustainable fisheries.[2] *See id.* § 1801(b)(4). The Act is structured to "assure" that management will be based on "the best scientific information available." *Id.* § 1801(c)(3). This approach has helped, but significant work remains to be done. *See* NOAA Fisheries, *Status of Stocks 2022: Annual Report to Congress on the Status of U.S. Fisheries* 45 (Apr. 2023), bit.ly/noaasos22 (stating that 49 stocks have been rebuilt under the Act and that 48 are overfished and remain under rebuilding plans).

The Act requires fishery management to meet data-driven goals: to "prevent overfishing" and achieve "the optimum yield" from the fishery. 16 U.S.C. § 1851(a)(1). Both relate to "maximum sustainable yield," the highest amount of fish that can be caught under current conditions in the fishery. 50 C.F.R. § 600.310(e)(1)(i). Overfishing occurs when the rate of fishing threatens a fishery's ability to produce the maximum sustainable yield; preventing it requires

[2] A fishery is defined as a "stock[] of fish which can be treated as a unit for . . . conservation and management." *Id.* § 1802(13).

restricting catch limits to let the fishery recover. *See* 16 U.S.C. § 1802(34). The optimum yield reflects the amount of fish that "will provide the greatest overall benefit to the Nation" and reflects the maximum sustainable yield, as reduced "by any relevant social, economic, or ecological factor." *Id.* § 1802(33).

Regional councils lead the implementation of the Act through fishery management plans and plan amendments, like the one challenged in this case. *See id.* § 1852(a), (h).[3] The councils reflect state, commercial, and recreational interests. *See id.* § 1852(b). The Secretary of Commerce reviews the councils' proposed plans and amendments and, if she approves them, issues implementing regulations through the notice-and-comment process. *See id.* § 1854.

The Act prescribes measures that must be in every plan to meet the requirement to prevent overfishing and achieve the optimum yield. For example, plans must contain "measures . . . necessary and appropriate for the conservation and management of the fishery" and "to prevent overfishing and rebuild overfished stocks" *Id.* § 1853(a)(1). A plan must "establish a mechanism for specifying annual catch limits . . . such that overfishing does not occur," including accountability measures. *Id.* § 1853(a)(15). And plans must "establish a standardized reporting methodology to assess . . . bycatch"—non-targeted species caught but not kept or sold—in the fishery and develop measures to "minimize bycatch" and "the mortality" of

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[3] The councils cover the U.S. Caribbean, Gulf of Mexico, Mid-Atlantic, New England, North Pacific, Pacific, South Atlantic, and Western Pacific. *Id.* § 1852(a). The Secretary of Commerce directly manages highly migratory species fisheries. *See id.* §§ 1802(21), 1852(a)(3).

unavoidable bycatch." *Id.* § 1853(a)(11). Plans must also "assess and specify the nature and extent of scientific data . . . needed for effective implementation." *Id.* § 1853(a)(8).

The Act also lists measures that may be included in a plan based on a fishery's needs. Plans may, for example, require permits to operate within the fishery; close areas to fishing; and restrict when, where, and how fishing occurs. *See id.* § 1853(b)(1)-(4). Plans may also obtain "data necessary for the conservation and management of the fishery" from fishing vessels by "requir[ing] that one or more observers be carried on board," subject to certain minimum safety requirements. *Id.* § 1853(b)(7)-(8). And plans may include any other measures that "are determined to be necessary and appropriate for the conservation and management of the fishery." *Id.* § 1853(b)(14).

C. Fishermen benefit when fishery managers have access to reliable observer data.

As Congress has expressly found, "[t]he collection of reliable data is *essential* to the effective conservation, management, and scientific understanding of [] fishery resources." *Id.* § 1801(a)(8) (emphasis added). Even without a legislative finding, common sense dictates as much. A fishery manager cannot avoid overfishing unless it knows how many fish are in the fishery, how quickly they reproduce, and how catch rates affect that reproduction. Nor can it minimize bycatch without knowing how the fishing gear being used affects bycatch, where and when bycatch occurs, and the rate at which different measures may reduce bycatch. *See* Eric Gilman, et al., *Ecological Data From Observer Programs Underpin Ecosystem-Based Fisheries*

Management, 74 ICES J. Mar. Sci. 1481, 1485 (2017). The same is true of the other quantifiable requirements for fishery management. *See* 16 U.S.C. § 1851.

At-sea observers are a "crucial" source of the reliable data that fishery managers need to carry out the Act. Yuntao Wang & Jane DiCosimo, *NOAA Technical Memorandum NMFS-F/SPO-186: National Observer Program 2016 Fishery Observer Attitudes and Experiences Survey* 3 (2019), bit.ly/noaa16. Very often, "the only independent data" that fisheries managers have comes from observers. *Id.* at 1. These observers are trained biological technicians who record data on catch, bycatch, gear, location, timing, biological characteristics, and more while onboard a vessel. *See id.* at 1, 3. In performing their work, observers face "the same workplace risks and dangers as" fishermen but can also face "harassment, assault, and interference in the course of their work." Kurt J. Heinz, et al., *Review of NOAA Fisheries Safety Policies and Procedures in US Regional and International Observer Programs* 28–29 (Dec. 2017), bit.ly/noaasafetyrpt.

The need for observer data reflects the unusual regulatory context fisheries present. In other settings, a regulator may be able to impose reporting requirements and check reported data against its own monitoring. *See, e.g.*, 42 U.S.C. § 7410(a)(2)(F) (requiring monitoring and reporting of air pollutant emissions). Because fishing occurs out at sea on moving vessels, obtaining reliable data about vessels' activities often requires being on the vessel itself. For example, a vessel fishing for herring can be required to report where it fished, the gear it used, what it caught, and how much it caught. *See* 50 C.F.R. § 648.7. But crews have a limited capacity to record data and may have incentives to misreport. *See* NOAA Fisheries, *Evaluating*

Bycatch: A National Approach to Standardized Bycatch Monitoring Programs 28–31 (2004), bit.ly/noaasbrm (discussing inaccuracies in self-reported data). Or the vessel can be required to report whether it also caught haddock, whether the haddock were alive or dead when caught, and what gear it used. *See* 50 C.F.R. § 648.86(a). But the only way to verify which fish were discarded, why, in what quantities, or the mortality of discarded fish is by seeing what took place on the vessel. *See* Samantha Brooke, *Federal Fisheries Observer Programs in the United States: Over 40 Years of Independent Data Collection*, 76 Mar. Fisheries Rev. 1, 35 (2014) (noting that "observers are highly trained and lack incentives for misreporting" and address "scientific concerns" about "using fishermen to report data").

Fishermen reap the benefits when fishery managers have access to reliable observer data.

Fishery managers can, for example, set higher catch limits when they have better data. To comply with the Act's requirement to avoid overfishing, fishery managers adjust annual catch limits to address "scientific uncertainty," for example about the size of the stock or the effects of factors on the stock, and "management uncertainty," for example about actual catch rates in light of vessel underreporting. NOAA Fisheries, *Setting an Annual Catch Limit*, bit.ly/aclnoaa. Observers produce more reliable data about a fishery (reducing scientific uncertainty) and catch rates (reducing management uncertainty). That reliable data helps "reduce the need for substantial buffers," 50 C.F.R. § 600.335(b), and allows higher annual catch limits. Fishery managers with access to sufficient observer data can therefore set higher catch limits. *See, e.g.*, U.S. GAO, *Federal Fisheries Management:*

Overfishing Determinations Vary Across Regions, and Data Challenges Complicate Management Efforts 18 (Oct. 2022) (reporting that "setting a buffer . . . is not a significant focus in the Alaska region because of the region's robust observer participation program"). But where observer coverage is low and less data is available, managers need to decrease catch limits. *See* 80 Fed. Reg. 39,731, 39,733 (July 10, 2015) (declining to increase observer coverage and explaining that "significant additional uncertainty buffers" already "mitigate[d] any lack of absolute precision and accuracy in estimating overall catch").

Better data also allows fishery managers to protect the fishermen who target bycatch species while reducing burdens associated with the bycatch-minimization requirement. When vessels catch non-target species, they "contribute to overfishing and slow efforts to rebuild" stock of those species. NOAA Fisheries, *Understanding Bycatch*, bit.ly/noaabycatch. And when vessels catch or kill non-targeted species, they harm the fishermen who do target those species. For example, if a herring vessel's football-field sized nets catch haddock too, those fish count against the haddock catch limit, leaving fewer for the smaller vessels that fish for haddock to catch. Observers are "the primary source for data" on bycatch rates that allows fishery managers to know whether their bycatch minimization measures are working. NOAA Fisheries, *Using Observer Data* (last updated Dec. 13, 2018), bit.ly/noaadatause. This data also allows them to reduce burdens associated with the minimization requirement. As new technology develops, offering the potential to reduce bycatch at lower costs, fishery managers need data on how it performs, including under real-world conditions, to authorize its use in a fishery. *See id.*

Because observers provide reliable data, observer coverage in a fishery can also increase trust in fishery management. In the North Pacific Groundfish Fishery, observers are stationed aboard most vessels, and fishermen can "observe and understand the data collection process." U.S. GAO, *Problems Remain With National Marine Fisheries Service's Implementation of the Magnuson-Stevens Act* 8 (Apr. 2000). This contributes to widespread agreement in the fishing industry "that the best available scientific information" used to make management decisions "is of high quality." *Id.* In fisheries without similar observer coverage, that agreement is often not present. *See id.* at 9.

II. Congress Has Consistently Embraced Industry-Funded Observer Programs After Fishery Managers Created Them.

Congress's attention to the use of observer programs under the Magnuson-Stevens Act has followed a pattern. After a fishery manager implements an observer program, Congress amends the Act to confirm or strengthen their authority to do so. In three contexts—for foreign vessels, in the North Pacific region, and for limited-access privilege programs—Congress's amendments reflect a conclusion that observer data is always needed and create a stable funding scheme under which industry pays for observer costs *and* the government's administrative costs to run the program. For all other contexts, Congress's amendments reflect a conclusion that fishery managers may sometimes need observer programs to address the data needs in their fisheries and can obtain that data, subject to available appropriations. Over the thirty years since that general amendment, fishery managers have continued to create observer programs and to require industry to bear observer costs when needed to

implement the Act. Congress has not returned to the Act to restrict their authority to do so.

A. Fishery managers have repeatedly read the Act to allow them to require vessels to bear observer costs.

Petitioners point to the herring observer program as "Exhibit A" of the type of agency actions that *Chevron* has wrought. Petrs. Br. 39. In reality, councils first read the Act to authorize them to create industry-funded observer programs for domestic vessels as early as 1990. These councils did not mention *Chevron*, which was then still developing into "an accepted mode of analysis." Merrill Br. 6. In the decades since then, councils have continued to use industry-funded observer programs when they have a specific need for observer data. The driving force behind these programs is not *Chevron*, but a long-held view that the Act authorizes fishery managers to collect the data they need to meet its data-driven requirements.

In the mid-1980s, fishery management councils realized that they needed reliable data from observers aboard domestic vessels.[4] When the Act was passed in 1976, foreign vessels dominated U.S. waters. The Secretary of Commerce included an observer program in the first foreign fishery management plan in 1977.[5]

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[4] The Act conditioned foreign vessel permits on, among other things, an agreement to permit U.S. observers "on board" and to reimburse the United States "for the cost of such observer." Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 204(b)(7), 90 Stat. 331, 343.

[5] The Secretary did so to "collect[] scientific data and carry[] out other management and enforcement activities" with respect to foreign vessels. 42 Fed. Reg. 8813, 8817 (Feb. 11, 1977). The program required foreign vessels to "[p]rovide, at no cost to the

When domestic vessels later displaced foreign vessels in U.S. waters, the councils needed reliable data about those vessels. As enacted, the Act required fishery management plans to contain "necessary and appropriate" measures but did not expressly address observer programs for domestic vessels. *See* 16 U.S.C. § 1853 (1988). Relying on this general authority, councils created observer programs as needed to address the specific needs of their fisheries.[6]

Some of these programs relied on industry funding. For example, the Mid-Atlantic Fishery Management Council created an observer program in 1990 for the Atlantic Surf Clam and Ocean Quahog Fishery to allow vessels to shuck at sea.[7] Shoreside shucking had become expensive, and observers allowed the council to authorize at-sea shucking and still "monitor the actual harvest." 55 Fed. Reg. at 24,186. Vessel owners were required to pay "all reasonable expenses of carrying the observer on board." *Id.* at 24,196.

The North Pacific Regional Management Council needed an observer program to obtain much-needed data. In the 1980s, domestic vessels displaced foreign

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observer or the United States, accommodations for the observer" and "reimburse the United States for the total costs of placing observers aboard." *Id.*

[6] *See* 48 Fed. Reg. 22,606, 22,607 (May 19, 1983) (Pacific Coast Groundfish Fishery, allowing the Regional Director to "assign an observer to permitted vessels" to "collect[] scientific data and carry[] out other management and compliance activities"); 48 Fed. Reg. 5560, 5565 (Feb. 7, 1983) (Western Pacific Spiny Lobster Fisheries, requiring vessels to carry an observer on request).

[7] *See* 55 Fed. Reg. 24,184, 24,196 (June 14, 1990); *see also* 49 Fed. Reg. 30,946, 30,948 (Aug. 2, 1984) (Atlantic Surf Clam and Ocean Quahog Fishery, allowing fishing for research purposes to be conditioned on "[e]mbarkation of observers").

vessels (which had been covered by the Secretary's foreign vessel observer program) in the fishery. This caused "a loss of observer data" considered critical for fisheries management." Mem. from Clarence G. Pautzke, Exec. Dir., to Council, SCC, and AP Members Re: *Fishery Observer Programs* 1 (Jan. 10, 1989), bit.ly/jan89mem. The Council formally declared that "the lack of observer data" prevented it "from meeting its obligations" under the Act. N. Pac. Fishery Mgmt. Council, Jan. 1989 Meeting Minutes at 15 (June 20, 1989), bit.ly/jan89min.

To address the problem, the Council created an observer program and required vessels to pay observer costs.[8] It required all large vessels (and a lower percentage of smaller vessels) in the North Pacific groundfish fishery "to carry an observer." 55 Fed. Reg. at 4842. Vessels were required to pay "the cost of the observer directly to the [observer] contractor" and were also responsible for paying the day-to-day "costs of deploying observers," like room and board. *Id.* at 4840. The government was responsible for administering the program and managing the collected data (and funding those activities). *Id.*

Over the next decades, fishery managers continued to create observer programs and require fishery users to bear observer costs.[9] These programs varied in

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[8] *See* 55 Fed. Reg. 4839, 4848 (Feb. 12, 1990); *see also* 52 Fed. Reg. 8592, 8596 (Mar. 19, 1987) (discussing an interim program under which the council "may rely" on industry-funded observers for "data necessary for conservation and management").

[9] *See, e.g.*, 56 Fed. Reg. 63,685, 63,690 (Dec. 6, 1991) (Summer Flounder Fishery, requiring vessels "to arrange for and facilitate observer placement" and "[p]rovid[e] adequate accommodations and food"); 56 Fed. Reg. 65,007, 65,012 (Dec. 13, 1991) (Atlantic

scope and duration, based on the needs of the fishery. In 1993, the Secretary responded to evidence of overfishing in the Atlantic Shark Fishery by, among other things, requiring vessels to accept observers onboard and pay associated observer costs.[10] After being left to act "based upon incomplete . . . information," the New England Fishery Management Council concluded in 1994 that an observer program was "necessary for the management program [in the Northeast Multispecies Fishery] to be effective."[11] In 1995, Mid-Atlantic Fishery Management Council used monitoring measures that included observers to address a growing risk of overfishing in the Squid and Butterfish Fisheries.[12] Responding to concerns about overfishing in the new Golden Crab Fishery in 1996, the South Atlantic Fishery Management Council restricted access to the fishery and imposed observer requirements.[13] In 2004, the Pacific Fishery Management Council required at-sea processing vessels in the Pacific Coast Groundfish Fishery to "arrange for observer services from an observer provider" to generate data the Council needed to carry out the Act's bycatch minimization requirements.[14] And the New England

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Swordfish Fishery, noting "costs associated with observer coverage would be shared by NMFS and vessel owner/operators").

[10] *See* 58 Fed. Reg. 21,931, 21,935, 21,940, 21,947 (Apr. 26, 1993).

[11] 59 Fed. Reg. 9872, 9878, 9903 (Mar. 1, 1994) (requiring operators to "[p]rovide accommodations and food" to the observer).

[12] *See* 60 Fed. Reg. 65,618, 65,619, 65,630 (Dec. 20, 1995) (requiring operators to "[p]rovide accommodations and food").

[13] *See* 61 Fed. Reg. 43,952, 43,953, 43,957 (Aug. 27, 1996) (requiring operators to "[p]rovide accommodations and food").

[14] 69 Fed. Reg. 31,751, 31,752, 31,756 (June 7, 2004); *see also* 50 C.F.R. § 660.314(d)(1), (e)(1) (2006).

Fishery Management Council created an observer program in the Atlantic Sea Scallop Fishery in 2007 because its specific bycatch restrictions "require close monitoring to achieve specified mortality targets."[15]

Rather than breaking new ground, the New England Fishery Management Council's herring observer program follows a well-trod course.

B. Congress has embraced, and expanded, fishery managers' authority to use these programs.

Petitioners point out that Congress has addressed the costs of observer data in three contexts—foreign vessels, the North Pacific region, and limited-access privilege programs—and insist these provisions "strongly suggest[]" that Congress did not otherwise authorize fishery managers to impose observer costs on vessels. Petrs. Br. 46. Their argument seems to stem from an apparent misunderstanding of the Act. These programs do not "cap[] the costs of [observer] salaries." *Id.* at i. In these contexts, Congress so strongly agreed that observer data is crucial that it guaranteed stable funding for the program, and it so strongly agreed that industry should bear the associated costs that it made industry responsible for observer costs *and* the government's administrative costs. Congress's endorsement of a stable, completely industry-funded program in these contexts does not suggest that it prohibited fishery managers from requiring vessels to bear only observer costs in other contexts. *See RadLAX Gateway Hotel, LLC v.*

[15] 72 Fed. Reg. 32,549, 32,551, 32,555 (June 13, 2007) (making vessels responsible for "arrang[ing] for carrying" the observer and "paying the cost of the observer," in return for being allowed additional fishing days at sea and a higher catch allowance).

Amalgamated Bank, 566 U.S. 639, 645 (2012) (discussing use of the specific-general canon to avoid a contradiction or superfluity). The most that can be inferred is that Congress was comfortable making fishery managers' ability to create these ad-hoc programs contingent on their having sufficient appropriations to cover their own administrative costs.[16]

Foreign Vessels. After the Secretary created an observer program for foreign vessels, Congress amended the Act to create a more robust program. It made observers mandatory, requiring U.S. observers to be "stationed aboard each foreign fishing vessel." Salmon and Steelhead Conservation and Enhancement Act of 1980, Pub. L. No. 96-561, § 236, 94 Stat. 3275, 3299 (1980). It expanded the costs foreign vessels are responsible for, *supra* at n.4, to cover the government's costs to implement the program. *See* § 236, 94 Stat. at 3300 ("all the costs of providing a United States observer aboard"); Pub. L. No. 97-453, § 2(a), 94 Stat. 2481, 2481 (1983) (requiring vessels to pay "all of the costs incurred incident to such stationing [of monitors], including the costs of data editing and entry and observer monitoring"). And it required those charges to be deposited in a newly created Treasury Fund, which the Secretary could draw from as provided in appropriations acts. That restriction created a risk that observer coverage would lapse due to "insufficient appropriations," so Congress directed

[16] This Court does not rely on unenacted bills to settle statutory meaning. *See, e.g.*, *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990). Petitioners collect bills that would allow fees that also fund the *government's* costs to run observer programs. Petrs Br. 50. The interpretive question their challenge raises involves a more limited set of costs: those associated with obtaining and accommodating observers.

the Secretary to create a "supplementary" program" to ensure stable funding during appropriations lapses. Act of Jan. 12, 1983, Pub. L. No. 97-453, § 2(a), 96 Stat. 2481, 2483. Under the supplementary program, the Secretary sets fees that foreign vessels pay directly to third-party observers. *See id.*[17]

North Pacific. Congress strengthened the North Pacific Council's observer program, *supra* at 16–17, when codifying it. Congress authorized the Council to design "a fisheries research plan" that "requires" observers to "be stationed on fishing vessels" for "collecting data necessary for [] conservation, management, and scientific understanding." Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 118(a), 104 Stat. 4436, 4457. Congress also responded to the concern that "data gathering, research, and enforcement" was "seriously handicapped . . . by a lack of stable funding" for the government's side of the costs.[18] It allowed the Council to raise the permit fee for all vessels or processors in the fishery to cover the costs of obtaining observer data *and* the government's costs. *See* 16 U.S.C. § 1862(a)(2), (b)(2).[19] And it

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[17] Because the Magnuson-Stevens Act, along with later statutes, succeeded in ending foreign fishing in U.S. waters, this program has become obsolete. *See* Cong. Research Serv., *Reauthorization Issues for the Magnuson Stevens Fishery Conservation and Management Act* 35 (2014) ("[F]oreign catch . . . declined from about 3.8 billion pounds in 1977 to zero since 1992.").

[18] *Oversight of Marine Fisheries Management: Hearing Before the S. Commerce, Science, and Transportation Comm.*, S. Hrg. 101-465, 101st Cong. 23 (1989) (Testimony of William E. Evans, Under Secretary for Oceans and Atmosphere, U.S. Department of Commerce).

[19] "Agency costs to administer and operate . . . observer programs are authorized recoverable costs." 59 Fed. Reg. 46,126,

created a fund for the fees and allowed the fund to be used for the plan "without appropriation or fiscal year limitation." *Id.* § 1862(b)(2), (d).

Limited Access Privilege Programs. Fishery managers turned to these programs, which allocate the fishery's quota among individual entities, in response to conditions like overcapitalization. In an overcapitalized fishery, there are too many vessels and too few fish, creating a rush to fish where "a very few" vessels end up "tak[ing] the entire fleet's annual quota."[20] When addressing these programs, Congress again created a stronger version of the existing administrative actions. Congress's program, like the administrative programs, required adequate observer coverage as part of the enforcement and management measures to make sure that no entity took more than its quota. *See* Sustainable Fisheries Act, Pub. L. No. 104-297, § 108(e), 110 Stat. 3559, 3576–577 (1996). Congress went further by requiring fishery managers to charge permit fees for vessels in the limited-access privilege program that cover "the actual costs"—including the government's costs—"directly related to the management, data collection, and enforcement" of the program. 16 U.S.C. §§ 1854(d), 1855(h)(5)(B).[21] For this program, too, Congress created a fund for those fees, and allowed the Secretary to use those funds to carry

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46,127 (Sep. 6, 1994). The increased fees are capped at either the actual costs of the research plan or 2% of the fishery's harvest. 16 U.S.C. § 1862(b)(2)(E).

[20] 55 Fed. Reg. 3416, 3417 (Feb. 1, 1990) (using industry-funded observer coverage to manage a catch-share program in the Atlantic Surf Clam and Ocean Quahog Fishery).

[21] Fees are capped at 3% of the ex-vessel value of fish harvested under a program. *See id.* § 1854(d)(2)(B).

out the programs "without appropriation." *Id.* § 1855(h)(5)(B).

General Observer Programs. After fishery managers created domestic vessel observer programs to carry out their duties under the Magnuson-Stevens Act, Congress amended the Act to confirm that authority.[22] Using the same "carrying" language as the administrative programs, *see supra* at 16–17, Congress stated that fishery management plans may "require that one or more observers be carried on board a [domestic] vessel . . . for the purpose of collecting data necessary for the conservation and management of the fishery." § 109(b)(2), 104 Stat. at 4448 (codified at 16 U.S.C. § 1853(b)(8)). It limited that authority only where requiring an observer would put the "health or safety of the observer" or the "operation of the vessel" at risk. *Id.* In the same amendment, Congress made a new finding that recognized the importance of the kind of reliable data that observers provide. *See* § 101(a), *id.* at 4437 ("The collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States."). And after fishery managers had continued to create observer programs and

[22] S. Rep. No. 414, 101st Cong., 2d Sess. 20 (1990) (The amendment "clarif[ied] the existing authority . . . to require that observers be carried on board domestic fishing vessels for conservation and management purposes."); H.R. Rep. No. 393, 101st Cong., 1st Sess. 28 (1989) (stating that "Councils already have—and have used—such authority" and that "the amendment makes the authority explicit"); *see also* S. Rep. No. 414, 101st Cong., 2d Sess. 8 (1990) (noting that the authority to "require[e] U.S. vessels to carry observers" was "implicit in the Magnuson Act," that the North Pacific Council had used it, and that the Council-specific amendments provided additional authority to spread costs among all fishery users not just vessels carrying observers).

require users to bear observer costs, *see supra* at 17–19, Congress amended the Act to impose sanctions (like permit revocation) on those who fail to make "any payment required for observer services . . . contracted by an owner or operator." § 114(c), 110 Stat. at 3599.

As this statutory history shows, each time Congress addressed the use of fishery observers, it recognized the important role that observer data plays in fishery management. In three specific contexts—foreign vessels, the North Pacific region, and limited access privilege programs—it determined that observer data will *always* be needed to meet the Magnuson Stevens Act's goals and provided stable funding for both the government's administrative costs and the costs of obtaining observer data. When addressing the general need for observer data that might arise in a fishery, Congress confirmed fishery managers' authority to create observer programs. Congress has never overturned fishery managers' understanding that, under this authority, they can create observer programs, require users to pay observer costs, and fund their own administrative costs with available appropriations.

III. The Herring Fishery Observer Program Follows This Established Practice.

The Atlantic herring fishery has collapsed before. For centuries, fishermen caught herring off the New England coast using "small-scale, low-impact gear." Herring Alliance, *Atlantic Herring: History of a Fishery* 1 (2010), bit.ly/historyah. Then the industrialization of herring fishing led to wild swings in the fishery's health. The herring fishery collapsed in the 1970s when foreign trawlers crowded into the fishery, rebounded in the 1980s after foreign vessels were kept

out, and fell again in the 1990s after domestic midwater trawling vessels took their place. *See id.*

The herring fishery remains at risk today. The herring stock crashed in 2018 after trawling vessels "operated under clearly unsustainable catch limits" for years. Peter Baker, *With Atlantic Herring Population Crashing, Managers Should Adopt Science-Based Rules* (Sept. 20, 2018), bit.ly/pewherring.[23] The fishery is now overfished, meaning the spawning stock is too small for the stock to replenish itself. *See* New England Fishery Management Council, *Atlantic Herring: Council Signs Off on 2023-2025 Specifications; Receives Stock Assessment Overview* 2 (Sept. 30, 2022), bit.ly/nefmc922. To successfully rebuild the fishery, the Council will need access to adequate, reliable data. *See supra* at 10–14.

As other fishermen have noted, the lack of observer data in the herring fishery harms their bottom line. For example, when observer coverage is low, the estimate of how quickly herring fishermen catch haddock (a commercially important groundfish stock caught as a bycatch species in the herring fishery) may be based on unrepresentative data. Herring fishermen may argue that the estimate of bycatch caught is too high, causing the herring fishery to be shut based on a premature conclusion that the haddock bycatch limit was met. *See* Letter from Shaun M Gehan, Counsel to the Sustainable Fisheries Coalition to Terry Stockwell III, Chair, N.E. Fishery Mgmt. Council 2–3 (Jan.

[23] The Secretary has allocated more than $11 million to the herring fishery to address this most recent crash under a statute providing for assistance to commercial fishermen after a secretarial determination of a "fishing resource disaster." 16 U.S.C. § 4107(d) (2018); NOAA Fisheries, *Fishery Disaster Determinations* (last updated Sept. 12, 2023), bit.ly/noaadisaster.

19, 2018), bit.ly/sfcletter (criticizing the low observer coverage). And because the vessels that fish for herring can catch a large amount of haddock on any given trip, low observer coverage can cause the haddock bycatch rate to be exceeded well before fishery managers can react. That leaves fewer haddock for the groundfishermen that depend upon haddock for their livelihoods. *See* Cape Code Commercial Fishermen's Alliance, *Comments on Industry Funded Monitoring Amendment* at 1 (Dec. 21, 2018), bit.ly/cccfacomment (supporting 100% observer coverage on larger vessels to address haddock bycatch).

The New England Fishery Management Council developed the Atlantic herring observer program to provide "affordable monitoring for the herring fishery" to address its data needs. 85 Fed. Reg. 7414, 7417 (Feb. 7, 2020). It needs the data to obtain "[a]ccurate estimates of catch" and "accurate catch estimates for incidental species for which catch caps apply" (like haddock). *Id.* at 7423, 7425 (estimating catch uncertainty will be low as 30%). Under the program, observers collect data on, among other things, catch, bycatch, and gear, and also collect samples. *See id.* at 7418.[24]

The Council required industry to bear some costs of the program, following the model of prior programs. Vessels covered by the program bear the costs of obtaining the observer data; the government is responsible for the administrative costs of running the program. *See id.* at 7415–416. The government may decide to reimburse vessels for observer costs, as it has

[24] The program refers to "at-sea monitors" because monitors, unlike observers, collect "whole specimens, photos, or biological samples" in only limited circumstances." *Id.* For simplicity's sake, this brief refers to observers throughout.

to date. Resps. Br. 5. When (as now) the government lacks appropriations to fund its responsibilities under the program, the program goes dormant. *See* NOAA Fisheries, *Atlantic Herring Industry-Funded Monitoring Program Suspended Beginning in April 2023* (Nov. 2022), bit.ly/noaaifm.

The Council took careful steps to minimize the observer costs that vessels bear. First, the vessels which may be required to carry observers are larger and can more easily accommodate observers. *See* 85 Fed. Reg. at 7417 (vessels with Category A and B permits); *see also* New England Fishery Mgmt. Council, *Amendment 5 to the Fishery Management Plan for Atlantic Herring* 259 (2013), bit.ly/nefmcam5 (noting that more than 60% of vessels with these permits are over 80 feet in length). Second, the covered vessels' permits do not contain vessel- or trip-specific catch limits, meaning they offer the most potential for profit and can more easily absorb costs of the program. *See* 50 C.F.R. § 648.204; *see also* NOAA Fisheries, *Industry-Funded Monitoring: An Omnibus Amendment to the Fishery Management Plans of the New England Fishery Management Council* 82 (2018), bit.ly/neifmea ("[V]essels with [these] permits harvest greater than 98% of herring catch."). Third, though some fishermen supported higher observer levels, *see supra* at 26, the Council selected a target of 50% of vessel trips to balance its need for data against vessel costs. *See* 85 Fed. Reg. at 7425. Finally, it included exemptions to further lower the burden on vessels. *See id.* at 7418, 7420, 7422 (wing vessels;[25] vessels intending to land less than 50 metric tons of herring; and midwater

[25] When two midwater trawl vessels drag a net between them and one does not take on any fish, it is a "wing vessel."

trawl vessels that opt for electronic monitoring and portside sampling, with federal funds available to offset electronic monitoring costs). And it committed to reassessing the program in two years to consider whether costs can be further reduced. *See id.* at 7420.

In the end, the Council's observer program rests on the same kind of reasonable judgments that other fishery managers have made for decades. The Council identified a specific need for reliable observer data to meet its responsibilities under the Magnuson-Stevens Act. It read the Act to authorize vessels to bear the costs of obtaining and accommodating observers (but not the government's administrative costs). It carefully considered the burden the program would impose on fishermen and took steps to minimize them. The result is a program that will produce data that will help the Council improve its management of the fishery and, in doing so, avoid more crashes—or a larger collapse—that could drive "the herring industry into nonexistence." Petrs. Br. 18.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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