No. 23-133

IN THE

Supreme Court of the United States

ARLEN FOSTER,
Petitioner,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., LANDMARK LEGAL FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, AND THE BUCKEYE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Landmark Legal Foundation (Landmark) is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities.

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates to protect individual rights and the framework set forth to protect such rights in

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Under Supreme Court Rule 37.2(a), *amici curiae* notified counsel for both parties of its intent to file this brief at least 10 days prior to the due date for this brief.

the Constitution. This aspect of its advocacy is reflected in the regular representation of those challenging overreaching governmental and other actions in violation of the constitutional framework. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014), and *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files amicus curiae briefs with this Court about issues of agency overreach and deference. *See, e.g., Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

The Buckeye Institute was founded in 1989 as an independent research and education institution—a "think tank"—to formulate and promote free-market public policy in the States. The Buckeye Institute performs timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those policy solutions for implementation in Ohio and across the country. Through its Legal Center, The Buckeye Institute works to restrain governmental overreach at all levels of government. That government overreach often comes in the form of agency rules and regulations imposed by unelected bureaucrats. This rule by regulatory agencies—particularly when those agencies' statutory interpretations are granted judicial deference on questions of legal interpretation—is incompatible with representative democracy and the Constitution's system of checks and balances.

Petitioner has thoroughly explained why the Eighth Circuit's decision is erroneous based on the text, purpose, and statutory history of 16 U.S.C. § 3822. *Amici* file in this case to address the second question presented, discussing how the proliferation of agency regulation hurts small businesses and how *Chevron* deference exacerbates the problem.

INTRODUCTION AND SUMMARY OF ARGUMENT

Much can be and has been said about *Chevron* deference. For the business community, and America's small businesses in particular, *Chevron* represents a judicially created doctrine that props up an aggressive administrative state, leading to agency aggrandizement of power and overregulation.

Overregulation is a major problem for small business. Small firms consistently rank the regulatory burden and associated regulatory requirements as one of the top problems facing their business. And the problem has gotten markedly worse since this Court decided *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Businesses have watched as the number of pages in the Code of Federal Regulations and in the Federal Register, the number of economically significant rules, and the number of total regulatory restrictions have ballooned like the national debt. Meanwhile, states impose tens or hundreds of thousands more regulatory restrictions. The result is a regulatory minefield impossible for the small business to navigate.

Beyond the regulatory burden itself, small businesses suffer from the costs of this morass of regulation. They pay comparatively more in regulatory costs than their mid- and large-size counterparts, meaning regulation is disproportionately falling on their shoulders. And higher regulatory costs lead to a decrease in the number of small businesses. Even though Congress has mandated that agencies reduce the regulatory burden and costs on small business, agencies are ignoring this requirement and are playing fast and loose with the law.

Chevron deference imposes dual harm on small businesses. The first is constitutional harm. As with all people and parties, small businesses suffer because *Chevron* deference is incompatible with our constitutional separation of powers and due process. The second is financial harm. When courts defer to agencies, they rubber stamp questionable rules with significant financial consequences for small businesses. And they do so without meaningful and thorough judicial review.

Eliminating *Chevron* will not change the fact that small businesses are overburdened with excessive regulations and costs. But doing so will lessen the burden, ensuring that regulations and their associated costs are based on legally sound interpretations, instead of amorphous concepts of reasonableness.

The Court should grant the petition, overrule *Chevron*, and reverse the decision below. At a minimum, the Court should hold the petition in abeyance pending resolution in *Loper Bright Enterprises, Inc. v. Raimondo* (docketed Nov. 15, 2022).

ARGUMENT

I. Today's Regulatory Burden is a Detriment to Small Business Success.

Overregulation handcuffs small business owners and prevents them from effectively operating and growing their business. It should serve as no surprise that small businesses consistently identify the regulatory burden as an impediment to their success. Every four years, the NFIB Research Center surveys small businesses to determine the most pressing obstacles hindering their success. In the most recent survey, small business owners ranked "Unreasonable Government Regulations" sixth, with nearly one-in-five labeling

it a critical problem. NFIB Research Center, Small Business Problems and Priorities 9 (2020), https://tinyurl.com/y9dn98xc. Nor is this a new phenomenon. In each of the last eight surveys dating back to 1991, "Unreasonable Government Regulations" ranked as a top-10 problem facing small businesses *Id.* at 22–23. In four of those eight surveys, small business owners ranked it in the top five. *Id.*

Other regulatory burden-related issues ranked highly as well—within the top 25. These include "Uncertainty over Government Actions" (10th), "State/Local Paperwork" (11th), "Frequent Changes in Federal Tax Laws and Rules" (13th), "Federal Paperwork" (15th), and "Finding Out about Regulatory Requirements" (25th). *Id.* at 9–10. For context, small business owners ranked these regulatory obstacles as more detrimental than typical business concerns such as cash flow (26th), poor sales (49th), training (32nd) and managing (35th) employees, and employee turnover (50th). *Id.* at 10–11.

Regulations themselves are not the only problem. With each new regulation comes a financial cost. This is why small business owners identified the *costs* of regulatory requirements as obstacles to their success as well. For example, "Minimum Wage/'Living Wage'" ranked 34th, with 13% labeling it a critical problem. *Id.* at 10. "Cost of Government Required Equipment/Procedures" ranked 39th and Mandatory Family or Sick Leave ranked 52nd, with one in ten identifying it as critical. *Id.* at 10–11.

This data reveals two things: 1) regulations themselves are burdensome to Main Street, and 2) the costs associated with regulations hinder small business success.

A. The Regulatory Burden Has Significantly Increased.

With each new regulation comes multiple burdens. First, there is the compliance burden, i.e., the burden of having to change current practices to conform to a new regulation. Then there is the financial cost associated with such compliance. Additionally, there are the reporting requirements and costs to report, recordkeeping requirements and costs to keep records, and time or financial costs to learn about the rule, i.e., rule familiarization costs. Thus, with each new federal or state regulation, comes potentially seven separate burdens.

The modern rise of the "administrative state with its reams of regulations would leave [the Framers] rubbing their eyes." *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting). Today's administrative state "wields vast power and touches almost every aspect of daily life" including "authority . . . over our economic, social, and political activities." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010); *City of Arlington v. F.C.C.*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). If the authors of the Constitution were to see today's executive agencies, with wide-ranging power unmoored from the text or structure of the Constitution as their essential feature, they would surely question whether our founding document still guides us, or if we long ago abandoned it for another path.

According to the Federal Register, the administrative state includes 435 federal agencies. Federal Register, Agencies, https://tinyurl.com/km9t57av (last visited Sept. 11, 2023); *but see* Clyde Wayne Crews Jr., *How Many Federal Agencies Exist? We Can't Drain the Swamp Until We Know* Forbes (July 5, 2017, 4:03 PM),

https://tinyurl.com/ckw4chuk (noting a range between 61–443 depending on the source). If our own government sources and administrative experts cannot accurately count the number of federal agencies, or agree on the definition to obtain an accurate number, how can we expect small businesses or the layperson to know the regulatory requirements of each separate agency?

Since this Court created *Chevron* deference in 1984, agency activity has ballooned. In 1984, the Code of Federal Regulations spanned 111,830 pages across 186 volumes. Federal Register, *Code of Federal Regulations Total Pages 1938–1949, And Total Volumes and Pages 1950–2021*, https://tinyurl.com/3f76enh9 (last visited Sept. 11, 2023). By 2021, it comprised 245 volumes and close to 190,000 pages. *Id.* In 1984, the Federal Register contained 50,998 total pages. Federal Register, *Federal Register Pages Published Per Category 1936–2022*, https://tinyurl.com/yfh925r3 (last visited Sept. 11, 2023). As of 2022, that number stands at 80,756. *Id.* In 1984 there were less than 25 economically significant final rules. George Washington University Regulatory Studies Center, *Economically Significant Final Rules Published by Presidential Year*, https://tinyurl.com/yeyt3862 (last visited Sept. 11, 2023). In recent years, this number has often doubled, and sometimes quadrupled or quintupled. *Id.* According to one report by the U.S. Chamber of Commerce, federal agencies have identified over 15,000 final rules that have a negative impact on small business. U.S. Chamber of Commerce Foundation, *The Regulatory Impact on Small Business: Complex. Cumbersome. Costly.* 15 (Mar. 2017) (hereinafter *Regulatory Impact*), https://tinyurl.com/5xtc2vxm.

When discussing regulatory burdens, the cumulative effect of regulations is often ignored. Yet this is what makes the regulatory burden so crushing. By one count, there are already over 1,094,000 federal regula-

tory restrictions. QuantGov, *State RegData RegCensus Explorer*, Geo. Mason Univ. Mercatus Ctr., https://tinyurl.com/2fma2y88 (last visited Sept. 8, 2023). Each year, federal agencies adopt between three to five thousand new rules. Ronald Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 Geo. Mason L. Rev. 683, 694 (2021). In a vacuum, the addition of new regulations each year is burdensome. But the regulatory burden cannot be viewed in a vacuum, as small businesses must stack the impact of each new regulation on top of those impacts of regulations already in effect from previous years. For the business owner, each new regulation is another cut toward the thousandth cut that strikes the fatal blow.

Recall that with each new regulation on small businesses, there may be up to seven separate burdens—changing business practices, the financial cost of compliance, reporting requirements and associated costs, recordkeeping requirements and associated costs, and rule familiarization costs. Being conservative, if only 25 of the 3,000–5,000 new rules each year regulate small business, that is potentially 175 new burdens on small business in a single year. Over a 5-year period, this is 875 potentially distinct burdens on a small business. And this is from federal agencies alone.

The regulatory burden on small businesses becomes exponentially worse when considering state restrictions. The Mercatus Center at George Mason University tracks each state's regulatory burden. As of 2022, California, New York, New Jersey, Illinois, and Texas were the top five states in terms of total regulatory restrictions imposed. QuantGov, *State RegData RegCensus Explorer*, Geo. Mason Univ. Mercatus Ctr., https://tinyurl.com/2fma2y88 (last visited Sept. 8, 2023). California had a jaw-dropping 404,000 total restrictions, while New

York had 299,000, New Jersey had 287,000, Illinois had 279,000, and Texas had 273,000. *Id.* For context, the number of total restrictions in California *alone* exceeded the number of restrictions for Canada's 13 provinces *combined*. *Id.* The small businesses in these highly regulated states can hardly keep track of, let alone absorb the burdens that come with, these federal and state regulatory restrictions.

Not only do these burdens affect small business owners, but also small business employees. 99.9% of American companies are small businesses, and they employ 61.7 million Americans, 46.4% of the private sector workforce. U.S. Small Business Administration Office of Advocacy, *Frequently Asked Questions About Small Business 2023* (Mar. 27, 2023), https://bit.ly/3MyX8au. Employees depend upon their employers' continued success, and if small businesses are straddled with an increasing set of regulatory burdens that hamper growth, the American workforce will likewise suffer.

The total regulatory burden on small businesses has increased since the first days of *Chevron*. Overturning *Chevron* will not eliminate the burden, but it will force agencies to craft legally sound rules instead of relying on court deference to uphold dubious agency interpretations.

B. Small Businesses Wrongfully Bear the Brunt of Regulatory Costs.

While each new regulation imposes hardship, regulations do not burden all businesses equally. Specifically, regulatory costs disproportionately fall on small businesses.

Congress has recognized that small businesses are disproportionately affected by regulatory costs. In

Section 2(a) of the Regulatory Flexibility Act, Congress declared that "regulations designed for application to large scale entities have been applied uniformly to small businesses" and that "uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses . . . with limited resources[.]" Regulatory Flexibility Act (RFA), Pub. L. No. 96–354, § 2(a)(2–3), 94 Stat. 1164, 1164 (1980) (codified at 5 U.S.C. § 601 note). Because of the disproportionate impact of regulation on small business, Congress mandated that agencies conduct, subject to a few narrow exceptions, front- and back-end analyses to minimize the burden on small businesses and fit regulation to the scale of the business. *See* 5 U.S.C. § 603 (mandating an Initial Regulatory Flexibility Analysis (IRFA)); 5 U.S.C. § 604 (requiring a Final Regulatory Flexibility Analysis (FRFA)). However, a recent NFIB White Paper revealed that agencies give short shrift to, or altogether ignore, these congressional mandates, regardless of the disproportionate impact their regulation has on small business. *See* Rob Smith, *The Regulatory Flexibility Act: Turning a Paper Tiger Into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*, NFIB (May 2023) https://tinyurl.com/yr5mtkkp.

Historical data proves that small businesses pay more in regulatory costs than their mid- or large-size counterparts. One 1995 report found that businesses with fewer than 20 employees spent $5,532 per employee in regulatory costs during 1992. Thomas D. Hopkins, *Profiles of Regulatory Costs* 20 (1995), https://tinyurl.com/mwmep39v. In the same year, businesses with 20-499 employees spent $5,298 per employee in regulatory costs, while businesses with over 500 employees paid only $2,979. *Id.* A 2014 analysis revealed the

same—the smallest of businesses continue to pay more per employee in regulatory costs than their counterparts. Businesses with less than 50 employees spent $11,724 in regulatory costs per employee per year, while mid-sized firms spent $10,664 and large firms spent just over $9,000 per employee per year. W. Mark Crain & Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* 1 (2014), https://tinyurl.com/y5pazz9r.

Agency activity from 2015 provides additional evidence that small businesses are shouldering most of the regulatory cost burden. In that year, the Departments of Energy, Health and Human Services, Labor, Transportation, and Environmental Protection Agency combined published 63 economically significant final rules. *Regulatory Impact*, *supra*, at 9. Of these, agencies identified 23 as having a significant impact on a substantial number of small businesses. *Regulatory Impact*, *supra*, at 9. The total regulatory cost to all businesses from these 23 rules was $4.9 billion, but small businesses were left holding the bag for over $4 billion, or 82% of the total regulatory cost. *Regulatory Impact*, *supra*, at 9, Table A1.

Higher regulatory costs lead to small business closures. Each 10 percent increase in cumulative regulatory costs for a specific industry leads to a 3-6 percent decrease in the number of businesses with fewer than 100 employees in that industry. Ben Gitis & Sam Batkins, *Regulatory Impact on Small Business Establishments* Table 1, American Action Forum (Apr. 24, 2015), https://tinyurl.com/52z28uvb. Narrowing this to the smallest of small businesses (those with less than 20 employees), a 10 percent increase in regulatory costs leads to a 5-6 percent reduction in small businesses. *Id.* A separate analysis found that every

dollar increase in per capita regulatory expenditures results in a 0.0156% decrease in small businesses with 1-4 employees. *Regulatory Impact*, *supra*, at 10 (citing Peter T. Calcagno & Russell S. Sobel, *Regulatory Costs on Entrepreneurship and Establishment Employment Size* Small Business Economics (June 2013)). Based on this finding, every $65 increase in per capita regulatory expenditures results in the closing of one business with 1-4 employees. A $5,000 increase in the regulatory burden results in the closing of 78 small businesses of that size. Moreover, the average annual regulatory growth increases business operating costs per unit of output by 3.3 percent. Richard Fullenbaum & Tyler Richards, *The Impact of Regulatory Growth on Operating Costs* Working Paper, Geo. Mason Univ. Mercatus Ctr. (Aug. 2020), https://tinyurl.com/rtvjkh5e. From this, one economic analysis posits that, excluding all other factors, regulations alone would have raised operating costs between 1998 and 2017 by 92 percent. *Id.* at 20.

This is only the beginning. Beyond these federal regulatory costs, small businesses incur the costs from state and local regulation. While it is incredibly difficult to measure a small business's total regulatory cost from federal, state, and local restrictions, one analysis provides insight into how significant the state regulatory burden can be. For example, in 2007 the total cost of regulation in California was $134,122.48 per each small business with less than 20 employees. Sanjay B. Varshney & Dennis H Tootelian, *Cost of State Regulations on California Small Business Study* 5 (Sept. 2009), https://tinyurl.com/mrmsj3vw.

Federal and state regulatory costs are significant for small businesses. On top of the enormous regulatory burden, agencies are forcing regulated entities with

the fewest resources—small businesses—to pay the most in regulatory costs.

II. *Chevron* Deference Hurts Small Businesses Constitutionally and Financially.

Chevron deference raises serious constitutional questions. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2446, n. 114 (2019) (Gorsuch, J., dissenting). Overturning *Chevron* would not bring government action to a halt. *See* Brief for The Buckeye Institute & National Federation of Independent Business Small Business Legal Center, Inc. as *Amicus Curiae Supporting Petitioner*, *Loper Bright Enterprises, Inc. v. Raimondo*, No. 22–451 (listing a myriad of states abandoning *Chevron* with little known adverse impact on government function and discussing a post-*Chevron* world). This is so because "[o]ne can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts." *Free Enterprise Fund*, 561 U.S. at 499.

Many of the oft-noted problems with *Chevron* apply equally to small businesses. When courts permit agencies to interpret and enforce the law, small businesses lose the fullest protection from our constitutional separation of powers. When courts defer to an agency's interpretation of the law in a case involving a small business, the business loses its due process right to a neutral decisionmaker—*Chevron* impermissibly tips the scales in favor of the government. The bar is thus low for agencies, but high for businesses, who have the untenable burden of proving unreasonableness. The playing field ought to be leveled, and this case presents an excellent vehicle for doing so.

Beyond *Chevron*'s constitutional deficiencies—more than enough to jettison it—the reliance on *Chevron* deference to resolve litigation imposes direct financial costs on small businesses.

Consider a recent rule from the Department of Labor (DOL) raising the minimum wage for federal contractors. *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67126 (Nov. 24, 2021); *see also Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 22835 (Apr. 30, 2021) (President Biden's Executive Order 14026 (Apr. 27, 2021) directing an increase in the minimum wage). This rule raises the minimum wage for small government contractors, small subcontractors, and small entities seeking government contracts to $15.00 per hour. 86 Fed. Reg. at 67131. The President and DOL rely on the Federal Property and Administrative Services Act, 40 U.S.C. 101, *et. seq.*, (Act) to justify this increase. *Id.* at 67129.

DOL admits that this rule is "economically significant." *Id.* at 67194. Shockingly, DOL then claims that the rule "is not expected to have a significant economic impact on a substantial number of small entities." *Id.* at 67217. This is so even though DOL admits the rule will affect 507,200 private firms, including 385,100 small entities. *Id.* at 67127–28. The agency also estimates average annualized direct employer costs at $2.4 million, with direct transfer of income from employers to employees costing employers $1.8 billion. *Id.* at 67204. Notably, this astronomical figure *does not include spillover costs* of increasing wages proportionally for those already making over $15.00 per hour. *Id.* at 67211.[2]

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[2] The Small Business Administration's Office of Advocacy rejected this same certification in the proposed rule as lacking a "factual basis" due to the "agency itself" providing "evidence of

As far as *amici* can tell, DOL has not raised *Chevron* to protect its interpretation of the Act during current litigation over the minimum wage increase. If it did, and courts accepted this argument, they would be rubber stamping the agency's erroneous 5 U.S.C. § 605(b) certification. More concerning, they would be permitting millions, and billions, in costs from the rule, without meaningful judicial review of the agency's legal authority.

Pending before this Court is *Loper Bright Enterprises, Inc. v. Raimondo*, No. 22-451, which provides another example. At issue there is a final rule from the National Marine Fisheries Services (NMFS) mandating industry funded monitors among all New England fisheries. *See* 85 Fed. Reg. 7414 (Feb. 7, 2020). The rule will have "direct economic impacts" on small New England fisheries, costing "$710 per day" of monitoring and an annual return-to-owner (RTO) reduction of "approximately 20 percent." *Id.* at 7418. A divided panel of the D.C. Circuit upheld the rule, relying on *Chevron*. *See Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022).

If this Court upholds that decision, keeping *Chevron* alive in the process, *Chevron* deference will cost these New England fisheries a significant amount of money. One 7-day fishing excursion would cost a small fishery almost $5,000 for the monitor alone. And that is a fixed cost whether the boat catches any fish at all. Put another way, one application of *Chevron* deference could cost a small fishery 6% of the average annual regulatory cost for businesses with less than 50

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the rule's impact." Small Business Administration Office of Advocacy, Comment Letter on Proposed Rule Increasing the Minimum Wage for Federal Contractors, (Aug. 27, 2021), https://tinyurl.com/yu856e5n.

employees.[3] Just two one-day trips a month would cost them over $17,000 per year. And since no fishery can survive on one day per year, or even two days per month, it is easy to see how the application of *Chevron* in this case could drastically raise annual regulatory costs for these businesses.

Take, for another example, the EPA's failed attempt to regulate the waters of the United States. *Revised Definition of "Waters of the United States,"* 88 Fed. Reg. 3004 (Jan. 18, 2023); *see Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023) (rejecting EPA's interpretation). An application of *Chevron* to the EPA's interpretation of the Clean Water Act would have broadened EPA's jurisdiction, increasing permitting costs and work delays for businesses. *See* Brief for Respondents at 38, *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023) (No. 21-454) (citing *Chevron* to support argument that "[t]he Agencies' Understanding Of The CWA's Coverage Of Adjacent Wetlands Is Entitled To Deference").

Yet another example is DOL's *Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal*, 86 Fed. Reg. 60114 (Oct. 29, 2021). The Western District of Texas recently rebuffed a challenge to the rule, relying on *Chevron* to grant the Government's Motion for Summary Judgment. *See Restaurant Law Center v. Dep't of Labor*, No. 1:21-CV-1106, 2023 WL 4375518 (W.D. Tex. July 6, 2023). If this decision stands, small businesses will face first-year per entity costs of nearly $500, and per year costs in subsequent years of over $375. 86 Fed. Reg. at 60150–51. But this is severely underestimated, as the figure does not include wage costs. *See id.* at 60155;

[3] Cost per day ($710) / Average annual cost ($11,724) = 0.06.

Small Business Administration Office of Advocacy, Comment Letter on Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal (Aug. 20, 2021), https://tinyurl.com/mrxp7vd9 (criticizing this exclusion in the proposed rule and providing examples where the rule could cost businesses hundreds of thousands of dollars).

These are just the tip of the iceberg. There are countless examples where *Chevron*'s use has hurt small businesses. They suffer from its infringement upon the separation of powers and its hinderance on due process. More directly, the application of *Chevron* to uphold legally suspect agency rules costs them financially.

CONCLUSION

For the reasons mentioned above and those laid out by Petitioner, the Court should grant the petition, overrule *Chevron,* and reverse the decision below. At a minimum, the Court should hold the petition in abeyance pending resolution in *Loper Bright Enterprises, Inc. v. Raimondo*.

Respectfully submitted,

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