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Maine Lobstermen's Association

Sutherland Weston

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Maine's iconic lobster fishing industry is in **deep trouble** and needs **your help!**

New federal rules intended to protect the endangered North Atlantic right whale won't save the whales but have set a course to eliminate the fishery and end Maine's lobstering tradition.

Imagine Stonington without lobster boats?

Boothbay Harbor without buoys?

No lobster industry for children on Vinalhaven?

The threat is real.

In 2021, the National Marine Fisheries Services (NMFS) released a ten-year whale plan that requires the Maine lobster fishery to reduce its already minimal risk to right whales by 98 percent. **This is an unachievable goal and the industry could not survive.**

The Maine Lobstermen's Association (MLA) is fighting back to Save Maine Lobstermen – and we need your help! We don't have time to wait.

Join the Fight to Save Maine Lobstermen

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New federal rules intended to protect the North Atlantic right whale have set a course to eliminate the Maine lobster fishery and end Maine's lobster industry. And sadly, the plan won't save the whales.

Maine Lobstermen are not to blame.

■ **FACT:** There has not been a *single* known right whale entanglement in Maine lobster gear *in almost 20 years*.

■ **FACT:** Maine lobster gear has *never* been linked to a right whale death.

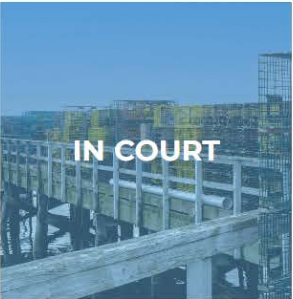
The federal government's plan ignores [important new research](#) about right whale migration patterns that reveals right whales have moved *away* from where Maine lobstermen fish. The government's plan also fails to recognize Maine lobstermen's successful whale conservation practices that have been in place for two decades.

Simply put – the federal government is wrongly holding Maine lobstermen accountable for the decline of the right whale population. Its plan will end the Maine lobster fishery but won't save right whales.

Read the original 10-year whale plan [here](#).

Join the Fight to Save Maine Lobstermen

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The Solution

For more than 25 years, the Maine Lobstermen's Association has been leading the effort to keep right whales safe in the rare instance they encounter Maine lobster gear. MLA is Maine's only statewide organization committed to the preservation of a sustainable lobster resource and the fishermen and communities that depend on it.

The MLA is engaged in a **four-prong strategy** to Save Maine Lobstermen AND right whales.



1. Legal and Policy

The MLA is suing the federal government to stop the 10-year whale plan that will decimate Maine's lobster industry. MLA has asked the court to fix the plan using accurate science so that we can save right whales without sacrificing the lobster fishery.



2. Science and Data

The MLA is engaging with scientific experts to ensure that the most up to date, cutting-edge science is the basis of any right whale conservation plan. This includes use of state-of-the-art modelling and objective research that will guide effective management decisions.



3. Conservation

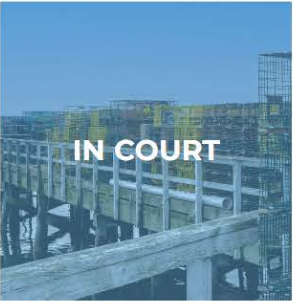
The MLA is working with Maine lobstermen to continue efforts to develop innovative gear solutions that protect right whales and support the continuation of Maine's lobstering heritage.



4. Communications

MLA is building support to ensure the community understands that Maine's lobstering heritage is at risk and may disappear forever, erasing generations of locally-owned and operated fishing businesses and the economic engine of Maine's coastal communities.

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Join the Fight

You Can Help Save Maine Lobstermen

Fighting the federal government and solving complex environmental and cultural problems takes resources. MLA is working to raise \$10 million to lead this fight. This funding will directly support legal efforts to challenge flawed federal regulations through lawsuits, regulatory processes, and political channels, and be invested in scientific research, development of innovative gear solutions, and education to save Maine lobstermen AND right whales.

The threat is real! We can't give up!

Our coastal communities are resilient, but they need our help. We must join together to reject a future where our children are not able to continue Maine's lobstering heritage. The MLA needs your financial support to prevent the lobster industry from being eliminated by flawed federal rules.

We must work to maintain a robust lobster industry for future generations, and all the families and businesses that rely on it today.

We need you.

With your support and generous donations, we will **Save Maine Lobstermen**

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In Court

In September 2021, MLA filed a lawsuit challenging the federal government's fundamentally flawed 10-year whale plan that will all but eliminate the Maine lobster fishery yet still fail to save the endangered North Atlantic right whale. MLA argues that NMFS has overestimated the lobster industry's risk to right whales by cherry-picking the science by using unsupported assumptions and "worst-case scenarios" to justify its mandate for Maine's lobster fishery to reduce its already minimal risk to right whales by 98-percent. MLA claims that NMFS also failed to follow mandatory legal requirements to assess the economic and social costs of their action.

On September 8, 2022, a federal judge in Washington, DC ruled against MLA in an opinion that deferred to the federal agency on all counts without disputing the validity of MLA's concerns. As a result, NMFS is now fast-tracking the 10-year whale plan.

In November 2022, the judge ruled that National Marine Fisheries Service (NMFS) would have until December 2024 to issue new rules. However, the Maine congressional delegation and Governor Mills announced in December 2022 that they were successful in securing a 6-year "regulatory pause" for Maine's lobster industry in the Omnibus appropriations bill which would delay new rules until December 2028. President Biden signed this bill into law on December 29, 2022.

Meantime, MLA's critical lawsuit continues. On October 11, 2022, MLA announced it has retained former U.S. Solicitor General Paul Clement and has filed for expedited consideration of its appeal to the United States Court of Appeals for the District of Columbia. That motion was granted on October 18 and oral arguments in MLA's appeal are set for late February 2023.

Press Release

 [Press Release](#)





Listen: Former U.S. Solicitor General Paul Clement explains MLA's legal appeal.

Motion to Expedite

 [Motion to Expedite](#)

[Motion to Expedite Granted \(October 18, 2022\)](#)

[Opening Brief \(filed November 10, 2022\)](#)

Briefs

Filed January 2023

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[ME Department of Marine Resources](#)

[Maine Lobstering Union](#)

[Massachusetts Lobstermen's Association](#)

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 [Dustin Delano](#)

 [Genevieve McDonald](#)

 [Ed Munsey](#)

 [Dwight Carver](#)

 [John Tripp](#)

 [Cindy Donnell](#)

 [Alexa Dayton](#)

 [Larry Barker](#)

 [Mark Brooks](#)

Maine Lobster Fishery Sues Monterey Bay Aquarium

[Press Release \(March 13, 2023\)](#)

[BML v. MBA complaint](#)

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MAINE

Lobstermen's Association, Inc.

2 Storer St, Ste 203 * Kennebunk, ME 04043
207-967-4555 * 866-407-3770 * www.mainelobstermen.org

For Immediate Release
October 11, 2022

MAINE LOBSTERMEN'S ASSOCIATION HIRES FORMER U.S. SOLICITOR GENERAL; FILES FOR EXPEDITED APPEAL TO PRESERVE LOBSTERING INDUSTRY & PROTECT STATE'S ECONOMY

Paul Clement has argued more than 100 cases at the U.S. Supreme Court

KENNEBUNK, Maine – The Maine Lobstermen's Association (MLA), today, announced that it has retained former [U.S. Solicitor General Paul Clement](#) and has filed for expedited consideration of MLA's appeal to the United States Court of Appeals for the District of Columbia in *Maine Lobstermen's Association v. National Marine Fisheries Service* — its lawsuit to reverse a scientifically-flawed federal whale plan that will cripple Maine's lobster industry.

Clement, who served as U.S. solicitor general during the President George W. Bush administration from 2004-2008, is widely recognized as a leading Supreme Court advocate, focusing on appellate matters, constitutional litigation, and strategic counseling. He has argued more than 100 cases before the Supreme Court including several of the highest-profile cases of the past decade.

“When we said we refuse to let a single judge's decision be the last word and that MLA is preparing to go all the way to the Supreme Court, we weren't kidding,” *said MLA president Kristan Porter*, who is also a commercial fisherman from Cutler. “We are incredibly grateful that Paul Clement, arguably the most qualified attorney in the nation on these matters, has chosen to stand with us. Paul has looked at the facts and agrees with what we have been saying all along – National Marine Fisheries Service (NMFS) abused its discretion. Maine lobstermen are not driving the right whale toward extinction, but we are being punished by unsound federal rules that will wreck this industry but won't recover the whale.”

“This is a clear case of government overreach. It is no exaggeration to say that the fate of the Maine lobster fishery, a national icon, hangs in the balance,” *said Paul Clement*. “The applicable statute requires the agency to apply the best available evidence. The agency instead has resolved every doubt and every disputed issue against an iconic American industry that has gone to great lengths to protect the right whale. The agency is inflicting unprecedented hardship on Maine

lobstermen, while explicitly acknowledging that all this suffering will do nothing to restore the right whale so long as they continue to die in Canada.”

In September 2021, MLA filed a lawsuit challenging the federal government’s fundamentally flawed 10-year whale protection plan that will all but eliminate the Maine lobster fishery yet still fail to save the endangered North Atlantic right whale. MLA argues that NMFS has overestimated the lobster industry’s risk to right whales by cherry-picking the science and using unsupported assumptions and “worst-case scenarios” to justify its mandate for Maine’s lobster fishery to reduce its already minimal risk to right whales by 98%. MLA claims that NMFS also failed to follow mandatory legal requirements to assess the economic and social costs of their actions.

On September 8, 2022, a federal judge in Washington, DC ruled against MLA in an opinion that deferred to the federal agency on all counts without disputing the validity of MLA’s concerns. As a result, NMFS is now fast-tracking the 10-year whale plan and will require Maine’s lobster industry to implement an unachievable 90-percent “risk reduction” as quickly as possible or the federal lobster fishery could be shutdown. According to Clement, the district court’s green light for shutting down a way of life is entirely unjustified.

“The Maine lobster industry is in utter shock and disbelief that their own federal government has set a course to eliminate a fishery that has never been known to kill a single right whale, *said Patrice McCarron MLA executive director*. “Lobstermen are already mourning the loss of their industry. These are good people who care deeply about the ocean, lobsters, and right whales. They want to be part of the solution but, without action by the Court, this is not possible.”

The Maine lobster fishery is essential to Maine’s culture, heritage, and economy and has supported communities and generations of families while ensuring that this important natural resource is sustainably harvested for nearly two centuries. There are approximately 4,750 commercially licensed lobstermen and 1,085 student license holders in the state. Maine’s lobster fleet directly supports more than 12,000 jobs on the water. In addition to the harvesters, the shoreside wholesale lobster sector, that is, the lobster supply chain, supports an additional 5,500 jobs and generates an additional \$1 billion annually – which just begins to touch upon the real value of the fishery to the state. Lobster directly infuses myriad sectors of Maine’s economy from real estate to hotels, restaurants, trucking companies, auto dealerships, and banks to name a few.

“The uncertainty of the new deep cutting federal whale regulations now underway has sent a chill through the lobster fishery this year unlike anything I have experienced during my tenure,” said *Larry Barker, president of Machias Savings Bank*, in a Declaration filed with the motion for appeal. “Our employees with close connections to the lobster industry are regularly hearing from lobstermen that they are canceling plans to apply for new loans given their uncertain future. Many will delay important investments in upkeep of their boats, engines, and traps due to financial uncertainty.”

The MLA is the oldest and largest fishing industry association on the east coast, established in 1954. In 2021, MLA launched its #SaveMaineLobstermen campaign with a four-pronged

approach to preserve the industry and protect the endangered whales. The plan includes aggressive legal and policy strategies, ensuring decisions are based on sound science, innovating effective conservation strategies, and communication. More information on the issue and documents supporting MLA's court case can be found at www.savemainelobstermen.org/in-court.

###

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5238**September Term, 2022****1:21-cv-02509-JEB****Filed On:** October 18, 2022

Maine Lobstermen's Association,

Appellant

State of Maine Department of Marine
Resources, et al.,

Appellees

v.

National Marine Fisheries Service, et al.,

Appellees

Consolidated with 22-5244, 22-5245, 22-5246**BEFORE:** Henderson, Wilkins, and Pan, Circuit Judges**ORDER**

Upon consideration of the unopposed motions to expedite, it is

ORDERED that the motions be granted. The following briefing schedule and format will apply in these consolidated appeals:Brief of Maine Lobstermen's Association
(not to exceed 13,000 words) November 9, 2022Briefs of State of Maine,
Massachusetts Lobstermen's Association,
and District 4 Lodge November 9, 2022
(up to two briefs, not to exceed
9,100 words in the aggregate)

Appendix November 9, 2022

Joint Brief of Federal Appellees
(not to exceed 13,000 words) December 20, 2022

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5238**September Term, 2022**

Joint Brief of Conservation Law Foundation,
Center for Biological Diversity,
and Defenders of Wildlife
(not to exceed 9,100 words)

December 20, 2022

Reply Brief of Maine Lobstermen's Association
(not to exceed 6,500 words)

January 10, 2023

Reply Briefs of State of Maine,
Massachusetts Lobstermen's Association,
and District 4 Lodge
(up to two briefs, not to exceed
4,550 words in the aggregate)

January 10, 2023

The Clerk is directed to calendar these cases for oral argument on the first appropriate date following the completion of briefing. The parties will be informed later of the date of oral argument and the composition of the merits panel.

Appellants should raise all issues and arguments in the opening briefs. The court ordinarily will not consider issues and arguments raised for the first time in the reply briefs.

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 43 (2021); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Laura Chipley
Deputy Clerk

United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

Mark J. Langer
Clerk

(202) 216-7300

NOTICE TO COUNSEL:

SCHEDULING ORAL ARGUMENT

The court has entered an order setting a briefing schedule in a case in which you are counsel of record. Once a briefing order has been entered, the case may be set for oral argument.

You will be notified by separate order of the date and time of oral argument. Once a case has been calendared, the Clerk's Office cannot change the argument date, and ordinarily the court will not reschedule it. Any request to reschedule must be made by motion, which will be presented to a panel of the court for disposition. The court disfavors motions to postpone oral argument and will grant such a motion only upon a showing of "extraordinary cause." See D.C. Cir. Rule 34(g).

If you are the arguing counsel, and you will be unavailable to appear for oral argument on a date in the future, so advise the Clerk's Office by letter, filed electronically. The notification should be filed as soon as possible and updated if a potential scheduling conflict arises later, or if there is any change in availability. To the extent possible, the Clerk's Office will endeavor to schedule oral argument to avoid conflicts that have been brought to the court's attention in advance. See D.C. Circuit Handbook of Practice and Internal Procedures at IX.A.1, XI.A.

Counsel must notify the court when serious settlement negotiations are underway, when settlement of the case becomes likely, and when settlement is reached. Such notice allows for more efficient allocation of judicial resources. Additionally, counsel should promptly notify the court if settlement negotiations are terminated. Notice must be given in an appropriate motion or by letter to the Clerk at the earliest possible moment. See, e.g., D.C. Circuit Handbook of Practice and Internal Procedures at X.D., XI.A.

No. 22-5238(L), 22-5244, 22-5245, 22-5246

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN’S ASSOCIATION,
Plaintiff-Appellant,

STATE OF MAINE DEPARTMENT OF MARINE RESOURCES; MASSACHUSETTS
LOBSTERMEN’S ASSOCIATION; DISTRICT 4 LODGE OF THE INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE WORKS; LOCAL LODGE 207,
Intervenors-Appellants,

v.

NATIONAL MARINE FISHERIES SERVICE; GINA RAIMONDO, IN HER OFFICIAL CAPACITY
AS SECRETARY OF COMMERCE; JANET COIT, IN HER OFFICIAL CAPACITY AS
ASSISTANT ADMINISTRATOR FOR FISHERIES,

Defendants-Appellees,

CONSERVATION LAW FOUNDATION; CENTER FOR BIOLOGICAL DIVERSITY;
DEFENDERS OF WILDLIFE,

Intervenors-Appellees.

On Appeal from the United States District Court for the District of Columbia,
No. 1:21-cv-02509-JEB

BRIEF FOR APPELLANT MAINE LOBSTERMEN’S ASSOCIATION

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November 9, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the Maine Lobstermen's Association certifies that it does not have a parent corporation and that no publicly held corporation owns more than 10% of its stock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

Plaintiff-Appellant in this case is the Maine Lobstermen's Association (MLA). The Defendants-Appellees in this case are the National Marine Fisheries Service, Gina Raimondo (in her official capacity as Secretary of Commerce), and Janet Coit (in her official capacity as Assistant Administrator for Fisheries) (collectively, NMFS). The state of Maine's Department of Marine Resources, the Massachusetts Lobstermen's Association, and the District 4 Lodge of the International Association of Machinists and Aerospace Workers, Local Lodge 207 intervened on behalf of MLA in the district court and are also Appellants in this appeal. The Conservation Law Foundation, the Center for Biological Diversity, and the Defenders of Wildlife intervened on behalf of NMFS in the district court and are also Appellees in this appeal. No other parties, intervenors, or amici appeared before the district court. The state of New Hampshire has filed a statement of intent to file an amicus brief in support of Appellants in this Court; no additional intervenors or amici have appeared in this Court.

B. Ruling Under Review.

The ruling under review is the district court order and accompanying memorandum opinion granting Appellees' cross-motions for summary judgment and denying Appellants' motions for summary judgment. Judge James E. Boasberg of the U.S. District Court for the District of Columbia issued both the order and the

memorandum on September 8, 2022. The order is entry 75 on the district court docket and is located on pages A208-09 of the appendix. The opinion is entry 76 on the district court docket and is located on pages A210-42 of the appendix. The Westlaw citation for the opinion is 2022 WL 4392642.

C. Related Cases.

This case has not previously come before this Court, nor has it come before any other court (other than the district court). The U.S. District Court for the District of Columbia is currently considering *Center for Biological Diversity v. Raimondo*, No. 18-cv-112, a case that involves substantially the same parties and a challenge to the same biological opinion issued by NMFS. Counsel is not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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GLOSSARY OF ABBREVIATIONSAbbreviationDefinition

A

Appendix

APA

Administrative Procedure Act

Dkt.

District court docket

ESA

Endangered Species Act

FWS

U.S. Fish and Wildlife Service

NMFS

National Marine Fisheries Service

INTRODUCTION

The National Marine Fisheries Service (NMFS) has mistakenly put the Endangered Species Act (ESA) on a collision course with the iconic, centuries-old lobster industry in Maine. Nothing in the ESA, properly interpreted, requires this economic and cultural disaster. Under the ESA, every federal agency must ensure that any proposed agency action “is not likely to jeopardize” an endangered species “us[ing] the best scientific and commercial data available.” 16 U.S.C. §1536(a)(2). The statute thus requires realistic assessments based on the best available data, not worst-case scenarios based on skewed data gerrymandered to resolve every doubt in favor of the species and against the industry. NMFS openly embraced the latter approach, and the decision below endorsing it cannot be allowed to stand.

The problems in this case begin (but certainly do not end) with the fact that NMFS is both the proponent and adjudicator vis-à-vis the agency action underlying this case. In the typical case where a federal agency wants to authorize action that implicates endangered marine species, that agency must consult NMFS, which in turn must issue an opinion—known as a “biological opinion”—that contains a determination as to whether jeopardy is likely or not. NMFS also may suggest conservation requirements in the biological opinion, but only under certain conditions. Here, however, NMFS is the proponent agency and must consult with itself. Perhaps because of the artificiality of that dynamic, NMFS short-circuited the

process by baking into the proposed action draconian conservation requirements that will imperil the lobster industry.

The endangered species that is implicated here is the North Atlantic right whale. Although few Maine lobstermen have ever seen a right whale, Maine's lobster industry has worked for decades with NMFS to ensure that lobstering gear does not pose a material risk of entanglement or other harm to the right whale. Those efforts have worked: No documented entanglement of a right whale in Maine lobstering gear has occurred *in nearly 20 years*; and there is no documented example of Maine lobstering gear *ever* seriously injuring a right whale.

Recently, however, oceanographic changes have caused the right whale's primary food source to move farther north (into Canadian waters), and Canadian fishing gear and vessels have killed or seriously injured a significant number of right whales. In 2017 alone, over a dozen right whales were killed or seriously injured in Canada, leading NMFS to declare an "unusual mortality event" and prompting Canadian officials to institute a host of protective measures. In light of that unusual mortality event, NMFS reinitiated the ESA consultation process to determine whether it could continue to authorize the American lobster fishery.

That ESA consultation process went off the rails. Relying on a handful of words of legislative history from 1979, NMFS decided that it would give the "benefit of the doubt" to the right whale by resolving all uncertainties "in favor of the species"

and using only those “metrics representing the worst case scenario”—which NMFS itself described as “very likely” to never occur, as is true of most worst-case scenarios. A804, 926. As expected, that radical approach projected a steadily declining right whale population—which led NMFS to develop a four-phase “conservation framework” that baked in draconian restrictions on the lobster industry in a stated effort to “meet” the purported “mandates of the ESA.” A1071. That conservation framework would decimate Maine’s lobster industry: It requires the American lobster fishery to “further reduce” NMFS’ inflated risk of right whale entanglement over 30-fold to nearly zero by 2030—a requirement that is well-nigh impossible to satisfy for a Maine lobster fleet that, by law, is exclusively composed of small businesses with thin profit margins. A1071.

After developing a proposal using dire predictions and assuming the necessity of industry-crushing restrictions, NMFS then asked itself whether authorizing the lobster fishery *on those conditions* is likely to jeopardize the right whale. Unsurprisingly, NMFS answered its own question with a foreordained answer. It concluded that a lobster fishery in which lobstermen must take the most extreme precautions possible to avoid hypothetical worst-case scenarios that err on the side of the species at every turn is not likely to jeopardize the right whale. NMFS then issued a final rule implementing the first phase of the conservation framework, and that rule alone is estimated to impose tens of millions of dollars in compliance costs

on Maine's lobster industry. NMFS is now proceeding to accelerate the second and third phases of the conservation framework to implement even more punishing measures that will all but eliminate the lobster fishery as we know it today. And to add insult to irreparable injury, NMFS conceded that even full compliance with the conservation framework's restrictions will do absolutely nothing to reverse the decline in the right whale population so long as mortalities continue unabated in Canada, where NMFS has no jurisdiction.

NMFS' biological opinion, conservation framework, and final rule are flatly inconsistent with the ESA. The ESA, its implementing regulations, the statutory history, and precedent all make clear that NMFS must assess whether agency action is reasonably likely to jeopardize an endangered species after reviewing the best available scientific and commercial data—not fixate on the most unlikely scenarios after placing a thumb on the scale in favor of the species. Moreover, NMFS' novel theory that it may impose draconian conservation requirements on private industry on the front end of the ESA consultation process and before issuing a biological opinion clearly violates the statute's procedural requirements, elides any meaningful inquiry into whether the conservation requirements are necessary or feasible, and reflects a virtually limitless view of its power.

Reversal of the decision below is plainly warranted given NMFS' interrelated legal errors, but reversal is imperative given the real-world impact of those errors.

Since the 1800s, Maine’s lobster industry has served as a cornerstone of the state’s economy and identity. Indeed, today, Maine’s lobster industry brings in hundreds of millions of dollars in revenue each year, supports thousands of jobs, and single-handedly sustains dozens of coastal communities in the Nation’s most rural state. The Supreme Court has already held—unanimously, no less—that a central purpose of the ESA provision at issue “is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.” *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997). This Court should heed that admonition and preserve a national icon.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1346. That court issued its decision and final judgment on September 8, 2022, *see* Dkt.75-76, and MLA timely filed a notice of appeal on September 13, 2022, *see* Dkt.77; Fed. R. App. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. §1291.

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are set forth in an addendum to this brief.

STATEMENT OF THE ISSUES

1. Whether NMFS’ biological opinion, conservation framework, and final rule are inconsistent with §7(a)(2) of the ESA and its implementing regulations because the agency relied on exceedingly unlikely “worst case scenarios” to the right

whale after applying a substantive presumption “in favor of the species” instead of assessing likely scenarios using the best scientific and commercial data available.

2. Whether the ESA authorized NMFS to incorporate draconian and untested conservation restrictions into its proposed agency action to avoid the effects of “worst case scenarios” to the right whale before seeking a biological opinion on whether authorizing the American lobster fishery is likely to jeopardize the right whale.

3. Whether NMFS acted arbitrarily or capriciously in assessing and applying the best scientific and commercial data available.¹

STATEMENT OF THE CASE

A. Legal Framework

Congress enacted the ESA in 1973 and directed the Secretaries of Commerce and the Interior to maintain “a list of all species determined by [them] to be endangered species and a list of all species determined by [them] to be threatened species.” 16 U.S.C. §1533(c); *see also id.* §§1532(6), (20); 50 C.F.R. §§17.11-17.12. The Secretary of Commerce has delegated her responsibility for administering the ESA to NMFS, and the Secretary of the Interior has delegated her responsibility for administering the ESA to the U.S. Fish and Wildlife Service (FWS). *See* 50 C.F.R.

¹ Maine’s Department of Marine Resources has separately briefed this final issue. MLA adopts that brief by reference. *See* Fed. R. App. P. 28(i).

§402.01(b). NMFS has general jurisdiction over marine species, while FWS has general jurisdiction over freshwater fish and terrestrial species. *See, e.g.*, NOAA Fisheries, *What is the Endangered Species Act?* (last visited Nov. 9, 2022), <https://bit.ly/3eDiyGB>.

In its original form, §7 of the ESA required a federal agency seeking to take any “actions” (often identified as the “action agency”) to “consult[.]” either with NMFS or FWS (often identified as the “consulting agency”) “to insure” that the proposed actions “do not jeopardize” an ESA-listed species. Pub. L. 93-205, §7, Dec. 28, 1973, 87 Stat. 884. After courts interpreted that absolutist language to require the government to halt several major projects, *see, e.g., TVA v. Hill*, 437 U.S. 153, 172-73 (1978) (explaining that “[t]his language admits of no exception” and concluding that the ESA required the “halting of a virtually completed dam for which Congress has expended more than \$100 million”), Congress immediately amended the ESA “to introduce some flexibility into the Act,” H.R. Rep. No. 95-1625 (1978), at 3; *see* Pub. L. 95-632, Nov. 10, 1978, 92 Stat. 3751; Pub. L. 96-159, Dec. 28, 1979, 93 Stat. 1226. As relevant here, Congress amended §7 in 1979—creating a new §7(a)(2)—to require that an action agency consult with the consulting agency to “insure” only that a proposed action “is not likely to jeopardize” a listed species. 16 U.S.C. §1536(a)(2). As courts recognized, that change “softened the obligation on an agency,” *Roosevelt Campobello Int’l Park Comm’n v. EPA*, 684 F.2d 1041,

1048-49 (1st Cir. 1982), and “modified [the ESA’s] previous policy that species be preserved at all cost,” *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1418 n.16 (9th Cir. 1990).

The 1979 amendments also provide that, when assessing whether an agency action is “likely to jeopardize” a listed species, “each agency shall use the best scientific and commercial data available.” 16 U.S.C. §1536(a)(2). As a unanimous Supreme Court explained in *Bennett v. Spear*, the “obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.” 520 U.S. at 176. “While this no doubt serves to advance the ESA’s overall goal of species preservation,” the *Bennett* Court continued, it is “readily apparent that another objective (if not the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.” *Id.* at 176-77.

The regulations implementing the ESA reflect that understanding. When developing its biological opinion, the consulting agency starts from the “environmental baseline”—that is, “the condition of the listed species ... without the consequences ... caused by the proposed action”—and then evaluates the “effects of the action” and the “cumulative effects” on the listed species. 50 C.F.R. §§402.14(g)(2)-(3), 402.02. The regulations define the “effects of the action” to

include “all consequences to [the] listed species ... that are caused by the proposed action.” *Id.* §402.02. “A consequence is caused by the proposed action if” “it is reasonably certain to occur” and “would not occur but for the proposed action.” *Id.* Furthermore, the regulations define “cumulative effects” to include only those effects that are “reasonably certain to occur.” *Id.* “A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available.” *Id.* §402.17(a). And NMFS has explained that the phrase “clear and substantial” means “a firm basis to support a conclusion that a consequence of an action is reasonably certain to occur.” 84 Fed. Reg. 44,976, 44,977 (Aug. 27, 2019). That “firm basis” “must be based on solid information and should not be based on speculation or conjecture.” *Id.* While that “does not mean the nature of the information must support that a consequence must be guaranteed to occur,” it does require “a degree of certitude” that it will. *Id.*

At the end of the consultation, the consulting agency issues a “written statement” called a biological opinion setting forth its opinion as to “how the agency action affects the species,” 16 U.S.C. §1536(b)(3)(A)—specifically, whether the action “is likely to jeopardize the continued existence of [the] listed species,” 50 C.F.R. §402.14(g)(4), (h). If the consulting agency issues a “no jeopardy” opinion, but nevertheless concludes that the proposed action will result in some “incidental taking” of the species, it “shall” provide a “written statement” known as an incidental

take statement that identifies the anticipated level of take of the listed species and enumerates “reasonable and prudent measures” to avoid and minimize the take. 16 U.S.C. §1536(b)(4)(C)(i)-(ii). Among other things, reasonable and prudent measures “may involve only minor changes” to the proposed action. 50 C.F.R. §402.14(i)(2).

If the consulting agency issues a “jeopardy” opinion, it “shall” suggest “reasonable and prudent alternatives” that are “economically and technologically feasible” and that (in the consulting agency’s view) will avoid jeopardy. 16 U.S.C. §1536(b)(3)(A); 50 C.F.R. §402.02. The action agency then has the choice to “terminate the [proposed] action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U.S.C. §1536(e).” *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 652 (2007); *see also U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S.Ct. 777, 784 (2021). And other parties can seek an exemption too. *See* 16 U.S.C. §1536(g)(1) (“A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption[.]”). The Endangered Species Committee must provide an exemption when, among other requirements, the benefits of the proposed action “clearly outweigh” the benefits of any alternatives and when the proposed action is “of regional or national significance.” 16 U.S.C. §1536(h). In this way, Congress

underscored that “economic consequences are an explicit concern of the ESA.” *Bennett*, 520 U.S. at 177.

B. Factual Background

1. In addition to its responsibilities under §7(a)(2) of the ESA, NMFS is also charged with authorizing fisheries in federal waters (*i.e.*, waters more than three nautical miles from the shore) under various laws, including the Atlantic Coastal Fisheries Cooperative Management Act. *See* 16 U.S.C. §§5101-08; A599, 604. One of those fisheries is the American lobster fishery, which is particularly critical to the state of Maine.

Maine is the Nation’s most rural state, with 3,500 miles of coastline and over 100 coastal communities that have few economic opportunities other than lobstering. *See* Dkt.42-2 ¶¶8-9. Lobstering has sustained Maine’s coastal communities for “centuries,” Dkt.42-3 ¶23, and it continues to do so today. In 2021, for instance, Maine’s lobster fleet caught approximately \$725 million worth of lobster, representing more than 80% of all commercial fishery landings in Maine and making the Maine lobster fishery the second most valuable fishery in the United States. *See* Dkt.42-2 ¶3. The broader lobster supply chain in Maine generates approximately \$1 billion in additional revenue each year. *See* Dkt.42-2 ¶3. And lobstering also directly supports over 15,000 jobs in Maine. *See* Dkt.42-2 ¶4. Most (if not all) of those jobs are with small businesses because, by law, there is no corporate ownership

of the Maine lobster fleet; instead, every Maine lobsterman is a self-employed business owner that either works alone or with a small crew. *See* 12 Me. Stat. tit. 12, §§6431-E, G; Dkt.42-2 ¶5; Dkt.42-3 ¶7. Maine’s lobstering industry is “an icon of the state of Maine” and an “integral part of the state’s culture, traditions, and economy”—so much so that “[t]he future of Maine’s coastal communities depends upon the continued success of the Maine lobster fishery.” Dkt.42-2 ¶25.

The centuries-long success of Maine’s lobster industry reflects its commitment to conservation. Maine’s lobster industry long ago adopted sustainable fishing practices, *see* Dkt.42-2 ¶¶2, 20-21, and NMFS has recognized the success of those efforts, *see, e.g.*, A615 (NMFS stating in 2021: “The Gulf of Maine/Georges Bank stock is at near record high abundance, above the abundance threshold, and overfishing is not occurring.”). In addition, Maine’s lobster industry has implemented measures to ensure that lobstering does not negatively impact other marine species—including the North Atlantic right whale, a species whose habitat has (at least until recently) traditionally included the Gulf of Maine, among various other areas along the Eastern Seaboard and elsewhere. *See* A678 (map showing the right whale’s range).

“Right whales are so named because, historically, they were considered the ‘right’ (correct) whale to hunt due to their close proximity to coastlines, their relatively slow speed, the prized oils they contain, and the large volume of blubber

that gives them a tendency to float when dead.” *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 914 (D.C. Cir. 2008). Right whales thus made prime targets for commercial whalers, and by 1935, commercial whaling had reduced the right whale population to just 100 individuals from an estimated high of between 9,000 and 21,000 in the pre-whaling era. *See* A679. Accordingly, the right whale has found itself on the endangered species list since the 1970s. *See* 50 C.F.R. §17.11.

Since the 1990s, Maine lobstermen have collaborated with NMFS and other stakeholders on the “Atlantic Large Whale Take Reduction Team” to help restore the right whale population—namely, by seeking to minimize any potential risk that lobster fishing gear may pose to the health and safety of right whales.² *See, e.g.*, 62 Fed. Reg. 39,157 (July 22, 1997); 50 C.F.R. §229.32. Those efforts, which included initiatives like deploying gear that allows whales to disentangle themselves more easily, successfully allowed the population to recover from the whaling-induced low abundance levels: Between 1990 and 2011, the right whale population increased by nearly 3% annually to a total of almost 500, representing a nearly five-fold increase

² NMFS established the Atlantic Large Whale Take Reduction Team pursuant to the Marine Mammal Protection Act. That statute authorizes NMFS to establish risk-reduction measures, subject to certain conditions, via “take reduction plans” with respect to marine mammals like the right whale. *See* 16 U.S.C. §1387(f). The take reduction planning process seeks to achieve “consensus” among stakeholders, and take reduction plans (and amendments to them) must go through notice and comment. *Id.* §1387(f)(7).

compared to 1935. *See* A679; *see also, e.g.*, 72 Fed. Reg. 57,104 (Oct. 5, 2007); 73 Fed. Reg. 51,228 (Sept. 2, 2008).

But between 2011 and 2019, the estimated right whale population again dipped below 400. *See* A680-81. In addition to identifying factors like unusually low calving rates, numerous scientists have attributed this recent decline to mortalities and serious injuries caused by heavier and more lethal Canadian fishing gear (for catching snow crabs) and vessel strikes in U.S. waters and Canada's Gulf of St. Lawrence—a location that the right whale is frequenting far more often today because oceanographic changes have caused right whales and their prey to move northward and away from the Gulf of Maine. *See* A1835, 1281, 1501, 1875, 1357. For example, in 2017, Canadian fishing gear and vessel strikes caused 13 documented right whale mortalities and serious injuries, *see* A2127—an unprecedented occurrence that NMFS declared an “unusual mortality event,” A360. And in 2019, Canadian fishing gear and vessel strikes caused 11 more documented mortalities and serious injuries. *See* A1853, 1868, 2127. These developments led Canadian officials to impose, and to subsequently reinforce, a slew of whale-protective measures, which NMFS “believe[s]” are now “benefiting right whales.” A518, 927, 1281-83, 1853, 1868.

By contrast, there are virtually no documented instances of right whale entanglement in lobstering gear associated with the American lobster fishery in

recent history. Between 2010 and 2019, only one (non-serious³) entanglement occurred—off the coast of Massachusetts. *See* A2127. The safety record of Maine’s lobster industry is even more spotless, with no observed right whale entanglements since 2004—and no documented mortality or serious injury in recorded history. *See* A2127. And although it is not always possible to identify which specific fishery’s gear is responsible for an entanglement, the broader category of U.S. trap/pot fisheries (which includes not only the lobster fishery, but also the cod, blue crab, and other fisheries) produced just one documented mortality or serious injury between 2010 and 2019—yielding a 0.1 annual rate of mortality or serious injury attributable to the U.S. trap/pot fisheries more broadly for the decade. *See* A2127. That 0.1 rate is a small fraction of the 0.8 “potential biological removal level” that NMFS has calculated for the right whale—*i.e.*, “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.” 86 Fed. Reg. 51,970 (Sept. 17, 2021); 16 U.S.C. §1362(20).

2. Following the 2017 unusual mortality event, NMFS’ Sustainable Fisheries Division (the action agency here) reinitiated the consultation process under

³ NMFS categorizes incidental injuries between fisheries and marine mammals as “serious” or “non-serious” injuries. A “serious injury” is “any injury that will likely result in mortality.” 50 C.F.R. §216.3.

§7(a)(2) of the ESA to determine whether it could continue to authorize various federal fisheries, including the American lobster fishery, consistent with the ESA. *See* A599. During the consultation process, staff from NMFS' Protected Resources Division (the consulting agency here) identified a purported "need" to develop a new "conservation framework" to "further reduce" the risk of right whale entanglement—an initiative that, according to NMFS, is required to "meet the mandates of the ESA." A1071; *see also* A447. That conservation framework derives from NMFS' (mis)understanding that the ESA requires it to "resolve" all "uncertainty" in the data "in favor of the species"—that is, to give the "benefit of the doubt to the species"—and to ensure that an endangered species is not jeopardized even under an unlikely "worst case scenario." A804, 926. NMFS did not identify anything in the ESA's text that supports that view. Instead, NMFS relied on a handful of words in a single sentence in a single piece of legislative history. *See* A804 (citing H.R. Conf. Rep. No. 96-697 (1979), at 12).

Applying that skewed approach, NMFS' conservation framework starts from the premise that, contrary to the observed data, U.S. trap/pot fisheries—by far the largest component of which is the American lobster fishery—are responsible for 7.57 right whale mortalities or serious injuries each year (4.57 of them in federal waters), *see* A824. To reach that inflated figure, NMFS made several unlikely assumptions—*e.g.*, that the United States and Canada each bear 50% responsibility

for all entanglements between 2010 and 2019 in which NMFS could not assign responsibility to a particular country, even though Canadian gear is responsible for 80% of documented entanglements between 2010 and 2019 and 100% of the entanglement-caused mortalities or serious injuries between 2016 and 2019; that trap/pot fisheries must bear 100% responsibility for every entanglement between 2010 and 2018 in which NMFS could not definitively determine the gear involved, even though NMFS has documented the presence of gear from other fisheries on entangled right whales. *See* A812-14, 816-17, 2127. Missing no opportunity to overstate its analysis of human threats, NMFS adopted a nonsensical assumption that, but for man, right whales that survive the calf stage achieve immortality. *See* A819 (“Natural mortality is not included in the apportionment as there is little evidence showing this to be a cause of right whale mortality except at the calf stage.”).

NMFS then “developed a population projection model to predict the female right whale population trajectory over 50 years.” A924. As NMFS admitted, that model “utilized metrics representing the worst case scenario,” yielding “model outputs” that “very likely overestimate the likelihood of a declining population” and that “should not be interpreted as an accurate predictor of the actual future right whale population.” A926, 939; *see* A937 (“[I]t is likely that the projections underestimate the likelihood of an increasing right whale population and that the

actual right whale population will likely fare better than the trajectories indicate.”). Among other things, NMFS’ model assumed the worst-case scenarios that the recent spike in mortalities and serious injuries in Canadian waters—*i.e.*, events that NMFS itself has identified as extraordinarily unusual—will occur unabated for the next 50 years (even though NMFS “believe[s]” that recent “measures taken by the Government of Canada are benefiting right whales” now) and that the unusually low calving rates from the post-2010 period will persist for 50 years into the future as well. A518, 927. Indeed, the inputs in NMFS’ model are so extreme that it projects a “97.72 percent” probability of a declining right whale population “even in the absence of the federal fisheries” altogether. A929, 934.

Having ballooned the number of mortalities and serious injuries caused by the American lobster fishery and projected the worst-case scenario for the next half-century, NMFS then developed a conservation framework for the fishery to engineer a more-than-30-fold reduction in the hypothetical “risk” of right whale entanglement, eliminating virtually all risk by 2030. *See* A1071-72. NMFS declared that it will pursue that stringent objective “through gear and operational measures” in a four-phase process over the course of the decade, in which it will seek to reduce the annual rate of mortality or serious injury first to 2.69, then to 2.61, then to 1.04, and finally to 0.136. *See* A1071, 1076-77. Although NMFS stated that, in its view, “this level of reduction ... is necessary to ensure the goals of the ESA ... are met,”

A1074, it repeatedly conceded that even these extreme measures will not reverse the decline in the right whale population if mortalities in Canada continue unabated, *see* A1099 (“[T]he NARW population is likely to decline if human-caused mortalities in Canada continue at current rates, regardless of effort in the United States.”); A937 (“[E]ven with a very high level of risk reduction in the United States, the population trajectory will not increase if right whale mortalities continue to occur at current levels in Canadian waters.”).

Next, rather than assess whether authorizing the existing lobster fishery would likely jeopardize the right whale, NMFS instead examined whether authorizing the lobster fishery under the draconian terms of its conservation framework would likely jeopardize the right whale—an assessment that assumed rather than tested the necessity of the crippling restrictions on the lobster fishery and elided any scrutiny into whether the restrictions are reasonable or prudent. *See, e.g.*, A605 (“The Framework” is “part of the proposed action[.]”). NMFS then provided the foreordained answer to its own question by issuing a biological opinion concluding that authorizing the lobster fishery subject to the debilitating conservation framework is unlikely to jeopardize the right whale. *See* A940.

In September 2021, NMFS promulgated a final rule implementing the first phase of the conservation framework, which required the American lobster industry to substantially reduce the risk of right whale entanglement. *See* 86 Fed. Reg. 51,970

(Sept. 17, 2021); A1116. To accomplish that objective, the rule (among other things) prohibited lobster fishing in certain prime fishing grounds off the coast of Maine during peak fishing season, and it also required lobstermen to substantially modify their gear. *See* 86 Fed. Reg. at 51,971; A823-24. It is estimated that compliance with these changes will ultimately cost Maine lobstermen tens of millions of dollars.⁴ *See* Dkt.42-2 ¶12.

C. Procedural History

The Maine Lobstermen’s Association (MLA) is the oldest and largest fishing-industry association on the East Coast and represents approximately 1,000 commercial lobstermen in Maine. *See* Dkt.42-2 ¶2; Dkt.42-3 ¶3. MLA has stood at the forefront of right whale conservation efforts since the 1990s. *See, e.g.*, Dkt.42-2 ¶21; Dkt.42-3 ¶4. But seeking to prevent unnecessary and “devastating economic hardship on the more than 4,800 individually owned and operated lobster fishing vessels and the tens of thousands of jobs they support, all of which are essential to Maine’s economy and irreplaceable aspects of the State’s coastal and maritime heritage,” A11, MLA filed this suit in September 2021 to challenge NMFS’ biological opinion, conservation framework, and final rule as inconsistent with the

⁴ NMFS recently “decided to accelerate the Conservation Framework’s timeline by combining phases 2 and 3.” Dkt.228 at 10, *Ctr. for Biological Diversity v. Raimondo*, No. 18-112 (D.D.C. filed Sept. 19, 2022). Thus, the destruction of the lobster industry as it has existed for centuries will occur even sooner than first projected.

ESA and as arbitrary and capricious under the Administrative Procedure Act (APA). *See* A32-36. Three parties intervened as plaintiffs: Maine’s Department of Marine Resources, the Maine Lobstering Union, and the Massachusetts Lobstermen’s Association. Three other parties intervened as defendants: the Center for Biological Diversity, the Conservation Law Foundation, and Defenders of Wildlife.⁵ MLA and the intervenor-plaintiffs moved for summary judgment, and NMFS and the intervenor-defendants cross-moved for summary judgment.

In the decision below, the district court awarded summary judgment to NMFS and the intervenor-defendants in a decision that sidesteps NMFS’ distortions of the ESA framework and concededly deals a “weighty” blow to the “livelihood and traditions” of Maine’s lobstermen. A241. The court acknowledged that MLA had made a “cross-cutting” argument that the ESA does not support the proposition that NMFS must regulate based on worst-case scenarios in which the evidence is skewed in favor of the species. A221-22. Although the court emphasized that it did “not

⁵ These conservation groups filed a separate lawsuit to challenge the biological opinion and final rule, claiming that NMFS did not sufficiently protect the right whale. The same district court judge that rejected MLA’s challenge in the decision below sided with the conservation groups in that separate suit and is presently considering what remedy to provide. *See Ctr. for Biological Diversity v. Raimondo*, No. 18-112 (JEB), 2022 WL 2643535 (D.D.C. July 8, 2022). The same judge has also sided with the conservation groups in a string of other decisions involving similar issues. *See, e.g., Ctr. for Biological Diversity v. Ross*, No. 18-112 (JEB), 2020 WL 4816458 (D.D.C. Aug. 19, 2020); *Ctr. for Biological Diversity v. Ross*, No. 18-112 (JEB), 2020 WL 1809465 (D.D.C. Apr. 9, 2020).

hold that the ESA compels the agency's conservative policy towards resolving ... scientific uncertainty," and although it also stated that it did not wish to "wade into" any debate about "*Chevron* deference," it nonetheless sustained NMFS' approach after declaring it not "arbitrary and capricious." A222. In the court's view, "all that the statute requires" is that NMFS' "assessments be based on the best available data," and NMFS "simply chose the more species-protective result" as a "policy" matter, so the court "need not ... decide here that the agency's approach to the multiple issues in play was the only, or even the best, way of analyzing the data or resolving uncertainty." A220-22.

After concluding that NMFS' various distorted choices—*e.g.*, NMFS' decision that a worst-case scenario remains static over a 50-year time horizon—survived under "deferential" arbitrary-or-capricious review too, *see* A223-38, the district court then turned to MLA's argument that NMFS improperly defined its proposed action to include the conservation framework, *see* A238-39. The court acknowledged that the ESA generally provides two options for proposing conservation requirements: If the consulting agency issues a biological finding that the proposed agency action is likely to jeopardize an endangered species, the agency may propose "reasonable and prudent alternatives" that are "economically and technologically feasible"; alternatively, if the consulting agency issues a biological finding that the proposed agency action is not likely to jeopardize an endangered

species, the agency may propose “reasonable and prudent measures” that involve “only minor changes” and do not “alter the basic design” of the proposed action. A238. The court acknowledged that there is some “appeal” to the notion that NMFS made an “unlawful end run around” the ESA by including the conservation framework in the proposed action and before issuing a biological opinion. A239. And the court also acknowledged that the ESA places “limits on a consulting agency’s” authority to impose conservation requirements. A239. But the court ultimately concluded that NMFS permissibly included the conservation framework in the proposed agency action because it did so in its capacity as the action agency, and the court could identify no limits on “how an action agency may define the scope of its proposed action.” A239 (emphasis omitted).

SUMMARY OF ARGUMENT

NMFS determined here that §7(a)(2) of the ESA required it to conduct a jeopardy analysis that gives the “benefit of the doubt” to the species and to assess the “worst case scenario” to the North Atlantic right whale that it concedes is exceedingly unlikely to occur. Unsurprisingly, the resulting analysis suggested that terminal restrictions on the American lobster fishery were necessary to avoid jeopardizing the right whale in the worst-case scenario (rather than any scenario likely to play out in the real world). In an effort to preserve the right whale even in that worst-case scenario, NMFS developed a conservation framework that requires

lobstermen to reduce the risk of right whale entanglement more than 30-fold to nearly zero in a matter of years, even though NMFS has not documented an entanglement in Maine lobstering gear in nearly 20 years. Having contrived a proposed agency action that bakes in all those worst-case scenarios and extreme restrictions to counter them, NMFS issued a biological opinion that reached the foreordained conclusion that subjecting the lobster fishery to debilitating restrictions—much like shutting it down entirely—would not likely jeopardize the right whale. Nowhere in the process did the agency ever consider whether it was necessary to jeopardize an iconic American industry in any likely real-world scenario. That profoundly skewed, industry-destroying approach is impossible to square with the ESA.

I. NMFS’ understanding of §7(a)(2) is unmoored from the statute and its implementing regulations. Section 7(a)(2) requires federal agencies to assess the best available “data” to determine whether jeopardy to the species is a “likely” result of agency action. The statutory text expressly says as much. Multiple different implementing regulations do the same thing. The statutory evolution reveals that Congress changed the law to incorporate a realistic and flexible standard and to eliminate a more stringent one. And the Supreme Court has unanimously confirmed that the point of Congress’ revised standard is to avoid unnecessary economic harm. Those principles suffice to dispose of this case: Relying on a sentence fragment in

decades-old legislative history, NMFS applied a “worst case scenario” approach to the §7(a)(2) inquiry and a substantive presumption that resolved all uncertainty “in favor of the species,” which caused the agency to ignore likely scenarios and the best data. And NMFS’ distortion of the §7(a)(2) framework and speculation about potential harm to the right whale has devastating real-world consequences, as it threatens to inflict just the sort of pointless economic harm on real families and communities in Maine that a faithful application of the ESA should avoid.

The district court nevertheless ruled in NMFS’ favor in the decision below because it believed that it could sidestep the core legal question and assess only whether NMFS’ approach of applying a thumb on the scale in favor of the species and focusing on the “worst case scenario” survives deferential arbitrary-or-capricious review. But assessing whether agency action is arbitrary or capricious is not the same as considering whether that action is contrary to law, and the APA imposes a nondiscretionary duty on courts to resolve questions of law. The court below thus abdicated its judicial duty.

II. NMFS lacked authority to incorporate into the proposed agency action the conservation framework’s plan to force the adoption of untested fishing technology. The ESA provides two paths by which NMFS may impose conservation requirements: as “reasonable and prudent alternatives” following a jeopardy opinion or as “reasonable and prudent measures” following a no-jeopardy opinion. Here,

NMFS took neither path and instead arrogated to itself unbridled power on the front end to regulate the traditional American lobster fishery into near-extinction without first assessing its realistic impact on right whales. Congress did not confer such extraordinary power on NMFS, nor did it intend for NMFS to use the consultation process in this way. The fact that NMFS' theory would render core features of the statute superfluous confirms the point.

The district court agreed that the ESA restricts a consulting agency's ability to impose conservation requirements, but it rejected MLA's challenge on the theory that nothing restricts NMFS' authority to design a proposed action that baked in untested and potentially unnecessary requirements in its capacity as an action agency. That would make nonsense of the statutory scheme. If anything, the scheme should place greater limitations when the same agency is both proponent and adjudicator. More fundamentally, NMFS is a creature of statute, and no statute grants it authority to impose crippling restrictions on fisheries to avoid worst-case scenarios that the agency admits are unlikely to ever occur. Regardless, the record demonstrates that NMFS developed the conservation framework in its capacity as consulting agency, not action agency, fatally undermining the court's theory.

III. Although the ordinary practice is to vacate unlawful agency action, in certain cases, such a remedy can cause more damage. This case is one of them. The Court therefore should order a remand to NMFS without vacatur to ensure that

Maine's lobstermen and citizens do not experience any more suffering than they already have.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo* in accordance with the APA, which "requires [the Court] to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Fogo De Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1135 (D.C. Cir. 2014); *see* 5 U.S.C. §706(2)(A). Agency action is not in accordance with law if it is "inconsistent" with applicable law. *Arizona v. Thompson*, 281 F.3d 248, 253 (D.C. Cir. 2002). Agency action is arbitrary and capricious if the agency "fails to 'comply with its own regulations,'" *Nat'l Env't Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014), or if it has "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. NMFS' Approach Of Giving The "Benefit Of The Doubt" To The Species And Assessing "Worst Case Scenarios" Contravenes The ESA And Its Implementing Regulations.

Congress enacted the ESA "to protect and conserve endangered and threatened species and their habitats." *Home Builders*, 551 U.S. at 651. But

“[n]o legislation,” including the ESA, “pursues its purposes at all costs.” *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1237 (D.C. Cir. 1996). That much is confirmed by §7(a)(2) of the ESA, which requires federal agencies to review the best scientific and commercial data and ensure only that their actions are not likely to jeopardize a listed species—not to place a thumb on the scale “in favor of the species” and to guard against jeopardy even in the most unlikely of scenarios, and surely not to plan for the extinction of a fishery before determining whether it poses jeopardy at all. A statute that required federal agencies to terminate their activities (such as by refusing to authorize activities in which private industry has engaged for centuries) merely because the worst-case scenario posed a conceivable threat to an endangered species would create economic chaos. Both NMFS and the district court failed to recognize as much, and that basic error infects the biological opinion, conservation framework, and final rule, warranting reversal of the decision below.

A. Section 7(a)(2) of the ESA and Its Implementing Regulations Require Agencies to Assess the Best “Data” Available to Determine What is “Likely” to Occur to the Species, Not to Skew the Evidence and Mitigate the Most Unlikely Scenario Imaginable.

1. When interpreting a statute, the “inquir[y] must begin[] with the language of the statute itself.” *U.S. Ass’n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131, 1135 (D.C. Cir. 2017). Here, the relevant text of the ESA explains that NMFS must focus on probable scenarios as revealed by the best available data, not the most

improbable scenarios that emerge after applying a substantive presumption “in favor of the species.” Two features of the statutory text confirm as much.

To begin, §7(a)(2) of the ESA provides that “[e]ach Federal agency shall, in consultation with and with the assistance of [NMFS], insure that any action authorized, funded, or carried out by such agency ... is not *likely* to jeopardize the continued existence of any endangered species.” 16 U.S.C. §1536(a)(2) (emphasis added). The statute does not define “likely,” so its “ordinary meaning” controls. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). The ordinary meaning of the term “likely” is “probable,” *Black’s Law Dictionary* 834 (5th ed. 1979) (*Black’s*), as NMFS (and FWS) has conceded in other ESA contexts, *see Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671, 684 (9th Cir. 2016) (“NMFS has interpreted the term ‘likely’ to have its common meaning (*i.e.*, more likely than not). Indeed, most dictionaries define ‘likely’ to mean that an event, fact, or outcome is probable.”); *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.—MDL No. 1993*, 709 F.3d 1, 14 (D.C. Cir. 2013) (similar). Accordingly, NMFS must assess likely or probable scenarios, not speculative or hypothetical or worst-case ones.

That interpretation is consistent with how the ESA’s implementing regulations construe the §7(a)(2) duty. Indeed, the regulations repeatedly make clear that the relevant inquiry in the §7(a)(2) context is what is *reasonably certain* to occur

as a result of a proposed federal action—not what is merely conceivable or possible. More precisely, 50 C.F.R. §402.14(g) provides that, after NMFS identifies the “environmental baseline,” it must “evaluate the effects of the action and cumulative effects on the listed species” and then “formulate [an] opinion as to whether the action is likely to jeopardize the continued existence of [the] listed species.” 50 C.F.R. §402.14(g)(3)-(4). The “effects of the action” are then defined in 50 C.F.R. §402.02 as the effects caused by the proposed action that are “*reasonably certain to occur*.” 50 C.F.R. §402.02 (emphasis added). That same regulation similarly defines “cumulative effects” as the “effects of future State or private activities ... that are *reasonably certain to occur* within the action area,” and it also defines “jeopardize the continued existence of” as “to engage in an action that *reasonably would be expected*” to “reduc[e] the reproduction, numbers, or distribution of that species.” *Id.* (emphasis added). On top of that, another regulation—50 C.F.R. §402.17—says that “[a] conclusion of reasonably certain to occur must be based on clear and substantial information” and that NMFS is prohibited from considering consequences that are “so remote in time from the action under consultation that it is not reasonably certain to occur” and “only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.” *Id.* §402.17(a)-(b); *see also* 84 Fed.

Reg. at 44,992 (explaining that “reasonably certain to occur” establishes an even “higher threshold” and “stricter” standard than ““reasonably foreseeable”).

The second notable feature about the text of §7(a)(2) of the ESA is that it instructs NMFS to conduct the foregoing analysis after “us[ing] the best scientific and commercial *data* available.” 16 U.S.C. §1536(a)(2) (emphasis added). That language carries a dose of empiricism. The ordinary meaning of “data” is “organized information” or “facts from which to draw a conclusion.” *Black’s* 356. Whether one calls it a “presumption,” A221, an “assumption,” A938-39, a “precautionary principle,” Dkt.48 at 13, or something else, NMFS’ approach of giving the “benefit of the doubt” to the species is plainly not “data”—let alone “the best scientific and commercial data.” Indeed, giving the benefit of the doubt to one side in assembling a record would affirmatively bias the inquiry away from the best scientific and commercial data. Moreover, the use of the term “best scientific and commercial data” with reference to whether jeopardy is “likely” or “reasonably certain” to occur reinforces that the statute favors actual data concerning likely outcomes. While hard science and factual information can inform whether jeopardy is “likely” or “reasonably certain” to occur, a substantive presumption “in favor of the species” only distorts that inquiry. And combining that presumption with a focus on worst-case scenarios forces the agency to ignore some valid data and to make decisions

based on scenarios that are “very likely” to never occur, A926, as this case vividly illustrates.

Here, too, the ESA’s implementing regulations are in accord. As they explain, “[a] conclusion of reasonably certain to occur must be based on clear and substantial *information*, using the best scientific and commercial data.” 50 C.F.R. §402.17(a) (emphasis added). The phrase “clear and substantial” means “a firm basis to support a conclusion that a consequence of an action is reasonably certain to occur.” 84 Fed. Reg. at 44,977. That “firm basis” “must be based on *solid information* and should not be based on speculation or conjecture.” *Id.* (emphasis added). While that “does not mean the nature of the information must support that a consequence must be guaranteed to occur,” it does require “a degree of certitude” that it will. *Id.* Hence, the regulations, just like the statute, require NMFS to make its decisions based on empirical information, not a thumb on the scale in favor of the species.

That the ESA and the implementing regulations are laser-focused on “likely” outcomes as revealed by the best available “data”—and not extreme outcomes based on a substantive thumb on the scale in favor of the species or speculation about unlikely scenarios—is no accident. To the contrary, that standard reflects a deliberate decision by Congress. As noted above, the original 1973 version of §7 of the ESA required federal agencies to “tak[e] such action *necessary to insure* that actions authorized, funded, or carried out by them *do not jeopardize* the continued

existence of ... endangered species,” and it said nothing about using “data”—much less the best available data. 87 Stat. 884, §7 (emphasis added). As the Supreme Court observed in *TVA v. Hill*, that language “admit[ted] of no exception” and seemingly required federal agencies to guard against even remote or speculative risks of jeopardy “whatever the cost.” 437 U.S. at 173, 184. But that “decision was ridiculed by many and brought sweeping condemnations in Congress.” J.B. Ruhl, *The Endangered Species Act’s Fall from Grace in the Supreme Court*, 36 Harv. Envtl. L. Rev. 487, 489 (2012). Thus, in 1979, Congress “lessened th[e] standard” in §7, John Earl Duke, Note, *Giving Species the Benefit of the Doubt*, 83 B.U. L. Rev. 209, 215 (2003), “softened the obligation” on federal agencies, *Roosevelt*, 684 F.2d at 1048-49, and instructed NMFS to base its biological opinions on the “best evidence,” H.R. Conf. Rep. No. 96-697, at 12. The newly created §7(a)(2) thus provided (as it still does today) that federal agencies need “insure” only that jeopardy is “not likely” based on assessment of “the best scientific and commercial data available.” 16 U.S.C. §1536(a)(2).⁶

⁶ This specific statutory change is just one of many from the late 1970s that “clearly reflect a congressional retreat from the 1973 unequivocal commitment to the continued viability of endangered and threatened species against any interference.” David Stromberg, *The Endangered Species Act Amendments of 1978: A Step Backwards?*, 7 Boston College Envt’l Aff. L. Rev. 33, 35 (1978); see Pub. L. 95-632, §3, 92 Stat. 3751 (imposing “reasonable and prudent” requirements); *id.* §3, 92 Stat. at 3758 (requiring newly created Endangered Species Committee to grant exceptions when benefits of the action clearly outweigh the alternatives); *id.* §2, 92 Stat. 3751 (defining “critical habitat” to include only those “specific” areas

Congress also intended these amendments to the ESA to have significant consequences on the ground. As the Supreme Court unanimously recognized in *Bennett v. Spear*, one of the “objective[s]” of the revised language—“if not indeed the *primary* one”—“is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.” *Bennett*, 520 U.S. at 176-77 (emphasis added). Or put another way, “the ‘best scientific and commercial data’ provision” is “intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations.” *Id.* at 177. Accordingly, when NMFS fails to conduct an objective assessment of the data and ignores the likely outcome to the species, and when that oversight threatens to inflict catastrophic and pointless economic harm, its action is plainly contrary to the statute.

2. Applying these principles, the agency’s error here is glaring. After all, NMFS concededly *never* focused on what would “likely” occur to the right whale if it continued to authorize the American lobster fishery. Instead, NMFS focused on “*worst case scenarios*” that it conceded would “very likely” *never* occur. A926,

“*essential* to the conservation of the species”); *id.* §11, 92 Stat. at 3766 (directing Secretary to consider “economic impact” in designating a critical habitat); *id.* (allowing Secretary to exclude areas from critical habitat designations “if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in extinction of the species”).

1071, 1074. And there is no denying that NMFS meant what it said, because the agency repeated the same thing over and over:

- “[W]e utilized metrics representing the worst case scenario. Consequently, model outputs very likely overestimate the likelihood of a declining population.” A926.
- “[W]e assumed a worst case scenario[.]” A927.
- “[P]rojections were generated utilizing worst case assumptions for several key variables, so these projections should not be interpreted as an accurate predictor of the actual future right whale population.” A939.
- “[I]t is likely that the projections underestimate the likelihood of an increasing right whale population and that the actual right whale population will likely fare better than the trajectories indicate.” A937.
- “[T]he assumptions may be considered pessimistic but ... we need to give the benefit of the doubt to the species.” A506.

Moreover, NMFS focused on “worst case scenarios” by ignoring the “best scientific and commercial *data*” and instead relying on a substantive thumb on the scale “in favor of the species,” which is plainly not “data.” Again, it is impossible to interpret NMFS’ action any other way:

- “[T]he uncertainty is resolved in favor of the species.” A804.
- “We generally select the value that would lead to higher, rather than lower, risk to endangered or threatened species. This approach provides the ‘benefit of the doubt’ to threatened and endangered species.” A804.
- “This approach provides the benefit of the doubt to the species.” A814.

- “[W]e are giving the ‘benefit of the doubt’ to the species and assuming the interactions were caused by gear used in the federal fisheries in this Opinion.” A821.
- “This gives the benefit of the doubt to the species by using years with a low number of births.” A934.

Unsurprisingly, NMFS’ focus on unlikely scenarios and its use of a thumb on the scale in favor of the species led it to embrace a host of nonsensical assumptions. NMFS assumed, for example, that the United States and Canada each bear 50% responsibility for all entanglement between 2010 and 2019 in which NMFS could not assign responsibility to a particular country, even though Canadian gear is responsible for 80% of documented entanglements between 2010 and 2019 and 100% of the entanglement-caused mortalities or serious injuries between 2016 and 2019. *See* A814-15, 820, 2127. NMFS also assumed that trap/pot fisheries must bear 100% responsibility for every entanglement between 2010 and 2018 in which NMFS could not definitively determine the gear involved, even though NMFS has documented the presence of gear from other fisheries on entangled right whales. A815-17, 820. NMFS also assumed (contrary to basic principles of mortality) that 0% of right whales die of “[n]atural” causes—*i.e.*, that right whales are immortal but for man. A819. NMFS further assumed that the unprecedented and unfavorable ocean conditions observed between 2010 and 2018 would persist unchanged for 50 years and with no ability for right whales to adapt, even though NMFS acknowledged that this assumption is “pessimistic.” A506. NMFS likewise

assumed that mitigation measures in Canada will not benefit right whales despite NMFS' stated belief that the opposite is true. *See* A518. And NMFS also assumed that the historically low calving rates between 2010 and 2018 would continue for 50 years even though NMFS believes that it is “likely” that such an assumption is wrong. A937; *see generally* Maine.Br.

NMFS has never identified anything in the text of the ESA that supports its “worst case scenario” or “benefit of the doubt” approach—which seemingly seeks to resurrect the “ridiculed” and “condemn[ed]” *original* version of §7 of the statute. Ruhl, *The Endangered Species Act's Fall from Grace in the Supreme Court*, *supra*, at 489. In fact, the agency has already acknowledged that the statutory text is unhelpful for its position: “[N]othing in the Act specifically requires [NMFS] to utilize a ‘worst-case scenario’ or make unduly conservative modeling assumptions.” 84 Fed. Reg. at 45,000. Nonetheless, NMFS appears to have felt compelled to apply its approach because of a “fleeting” statement, J.B. Ruhl, *The Battle over Endangered Species Act Methodology*, 34 *Env'tl. L.* 555, 593 (2004), that appears in a House report from 1979, *see* A804, which observed that the change in language in §7—*viz.*, eliminating the phrase “do not jeopardize” and replacing it with “is not likely to jeopardize”—“continues to give the benefit of the doubt to the species,” H.R. Conf. Rep. No. 96-697, at 12.

NMFS' reliance on that passing statement in 43-year-old legislative history is a complete non-starter. Most obviously, that is because "legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1631 (2018); *see also Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1266 (11th Cir. 2009) (examining the legislative history that NMFS cites and explaining that "we are reluctant to read into the words that Congress has enacted as law words that it did not enact as law"). But even setting that insuperable problem aside, the legislative history does not even support a "worst case scenario" or "benefit of the doubt" approach anyway—as NMFS itself admitted three years ago. As NMFS correctly explained then, the 1979 House report "[a]t most ... seems to indicate that the statutory language 'is not likely to jeopardize' continues to provide protections to listed species by requiring action agencies to insure that their actions are not likely to jeopardize listed species." 84 Fed. Reg. at 45,007. In other words, "[t]he use of the words 'benefit of the doubt to the species' in the Conference Report appears intended to provide reassurance that the statutory language, as amended, would remain protective of the species." *Id.* But the House report decidedly does not permit NMFS to focus exclusively on worst-case scenarios or resolve all uncertainties "in favor of the species" and against private industry.

To the extent that NMFS thinks that its "worst case scenario" or "benefit of the doubt" approach is entitled to deference because the agency also mentioned this

same piece of legislative history in its “1998 ESA Section 7 Consultation Handbook,” *see* A524, 1925 (mentioning this Handbook), that argument goes nowhere. A snippet of legislative history remains just that whether or not it is repeated in an agency handbook. It is no match for the statutory text, and there is no textual ambiguity serving as a foothold for deference to an agency approach that is antithetical to both the statutory text and the specific aim of the statutory amendments. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). Worse still, converting a statute designed to test proposed agency actions based on the best data to determine risk in likely scenarios into a license for the preemptive shut down of entire industries is not an interpretation entitled to deference. Congress did not authorize NMFS to shut down the entire lobster industry when it amended the ESA to avoid shutting down major projects based on trivial risks. *Cf. West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

NMFS’ misunderstanding of §7(a)(2) is no mere foot fault. To the contrary, NMFS’ legal error undergirds the biological opinion; the biological opinion evaluates the fishery as modified by the conservation framework; and the final rule implements the first phase of the conservation framework. *See, e.g.*, A605, 1071. Thus, NMFS’ legal error infects everything that the agency has touched here.

That error, moreover, has immense practical consequences. The evidence in the summary-judgment record is uncontested that, if NMFS’ action is permitted to

stand, it will decimate (if not wholly eliminate) the American lobster fishery—a vitally important component of Maine’s economy and a centuries-old cultural icon. Each year, Maine’s lobster industry brings in hundreds of millions of dollars in revenue, supports thousands of families, and gives life to over 100 coastal communities in a state where there are precious few economic opportunities. But thanks to NMFS’ conduct here, all of that is now circling the drain. That result has nothing to recommend it, especially given NMFS’ concession that all of this suffering is essentially gratuitous because the right whale population *will still decline* so long as mortalities in Canada continue at current rates. *See* A937, 1099; *but see* 50 C.F.R. §402.02 (“A consequence is caused by the proposed action *if it would not occur but for the proposed action* and it is reasonably certain to occur.” (emphasis added)). There is accordingly no denying that NMFS’ action here is a quintessential example of precisely what the ESA precludes: the “zealous[] but unintelligent[]” pursuit of “environmental objectives” that produces “needless economic dislocation.” *Bennett*, 520 U.S. at 176-77.

B. The District Court Abdicated its Duty to Interpret the Law.

The district court rejected MLA’s legal challenge only by bypassing the core legal question entirely. Although the court acknowledged that NMFS had systematically applied a “conservative,” “substantive presumption ‘in favor of the species’” that is not “compel[led]” by the text of the ESA, A221-22—an

acknowledgment that itself should have set off alarm bells given that NMFS concluded that the “mandates of the ESA” “*required*” what it did here, A1071, 1074 (emphasis added)—the court declined to “wade into [a] deference debate” under *Chevron* because it held that NMFS’ “policy” choice vis-à-vis the data did not fail “arbitrary and capricious” review. A222.

That is not an available option. An agency is not entitled to misinterpret a statute as long as its misinterpretation is not a capricious error or its actions are reasonable under its misinterpretation. The district court must consider whether an agency acted “not in accordance with law” *and* whether it acted in an “arbitrary [and] capricious” manner. 5 U.S.C. §706(2)(A). Simply avoiding the latter in the abstract does not obviate the former. An agency can violate the law quite deliberately and systematically, as NMFS did here by applying its atextual presumption in favor of the species at every turn while considering worst-case scenarios rather than assessing likely outcomes based on the best data.

This Court has repeatedly emphasized that “not in accordance with law” and “arbitrary and capricious” are distinct standards under the APA. *See, e.g., Scheduled Airlines Traffic Offs., Inc. v. Dep’t of Def.*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (“The question under the APA [in this case] is not whether the Department acted arbitrarily or capriciously, ... but rather whether it acted ‘in accordance with ... law.’”); *see also Mil. Toxics Project v. EPA*, 146 F.3d 948, 954-56 (D.C.

Cir. 1998). And the distinction is material, especially when it comes to ascertaining the meaning of statutory language. Assessing whether agency action is “not in accordance with law” requires a court to analyze the relevant statute or regulation on its own and, if the law is clear, to follow it without asking whether the agency’s construction is arbitrary or otherwise entertaining agency requests for deference. *See, e.g., FCC v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 304 (2003); *Holland v. Nat’l Mining Ass’n*, 309 F.3d 808, 815 (D.C. Cir. 2002); *see also Doe, 1 v. FEC*, 920 F.3d 866, 870 (D.C. Cir. 2019) (agency regulations are “‘law’ within the meaning of §706”). By contrast, “[r]eview under the arbitrary and capricious standard is deferential” to the agency from the outset. *Home Builders*, 551 U.S. at 658. Thus, the court’s insistence that it “need not ... decide ... that the agency’s approach ... was the only, or even the best, way of analyzing the data or resolving uncertainty”—and that it could instead resolve MLA’s challenge by extending “deferen[ce]” to the agency, A220—is plainly wrong and an abdication of APA duties. *See* 5 U.S.C. §706 (“[T]he reviewing court *shall* decide all relevant questions of law, interpret ... statutory provisions, and determine the meaning or applicability of the terms of an agency action,” (emphasis added); *see also id.* §551(13) (defining “agency action” to include “agency rule[s]”).⁷

⁷ In all events, agency action is arbitrary and capricious if the agency “fails to ‘comply with its own regulations,’” *Nat’l Env’t Dev. Ass’n’s Clean Air Project*, 752 F.3d at 1009, which describes NMFS’ conduct here. Indeed, the regulations (just

To the extent that the district court meant to suggest that “all that the [ESA] requires” is that NMFS’ “assessments be based on the best available data” and that the agency may lawfully apply a thumb on the scale in favor of one side or another when data is limited, A222, that is wrong too. The statutory text requires NMFS to assess the best available data to determine what is “*likely*” to occur to the species if the proposed action proceeds,” 16 U.S.C. §1536(a)(2) (emphasis added)—as NMFS has previously recognized, *see* 84 Fed. Reg. at 44,992 (“In all instances, we will draw upon the best scientific and commercial data available *to determine if ... an activity is reasonably certain to occur.*” (emphasis added)). And a substantive presumption “in favor of the species” is not “data” at all, let alone the “best scientific and commercial data”—if anything, it is the very opposite, as it causes the agency to skew data showing what is likely to occur to the species. Thus, when applying such an atextual presumption leads the agency to assess “worst case scenarios” that are concededly “very likely” to never occur, A926, the agency has violated the ESA’s mandates twice over.

The district court also suggested in passing that NMFS’ “policy” choice to examine the worst-case scenario is of no moment because the “best data” showed that scenario as within the “range of reasonably likely options.” A222. The court

like the ESA itself) make clear that NMFS should examine reasonably likely scenarios, not worst-case ones.

cited nothing to support that dubious proposition, and understandably so. Unless disaster is more likely than not, the worst-case scenario is *unlikely* to occur—and in a situation like this, where various scenarios are distributed across the spectrum based on numerous highly variable factors (everything from calving rates to migration patterns to Canadian fishing practices)—the worst-case scenario lies at the extreme end of the bell curve, far removed from the likely scenarios in the middle. *See* 50 C.F.R. §402.17(b)(3) (explaining that agency should not consider a consequence that “is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur”). Certainly nothing in the record here indicates that NMFS thought that the worst-case scenario that it examined is reasonably likely to occur. In fact, NMFS admitted that, as a “[c]onsequen[ce]” of “utilizing metrics representing the worst case scenario,” its projections are “very likely” inaccurate—*i.e.*, “it is likely that the projections underestimate the likelihood of an increasing right whale population.” A926, 937.

* * *

In sum, NMFS’ theory that §7(a)(2) of the ESA requires it to apply a “worst case scenario” approach and a presumption “in favor of the species” is egregiously wrong. The statute, the implementing regulations, the statutory history, and Supreme Court precedent all make clear that NMFS should have focused on the

“data” showing “likely” scenarios. NMFS’ refusal to do so at the expense of the most important industry in Maine suffices to reverse the decision below.

II. NMFS Lacked Authority To Incorporate Its Draconian Conservation Framework Into The Proposed Agency Action.

NMFS’ action here suffers from a second and interrelated legal defect: The agency failed to adhere to the procedural requirements set forth in the ESA. Like all administrative agencies, NMFS is a “creature[] of statute” and thus “possess[es] only the authority that Congress has provided.” *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 142 S.Ct. 661, 665 (2022). Here, however, NMFS imposed radical changes to existing conservation restrictions on the American lobster fishery without meaningfully testing their necessity or proportionality as Congress required.

A. NMFS Unlawfully Circumvented the ESA’s Meticulous Scheme for Imposing Conservation Requirements.

1. Section 7(a)(2) of the ESA provides two routes by which a consulting agency may impose conservation requirements when considering a proposed agency action that could harm a listed species. First, if the consulting agency issues a biological opinion that finds that a proposed agency action is likely to jeopardize the species, the consulting agency “shall suggest . . . reasonable and prudent alternatives” that would allow the action agency to avoid jeopardy. 16 U.S.C. §1536(b)(3)(A); *see Bennett*, 520 U.S. at 158. That authority is not *carte blanche* to impose the most stringent conservation measures that the consulting agency can conjure up to protect

the species even if unlikely scenarios come to pass. To the contrary, a “reasonable and prudent alternative” is one that is “economically and technologically feasible.” 50 C.F.R. §402.02. And that requirement has teeth: Courts have determined that the consulting agency’s failure to evaluate its proposed alternative for economic and technological feasibility is itself arbitrary and capricious. *See, e.g., Dow AgroSciences LLC v. NMFS*, 707 F.3d 462, 474-75 (4th Cir. 2013).

Second, if the consulting agency issues a biological opinion that finds that a proposed agency action is not likely to jeopardize the species, but that the action will result in some incidental taking of the species, it must specify “reasonable and prudent measures” that are “necessary or appropriate” to “minimize such impact.” 16 U.S.C. §1536(b)(4). In that scenario, the ESA more strictly limits the kind of requirements that the agency may impose. As the implementing regulations explain, “reasonable and prudent measures” “cannot alter the basic design, location, scope, duration, or timing of the action” and “may involve only minor changes.” 50 C.F.R. §402.14(i)(2). That requirement also has teeth: Courts regularly set aside conservation restrictions that are “major” rather than “minor.” *See, e.g., Shafer & Freeman Lakes Env’t Conservation Corp. v. FERC*, 992 F.3d 1071, 1095-96 (D.C. Cir. 2021); *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 876 (9th Cir. 2004).

2. NMFS' action here is an obvious end-run around the ESA's considered scheme. Indeed, at the outset of the §7(a)(2) consultation process and before the issuance of a biological opinion, NMFS unilaterally determined that the "mandates of the ESA" "required" it to impose crippling restrictions on the lobster industry and so developed its draconian conservation framework. A1071, 1073. NMFS simply *assumed* on the front end of the process that economically debilitating conservation restrictions on the lobster fishery are necessary and then generated a biological opinion that did nothing but confirm that those extreme restrictions—untested for reasonableness or prudence—would not jeopardize the right whale. That approach makes a mockery of the congressional scheme, as it allows NMFS to entirely sidestep questions about whether the conservation framework is necessary to avoid likely jeopardy, a "reasonable and prudent alternative" (including whether it is "economically and technologically feasible"), *see* 16 U.S.C. §1536(b)(3)(A); 50 C.F.R. §402.02, or a "reasonable and prudent measure" (including whether it qualifies as only a "minor change" to the existing fishery), *see* 16 U.S.C. §1536(b)(4); 50 C.F.R. §402.14(i)(2).

Congress never conferred such sweeping power on NMFS in §7(a)(2) of the ESA—quite the opposite. Congress added the "reasonable and prudent" requirements to the ESA in 1978 as part of the immediate legislative backlash to judicial decisions interpreting the ESA to require the preservation of species

“whatever the cost.” *Hill*, 437 U.S. at 184; *see* Pub. L. 95-632 §3, 95 Stat. 3751, 3752. The whole point of requiring the consulting agency to assess whether proposed conservation restrictions are “reasonable and prudent” is to ensure that the agency does *not* inflict any more economic disruption than is necessary to protect the species.⁸ *See Bennett*, 520 U.S. at 176-77. If NMFS had limitless authority to impose the most unreasonable and imprudent conservations requirements at the outset of the process, it would render the “reasonable and prudent” language in the statute nugatory and result in precisely the sort of economic disruption that Congress sought to avoid.

NMFS’ novel approach also collides with other features of the statutory scheme. Consider the detailed provisions regarding the Endangered Species Committee, which comprise the bulk of §7 of the ESA. *See* 16 U.S.C. §1536(e)-(p). Those provisions authorize the Committee—whose members include not only members of the President’s Cabinet, like the “Chairman of the Council of Economic Advisors,” but also “one individual from each affected State”—to provide an

⁸ For instance, if an agency has multiple options to prevent likely jeopardy to the species and one of the options is reasonable and prudent and the other is not, the ESA requires the agency to choose the former. Thus, in this case, even assuming that NMFS could find that authorizing the American lobster fishery would likely jeopardize the right whale (it could not), NMFS had to assess whether its proposed requirements qualified as “reasonable and prudent.” Had it done so, it would have had no choice but find that its industry-imperiling approach is neither reasonable nor prudent and would have had to consider whether less draconian restrictions suffice.

“exemption” from §7(a)(2)’s no-jeopardy mandate after the consulting agency issues a biological opinion that finds a likely threat of jeopardy to the species and that there are no reasonable and prudent alternatives available to avoid that likely threat. *See id.* §1536(e)(3), (h). That Committee must issue an exemption when, among other things, the proposed action is “of regional or national significance” and when the “benefits” of that action “clearly outweigh” the benefits of any alternatives. *Id.* §1536(h)(1)(A). In other words, the Committee-related provisions in the statute reinforce the idea “[t]hat economic consequences are an explicit concern of the ESA.” *Bennett*, 520 U.S. at 177.

Quite obviously, however, if NMFS could impose economically ruinous conservation requirements at the outset of the consultation process to eliminate the possibility of a jeopardy opinion, the Committee and the economic policymakers who sit on it would *never* have any role to play. Indeed, the obvious design of the Committee—requiring high-ranking executive branch officials with economic responsibility and representatives from affected states to determine whether the benefits of the proposed agency action outweigh the harms—is to obtain accountability and “buy in” for difficult decisions when there are no reasonable and prudent avenues for reaching a no-jeopardy solution. Allowing NMFS to arrogate to itself the role of proposing unreasonable and imprudent measures upfront and then rubberstamping those draconian conditions as posing no jeopardy to the species,

with none of the accountability and buy-in provided by the Committee system, utterly defeats the carefully constructed statutory regime. Put differently, the ESA provides a specific mechanism for deciding “major questions,” *see West Virginia*, 142 S.Ct. at 2607-09—*i.e.*, questions “of regional or national significance,” 16 U.S.C. §1536(h)(1)(A). Congress did not leave it for NMFS to decide those questions for itself on the front end without meaningful testing on either the front or back ends.⁹

But that is exactly what NMFS did here. It manipulated the statutory scheme to impose a conservation framework that promises to destroy the American lobster fishery while bypassing the detailed provisions governing “reasonable and prudent measures” and “reasonable and prudent alternatives.” This approach has no basis in the ESA.

B. The District Court’s Contrary Conclusion Is Wrong.

The district court acknowledged that, through its discussion of “reasonable and prudent alternatives” and “reasonable and prudent measures,” the ESA places “limits on the *consulting agency’s*” authority to impose conservation restrictions in the biological opinion. A239 (emphasis added). But the court nevertheless concluded that NMFS permissibly incorporated the conservation framework into the

⁹ Although NMFS is one of the parties that could file an application for an exemption with the Endangered Species Committee, other parties can do so too. *See* 16 U.S.C. §1536(g)(1).

proposed agency action because NMFS did so in its capacity as the *action agency*, and nothing in “any statute, regulation, or other legal rule limit[s] how an action agency may define the scope of its proposed action.” A239.

That conclusion is fundamentally misguided as both a legal and factual matter. Just like any administrative agency, NMFS (regardless whether it is acting in its capacity as action agency or consulting agency) must point to explicit congressional authority to justify its conduct. *See NFIB*, 142 S.Ct. at 665. Thus, rather than ask whether any statute *limits* NMFS’ authority to include needless and economically ruinous conservation requirements in its proposed action, the district court should have asked whether any statute *authorized* it to do so. No such statute exists. Indeed, the only statute that NMFS invoked below is §7(a)(2) of the ESA. *See* Dkt.48-2 at 40. But as the Supreme Court has already held, arguably the “primary” purpose of that provision “is to *avoid* needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.” *Bennett*, 520 U.S. at 176-77 (emphasis added). NMFS’ action is obviously at cross-purposes with that provision. And the plain text of §7(a)(2) makes clear that it applies to both the action agency and the consulting agency alike. *See* 15 U.S.C. §1536(a)(2).

In all events, the district court’s theory that NMFS included the conservation framework within the scope of the proposed action in its capacity as *action agency*

is incorrect. When NMFS' Sustainable Fisheries Division (*i.e.*, the action agency) initiated formal consultation under §7(a)(2) of the ESA in October 2017, it never mentioned any conservation framework. *See* A2118-24. In fact, the administrative record unmistakably demonstrates that NMFS' Protected Resources Division (*i.e.*, the consulting agency) developed the framework and included it in the proposed agency action itself. A memorandum written by the Protected Resources Division in October 2020 (less than three months before NMFS issued its draft biological opinion) confirms as much. The memorandum states that “we”—meaning the Protected Resources Division—“developed an option (referred to as the Conservation Framework) which would set targets for reducing serious injury and mortality of right whales in the federal fisheries and be considered as part of the proposed action.” A447. The “draft Conservation Framework was developed by staff in PRD given their expertise.” A447. The Protected Resources Division then included that conservation framework in the proposed action before asking the Sustainable Fisheries Division to concur in that decision in May 2021—four months *after* issuing the draft biological opinion. A531. Thus, even accepting the district court's erroneous view that an action agency can impose draconian conservation restrictions to its heart's content when defining the proposed action, the district court still erred, as the record confirms that the consulting agency imposed the

conservation framework here. Even the court below seemed to agree that there is no statutory authority for that novel maneuver.

III. The Court Should Order A Remand To NMFS Without Vacatur.

As the foregoing demonstrates, NMFS' action here is (at a minimum) doubly inconsistent with the ESA. Although "the ordinary practice is to vacate unlawful agency action," that is not an inexorable command. *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019). For good reason: "Vacatur itself carries *more-harmful* consequences" in certain cases. *U.S. Sugar Corp. v. EPA*, 844 F.3d 268, 270 (D.C. Cir. 2016) (emphasis added).

That is the situation here, which is why MLA has never sought vacatur. Indeed, as NMFS itself has asserted, vacatur of the biological opinion could result in the closure of the entire lobster fishery because it would leave the agency in noncompliance with its §7(a)(2) duty to "insure" that authorizing the fishery "is not likely to jeopardize" the right whale. *See* Dkt.228 at 4, *Ctr. for Biological Diversity v. Raimondo*, No. 18-112 (D.D.C. filed Sept. 19, 2022) ("The federal lobster industry ... could be closed if NMFS does not have an operable biological opinion in place to satisfy its ESA Section 7 legal requirements."). Vacatur here thus would amount to "an invitation to chaos." *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002). Because Maine's lobster industry (and the entire state) has suffered enough already, the Court should reverse and simply order a

remand to the agency to assess whether authorizing the American lobster fishery would likely jeopardize the right whale without speculating about “worst case scenarios,” or putting a thumb on the scale “in favor of the species” and against the hardworking men and women of Maine’s iconic lobster industry.

CONCLUSION

The Court should reverse the district court’s judgment and order a remand to NMFS without vacatur.

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November 9, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e) because it contains 12,957 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(a)(1).

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November 9, 2022

s/Paul D. Clement
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CERTIFICATE OF SERVICE

I hereby certify that, on November 9, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
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ADDENDUM

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16 U.S.C. §1536. Interagency cooperation

(a) Federal agency actions and consultations

...

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

...

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) Opinion of Secretary

...

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

...

(4) If after consultation under subsection (a)(2), the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

...

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or

not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

...

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term “final agency action” means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

...

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.

...

50 C.F.R. §402.02 Definitions.

...

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

...

Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).

...

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

...

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take.

50 C.F.R. §402.14 Formal consultation.

...

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status and environmental baseline of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is

under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.

(h) *Biological opinions.* (1) The biological opinion shall include:

(i) summary of the information on which the opinion is based;

(ii) A detailed discussion of the environmental baseline of the listed species and critical habitat;

(iii) detailed discussion of the effects of the action on listed species or critical habitat; and

(iv) The Service's opinion on whether the action is:

(A) Likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy" biological opinion); or

(B) Not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a “no jeopardy” biological opinion).

(2) A “jeopardy” biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, the Service will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

...

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, *i.e.*, the amount or extent, of such incidental taking on the species (A surrogate (*e.g.*, similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level ii anticipated take has been exceeded.);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or

any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

...

50 C.F.R. §402.17 Other provisions.

(a) *Activities that are reasonably certain to occur.* A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:

(1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;

(2) Existing plans for the activity; and

(3) Any remaining economic, administrative, and legal requirements necessary for the activity to go forward.

(b) *Consequences caused by the proposed action.* To be considered an effect of a proposed action, a consequence must be caused by the proposed action (*i.e.*, the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:

(1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or

(2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or

(3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.

(c) *Required consideration.* The provisions in paragraphs (a) and (b) of this section must be considered by the action agency and the Services.

No. 22-5238(L), 22-5244, 22-5245, 22-5246

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN'S ASSOCIATION,
Plaintiff-Appellant,

STATE OF MAINE DEPARTMENT OF MARINE RESOURCES; MASSACHUSETTS
LOBSTERMEN'S ASSOCIATION; DISTRICT 4 LODGE OF THE INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE WORKS; LOCAL LODGE 207,
Intervenors-Appellants,

v.

NATIONAL MARINE FISHERIES SERVICE; GINA RAIMONDO, in her official capacity as
Secretary of Commerce; JANET COIT, in her official capacity as Assistant
Administrator for Fisheries,

Defendants-Appellees,

CONSERVATION LAW FOUNDATION; CENTER FOR BIOLOGICAL DIVERSITY;
DEFENDERS OF WILDLIFE,

Intervenors-Appellees.

On Appeal from the United States District Court for the District of Columbia,
No. 1:21-cv-02509-JEB

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GLOSSARY OF ABBREVIATIONS

<u>Abbreviation</u>	<u>Definition</u>
A	Appendix
APA	Administrative Procedure Act
CFR	Code of Federal Regulations
ESA	Endangered Species Act
NGOs	Non-Governmental Organizations (Intervenor-Defendants)
NGO.Br.	Intervenor-Defendants' Brief
NMFS	National Marine Fisheries Service
NMFS.Br.	National Marine Fisheries Service's Brief
MLA	Maine Lobstermen's Association
MMPA	Marine Mammal Protection Act

INTRODUCTION

Maine lobster is an American icon—what Presidents serve at state dinners to showcase the best that our Nation has to offer. *See* Zolan Kanno-Youngs, *Biden and Macron Toast Their Alliance With Lobster and American-Made Cheese*, N.Y. Times (Dec. 1, 2022), <https://nyti.ms/3hLyOXD>. But the National Marine Fisheries Service (NMFS) mistakenly believes that it must regulate the lobster industry out of existence no matter the economic or cultural toll. According to NMFS, §7(a)(2) of the Endangered Species Act (ESA) demands this and requires NMFS to protect the North Atlantic right whale against astonishingly unlikely “worst case scenario[s],” with all uncertainties in the data resolved “in favor of the species.” And NMFS believes that it can eliminate that speculative threat by imposing crippling restrictions on the lobster industry on the front end of the §7(a)(2) consultation process—and thereby evade the sensible balancing and cost-benefit scrutiny that the ESA would otherwise require on the back end. None of that has any grounding in the statute, and the district court’s decision sustaining those legal errors and imperiling a centuries-old industry cannot stand.

NMFS and the non-governmental organizations (NGOs) supporting it (collectively, Appellees) have no persuasive explanation why NMFS’ actions comply with the ESA, which is presumably why NMFS buries its analysis in the back of its brief while all Appellees hide behind pleas for deference. As to whether

the ESA permits NMFS' benefit-of-the-doubt and worst-case-scenario approach, Appellees first insist that NMFS did not, in fact, examine or seek to mitigate unlikely worst-case scenarios. But that asserted denial does not survive even a quick reading of the biological opinion. Appellees' legal arguments in defense of NMFS' actual approach are equally dubious. Appellees posit that the statutory text is silent on how NMFS should deal with uncertainty—a seemingly stunning congressional oversight given the uncertainty inherent in a §7(a)(2) jeopardy analysis—and that NMFS is unconstrained in resolving the inevitable uncertainties. But federal agencies require statutory authority for their actions, and there is no authority for NMFS' approach here. Instead, the statutory text, NMFS' own regulations implementing it, the statutory history, and Supreme Court cases like *Bennett v. Spear*, 520 U.S. 154 (1997)—most of which Appellees ignore or barely address—all confirm that NMFS must objectively assess the best “data” to minimize inevitable uncertainties (not selectively apply data-free presumptions favoring the species) as it assesses the impact on the species in “likely” scenarios (not unlikely worst-case ones). Appellees' contrary view—that NMFS must protect against hypothetical worst-case risks to the species—is a recipe for taking lobster and the Maine lobster industry off the menu and inflicting the sort of needless economic dislocation that Congress sought to avoid in the ESA.

Appellees fare no better in suggesting that NMFS lawfully baked its worst-case-scenario-mitigating conservation framework into the proposed agency action. Indeed, neither defends the district court’s theory that NMFS lawfully developed that framework in its capacity as “action agency,” because the record fatally undermines it. And only NMFS attempts to offer any justification for the idea that, without consideration of economic consequences, it may develop and impose a conservation plan that requires the lobster industry to achieve a more-than-30-fold reduction in risk in a matter of years. NMFS identifies no statutory text to support that bold claim, and so it ultimately asks the Court to uphold its atextual approach as facilitating “good government.” But all it really facilitates is the complete circumvention of the specific conception of good government embodied in the ESA—*e.g.*, using data rather than speculation, employing meaningful cost-benefit analysis, and involving politically accountable actors in particularly difficult cases.

Unable to muster any defense of NMFS’ improper action, the NGOs (but not NMFS) contend that no one has Article III standing to challenge the conservation framework, which is a component of the biological opinion under review. But the first phase of that framework (NMFS’ 2021 final rule) is already injuring members of the Maine Lobstermen’s Association (MLA)—and, no matter how many times Appellees say otherwise, MLA is challenging that rule here. Furthermore, even the NGOs concede (with considerable understatement) that future phases of the

framework “will affect” lobstermen. Article III thus is no impediment. The Court should reverse and order a remand to NMFS without vacatur.

ARGUMENT

I. NMFS’ Approach Of Giving The “Benefit Of The Doubt” To The Species And Assessing “Worst Case Scenarios” Contravenes The ESA And Its Implementing Regulations.

In the biological opinion here, NMFS declared that, “to meet the mandates of the ESA,” it could authorize the continued operation of the lobster fishery only on condition of compliance with industry-imperiling conservation measures because the right whale faced a possible threat of jeopardy in a concededly unlikely “worst case scenario,” which the agency concocted after repeatedly giving “the benefit of the doubt to” and resolving “uncertainty” “in favor of the species.” A804, 926, 1071, 1074. The threshold question here is whether this economically ruinous (and scientifically questionable) benefit-of-the-doubt and worst-case-scenario approach is consistent with the ESA and its implementing regulations, the statutory history, and controlling precedent.¹ The answer is plainly no, and Appellees cannot avoid that reality by relegating the issue to the back of a brief, *see* NMFS.Br.41-49, or by stacking one baseless request for “deference” on top of another, *see* NMFS.Br.22, 48; NGO.Br.2, 13, 15, 18, 21, 22, 23. Indeed, while repeated calls for deference

¹ MLA adopts by reference Maine’s reply brief, which explains why NMFS fails arbitrary-or-capricious review. *See* Fed. R. App. P. 28(i).

speak volumes about Appellees' confidence in their underlying legal arguments, the Administrative Procedure Act (APA) makes clear that legal questions are for *courts* to resolve. *See* 5 U.S.C. §706.

Appellees begin by trying to minimize the problem. By their telling, all that NMFS did here—"at the margins"—is "evaluate[] the best available data and, when that data revealed two or more reasonably likely outcomes, ... select[] the more conservative one." NMFS.Br.20, 42; *see* NMFS.Br.46, NGO.Br.14. That is wishful thinking. While the *district court* described NMFS' action along these lines in a single, citation-free sentence (and even that sentence did not claim that NMFS had skewed the data only in "limited instances," NGO.Br.17), *see* A222, NMFS' *biological opinion* tells a very different story. That opinion candidly acknowledges that, in conducting its jeopardy analysis, NMFS made "worst case assumptions for several key variables," and it repeatedly concedes that the worst-case scenario that emerged from that skewed approach will "*very likely*" not occur, which is true of virtually every worst-case scenario (particularly those projected over a half-century).² A926, 939 (emphases added); *see, e.g.*, A937 ("[I]t is likely that the

² NMFS' contemporaneous statement is unavoidable. For example, it obviously is not "reasonably likely" that 0% of right whales die of natural causes or that the trap/pot fisheries are responsible for 100% of unknown-gear-caused right whale mortalities when the data reveal that such implausible scenarios have *never* occurred before. *See, e.g.*, A816, 151560, 1563, 1936; Dkt.54.

projections underestimate the likelihood of an increasing right whale population and that the actual right whale population will likely fare better than the trajectories indicate.”); A939 (“[T]hese projections should not be interpreted as ... accurate[.]”). Agency action is reviewed based on the “contemporaneous” record, and “*post hoc* justifications” are disregarded. *DHS v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1909 (2020). That elementary rule forecloses Appellees’ belated efforts to minimize NMFS’ distortion of “key variables” or its imposition of severe costs to mitigate “remote” “possibilities.”³ A939; NMFS.Br.45-46.

Appellees’ felt need to distort the record is understandable, as the benefit-of-the-doubt and worst-case-scenario approach that NMFS *actually* took is legally indefensible. Appellees’ primary submission is that NMFS’ approach is “consistent with” the text of the ESA because §7(a)(2) requires it to assess the “best scientific and commercial data available” but “says nothing” about how to “approach” the data when there is “uncertainty” and hence a “range of values” in the “data set.” NMFS.Br.41, 43, 45; *see* NGO.Br.17. Appellees therefore suggest that NMFS has unfettered “discretion” to give the species the “benefit of the doubt” and “evaluate[]

³ The NGOs puzzlingly suggest that NMFS “[b]y no means ... always assume[d] the worst for right whales” because it assumed that its conservation framework “will be 100 percent effective.” NGO.Br.16. But requiring the lobster industry to mitigate the worst-case scenario while leaving *no margin for error* only exacerbates the problem.

a ‘worst-case scenario’” as a *policy* matter whenever uncertainty is present in the data, NMFS.Br.42-43, 45; *see* NGO.Br.14 (“policy choices”)—which is to say, whenever the agency is conducting any §7(a)(2) analysis, as uncertainty is inherent in this context, *see, e.g.*, Nat’l Research Council, *Science and the Endangered Species Act* 148 (1995) (“[D]ecisions regarding endangered species must always be made in the face of uncertainty[.]”).

That submission is flawed on multiple levels. Before an agency throws up its hands and declares an “interpretive question ... ‘more one of policy than of law,’” it must “exhaust” every “tool” in the “legal toolkit” to discern a statute’s meaning. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) (brackets omitted). One need not dig deep in the toolkit to reject Appellees’ submission here, as multiple factors foreclose the submission that a command to consider the best available data to evaluate likely scenarios was really an invitation to err on the side of the species and employ speculative, worst-case scenarios to impose draconian burdens whenever the agency confronted uncertainty about something as inherently uncertain as the impact of contemplated future action on an endangered species.

To begin, Congress commanded NMFS to use “*data*” to determine what is “*likely*” to occur to the species. 16 U.S.C. §1536(a)(2) (emphases added). Appellees do not dispute that “data” means actual “information” that is “collected for [a] specific purpose,” *Black’s Law Dictionary* 356 (5th ed. 1979), nor do they dispute

that “likely” means scenarios that are more “[p]robable” than not, *id.* at 834. A straightforward reading of the statute therefore confirms that NMFS must objectively assess actual information for the specific purpose of determining whether, under the proposed agency action, jeopardy is probable. Factual information and realistic scenarios can inform that inquiry. But an approach that repeatedly “select[s] the value” that poses “higher, rather than lower, risk” to “provide[] the ‘benefit of the doubt’ to the species,” and that focuses on “pessimistic” assumptions and “worst case scenario[s],” affirmatively distorts that inquiry in the direction of whether jeopardy is possible, as opposed to likely. NMFS.Br.41, 44-46; A506, 804, 926. This case illustrates the point. NMFS found its draconian conservation framework necessary only because it repeatedly applied a thumb on the scale in favor of the species (rather than looking at the data objectively) and selected worst-case (rather than realistic) scenarios that are concededly unlikely. The statute does not support that approach, and the mere fact that “scientific data” were considered as part of this skewed and misguided inquiry does not suffice. NMFS.Br.22; NGO.Br.18.

NMFS describes MLA’s “interpretation” as without “grounding in the statutory text.” NMFS.Br.45, 48. That claim is ironic given that NMFS has not even tried to ground its arguments in the statutory text. And it is especially hard to credit

since the agency itself previously *embraced* MLA's interpretation after examining the same text.

As NMFS explained in 2019 during notice-and-comment rulemaking, “nothing” in the ESA’s text instructs NMFS to “utilize a ‘worst-case scenario’ or make unduly conservative modeling assumptions.” 84 Fed. Reg. 44,976, 45,000 (Aug. 27, 2019). Instead, NMFS continued, the language in “section 7(a)(2)” “require[s]” it—“[i]n all instances”—to “draw upon the best scientific and commercial data available to determine if ... an activity is reasonably certain to occur” (which only confirms that NMFS does not consider worst-case scenarios “reasonably likely,” NMFS.Br.42-43). *Id.* at 44,992; *see id.* at 44,993 (evaluating what is “reasonably certain ... is consistent with the [ESA] generally and section 7(a)(2) in particular”). The agency also *rejected* the view of certain commenters who insisted that, “in order to give the benefit of the doubt to the species,” it “should consider effects or activities that were possible even if not likely.” *Id.* at 44,993. And NMFS further emphasized that a determination about what is reasonably certain to occur “must be based on clear and substantial” or “solid” “information.” *Id.* at 44,977. Consistent with all of that, NMFS’ regulations repeatedly explain that, to fulfill its duties under §7(a)(2), NMFS must identify what is “reasonably certain to occur” and “reasonably ... expected” using “clear and substantial information,” 50

C.F.R. §§402.02, 402.17(a)-(b), and they say not a word about a benefit-of-the-doubt or worst-case-scenario approach.

The NGOs have no response to the regulations, while NMFS tries to divert attention toward its “1998 Endangered Species Act Consultation Handbook.” NMFS.Br.44. According to NMFS, that handbook “directs” the agency to apply the benefit-of-the-doubt and worst-case-scenario approach, and because it “was developed after notice-and-comment rulemaking,” it is “entitled to substantial weight.” NMFS.Br.44 & n.11. But just asking for comment on a handbook does not give it the authoritative weight of rules duly promulgated in the CFR, and NMFS studiously avoids asking for deference to the handbook for good reason. Courts are justifiably skeptical of undue reliance on handbooks. *See Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1142 (2018). And even full-blown notice-and-comment regulations are entitled to *zero* weight when they contradict the statute, *see Am. Hospital Ass’n v. Becerra*, 142 S.Ct. 1896, 1903-06 (2022), which NMFS’ benefit-of-the-doubt/worst-case-scenario approach does.

Nor does the handbook ever claim otherwise. As NMFS conveniently omits, the only authority that the handbook cites to justify that approach is the same half-sentence of legislative history that NMFS cited in its biological opinion. *See* A1925 (citing H.R. Conf. Rep. No. 96-697 at 12 (1979)); A804 (same). But “legislative history is not the law,” *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1631 (2018), and

citing it in a handbook does not change the calculus. In all events, NMFS does not deny that it examined this same piece of legislative history even more recently (during notice-and-comment rulemaking in 2019) and saw no basis for an atextual benefit-of-the-doubt or worst-case-scenario approach: “The use of the words ‘benefit of the doubt to the species’ in the Conference Report appears intended to provide reassurance that the statutory language, as amended, would remain protective of the species. At most, the language seems to indicate that the statutory language ‘is not likely to jeopardize’ continues to provide protections to listed species by requiring action agencies to insure that their actions are not likely to jeopardize listed species.” 84 Fed. Reg. at 45,007.

Far more relevant to the analysis than a snippet of the *legislative* history is the *statutory* history or evolution, which (despite the NGOs’ attempted conflation, *see* NGO.Br.20) is “quite separate.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012); *compare* Statutory History, *Black’s Law Dictionary* (11th ed. 2019) (“enacted lineage of a statute”), *with* Legislative History, *id.* (“proceedings leading to the enactment of a statute”). As NMFS acknowledges, when originally enacted in 1973, §7 of the ESA required it “to insure the species would not be jeopardized” in any possible scenario, but in 1979, Congress “relax[ed]” the standard by requiring NMFS to ensure only that jeopardy is not “likely” as judged by the “best available science.” NMFS.Br.45, 47. If those

amendments truly permitted NMFS to place a thumb on the scale in favor of the species to prevent unlikely worst-case scenarios, the amendments would have been self-defeating. The agency would still find itself in the pre-1979 position of “prov[ing] an absolute negative”: that jeopardy is not a possibility. NMFS.Br.45. Congress rejected that standard as practically untenable, and NMFS is not free to resurrect it. *See Intel Corp. Inv. Pol’y Comm. v. Sulyma*, 140 S.Ct. 768, 779 (2020) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”); *accord* Scalia & Garner 256.

NMFS protests that this understanding of the statutory history (and the statute more generally) is “wrong,” as purportedly “confirmed” by “[s]ubsequent cases.” NMFS.Br.47. But the most important “subsequent case” is *Bennett v. Spear*, in which a unanimous Supreme Court held that the language added to §7(a)(2) in 1979 prohibits NMFS from “implement[ing]” the statute based on “speculation or surmise,” all while explaining that an “obvious” and “primary” purpose of that language (“if not indeed the primary one”) is “to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.” 520 U.S. at 176-77. As this case vividly demonstrates, when NMFS gives the benefit of the doubt to the species at every turn and seeks to mitigate speculative worst-case scenarios, the result is precisely the sort of

“uneconomic” jeopardy analysis that *Bennett* says §7(a)(2) is designed to “prevent.” *Id.* at 177 (emphasis added).

Remarkably, the NGOs never engage with *Bennett*, while NMFS addresses it only on the penultimate page of its brief. *See* NMFS.Br.55. By NMFS’ telling, *Bennett* does not “aid[]” MLA because the Supreme Court addressed §7(a)(2) in the context of a “zone of interests” analysis. NMFS.Br.55. True enough, but that hardly renders the Court’s analysis dictum or any less authoritative. When identifying a statute’s focus for purposes of a zone-of-interests analysis, the Supreme Court does not engage in some extratextual conjuring. It “appl[ies] traditional principles of statutory interpretation” “to determine the meaning of the congressionally enacted provision” at issue. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). That would seem to be particularly true of a zone-of-interests inquiry in an opinion like *Bennett* authored by Justice Scalia. Thus, *Bennett*’s explication of §7’s “obvious” and “primary” meaning is a statutory holding that is controlling in all cases involving that provision—this one included.

Rather than grappling with *Bennett*, Appellees seek refuge in various other decisions, like *TVA v. Hill*, 437 U.S. 153 (1978). *See* NMFS.Br.43-44; NGO.Br.4-5. But *Hill* is the last place to look for guidance on the current version of §7, except perhaps for evidence of the approach that Congress wished to discard. As Appellees do not dispute, Congress amended the ESA precisely because it *disagreed* with the

outcome in *Hill*. See J.B. Ruhl, *The Endangered Species Act's Fall from Grace in the Supreme Court*, 36 Harv. Envtl. L. Rev. 487, 489-90 (2012) (*Hill* “was ridiculed,” “brought sweeping condemnations in Congress,” and “has become the extreme outlier in the Court’s ESA jurisprudence”).

NMFS (though not the NGOs) suggests that two other circuits “have ... acknowledged the appropriateness” of its benefit-of-the-doubt-to-the-species approach because they cited the legislative history mentioning that phrase.⁴ NMFS.Br.44 (citing *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Roosevelt Campobello Int’l Park Comm’n v. EPA*, 684 F.2d 1041 (1st Cir. 1982)). But both decisions long predated *Bennett*, and neither helps NMFS anyway. In *Conner*, the Ninth Circuit said only that “failing to use the best information” and “failing to adequately assess whether the agency action was likely to jeopardize the continued existence of any threatened or endangered species, as required by section 7(a)(2),”—*i.e.*, failing to faithfully apply the statutory text—would fail to ““give the benefit of the doubt to the species.”” 848 F.2d at 1454. *Conner* thus suggests only that NMFS

⁴ Appellees repeatedly reference two First Circuit decisions resolving the Maine Lobstering Union’s (not MLA’s) litigation seeking a preliminary injunction of NMFS’ seasonal closure of certain fishing grounds. See *Dist. 4 Lodge v. Raimondo*, 40 F.4th 36 (1st Cir. 2022); *Dist. 4 Lodge v. Raimondo*, 18 F.4th 38 (1st Cir. 2021). Those decisions do not address the statutory questions here, and neither Appellee contends otherwise. Indeed, the complaint in that litigation did not even challenge NMFS’ biological opinion.

should protect the species by *adhering* to the statute—not that NMFS may deviate from it by applying pro-species presumptions and analyzing worst-case scenarios. *See NRDC v. Kempthorne*, 506 F.Supp.2d 322, 360 (E.D. Cal. 2007) (“*Conner* does not directly support the broader interpretation ... that the agency should err on the side of the species when evaluating uncertain evidence.”). And the First Circuit’s decision in *Roosevelt* is not materially different. *See* 684 F.2d at 1049 (suggesting that Congress “inten[ded]” “to give the benefit of the doubt to the species” by requiring agencies to protect against “likely” jeopardy).

Nor do the other decisions that Appellees invoke move the needle. Several do not involve the ESA. *See* NMFS.Br.43-44; NGO.Br.18, 21 (citing *Balt. Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87 (1983); *Nw. Coal. for Alternatives to Pesticides v. EPA*, 544 F.3d 1043 (9th Cir. 2008); *Int’l Fabricare Inst. v. EPA*, 972 F.2d 384 (D.C. Cir. 1992)). Others do not involve §7(a)(2). *See* NGO.Br.17-18 (citing *Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016), *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.—MDL No. 1993*, 709 F.3d 1 (D.C. Cir. 2013), *Building Indus. Ass’n of Superior Cal. v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001); *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58 (D.C. Cir. 2000)).⁵ And those that involve §7(a)(2) do not pass on the arguments that MLA

⁵ To the extent that *Alaska Oil & Gas Association* and *In re Polar Bear Litigation* are relevant, it is only because they explain that “likely” means “probable.”

asserts here. *See* NMFS.Br.43; NGO.Br.18 (citing *Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893 (9th Cir. 2020); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014)).

Appellees thus do nothing to disturb the conclusion that the statutory text, the implementing regulations, the statutory history, and controlling precedent all confirm that §7(a)(2) of the ESA requires NMFS to make jeopardy determinations after examining likely scenarios as revealed by actual data, not unlikely scenarios that emerge after applying a substantive presumption in favor of the species. NMFS' biological opinion impermissibly adopted the latter approach, and the biological opinion encompasses the conservation framework, which in turn encompasses the final rule, *see* NMFS.Br.12—a rule that, despite Appellees' puzzling statements, *see* NMFS.Br.18; NGO.Br.15, MLA has undoubtedly challenged, *see* MLA.Br.5 (identifying the first issue on appeal as “[w]hether NMFS' biological opinion, conservation framework, and *final rule* are inconsistent with §7(a)(2) of the ESA and its implementing regulations” (emphasis added)). NMFS' legal error thus has indeed “infected” everything at issue here. NMFS.Br.49

Nor, contrary to the NGOs' belief, is that legal error somehow rendered harmless because “NMFS concluded that the continued operation of the lobster fishery *‘is not likely to jeopardize* the continued existence of North Atlantic right whales.” NGO.Br.22. NMFS has allowed the lobster fishery to “continue” only if

it engineers a more-than-30-fold reduction in risk to the right whale, and the agency arrived at that impossible-to-satisfy target based on its mistaken understanding that it had to mitigate an unlikely worst-case scenario to the right whale after stacking the deck in favor of the species. *See, e.g.*, A926, 1074. MLA thus “vehemently oppose[s],” NGO.Br.22, what NMFS did here for good reason: The agency’s action is divorced from the statute and causing real-world harm not only to Maine lobstermen, but an entire region, *see* New.Hampshire.Amicus.Br.8-9, 18-22.

II. NMFS Lacked Authority To Incorporate Its Draconian Conservation Framework Into The Proposed Agency Action.

Appellees’ arguments that NMFS properly baked the draconian conservation framework into the proposed agency action here are equally meritless. The ESA authorizes a consulting agency to impose conservation requirements only as “reasonable and prudent alternatives” following a jeopardy opinion or as “reasonable and prudent measures” following a no-jeopardy opinion. 16 U.S.C. §§1536(b)(3)(A), (b)(4). NMFS did neither. Rather, NMFS incorporated its conservation framework into the proposed action *before* issuing a jeopardy assessment on the mistaken belief that the “mandates of the ESA” “required” such a maneuver, which resulted in crippling requirements exclusively designed to ward off NMFS’ manufactured “worst case scenario.” A926, 1071, 1074. The district court sustained this action solely on the mistaken premise that NMFS imposed the conservation framework in its capacity as *action* agency, not *consulting* agency, and

the statute does not “limit” the former’s discretion in defining the proposed action. *See* A239.

NMFS pointedly does not defend the district court’s reasoning, nor could it. NMFS concedes that it did *not* develop the conservation framework in its capacity as *action* agency, but did so in its capacity as *consulting* agency: “The Protected Resources Division[,] the Service’s *consulting* component[,] ... developed the Conservation Framework[.]” NMFS.Br.11 (emphasis added). But while even the court below worried that baking the conservation framework into the proposed action would amount to “an unlawful end run around” the ESA if NMFS did so in its capacity as consulting agency, A239, NMFS nevertheless contends that it “was well within its authority” to forge ahead in that manner, NMFS.Br.50. NMFS, however, tellingly does not invoke any *statutory* authority for its actions. Instead, the agency relies entirely on a pair of nearly 30-year-old decisions from the Ninth Circuit. *See* NMFS.Br.50 (citing *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Lane Cnty. Audubon Soc’y v. Jamison*, 958 F.2d 290 (9th Cir. 1992)).

Those decisions are plainly insufficient to sustain NMFS’ conduct. In *Pacific Rivers Council*, the Ninth Circuit merely rejected the argument from the U.S. Forest Service (the action agency) that it need not consult NMFS at all because NMFS had not listed the potentially impacted species until after the Forest Service adopted certain forest plans. *See* 30 F.3d at 1053-56. And in *Lane County*, the Ninth Circuit

merely held that the Bureau of Land Management (the action agency) had to consult the U.S. Fish and Wildlife Service to determine whether a logging plan would likely jeopardize the species. *See* 958 F.2d at 293-94. How either of those decisions—in which action agencies sought to freeze out consulting agencies altogether—somehow empowered NMFS in its consulting-agency capacity here to develop an industry-annihilating conservation framework through a process nowhere mentioned in the statute, NMFS leaves unexplained.

NMFS thus is forced to argue that its unauthorized approach nonetheless promotes “good government.” NMFS.Br.2, 54. As NMFS puts it, “it was clear” that “evaluating the effects of authorizing the fisheries without conservation measures” would have led to a jeopardy finding, so it decided to avert such a finding (a.k.a., circumvent the statute) by “develop[ing]” the conservation framework and defining the “proposed action” to include it, thus guaranteeing a no-jeopardy finding. NMFS.Br.50, 54. The threshold problem with that statement is that NMFS perceived a “clear” and inevitable jeopardy finding only based on its atextual benefit-of-the-doubt and worst-case-scenario approach.

But more fundamentally, Congress has already decided what “good government” looks like in this context, and it is reflected in the text of the ESA itself. *See Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1486 (2021) (“If men must turn square corners when they deal with the government, it cannot be too much to expect the

government to turn square corners when it deals with them.”). And that statute does not provide for a step-zero in which the agency circumvents the statutory process—which requires cost-benefit analysis and involves politically accountable officials in difficult cases—by imposing crippling requirements on the front end designed to ward off a jeopardy finding even in the least likely scenarios. Instead, under the statute as written, if there is a clear threat of jeopardy to the species (based on an objective assessment of the action’s likely effects), the proper course is for NMFS to propose “reasonable and prudent alternatives,” which the agency must test for economic viability. If no such alternatives exist, either NMFS or another party can seek an exemption from the Endangered Species Committee, which has the inestimable advantage of bringing the judgment of politically accountable officials to bear before an industry—and, here, an entire way of life—is eviscerated. *See* 16 U.S.C. §§1536(b)(3)(A), (g)(1); *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 652 (2007).

NMFS claims that MLA has “misinterpret[ed]” the ESA and its implementing regulations. NMFS.Br.52. Even if it had issued a “jeopardy determination,” NMFS reasons, the conservation framework would not have had to undergo any “economic” “test,” and because the agency promises to “consider additional economic concerns” when promulgating “future” rules implementing the framework, it will not “evade[]” “economic analysis.” NMFS.Br.52. Wrong again. If NMFS attempted to

implement the conservation framework following a jeopardy determination, it could have done so *only* if the framework qualified as a “reasonable and prudent alternative”—indeed, NMFS identifies no other statutory path—and as NMFS concedes, *see* NMFS.Br.52, its own regulations implementing §7 (correctly) *require* it to demonstrate that such alternatives are “economically and technologically feasible,” 50 C.F.R. §402.02; *cf. Michigan v. EPA*, 576 U.S. 743, 752-53 (2015) (“[I]t is unreasonable to read an instruction to an administrative agency to determine whether ‘regulation is appropriate and necessary’ as an invitation to ignore cost.”). Furthermore, the notion that NMFS will adequately “consider” economic concerns in the “future” is impossible to square with NMFS’ repeated statements that it *already* made a “*commitment*” to implement its framework when it issued the biological opinion—and did so *without* consideration of the devastating economic consequences. NMFS.Br.1, 14 (emphasis added); *cf. Michigan*, 576 U.S. at 756 (“Cost may become relevant again at a later stage of the regulatory process, but that possibility does not establish its irrelevance at *this* stage.”). There is accordingly no denying that NMFS’ theory “reads out” the economic analysis that the ESA and the implementing regulations demand. *Dow AgroSciences LLC v. NMFS*, 707 F.3d 462, 474-75 (4th Cir. 2013).

Nor is there any denying that NMFS’ statutorily unauthorized theory empowers the agency to cut the statutorily authorized Endangered Species

Committee out of the process entirely. NMFS does not seriously suggest otherwise. Instead, pointing to two fragments of “legislative history,” NMFS insists that Congress “planned” all along for the Committee to operate in theory only, with agencies supposed to resolve ESA “conflicts” through backroom channels. NMFS.Br.53. That claim is unsustainable for a host of reasons, including because legislative history is not the law, *see Epic*, 138 S.Ct. at 1631, congressional amendments presumptively have substantial effect, *see Intel*, 140 S.Ct. at 779, and the *Bennett* Court already concluded that the Committee process is crucial to a proper functioning of the statute, *see* 520 U.S. at 177-78. In all events, NMFS’ cited congressional reports actually undermine its argument. The first says that “the integrity of the interagency consultation process designated under section 7 of the act [should] be preserved” before predicting that “many, if not most,” cases will not require resort to the Committee. H.R. Conf. Rep. No. 95-1804, at 18 (1978). And the second says that the Committee may intervene only if the “consultation process” under §7 proves “unsuccessful in resolving the conflict.” S. Rep. No. 95-874, at 3 (1978). Thus, if anything, the legislative history merely confirms that NMFS should follow the consultation process *as set forth in the statute*—which has built-in methods for resolving “conflicts” (*e.g.*, economically viable “reasonable and prudent alternatives”). Similarly, no one doubts that Committee resolution should be the exception and not the rule, but that is because it comes at the end of the statutory

process and because the possibility of intervention by a more politically accountable Committee incentivizes agencies to compromise and act reasonably. Nothing in the legislative history endorses circumventing the entire statutory process, including any possible intervention by the Committee, through the simple expedient of imposing draconian restrictions designed to avoid worst-case scenarios on the front end, so that neither the cost-benefit analysis nor the possibility of Committee intervention—both of which Congress expressly authorized—ever occurs.

NMFS attempts to minimize the impact of its creative workaround by denying that the conservation framework is “crippling.” NMFS.Br.50. But it is far too late for NMFS to conduct the required economic analysis now, *see Regents*, 140 S.Ct. at 1909, and NMFS’ *ipsit dixit* does not withstand even minimal scrutiny. NMFS does not dispute that compliance with just the *first* phase of the framework—which, among other things, has already resulted in the seasonal closure of the lobster fishery in a massive area off the coast of Maine—will cost Maine lobstermen tens of millions of dollars. *See* Dkt.42-2 ¶12; *see also* NMFS.Br.11 (“The Rule restricts the use of trap/pot gear in particular areas during particular periods, reduces line density, and requires gear modifications and markings, among other measures.”). And NMFS itself recently argued in other litigation that “the measures required” to achieve the risk-reduction targets mandated by other phases of the framework—indeed, even achieving targets short of the agency’s *ultimate* target—“will have

severe economic and social consequences to the affected fisheries and surrounding communities,” like “the end of a viable fishing operation” and “massive disruption in the form of wide closures of fixed gear fisheries.” Dkt.228-1 ¶¶7, 12, *Ctr. for Biological Diversity v. Raimondo*, No. 18-cv-112 (D.D.C. filed Sept. 19, 2022).

NMFS thus shifts to offering various reasons why the Committee purportedly “would not have helped” MLA in this case had the agency adhered to the ESA’s procedures. NMFS.Br.54. Of course, because NMFS arrogated that decision to itself, no one will ever know. But NMFS’ speculative reasoning is illogical in any event. NMFS first declares that, if it issued a jeopardy opinion (based on its unlawful worst-case-scenario approach), it would have adopted the conservation framework as a “reasonable and prudent alternative” and prevented Committee intervention that way. NMFS.Br.54. But that assumes the reasonableness and prudence of the restrictions (and that they are “economically and technologically feasible,” 50 C.F.R. §402.02), none of which is true. And if NMFS had made those findings anyway, MLA would have a clear target to challenge in court.

NMFS next contends that, “although private permittees may request an exemption” from the Committee “if requested permits are denied,” MLA members could not have sought an exemption because “no permits were denied *here*.” NMFS.Br.54 (emphasis added). But that just attempts to make a virtue out of flouting the statute. The only reason permits were not denied here is because the

crippling restrictions were imposed on the front end, the crippling restrictions protected the species against even worst-case scenarios, and thus no permits need be denied. Voila! The agency's maneuvers here manage to evade the entire statutory scheme, including MLA's right to seek Committee review upon a permit denial. But in a system that requires agencies to act only with statutory authority and to follow statutory processes, that is decidedly a bug and not a feature.

Perhaps recognizing that the Committee would inevitably have intervened had NMFS followed the statute and deemed the draconian restrictions necessary to avoid a jeopardy finding, NMFS suggests that the Committee "would have taken [MLA] only so far" because the Committee may grant an exemption only from the ESA, not from the Marine Mammal Protection Act (MMPA), which NMFS describes as "squarely at issue here." NMFS.Br.55. At the outset, NMFS' focus on the MMPA is inconsistent with the biological opinion, which repeatedly states that NMFS imposed the conservation framework to "meet the mandates of the ESA," A1071; *see* A1075 ("This Conservation Framework is ... required by the ESA"); A1074 (similar). That is why the district court agreed that NMFS "did not cite its MMPA obligations" to justify its ultimate risk-reduction target. A238. Moreover, there is no question that the agency developed that framework through the ESA process and not through the notice-and-comment procedures required by the MMPA. *See* 16 U.S.C. §1387(f)(7). All that aside, nothing in the MMPA authorizes a worst-case-

scenario approach, so the assumption that the MMPA would require industry-crippling restrictions is unfounded.

Moreover, if the politically accountable Committee *had* found that the continued operation of the lobster fishery is “in the public interest” and “of national or regional significance,” 16 U.S.C. §1536(h)(1)(A), and the MMPA still demanded crippling restrictions contrary to the public interest, there is every reason to believe that a politically accountable Congress would step in. In fact, after NMFS filed its brief in this case, Congress passed and the President signed a law that *prevents* NMFS from imposing further conservation restrictions on the lobster fishery under either the MMPA (or the ESA) until at least December 2028. *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. JJ (Dec. 29, 2022). That action is proof-positive that whether the second most valuable fishery in the United States should remain in existence is an “extraordinary” issue and a “major question[.]” that NMFS should *not* resolve on its own via a process that circumvents the statute, including the politically accountable Committee. NMFS.Br.55-56; *see West Virginia v. EPA*, 142 S.Ct. 2587 (2022); Maine.Chamber.Amicus.Br.3, 31.

To be sure, the recent legislation only *delays* NMFS’ efforts to follow through on its “commitment” to impose additional restrictions on the lobster fishery, NMFS.Br.1, and it does not address the underlying biological opinion or NMFS’ final rule implementing the conservation framework’s first phase. This litigation

thus remains necessary to address the underlying errors and *permanently* resolve *all* of MLA's objections to the framework (and permanently eliminate the misguided worst-case-scenario mode of analysis that has infected the entire process). And contrary to the NGOs' argument—which NMFS does not join—MLA has Article III standing to challenge it. NGO.Br.34-40.

As the district court correctly explained below when the NGOs packaged this argument in terms of reviewability under the APA (as opposed to Article III standing), the framework is a “necessary part” of the biological opinion here and the “only” way that NMFS avoided a jeopardy finding. A234-35. That means that NMFS itself believes that implementation of the framework is not just possible, but certain to occur—otherwise, it would have had to issue a jeopardy determination. *See* A235. In fact, as already noted, the first phase of that framework is already inflicting substantial actual injury on MLA's members, which obviously suffices for Article III standing. *See TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021) (“actual” injuries suffice).

And even the NGOs concede that latter phases of the framework “will affect the federal lobster fishery.” NGO.Br.35. That concession is wise. As NMFS declares on the first page of its brief, it developed the entire conservation framework for the purpose of eliminating the threat to right whales supposedly caused by the lobster fishery. *See* NMFS.Br.1; *see also* NMFS.Br.8 (“Entanglement in fishing gear

is the leading cause of mortality in adult right whales.”); NGO.Br.1 (“Th[e] BiOp demonstrated that ... the federal lobster fishery is killing right whales at grossly unsustainable levels.”). Moreover, NMFS has since declared that compliance with the latter phases of the framework will cause “severe” injury to lobster fishermen—an acknowledgment consistent with the record in this case. *See* Dkt.42-2; Dkt.42-3. Article III requires nothing more. *See Jibril v. Mayorkas*, 20 F.4th 804, 812 (D.C. Cir. 2021). In short, nothing prevents this Court from holding that NMFS’ biological opinion and its constituent components (including the conservation framework and final rule) are inconsistent with the ESA, thus necessitating a remand (without vacatur) to the agency.⁶

⁶ It is undisputed that this is the appropriate remedy if MLA prevails.

CONCLUSION

The Court should reverse and order a remand to NMFS without vacatur.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e) because it contains 6,498 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

January 10, 2023

s/Paul D. Clement
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CERTIFICATE OF SERVICE

I hereby certify that, on January 10, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement

ARGUMENT SCHEDULED FOR FEBRUARY 24, 2023**No. 22-5238(L), 22-5244, 22-5245, 22-5246**

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN'S ASSOCIATION,
Plaintiff-Appellant,

STATE OF MAINE DEPARTMENT OF MARINE RESOURCES
Intervenor-Appellant,

v.

NATIONAL MARINE FISHERIES SERVICE; GINA RAIMONDO, IN HER OFFICIAL CAPACITY
AS SECRETARY OF COMMERCE; JANET COIT, IN HER OFFICIAL CAPACITY AS
ASSISTANT ADMINISTRATOR FOR FISHERIES,
Defendants-Appellees,

CONSERVATION LAW FOUNDATION; CENTER FOR BIOLOGICAL DIVERSITY;
DEFENDERS OF WILDLIFE,
Intervenors-Appellees.

On Appeal from the United States District Court for the District of Columbia,
No. 1:21-cv-02509-JEB

**REPLY BRIEF FOR INTERVENOR-PLAINTIFF-APPELLANT STATE OF
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January 10, 2023

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GLOSSARY

APA:	Administrative Procedure Act
DST:	Decision Support Tool
ESA:	Endangered Species Act
Federal Appellees Brief:	Response Brief for Federal Appellees, National Marine Fisheries Service, et al.
ME Brief:	Opening Brief of the State of Main Department of Marine Resources
M/SI:	Mortality and Significant Injury
NMFS:	National Marine Fisheries Service

I. INTRODUCTION

“When dealing with data uncertainties (e.g, a range of potential calving rates, or unquantified benefits from conservation measures), we utilized metrics representing the worst case scenario. Consequently, model outputs very likely overestimate the likelihood of a declining population.”

- A926 (2021 Biological Opinion).

“Plaintiffs err in asserting that the Service applied an unfounded ‘worst-case scenario’ approach The record shows that the Service adopted no such approach”

- Federal Appellees Brief at 21.

In its 2021 Biological Opinion regarding the effects of several fisheries including the lobster fishery on the North Atlantic right whale, the National Marine Fisheries Service (“NMFS”) stretched the precautionary principle (or worst-case scenario analytical approach) beyond the breaking point. It did so by repeatedly overstating the effects of the lobster fishery on the right whale when engaging in consultation under Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), while understating the effects of other factors in the environmental baseline on the species. At the same time, NMFS completely discounted the beneficial effects of risk mitigation efforts in the environmental baseline, including its own Ship Strike Reduction Program and Canadian measures implemented to reduce harm to the right whale from entanglements and vessel strikes.

In an effort to defend their unlawful conduct, Federal Appellees engage in revisionist history and marshal post hoc rationalizations to defend the Biological Opinion. The quotations above illustrate the efforts of Federal Appellees to walk away from NMFS's statements in the Biological Opinion and its associated administrative record. NMFS expressly acknowledged that it systematically inflated the effects of the lobster fishery on the North Atlantic right whale when preparing the Biological Opinion. A926. Yet Federal Appellees now characterize this acknowledgement as "unremarkable." Fed. Appellees Br. at 39. But knowingly misallocating risk posed by different threats to a listed species will lead to misguided conservation efforts and needless economic dislocation in violation of the Endangered Species Act's ("ESA") requirement to use the best scientific and commercial data available, 16 U.S.C. § 1536(a)(2), *Bennett v. Spear*, 520 U.S. 154, 176 (1997), and the Administrative Procedure Act's ("APA") requirement that the agency engage in reasoned decision-making. *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (opining that the APA requires federal agencies to engage in reasoned decision-making).

Federal Appellees' brief cedes the fact that NMFS adopted a "worst-case scenario" analytical approach. Fed. Appellees Br. at 42-43. In a post hoc effort to mitigate the agency's unlawful conduct, Federal Appellees argue NMFS "evaluated a 'worst-case scenario' among the most likely scenarios, and only when necessary to resolve uncertainties," citing to the Biological Opinion. *Id.* (emphasis

added) (citing A926-27). However, neither the Biological Opinion nor the administrative record confirm that NMFS “evaluated a ‘worst-case scenario’ among the most likely scenarios.” While Federal Appellees refer to the “most likely scenarios,” their brief does not cite any portions of the record identifying those most likely scenarios. Federal Appellees should not be permitted to engage in post hoc rationalization to support NMFS’s approach to undertaking the effects analysis and finalizing the Biological Opinion. *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (rejecting an agency’s attempt to rely in court on “impermissible post hoc rationalizations” to defend the legality of its action).

This unlawful analytical approach led to pervasive shortcomings in the Biological Opinion. The Court need not take on the task of rooting out each shortcoming. Rather, the Court can and should hold that the agency’s analysis was flawed when it disregarded the best available data regarding three key elements: the apportionment of right whale mortality between Canada and the United States (defaulting to a 50/50 split); entanglement between gear types (assuming 100% of entanglements are attributable to trap/pot (i.e., lobster) gear); and anthropogenic and natural sources of mortality (assuming 100% of mortality is attributable to anthropogenic sources).

II. ARGUMENT

A. NMFS Erred by Arbitrarily Defaulting to a 50/50 Split of Right Whale Mortality between Canada and the United States.

Under *State Farm*, an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). NMFS failed this test in the Biological Opinion by arbitrarily splitting unassigned right whale mortality and significant injury (“M/SI”) 50/50 between the United States and Canada. Despite the post hoc rationalizations of Federal Appellees (and Intervenor Appellees), a 50/50 split directly contradicts, and obscures, actual data showing far more Canadian takes. And after-the-fact argument does not cure the arbitrary nature of a decision for which the Biological Opinion offers no rational explanation.

In the unknown country apportionment section of the Biological Opinion, NMFS provides cursory discussion of why it decided not to apportion based on either the percentage of time right whales occur in each country’s waters or on known risk. A814-15. Regardless of whether the agency was correct in its conclusions on these points (which it was not), those conclusions are not explanations for why the agency decided to instead go with the 50/50 split. NMFS did not face a choice among only apportionment based on time, known risk, or an arbitrary 50/50 split. Simple dismissal of two options and failure to consider other

available and defensible options (including extrapolating from the known country apportionment data) is not “a satisfactory explanation” for defaulting to a 50/50 split.

In discussing the 50/50 split, NMFS merely states that it was following the approach used by the Atlantic Large Whale Take Reduction Team for its April 2019 meeting. *Id.* The only other possible reason given for why the 50/50 split represents the “best available information,” is the agency’s statement that “[g]iven limited distribution information and transboundary fishery attributes, NMFS assessed an equal division of the unassigned serious injuries and mortalities between the United States and Canada.” A815. There is no “rational connection between the facts found and the choice made.” *See State Farm*, 463 U.S. at 42. NMFS’s decision to assign a 50/50 split between the United States and Canada was arbitrary and in error.

NMFS asserts that “[t]hese methods were peer reviewed . . . and while the reviewers did not come to consensus on accuracy, they considered the approach reasonable.” A815. But, as the State pointed out earlier (and neither Federal Appellees nor Intervenor Appellees addressed), this statement is erroneous – nowhere did the peer reviewers conclude that the 50/50 split was “reasonable.” *See ME Br.* at 14-16.

As this Court has stated on numerous occasions, “post hoc explanation by appellate counsel . . . is not an acceptable foundation for review of agency action.”

Nasdaq Stock Mkt. LLC v. SEC, 1 F.4th 34, 38 (D.C. Cir. 2021); *see also Genuine Parts Co. v. EPA*, 890 F.3d 304, 314 (D.C. Cir. 2018); *Am. Min. Cong. v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990). That has not stopped Federal Appellees here. They cite to *Appalachian Power Co. v. EPA*, arguing the fact that “a model is limited or imperfect is not, in itself, a reason to remand agency decisions based upon it.” Fed. Appellees Br. at 25-26 (citing 249 F.3d 1032, 1052 (D.C. Cir. 2001)). But this analogy fails – NMFS’s simplistic assumption of a 50/50 split is nothing like the complex and quantitative computer modeling EPA used to determine whether a state’s manmade air emissions affected a downwind state’s attainment. *See Appalachian Power Co.*, 249 F.3d at 1048.

Further, Federal Appellees miss the full mark: as the *Appalachian Power Co.* court held, an agency “has undoubted power to use predictive models so long as it explains the assumptions and methodology used in preparing the model and provides a complete analytic defense should the model be challenged.” *Id.* at 1052 (emphasis added). As detailed above, NMFS failed to either explain the assumptions or provide a complete analytic defense in regards to the 50/50 split. NMFS’s decision to arbitrarily split unassigned M/SI is so oversimplified that the agency’s conclusion is unreasonable. *See id.* Assigning a 50/50 split between the United States and Canada bears “no rational relationship to the reality it purports to represent” and, as such, this Court should reject it. *Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999).

Federal Appellees argue that the 50/50 split “may not have been perfect, but it was reasonable based on the available data and therefore passes muster under APA review.” Fed. Appellee Br. at 25. First, unsupported statements from NMFS that its actions were “reasonable” are insufficient to establish reasonableness. As discussed above, the peer review summary did not conclude that NMFS’s approach was “reasonable,” and neither Federal Appellees nor Intervenor Appellees can point to any specific such citation. In fact, the peer review summary explicitly says that a 50/50 split may not be the most appropriate method. A1991. The peer review summary also highlights a “clear recent shift in the spatial distribution of [right whales] which has been coupled with a shift in the source of known serious injuries and mortalities to more Canadian records.” *Id.* Yet NMFS discounts both of these factors in its discussion of apportionment between the United States and Canada. *See* A814-15. Thus, not only does the peer review summary refute Federal Appellees’ assertion that the peer review found NMFS’s methodology to be “reasonable,” the peer review summary explicitly calls out the northern shift in right whale spatial distribution and the greater risk to right whales in Canada as reasons that a different method should be examined.

The current briefs of the Federal Appellees and Intervenor Appellees cannot make up for the fact that NMFS did not provide a rational reason in the Biological Opinion itself for why the agency chose a 50/50 split between the United States and Canada. Moreover, unsupported statements from NMFS that its actions were

“reasonable” run contrary to the record. NMFS’s decision to split unassigned right whale M/SI evenly between the United States and Canada was arbitrary and is a basis for setting aside the Biological Opinion.

B. NMFS Erred by Attributing 100% of United States Right Whale Entanglement to the Lobster Fishery.

NMFS studied entanglements from 2010-2018 using what it described as the “best available information to estimate future right whale interactions with the fisheries.” A813. NMFS then disregarded this data and arbitrarily assumed that 100% of right whale entanglements were attributable to trap/pot gear. A817, 482. The studies recorded 107 right whale entanglements, and NMFS was able to classify the gear type in one-quarter of those entanglements. A816. Of the 25 known entanglements, 78% were categorized as attributable to pot/trap and 22% to gillnet gear. NMFS stated that this “data must be interpreted cautiously,” but it then supplanted caution with unreasoned certainty and allocated 100% of the entanglements to the pot/trap fishery. This arbitrary assumption led NMFS to overstate the impacts of the lobster fishery on right whales.

In its brief, NMFS states that “it has good reasons to conclude that most of the unknown-gear entanglements were caused by trap/pot gear.” Fed. Appellee Br. at 31 (emphasis added). We agree that the known data of right whale entanglements could inform this reasoned conclusion, but not a 100% allocation. Furthermore, the “good reasons” advanced by Federal Appellees are based on

faulty or incomplete conclusions.

First, NMFS justifies its 100% allocation because right whale interactions with gillnet panels “may be more easily detected” than trap/pot lines. A816; Fed. Appellee Br. at 31-32. However, NMFS fails to provide any data or analyses to support this difference in relative detection rate between gear types. Absent supporting data or analyses, this assertion amounts to an untested hypothesis that is insufficient to disregard the “best available information.” NMFS now states this claim is misguided because this statement “was not the basis for the Service’s decision.” Fed. Appellee Br. at 32. However, this contradicts NMFS’s use of the hypothesis in the Biological Opinion, the district court’s reliance on it, and NMFS’s acknowledgment that the statement was one of the “good reasons” for its allocation. A816, 226.

Second, NMFS states that because the vast majority of lines in the action area are pot/trap lines, 100% of right whale entanglement can be attributed to the lobster fishery. Fed. Appellee Br. at 31; *see* A816-17. However, this conclusion ignores the fact that the presence of a fishing line in the ocean cannot, by itself, inform right whale risk. A807-08. NMFS explained that a gear’s presence in the water must be considered alongside a second factor, the presence of right whales where the gear is located. *Id.* Maine pointed out that analysis completed using the NMFS Decision Support Tool (“DST”) indicated the State’s exempt waters contain 73% of the vertical lines in the state’s lobster fishery, but only account for 3% of

the risk of right whale entanglement. A1225. NMFS has not at any point disputed this conclusion. Therefore, that the bulk of the lines in the area are pot/trap lines is not a reasoned basis to ignore the data on known entanglements and conclude that such lines cause 100% of the danger to right whales.

Third, NMFS conflates the Biological Opinion's use of the term "lines" with "vertical lines." The Biological Opinion discusses NMFS's classification of gear types for observed entanglements. For entanglements with gear present, but not known, "it was described as *lines*," which could be "from gillnet gear, trap/pot gear, or another source." A815 (emphasis added). Later, NMFS discussed gillnet panel interactions and stated that one component of the gillnet gear responsible for entanglements are the "vertical lines." A816. NMFS now conflates these discussions in order to engage in post hoc rationalization. The Biological Opinion describes the unknown gear as "lines," not "vertical lines," and NMFS cannot now seek to rewrite the record.

Lastly, NMFS attributes Maine's concerns over NMFS's unexplained decision to deviate from its practice of extrapolating from observed data to nothing more than differing policy and scientific views. Fed. Appellee Br. at 33; ME Br. at 20. However, an agency's determination must be "logical and rational," and must "articulate a satisfactory explanation for its action." *Allentown Mack Sales & Serv.*, 552 U.S. 359, 374 (1998); *State Farm*, 463 U.S. at 43. Here, NMFS's inability to provide sufficient reasoning to justify its arbitrary departure from

standard practice goes directly to its violation of the APA and ESA. NMFS had the information to consider the factors before it and come to a reasoned adjustment of the observed data, but instead it arbitrarily zeroed out any impacts from other gear types in violation of the ESA and APA.

C. NMFS Erred by Assuming 100% of Right Whale Mortality is Anthropogenic.

In the Biological Opinion, NMFS describes how it apportioned take among different sources of mortality. The agency states that “[n]atural mortality is not included in the apportionment.” A565, 819. This failure to account for any natural mortality is a crystal clear flaw in the NMFS analytical approach. Rather than acknowledge this fact, the agency has devised a series of post hoc rationalizations.

One is that, because humans are responsible for most right whale mortalities, it was reasonable for the agency to assume that humans are responsible for all right whale mortalities. *E.g.*, Fed. Appellees Br. at 35 (arguing “studies confirm that humans are responsible for nearly all adult right whale mortalities”). But as we explain in our opening brief, available, published analyses show that between 1970-2009, 20% of documented right whale deaths were “nonhuman,” and that between 2003-2018, 12% of right whale deaths were natural (with all of these being calf deaths). ME Br. at 23. Zeroing out natural mortalities and attributing a share of them to the lobster fishery is unsupported by the best data available and unreasonable, and therefore, unlawful.

Another post hoc rationalization is that natural mortality is limited to calves and NMFS only analyzed mortality of “right whale adults.” Fed. Appellees Br. at 36 (emphasis in original). But NMFS does not indicate where in the Biological Opinion it disregarded non-adult (i.e., calf and juvenile) mortality and only analyzed mortality of adult right whales. While Federal Appellees now contend that calves cannot be counted, Fed. Appellees Br. at 36, the Biological Opinion includes statements to the contrary. A684 (stating “new calves rarely go undetected”); A1094 (stating “extensive survey efforts on the breeding grounds allow for the assumption that observed calf counts are essentially a census of NARW calf production”). The claim that calves weren’t counted is made for the first time in Federal Appellees’ brief, not in the Biological Opinion. “An agency must defend its actions based on the reasons it gave when it acted.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. at 1909. This and other post hoc rationalizations should be disregarded.

Further, Federal Appellees essentially make a harmless error argument: even if NMFS were to reduce the mortality attributed to the lobster fishery to account for natural mortality, the record would still support the conclusion that the fishery adversely affects right whales. Fed. Appellees Br. at 38. First, in making this argument Federal Appellees cede the fact that NMFS failed to account for natural mortality when apportioning mortality among different sources. Even more concerning, Federal Appellees fail to acknowledge that the flawed NMFS analysis

(which propagates errors inherent in worst case scenarios) has overstated the magnitude of the effects of the fishery on the right whale, leading the agency to demand excessive risk reduction by the lobster harvesters in order to fulfill the requirements of the ESA and Marine Mammal Protection Act.

III. CONCLUSION

For the reasons set forth above and in its opening brief, the State of Maine, through its Department of Marine Resources, respectfully requests that this Court reverse the decision of the district court, hold that the Biological Opinion violates the APA and ESA, and remand the Biological Opinion to NMFS without vacatur.

Respectfully submitted,

Dated: January 10, 2023

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE, AND TYPE STYLE REQUIREMENTS**

This response complies with the length limit in Fed. R. Civ. P. 27(d)(2)(A), because the response contains 2,987 words.

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The response has been prepared using 14 point Times New Roman font.

Dated: January 10, 2023

/s/ Paul S. Weiland

Paul S. Weiland (D.C. Cir. No. 56111)

CERTIFICATE OF SERVICE

In accordance with F.R.A.P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that on January 10, 2023, I electronically filed the foregoing by using the Court's CM/ECF system and that service will be accomplished by the appellate CM/ECF system on all participants registered in this case as CM/ECF users.

/s/ Paul S. Weiland _____

Paul S. Weiland

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 24, 2023

No. 22-5238

(Consolidated with 22-5244, 22-5245, and 22-5246)

IN THE

**United States Court of Appeals
For the District of Columbia Circuit**

MAINE LOBSTERMEN'S ASSOCIATION

*Plaintiff-Appellant,*DISTRICT 4 LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, LOCAL LODGE 207, STATE OF MAINE DEPARTMENT OF
MARINE RESOURCES, MASSACHUSETTS LOBSTERMEN'S ASSOCIATION,*Intervenors-Appellants,*

v.

NATIONAL MARINE FISHERIES SERVICE, GINA M. RAIMONDO, in her official capacity
as Secretary of Commerce; JANET COIT, in her official capacity as Assistant
Administrator, NOAA Fisheries,*Defendants-Appellees,*CONSERVATION LAW FOUNDATION, CENTER FOR BIOLOGICAL DIVERSITY,
DEFENDERS OF WILDLIFE,*Intervenors-Appellees.*On Appeal from the United States District Court
for the District of Columbia in Case No. 1:21-cv-02509, Hon. James E. Boasberg**Reply Brief of Intervenor-Appellant District 4 Lodge of the International
Association of Machinists and Aerospace Workers, Local Lodge 207**

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January 10, 2023

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GLOSSARY

A:	Joint Appendix
BiOp:	Biological Opinion
ESA:	Endangered Species Act
MLU:	Maine Lobstering Union
M/SI:	Mortality/Serious Injury
NMFS:	National Marine Fisheries Service

SUMMARY OF THE ARGUMENT

The Defendants incorrectly suggest that judicial deference allows agency's such as NMFS to rely on rudimentary assumptions when the best data available is incomplete. Its peer reviewers have said the opposite. But leaving the issue of deference aside, the Defendants' response briefs do not support unfettered reliance on the First Circuit's decision in *District 4 Lodge v. Raimondo*, 40 F.4th 36, 41 (1st Cir. 2022), NMFS's decision to allocate 50% of all entanglements to U.S. waters, the agency's assumption that all M/SI events are caused by lobster trap/pot gear in the Northeast, or that entanglements in lobster gear are the sole cause of so-called cryptic mortalities. By utterly ignoring major aspects of the problem, NMFS has not only acted arbitrarily and capriciously, it has violated the fundamental tenant of administrative law that agencies must "avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

ARGUMENT

In addition to the arguments set forth in the initial briefs and replies of the Maine Lobstermen's Association, the Maine Department of Marine Resources, and the Massachusetts Lobstermen's Association, which the MLU adopts and incorporates herein by reference, the MLU offers the following reply to the Defendants' arguments.

A. Judicial Deference is Not Unlimited.

Contrary to what the Defendants seemingly suggest, judicial deference “is not unlimited.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). While the Court certainly must “defer to the agency's technical expertise in areas of scientific specialization, the Court is not required to ignore simple probability.” *Humane Soc'y of the United States v. Pritzker*, 75 F. Supp. 3d 1, 12 (D.D.C. 2014). To that end, the Court must ensure that an agency actually applied its “expertise in a reasoned manner” before affording it any deference, even where (and especially when) the matter at hand is highly technical and scientific. *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 216 (D.C. Cir. 2011). Put another way, experts not using their expertise are not acting as experts.

Were this a case where NMFS had made highly technical apportionments of entanglements and M/SI events among various causes and locations based on its scientific analysis and application of the best available data, NMFS’s decisions would be entitled to deference. But this is not what happened here. Here, NMFS ignored observed entanglement data (necessarily the best available) and rudimentarily assumed that half of all entanglements occurred in U.S. waters and that *all* M/SI events in U.S. waters were caused by lobster trap/pot gear. Although gillnets, trap/pot gear used in other fisheries, and natural causes are all known sources of right whale mortality – the only debate is over the extent of that mortality

vis a vis the lobster fishery – NMFS did not allocate any responsibility for the entanglement problem whatsoever to these sources.

To be sure, the process of attributing *all* M/SI events to a single source, and splitting all entanglements equally between two countries, was not a scientific one. Instead, it was little more than the proverbial flipping of a coin in order to reach a simplistic result on an expedited timeframe. *See Greater Yellowstone Coal, Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) (Where an agency is uncertain about the effects of agency action, it may not rely on “substantial uncertainty” to justify its actions when deferring to such an approach would amount to no more than “deferring to a coin flip”) (internal quotation marks and citation omitted).

Moreover, any deference to NMFS’s conclusions is undermined by the fact that the agency’s own peer reviewers – the “experts” from which NMFS derives its expertise in the first place – actually warned *against* deferring to NMFS’s allocations of M/SI events among nations, causes and fisheries. To use the peer reviewers’ own words, NMFS’s approach was “not fully transparent or coherent,” A1992; did “not seem to have much supporting evidence,” A1252; “does not reflect the current shift in NARW distribution,” A2023; and “lacks the rigor to be sufficiently robust to support the types of decisions being considered.” A1980. These are not the sort of findings that support judicial deference, particularly when actual data exists that undermines NMFS’s allocations.

B. The First Circuit's Decision in District 4 Lodge v. Raimondo is Not Controlling.

The Defendants rely heavily on the First Circuit's decision in *District 4 Lodge v. Raimondo*, 40 F.4th 36, 41 (1st Cir. 2022). For the reasons that follow, that opinion should not control this Court's deliberations.

First, NMFS notes that the First Circuit found that “[t]he Agency’s explanation and reliance on the peer-review panel is enough to pass arbitrary-and capricious review.” *District 4 Lodge v. Raimondo*, 40 F.4th at 41. But the First Circuit did not have the benefit of an administrative record or the substance of any of the actual peer reviews, i.e., the *proof* that could justify NMFS’s entitlement to deference in the first place. Instead, the First Circuit simply trusted NMFS’s representation that its peer reviewers found the agency’s approach to be “reasonable.” *Id.* (citing A815). As noted above, however, NMFS’s subjective characterization of its peer reviewers’ conclusions is undermined by the actual verbiage employed by the peer reviewers themselves. When the First Circuit Court deferred to the agency’s modeling techniques (or, more accurately, the agency’s characterization of the peer reviews of those techniques), it was unaware that the actual experts on the ground found that NMFS’s approach “g[a]ve the reader a sense of precision or accuracy that is not the case and could be misleading to the public or the end-users of the tool.” A1962-63. No court should knowingly defer to any

agency action that is misleading.

Second, in reaching its limited decision on the propriety of the closure of some 960 square miles of fishing grounds in the Gulf of Maine, the First Circuit did not reach many of the issues raised by the Plaintiffs in these proceedings. These issues include (but are certainly not limited to) the all-important questions of whether: 1) the agency improperly relied upon a “worst-case scenario” approach, A804, rather than on the most “reasonably certain” scenario presented by the best scientific and commercial data available, 50 C.F.R. § 402.14(g); 2) the 2021 BiOP’s Conservation Framework unlawfully evaded the ESA’s consultation requirements; 3) NMFS could properly assess levels of “cryptic mortality” by focusing only on possible undetected entanglements in the face of evidence that other causes of “cryptic mortality” – including natural deaths and the departure of the right whale population from the agency’s traditional survey areas – were also at play; 4) NMFS ignored the impacts of gillnets and gear deployed by other fisheries on the right whale population; and 5) NMFS employed its modeling for purposes that the agency was specifically warned were improper. These issues are all a matter of first impression for this Court.

Third, the Defendants point to the First Circuit’s finding that NMFS “acted reasonably in rejecting the implication that a lack of attribution suggests a lack of occurrence” as support for their position that “the record makes clear that observed

entanglement data is unlikely to represent the true rate or distribution of entanglement.” Fed. App. Br. at 27-28 (quoting *Dist. 4 Lodge*, 40 F.4th at 41 & n.1). What the First Circuit failed to recognize (because it did not have a developed record) is that the agency *did* use observed data to allocate 77% of all unknown causes of M/SI events in U.S. waters to entanglements and 23% to vessel strikes. A817-18. Neither NMFS nor the First Circuit has ever explained why observed data is sufficiently reliable to apportion M/SI events between the two primary anthropogenic causes of right whale mortalities but is *not* sufficiently reliable to apportion these events between the countries and/or fisheries where the observed cases occurred. Indeed, the only reason why NMFS used observed data to apportion one data set but not the other was to mask the fact that it did not 1) consider *any* risks posed by gillnets in implementing its regulations, 86 Fed. Reg. 52,006; 2) even *attempt* to evaluate the impact of *any* fishing activities in the southern states, 86 Fed. Reg. 51,987; and 3) analyze the effectiveness of *any* mitigation measures it has imposed on the American lobster fishery since 2009. A267. NMFS cannot claim that its assumptions are preferable to the best available data when it did not even attempt to gather the data that the agency was lacking.

C. The Defendants’ Arguments Concerning Gillnets and Risks Posed by Other Fisheries Ring Hollow.

NMFS attempts to defend its decision to allocate *all* unobserved M/SI events

in U.S. waters to lobster trap/pot fishing gear in the Northeast, rather than allocate a portion of those events to gillnets or to trap/pot gear used in other fisheries, by claiming that “the Service decided not to attribute more entanglements to gillnets because nearly all the unknown gear retrieved included vertical lines, and 99.7% of the vertical lines in the federal fisheries are from trap/pot gear.” Fed. App. Br. at 32. NMFS argues that the Court cannot disturb its finding “that gillnet gear was less likely to be responsible for serious unknown-gear entanglements than was trap/pot gear.” *Id.* at 32-33.

This argument might have some merit had the agency allocated at least *some* responsibility for entanglements to gillnets (or other trap/pot fisheries). In that case, the Plaintiffs would be hard pressed to argue that NMFS “overlook[ed] the role played by gillnet gear” because the agency would have acknowledged that gillnets play at least *some* role in causing right whale mortalities. Fed. App. Br. at 32-33. But in *this* case, NMFS allocated *no* M/SI events to gillnet gear (or other trap/pot fisheries), despite the fact that the best data available conclusively establishes that both gillnets and vertical lines employed by non-lobster fisheries – particularly those in southern states where right whales aggregate and breed – cause at least *some* entanglements. A816. While NMFS might have some latitude in deciding how much of that “some” should be allocated among the various fisheries based on the lack of available data, it did not have latitude to refuse to make *any* apportionment

whatsoever to *known* causes of entanglements simply because other entanglements have no known cause. Ignoring such important aspects of the problem by offering an explanation “that runs counter to the evidence before the agency” is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

D. NMFS's Analysis – or Lack Thereof – of Cryptic Mortalities was Arbitrary and Capricious.

Finally, NMFS's consideration of the sources of cryptic mortalities suffers from similar flaws. Although the agency claims it did not assign any cryptic mortalities to natural causes because “studies confirm that humans are responsible for nearly all adult right whale mortalities,” Fed. App. Br. at 35, NMFS fails to recognize that “nearly all” is not the same as the entirely “all.” According to NMFS itself, the best available data indicates natural causes are responsible for between 10-20% of all right whale mortalities. A1243 (“Over a period of 40 years, 1970-2009 inclusive, ~80% (70 of 87) of [right whale] mortalities for which the cause of mortality is known . . . were anthropogenic . . . With almost no observations from any other sources of mortality, a reasonable inference is that the vast majority of non-calf female [right whale] mortality is anthropogenic.”); A1889 (noting that 38 of 43 cases (88%) where cause of death could be determined were anthropogenic). The fact that human beings may cause the *majority* of adult right whale deaths does

not give the agency license to ignore the fact that not *all* deaths are anthropogenic, particularly when increased climate change comes with “increased susceptibility to disease and contaminants.” A796-97. Even factoring in a 10% natural death rate would have preserved hundreds of jobs and informed more realistic and scientifically-sound risk reduction targets. If the agency wants to fix a problem, it needs to consider *all* important aspects of that problem, not “nearly all” of them.

Moreover, while the agency perfunctorily dismisses as “nonexplanatory” the MLU’s argument that many cryptic mortalities are really the result of their migration into un-surveyed waters, Fed. App. Br. at 35 n.9, the fact that NMFS’s total population survey includes *some* whales in Canadian waters does not mean that its survey accounts for the *majority* of whales in Canadian waters. Indeed, NMFS does not dispute that there is “insufficient survey effort” for NMFS to “distinguish between true mortality and the appearance of mortality that would come from an individual permanently leaving the survey areas,” 86 Fed. Reg. 51,976, 51,993, or that “resighting rates of individual whales have been declining in the past few years” due to changes in critical habitat and reduced surveying resources. A1808. The fact that the agency’s brief does not even attempt to engage with the possibility that right whales it can no longer locate were not killed by lobster gear in the Northeast but instead have relocated to waters off Canada, Greenland and the deep Atlantic concedes the validity of the MLU’s argument that at least *some* portion of cryptic

mortality is the result of insufficient survey effort.

CONCLUSION

In a case such as this, where NMFS expects the lobster industry to reduce the risk of entanglement by nearly 100%, every aspect of the problem is important. By ignoring all possible causes of the problem other than entanglements in U.S. lobster trap/pot gear, NMFS has placed an impossible burden on the lobster industry – and by extension, the hardworking men and women of the State of Maine – to eradicate all possible threats to the North Atlantic right whale, even the ones it does not cause.

Dated at Portland, Maine this 10th day of January, 2023.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because this document contains 2,938 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1). I further certify that this brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), as well as the recommendations of the Court in its Handbook of Practice and Internal Procedures at IX.A.6, because this brief has been prepared in Times New Roman 14-point font using Microsoft Word.

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January 11, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2023, I filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the CM/ECF system, which will serve notice of this filing to all counsel of record via ECF.

/s/ Alfred C. Frawley IV
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No. 22-5238(L), 22-5244, 22-5245, 22-5246

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN'S ASSOCIATION,

Plaintiff-Appellant,

STATE OF MAINE DEPARTMENT OF MARINE RESOURCES; MASSACHUSETTS
LOBSTERMEN'S ASSOCIATION; DISTRICT 4 LODGE OF THE INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE WORKS; LOCAL LODGE 207,

Intervenors-Appellants,

v.

NATIONAL MARINE FISHERIES SERVICE; GINA RAIMONDO, IN HER OFFICIAL CAPACITY
AS SECRETARY OF COMMERCE; JANET COIT, IN HER OFFICIAL CAPACITY AS

ASSISTANT ADMINISTRATOR FOR FISHERIES,

Defendants-Appellees,

CONSERVATION LAW FOUNDATION; CENTER FOR BIOLOGICAL DIVERSITY;

DEFENDERS OF WILDLIFE,

Intervenors-Appellees.

On Appeal from the United States District Court for the District of Columbia,
No. 1:21-cv-02509-JEB

**REPLY BRIEF FOR APPELLANT-INTERVENOR MASSACHUSETTS
LOBSTERMEN'S ASSOCIATION**

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January 10, 2023

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
BiOp	References to the 2021 Biological Opinion
CBD	Center for Biological Diversity
CLF	Conservation Law Foundation
Conservation Framework	North Atlantic Right Whale Conservation Framework
DW	Defenders of Wildlife
ESA	Endangered Species Act
J.A.	References to the joint appendix
MALA	Massachusetts Lobstermen's Association
M/SI	mortalities and serious injuries
NMFS	National Marine Fisheries Service
right whale	North Atlantic right whale

I. INTRODUCTION

For the first time on appeal, NMFS now asserts that it did not use “worst case scenarios,” despite specifically stating it was doing so in its Biological Opinion, JA[BiOp_2004, 2149, 2152], and defending that approach before the lower court. Instead, it claims to have sought “more protective outcomes.” This blatant and unavailing attempt at reframing its violation of its statutory obligations should not be accepted by this Court. Even if seeking “more protective outcomes” was permissible, NMFS would still have been required to use the “best available scientific and commercial data available,” which it failed to do. Rather, it relied on statistical models that directly contradicted the actual data available to NMFS. Finally, NMFS reliance on *District 4 Lodge v. Raimondo*, 40 F.4th 36 (1st Cir. 2022), is misplaced, as the First Circuit, in evaluating a grant of a preliminary injunction, lacked the full record now available to this Court and was considering issues not on appeal to this Court.

II. ARGUMENT

A. NMFS Failed to Use Actual Data for Outcomes Reasonably Certain to Occur to Create its Biological Opinion in Violation of the ESA, MMPA, and APA.

Despite Appellees’ assertions to the contrary, this is not a case of “competing views about policy and science,” wherein MALA is simply complaining about catastrophic and ill-advised regulations that otherwise comply with all statutory

obligations. *In re Polar Bear ESA Listing & Section 4(d) Rule Litig.*, 709 F.3d 1, 9 (D.C. Cir. 2013) (citation omitted). Rather, this case asks whether this Court will permit NMFS to use statistical models instead of actual data to forecast worst case scenarios for the right whale in contravention of its obligation to rely on the best available science and commercial data to determine outcomes reasonably certain to occur. 16 U.S.C. §1536(a)(2); 50 C.F.R. § 402.14(g). The answer must be a resounding no. *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious if it “runs counter to the evidence before the agency[.]”).

In their Brief, CBD, CLF and WF (the “NGOs”) claim that NMFS only “resolved scientific uncertainty” in favor of the right whale “when the available information included a range of values that permitted it to do so.”¹ (NGOs’ Corrected Brief at 13.) However, this framing betrays the exact issues with the Biological

¹ The NGOs alternatively refers to this as a “more conservative approach” and asserts that “Courts” have upheld an agency’s right to use a conservative approach for ESA consultations. (NGOs’ Corrected Brief at 27 (citing *San Luis & Delta–Mendota Water Auth. v. Jewell*, 747 F.3d 581, 610 (9th Cir. 2014); *Nw. Coal. for Alt. to Pesticides v. EPA*, 544 F.3d 1043, 1050 (9th Cir. 2008)).) Notably, the NGOs cite only two Ninth Circuit decisions, which are non-precedential in this Circuit. More importantly, the cases have no persuasive value because, in both cases, the agency was choosing between “various scientific models” and chose a conservative model, whereas here NMFS chose a scientific model over actual data that directly contradicted the model. *See Jewell*, 747 F.3d at 610; *N.W. Coal. For Alt. to Pesticides*, 544 F.3d at 1050. When NMFS is faced with actual data, it must use that data instead of contradictory outcomes suggested by a model. *Tex Tin Corp. v. EPA*, 992 F.2d 353, 354–55 (D.C. Cir. 1993).

Opinion that MALA has repeatedly raised. These supposed “range of values” were not based on the actual and best scientific and commercial data but rather were generated by a model that was systematically manipulated to provide worst case scenarios directly in contrast to the outcomes the real data showed were reasonably certain. This is a clear violation of the ESA. *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56–57 (D.C. Cir. 2015) (“[A]gencies do *not* have free rein to use inaccurate data.”) (emphasis in original). MALA is not “simply disagreeing with NMFS’s reasoned conclusions about the lethal threat of federal lobster gear to right whales,” (NGOs’ Corrected Brief at 13), it is objecting to NMFS’s arbitrary, capricious, and illegal reliance on models that flaunt the actual data NMFS had available. *Nat. Res. Def. Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 96 (D.D.C. 2017) (“Suffice it to say, it is arbitrary and capricious for an agency to base its decision on a factual premise that the record plainly showed to be wrong.”).

Nothing demonstrates NMFS’s systemic flaws in crafting its Biological Opinion more clearly than NMFS’s newest defense of its unsupportable Canadian vs. US mortality distribution. NMFS claims that it “explained that apportioning more mortalities to Canada than the United States *based simply on observed data* would reflect only ‘relative differences in survey effort’ and not the best available science.” (NMFS Brief at 26 (emphasis added).) Put differently, NMFS asks this Court to hold that rejecting actual verifiable data of mortality distribution in favor of a model that

estimates what mortality may be is somehow compliant with the agency's obligation to use the best available data to determine outcomes reasonably certain to occur.² Such reliance is arbitrary and capricious and NMFS's actions clearly violate the ESA and APA. *Building Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246–1247 (D.C. Cir. 2001) (agency cannot base its decision “on speculation or surmise or disregard [of] superior data.”).

Finally, this Court should not be fooled by NMFS's wordsmithing. NMFS repeatedly said it resolved uncertainties by assuming worst case scenarios. JA[BiOp_2004, 2005, 2149, 2152.] Now, realizing such an approach is clearly impermissible under the ESA, NMFS attempts to jettison such language, claiming that “the record shows that the Service adopted no such [worst case scenario] approach; instead, it applied the best available data and decided, in instances of uncertainty, to resolve the uncertainty in favor of more protective outcomes for the critically endangered whale.” (NMFS's Brief at 21.) NMFS cannot run from its own Biological Opinion. It specifically stated it was using worst case scenarios, and it

² NMFS claims that it was not “required to ‘extrapolate from’ the subset of observed entanglement data simply because it extrapolated from *other* datasets to estimate *other* values elsewhere in the [Biological] Opinion.” (NMFS's Brief at 37 (emphasis in original).) This is a shocking admission of hubris from the agency. NMFS asks this Court to hold that the agency can extrapolate from data when it feels like doing so and can refuse to extrapolate from data when it does not. This is blatantly arbitrary and cannot be accepted. *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259 (D.C. Cir. 1994).

must dance with the language it brought. Further, even if this Court did accept the obviously self-serving reframing of worst-case scenario, saying it resolved uncertainty “in favor or more protective outcomes” is simply using more words to say worst case scenario. There is simply no functional difference between the two. And, as with worst case scenarios, NMFS is not allowed to resolve uncertainty in favor or more protective outcomes when actual data shows that the outcomes reasonably certain to occur are not those that necessitate “more protective outcomes.”

NMFS has failed to rebut the clear evidence that the Biological Opinion was arbitrary and capricious and in violation of the Endangered Species Act. Accordingly, this Court must remand the Biological Opinion directing NMFS to use the actual data available to it rather than statistical models that assume worst case scenarios.

B. *District 4 Lodge v. Raimondo* Is Not Persuasive to This Court Because This Court has a More Developed Record to Consider than the First Circuit Did And the First Circuit Addressed Different Issues.

In their Briefs, NMFS and the NGOs cite to *District 4 Lodge v. Raimondo*, 40 F.4th 36 (1st Cir. 2022), to suggest that Appellants and Appellant-Intervenors’ arguments against the Biological Opinion have already been ruled on by the First Circuit in NMFS’s favor. (NMFS’s Brief at 17-18, 28; NGOs’ Brief at 2, 24.) However, this does not paint an entirely accurate picture of the *District 4 Lodge*

court's opinion nor does it reflect the different procedural postures between the two cases.

First, the 2022 decision was a continuation of the First Circuit's previous decision in *Dist. 4 Lodge of the Int'l Ass'n of Machinists Loc. Lodge 207 v. Raimondo*, 18 F.4th 38 (1st Cir. 2021), which lifted a stay of the Biological Opinion issued against NMFS based on the record then existing. *Id.* at 49-50. The 2022 *District 4 Lodge* decision weighed whether to uphold the district court's preliminary injunction. 40 F.4th at 36. In that decision, plaintiffs were specifically challenging the Biological Opinion on the basis that there was no evidence that whales were present in the LMA 1 Restricted Area and thus NMFS could not assume whales were present in that area. *District 4 Lodge*, 18 F.4th at 40. The First Circuit determined that "the plaintiffs' brief does not point to any relevant existing data supposedly ignored by the Agency." *Dist. 4 Lodge*, 40 F.4th at 40. Indeed, much of the 2022 *Dist. 4 Lodge* decision focused on plaintiffs' contentions regarding closures and different mechanisms that plaintiffs' believed NMFS should have taken regarding the closures, which are not relevant here. 40 F. 4th at 41-42.

Clearly, those arguments and concerns are entirely irrelevant to this present appeal, which focuses on different deficiencies with the Biological Opinion. And, to be clear, MALA has identified specific data ignored by NMFS in favor of statistical models, including, *inter alia* Canadian vs. U.S. Mortalities and collision vs.

entanglement mortalities. Finally, because it was evaluating the merits of a preliminary injunction, the *Dist. 4 Lodge* court had to consider whether the balance of harms weighed in favor of regulation that would ostensibly protect the right whale, a consideration that is not applicable to this appeal. 40 F. 4th at 41-42. Thus, to the extent the First Circuit's *Dist. 4 Lodge* is relevant at all, it is for the proposition that MALA must identify data NMFS did not consider; MALA has met that burden.³

CONCLUSION

NMFS's Biological Opinion was and is arbitrary and capricious and NMFS's attempts to deploy linguistic slight of hands to avoid this truth cannot be permitted to succeed. Whatever noble intentions it might have had, NMFS was required to use the best scientific and commercial data available to it to determine outcomes reasonably certain to occur regarding the right whale. It has failed to do so. Without this Court remanding the Biological Opinion to fix these fatal flaws, NMFS's lawless actions will destroy a cornerstone of Massachusetts' cultural and economic identity – the lobster industry.⁴

³ It also cannot be ignored that this Court, by virtue of the nature of cases it most frequently encounters, is eminently more equipped to handle APA challenges to government regulation than any other circuit, including the First and Ninth Circuits, and thus this Court should not consider the decisions of other courts on APA challenges on regulation as particularly persuasive.

⁴ On January 3, 2023, the Department of Justice filed a letter to this Court informing it of potentially relevant language in H.R. 2617 regarding the American

Dated: January 10, 2023

Respectfully submitted,

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lobster industry and NMFS's regulatory efforts. [Dkt. # 58.] It is the opinion of MALA that H.R. 2617 does not affect this appeal as it does not alter NMFS's ongoing obligation to produce regulation(s) that complies with the ESA and MMPA by using the best scientific and commercial data available.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e), as well as this Court's Amended Per Curium Briefing Order, because it contains 1900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(a)(1).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

Dated: January 10, 2023

/s/ SAMUEL P. BLATCHLEY

Samuel P. Blatchley

CERTIFICATE OF SERVICE

I hereby certify that, on January 10, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Samuel P. Blatchley
Samuel P. Blatchley

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN’S ASSOCIATION,
INC.

Appellant

and

STATE OF MAINE, DEPARTMENT OF
MARINE RESOURCES, et al.,

Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE, et
al.,

Appellees.

September Term, 2022

1:21-cv-02509-JEB

Case No.: 1:22-cv-5238

DECLARATION OF PATRICE MCCARRON

I, Patrice McCarron, declare and state as follows:

1. I am the Executive Director of the Maine Lobstermen’s Association (MLA), having served in that role since 2001. I am responsible for overseeing the operations of the association and leading the association’s outreach and policy activities, including those pertaining to conserving large whales. I serve as one of Maine’s representatives on the Atlantic Large Whale Take Reduction Team (TRT). The MLA has been an advocate for its members and the lobster industry on marine resource management issues and has been highly regarded by stakeholders for its efforts to maintain the health of Maine’s unique coastal and marine resources since 1954. MLA members are committed to its mission to advocate for a sustainable lobster resource and the fishermen and communities that depend on it.

2. The National Marine Fisheries Service (NMFS) issued a new Biological Opinion under Section 7 of the Endangered Species Act (ESA) in May 2021 which found that the operation of the lobster fishery does not jeopardize the continued existence of the North Atlantic right whale population provided the fishery complies with an aggressive ten-year Conservation Framework to reduce the fishery's risk profile. In September 2021, NMFS issued new whale regulations implementing the Atlantic Large Whale Take Reduction Plan (Whale Rule) under the Marine Mammal Protection Act (MMPA). The Conservation Framework requires MLA's members to achieve a 98% risk reduction by 2030, beginning with a 60% risk reduction implemented through the Whale Rule in 2022.

3. In September 2021, the MLA filed a lawsuit, *Maine Lobstermen's Association v. National Marine Fisheries Service*, in the United States District Court for the District of Columbia on behalf of its members. The MLA asserted the BiOp is unlawful because NMFS acted arbitrarily in numerous ways, including failing to rely on the best scientific information and failing to account for the positive impact of whale conservation measures already adopted by the Maine lobster fishery. The complaint asked for relief from the new Whale Rule arising from flaws in the Biological Opinion. In September 2022, the United States District Court for the District of Columbia denied the MLA's claims.

4. I provide this declaration to inform the U.S. Court of Appeals for the District of Columbia Circuit (Court) of the serious harm that is being done to Maine's lobster fishery as a result of the decision of the United States District Court for the District of Columbia in *MLA v. NMFS*. If the decision is not reversed and remanded for further consideration of underlying scientific issues raised by MLA in this matter, there will shortly be a nearly complete, unjustified closure of the federal lobster fishery. MLA believes the closure to be unwarranted and

unsupported by the best available scientific information. Closure of the federal lobster fishery would also have significant destructive consequences on the Maine state waters lobster fishery. In addition, each and every one of the rural communities on Maine's coastline where lobstermen make their homes and from which they work will suffer economic, social and cultural disruptions on an unprecedented scale. I will address each of these categories of impacts in this declaration.

5. Maine lobstermen live along more than 3,500 miles of coastline in 120 rural communities comprising 105 coastal towns and 15 year-round islands. Maine's coastal communities consist primarily of small, rural towns with 80% of coastal communities having fewer than 2,500 residents; 25% have fewer than 800 residents.

6. Maine's coastal communities are highly vulnerable to any downturn of the Maine lobster fishery. Based on data reports produced by the Maine Department of Marine Resources (DMR), true and correct copies of which are attached to this declaration as Exhibit A, in 2021, the Maine lobster fleet landed 108,889,871 pounds of lobster valued at \$730,596,022. This represented 82% of the value of all of Maine's commercial fishery landings and aquaculture combined (\$890,668,873). Based on a 2018 report prepared by Colby College Professor of Economics Michael Donihue, a true and correct copy of which is attached to this declaration as Exhibit B, the lobster supply chain is estimated to generate at least \$968 million in additional revenue. The success of the Maine lobster fishery is the linchpin of the economic viability of Maine's coastal communities.

7. Maine DMR assigns a commercial lobster license and a maximum 800-trap tag allocation to a vessel, which is owned by the Captain. The Captain is required to operate his or her own boat. By law, every Maine lobsterman is a small, self-employed business owner. Each

runs his own boat and lives, works, and spends earnings locally. There is no corporate ownership of the Maine lobster fleet. In many of our rural coastal communities, virtually every dollar sustaining the local community flows from a lobster dollar. Without lobstermen, local restaurants, coffee shops, banks, gas stations, grocery stores, and a host of other local businesses would go out of business.

8. In 2019, the Maine lobster fishery was composed of 4,745 commercially licensed lobstermen and 1,087 student license holders. Maine's lobster fleet directly supports more than 12,000 jobs on the water (4,745 Captains, up to 7,000 crew, 1,087 students). Licenses and trap tags can only be sold by the state of Maine; there is no sale or transfer allowed. In addition to the harvesters, the shoreside wholesale lobster sector, that is, the lobster supply chain, supports an additional 5,500 jobs. The revenues generated from harvesters, dealers, and processors support hundreds of additional businesses throughout Maine's coastal economy. Approximately one-quarter of Maine lobstermen hold a federal permit, which allows them to fish beyond 3 miles from shore and out to approximately 40 miles. This federal waters area, managed by the Atlantic States Marine Fisheries Commission (ASMFC), is known as Lobster Management Area 1 (LMA 1). In 2017, NMFS issued 1,601 LMA 1 federal lobster permits. According to DMR, 1,278 Maine commercial lobstermen held a federal permit in 2019 (79% of all LMA 1 federal permits). These data are based on reports produced by Maine's DMR and NMFS, true and correct copies of which are attached as Exhibit C, as well as the information contained in the report attached as Exhibit B.

9. Today, Maine lobstermen face punishing regulatory restrictions from a misguided effort by NMFS to focus the nation's plan to save right whales on the U.S. lobster industry. NMFS's plan is a 10-year program to shrink the U.S. lobster industry's footprint by 98%. NMFS

itself admits the program will not ensure the species survival because the recent spike in whale mortalities in Canadian waters, if unmitigated, would undermine the prospects for recovery of the species even if the U.S. federal lobster fishery were completely shut down. The combination of recently implemented closures and new restrictions on fishing, with NMFS's accelerated timetable for reaching risk reduction milestones is adversely impacting the MLA's members's fishing operations and livelihoods, as well as imperiling the economic welfare of the small, rural communities that depend on the lobster fishery. These impacts are not hypothetical. They are already hitting the lives of men and women who depend on lobstering to make a living. Many are questioning whether there is a future in lobstering and are reluctant to continue to invest in a business that NMFS has stamped with an expiration date.

10. The MLA worked for many years with federal regulators and other stakeholders to address the association's well-documented concerns with scientific deficiencies related to NMFS's Whale Rule. MLA's concerns were disregarded when NMFS issued the BiOp and Final Rule, which contain major scientific deficiencies. MLA's concerns were similarly swept aside by the District Court that deferred to NMFS on its many arbitrary and scientifically problematic decisions.

11. Amid MLA's numerous concerns, the BiOP suffers from a pervasive flaw: it uses a "worst case scenario" approach to its scientific assessments. NMFS incorporates serial conservative estimates, the effects of which are compounded through each step of its analysis, to project declines in the right whale population over the next 50 years. NMFS's overly precautionary assumptions bias the analysis toward unrealistic and implausible scenarios. To no avail, MLA has repeatedly explained the many ways in which NMFS's scenarios are not representative of the Maine lobster fishery today or its potential impact on right whale recovery.

But NMFS persists with an over-reaching regulatory goal of dismantling Maine's traditional, sustainable lobster fishery.

12. NMFS recently provided the TRT with its latest data on known causes of right whale mortality in 2020 and 2021 updating the data used as the basis of the Biological Opinion and Final Whale Rule. These new data show the continued trend of zero *known right whale mortalities or serious injuries associated with Maine lobster gear or any U.S. commercial fishing gear*. By contrast, there were two entanglement deaths confirmed to Canada from 2020 to 2021, bringing the total death count of right whales from Canadian fishing gear to 12 since 2016. An additional 8 right whales died in Canada due to vessel strikes since 2016. These data also reveal four right whale deaths resulting from U.S. vessel strikes from 2020 to 2021, totaling 5 since 2017.

13. Despite the continued lack of documented U.S. entanglement of right whales, published research confirming the continued shift of right whale migration patterns away from Maine's fishing grounds, and the lack of any evidence showing an increase in the risk posed to right whales by the lobster fishery, NMFS announced recently that the lobster fishery's mandated 60% risk reduction will be escalated to 90% in the May 2022 Final Rule. In pursuit of this goal, NMFS has now directed the TRT to identify an additional suite of measures to achieve the higher level of risk reduction by 2025.

14. NMFS introduced its accelerated risk reduction mandate in a series of presentations to the TRT in recent months. Nowhere in those presentations did NMFS proffer a rational explanation of why additional protective measures are urgently required so soon after the industry implemented a suite of significant changes in gear configurations and fishing practices. To make matters worse, just three months after the November 2021 Take Reduction Plan was

implemented, NMFS downgraded the plan's expected risk reduction credit by 10 percent based on a new, exaggerated set of assumptions, making the task of reaching a 90% risk reduction even more daunting. This new plan is virtually impossible to implement without disrupting the fishery's carefully crafted sustainability management scheme.

15. Closing the federal fishery will put a tremendous strain on our state waters lobster resource which has been successfully stewarded by our fishermen for many generations. Federal boats operate nearly 12 months of the year, while most state waters lobstermen fish only five months, from July through November. This creates a lose-lose situation for everyone, including the lobster resource. Federal vessels will need to unleash the full force of their fishing power in an effort to land enough lobster to try to break even (which will be difficult to achieve due to the higher overhead of these operations), and in the process the federal vessels will out-fish the smaller state waters vessels, making it nearly impossible for either sector to remain profitable. Each boat will receive too small a piece of the pie; there are simply not enough lobsters in state waters to sustain all of these boats. This would also create crowding, gear conflict, and cause significant social and cultural unrest. I worry what this concentrated level of fishing effort will do to the sustainability of the lobster resource in state waters.

16. MLA is concerned that unless NMFS is directed to halt its rush to impose ever more restrictive and unjustified risk targets and to reevaluate its scientific assumptions, the fate of Maine's fishery will have been irretrievably sealed. NMFS is not acting on the basis of best available science and should not be permitted to force the downsizing and virtual elimination of a fishery that has been operated in a sustainable manner for more than 150 years. I want the Court to understand that no right whale has ever been documented to have been seriously harmed or killed in our fishery. The Court should also be aware that NMFS is acting on a hypothetical,

implausible risk scenario and that NMFS discarded ample evidence that the whale population is at risk from other human and environmental factors. Nonetheless, it is embarked on a ruinous plan to dismantle the U.S. lobster industry. NMFS's relentless march to eliminate the rope and gear needed for lobstermen to make a living is now causing them to search for other ways to feed their families. MLA's only option is to petition this court for prompt review of MLA's well-documented assertions of legal and scientific error by NMFS.

17. Despite devastating effects on the Maine lobster fishery, according to NMFS, shutting down all federal fixed gear fisheries from Maine to Florida, including the lobster fishery, will achieve only an 85% risk reduction, thus falling short of the mandated 90%. Even worse, when NMFS considers the likely scenario in which gear fished in federal waters is redeployed in state waters, the estimated risk reduction falls to only 61%. For those lobstermen still allowed to fish in state waters, NMFS estimates the need to eliminate half of their rope from the water, a result which could be achieved at the cost of removing 75% of their traps. The remaining rope would then have to be modified to weaken the top 75% of the length of each line. Cumulatively, shutting down the federal lobster fishery and drastically cutting back the 3-mile wide state fishery would achieve a 94% risk reduction, according to NMFS estimates. However, even this level of cutbacks makes the unrealistic assumption that no federal gear is redeployed in state waters.

18. The lobster industry has long prided itself on being a diverse fishery with low barriers to entry. If you are willing to work hard, you can get started in a small boat with a few traps and work your way up to a larger boat. According to NMFS, the lobster fishery's only hope to avoid full closure of all state and federal waters lobster fisheries is to replace its sustainable fishing practices with yet-to-be proven ropeless fishing technology that the Agency itself asserts

will take nearly a decade to reach commercial viability. A true and correct copy of Michael Pentony Declaration from *CBD vs Raimonndo* is attached to this declaration as Exhibit D).

NMFS's plan for a ropeless fishery ignores the unique diversity of Maine's fleet and will remove opportunity for all but the lobster fishery's largest vessels and for the next generation of fishermen from rural communities who had expected lobstering to be their future. According to Maine DMR, the Maine lobster fleet's largest vessel category, boats 40 to 50 feet in length, accounts for only 10% of the fleet. By contrast, 20% of Maine's lobster fleet is made up of boats 18 feet in length or less. This is why adoption of ropeless fishing—NMFS's ultimate goal for its whale protection plan—will result in immense pressure to replace Maine's owner-operator lobstering system with a heavily consolidated, corporately owned fleet. As observed in fisheries around the world, the result is a few very big winners, with the majority of fishermen forced out of business. This would be a death knell for the Maine lobster industry and our coastal communities, even if its commercial deployment were practical any time in the relatively near future, which it is not.

19. NMFS has been arbitrary and contradictory in its scientific assumptions applied to management of the two primary human causes of harm to right whales. In July 2022, NMFS published a proposed rule to reduce harm from vessel strikes by 27%— a stark contrast to the agency's aggressive demand for a 90% risk reduction from the lobster fishery. Using NMFS's methodology for estimating "risk reduction" for U.S. commercial fisheries, vessel strikes would have to reduce risk by 75%, not 27%. NMFS's favorable treatment of the shipping industry is both arbitrary and confounding, given that from 2017 to 2021, NMFS reported five known right whale mortalities from U.S. vessels strikes compared to zero known U.S. fishing entanglement deaths during that same time period. This contrast between assignment of responsibility to the

shipping industry and the lobster industry is a stark example of NMFS's arbitrary use of science that must be reviewed. U.S. vessels continue to kill whales while the lobster industry does not. NMFS should be focused on stopping current, documented threats to whales from vessel strikes and Canadian fishing gear rather than hypothetical entanglements in Maine fishing gear that has already been made significantly safer to avoid risk to right whales. And NMFS should do its job correctly so it does not give short shrift to up-to-date science that documents the geographical shift in right whale habitat away from the Gulf of Maine.

20. The serious concerns noted above are real and immediate in their impact on the Maine lobster fishery. To meet NMFS's arbitrary risk reduction targets, the Maine lobster fishery would be reduced to a fraction of what it is today, putting thousands of people out of work, and setting off a domino effect of devastating economic impacts throughout the State causing lobstermen, their families and their communities to suffer serious and irreparable harm. This harm to the working people of Maine is not a hypothetical future result — it is happening now.

21. The level of anxiety in the lobster industry is beyond anything I have ever experienced. Many lobstermen travelled up to 5 hours to attend the one in person public hearing NMFS held for the scoping phase of its new rulemaking to reduce risk from the lobster industry by 90%. The meeting was attended by lobstermen, many of whom brought their wives and children so they could look NMFS officials in the eye and show them the lives that will be ravaged by these measures. Others testified of their fear that their grocery stores, restaurants, banks and schools will close because lobster dollars will no longer be spent in those communities. MLA has been told of trap builders already laying off workers due to cancellation of orders and banks hearing from lobstermen who are concerned about their ability to repay loans and others who have dropped plans for loans that would support new business investments.

Well established lobstermen regularly call the MLA office begging to know what NMFS is going to do. They have no idea what to plan for – closures, trap reductions, gear modifications, or all of these – or when and where they will be required. MLA is regularly hearing of more and more lobster boats, gear, and federal permits listed for sale in online commercial fishing gear forums by lobstermen who fear that if they wait to find out what NMFS is doing, their entire business – the culmination of their life’s work -- will be worthless. And there are few viable job options. Some have already said that they will leave the state and the profession that defines who they are, because there will be no other opportunity for them in Maine.

22. All are in utter shock and disbelief that their own government can and will eliminate a fishery that has never been known to kill a single right whale – a species that most have never seen despite each of them having spent tens of thousands of hours at sea. They are already mourning the loss of their fishing heritage. These are good people. They are world renowned for their stewardship of marine resources. They care deeply about the ocean, lobsters and right whales. They want to be part of the solution but, without action by the Court, NMFS will proceed to destroy their future in the lobster fishery, and we will stand powerless as misguided regulations from agency over-reach eliminate the very heart and soul of the state of Maine, our lobster industry.

23. MLA asks the Court to act promptly to reverse the District Court’s decision rubber stamping NMFS’s unsupported and patently erroneous analysis of the fishery’s current impacts on right whales. In the interest of simple fairness — and to ensure NMFS is following the best available science— I believe it is important for NMFS to be directed to re-examine its assumptions of allocating of risk responsibility, and it should also be directed to address a significant disparity in how it regulates various industries that interact with right whales.

24. Attached to this declaration as Exhibit E is a true and correct copy of Erin L. Meyer-Gutbrod *et al.*, Ocean Regime Shift is Driving Collapse of the North Atlantic Right Whale Population, *Oceanography*, Vol. 34, No. 3 (2021).

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on October 10, 2022, in Kennebunk, Maine.



Patrice McCarron

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN’S ASSOCIATION,
INC.

Appellant

and

STATE OF MAINE, DEPARTMENT OF
MARINE RESOURCES, et al.,

Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE, et
al.,

Appellees.

September Term, 2022
1:21-cv-02509-JEB

Case No.: 1:22-cv-5238

DECLARATION OF DUSTIN DELANO

I, Dustin Delano, declare and state as follows:

1. I am the Vice President of the Maine Lobstermen’s Association (MLA) and have served in this role since 2020. Before I was elected as the Vice President of the association by MLA’s members, I served as 2nd Vice President in 2018, and Secretary/Treasurer in 2019. I have been a dues-paying member of the MLA since 2015. As MLA’s Vice President, I serve on the Executive Committee and assist the President in overseeing the general and active management of the business of the association and its positions on policy issues that affect Maine’s lobster fishery.

2. In 2014, I participated in the Maine Lobster Leadership Institute through which I learned about lobster science and policy issues, including MLA’s work with Maine’s lobster

fishery to protect both North Atlantic right whales and preserve a future for the lobster industry. During this program, I travelled to Prince Edward Island in Canada where I stayed and fished with lobstermen to learn about the Gulf of St. Lawrence lobster fishery.

3. Founded in 1954, the MLA is a private, non-profit trade association which represents the interests of 1200 members, including nearly a thousand Maine lobstermen who are voting members, and a few hundred non-voting friend and business members. The MLA is the oldest and largest fishing industry association on the East Coast. The MLA's mission is to advocate for a sustainable lobster resource and the fishermen and communities that depend on it, which includes the conservation of the species that are potentially impacted by the lobster fishery.

4. The MLA has been a member of the Atlantic Large Whale Take Reduction Team (TRT) since it was created in 1995. As a commercial lobsterman and the Vice President of MLA, I have firsthand knowledge of both the organization and my fellow lobstermen's long-standing efforts to develop and implement practical management measures and harvesting practices designed to reduce the risk to right whales when they are present in state and federal waters off Maine.

5. In addition to my primary occupation as a commercial lobsterman, I also commercially fish for menhaden, an important local bait source for Maine's lobster fishery. I have made my living as a lobsterman, based in Friendship, Maine, since 2009. I currently hold both a state of Maine Class III lobster license and a federal lobster permit to fish from my 40-foot boat, F/V Knotty Lady. I am fully compliant with all federal and state commercial fishing laws and regulations.

6. I grew up wanting to be a lobsterman. My family has fished in the region for four

generations before me. I first went lobstering with my father when I was five years old, and I bought my first boat—a skiff, with the money I had saved from fishing with my father—at 11 years old. I was taught at an early age that lobstering comes with a lot of responsibility. A lobsterman must respect that he has an opportunity to fish because previous generations took care of the resource. I take pride in doing my part to ensure that this fishery will be handed down to the next generation.

7. Lobstering is an amazing way of life that keeps our young people right here in Maine and contributes to our local and state economies. Lobstering is not just a job. As a lobsterman, I am a small businesses owner. I employ sternmen. And like all Maine lobstermen, I am required by the state to run my own boat and haul my own traps. I am fully invested in taking excellent care of the ocean because my livelihood depends on it. Lobstering is not only invaluable for Maine’s families, culture, and history, it sustains entire towns and regional economies.

8. In 2021, the National Marine Fisheries Service (NMFS) adopted a final rule that implements the Take Reduction Plan developed by the TRT. The final rule is intended to reduce risk to right whales by 60%. These measures include vastly expanded gear marking requirements in federal waters, removing rope from the water by adding more traps to each buoy line, making remaining rope safer by weakening buoy lines at specific intervals, and a large new seasonal closure in Maine’s Lobster Management Area 1 (LMA 1 Restricted Area). The federal whale plan directly regulates my fishing activities.

9. On March 1, 2021, I submitted a public comment to NMFS concerning the proposed regulation to implement the Final Rule. I urged NMFS to consider the economic realities of the LMA 1 Restricted Area and other proposed amendments to the federal whale

plan. I asked NMFS to consider how Maine lobstermen and their families are impacted by the closures and the restrictions on gear, and the economic devastation that will occur if Maine lobstermen are not given adequate time to adjust to the new regulations. I also supported the public comments submitted by MLA on behalf of MLA members like me.

10. I care deeply about the Maine lobster fishery and my responsibility as a steward of the ocean and all of the life it supports. My fellow lobstermen and I have already adopted a series of measures aimed at protecting right whales and other marine creatures. We incorporate 600-pound weak links at the top of the buoy line, fish sinking rope between traps, and fish long trawls to cut down the amount of rope in the water, the number of which increases the further you fish from shore. We spent a year removing the previously required three 12-inch red marks inserted at the top, middle, and bottom of our buoy lines to aid in gear identification if a whale encounters the gear. We've replaced those with four purple marks including three 12-inch marks located at the top, middle and bottom of the line and a 3-foot mark below the buoy. I had to purchase a new set of endlines for the gear I fish in federal waters that must be marked with four 12-inch green marks adjacent to each of the purple marks I added in 2020. NMFS did not discuss this gear marking in the proposed rule, and it came as a surprise.

11. Even Maine lobstermen who are not subject to the federal whale plan rig their gear to make it safer. They may deploy a 600 pound breakaway link below the buoy or fish sinking rope for their groundline or buoy line. For the first time in 2020, they marked their gear with the Maine-specific purple marks and also had to add a weak insert to their buoy line in May 2022.

12. Adapting to these regulations has been both time consuming and difficult. Fishing sinking groundlines is far more dangerous than fishing floating groundlines as sinking rope is

easily hung-up down on the bottom creating a hazard when the gear is hauled back. Lobstermen have adapted, and through trial and error, developed strategies to haul this gear back safely. Sinking groundlines also require regular inspection and replacement as this rope chafes on the bottom and can part off unexpectedly if not properly maintained, which can be very dangerous to the Captain and crew. Despite the challenges in adapting to these regulations, and higher costs of fishing this gear, compliance with the federal whale plan has been excellent.

13. It is important to understand why U.S. whale-safe fishing methods are so effective. U.S. fishermen cannot fish floating line at the surface, so all buoy lines are comprised of at least two sections of rope, spliced or knotted together. I rig the top half of my buoy lines with 3/8" or 7/16" sinking rope coming down from the buoy, spliced into a section of 7/16" floating line to the trap. In deeper waters, I add another section of floating line, or a lengthener, to the bottom of my buoy line connected with a knot. Knots weaken any line by 40% to 60%. By contrast, the majority of Canadian snow crab and lobster gear is fished with a single length of strong floating line from trap to buoy. Last year, an MLA member shared a photo of a Canadian endline that washed up on a Maine beach that was a straight shot of 15-Fathom, 1/2-inch floating rope rigged to the buoy. Based on the yellow and black marker with a green tracer gear marking, this buoy line is from the LFA 35 lobster fishery in the Bay of Fundy. Maine lobstermen do not fish 1/2-inch line to the buoy and do not fish floating line at the surface and would connect this line with a knot. These differences in the size of lines and how they are prepared, assembled, and marked make it possible to distinguish gear from the various parts of the North Atlantic lobster fishing grounds and other gear fished in Canada. I often hear about line removed from a right whale that cannot be traced back to a fishery, but based on size and rigging, I can confidently determine the line did not come from the Maine lobster fishery. For example, according to the

NMFS, the right whale named Snow Cone is entangled in 5/8" leaded sink line which is not fished in the Maine lobster fishery. Unfortunately, NMFS does not use this type of information to rule out certain fisheries, such as the Maine lobster fishery, as causes of right whale entanglements. They simply say it can't be definitely be attributed to a specific fishery, list it as an entanglement of unknown origin, and then use a formula to attribute it back to our fishery.

14. In 2021, NMFS issued a biological opinion (the "BiOp") that evaluates the impacts of the American lobster fishery, which includes the Maine lobster fishery. In that BiOp, NMFS overestimates the impact of the trap/pot fisheries on the right whale by using worst-case scenarios that are inconsistent with NMFS's data, including data about the origin of fishing gear involved in entanglements. Some of these same worst-case scenarios were used by NMFS to justify the LMA 1 Restricted Area in the latest federal whale rule. NMFS's BiOp imposes a Conservation Framework to reduce its inflated risk estimates, which requires the Maine lobster fishery to achieve a 98% risk reduction by 2030. The alleged need for these reductions, and the LMA 1 Restricted Area, are not supported by the best scientific and commercial data available. I am particularly concerned that the reductions have been mandated without proper consideration of all of the whale conservation measures implemented by Maine lobstermen over the last 20 years. I do not find it credible that our government would put forward a plan that decimates the Maine lobster fishery and fails to recover the right whale especially when they have failed to regulate known sources of right whale mortality.

15. The Final Rule has already impacted my fishing business. The LMA 1 Restricted Area prohibits lobstermen from fishing in a 967-square-mile area of prime lobstering bottom off the coast of Maine from October 1 to January 31 of each year. This rectangular shaped closure runs nearly 100 miles along the length of Maine's lobster zones C, D and E, and 10 miles deep

out to the Area 3 line. As a Zone D lobsterman out of Friendship, a portion of my offshore fishing bottom is in the LMA 1 Restricted Area. This closure restricts some of the most productive fishing grounds in Maine's federal waters during the peak time when demand and price are typically strongest. When I was able to set my traps back in that area in February, the lobsters were gone. If anyone thinks that lobsters don't migrate through areas and will wait patiently for lobstermen to catch them when a closure reopens, they are just plain wrong. I was disheartened to learn from Maine's Department of Marine Resources (DMR) that nearly three-quarters of the whale sightings used as the basis of the closure were detected outside the closure in Lobster Management Area 3. I was equally frustrated that NMFS did not conduct even a single day of surveillance to monitor the LMA 1 Restricted Area for right whales during the 2021 closure. No airplane flew, no vessel-based survey or acoustic surveillance were conducted. I, and my fellow lobstermen, are also very confused and frustrated that NMFS is closing the same waters to fishermen that they have permitted for the construction of wind farms, such as in the Nantucket closure in Massachusetts.

16. The federal whale plan is not fair or equitable. NMFS will allow ropeless gear to be fished in the LMA 1 Restricted Area, but only for those who obtain an Exempted Fishing Permit (EFP), and fish high-tech acoustic release gear approved by the agency. I find it fundamentally unfair that NMFS would provide financial support for and permit a privileged few lobstermen to fish and land lobsters from that prime fishing area, while the remainder of the displaced lobstermen are sidelined. NMFS estimated that 64 vessels would be displaced from the LMA 1 closure, while DMR's Commissioner estimated as many as 150 vessels may be displaced. Yet NMFS approved an EFP to allow up to 30 vessels, New England-wide, to fish ropeless gear.

17. The federal whale plan has already caused me significant financial injury.

Commercial lobstering is my primary source of income. I predominantly fish in waters that are directly adjacent to the LMA 1 Restricted Area, and fish about a quarter of my gear in the LMA 1 Restricted Area during the winter months when the closure is in place. As a result, my fishing activities are now severely impacted for more than four months each year. I have had to relocate that portion of my gear out of the LMA 1 Restricted Area to less productive fishing bottom, and my traditional fishing bottom adjacent to the closure has been less productive because other displaced lobstermen have relocated gear there. This directly and significantly limits my income and my ability to make a living. Fortunately, those who relocated to the area where my gear was set are lobstermen who I traditionally fish around. While the January catch in 2022 was the lowest I can recall in recent history, we avoided gear conflicts. I fish from a 40-foot boat, and the wind and weather experienced in February made it impossible for me to safely stack traps on my vessel to relocate my gear back to my prime fishing bottom, and the losses I suffered from the closure extended well beyond just their obvious impacts. I got only one good haul from the traps I was able to shift back into the closure area. I am frustrated that despite the reopening in February, the closure continued to negatively impact my business due to the operational realities of the Maine lobster fishery.

18. Maine's lobster zone management law requires me to declare a home zone for setting my lobster traps. I am required to fish the majority of my gear in my home zone. It is illegal for me to simply move all of my traps outside of my declared home zone and thus further away from the LMA 1 Restricted Area. Furthermore, as a Zone D lobsterman, the fishing grounds on either side of my home zone (Zones C and E), are also part of the LMA 1 Restricted Area. Not only am I limited to relocating only 49% of my gear outside of Zone D, it is not

financially feasible, nor would it be culturally acceptable, for me to relocate my gear in one of the adjacent zones outside the closure area. I know that I am not the only lobsterman significantly impacted by the LMA 1 closure. I personally know of at least a dozen lobstermen, most of whom are MLA members, who also fish in waters subject to the restrictions and who suffered a loss of income during the closure period this season. I know of approximately 50 vessels in total that had to relocate gear out of the closure and experienced economic loss as a result. To the north (Zone C side), I also know of lobstermen who suffered gear loss due to conflicts arising from the relocation of gear from the closure. And everyone I spoke with reported that the lobsters just weren't there when they set their gear back in the closure area when it reopened in February.

19. The lobster fishery is suffering significant harm due to NMFS's failure to use the best scientific and commercial data available in issuing the federal whale rule and BiOp. I do not know of any Maine lobsterman who has ever even seen a right whale. I am not aware of any right whale becoming entangled in Maine lobster gear in nearly 20 years. I do not know of any right whale that has ever been killed by Maine lobster gear. That is important to me and my fellow lobstermen because we take pride in all of the whale conservation measures we have put in place. Because NMFS relied on worst case scenarios, it is now imposing an immediate 90% risk reduction on the lobster fishery. But such a risk reduction is unnecessary and cannot be achieved short of imposing significant additional fishery closures, trap reductions and further weakening our rope which would further harm my commercial fishing interests, ability to earn a living, and way of life. According to NMFS, closing the entire federal fishery will only achieve an 85% risk reduction, and if lobstermen relocate their gear to state waters, which they will, it will only achieve a 61% risk reduction. Given the harm caused by the LMA 1 closure alone, I

can't even imagine the devastating impacts that closing the federal fishery along with whatever other measures are needed to get to a 90% risk reduction will do to the Maine lobster fishery. I am willing to do my part to help right whales. But we need the government to use the most up-to-date science and modern technology to make sure that the rules we are operating under make sense for both lobstermen and right whales. What NMFS is pushing forward does not make sense for either whales or lobstermen.

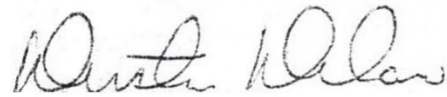
20. Maine lobstermen, like myself, generally support science-based conservation measures necessary to protect whales. We have worked hard to develop and implement effective measures. Lobstermen regularly volunteer their time, ideas, and fishing gear, working with DMR and other researchers, to innovate new ways to ensure lobster gear poses a minimal risk to right whales. But NMFS's risk reduction calculations are not science-based. A recent report from Bigelow Laboratory based in Boothbay, Maine, shows the right whale is actually migrating further and further away from where Maine lobstermen fish and into different feeding grounds. It doesn't make sense to force us to stop fishing in an area the whales no longer use. NMFS's mandate to impose massive new risk reduction are based on unrealistic scenarios and speculation. NMFS's use of speculation has caused, and will continue to cause, significant economic hardship to me and my family.

21. I sincerely hope that the federal government is not purposefully killing Maine's lobster industry. From my perspective, my fellow lobstermen and I have become collateral damage in NMFS's poorly-researched and misguided plan to recover the right whale population. As one kid told me, if the federal government shuts down this fishery, they are not telling me to get a new job, they are telling me to get a new life. I really like my life. I am really proud to be part of a lobstering heritage that has supported this state for centuries. I want NMFS and all the

stakeholders in the Maine fishery to avoid irreparable harm to that heritage by ensuring that the BiOp and Plan are guided by sound science and respect for the generations of lobstermen who have built and maintained an unmatched record of conservation practices and sustainable fishing.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my information and belief.

Executed on October 6, 2022, in Friendship, Maine.

A handwritten signature in cursive script, appearing to read "Dustin Delano", written in black ink on a light-colored background.

Dustin Delano

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN’S ASSOCIATION,
INC.

Appellant

and

STATE OF MAINE, DEPARTMENT OF
MARINE RESOURCES, et al.,

Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE, et
al.,

Appellees.

September Term, 2022

1:21-cv-02509-JEB

Case No.: 1:22-cv-5238

DECLARATION OF GENEVIEVE MCDONALD

I, Genevieve McDonald, declare and state as follows:

1. I am Genevieve McDonald, a 39-year-old lobster boat captain in Stonington, Maine. I have been a commercial fisherman for 17 years. I fish for lobster and halibut, and have worked as crew on lobster, sea urchin, menhaden, and sea cucumber fishing vessels. My husband is the rigging foreman for Billings Diesel & Marine, a boatyard located in Stonington specializing in service for commercial fishing vessels. We have two children. Stonington, Maine is a fishing town of 1070 year-round residents. There are approximately 150 lobstermen, who employ 1-3 crew members, and 8 lobster buying stations which fuel the economy of our small island community.

2. I am a long-time advocate for sustainable marine fisheries management, climate change resiliency strategies, and environmental policy. In 2014, I was the first woman appointed to the Maine Department of Marine Resources Lobster Advisory Council (LAC), where I served eight years as the Downeast Region Representative. In this capacity I also served eight years as the LAC appointee to the Maine Commercial Fishing Safety Council. From 2018-2022, I served two terms in the Maine House of Representatives for House District 134 representing the communities of Deer Isle, Frenchboro, the Cranberry Isles, Isle au Haut, North Haven, Southwest Harbor, Stonington, Swan's Island, Tremont, and Vinalhaven. During my time in office, I was a member of the Joint Standing Committee on Marine Resources. I also served on the Coastal and Marine Working Group; and the Community Resilience, Public Health, and Emergency Management Working Group of the Maine Climate Council. I currently sit on the Board of Advisors for the William S. Cohen Institute for Leadership and Public Service at the University of Maine.

3. I have held a Class II Maine Lobster and Crab Harvesting license since 2008, having spent the previous three years completing the Maine Lobster Apprentice program. I do not have a federal fishing permit and lobster entirely within the three-mile state waters boundary. I set 400 lobster traps each fishing season; in previous years I set 600. My season begins in May and ends in November. In the spring, I assess my traps, ropes, and buoys, make needed repairs, and complete maintenance on my fishing vessel. Spring is a stressful time as funds saved from the previous year's fishing season are depleted, yet the costs to prepare for the upcoming season are significant. Like many lobstermen, I have a charge account at local fishing supply stores, which is paid off as the season gets underway. I also charge the bait and fuel needed to set out traps, to be paid when I have lobster landings to generate the necessary cash flow.

4. I love to lobster. I love being on the water. I love the fact that I am an independent business owner, choosing when and how to fish and keeping others employed. I love the fact that I don't have to ask anyone for a raise, I just have to work harder. I love the fact that, as a working mother, I can set my own schedule and also make a good income in a rural area. There is nowhere else I would rather be and nothing else I would rather do. My children, both daughters, also love being on the water, and I want there to be a fishery that is accessible for them long into the future.

5. I own my boat, a 32ft Holland, *Hello Darlings II*, outright. However, I took out a Small Business Administration Economic Injury Disaster loan in 2020 in the midst of the COVID pandemic. At that time, I had no concern about my ability to repay the loan. Now, due to the uncertainties arising from the litigation being pursued by environmental advocates and potential federal whale regulations, I have serious concerns about my ability to pay back those funds. In addition to my own anxieties, I helped a number of other lobstermen apply for disaster relief loans during my tenure in the Maine Legislature, which they may also find difficult to repay.

6. Lobster traps set too close in proximity compete for lobster and reduce catch per trap, which makes overall fishing effort less efficient. Gear density and crowding in state waters of Penobscot Bay is already high. By the first week of July, the inshore fleet has set their traps and the larger offshore vessels have returned inshore and set their gear out as well. Lobstermen try not to literally set their traps on top of one another but inevitably traps become snarled due to the push of the tide or the force of the current. A snarl may involve two or three pairs of traps, four to six traps in total, or it may become a "bouquet" of dozens of traps. Snarls are dangerous. It is not uncommon for a lobsterman to lose a finger or injure a shoulder or back while

attempting to untangle a heavy snarl. A lobsterman must haul the snarled gear to work on it, and the weight combined with the extreme tension from the hauler may cause the rope to break and snap back, injuring the captain or crew members. This can also cause the davit, an arm mounted to the side of the boat, to separate from the cabin substructure causing damage and lost fishing time. If the snarl can be lifted into the boat, it creates a tangled hazard underfoot that in the worst of circumstances can tangle the captain or a crew member and pull them overboard and underwater due to the weight of the snarl. Segments of snarls are often not visible on the surface but stay below the water line creating hazards to navigation. Others are never recovered and become “ghost” traps that contribute to marine pollution.

7. If the federal lobster fishery is closed or severely restricted, the economic, operational, and cultural impacts for Deer Isle, Stonington, and the unbridged island communities of Penobscot Bay will be profound. There are three components vital to the success of the Maine lobster fishery. First, sustainability of the resource. Second, diversity within the fleet. Third, it must be profitable enough for people to earn an honest living. Take away any of these components and the fishery fails. The regulations contemplated to preserve the North Atlantic right whale population threaten all three elements.

8. The Maine lobster fishery is structured to support a diversity of fishing vessels, from student license holders fishing seasonally nearshore in small skiffs to 50-foot or larger vessels operating year-round offshore in federal waters. If closures or severe restrictions are enacted in federal waters, the lobstermen who once fished offshore throughout the year will not take up their gear—they will move inshore. The crowding will be extraordinary and will cause significant reduction in catch for individual lobstermen, increase safety issues (such as increasing the risk of snarled gear, among other things), and lead to social unrest among competing

fishermen. The offshore vessels use heavier traps and more sophisticated, high-end equipment, which translates into more fishing power. These vessels will outcompete the smaller inshore vessels and drive them out of business.

9. The Maine lobster fishery has a long history of responsible stewardship. The first fishermen-initiated conservation measures to protect the resource became law in 1872. I am concerned that the lobster resource cannot sustain such a high level of intense, concentrated fishing effort in inshore waters resulting from a court order or ill-conceived regulatory measures that result in the closure or severe restriction of the federal lobster fishery.

10. Deer Isle, Stonington, Vinalhaven, and other communities that depend on the lobster fishery will suffer severely if the offshore lobster fishery were shut down or significantly restricted. While the state waters fishery is seasonal, the federal fishery supports our lobster fleet year-round sustaining many fishing families through the entire year. Stonington has been the top landing lobster port in Maine for value for many years. Vinalhaven, an unbridged island community, is the 2nd highest landing port by value. The value of lobster landed in Stonington was \$73.3 million in 2021 and \$43.3 million in 2020. The value for Vinalhaven was \$55.65 million in 2021 and \$33.71 million in 2020. Removing the offshore fishery is the equivalent of removing the economic cornerstone not only of Stonington and Vinalhaven, but of the many coastal communities in Washington, Hancock, and Knox counties.

11. There are few other economic opportunities in this region, and the cost of living is higher on the coast than in the rest of Maine. If the offshore lobster fishery is closed, lobstermen and their families—whether federal lobstermen who go out of business or state lobstermen who are pushed out of state waters by offshore boats—will be forced to leave their communities to

pursue other work or to find affordable housing elsewhere. Removing these families will erode our tax base and reduce the number of students, and our schools will fail. The many fishery-dependent businesses such as bait dealers, lobster buyers, fishing supply stores, boat builders, and vessel service yards, will decline or close. These businesses, which are the shoreside infrastructure of the lobster fishery, employ thousands of people in Hancock, Washington and Knox counties.

12. Not only will these lobstermen go out of business, but their business assets will be worthless. If NMFS closes the federal fishery, there will be a flood of boats, traps, and other lobstering assets for sale with no market to sell them. Lobster boats and associated fishing equipment are highly specialized. They are typically sold within the industry; as one expands into a new boat, the boat will be bought by someone still growing into the business. This market will cease to exist. The shoreside support businesses including boat yards, mechanics, bait businesses, fuel, and support services will all be devastated as lobstering is the largest and most dominant fishery that keeps these businesses going.

13. The social fabric of Stonington will also be sharply affected. Stonington has achieved something that very few towns in Maine and perhaps elsewhere have achieved. The town is a thriving year-round community of fishermen, retirees, artists, and people from diverse backgrounds. We have a robust working waterfront, a flourishing cultural center that includes the Stonington Opera House, restaurants, grocery stores, and fishing supply stores. We support our schools' sports teams and also modern theater and music events throughout the year. Stonington and Deer Isle are places where people of different economic strata know each other, volunteer together, and live together with each appreciating what the other contributes to the community.

14. If the federal fishery is shut down, and those boats are forced to fish inshore (or go out of business), compromising the success of all of these lobstering businesses, gentrification will occur. People who can no longer fish will leave the island. The allure of coastal living, however, remains extremely strong. We have seen a sharp uptick of new residents, many of whom are COVID refugees, during the past three years. Should fishing families have to move elsewhere because they can't afford to stay, others will come here to fill that vacuum. And they won't be fishermen. Stonington will become another tourist destination, another coastal town where the economic opportunities are limited to low-paying seasonal jobs, which becomes a ghost town in the winter. Families that have made their living for generations on the water and kept waterfronts active will be driven elsewhere. The social fabric of these communities, their schools, libraries, restaurants, town festivals, and other aspects of a rich year-round life will be irretrievably lost. Stonington will no longer be a fishing town, and other towns will suffer the same fate.

15. I am very disturbed and saddened by the idea that a court or agency-induced closure of the federal lobster fishery could occur and consequently destroy a fishery and a traditional way of life that has proved its sustainability over the decades, that feeds and clothes numerous families in an economically depressed region, and that remains the lifeblood of so many small harbors along the Maine coast. Lobstering is more than a job. It is our cultural identity and sense of place. It is Maine.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my information and belief.

Executed on October 6, 2022, in Friendship, Maine.

Genevieve L. McDonald

Genevieve McDonald

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN’S ASSOCIATION,
INC.

Appellant

and

STATE OF MAINE, DEPARTMENT OF
MARINE RESOURCES, et al.,

Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE, et
al.,

Appellees.

September Term, 2022

1:21-cv-02509-JEB

Case No.: 1:22-cv-5238

DECLARATION OF RUSSEL MUNSEY

I, Russel E. Munsey, declare and state as follows:

1. My name is Ed Munsey (Russel E. Munsey). I am a 54-year-old lobsterman and lifelong resident of Cundy’s Harbor, a small village in Harpswell, Maine, located at the end of a long peninsula. Cundy’s Harbor is a fishing community, so pretty much all of us just went fishing when we were kids. Me and my two brothers grew up fishing. My father was a draggerman who fished for groundfish when he was young. After working off the water for a time, he became a lobsterman which he still does now.

2. I’ve been a full-time lobsterman for about 27 years and I feel truly lucky to live and work in Cundy’s Harbor. I can’t imagine doing anything else. The lobster fishery has been

Maine Lobstermen’s Ass’n, Inc., v. NMFS et al.

very good to me. It has given me a great life. It has allowed me to raise my three children and provided a good living for my family.

3. Both of my sons, who are now 22 and 19 years old, are lobstermen. They both went through the state of Maine's Student Apprentice program starting when they were eight years old. Each worked their way into the fishery starting in a skiff, earning money to move to a small boat with an outboard engine, and then saving up to get into a lobster boat. Each of them has invested in a federal lobster permit. They have spent a lot of time fishing with me over the years during summers and school vacations so they understand that there is much more potential to build a successful lobstering business by fishing federal waters. Fishing offshore requires a larger investment but has much higher earning potential because you can lobster through the winter months when lobster prices are highest and catches are strong. They both love lobstering and want to spend their careers in this profession. They have no plans to do anything else. I also love lobstering and would never discourage anyone from being a part of this fishery. The lobster resource remains very healthy and it is my true hope that my sons will have the same opportunity and success in the lobster fishery as I have had.

4. I understand that right whales are endangered. I will do whatever I have to do to stay in the lobster fishery because it means everything to me. Over the years I have made many changes to my gear and how I fish because NMFS made them part of a plan to save right whales.

5. This latest round of restrictions for LMA 1 makes no sense to me. I do not want to harm a right whale, but I have never seen one where I fish so I do not understand why NMFS has acted so fast without learning what it means for fishermen. I am troubled that fishing areas have been closed even though right whales are not known to frequent them. If NMFS had real concerns that right whales were at greater risk in some areas of LMA 1, those concerns should

have been explained in advance to those of us who fish those waters. It's not right that NMFS can close fishing grounds without any input from fishermen and without showing us evidence that right whales are at risk in those waters. If we knew why NMFS thinks we might actually harm whales, we would have a chance to figure out a way to avoid that. That's why it troubled me to learn that NMFS is pushing ahead to impose new restrictions quickly. I have no idea why, when or what I will be told to do next. I will do whatever I have to do to keep fishing but I deserve to have a voice in how we do this so decisions are not blind to what lobstermen need to keep fishing. I also need time to plan and make the right investments to increase the chances that I can make future changes work for my lobstering business. I believe NMFS should at least take time to hear from those of us who know the waters and the fishery. Here are some of the things I would have told NMFS if I'd been given the opportunity.

6. I have fished in the LMA 1 Closure area for more than 10 years. I am a Zone F lobsterman. The trap limit in Zone F is 800 traps. Zone E has a trap limit of 600 traps. The LMA 1 closure runs the length of Zones E, D, and C. I cannot legally set gear in Zone E unless I adhere to the 600 trap limit. That means when I fish my gear in the closure area, I must steam an extra 15 miles through Zone E to get to Zone D where I can legally fish 49% of my gear, which is 392 traps. It takes me about three hours to reach these fishing grounds in good weather.

7. In a typical year, I would shift my traps out of Zone F into the LMA 1 closure starting in November. I can move 120 to 130 traps aboard my boat at a time, as long as the weather is not too rough, so it takes me at least three trips to get all of my gear out there. The fishing is best in November and December which makes it worthwhile to fish there even with the leaner catches which happen in the months after that.

8. In 2021, I was not able to shift my gear out to my usual offshore fishing grounds in Zone D due to the seasonal closure. Instead, I had to continue to fish my traps in Zone F in areas that I used to fish years ago. There is a lot more gear being fished there than in past years. In addition to no longer knowing that bottom well, I was unfamiliar with how lobsters are using that bottom, and I had to compete with a lot of other boats that now fish that area. Overall my catch was down quite a bit compared to what I would expect to catch had I fished in the LMA 1 closure.

9. When I was finally able to shift my gear out into the LMA 1 closure area in February, it took me over three weeks to get my full gang out there with the rough seas and winter weather. By the time I got there, the lobsters just weren't there. In all honesty, I lost money fishing out there when the closure reopened because I wasn't allowed to fish there until it was too late to hit the run of lobsters I usually catch. If anyone thinks the lobsters don't move and will still be there when a closure reopens, they are wrong. I am at a loss for what I am going to do next winter but I doubt I will try to shift my gear out there again in February.

10. I was very upset when I learned that the Court had denied all of MLA's claims in its lawsuit against National Marine Fisheries Service on using only doom and gloom assumptions in its computer models. I understand that the federal lobster fishery cannot legally operate without the Biological Opinion and Final Rule in place. I am fully prepared to do whatever I have to do to save the right whales so I can continue to go lobstering. But I do not know how I could reduce my risk by 98% and still be able to make my living lobstering. And I cannot understand how NMFS arrived at a 98% risk reduction. It makes no sense that a fishery with no record of killing right whales would have to give up so much to save them.

11. I can tell you what shutting down the federal lobster fishery would do to Cundy's Harbor, and probably all of the small communities like us along the Maine coast. There are four wharves that buy lobster in Cundy's Harbor. I sell my lobsters to the Cundy's Harbor Lobster Coop which is the largest, buying from about 20 lobster boats. I estimate that 16 of those boats fish in federal waters. It is similar for the other wharves. Lobstering is everything to our community and most of the lobstering revenue comes from the federal waters fishery. I am typical of others in town, generally fishing in federal waters for about 9 months of the year, setting gear close to shore only during the summer. If the federal lobster fishery was shut down, our town would be devastated.

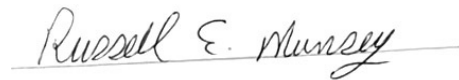
12. I think adjusting to whatever the next round of whale regulations will be is going to be hardest on the younger lobstermen still working to establish themselves. My business is well-established, and I no longer rely on bank loans. The younger guys have boat payments and house payments because they are still building up their business. It is going to be a lot harder for them to make it now that lobstering rules are changing too fast to even know what's coming next and make adjustments. Like any small businessman, lobstermen need time to plan and make adequate preparations to make it work. Their biggest asset is their willingness to work hard. But in the end, you have to be able to land enough lobsters to pay the bills. If new regulations continue to escalate the cost of running your business, or close our fishing grounds, then even the most skilled lobsterman will not be able to land enough lobster for the business to survive.

13. When I think about what might come next and the possibility that our fishery could either be shut down or regulated out of business, I wish that the people making those decisions would come to Cundy's Harbor and see what we do. For many of us, our whole lives depend on the lobster fishery. I ask decision makers to come visit our wharves and come out on a

lobster boat to experience the lobster fishery – we are proud of what we do. Lobstermen are willing to do all we can to save the whales and stay in business. But we can't do the impossible. We wish decision makers would come visit and see the devastation a 98% risk reduction would actually do each of us who want nothing more than to carry on our proud fishing heritage. Perhaps if they understood the impact on peoples' lives they would be more careful to design a whale plan that is aimed at areas where whales are known to be at risk.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on October 7, 2022 in Harpswell, Maine.

A handwritten signature in cursive script that reads "Russell E. Munsey". The signature is written in black ink and is positioned above a horizontal line.

Russel E. Munsey

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN’S ASSOCIATION,
INC.

Appellant

and

STATE OF MAINE, DEPARTMENT OF
MARINE RESOURCES, et al.,

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NATIONAL MARINE FISHERIES SERVICE, et
al.,

Appellees.

September Term, 2022
1:21-cv-02509-JEB

Case No.: 1:22-cv-5238

DECLARATION OF DWIGHT CARVER

I, Dwight Carver, declare and state as follows:

1. My name is Dwight Carver. I am a 68-year-old fisherman from Beals Island, a community of less than 450 people located in Downeast, Maine. I have been a fisherman for most of my life having learned the trade from my father who was a founding member of the Maine Lobstermen’s Association (MLA). I grew up knowing the virtue of hard work and determination. I have fished full-time since I graduated high school in 1973. Lobstering has provided me with a way to make a proud living in my hometown where I married my high school sweetheart and together we raised our three amazing daughters.

2. It's hard to express how fortunate I feel to be a fisherman on the coast of Maine. When you are a fisherman, you are in love with what you do. Fishing is not only your identity but also the heart and soul of the community. Fishing is also the promise that our children have a future in our communities where job options are extremely limited. Lobstering is everything to my town and to the entire Downeast region of Maine. We lobstermen work around and live off of lobster and the rest of the community lives off of our ability to bring the product in. If lobstering is in trouble, most people in my community will feel like the world is coming to an end.

3. Over years, I have fished in nearly every commercial fishery in the state of Maine from ground fishing to herring to scalloping to lobstering, but have earned my living from lobstering in recent decades as other fishing opportunities disappeared. I stayed active in the gillnet fishery right up until the early 1990s when I used to see plenty of minke and sei whales while fishing offshore. In my area, those whales were much more active in the 1970s and 1980s and came closer to home than now. I still lobster offshore, though not as far off as I used to, and the whale feed just isn't there anymore. I very seldom see any whales now. I have never seen a right whale.

4. Lobstering has been my life, and I have always had a strong belief in the importance of paying it forward and making sure it's good for younger guys the way it has been for me. That is why I have served on the Zone A Lobster Council and Maine Center for Coastal Fisheries Board for many years. I was also more than willing to serve on the MLA Board of Directors for more than 20 years. I only stepped down from MLA because I felt strongly that it was time for a younger fellow to step up and guide the future of the fishery for the next generation.

5. No Maine lobsterman wants to harm a right whale. That would be one of the saddest days of my life if I had come upon that. The Maine lobster industry has been involved in this process since the 1990s, working alongside scientists and different conservation groups working to find a way to coexist with right whales. I have been closely involved in the lobster fishery's efforts to protect right whales since it all started, having worked with National Marine Fisheries Service (NMFS) gear team to develop the 600 pound breakaway back in the 1990s.

6. I am currently a member of the Atlantic Large Whale Take Reduction Team (TRT) and have served in that role since 2012. I go to the TRT meetings because I understand how important it is to talk face to face, and for everyone to bring their knowledge to the table. I have made the 900 mile roundtrip drive to Rhode Island many times, usually missing a week of prime fall fishing to be there. But I understand how important it is to find a solution to the whale issue so I make the sacrifice to be there. We must continue to have conversations and actually listen to one another if we are going to find a way to preserve the lobster fishery and right whales. Sadly, I have found it very difficult to participate in the most recent meetings that we have had on the computer. I am not proud of this, but I am so angry when I hear what they want to do to the lobster fishery that I cannot compose myself enough to speak. They talk about saving whales that rarely swim through the areas we fish without any genuine concern for the lives they will surely ruin.

7. We teach our young ones at an early age that keeping the lobster fishery going is extremely important. But now I find myself questioning whether there is actually a future for these young ones. At the May virtual TRT meeting I learned that NMFS is already coming back to the lobster industry to do more to conserve right whales. They are now saying 90% reductions are necessary straight away. This is a shock because we are still coping with all the new whale *Maine Lobstermen's Ass'n, Inc., v. NMFS, et al*

protections we put in place this spring. We are still adapting to these changes and learning how to work safely with untested weakened gear. The May TRT meeting was a sad reality check for me. When my grandson asked me why I was so upset I could hardly bring myself to explain to him that I don't see that there will be a lobster fishery for him when he's old enough to enter the profession. I can hardly believe it has come to this since in all my years at sea I have honestly never seen a right whale and I know of no right whale that has been injured or killed in our gear.

8. I am deeply disturbed by the sincere and genuine effort that the lobster industry has put towards working with the NMFS over the years only to be disregarded over and over again. The other TRT lobstermen members and I have raised concerns with how NMFS is misusing the science to set unrealistic conservation goals for our fishery. We have attended all of the meetings, worked with our fishermen to find solutions, written letters and comments, and poured through the data. We've told NMFS that lobstermen can't solve this issue alone. It will take all fishermen from Florida to Maine, and a larger effort from Canada, if we are to find a solution to this problem. Instead we are facing the "writing on the wall" of a 98% risk reduction because NMFS has not been listening to us. Lobstermen are worried whether they will have a fishery next year as a consequence of NMFS's actions. Already, I am seeing some of the older lobstermen stepping away from the business they love so much because they can't keep pace with the changes. Some of the younger fellows have put their boats and traps up for sale because they are afraid that these assets, which are their life's work, will be worthless. I myself am not sure how to plan for next year because I don't know what we will need to do or when it has to be done. I know I want to fish and I pray I will be able to continue. It is extremely stressful and very sad to think that the very fishery we have built to make sure the next generation has the same opportunity we've had may not be here.

9. Despite the anxiety and anger, one thing I know to be true is that Maine lobstermen want to be part of the solution. We have continually worked with NMFS and the TRT in good faith. We are always willing to sit down and go over new measures that could work for us and for the whales. But I feel like instead of listening to us and working with us, they have loaded the gun and are asking us to pull the trigger. And all the while, we continue to urge lobstermen to do the right thing and implement all the measures being asked of us to protect right whales, even at higher and higher cost. And even though, like me, they have seen no right whales where they fish. We are also trying to keep morale up with our fishermen but I don't know how to explain to them how it has come to a point where a fishery with no track record of harming a right whale has to get to 90% risk reduction right away, and then to a 98% risk reduction in such a short time without every seeing how well the last set of measures have worked. I'd say most of us are still in shock as we try to understand what this will mean for our families and our communities.

10. I want my grandson and all of the other hard working youngsters to have an opportunity to choose the lobstering profession so they have the same chance I had to live and work in Downeast, Maine, keep our communities alive and carry forward the legacy of our proud lobstering heritage. Time is running short for the lobstering profession. I believe it does not have to be that way if NMFS and the TRT would re-evaluate what the science actually tells us about how and where right whales are at risk of harm. I don't have a problem with using computer models to help get this done, but you still need to use common sense. If the model in no way matches up with what is actually happening then what good is it? The MLA's lawsuit raises a number of concerns that I hope will be addressed before the Maine lobster industry is subjected to the kind of reductions presently required and contemplated by NMFS right now. If

they aren't, I truly fear a future of lobstering for my grandsons and my community will be lost.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my information and belief.

Executed on October 6, 2022, in Downeast, Maine.

A handwritten signature in cursive script that reads "Dwight Carver". The signature is written in dark ink on a light-colored background.

Dwight Carver

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN’S ASSOCIATION,
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Appellant

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STATE OF MAINE, DEPARTMENT OF
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September Term, 2022
1:21-cv-02509-JEB

Case No.: 1:22-cv-5238

DECLARATION OF JOHN TRIPP

I, John Tripp, declare and state as follows:

1. My name is John Tripp. I am 34 years old and a third-generation lobsterman from Spruce Head, Maine. I have been a member of the Maine Lobstermen’s Association (“MLA”) since 2013 and have served on the MLA Board of Directors since 2015. In 2014, I participated in the Maine Lobster Leadership Institute where I learned about the importance of lobster fishery management, science, and the responsibilities that fishermen bear to ensure the sustainability of our lobster resource.

2. I started lobstering when I was 11 years old in a 21’ skiff using 50 traps that were handed down to me from my father and grandfather. I would fish with one parent always in the

bow with me. I spent summers hauling in the harbor off the coast of South Thomaston, around Tommy's Island, an island my grandfather purchased many years ago, where my family and I lived in the summer.

3. My father began lobstering when he was eight years old and has been a professional lobsterman for 57-years. He is one the pioneers of Maine's offshore lobster fishery. My father served on the Atlantic Large Whale Take Reduction Team during the development of the vertical line reduction rule implemented in 2015. My family has always taken Maine's sustainability measures very seriously to ensure the protection of the lobster population, and to protect the endangered North Atlantic right whale. I grew up understanding the responsibility fishermen have to leave the fishery and ocean healthy for the next generation.

4. For me and my family, lobster fishing is not just a job. It is in our blood. It is a passion that has been passed down for generations. No one cares more about the well-being of the ocean and the creatures that live in it than people like me who rely on it to feed our families, who rely on it to put a roof over my children's head, and who rely on it to provide a future.

5. Lobstermen love being on the water. We appreciate the environment. Some of my best days on the ocean are when we encounter sea life, such as porpoises or sun turtles. We stop to watch and take the time to appreciate the beauty that is around us. I believe that is a benefit of this job and it takes the monotony out of our day-to-day responsibilities. My daughter has expressed that when she grows up, she would like to become a marine biologist. When I'm out on the water, I take pictures of what we see and send them to her. It makes me proud to see her love of the ocean and appreciation of world around her.

6. Like many in Maine's lobster fishery, I built up my lobstering business working from smaller lobster boats until I earned enough to invest in a larger boat. A larger lobster boat allows you to safely travel longer distances, efficiently fish more traps, and ultimately catch more lobsters. Today I fish from a 48' Maine-built Mussel Ridge named "SkyAnnIra," the middle names of my three children, ages three, five, and seven. My children, who already love being on the water, would become sixth generation lobstermen – as their mother's ancestors were also all lobstermen from the island of Matinicus. My father-in-law and his family still lobster from Matinicus.

7. For the past ten years, I have fished exclusively in federal waters year-round. Fishing offshore requires a larger investment in boat, fishing gear and crew, but has much higher earning potential because you can lobster through the winter months when lobster prices are highest and catches are strong. Due to the geography of Midcoast Maine and the islands off the coast, I steam roughly an hour and a half, or 22 miles, to haul my first set of traps. I enjoy fishing in this area because I can safely deploy my 800 traps as 40 trawls of 20 traps each, with two endlines per trawl. I fish an area of roughly 130 square miles, and on most days there are only four to five other boats anywhere in the area. This means that each of my lobster traps can fish to its maximum capacity because it does not have to compete with other traps set in the area. I have on average only one and a half vertical lines per square mile.

8. I am sincerely concerned with the future of Maine's lobster heritage. I cannot imagine what NMFS new mandate to reduce risk by 90%, with practically no opportunity for input from the lobstermen who will be impacted, will mean for me and my family. Based on my business model, NMFS's preliminary examples of what would be required to meet this risk reduction – large seasonal closures, massive trap reductions to remove vertical lines, and near

fully weakened endlines – would have a devastating impact on my ability to catch lobsters and earn a living. And NMFS has stated that even the full closure of the federal fishery will not achieve the necessary risk reduction. It breaks my heart because I want to be able to pass on my skills, knowledge, and passion for this industry to my children. I am saddened that I cannot in good conscience encourage them to get into the fishery because I fear that there won't be anything left for them.

9. If the federal lobster fishery were to close, it would have devastating impacts on my fishing business. I would instantly lose 40-50 percent of my landings. My boat is built to fish offshore where I am able to fish large traps spread over expansive areas of fishing bottom. It is not designed to work efficiently in crowded inshore fishing areas. An important part of my business plan is my ability to fish year-round as offshore waters which produces income 12 months of the year. The inshore fishery is much more seasonal with lobstering grounds productive for only five months because lobsters are largely dormant during the cold winter and spring months. Fishing offshore, year-round, also allows me flexibility in my schedule and gives me opportunity to spend time with my family that I might not have fishing seasonally.

10. If the federal fishery were to close, I would be forced to fish my boat inshore where there is already too much effort on the resource. Maine's lobster zone councils have implemented exit ratios to ensure that no new effort enters the fishery unless a certain number of licenses are retired. My town of Spruce Head is in Zone D where five licenses must be retired before a qualified Apprentice can enter the fishery from the waiting list. This system is in place because the state waters fishery is already too crowded and lobstermen fear that any downturn in the resource could result in lobstermen going out of business. Forcing the larger federal fleet to fish inshore will add significant pressure on the lobster resource and create a lot of conflict

among fishermen who would be forced to compete for access to limited fishing bottom and a limited number of legal size lobsters that molt into the fishery each year.

11. If the federal fishery were to close, I would probably not be able to continue to employ my two sternmen – one is the father of two children, and the other is a 22-year-old Army veteran who hopes to one day start a family of his own. He does not come from a fishing family and tells me he never fully appreciated the opportunities that fishing provides. He loved it right off the bat, which is remarkable with all the uncertainty in this industry these days.

12. The uncertainty surrounding federal regulations are already taking a mental toll on me, as a small business owner, and on my family. My seven-year-old daughter heard about the challenges facing lobstermen and she started crying, worried that her Dad won't be able to pay the bills and that we could lose our home.

13. I worry that lobstermen and this fishery are seen as dispensable. If a hospital closes, a doctor can always go work at another hospital. If a school closes, a teacher can teach at another school. If the federal lobster fishery is shut down, I can't fish anywhere else. If the federal lobster fishery is shut down, I'm not losing just my job, I will lose my identity – my family's way of life.

14. As a lobsterman who cares deeply about the future of this industry, I want to be part of the solution. I am proud of the fact that Maine lobstermen are leaders in right whale conservation. We have done everything asked of us to help ensure that the right whale does not become entangled in our gear. Our efforts have been overwhelmingly successful. We are proud of the fact that zero right whales are known to have ever been killed as a result of entanglement

in our gear, and that there have been zero known entanglements in Maine gear for nearly 20 years.

15. It is a helpless feeling because science and data clearly show that Maine lobstermen are not killing the endangered North Atlantic right whale, but we are being forced to become the solution to the problem. We feel like we are being treated as guilty until proven innocent, but no one will listen to the facts and instead are relying on computer models that don't tell the whole story.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my information and belief.

Executed on October 6, 2022, in Friendship, Maine.



John Tripp

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN’S ASSOCIATION,
INC.

Appellant

and

STATE OF MAINE, DEPARTMENT OF
MARINE RESOURCES, et al.,

Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE, et
al.,

Appellees.

September Term, 2022

1:21-cv-02509-JEB

Case No.: 1:22-cv-5238

DECLARATION OF CINDY DONNELL

I, Cindy Donnell, declare and state as follows:

1. My name is Cindy Donnell. I am a lifelong resident of York, Maine. I am the wife of a York lobsterman, mother to two York lobstermen and a York lobster buyer.

2. My husband Jeff has been lobstering for 50 years. He is passionate about the fishery and its traditions. Lobstering is in his blood and defines who he is. He has worked hard to build a successful lobstering business and has passed his passion for the lobster fishery on to our three children.

3. My son Matthew has been lobstering for 26 years and now has two sons of his own who are learning to lobster as well. My son Zachary has been lobstering for 28 years and

has two young children. My daughter Lindsey is the founder of Off the Boat Lobsters based at Sewall's Dock in York where she buys and sells her family's lobster catch as well as other local wild caught sustainable seafood. She also has two children and at 4 years old, Vivienne is already working at the dock alongside her mom and dad.

4. My entire family is passionate for our marine conservation practices which include protecting the lobster resource and right whales making Maine lobster one of the world's most sustainable fisheries. Our family is typical of other Maine lobstering families where each generation works hard to leave the ocean and its resources in better shape than we received it so the next generation can earn a living from the sea. We do this without hesitation because it is part of who we are and what we do. Maine lobstermen have been v-notching and measuring lobsters since 1890. What amazing conservation efforts have been created in this industry from early on and have continued on since its inception! The lobster industry is an amazing bunch of conservationists.

5. We hold ourselves accountable for our actions and take our responsibility to keep right whales safe from our fishing gear very seriously. But we've reached a point where the National Marine Fisheries Service (NMFS) is asking us for changes that make no sense. NMFS has no record of Maine lobster gear ever killing or causing serious injury to a right whale. So now they are telling us that our fishing gear is responsible for right whale deaths that have never been seen which they are calling "cryptic." NMFS itself says it does not even believe its new requirements for Maine will save the species. That means NMFS is prepared to gamble away my family's way of life for no good reason.

6. This whole mess has happened because NMFS is not using its own data that show Maine lobstermen are not the culprits in the decline of the right whale. And this has confused

others about what is actually happening to the whales. I get extremely frustrated when I see groups blaming Maine lobstermen for entangling right whales but show pictures of whales entangled in rope that is significantly larger than any rope used in our fishery.

7. For me and my family, it is urgent for us to know whether there is any future for us in this fishery, and things look very bleak. If NMFS closes the fishery or imposes any more drastic measures like massive closures, trap limits and weaking all of our rope, my sons will be regulated out of business because there is no feasible way to meet a 90% -- or ultimately a 98% risk reduction. It is hard enough to run a successful lobstering business not knowing how many lobsters you will catch or the price you will get paid or when you may need to replace a blown engine as well as the increase in bait to \$0.89 per pound and high fuel prices. How can any small business continue to grow not knowing if it will be allowed to operate from one year to the next, or meet unknown regulations?

8. More than 20 years ago lobstermen were told by NMFS to install break-away links at the buoy so that the buoy would pop off if a whale entanglement occurred allowing the rope to slide free of the whale. They were also told to mark the rope by adding a red mark to the line to identify its origin if any whale were to get entangled in it.

9. They did this and it was a lot of work and cost. To mark the gear, they had to remove all of their traps from the water and all of the rope had to be run up and down the driveway to be dried. They unlaidd the rope and put a thin red line in between the lathes of the rope or painted the rope with red marks. This took months of work. They also changed to knotless connections, reduced the amount of floating rope on endlines and switched to sinking ground lines to make our gear much safer for whales.

10. Later they were told to add two more red marks to the line, and make each mark longer, which again entailed them taking the traps out of the water, drying the lines, adding the marks and putting the traps back in the water. Just as they were finishing, NMFS added yet another green mark for the gear they fished around Jeffrey's Ledge.

11. Then again, in 2020, they were ordered to re-mark all of their lines with purple instead of red and add another even longer mark. So again the traps came out of the water and went through the same costly and time-consuming scenario.

12. Just over a year later, NMFS changed it again. This time all the gear fished in federal waters had to come back out of the water and the fishermen were ordered to add large green marks beside each of the four purple marks.

13. This year, NMFS decided weak links at the buoy are now optional. Lobstermen can't figure out why NMFS would remove a whale protection measure when we are trying to reduce risk. And they added more: a new 1700 pound weak link had to be inserted half way down the rope and boats had to re-rig gear with more traps on each buoy line. Lobstermen did all of these things even though it is dangerous to have 25 or more traps to haul up each time, not to mention the added danger of hauling that load with a weak line. This is also impossible for smaller boats and our aging lobstermen and women.

14. The weak link requirement was particularly stressful, confusing and expensive. NMFS set a deadline to weaken our endlines, but the deadline came and went before the gear was developed, manufactured or available for lobstermen to purchase. This meant that we couldn't add the new weak points to our line when our gear was already hauled out to add the newly required green marks. Everyone had to scramble to get what we needed to keep our gear compliant with the rules. It has been extremely confusing and expensive because my family has

had to rig up three different sets of end lines to fish in different areas. It's hard to keep it all straight. Each has had to buy more new rope, expensive paint and shrink wrap, weak links, and pay for extra help to do the work. And worst of all, when the traps are out of the water, they do not catch lobsters.

15. This has also created health issues. Doing this repetitive work hurts your joints, shoulders, feet and back. Flaking miles of rope over and over is not an easy task. This last round has taken months to complete. As a wife and a mother, it breaks my heart to see the physical and emotional stress my family members have endured.

16. My family has done everything the government has asked of us. We simply cannot understand how NMFS can now claim that we need to immediately get to a 90% risk reduction even though NMFS cannot look us in the eye and tell us that they have scientific evidence showing a reduction of that magnitude to the Maine fishery would save whales. They are not asking us to reduce our entanglements because you can't get any lower than zero. They are asking us to reduce a hypothetical entanglement risk based on worst case assumptions that are not reality. And they haven't told us how they are going to stop the actual entanglements and vessel strikes that scientists have documented in locations beyond the waters where we fish.

17. We are not a big boat, corporately-owned fleet. We are small fishing businesses owned and operated by individual lobstermen. If NMFS continues to race down the path toward eliminating all of our gear from federal waters, and adding on steep trap reductions and more weak rope measures, my family and lobstering families up and down the coast will be put out of business and our communities will be severely threatened.

18. NMFS may not have considered that right now lobstering families like mine are struggling under the weight of inflated costs of fuel and bait, coupled with plummeting prices

paid for lobster when it is landed. On top of these normal but challenging business risks, it is impossible to know if a lobstering business can remain profitable in future seasons when you have no idea what the regulations will be, but we are scared because all signs point to extreme impacts on the lobster fishery. Lobster boats, traps and other gear are specialized for lobster; there is no other market for these assets. If my sons find that they can no longer make a living lobstering in a few years, everything they have invested in will be worthless because there will be no one to buy their gear. We are already hearing of lobstermen looking to sell out because they fear if they wait until they are forced out, all of their business assets will be worthless.

19. My husband and children sincerely worry if they will make it through the next season. They can only hope that NMFS will reexamine the facts rather than steam rolling ahead with a 90% risk reduction that will drive lobstering to extinction in Maine.

20. If NMFS does not fix its inflated risk reduction assumptions, I am afraid the government is going to regulate my family out of business to save whales that are not dying in Maine lobster gear. Our heritage is at stake! We need the Court of Appeal to take action without delay that will cause NMFS to re-examine its inaccurate assumptions and take actual facts into account. Otherwise, my family and I see no realistic hope for the future of the lobster fishery.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on October 6, 2022, in York, Maine.



Cindy L. Donnell

I, Alexa M. Dayton, declare the following:

1. My name is Alexa Dayton. I have a PhD from the University of Maine, where my work was focused on the economics of the Maine lobster fishery and fleet, evaluating the economic impact of changing ecosystem conditions. I have performed projects as an independent contractor for the State of Maine specific to lobster and crab policy. I hold a M.S. degree in biological sciences, focused on ecology and ecosystems, and a B.S. in engineering. I am the Executive Director at the Maine Center for Coastal Fisheries, situated in the Town of Stonington, Maine, home to 1,075 people, of which ~450 derive their livelihoods from the lobster fishery.
2. The Magnuson-Stevens Act, the federal statute guiding sustainable management of our nation's commercial fisheries, established 10 National Standard which provide a basis for conservation of our fishery resources balanced with economic return to the nation. Together the 10 standards aim to achieve optimal yield, which incorporates economic return in the management framework.
3. I herewith provide an economic impact assessment of two components of the proposed regulatory approach to achieve a 90% risk reduction of the Maine lobster fishery, specifically, the removal of 75% of the vertical lines from the Maine lobster fishery in a compressed timeline, and/or full closure of the offshore fishery. These regulatory alternative proposals are based on assumptions that alternate technologies exist for immediate adaptation, such as ropeless trap fishing. I provide an economic impact assessment and discussion of the implementation realities to these assumptions, for consideration by the courts to balance with the conservation viewpoint.

- The stakes are high for a small number of people significantly affected by this process.

Maine lobster management zones A through D are home to 67% of the Maine lobster fleet, and 71% of the vertical lines of the inshore Maine lobster fleet¹. This group of 3,200 fishermen is distributed across 15 islands and 105 small coastal villages, representing upwards of 50% of the population of each village, and with minimal employment alternatives. (See figure 1.) Under NMFS’ draft risk reduction scenarios, these villages and island communities in rural Maine plus the 1,087 student license holders who represent our future, will inequitably bear the vast majority of the economic burden of the right whale risk reduction measures, despite lack of evidence of a single documented right whale death in these Gulf of Maine waters.

	% HH Income from lobstering*	\$/hr for potential alternate earnings**	Unemployment rate*	Poverty Rate*	Nominal Income*	Proportion of the fleet	Maine County
Zone A	77%	\$ 9.73	12%	21%	\$ 28,000	20%	Washington
Zone B	77%	\$ 16.65	10%	14%	\$ 38,000	10%	Hancock
Zone C	81%	\$ 13.05	10%	14%	\$ 38,000	17%	Hancock
Zone D	74%	\$ 13.64	10%	16%	\$ 35,000	20%	Waldo
Zone E	65%	\$ 16.75	6%	8%	\$ 58,000	9%	Cumberland
Zone F	62%	\$ 16.48	6%	8%	\$ 53,000	16%	York
Zone G	69%	\$ 16.22	6%	8%	\$ 53,000	8%	York
* Pre-pandemic census statistics							
** Independent survey statistics							
***Dept of Marine Resources					Zones A thru D	67%	

Figure 1. Maine lobster zone economic statistics.

- I believe the proposed risk reduction measures in the NMFS right whale risk reduction plan pose significant risk of irreparable and irreversible economic harm to the most vulnerable communities in Maine, with significant impact on the Maine economy and social structure, such that it warrants immediate granting of an emergency appeal to

¹ DMR licensing statistic

provide the necessary time for review of the science underpinning the proposed regulations before a final decision is reached.

6. In 2019, the Maine lobster fishery was composed of 4,745 commercially licensed lobstermen and 1,087 student license holders. Maine's lobster fleet directly supports more than 12,000 jobs (4,745 Captains, up to 7,000 crew, 1,087 students)², generating \$510 million in direct wages and income. These labor statistics and the ex-vessel landings value do not reflect the full economic impact of the industry; research has quantified the lobster fishery impact on Maine GDP with an employment multiplier of 1.54 and a sales output multiplier of 2.20 of indirect effect elsewhere in Maine's economy of intermediate goods and services³. The indirect effect of the lobster fishery's \$731 million in ex-vessel sales is therefore associated with 6,600 additional jobs, with \$300 million in wages plus an additional indirect effect of \$1.6 billion, for a total of \$1.9 billion in total contribution. The lobster industry therefore represents as much as 3% of Maine's overall GDP of \$61.8 billion in 2021⁴.
7. The Maine lobster harvester fleet is characterized by five different business operating models, roughly aligned with vessel size but also with different crew and gear configurations and operating within designated management zone boundaries. These business models operate at different efficiencies, and are unevenly impacted by changes in regulations, market fluctuations and changes in resource abundance⁵. I analyzed economic impact scenarios incorporating the current and proposed regulatory measures

² Class I + (2xClass II) + (3.5 x Class III) = 12,000. Class III crew limit expanded to 4

³ Jenny Sun, Bradley Franklin, Brian Kennedy and Eric Thunberg, "Economic impact of climate variability on the Maine lobster fishery and its climate adaptation options", NAREA 2018.

⁴ Federal Bureau of Statistics

⁵ Dayton and Tokunaga, "Economic Diversity of Maine's American Lobster Fishery", 2022.

on the differing harvester operating models, including a 75% trap reduction, which would remove 50% of rope, and second, a full closure of the federal fishery. In the first instance, density of fishing effort and increased competition will cause segments of the fleet to operate below break-even and exit the fishery; in the second instance many owners will choose not to adapt to new technology and regulations, either due to cost or due to age, and exit the fishery. The findings in both cases indicate a potential loss of 1,800 – 1,900 vessels in the fleet, associated with 3,600 jobs and a total economic loss of \$576 million per year, occurring within three of the most economically depressed counties of Maine and representing 15 islands and 105 coastal communities. The vessels and gear are further considered non-malleable capital and represent an additional \$180 million in lost equity to these communities.

8. The social and economic consequences of loss of lobstering jobs are real, and irreversible. In these rural, island, and fjord-like rugged coastal regions of Maine, lobstering income represents as much as 81% of individual household income⁶. Opportunity for alternate employment is constrained, with unemployment rates of 10 - 12%, and poverty rates of 14 - 20%⁷. In these counties of Maine, lobstering is the third largest source of income and the entire community is dependent on revenue generated from the fishing industry to keep the service and retail economies moving. The Maine inshore fishery will suffer the most impact as a result of proposed changes; these are the most vulnerable community members, with the fewest options for adaptation, leading to irreparable economic harm for these towns and islands.

⁶ Dayton, A. "Understanding opportunities and barriers to profitability of the New England Lobster Fishery", 2014.

⁷ Dayton, A. and Sun, J. "An independent evaluation of the Maine limited Entry System for Lobster and Crab", 2012.

9. Maine's lobster fishery is the most sustainably managed fishery in the world and is a rare owner operator fishery that operates in rural and rugged environments. The fishery's conservation program evolved as a series of voluntary and self-enforced measures of breeding female release, minimum size and maximum harvest sizes, escape vents in pots, and whale mitigation measures. New sinking rope, break away links in the rope, and trawling up have become standardized. This is a successful business and fishing model that aims to ensure intergenerational longevity.
10. Apprenticeship program and leadership councils at a zone scale have created a co-management system that works with industry fully invested in the management of the resources that sustain them. The tight controls on entry and exit, including non-transferability of licenses and reductions in trap counts over 20 years have maintained balance of the fishery for over a century. Tight management has prevented over-fishing and fishing licenses remain within the communities to ensure affordable startup cost for new entrants into the fishery. This contrasts starkly with other fisheries where consolidation of the fleet has occurred, leading to significant startup costs that can only be borne by corporate ownerships with funding capital, which can lead to excessive pressure on the fishery resource to overcome this structural cost.
11. The inshore fishing effort in the Maine lobster fishery is constrained by spatial management zones, which prevents migratory fishing practices and creates a territorial use rights schema that is honored within the fleet and by regulators. As the biomass of the lobster fishery shifts spatially over time, the fishing success by zone will vary in catch per trap. This constraint leads to differing economic outcomes for similar fishing practices by region. The number of licenses per zone is constrained as well, and so the community

accepts the natural fluctuations in the overall fishery return and shares in this together. There are good years and bad years, and these are weathered, leading to adaptation and change over the years. This is unique to Maine and bears significant conservation value that is rarely acknowledged.

12. An estimated 1,278 Maine lobstermen have added a Federal offshore lobster permit to allow for expanded year-round fishing opportunities, representing 79% of all Federal permits issued. This has contributed to the State's economic output, expanding markets for lobster in peak holiday seasons in the U.S. and Asia, where lobster is culturally revered as a symbol of the dragon. This fishery has operated very successfully and demonstrates exceptional technical and economic efficiency.
13. Adaptation has occurred, as revealed by the different business operating models in the fishery. Increased numbers of traps per trawl for example have already reduced the vertical lines in the water, leading to a need for larger newer vessels able to handle the larger loads. The fisheries business models can adapt and sustain shocks to any number of production inputs, (i.e. bait, fuel, ice, labor, price) where a bad year or two can be sustained, but multiple bad years plus a compressed timeline for substantial change with added costs, can rapidly lead to marginal small business failures.
14. Additional rope reductions of 75%, achieved through a combination of deployment of new ropeless buoy technology, plus trap reductions, comes with significant capital cost increase to the vessels and additional on-the-water operating costs through labor time in handling. Invisible gear will lead to loss of gear for lobstermen, resulting from gear conflicts with other fisheries such as s trawls, and shipping. Enforcement will require participation and installation of GPS receivers, other fisheries will need to avoid the

invisible lobster gear through installation of GPS receivers, increasing complexity of the overall change. This level of technological investment and behavior adaptation will only be borne by those who see economic viability. Our model indicates that the larger operators have the technical efficiency and economic resilience to adapt, where other segments of the fleet do not. These rope reductions of 75% will lead to the exit of the older vessels and fishermen and result in fleet consolidation. Based on our survey of vessel age, length and HP and the age of the license holders in the fleet, many of whom are between 60 - 65 years old, I estimate that there are as many as 1,800 vessel owners who are at risk of exit, stranding boats and gear with little value.

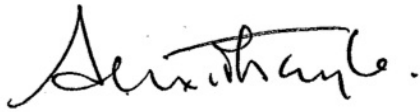
15. Closure of the federal offshore fishing grounds will displace the offshore fishing effort into state waters, significantly increasing effective fishing effort density within spatially constrained management zones. This will have the net effect of degrading catch rates for all vessels in the fishery, and lead to reduced revenues, impacting the different lobster business models unevenly. The larger, more profitable, efficient business model will be able to withstand revenue decreases, and thereby outcompete the lesser efficient inshore business model through more efficient production economics. A 20% reduction in catch rates could trigger a cascade of small business owner failures as high as 1,900 vessels, or up to 70% of the inshore fleet. A loss of this number of jobs in these rural economically depressed counties of Maine would be devastating.
16. Lobster is food, and a sustainable source of protein, caught locally in New England, proximal to freezer capacity and rail transport into the entire U.S. These measures will acquiesce a critical national food source to Canada with what will effectively be a fishery closure. We currently import 90% of the seafood consumed in the United States, much of

it sourced from unsustainable fisheries with harmful labor practices. We export 90% of our hard-won sustainable fisheries output to the rest of the world. The health impacts of this on our population, and the dependency we develop on transported goods at the expense of national climate goals is astonishing. The lobster fishery contraction would add to this trade deficit.

17. Based on the scenarios provided for potential regulatory changes, it is my opinion that irreparable economic harm will be caused to the coastal communities of Maine, and this is without any evidence to indicate it will result in a reduction in the number of North Atlantic right whale deaths. According to NMFS, the right whale population tripled from roughly 150 whales in 1971 to a peak of 481 individuals in 2011. The lobster fishery also expanded during these years, but actually reduced its risk to the species beginning in 2010 when it removed a significant amount of rope from the fishery. Zero right whales have died in Maine, yet they have declined in numbers nonetheless. These proposed regulations sadly do not address this problem, and by misdirecting resources even go further to detract from finding real solutions to reducing whale deaths and increasing whale births.
18. Evidence does support a proposed protected Area in the Southern New England Great Channel, and the idea of further testing and scaling of ropeless fishing technologies to enable continued fishing in these specific areas with high documented incidence of whale forage activity is a motivating call-to-action for all. But the blanket adoption of this regulatory proposal encompassing all trap and pot fisheries from Maine to Florida, without the data to support this expansion, or the time for the adaptation to occur is a significant over-reach without scientific basis. It errs grossly from effective fishery

management, undermines the public trust, and creates social inequity leading to irreparable economic harm.

I declare under penalty of perjury that this statement is true and accurate to the best of my knowledge.

A handwritten signature in black ink, appearing to read "Alexa M. Dayton". The signature is written in a cursive, flowing style with a prominent initial 'A'.

Alexa M. Dayton, PhD

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN’S ASSOCIATION,
INC.

Appellant

and

STATE OF MAINE, DEPARTMENT OF
MARINE RESOURCES, et al.,

Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE, et
al.,

Appellees.

September Term, 2022
1:21-cv-02509-JEB

Case No.: 1:22-cv-5238

DECLARATION OF LAWRENCE BARKER

I, Lawrence Barker, declare and state as follows:

1. I am Larry Barker, President and Chief Executive Officer of Machias Savings Bank. Machias Savings Bank, founded in 1869, has offices in Bangor, Bar Harbor, Brewer, Calais, Caribou, Columbia, Danforth, Princeton, Ellsworth, Houlton, Lincoln, Portland, Presque Isle, Rockland as well as Machias. The bank has over 300 employees and in 2021 earned \$30.8 million in net income on revenue of \$91.8 million. The bank serves approximately 700 fishermen from Calais to Portland and has done so for more than 150 years. My son is a lobsterman as are many of my friends. Many of our employees have partners in the fishing industry.

2. The importance of lobstering to the economy of Maine cannot be overstated. Should the lobster fishery be severely restricted due to proposed changes to the Atlantic Large Whale Take Reduction Plan resulting in a 90% reduction in risk from the fishery to North Atlantic right whales, the ripple effects will be enormous.

3. Lobstermen come to Machias Savings Bank for many different services, from business financing to home and boat loans. We provide financial assistance to a fisherman somewhere along the coast every day. By NAICS code, the bank holds a \$150MM agricultural/fishing portfolio, \$85MM of which is directly from lobstermen and women. Within Washington County those figures are even greater – 30% of the bank’s business loans in that county are for lobster fishing purposes.

4. The Downeast lobster fishery spans Washington and Hancock Counties. According to the Sunrise County Economic Council, approximately 1,100 residents work full-time as lobstermen in the Downeast fishery, either as captains or as sternmen. While aquaculture is also an important component of the two counties’ economies, it employs between 75 and 100 people, a fraction of those connected to lobstering. In years past, if one fishery had a difficult year or there was a downturn in that species, fishermen could shift into other fisheries such as groundfish, herring or shrimp. Those opportunities no longer exist. According to the state of Maine, in 2021 lobstering accounted for 82% of the value of all seafood landed in Maine. Lobstering is the primary economic driver for Maine’s coastal communities.

5. More than any of the other Maine counties we serve, Washington County is highly dependent on commercial lobster fishing. After government support and the county’s one paper mill, lobstering is the third largest source of income. The college education rate is 25.4%

less than the State average, with families pursuing fishing directly after high school. The poverty rate and deep poverty rates are among the highest in the State at 18.1% compared to a Maine average of 11.1% and 49% for single head of household with children under 5. The entire community is dependent on revenue generated from the fishing industry to keep the service and retail economies moving. Neither aquaculture nor the limited window of tourism provide substantial revenue creation or population increases to counteract the 100 year population decline the county is experiencing.

6. The Downeast lobster fishery is home to four of Maine's top ten-earning fishing ports. This portion of the fishery comprised nearly half (48%) of the value of Maine's lobster landings in 2021. If the Downeast lobster fishery were reduced severely, the effects would be far-reaching. Hundreds of lobstering families would be put out of business which would have a domino effect, decimating a variety of other businesses both directly and indirectly dependent upon the success of the lobster industry.

7. The lobster fishery directly supports hundreds of businesses, large and small, in the lobster supply chain including lobster buying stations, transportation companies, storage and holding facilities and lobster processing plants. According to an economic study by Colby College in 2018, the Maine lobster fishery supply chain generates nearly \$1 billion in revenue each year, in addition to lobster landings. These subsidiary businesses and services provide much-needed steady jobs in a region of Maine plagued by high unemployment and poverty rates.

8. Numerous other businesses in the bank's service area, such as car and truck dealerships, trucking companies, local stores and restaurants, all would be negatively affected by a steep decline in lobstermen's income. Many of these smaller businesses have been our

customers for decades. To see them disappear would be a blow not only to the bank but to the communities in which they operate. The lobster fishery truly is the backbone of this region.

9. Machias Savings Bank prides itself on its ability to work with our customers to help them through hard times. When the Great Recession began in 2008, many hardworking men and women in this region found themselves in difficulty with respect to home and business loans. We were able to re-negotiate many of these loans during those challenging years, a success that reflects the bank's firm connection to our communities. We will continue this to support our lobster fishing industry along with philanthropic support.

10. The post-pandemic economic climate for the lobster industry has been extremely challenging. The cumulative effects of higher fuel prices, higher bait prices, and increased shipping costs have already affected the solvency of many of these businesses. However, lobstering business are resilient and are skilled at squeezing through marginal years in hopes of a better year later.

11. Things have changed in the aftermath of the federal court ruling in September denying the lobster industry's claims in *Maine Lobstermen's Association vs National Marine Fisheries Service*. The uncertainty of the new deep cutting federal whale regulations now underway has sent a chill through the lobster fishery this year unlike anything I have experienced during my tenure. Since the Court's ruling there has been a significant increase in anxiety and unease among lobstermen who are our customers. Our employees with close connections to the lobster industry are regularly hearing from lobstermen that they are cancelling plans to apply for new loans given their uncertain future. Many will delay important investments in upkeep of their boats, engines and traps due to financial uncertainty. Already, we are receiving numerous

inquiries for loan modifications and we anticipate those requests to accelerate dramatically. We are fielding calls from Rockland (17 in one day) to Cutler from concerned fishermen inquiring about the bank's process for vessel repossession.

12. I have heard directly from lobstermen that the Downeast region will likely experience an extremely large closure of state and federal waters due to a computer model that predicts the presence of right whales. Years ago this would have made sense but right whales no longer pass through these waters to feed in the Bay of Fundy. I know that this is true because the New England Aquarium has abandoned its whale monitoring station in the town of Lubec, located in Washington County, because they no longer detect these whales. Federal actions make even less sense because Canadian lobstermen will continue to set their traps, which do not use the same whale-safe gear that we do, in the U.S.– Canada shared waters called the Gray Zone.

13. As president of Machias Savings Bank, I dread the fallout of a sharp reduction in the lobster fishery. A bank does not want to repossess a fishing boat, no more than it wants to call in a loan on a truck or a home. We want our customers to succeed, both in their businesses and in their communities. Should federal regulations come into effect that close the offshore lobster fishery in this state or severely restrict lobstermen's ability to fish, the sheer volume of those affected will present a financial disaster unlike any in the bank's recent years. I fear that this will destabilize our coastal economy to levels that will have profound irreversible effects.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my information and belief.

Executed on October 6, 2022, in Friendship, Maine.



Lawrence Barker

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN’S ASSOCIATION,
INC.

Appellant

and

STATE OF MAINE, DEPARTMENT OF
MARINE RESOURCES, et al.,

Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE, et
al.,

Appellees.

September Term, 2022
1:21-cv-02509-JEB

Case No.: 1:22-cv-5238

DECLARATION OF MARK BROOKS

I, Mark Brooks, declare and state as follows:

1. My name is Mark Brooks. I am co-owner of Brooks Trap Mill, a small, third-generation family business headquartered in Thomaston, Maine. We employ 120 people in our wholesale and retail operations, building and selling a wide variety of marine products including manufactured lobster traps and supplies for fishermen who still prefer to build their own. In addition to the headquarters, our business also operates locations in Portland, West Bath, and Jonesboro, Maine and Wakefield, Rhode Island.

2. In 1946, my grandfather, Michael Brooks, set up a trap stock mill on Camden Street in Rockland, Maine after my father, Karl, returned from the U.S. Navy. The mill moved to our current location in 1949 and, in 2003, my brother Stephen, my sister Julie, and I assumed ownership. We stock the largest inventory of lobstering materials in the state of Maine.

3. The first wooden lobster trap was designed and built in Massachusetts in 1806. Today, nearly all traps are made of wire, come in different sizes and colors, but the fundamentals of the trap have remained essentially the same for more than two centuries. Our company produces an estimated 2,500 traps per week in addition to approximately 2,000 trap kits that lobstermen use to build their own traps.

4. Maine lobstermen have long been excellent stewards of the lobster resource and were at the forefront of efforts to ensure a healthy lobster population for future generations. In the late 1800's, Maine lobstermen banned the harvest of egg-bearing females and established a minimum legal size to harvest lobsters. As a result, the Maine lobster industry has thrived and is now a globally-recognized sustainable fishery.

5. The value of Maine's lobster catch at the docks in 2021 was more than \$725 million, and studies have shown the lobster fishery supply chain, of which the trap building industry is an important component, generates an additional \$1 billion annually.

6. There are nearly 5,000 licensed lobstermen in Maine and each is, by law, a small-business owner. The lobstermen's successful management of the fishery has allowed these businesspeople and families to plan ahead and invest in new equipment, boats, traps, supplies. For the past three years, our business has been booked out with orders from lobstermen who could make confident decisions based on the trend in landings.

7. In 2020, as a result of global supply chain issues caused by COVID, our company began experiencing delays that resulted in backlogs and waitlists for orders. Nothing, however, has caused more concern for the future of Brooks Trap Mill than the uncertainty surrounding federal whale regulations.

8. A majority of our customers have done business with us for generations and, as a result, many are trusted friends. On faith, and without collecting deposits, our company has ordered millions of dollars' of the necessary supplies to fulfill the orders we have received thus far – and to keep our employees working at capacity for at least one year.

9. Over the past several weeks, however, nervous lobstermen have started to cancel their orders. They have no idea how many traps they will need in the next six months or year. They have no idea if there will even be a fishery. As a result of this unknown, our company now finds itself in a precarious position. Will we be left owing millions of dollars for supplies we purchased but can't sell? This isn't a hypothetical scenario. A smaller trap building company in Maine already canceled all of its orders and laid off all of its employees. For those workers, the uncertainty sparked by the development of deep cutting whale regulations has already caused real-life consequences. Hardworking people are now without a paycheck because the federal government has not told us what measures will be required to achieve those deep cuts and this has left a vanishingly low level of doubt of a very bleak future for the Maine lobster fishery.

10. The economic impact of this uncertainty is not limited to trap builders like Brooks Trap Mill. Other family-owned businesses such as boat builders, bait dealers, and fuel companies are facing similar dilemmas. How can you make a business plan for the next year when you don't know if you will have any customers? The closure of the federal fishery would cause an economic tidal wave that would wipe out generations of small businesses, destroy the livelihoods

of hardworking families, and change a way of life that has sustained Maine's coastal economy for centuries.

11. We agree that a common-sense solution needs to be found that will help protect the endangered right whale but it should be implemented in areas where science shows clearly that the whale is known to exist. This spring, our company developed a 1700-pound weak link that is designed to break under stress in the rare chance that there be a gear entanglement. By all accounts, the product is safe and works. Though some lobstermen were skeptical, we sold thousands of these weak links and lobstermen installed them in their gear despite the fact that the right whale is extremely rare or entirely unknown in the waters where most of them fish. This demonstrates their ongoing commitment to ensuring that the fishery and the whale can coexist.

12. Maine lobstermen don't want to be a problem, they want to be part of the solution. The regulators should require lobstermen who, in the unlikely event that they do spot a right whale, to report it. These men and women are on the ocean every day and care about protecting it and the marine life in it. Federal regulations can also have unintended consequences. For instance, should new rules require a massive trap reduction, what impact will that have on the lobster population itself? Lobstermen act as farmers of the ocean, and removing the food that they supply as bait, could have a detrimental effect on what is now a healthy lobster population.

13. Maine's lobster industry and the thousands of small businesses that rely on it are currently living on the edge and concerned about the future. This stress is already causing a significant economic strain on the state. We are asking for someone to inject some common-sense into this situation and implement sensible regulations that will protect the whale without destroying an entire industry and wiping out this heritage and way of life that is at the heart of our state's identity.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my information and belief.

Executed on October 6, 2022, in _____.

A handwritten signature in cursive script that reads "Mark Brooks". The signature is written in black ink on a white background. Below the signature is a horizontal line.

Mark Brooks

Maine Lobster Fishery Sues Monterey Bay Aquarium, Claims Attack on Maine Lobster Fishing Practices Is Defamatory

KENNEBUNK, Maine - Maine lobster businesses and industry trade associations today filed a federal lawsuit against the Monterey Bay Aquarium Foundation (the "Aquarium") for making false and defamatory statements about Maine lobster fishing practices and for misleading consumers and commercial lobster buyers about the integrity of the Maine lobster harvest. The lawsuit challenges the Aquarium's claims that "scientific data" show that Maine lobster fishing practices are responsible for harming North Atlantic right whales. The lawsuit asserts that the Aquarium's claims are in fact not supported by science, and that the Aquarium's false statements have caused substantial economic harm to plaintiffs, as well as to the Maine lobster brand and to Maine's long-standing reputation for a pristine coastal environment protected by a multi-generational tradition of preserving resources for the future.

Plaintiffs include Bean Maine Lobster Inc., the Maine Lobstermen's Association (MLA), the Maine Coast Fishermen's Association, Atwood Lobster LLC, and Bug Catcher Inc., owned by sixth-generation fisherman Gerry Cushman of Port Clyde.

The lawsuit, filed on March 13 in the United States District Court for the District of Maine, alleges that Monterey Bay Aquarium knowingly ignored and mischaracterized scientific data to convince the public that, despite their sustainable practices, Maine lobstermen are causing harm to endangered North Atlantic right whales. In September 2022, the Aquarium announced that its "Seafood Watch" program was downgrading the rating of Maine-caught lobster from "yellow" to "red," and instructing consumers and businesses to "avoid" Maine lobsters because "scientific data" supposedly linked Maine lobster fishing practices to right whale deaths and injuries. While promoting the Aquarium's new "red" rating for Maine lobster, Aquarium officials stated that consumers' "appetite for seafood is driving a species to extinction."

As the lawsuit alleges, since Maine lobster was rated "yellow" by the Aquarium years earlier, there had been no "scientific data" linking Maine lobster fishing to any harm to the right whales. Federal data show that there are no documented right whale deaths attributed to Maine lobster gear, and there has not been a recorded right whale entanglement in Maine lobster gear in nearly twenty years. This is due in large part to a shift of right whales further away from the Maine lobster fishery, and to the extensive conservation measures Maine lobstermen have adopted—some of which were put in place years after the Aquarium had issued its "yellow" rating. Those conservation measures include removing 30,000 miles of rope from the ocean and weakening the rope that remains to allow an animal to easily free itself in the unlikely event it encounters the gear. Rather than creating a threat to the whales, these measures have made the Maine lobster industry "a model for what a sustainable and environmentally responsible fishery can do."

“This is a significant lawsuit that will help eradicate the damage done by folks who have no clue about the care taken by lobstermen to protect the ecosystem and the ocean,” stated John Petersdorf, CEO of Bean Maine Lobster Inc. “Lobstermen are very responsible stewards of the ocean. We cannot sit back and let lies to the contrary prevail.”

“Lobstermen have been under constant assault for the past several years. Yet the science is clear – right whales are not dying in Maine lobster gear,” stated Patrice McCarron, Policy Director for the MLA. “In fact, the opposite is true; innovations by Maine lobstermen have been instrumental in minimizing harm to whales.”

Plaintiff Gerry Cushman said: “I am a sixth-generation lobsterman. I work hard to support my family and depend on a healthy ocean for my livelihood. Like my fellow lobstermen, I will continue to do all I can to protect the ocean and its wildlife just as my forefathers have done. Our stewardship practice is a tradition that defines what Maine is all about. The barrage of lies about Maine fishing practices must be confronted and defeated by truth.”

The complaint in the lawsuit demands monetary relief and an injunction ordering the Aquarium to remove and retract all its defamatory statements.

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For More Information:

Kevin Kelley
Maine Lobstermen’s Association
kevin@mainelobstermen.org

John Petersdorf
Chief Executive Officer
Bean Maine Lobster Inc.
john@beanmainelobster.com

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

BEAN MAINE LOBSTER, INC., MAINE
LOBSTERMEN’S ASSOCIATION, INC., MAINE
COAST FISHERMEN’S ASSOCIATION, INC., MAINE
LOBSTER AND PROCESSING, LLC d/b/a ATWOOD
LOBSTER, LLC., and BUG CATCHER, INC.,

Civ. Action No. _____

Plaintiffs,

- v. -

MONTEREY BAY AQUARIUM FOUNDATION,

Defendant.

COMPLAINT AND DEMAND FOR JURY TRIAL
(INJUNCTIVE RELIEF REQUESTED)

Plaintiffs Bean Maine Lobster, Inc. (“BML”), Maine Lobstermen’s Association, Inc. (“MLA”), Maine Coast Fishermen’s Association, Inc. (“MCFA”), Maine Lobster and Processing, LLC d/b/a/ Atwood Lobster, LLC (“Atwood”), and Bug Catcher, Inc. (“Bug Catcher”), by and through their undersigned counsel, assert the following claims against Defendant Monterey Bay Aquarium Foundation (the “Aquarium”).

SUMMARY OF THE ACTION

1. This case arises out of the Monterey Bay Aquarium’s false and defamatory statements about Maine lobster fishing practices.
2. The lobster industry is an essential component of Maine’s fabric and identity. Lobstering is a shared heritage, a way of life for thousands of Maine residents, a ubiquitous cultural force shaping ambitions of the state’s youth, and a thread that connects families to prior generations while binding them to the region. Maine even offers a specialty license plate that features a lobster, and donates some of the proceeds from the purchase of these plates to lobster

research and education. As the Department of Motor Vehicles website states, the lobster is “Maine’s signature product.”

3. The lobster is not just a symbol. Maine is synonymous with lobster. Dating back before Maine became a state, lobsters have continually been a critical element of Maine’s economy. The Maine lobster industry contributes about \$1 billion annually to the state’s economy.¹ The industry directly supports roughly 12,000 jobs on the water and an additional 6,600 shoreside jobs through its supply chain.² Many ancillary businesses, including hospitality, retail, dining establishments, trucking, banking, and trap-making firms base their operations around the lobster fishery and depend on robust national and international markets for lobster.³ More than a thousand lobstermen fish with student licenses while in high school or college, working toward a commercial license.⁴ New lobstermen often apprentice on boats owned by relatives, carrying on a trade that often spans multiple generations. And a new Maine-based volunteer program focused on diversity and inclusion has been offering apprenticeship opportunities on lobster boats to Mainers of color in local high schools.⁵

¹ Michael Donihue, *Lobsters to Dollars: The Economic Impact of the Lobster Distribution Supply Chain in Maine* (June 2018), <https://colbycollege.maps.arcgis.com/apps/Cascade/index.html?appid=e0c247dcb1a34d8293d953f92f360eb9>.

² See Brief for MLA in support of Mot. to Expedite Briefing and Oral Arg. Ex. P, Decl. of Alexa M. Dayton, at ¶ 6, *MLA v. NMFS*, No. 22-5238 (D.C. Cir. Oct. 11, 2022).

³ See *id.*, Ex. H, Decl. of Lawrence Barker, at ¶¶ 7-8; *id.*, Ex. J, Decl. of Mark Brooks, at ¶¶ 9-10, 13.

⁴ See Shannon Mullen, *Maine’s Next Generation of Lobstermen Brace for Unprecedented Change*, NPR, (Sept. 19, 2021), <https://www.npr.org/2021/09/19/1036328606/maines-next-generation-of-lobstermen-brace-for-unprecedented-change>.

⁵ See Fred Bever, *These Young Men Catch More Than Lobsters. They Also Catch a Break*, NPR, (Sept. 24, 2022), <https://www.npr.org/2022/09/24/1123526182/maine-lobsters-lobster-fishing-apprentice-program>.

4. Maine businesses also depend on tourists who visit the State to eat locally-caught lobster. According to a survey, of the approximately 10.1 million people who visited Maine between May and August 2021, 64% said they visited for the state’s food and culinary experiences, and a whopping 42% said they specifically came to Maine for the lobster.⁶

5. Plaintiffs are some of the thousands of businesses that make up the Maine lobster fishing industry. By law, each of Maine’s 5,600 commercial lobstermen—a term that describes the men and women who hold commercial licenses to harvest lobster—is a self-employed small business owner who runs his or her own boat and lives, works, and spends earnings locally.⁷

6. Maine lobstermen are responsible stewards of the State’s natural resources and have long led efforts to make lobster fishing environmentally sustainable. Relevant here, Maine lobstermen have modified their harvesting practices at great expense, and in compliance with federal and state regulatory programs, to protect the endangered North Atlantic right whale.

7. The Aquarium runs a program called “Seafood Watch,” which assigns ratings to different varieties of seafood based on environmental impact and sustainability. The Aquarium describes Seafood Watch as a “global leader in the sustainable seafood movement.” Seafood Watch publishes ratings of different seafood varieties, purporting to indicate the environmental impact of consuming that type of seafood. The Aquarium claims that its ratings are based on science. Through this Seafood Watch ratings program, the Aquarium seeks to influence the

⁶ See Melissa Waterman, *Lobster’s Claw-hold on Maine is Strong: Impact of Fishery Goes Beyond Big-Dollar Landings*, ISLAND INSTITUTE (Jul. 6, 2022), <https://www.islandinstitute.org/working-waterfront/lobsters-claw-hold-on-maine-is-strong/>.

⁷ See *Advocacy and Education*, Maine Lobstermen’s Association, <https://www.maine lobstermen.org/policy-advocacy-and-education>; *Maine Lobster Fact Sheet*, The Maine Lobster Marketing Collaborative, <https://lobsterfrommaine.com/article/maine-lobster-fact-sheet/>.

seafood-purchasing decisions of consumers and businesses.

8. In September 2022, Seafood Watch published a “red” rating for lobster caught in certain Canadian and U.S. fisheries, stating that consumers and businesses should “avoid” purchasing them. The Aquarium applied this rating to lobster caught in the Gulf of Maine/Georges Bank region, where the Maine lobster fishery operates. In several public statements made to explain this “red” rating, the Aquarium has falsely depicted the Maine lobster fishery as being directly responsible for right whale injuries and mortalities. The Aquarium has stated that its rating was based on a review of “all available scientific data” which, it claimed, showed that lobster fishing practices in the covered regions pose “significant risks of entanglement” to North Atlantic right whales, which can cause serious harm and death. The Aquarium claimed that it followed a “rigorous, transparent, science-based process” in reaching its rating decision. The Aquarium also stated that the Maine lobster fishery does not have in place appropriate measures to protect right whales and that consumers’ appetite for seafood was “driving a species to extinction.”

9. The Aquarium’s purported factual statements about Maine lobster fishing practices are false. Contrary to what the Aquarium has represented, there are no “scientific data” showing that any North Atlantic right whale has been harmed—let alone killed—by entanglement in Maine lobster fishing gear in more than 18 years. In fact, the most recent instance of any observed right whale entanglement in Maine waters was in 2004, and that whale was not seriously harmed. For more than 20 years, the Maine lobster fishing industry has been making changes to its harvesting practices to avoid entanglements, including major modifications in 2009 when the fishery converted to rope that sinks between traps; in 2014 when the fishery removed 30% of its buoy lines from the water; and in 2022 when it removed additional buoy lines and weakened all remaining rope to break if a whale becomes entangled.

Recently, North Atlantic right whale migratory patterns have changed as a result of climate changes, and the whales rarely pass through Maine coastal waters. The Aquarium has ignored these facts, and its false statements in support of its “red” rating have misled consumers and businesses to believe that Maine lobster gear is causing serious harm to the right whale population, which is contrary to the scientific data the Aquarium purports to have reviewed.

10. There is no question that the Aquarium knew these statements were false when made. Indeed, the Aquarium *admits* that there are no recent documented cases of North Atlantic right whales being caught in Maine lobster fishing gear. Instead, the “scientific data” upon which the Aquarium purportedly relies show that right whales have been found entangled in gear that is *not linked to the Maine lobster fishery*—much of which has been directly linked to gear used in Canadian waters to harvest snow crabs. No “scientific data” warrant a conclusion that any of these entanglements are attributable to the Maine lobster fishery. The Aquarium has not engaged in a “rigorous, transparent, science-based process” to support its representations to businesses and consumers about Maine-caught lobsters. At best, the Aquarium has engaged in wild speculation about the cause of these entanglements, with a reckless disregard for the truth; at worst, the Aquarium knew that there was no science supporting its “red” listing of Maine-caught lobsters because reports of right whales harmed in Canadian fishing gear have been well-publicized in recent years.

11. In fact, MLA and other stakeholders in the lobster industry engaged in a dialogue with the Aquarium prior to September 2022 and repeatedly presented evidence that the Maine lobster fishery was not responsible for right whale entanglements. MLA informed the Aquarium that its claims would mislead the public and that available data contradicted its conclusions. But the Aquarium ignored these facts and maintained its unscientific approach, insisting that entanglements for which there was no known cause could be attributed to Maine

lobstermen.

12. The Aquarium’s false claims to “scientific” support for its “red” rating of Maine-caught lobsters have caused great harm to the Maine lobster industry—and Plaintiffs’ business and reputation in particular. This harm is intentional: The Aquarium told businesses and consumers to “avoid” and “take a pass” on purchasing Maine-caught lobster and lobster products on the basis of its false statements. In doing so, the Aquarium leveraged its significant influence over public opinion and the commercial decisions of major lobster purchasers, using its public platform to pressure those parties into cutting off business with Plaintiffs. As a result, several large businesses that had purchased lobsters from Plaintiffs in the past announced that they will no longer carry Maine-caught lobsters because of the Aquarium’s statements. This has caused Plaintiffs economic harm in the form of lost business. And, overall consumer demand for Maine-caught lobsters has decreased since September 2022, due in whole or in part to the Aquarium’s false statements, depressing the price for lobsters and causing further commercial harm to Plaintiffs.⁸

13. Prior to filing this lawsuit, Plaintiffs requested that the Aquarium remove its false statements about Maine-caught lobsters. The Aquarium refused. Plaintiffs also requested that the Aquarium come forward with any factual support for its statements about Maine lobster fishing practices. Again, the Aquarium refused. Left with no other options, Plaintiffs come to this Court for relief in the form of an injunction ordering the Aquarium to remove and retract any and all defamatory statements from its website and other publications, and damages for the business that Plaintiffs have lost as a result of the Aquarium’s false statements.

⁸ Data released by the Maine Department of Marine Resources shows that the average per-pound price of lobster in Maine between September and December 2022 was \$3.89, compared with \$6.59 for the same period in 2021. This reflects a 40% drop in price. *See 2004-2022 Maine Commercial Lobster Landings as of 2/22/2023*, Maine Department of Marine Resources, <https://www.maine.gov/dmr/sites/maine.gov.dmr/files/inline-files/LobByCntyMoZone.pdf>.

PARTIES

14. Plaintiff Bean Maine Lobster, Inc. (“BML”) markets and sells high-quality mid-coast Maine-caught lobster and lobster foods. BML has suffered actual injury, including economic losses, as a result of Defendant’s false and defamatory statements. BML is incorporated under the laws of the State of Maine, and has its principal place of business in Rockland, Maine.

15. Plaintiff Maine Lobstermen’s Association, Inc. (“MLA”) is a non-profit corporation that represents roughly 1,200 of Maine’s 5,600 lobstermen. MLA actively advocates to protect the lobster resource and lobster fishery, the members who depend on it, and the value of the resource, including the brand value and goodwill attached to the Maine lobster. MLA has suffered actual injury, including economic and reputational injury, as a result of Defendant’s false and defamatory statements. MLA is incorporated as a nonprofit corporation under the laws of the State of Maine, and has its principal place of business in Kennebunk, Maine.

16. Plaintiff Maine Coast Fishermen’s Association, Inc. (“MCFA”) is a non-profit corporation that works to enhance the sustainability of Maine’s fisheries—including the lobster fishery, which is the state’s largest—by advocating for the needs of community-based fishermen, the environmental restoration of the Gulf of Maine, and the brand value and goodwill associated with Maine lobster. MCFA works directly with approximately 200 Maine fishermen, nearly all of whom trap and sell lobster as part of their business. MCFA has suffered actual injury, including economic and reputational injury, as a result of Defendant’s false and defamatory statements. MCFA is incorporated as a nonprofit corporation under the laws of the State of Maine, and has its principal place of business in Brunswick, Maine.

17. Plaintiff Maine Lobster and Processing, LLC (doing business as Atwood Lobster, LLC) (“Atwood”) is a third-generation Maine lobster company and is one of the leading lobster

producers in the United States. Atwood has suffered actual injury, including economic and reputational losses, as a result of Defendant's false and defamatory statements. Atwood was formed under the laws of the State of Delaware and has its principal place of business in South Thomaston, Maine. Atwood is a citizen of a State other than California.

18. Plaintiff Bug Catcher, Inc. ("Bug Catcher") is a lobster fishing company run by Gerald R. Cushman, a sixth-generation lobsterman and member of both MLA and MCFA. Bug Catcher has three employees, including Mr. Cushman, and operates a single boat. Bug Catcher has suffered actual injury, including economic and reputational injury, as a result of Defendant's false and defamatory statements. Bug Catcher is incorporated under the laws of the State of Maine, and has its principal place of business in Port Clyde, Maine.

19. Defendant Monterey Bay Aquarium Foundation ("the Aquarium") is a nonprofit corporation organized under the laws of the State of California, and its principal place of business is in Monterey, California. The Aquarium operates Seafood Watch, a program that seeks and secures commitments from major buyers in the seafood industry to follow its recommendations and purchase only products Seafood Watch deems environmentally sustainable. Seafood Watch issues consumer and business-facing ratings and recommendations for seafood sources which those companies commit to follow and which it claims are based on its own assessments of environmental sustainability and supported by scientific data.

JURISDICTION AND VENUE

20. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332, as the Plaintiffs and the Defendant are citizens of different states and the amount in controversy between each Plaintiff and the Defendant exceeds \$75,000.

21. This Court has personal jurisdiction over the Aquarium under Maine's long-arm statute, 14 M.R.S.A. § 704-A(I), which authorizes jurisdiction over nonresident defendants to the

fullest extent permitted by the due process clause of the United States Constitution, 14th Amendment. Jurisdiction over the Aquarium satisfies due process because (1) Maine has a legitimate interest in the subject matter of this litigation; (2) the Aquarium, by its conduct, reasonably could have anticipated litigation in Maine; and (3) exercise of jurisdiction comports with traditional notions of fair play and substantial justice.

22. Maine has a substantial interest in protecting its industries and allowing its residents a forum in which to seek redress when out-of-state actors publish false statements about a business essential to Maine's economy, particularly after that actor refuses to correct those false statements. The Aquarium's false statements have had and continue to have a significant effect on an industry that is crucial to Maine's economy and impacts the lives of thousands of Maine residents.

23. This Court also has jurisdiction under 14 M.R.S.A. § 704-A(B), which confers jurisdiction over any person who "cause[s] the consequences of a tortious act to occur within this State." The consequences of the Aquarium's defamatory statements are impacting thousands of Maine residents. The Aquarium could reasonably have anticipated litigation in Maine based on its tortious conduct. By choosing to attack specifically the lobster fishing practices in the Gulf of Maine and Georges Bank regions, which encompass the entire Maine lobster fishery, the Aquarium directed its defamatory statements at entities and individuals located in Maine—particularly, businesses and individuals involved in the Maine lobster fishery. The Aquarium knew that injury caused by the publication of its defamatory statements would be felt in Maine, where Plaintiffs reside, conduct business, and have an established reputation. The Aquarium published falsehoods about the conduct of the Maine lobster industry and specifically told consumers not to purchase lobster caught in Maine fisheries.

24. Venue is proper in the District of Maine under 28 U.S.C. § 1391(b) because this is

where Plaintiffs reside and where the injuries caused by the Aquarium's conduct have occurred.

FACTS

A. The Maine Lobster Fishery Employs Sustainable Practices That Have Successfully Protected North Atlantic Right Whales From Harm.

25. The Gulf of Maine is the center of the U.S. lobster industry. The Maine lobster fishery has harvested in excess of 100 million pounds of lobster annually, and contributes more than a billion dollars to Maine's economy every year. According to the Maine Department of Marine Resources, in 2021, the Maine lobster fishery landed more than 100 million pounds of lobster, for a value of nearly \$725 million.⁹ The fishery employs more than 5,600 lobstermen,¹⁰ and in 2021 hauled in more than 80% of the country's lobster landings.¹¹ The lobsters are sold domestically and internationally, in both live and processed forms.

26. The Maine lobster fishery uses traps deployed on the seabed. These traps feature an entrance tunnel through which a lobster is lured with bait. Traps are laid out as singles or pairs, or in strings (trawls) with a number of traps attached to a rope. Ropes (vertical or buoy lines) connect the traps to surface buoys. The traps are generally harvested and re-baited several times a week.

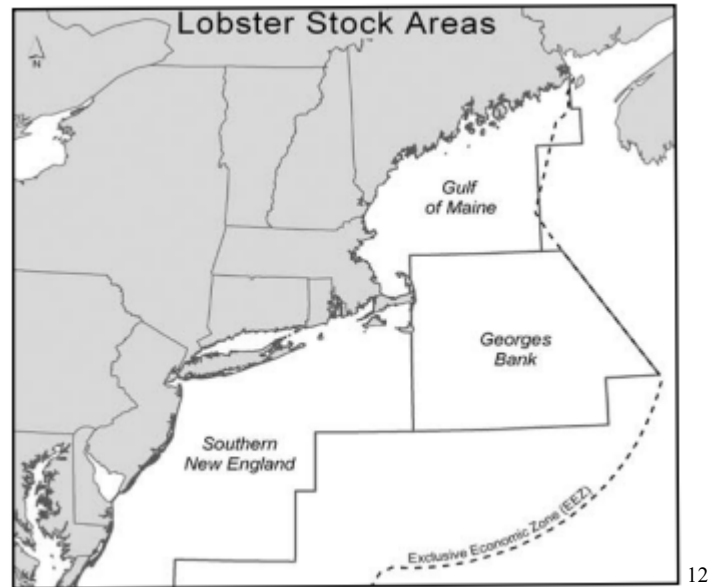
27. For management purposes, the Northwest Atlantic Ocean region from Maine to

⁹ See *2021 Maine Lobster Harvest the Most Valuable in the History of the Fishery*, State of Maine, Office of Governor Janet T. Mills (Feb. 14, 2022), <https://www.maine.gov/governor/mills/news/2021-maine-lobster-harvest-most-valuable-history-fishery-2022-02-14#:~:text=According%20to%20recently%20updated%20data,in%20value%2C%20year%20over%20year.>

¹⁰ See *Maine Lobster Fact Sheet*, The Maine Lobster Marketing Collaborative, <https://lobsterfrommaine.com/article/maine-lobster-fact-sheet/>.

¹¹ See Commercial Fishing Landings Database, NOAA Fisheries, available at <https://www.fisheries.noaa.gov/foss/f?p=215:200:6182282017135.>

North Carolina is divided into two discrete lobster stocks: Gulf of Maine/Georges Bank and Southern New England. The Maine lobster fishery targets the Gulf of Maine/Georges Bank lobster stock.



28. Lobster fishing in Maine coastal waters is subject to strict regulations that ensure resource and environmental sustainability. For example, there are minimum and maximum size limits for legal lobster harvest. Larger lobsters are protected because they generally produce more young. And, “berried” females carrying eggs must be released and marked with identifying “V-notches” to ensure the reproductive success of the lobster stock. There are also restrictions on the number and configuration of traps that may be used.

29. For more than 150 years, Maine lobstermen have employed sustainable practices that protect the health of the lobster stock as well as the entire marine environment with which they interact. In particular, the industry has employed practices that protect the North Atlantic right whale, a species that lives primarily in the North Atlantic Ocean and is listed as an “endangered species” under the Endangered Species Act and protected under the Marine

¹² Source: <https://www.mass.gov/files/2017-08/dmfng410.pdf>.

Mammal Protection Act. By 1890, the right whale population had substantially diminished due to commercial whaling. There were approximately 100 whales in 1935, when the National Marine Fisheries Service (“NMFS”) designated the right whale as endangered. According to NMFS, the right whale population tripled from roughly 150 whales in 1971 to a peak of 481 individuals in 2011.¹³ By 2017, NMFS detected an unusual rate of mortalities that brought the population down to its current number of about 350. None of the deaths during this “unusual mortality event” has been attributed to Maine lobster gear.

30. Since the 1990s, the Maine lobster industry has been contributing to the conservation effort by ensuring that the fishery’s practices do not cause harm to right whales. In 1997, the Atlantic Large Whale Take Reduction Plan (the “Take Reduction Plan”), developed by a collaboration of fisheries, agencies, scientists, lobstermen and environmental groups, began to require implementation of innovative fishing practices and gear deployment strategies designed to protect right whales. Those measures were continuously updated and improved in subsequent years to include: (1) the use of sinking lines between traps, which effectively removed 27,000 miles of rope from New England waters, to greatly reduce the risk that whales will encounter lobster gear; (2) requirements that more lobster traps to be attached to each buoy line, removing 3,000 more miles of rope in the water; and (3) the incorporation of “weak-links” or weak rope in the buoy line, so that a right whale would break free if it became entangled.¹⁴

31. These proactive measures significantly reduced the frequency and severity of

¹³ See Brief for MLA in support of Mot. to Expedite Briefing and Oral Arg. Ex. P, Decl. of Alexa M. Dayton, at ¶ 17, *MLA v. NMFS*, No. 22-5238 (D.C. Cir. Oct. 11, 2022).

¹⁴ See 72 Fed. Reg. 57,104, 57,106 (Oct. 5, 2007); 73 Fed. Reg. 51,241 (Sept. 2, 2008); 79 Fed. Reg. 36,586, 36,587 (June 27, 2014); 80 Fed. Reg. 30,367, 30,378 (May 28, 2015); Maine Lobstermen’s Association Comment Letter on NMFS proposed rule to amend the Take Reduction Plan, at 7 (Mar. 1, 2021).

interactions between whales and U.S. fishing gear.¹⁵ There has not been a single documented entanglement of a right whale in Maine lobster gear since 2004.¹⁶ A search of the official NMFS database that chronicles mortality and injury to right whales reveals not a single record of right whale entanglement with Maine fishing gear resulting in serious injury or death.¹⁷ By contrast, the same database and other experts have documented many incidents of right whale entanglements with gear from other fisheries—including Canadian snow crab fisheries—that led to serious injury and death.¹⁸

32. In 2021, the Take Reduction Plan was modified further. Under these most recent modifications: (1) the minimum number of lobster traps for each buoy line in certain areas is even higher; (2) nearly 1,000 square miles of prime winter fishing grounds have been closed to lobster fishing for one-third of the year, eliminating even more rope from the water; (3) new

¹⁵ See Patrice McCarron, *Comments of the Lobster Fishing Association to the Draft BiOp*, The Lobster Fishing Ass’n, 4-5 (Feb. 19, 2021), https://lobstermen.com/wp-content/uploads/2020/08/Lobster-Association-Comments-on-Draft-BiOp_Final_2021.02.19.pdf.

¹⁶ This entanglement did not result in serious injury or death to the whale.

¹⁷ See *2017-2023 North Atlantic Right Whale Unusual Mortality Event*, NOAA, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event>; *North Atlantic Right Whale Updates*, NOAA, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-updates>; *North Atlantic Right Whale*, NOAA, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

¹⁸ According to an incident report cited by NOAA’s 2017-2023 Unusual Mortality Event tracker, in 2017 alone, multiple instances of right whale entanglement with snow crab gear were recorded. Snow crab fishing gear was “implicated in two observed NARW mortalities . . . as well as four of the five observed entanglements of free-swimming animals.” Daoust, P.Y., Couture, E.L., Wimmer, T., and Bourque, L. 2018. Incident Report: North Atlantic Right Whale Mortality Event in the Gulf of St. Lawrence, 2017, at 30, http://www.cwhc-rcsf.ca/docs/technical_reports/NARW_Incident_Report-%2020180405%20MD.pdf. See also Decl. of Glenn Salvador in support of Defendant-Intervenor’s Motion for Order on Remedy, *CBD et al. v. Ross et al.*, No. 1:18-cv-00112 (D.D.C. Jun. 18, 2020) at ¶¶ 18-21 (noting that since 2010, there has been a dramatic increase in right whale entanglements in Canadian gear, and the type of wide ropes removed from whales in recent years is typically not used by New England lobstermen).

requirements were established for the use of weak ropes designed to break at a force of 1,700 pounds; and (4) gear marking requirements were expanded.

33. Many individual Maine lobstermen also have implemented additional practices to further protect the right whales, using even less rope than permitted under the Take Reduction Plan. These measures are in keeping with the Maine lobster industry's more than century-old tradition of voluntarily adopting conservation measures to preserve the lobster stock and affected marine resources. For example, in addition to the federal requirements, the State of Maine has voluntarily maintained right whale protections in waters that are exempt from the federal whale plan, and implemented enhanced gear marking nearly two years sooner than federal rules required.

B. The Aquarium's Seafood Watch Program Publishes Purportedly "Science-Based" Ratings of Seafood Varieties According to Environmental Impact, in an Effort to Influence Consumer and Business Seafood-Purchasing Decisions.

34. The Aquarium established and operates "Seafood Watch," a program that claims to promote environmental sustainability in the seafood industry and aims to "push suppliers to source more environmentally responsible products."¹⁹ Seafood Watch bills itself as a "global leader in the sustainable seafood movement"²⁰ and "the leading source of science-based information for sustainable seafood around the world."²¹

35. Seafood Watch publishes recommendations telling consumers and businesses whether to purchase seafood products and rates various seafood sources based on its own purportedly scientific assessments of those sources' environmental sustainability.

¹⁹ Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/>.

²⁰ *Stories*, Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/stories>.

²¹ *Twenty Years of Seafood Watch*, Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/stories/twenty-years-of-seafood-watch>.

36. Seafood Watch seeks to influence consumer decisions and “spark change throughout the supply chain,”²² including by “leveraging the industry.”²³ To do this, Seafood Watch secures commitments from major seafood buyers, including restaurants, grocery stores, and retailers, to “serve environmentally responsible seafood following the Seafood Watch recommendations.”²⁴

37. Seafood Watch’s website touts “major buyers” of seafood that have made a “commitment to serve environmentally responsible seafood following the Seafood Watch recommendations.”²⁵ These buyers are in the food service, restaurant, grocery, and other related industries, which are listed on Seafood Watch’s website.²⁶

38. In its self-appointed role as arbiter of what constitutes sustainable seafood, Seafood Watch purports to review “all available scientific data” and follow a “rigorous, transparent, science-based process to evaluate the current environmental performance of a fishery.” Monterey Bay Aquarium, Seafood Watch Assigns Red Ratings to Canadian and U.S. Fisheries That Pose Dire Risk to the Endangered North Atlantic Right Whale (Sept. 5, 2022) **(Exhibit 1)**.

39. Seafood Watch defines “sustainable seafood” as “originating from sources, whether wild-caught or farmed, which can maintain or increase production in the long-term without jeopardizing the structure or function of affected ecosystems.” Monterey Bay Aquarium

²² Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/>.

²³ *Collaborations*, Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/collaborations>.

²⁴ *Businesses*, Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/collaborations/businesses>.

²⁵ *Id.*

²⁶ *See id.*

Seafood Watch, American Lobster, Report ID 524 (the “Lobster Report” or “Report”) (Sept. 6, 2022) (**Exhibit 2**) at p. 3.

40. Seafood Watch claims that each rating it issues is supported by “a Seafood Watch assessment,” in which “the fishery or aquaculture operation is evaluated using the Seafood Watch standard.” *Id.* This standard, in turn, is “built on [Seafood Watch’s] guiding principles,” ten of which are enumerated in the Report. *Id.* at p. 4.

41. Seafood Watch’s guiding principles are “operationalized” in four “criteria,” and once a rating has been assigned to each criterion, Seafood Watch develops and assigns a color-coded “overall recommendation.” Ex. 2 at p. 4.

42. Seafood Watch represents that seafood given a “red” or “avoid” rating “comes from sources that don’t align with [its] guiding principles.” *Id.* at p. 3. This rating means there is “a critical conservation concern or many issues need substantial improvement.” *Id.* Seafood Watch tells consumers to “[t]ake a pass” on seafood with a red rating because it is “caught or farmed in ways that harm other marine life or the environment.” *Id.* at p. 4.

43. In an October 5, 2022 FAQ released about its lobster assessment, the Aquarium also stated that fisheries given a red rating “pose a high risk of harm to marine life or the environment and appropriate management measures are not in place.”²⁷

44. By contrast, a “green” or “best choice” rating tells consumers: “Buy first; they’re well managed and caught or farmed responsibly.” Ex. 2 at p. 4. Sources of green-rated seafood “operate in a manner that’s consistent with [Seafood Watch’s] guiding principles” and the seafood “is caught or farmed in ways that cause little or no harm to other wildlife or the

²⁷ *Answers to frequently asked questions about Seafood Watch’s latest assessments for fisheries using gear that pose significant risk to the endangered North Atlantic right whale*, Monterey Bay Aquarium (Oct. 5, 2022), <https://www.montereybayaquarium.org/newsroom/press-releases/seafood-watch-assessments-faqs-north-atlantic-right-whale>.

environment.” *Id.* at p. 3. An intermediate “yellow” or “good alternative” label tells consumers, “Buy, but be aware there are concerns with how they’re caught, farmed or managed.” *Id.*

C. Seafood Watch Makes Defamatory Statements About The Effect of Maine Lobster Fishing Practices on Right Whales

45. In 2014, Seafood Watch assigned Maine lobster a “yellow” rating, describing it as a “good alternative” and stating that the lobsters were “from sources that align with most of our guiding principles.” Seafood Watch recommended that consumers and businesses should “[b]uy, but be aware there are concerns with how they’re caught, farmed or managed.”

46. Since 2014, the Maine lobster fishery has implemented even more changes to its fishing practices to protect right whales, even as whales have become more rare in waters where Maine lobstermen fish due to scientifically demonstrated changing ocean conditions.²⁸ The 2021 Take Reduction Plan modifications decreased the amount of rope in the water, created more exacting requirements for weak links, weak rope and break-aways to weaken vertical fishing lines, and closed nearly 1,000 square miles of fishing grounds for an entire season each year. There have been no scientific data collected since 2014 (or earlier) that would warrant an adverse change in the Aquarium’s rating of Maine-caught lobster.

47. Nevertheless, on September 5, 2022, the Aquarium changed its rating of Maine-caught lobster from “yellow” to “red.” On that date, the Aquarium published a press release on its website announcing that Seafood Watch had downgraded to a “red” rating all lobsters caught in certain Canadian and U.S. lobster fisheries, expressly including in the Gulf of Maine/Georges Bank region that encompasses the Maine lobster fishery. The press release stated that the “red” rating was based on “significant risks of entanglement in pot, trap, and gillnet fisheries to the

²⁸ See Meyer-Gutbrod, E.L., C.H. Greene, and K.T.A. Davies, *Marine species range shifts necessitate advanced policy planning: The case of the North Atlantic right whale*, OCEANOGRAPHY, 31(2):19–23 (2018), <https://tos.org/oceanography/article/marine-species-range-shifts-necessitate-advanced-policy-planning>.

endangered North Atlantic right whale and the lack of timely, effective management necessary to mitigate entanglement risks and promote recovery of the species.” The press release claims Seafood Watch reviewed “all available scientific data” and followed a “rigorous, transparent, science-based process” in determining that current management measures for these fisheries “do not go far enough to mitigate entanglement risks.” Ex. 1. The press release states that some of the rated fisheries “use gear with vertical lines that are known to entangle the endangered North Atlantic right whale.” *Id.*

48. On September 6, 2022, the Aquarium published the Lobster Report (“Report”) containing its recommendations for American lobster in the United States Northwest Atlantic region. The Report details Seafood Watch’s assignment of a “red” rating to lobster caught in the Gulf of Maine/Georges Bank and Southern New England regions. Ex. 2 at pp. 3-4.

49. The Aquarium’s Report tells readers to “***Avoid*** American lobster caught by trap from Georges Bank and the Gulf of Maine stocks due to risks to the critically endangered North Atlantic right whale and insufficient measures for reducing these risks.” *Id.* at p. 6.

50. The Aquarium’s Report further comments on the effectiveness of the Atlantic Large Whale Take Reduction Plan, asserting that “management measures and the Atlantic Large Whale Take Reduction Plan have not been successful at reducing serious injury and mortality to the North Atlantic right whale.” *Id.* at p. 5.

51. The Report further states: “Based on the available information and the significant risks to [the right whale], the American lobster fishery cannot be considered sustainable[.]” *Id.* at p. 41.

52. In connection with the Aquarium’s aggressive publicity of Seafood Watch’s recommendation against Maine lobster, the Aquarium’s Vice President of Global Ocean Initiatives stated in an interview that consumers’ “appetite for seafood is driving a species to

extinction.”²⁹

D. The Aquarium’s Statements Are Demonstrably False

i. Right whale mortality is driven by factors wholly unrelated to Maine lobster fishing practices.

53. The available scientific data show that the real threats to right whales come not from the Maine lobster fishery but from entanglements in Canadian snow crab gear, vessel strikes, climate change, and ocean noise.³⁰ There are no “scientific data” evidencing that any North Atlantic right whale has ever died or been seriously injured by entanglement with the lobster fishing gear that is used in the Maine fishery.

54. In fact, right whales are rarely found in Maine lobster fishing grounds. Beginning in 2010, the Gulf of Maine and Scotian Shelf regions of the Northwest Atlantic experienced a significant change in oceanic conditions that caused a substantial decline in the abundance of copepods, a primary component of the right whale’s diet.³¹ Copepod populations in the Gulf of

²⁹ *Seafood watch group lists New England lobster as seafood to avoid due to environmental concerns*, CBS NEWS (Sept. 6, 2022), <https://www.cbsnews.com/news/seafood-watch-group-new-england-lobster-north-atlantic-right-whale/>.

³⁰ See *2017-2023 North Atlantic Right Whale Unusual Mortality Event*, NOAA, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event>; *North Atlantic Right Whale Updates*, NOAA, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-updates>; *North Atlantic Right Whale*, NOAA, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>. See also *Review of North Atlantic right whale occurrence and risk of entanglements in fishing gear and vessel strikes in Canadian waters*. DFO Can. Sci. Advis. Sec. Sci. Advis. Rep. 2019/028, at 21 (noting that “the co-occurrence of NARW and fishing activities in the southern [Gulf of St. Lawrence] is high and entangled NARW have been discovered over the past three years (2016-2018), either in the GSL or elsewhere, carrying gear attributed to Canadian snow crab fisheries. There were at least two known entanglements in 2016, seven in 2017 and at least three in 2018. Since 2016, at least five NARW are considered to have died after being entangled in snow-grab gear.”).

³¹ See Nicholas R. Record et al., *Rapid Climate-Driven Circulation Changes Threaten Conservation of Endangered North Atlantic Right Whales*, OCEANOGRAPHY, Vol. 23, No. 2, 163-67 (June 2019).

Maine have remained low since then. Right whales have adjusted their own behavior as a result, abandoning Gulf of Maine waters in favor of Canada's Gulf of St. Lawrence, where copepods are more plentiful.³²

55. These climate-driven changes threatening the right whale's food supply have pushed the whales into Canadian waters, where they encounter vessel strikes and entanglement by heavy, deep-water snow crab gear. Canadian snow crab gear uses ropes that are significantly heavier and thicker than the ropes used by the Maine lobster fishery, and pose a greater risk to right whales as a result.³³ During the time the Maine lobster fishery has been implementing new protective gear deployment measures, Canada has not implemented similar measures for snow crab gear and is not expected to do so until 2024.³⁴

56. Coinciding with these oceanic and migratory changes, the right whale population

³² See Yvan Simard, *North Atlantic Right Whale Shift to the Gulf of St. Lawrence in 2015, Revealed by Long-term Passive Acoustics*, ENDANGERED SPECIES RESEARCH, 40, 271-284; Kimberly T.A. Davies & Sean W. Brilliant, *Mass Human-Caused Mortality Spurs Federal Action to Protect Endangered North Atlantic Right Whales in Canada*, Vol. 104 MARINE POLICY, 158 (2019); Genevieve E. Davis, *Exploring Movement Patterns and Changing Distribution of Baleen Whales in the Western North Atlantic Using a Decade of Passive Acoustic Data*, GLOBAL CHANGE BIOLOGY, 4813 (May 25, 2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/gcb.15191>.

³³ See Endangered Species Act Section 7 Consultation on the: (a) Authorization of the American Lobster, Atlantic Bluefish, Atlantic Deep-Sea Red Crab, Mackerel/Squid/Butterfish, Monkfish, Northeast Multispecies, Northeast Skate Complex, Spiny Dogfish, Summer Flounder/Scup/Black Sea Bass, and Jonah Crab Fisheries and (b) Implementation of the New England Fishery Management Council's Omnibus Essential Fish Habitat Amendment 2 [Consultation No. GARFO-2017-00031], National Marine Fisheries Service (May 27, 2021), <https://repository.library.noaa.gov/view/noaa/30648> [hereinafter "BiOp"], at 217; Daoust, *supra* note 17, at 16 ("Recent analyses on the effects of snow crab gear entanglement in North Atlantic right whales demonstrate that the extreme weight of snow crab gear inflicts debilitating drag forces upon even healthy individuals.").

³⁴ See *P.E.I. Fishers Welcome Extension on Deadline for Gear to Protect Whales*, CBC NEWS (Jan. 11, 2023), <https://www.cbc.ca/news/canada/prince-edward-island/pei-right-whales-break-free-gear-1.6709434#:~:text=fishing%20community%20are%20welcoming%20DFO's,whale%20escape%20during%20an%20entanglement>.

has experienced an unusually high mortality rate since 2017. During this “unusual mortality event,” an unprecedented number of adult whales have been lost to vessel strikes and fishing gear entanglement.³⁵ Critically, none of the injuries or deaths caused by entanglement during this time have been attributed to Maine lobster gear or the Maine lobster fishery. The right whale population has also experienced a reduction in its calving rate since 2010, which is thought to be linked to the oceanic shift.³⁶

57. Numerous scientists have linked the post-2010 decline in right whale abundance to a spike in right whale serious injuries and mortalities caused by Canadian fishing gear and vessels in Canada’s Gulf of St. Lawrence.³⁷ In 2017 alone, 12 observed right whale mortalities were attributed to Canadian waters due to fishing gear, vessel strikes and unknown causes.³⁸ In 2019, another spike occurred, with 11 observed right whale mortalities occurring in Canadian waters.³⁹

³⁵ See *2017-2023 North Atlantic Right Whale Unusual Mortality Event*, NOAA, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event>; Erin L. Meyer-Gutbrod et al., *Ocean Regime Shift is Driving Collapse of the North Atlantic Right Whale Population*, OCEANOGRAPHY, Vol. 34, No. 3 (2021), <https://tos.org/oceanography/article/ocean-regime-shift-is-driving-collapse-of-the-north-atlantic-right-whale-population>; Record, *supra* note 26; Sean A. Hayes, *North Atlantic Right Whales – Evaluating Their Recovery Challenges in 2018*, NOAA Tech. Memo., (Sep. 2018), <https://repository.library.noaa.gov/view/noaa/19086>.

³⁶ See Meyer-Gutbrod, *supra* note 35.

³⁷ See *id.*; Hayes, *supra* note 35.

³⁸ See Daoust, *supra* note 17; Lindsay Jones, *Boat Strikes, Fishing Gear Behind Right Whale Deaths in Gulf of St. Lawrence: Report*, THE GLOBE AND MAIL, (Oct. 5, 2017), <https://www.theglobeandmail.com/news/national/veterinarians-release-results-from-study-of-north-atlantic-right-whale-deaths/article36499114/>.

³⁹ See Bourque, L., Wimmer, T., Lair, S., Jones, M., Daoust, P.Y. 2020. Incident Report: North Atlantic Right Whale Mortality Event in Eastern Canada, 2019, http://www.cwhc-rcsf.ca/docs/2019%20NARW%20incident%20report_June%202020.pdf.

58. Right whales also face threats from the impacts of ocean noise on their ability to communicate and navigate. Ocean noise from human activities like military sonar, shipping, construction, and energy exploration and development has increased in the Northwest Atlantic, interrupting the normal behavior of right whales and other large whale species, and interfering with their communication. The noise likely reduces their ability to detect and avoid predators and human hazards, navigate, identify physical surroundings, find food, and find mates.⁴⁰ In just the last several months, *twenty-three* whale deaths—sixteen of them humpback whales—were recorded in New York and New Jersey.⁴¹ While these whale deaths did not involve right whales and were not linked to entanglement in fishing gear, they indicate the scope of threats right whales face.⁴²

59. The scientific evidence collected by the U.S. Government, the Government of Canada, and other researchers does not contain a single instance of Maine fishing gear involved in a serious injury or death of a right whale. There are, however, multiple instances of documented serious injuries and mortalities attributed to other commercial fisheries and vessels

⁴⁰ See *North Atlantic Right Whale*, NOAA, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>; Andie Bulman, *The Wrong News About North Atlantic Right Whales: How Human Noise Affects the Animals*, CBC NEWS (Jan. 22, 2023), <https://www.cbc.ca/news/canada/newfoundland-labrador/right-whales-noise-1.6713077>.

⁴¹ See Tracy Tulley and Winston Choi-Schagrin, *Why 23 Dead Whales Have Washed Up on the East Coast Since December*, NY TIMES (Feb. 28, 2023), <https://www.nytimes.com/2023/02/28/nyregion/east-coast-whale-deaths.html>; Brandon Drenon, *14 Whale Deaths Along US East Coast Remain a Mystery*, BBC, <https://www.bbc.com/news/world-us-canada-64375264>.

⁴² See *id.*; Dana Difilippo, *Debate Grows Over Offshore Wind, As Whale Deaths Mount*, NEW JERSEY MONITOR (January 17, 2023), <https://newjerseymonitor.com/2023/01/17/debate-grows-over-offshore-wind-as-whale-deaths-mount/>. Some have linked these recent whale deaths to offshore wind farm development. See Carly Wanna, Jennifer A Dlouhy and Josh Saul, *The \$100 Billion Offshore Wind Industry Has a Whale Problem*, BLOOMBERG (Feb. 18, 2023), <https://www.bloomberg.com/news/articles/2023-02-18/why-are-whales-dying-in-new-jersey-some-blame-wind-farms>.

in the U.S. and Canada. These facts belie the Aquarium's claim that Seafood Watch conducted a rigorous, transparent assessment of all available scientific data.

ii. Appropriate and effective measures are in place in the Maine lobster fishery to protect right whales

60. Despite the Aquarium's statements that the fisheries in its Report have "insufficient measures" that "do not go far enough to mitigate entanglement risks," the data show that the measures implemented in the Maine lobster fishery are not only effective but a model for what a sustainable and environmentally responsible fishery can do.

61. The Take Reduction Plan and other measures implemented in the Maine lobster fishery over the last several decades have achieved their intended purpose of reducing risk to right whales in the increasingly rare circumstance when they migrate through areas fished by Maine's lobster fleet. These measures are continuously modified and improved to adapt to changing circumstances.

62. Beginning from the first right whale protections in 1997, the whale population increased from 295 to 481 in 2011. A population decline was not detected until 2017 with publication of a right whale population model which coincided with the 2017 unusual mortality event.⁴³

63. Since 2009, known entanglements in any U.S. lobster gear have fallen by 90% compared to the prior 13 years. And again, since 2004 there have been no entanglements linked to lobstering gear used in the Maine fishery.

⁴³ See *U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment*, NOAA, https://www.fisheries.noaa.gov/s3/2023-01/Draft%202022%20Atlantic%20SARs_final.pdf.

iii. The Aquarium ignores statistical trends, skews facts, and misrepresents data regarding right whale entanglements while making unfounded assumptions attributing the harm to Maine lobster fishing

64. Data relied upon by the Aquarium and Seafood Watch do not support that Maine lobster fishing practices pose a significant threat to or cause harm to the right whale. In attempting to skew the facts to support its conclusion, the Aquarium disregards the scientific process it claims to follow.

65. First, the Aquarium relies heavily on data regarding *Canadian* entanglements—which are irrelevant to what happens in waters fished by Maine lobstermen. The fact that entanglements have occurred in other locations involving unidentified gear does not mean they are attributable to Maine lobstermen, who use different and safer fishing methods and fish in areas with characteristics not common in other fishing grounds. Canadian snow crab gear is significantly different from gear used by the lobster fisheries, and poses far greater risks due to its rope size, rigging, heavy traps and the absence of weak links.

66. The Aquarium also misuses broad statistics about the existence of *any* documented injuries or deaths in U.S. or Canadian waters to support the specific charge that “each fishery” using vertical lines, including the Maine lobster fishery “is putting [the right whale] at risk of extinction.”⁴⁴ This statement is false as applied to the Maine lobster fishery. It is directly contradicted by NMFS, which attributes the risk of right whale extinction not to Maine lobster gear, but to “[c]urrent conditions that continue to act on the species, like the effect of Canadian fisheries and vessel strikes in the United States and Canada[.]”⁴⁵

⁴⁴ *Seafood Watch responds to misinformation regarding red ratings of Canadian and U.S. fisheries that pose dire risk to the endangered North Atlantic right whale*, Monterey Bay Aquarium (Sept. 16, 2022), <https://www.montereybayaquarium.org/newsroom/press-releases/seafood-watch-responds-to-misinformation-regarding-red-ratings-of-canadian-and-us-fisheries-that-pose-risk-to-endangered-north-atlantic-right-whale>.

⁴⁵ BiOp at 339.

67. The September 5, 2022 Seafood Watch press release states that “[m]ore than 90% of *entanglements cannot be linked to a specific gear type, and only 12% of entanglements can be linked to a specific location.*” Even so, the Aquarium ignored these facts, concluding, “Until there is more evidence, *all of the fisheries* using this gear are considered a risk.” Ex. 1. The Aquarium’s inference defies logic or common sense; and more critically here, lacks any scientific support. The gear used in the Maine lobster fishery is distinguishable from other gear, such as the kind used to catch snow crab in Canadian waters. If Maine lobster gear actually posed a risk of entanglement for right whales, the gear would surely have been identified in at least one of the entanglements since 2004. There is no basis for the Aquarium’s assumption that unidentified gear should be attributed to “all fisheries” using vertical lines.

68. The Aquarium concedes, “Due to a lack of information, it is often not possible to assign entanglements to a specific fishery.” Nonetheless, the Aquarium concludes, “**Documented entanglements from 2015 to 2019 involving pot/trap gear or unidentified gear are all attributed to unknown fisheries, of which the lobster fishery may be a part.**” Ex. 2 at p. 39 (emphasis added). This is not “science”; it is conjecture: There is no evidence supporting the Aquarium’s statements about the Maine lobster fishery.

69. The Aquarium’s Report acknowledges that Seafood Watch relies on data regarding entanglements that are “unattributed” to any particular fishery, but then asserts that, until more specific information is available, it considers that “all relevant fisheries that *may* overlap with [the North American right whale] pose risks.” (emphasis added). *Id.* at p. 41. In other words, the Aquarium’s “red” rating was based on naked guesswork that all lobster fisheries on the North American east coast are responsible for the unattributed entanglements. There is ample evidence that right whales spend significant amounts of time in parts of their habitat where the risk of entanglement is well documented, *e.g.*, the Gulf of St. Lawrence and areas of Cape

Cod Bay, where whales are known to aggregate at times when their behavior increases the risk of entanglement. The federal Take Reduction Plan and the State of Massachusetts have implemented seasonal closures to address the higher risk posed in these areas. The Canadian fisheries in the Gulf of St. Lawrence have yet to implement similarly effective whale protective measures. In light of these and other well-known areas of heightened risk for right whales in specific parts of its habitat, it is false, misleading and negligent for the Aquarium to represent to consumers and businesses that its “red” rating for the Gulf of Maine, for which there is no comparable record of entanglement risk, was based on a rigorous scientific assessment.

70. The Aquarium’s Report also acknowledges that entanglement in fishing gear is only one of several factors likely contributing to the decline in the right whale population, along with “climate-related shifts in prey distribution, anthropogenic noise, pollution, [and] vessel strikes,” and that the cause of the decrease in the right whale’s population since 2011 “is unknown.” Ex. 2 at p. 39.

71. The Aquarium admits that there has been a northward distributional shift in recent years with the right whale’s presence “decreased in the Scotian Shelf and greater Gulf of Maine.” Ex. 2 at p. 41. In fact, the whales have shown “increased presence farther north in the Gulf of St. Lawrence.” *Id.* These data have been linked to the high rate of mortalities caused by Canadian snow crab gear.⁴⁶ The Aquarium ignores this evidence when assigning blame to Maine lobster fishing practices.

72. Finally, the Aquarium cites outdated studies that support its conclusion while failing to incorporate recent facts demonstrating a significant reduction in the potential harm posed to right whales by lobster fishing.

73. The Aquarium’s Report claims, “Rope strengths have increased in recent decades

⁴⁶ See Meyer-Gutbrod, *supra* note 28.

(based on data from 1994 to 2010), leading to reduced escape success from entangling gear.” *Id.* at p. 40. This *omits all data from the last 13 years* and disregards the implementation in the Maine lobster fishery of “break-aways” or “weak-links” in ropes, which allow entangled whales to break free. Indeed, the Aquarium had all of the 1994-2010 data available to it in 2014, when Seafood Watch assigned a benign “yellow” rating to Maine-caught lobster.

74. When it does acknowledge proactive measures taken to protect right whales, the Aquarium finds reasons to disregard such data. For example, the Report states, “Sinking groundline (2009) and vertical line (2015) regulations have been implemented, resulting in gear configuration changes *for which the effects on mitigation of whale entanglement have yet to be determined.*” *Id.* at 40 (emphasis added). The Aquarium does not adjust its calculations and estimates based on implementation of these harm-reduction measures to provide a rigorous scientific assessment of the effects of mitigation measures on risk to whales.

75. The Aquarium’s disregard for fact-driven analysis and its arbitrary treatment of data to suit its false narrative demonstrate the falsity of its assertions that “scientific data” show that Maine lobster fishing practices threaten North Atlantic right whales with extinction.

iv. The Aquarium ignored requests by Plaintiffs to retract or provide factual support for its false statements.

76. MLA learned around February 2020 that the Aquarium intended to downgrade its rating of American lobster. MLA and other interested parties reached out to the Aquarium repeatedly throughout that year to set the record straight and provided detailed scientific evidence demonstrating the falsity of the claims the Aquarium had made in unreleased draft reports. In multiple meetings and emails between June and September 2020, MLA provided the Aquarium with data showing, inter alia, that Maine lobster fishing was not the cause of right whale entanglements, that there had been a dramatic increase in entanglements in Canadian waters, that ropes being found on entangled whales were wider than those used in Maine, and

that ongoing measures had been implemented to drastically reduce the amount of rope in Maine waters. MLA continued these efforts in 2021 and 2022 and warned the Aquarium that publication of its false claims would mislead consumers about the Maine lobster fishery's impact on right whale mortalities and injuries. Nevertheless, the Aquarium ignored these appeals to the truth and insisted on promoting its unscientific conclusions.

77. On December 1, 2022, Plaintiffs, through their counsel, sent a cease-and-desist letter to the Aquarium demanding that the Aquarium remove Maine lobster from the "red" list and remove or retract all statements claiming that Maine lobster fishing endangers or harms the right whales. (**Exhibit 3**). Plaintiffs described the harm these statements caused and would continue to cause if not removed.

78. On December 9, 2022, the Aquarium's counsel responded that the Aquarium would not retract its statements. (**Exhibit 4**).

79. On December 15, 2022, Plaintiffs' counsel sent a follow-up letter to the Aquarium's counsel, asking that the Aquarium identify any scientific data or other facts that would support the Aquarium's statements about Maine lobster fishing practices. On December 17, 2022, the Aquarium's counsel responded that they would not do so. (**Exhibit 5**).

E. The Aquarium, by Knowingly Making These False Statements, Intentionally Caused Harm to the Maine Lobster Industry, and Plaintiffs in Particular.

80. Seafood Watch's powerful platform influences the commercial decisions of thousands of restaurants, stores, distributors, and other major purchasers of seafood, many of which have pledged to avoid any items that appear on the Seafood Watch "red" list.

81. Decisions to denounce certain products by certification programs like Seafood Watch have immediate and drastic impacts on the market. For example, following a 2013 red-listing by Seafood Watch, around 13,000 restaurants and stores across the U.S. that had made

“sustainability commitments” refused to sell Louisiana shrimp.⁴⁷

82. Based on the publication of the Aquarium’s false statements, several large commercial buyers have announced plans to stop selling Maine lobster,⁴⁸ and there are reports that large restaurant chains are in the process of removing Maine lobster from their menus because of the “red” listing.

83. Plaintiffs have suffered harm as a result, including lost income. As one example, Atwood lost significant profits when one of its major purchasers, citing the Aquarium’s “red” listing, announced in November 2022 that it would stop buying lobster caught in the Gulf of Maine. Atwood has been paying premiums to the lobstermen who catch and supply specifically for this purchaser, because the purchaser requires strict quality control measures that add to the lobstermen’s costs. This premium was originally ten cents more per pound of lobster caught, and increased to fifteen cents per pound on July 1, 2022. In 2022, Atwood paid \$153,194 in these premiums, which were then offset by revenues from the purchaser. Atwood has had to continue paying these premiums even after the purchaser decided to stop buying Atwood’s lobster. Without the purchaser’s business, Atwood has lost and will continue to lose significant revenue to offset the premiums. In 2023, Atwood is projected to pay \$156,965 in premiums, none of which will be recouped from sales to the purchaser. Atwood has suffered a loss of past and future profits in excess of \$75,000.

84. Seafood Watch’s ratings and recommendations also impact the market through their influence on public opinion and consumer choices. The “red” rating of Maine lobster and

⁴⁷ See Benjamin Alexander-Bloch, *Seafood Watch removes Louisiana shrimp from ‘avoid’ list*, NOLA.COM (Jul. 2, 2015), https://www.nola.com/news/environment/article_bd2bfbdd-f131-5c98-aa54-09b61f6bf9f7.html.

⁴⁸ See *Retailers Pull Lobsters From Menus After ‘Red List’ Warning*, NBC NEWS (Sept. 8, 2022), <https://www.nbcnews.com/news/us-news/retailers-pull-lobster-menus-red-list-warning-rcna46886>.

the Aquarium's statements supporting that rating have damaged the Maine lobster brand. They have caused a significant decrease in consumer demand for Maine lobster and, as a result, economic harm to Maine lobstermen. According to the Maine Department of Marine Resources, the average per-pound price of lobster in Maine between September and December 2022 was \$3.89, compared with \$6.59 for the same period in 2021.⁴⁹ At least part of this roughly 40% decline in price is the result of the Aquarium's statements and their influence on consumer and business decisions.

85. Because of the "red" rating, Gerald R. Cushman, the owner of Bug Catcher, has seen an estimated 20% decline in his business, which had made roughly \$600,000 in sales in 2021. Bug Catcher has suffered a loss of past and future profits in excess of \$75,000.

86. BML has suffered lost profits in excess of \$75,000 due to the sharp decline in demand for Maine lobster caused by the Aquarium's statements.

87. MLA has suffered losses in excess of \$75,000 as a result of the Aquarium's false and defamatory statements.

88. MCFA has suffered losses in excess of \$75,000 as a result of the Aquarium's false and defamatory statements.

89. The Aquarium's decisions are thus causing economic harm to Plaintiffs and thousands of people involved in the Maine lobster industry.

90. Each Plaintiff has also suffered ongoing reputational harm, loss of good will, and loss to the brand value of Maine lobster as a result of the Aquarium's defamatory statements, for which Plaintiffs seek injunctive relief. The value to each Plaintiff of the Maine lobster brand, the industry's reputation for sustainable practices and goodwill is substantial, and each Plaintiff will

⁴⁹ See *2004-2022 Maine Commercial Lobster Landings as of 2/22/2023*, Maine Department of Marine Resources, <https://www.maine.gov/dmr/sites/maine.gov/dmr/files/inline-files/LobByCntyMoZone.pdf>.

suffer ongoing harm absent an injunction ordering the Aquarium to remove and retract any and all defamatory statements. The value of such injunctive relief to each Plaintiff exceeds \$75,000.

91. This harm is intentional. When the Aquarium released its updated recommendations and announced that businesses and consumers should avoid buying Maine lobster based on supposed harm to the right whales, it was in possession of scientific data contradicting its claims. There is no evidence that Maine lobster fishing is harming right whales, and the Aquarium does not cite a *single instance* of a right whale being killed, entangled, injured, or otherwise harmed by Maine lobster gear since 2004.

92. The Aquarium thus acted with malice, or alternatively, recklessly, negligently, or with disregard as to the falsity of its statements.

CAUSE OF ACTION – DEFAMATION

93. Plaintiffs incorporate by reference and reassert the allegations in the preceding paragraphs of the Complaint.

94. As set forth herein, Defendants knowingly and intentionally published false and injurious statements disparaging Plaintiffs' products and business, including, among other things, that commercial lobster fishing practices in the Gulf of Maine cause death and serious injury to North Atlantic right whales. Those statements include:

- (a) "At this time, each fishery using this gear is putting this protected species [*i.e.*, the right whale] at risk of extinction."
- (b) "No one wants to know their appetite for seafood is driving a species to extinction."
- (c) "The seafood [rated Avoid] is caught or farmed in ways that harm other marine life or the environment. There's a critical conservation concern or many issues need substantial improvement."

- (d) “[M]anagement measures and the Atlantic Large Whale Take Reduction Plan have not been successful at reducing serious injury and mortality to the North Atlantic right whale[.]”
- (e) “Based on the available information and the significant risks to NARW, the American lobster fishery cannot be considered sustainable.”
- (f) “The updated assessments highlight significant risks of entanglement in pot, trap, and gillnet fisheries to the endangered North Atlantic right whale and the lack of timely, effective management necessary to mitigate entanglement risks and promote recovery of the species.”
- (g) That Seafood Watch reviewed “all available scientific data” and followed a “rigorous, transparent, science-based process to evaluate” the Maine lobster fishery.
- (h) “According to Seafood Watch standards, when fisheries pose a high risk of harm to marine life or the environment and appropriate management measures are not in place, they are assigned a red rating.”
- (i) That consumers should “avoid” and “take a pass” on purchasing lobster and lobster products caught in the Gulf of Maine/Georges Bank region on the basis of these false statements.

95. This is not a situation where the Aquarium merely expressed an opinion regarding the Maine lobster fishery. The totality of these statements, in context, amounts to a representation that the average reader would understand to mean (a) that Maine lobster gear has caused and continues to cause harm to the North Atlantic right whale population that is pushing them to the brink of extinction; (b) that recent increases in right whale mortality have been due to Maine lobster gear; (c) that despite changes in its practices to further prevent entanglements, the

Maine lobster fishery is now endangering the right whale more than it did in 2014 when Seafood Watch rated assigned a “yellow” rating to Maine lobster; and (d) that a general scientific consensus exists on all of these points. The Aquarium has thus knowingly implied an assertion of objective facts about the Maine lobster industry that are verifiably false, and which have caused real economic harm.

96. By assigning the Gulf of Maine/Georges Bank region a “red” rating and urging the public to avoid seafood caught there, the Aquarium has targeted the Maine lobster fishery, despite the absence of any data showing serious injuries or deaths of right whales caused by entanglement with Maine lobster gear. The Aquarium knowingly communicated to the public that “each fishery” using vertical lines was placing the right whale at risk of extinction. In doing so, it specifically assigned responsibility to the Maine lobster industry for events in separate geographic locations and involving entirely different fishing practices. As a result, the Aquarium has steered consumers and businesses to factual conclusions that are false. Falling prices and decisions by large buyers to cut off lobster purchases confirm this.

97. Plaintiffs, and the individuals they employ and represent, depend on the reputation of the Maine lobster brand and robust markets for Maine-caught lobster.

98. The Aquarium’s defamatory statements to customers and prospective customers of Plaintiffs have caused Plaintiffs to lose business.

99. The Aquarium was aware that its statements set forth above were false or made these statements recklessly, negligently, or with disregard as to the falsity of the statements.

100. These statements by the Aquarium set forth above were made with the intent of influencing those who would consume lobster, including customers and business partners upon whom the Plaintiffs rely for commerce. Thousands of businesses, including seafood wholesalers, retailers, distributors, and restaurants use Seafood Watch’s recommendations to

inform their buying decisions, as do individual consumers.

101. The Aquarium's statements were false and were made available to the public through its reports and press releases, which were picked up widely by national media outlets. The statements specifically directed the audience to avoid purchasing Maine-caught lobster.

102. While the Aquarium expressly represented that its statements were based on science, it was not true. Instead, the Aquarium significantly misrepresented actual data, which provide no evidence that any right whale has been entangled in Maine lobster gear in nearly 20 years. By at least 2014 and continuing through September 5, 2022, the Aquarium had assigned a yellow rating to Maine-caught lobsters, telling the public that they were a "good alternative". There was no new "scientific data" available in September 2022 that would warrant the significant change from a "good alternative" rating for Maine-caught lobsters to a red "avoid" warning.

103. The Aquarium used its highly influential Seafood Watch platform to disparage Plaintiffs' business practices. Specifically, Defendant misrepresented statistics and conflated data about unrelated fishing practices in regions other than Maine to unfairly portray the Maine lobster fishery as environmentally unsustainable and as harmful to the right whale population.

104. The statements by the Aquarium set forth above were made with intent to damage Plaintiff's reputation and did in fact do so.

105. The statements by the Aquarium as set forth above were made with the intent of influencing Plaintiffs' existing and potential business relationships.

106. When the Aquarium made the statements, it was aware that the statements were false or made the statements recklessly, negligently, or with disregard as to their falsity. In particular, the Aquarium knew or should have known that there were no data supporting its statements linking death or harm to right whales to Maine lobster fishing practices. The

Aquarium was notified well before publication of their statements by MLA and other parties that the available scientific data did not support its statements.

107. The Aquarium's statements were defamatory *per se* because they were intended to—and did—injure the Plaintiffs in their occupation or profession.

108. The Aquarium's statements also caused damages to Plaintiffs in the form of lost business. As examples of the harm being inflicted on the multi-generational, family businesses that make up the Maine lobster industry, as alleged above, Atwood and Bug Catcher and incurring ongoing business losses directly traceable to the cancellation of contracts by companies who followed the Aquarium's malicious libel by ceasing purchases of Maine lobster. As time passes, these losses are continuing to accumulate.

109. As a direct and proximate result of Defendants' intentional, willful, and malicious acts in publishing false and defamatory statements, each Plaintiff has suffered a significant loss of income in excess of \$75,000, which entitles Plaintiffs to damages.

110. Plaintiffs also seek an injunction ordering the Aquarium to remove and retract any and all defamatory statements from its website and other locations where those statements are published.

111. Continued publication of the Aquarium's defamatory statements constitutes an ongoing violation of Plaintiffs' rights and will cause irreparable harm to Plaintiffs' reputation and to the brand value of Maine lobster that cannot be adequately compensated for by monetary damages, or for which compensation cannot accurately be measured. The value to each plaintiff of the Maine lobster brand, the industry's reputation for sustainable practices and goodwill is substantial. Each Plaintiff will suffer ongoing harm absent an injunction ordering the Aquarium to remove and retract any and all defamatory statements. The value of this injunctive relief to each Plaintiff exceeds \$75,000.

112. The Aquarium is capable of removing any and all false and defamatory statements from its websites and published material without undue burden. An injunction will not cause harm to the Aquarium, or in the alternative, any harm to the Aquarium caused by an injunction is substantially outweighed by the harm Plaintiffs will suffer in the absence of the injunction.

113. Issuance of this injunction would serve the public interest of the State of Maine, whose signature industry has been defamed. Alternatively, issuance of the injunction will not adversely impact the public interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

- a. Judgment in Plaintiffs' favor on their defamation claim against Defendant;
- b. An injunction requiring Defendant to remove from its websites and other published material all defamatory statements concerning the Maine lobster industry and its fishing practices;
- c. An award of money damages in Plaintiffs' favor, including but not limited to the value of all business Plaintiffs have lost or will lose in the future as a result of Defendant's defamatory statements;
- d. An award of Plaintiffs' reasonable attorney's fees and court costs in an amount to be determined by the Court;
- e. An award of punitive damages; and
- f. Any other relief as the Court deems proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury of all issues so triable.

Dated: Portland, Maine

March 13, 2023

ROACH RUPRECHT SANCHEZ & BISCHOFF P.C.

By: */s/ Clifford Ruprecht*

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