No. 24-1734

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELIZA WILLE; LISA DENNING,

Plaintiffs – Appellants,

and

SHELLEY CAREY,

Plaintiff,

v.

GINA M. RAIMONDO, in her official capacity as Secretary of Commerce; NATIONAL MARINE FISHERIES SERVICE; RICHARD SPINRAD, in his official capacity as Administrator of the National Oceanic and Atmospheric Administration; JANET COIT, in her official capacity as Assistant Administrator for Fisheries,

Defendants – Appellees.

On Appeal from the United States District Court
for the District of Maryland
Honorable Brendan A. Hurson, District Judge (8:22-cv-00689-BAH)

APPELLANTS' OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 24-1734 Caption: Eliza Wille v. Gina M. Raimondo

Pursuant to FRAP 26.1 and Local Rule 26.1,

Eliza Wille and Lisa Denning
(name of party/amicus)

who is Appellants, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Michael Poon Date: 10/7/2024

Counsel for: Appellants

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction); *id*. § 2201 (authorizing declaratory relief); *id*. § 2202 (authorizing injunctive relief); and 5 U.S.C. §§ 701–06 (judicial review provisions of the Administrative Procedure Act).

The Court of Appeals has jurisdiction under 28 U.S.C. § 1291, because this is an appeal from the District Court's final judgment.

The appeal is timely, because the notice of appeal was filed on August 2, 2024, 59 days after the District Court's final judgment on June 4, 2024.

STATEMENT OF ISSUES

1. Whether any statute authorizes the NOAA Administrator to ratify a rulemaking issued in violation of the Appointments Clause.
2. If any statute authorizes the NOAA Administrator to ratify a rulemaking issued in violation of the Appointments Clause, whether that statute authorizes a ratification that postdates Plaintiffs' suit.
3. If the NOAA Administrator's ratification is otherwise valid, whether it cures the Appointments Clause violation.

STATEMENT OF THE CASE

I. Spinner Dolphins, Plaintiffs, and the Approach Rule

Hawaiian spinner dolphins are abundant and playful animals that often seek out human encounters in nearshore waters. National Marine Fisheries Service, Final Environmental Impact Statement and Regulatory Impact Review 86 (June 2021).[1] These dolphins are not threatened or endangered, being "common and abundant throughout the entire Hawaiian Archipelago." *Id.* at 82.

These gregarious animals were at the center of Plaintiffs' lives. Appellant Eliza Wille is a psychotherapist who incorporated dolphin encounters into her practice as a form of experiential therapy for her patients. JA249. Experiential therapy is a well-known category of psychotherapy that includes nature and equine therapy: clients are placed clients in unfamiliar situations to evoke emotions that may be difficult to elicit in a traditional talk-therapy setting. As a marine mammal naturalist, Appellant Lisa Denning guided members of the public in respectful encounters with spinner dolphins and supplemented her income with ocean photography and videography featuring spinner dolphins. JA249–250. She also co-founded the nonprofit Light ON Foundation to help survivors of sexual assault and

[1] https://media.fisheries.noaa.gov/2021-07/enhancing-protections-for-hawaiian-spinner-dolphins-feis-508.pdf. As explained below, summary judgment was bifurcated such that the government has not yet produced the administrative record for the regulation at issue.

domestic violence overcome their traumas with free therapy, primarily dolphin-based experiential therapy. JA11.

This fruitful and mutually beneficial relationship between humans and dolphins was destroyed in September 2021, when a regulation, issued under the Marine Mammal Protection Act ("MMPA"), forbade people and dolphins from swimming together. *Swim With and Approach Regulation for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act*, 86 Fed. Reg. 53,818 (Sept. 28, 2021) ("Rule" or "Approach Rule").

The Rule's preamble admits that there is no "clear evidence of population decline or adverse biological impacts" from spinner dolphins swimming with people. *Id.* at 53,824. However, the Rule determined that dolphins should expend their energy on eating or caring for their young instead of swimming with people. 86 Fed. Reg. at 53,819. To protect dolphins from their own desire to interact with humans, the Rule not only forbids people from approaching spinner dolphins, it also requires people to swim away from approaching spinner dolphins. *Id.* at 53,841. Failure to do so is a federal crime punishable by a year in prison and a $20,000 fine, 16 U.S.C. § 1375(b), as well as a $35,574 civil penalty, 15 C.F.R. § 6.3(f)(11).

II. The Delegations and Agency Officials

Congress entrusted the Secretary of Commerce ("Secretary") with rulemaking authority under the MMPA. 16 U.S.C. §§ 1373(a), 1382(a). But the Secretary of

Commerce did not issue the Rule. Instead, through a series of three delegations, the MMPA's rulemaking power landed in the hands of a career employee.

First, under departmental delegations, the Secretary of Commerce passed enormous portions of her power to the NOAA Administrator. *See* JA189–196. The NOAA Administrator then redelegated his power under 64 separate statutes to the Assistant Administrator for Fisheries, who heads the National Marine Fisheries Service ("NMFS"), a component agency of NOAA. JA201–204. Among these 64 statutes are consequential authorities such as the Marine Mammal Protection Act, the Endangered Species Act, and the Fish and Wildlife Act. JA202. Finally, the Assistant Administrator redelegated to her top regulatory official, the Deputy Assistant Administrator for Regulatory Programs, the power to publish rules and other materials under these statutes in the Federal Register and the Code of Federal Regulations. JA204.

Richard Spinrad is the NOAA Administrator, a Senate-confirmed position. The Assistant Administrator for Fisheries is Janet Coit, who was appointed by the Secretary. Reorganization Plan No. 4 of 1970 § 2(e)(1). Samuel Rauch is the Deputy Assistant Administrator for Regulatory Programs ("DAARP"), one of three senior career positions within NMFS that report to the Assistant Administrator. JA15–16. As a career official, Rauch was hired through the civil-service staffing process.

JA16. Rauch was responsible for issuing the Approach Rule challenged in this case. JA16; *see* 86 Fed. Reg. at 53,841 (signature of the Rule).

III. The Appointments Clause

The Appointments Clause is "among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997). At the time of the Founding, one of the great causes of arbitrary governance was the English monarch's uncontrolled appointment of officers who then wielded tremendous power against the people. This "power of appointments to offices was deemed the most insidious and powerful weapon of eighteenth century despotism," *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609, 655 (4th Cir. 2013) (simplified), to such a degree that its abuse was listed among the grievances in the Declaration of Independence, The Declaration of Independence (U.S. 1776) ("He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.").

To guard against unaccountable officials, the new nation adopted the Appointments Clause. As construed by the Supreme Court, the Clause requires that positions with "significant authority"—called "Officers of the United States"—must be filled by presidential nomination and Senate confirmation, except that Congress may by law vest the appointment of "inferior" officers in the President alone, the courts of law, or the heads of departments. *Buckley v. Valeo*, 424 U.S. 1, 126, 132

(1976) (per curiam). These procedures ensure officers' "accountab[ility] to political force and the will of the people." *Enterprise Leasing*, 722 F.3d at 655 (simplified). Among the significant powers that only a properly appointed officer may exercise is "rulemaking." *Buckley*, 424 U.S. at 140–41.

The Appointments Clause distinguishes between non-inferior (commonly called principal) officers and inferior officers. Principal officers must be Senate-confirmed, but inferior officers may, if Congress provides, be appointed by the President, a head of department, or a court. U.S. Const. art. II, § 2, cl. 2. Both wield significant authority, but an officer may be appointed as an inferior officer if he "is directed and supervised" by a Senate-confirmed official. *Edmond*, 520 U.S. at 663. Whether the officer is so directed and supervised turns on three kinds of control: whether a Senate-confirmed official (1) exercises "administrative oversight" over the officer, (2) may remove the officer without cause, and (3) "could review the [officer's] decisions" before they become final. *United States v. Arthrex, Inc.*, 594 U.S. 1, 13–14, 16–17 (2021). *Arthrex* singled out the third factor for special treatment: review is not just one factor to be considered but is instead a requirement for inferior-officer status. In other words, if an official can make a decision that cannot be reviewed by another in the Executive Branch, he must be Senate-confirmed as a principal officer. *Id.* at 14–16. Accordingly, because rulemaking is a

final action unreviewable in the Executive Branch, only a Senate-confirmed principal officer may make rules.

When an individual's selection does not conform to the Appointments Clause, his "appointment . . . to office is deficient," and he acts only "under the color of official title." *Ryder v. United States*, 515 U.S. 177, 180 (1995). As a result, he "lack[s] the authority to carry out the functions of the office" and his actions are "void." *Collins v. Yellen*, 594 U.S. 220, 258 (2021) (contrasting appointment claims with removal claims).

IV. The District Court Proceedings

In March 2021, Plaintiffs filed suit to restore their respectful, productive relationship with spinner dolphins and to ensure that they will be governed by constitutionally qualified regulators. They brought two claims and sought declaratory and injunctive relief. Plaintiffs' first claim alleged that the Rule had been promulgated in violation of the Constitution, because Rauch issued the Rule but had not been properly appointed under the Appointments Clause. *See* JA22–25 (first cause of action). As a result, he lacked the power to issue the Rule and the Rule was void. Moreover, Plaintiffs alleged that the Rule was void even if Rauch had issued the Rule at Coit's direction, because Coit had not been Senate-confirmed to her position.

The second claim alleged that the delegations that enabled Rauch to issue the Rule—specifically, the Administrator's delegations to the Assistant Administrator and the Assistant Administrator's delegations to the DAARP—violated the Appointments Clause because they delegated power reserved for principal officers to officials who were not Senate-confirmed. *See* JA25–27 (second cause of action).

In July 2022, Administrator Spinrad, recognizing that "[q]uestions have been raised in litigation concerning the authority of . . . officials to issue the Approach Rule" and seeking to "remove any doubt as to its validity," issued a ratification of the Rule's promulgation. JA244. He did not revoke his Appointments Clause–violating delegations, which continue in force. The government then moved to dismiss Plaintiffs' complaint, arguing that the ratification defeated Plaintiffs' Claim 1 on the merits and left the District Court without jurisdiction to resolve Claim 2. Dist. Ct. ECF No. 12.

The District Court held a hearing on the government's motion to dismiss and opted to resolve the issue of ratification on summary judgment. JA91. The court therefore denied the motion to dismiss and ordered summary judgment to be bifurcated. Ratification was to be resolved first and other issues, including the merits of the Appointments Clause claims, were to be resolved only if Plaintiffs prevailed on the issue of ratification. *See* JA82. The court ordered the government to produce an administrative record limited to the ratification, JA91, 96; *see* Dist. Ct. ECF

No. 29, with the full administrative record for the Rule to be produced only if the case reached the second stage of summary judgment.

Pursuant to the court's order, the government moved for summary judgment based on Spinrad's ratification. The motion was briefed, and on June 3, 2024, the District Court issued an order granting summary judgment to the government and entering final judgment. JA246. As relevant to this appeal, the District Court held that Spinrad's ratification was statutorily authorized and not disallowed by common-law principles incorporated by statute. Plaintiffs filed a timely appeal. JA266. Due to the bifurcation, the only issue on appeal is the validity and effectiveness of the ratification.

SUMMARY OF ARGUMENT

The government claims that Administrator Spinrad's ratification cured any constitutional defect in the Approach Rule's promulgation and left the courts powerless to review his delegations, requiring judgment for the government. The District Court agreed, but this Court should reverse for any of three reasons.

First, no statute authorized Spinrad to ratify an MMPA rulemaking. It is bedrock administrative law that agency officials have no power except that given to them by statute. And the Supreme Court has held that, due to the law's longstanding distrust of retroactivity, statutes authorize retroactive agency action only when they do so expressly. By definition, ratification is retroactive, a point unanimously

recognized by courts from ancient Rome to now. Therefore, ratification is authorized only by means of a statute's clear statement. No such clear statement supports Spinrad's ratification, which is therefore *ultra vires*.

Second, even if a statute authorized Spinrad's ratification, the ratification is ineffective because Spinrad ratified after Plaintiffs filed suit. Congress is presumed to incorporate common-law principles when it adopts a common-law concept like ratification. Thus, any statute that authorizes ratification incorporates relevant common-law principles unless Congress directs otherwise. One such principle is a timing rule, which the Supreme Court explicitly applied as recently as 1994. Under the timing rule, ratifications are permitted only if they are made before, *inter alia*, a suit is brought against the act to be ratified. Late ratifications, especially if made to destroy the cause of action, are inequitable and are not to be given effect. Because any statutory authority for Spinrad's ratification would incorporate the timing rule, such authority would permit only timely ratifications. Spinrad's ratification is not timely, because it postdates Plaintiffs' suit. Indeed, it was made specifically to destroy Plaintiffs' causes of action and deprive the courts of jurisdiction to hear them. Thus, even if a statute authorizes ratification of MMPA rulemakings, it does not authorize Spinrad's ratification, which is therefore *ultra vires*.

Third, Spinrad's ratification suffers from the same constitutional defect as the challenged delegations. It is settled law that the effect of ratification is to provide

authority for a prior act. Here, Spinrad, by ratifying, purportedly authorized Rauch to issue the Approach Rule. But this only repeats the delegations through which Spinrad had already authorized Rauch to issue the Approach Rule and other MMPA rules. The ratification therefore is as defective as the delegations: the Appointments Clause forbids authorizing an official who is not Senate-confirmed to make rules. Further, even if the ratification were (incorrectly) considered to *direct* Spinrad to issue the Rule instead of *authorizing* him to do so, the ratification would still not cure the Rule's constitutional defect. Although in carrying out Spinrad's direction, Rauch would not be exercising a significant power, he still would possess significant authorities under the still-extant delegations. The Supreme Court has held that an official who possesses significant authority must be properly appointed even for purposes of carrying out non-significant duties. Rauch's delegated powers mean that he was not properly appointed even when taking non-significant actions, including *arguendo* carrying out Spinrad's direction to issue the Rule. Thus, the ratification would not cure Rauch's defective appointment or his void actions in promulgating the Rule.

The Court should reverse because Plaintiffs are right on the law, but it should also consider the context of the ratification. Spinrad ratified the Approach Rule but kept in place his delegations, which the government argues are—because of the ratification—now beyond the judiciary's power to review. If the Court permits this

tactic, policies like Spinrad's delegations will be immunized from review and the Executive Branch will become riddled with persistent violations of the Appointments Clause. That provision of the Constitution would become a dead letter, along with its promise of accountable governance.

ARGUMENT

I. Standard of Review

This Court reviews a grant of summary judgment de novo. *See Franklin v. City of Charlotte*, 64 F.4th 519, 529 (4th Cir. 2023). In reviewing the decision, the Court views all facts and reasonable inferences in the light most favorable to the nonmovants—here, Plaintiffs. *See Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 817 (4th Cir. 1995).

In judicial review of an agency decision, there typically are few facts in dispute because adjudication takes place on the administrative record. However, the District Court below bifurcated summary judgment between the issue of ratification and the merits of Plaintiffs' constitutional claims, and directed that the ratification issue be decided first. JA58 (transcript) (District Court stating "we're going to do the ratification question first"). It therefore permitted the government to produce, at the first stage of summary judgment, only "an administrative record for the July 8, 2022 ratification, and not produce the entire administrative record for the [Approach Rule]." JA96; *see* Dist. Ct. ECF No. 29 (order). The ratification's record amounted

to nine documents and did not show whether Rauch issued the Approach Rule of his own accord or whether he was acting at Coit's direction. *See* JA95 (list of record items).

Plaintiffs do not believe that the ratification analysis is affected by whether Rauch or Coit approved the Approach Rule, the government agrees, Dist. Ct. ECF No. 12-1 at 6 n.2, and the District Court's judgment did not turn on this question.[2] Plaintiffs therefore will refer to Rauch as the issuer of the Approach Rule, consistent with their complaint's allegations and his signature of the regulation. But if the Court believes that this issue affects the ratification analysis, it should draw all inferences in favor of Plaintiffs as the nonmovants and, to the extent it becomes a material fact, reverse the District Court's grant of summary judgment. Fed. R. Civ. P. 56(a) (permitting summary judgment if "there is no genuine dispute as to any material fact"). The issue would then be resolved at the second stage of summary judgment, when the government is expected to produce the full administrative record, which would show whether Rauch or Coit was ultimately behind the Approach Rule. *See* 5 U.S.C. § 706 (requiring that adjudication be on the "whole record").

[2] This is because the ratification analysis in this bifurcated proceeding assumes that the Rule was promulgated in violation of the Appointments Clause, regardless of the identity of the Clause-violating official.

II. No statutory authority supports Spinrad's ratification.

It is a fundamental principle of administrative law that an agency, including its officials, "literally has no power to act . . . unless and until Congress authorizes it to do so by statute." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 301 (2022) (simplified). Agencies "are creatures of statute" and "accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022). Thus, "if there is no statute conferring authority, a federal agency has none." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). The office of the NOAA Administrator, like other agency positions, "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Id.*

No part of the MMPA authorizes the NOAA Administrator (or the Secretary of Commerce from whom the Administrator receives his delegated powers) to ratify the issuance of the Approach Rule. Ratification must be authorized by a clear statement in the MMPA because ratification is retroactive, and Congress only vests retroactive powers in agencies when it does so expressly. No such clear statement exists, and Spinrad's ratification is therefore *ultra vires*. Accordingly, the ratification does not cure the defective issuance of the Approach Rule, and the Court should reverse so that the District Court may decide the merits of Plaintiffs' claims.

A. Retroactive powers must be expressly granted.

"The law disfavors retroactivity," *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 176–77 (4th Cir. 2010), and this disapproval is "as ancient as the law itself." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 n.17 (1994) (quoting *Dash v. Van Kleeck*, 7 Johns. 477, 503 (N.Y. 1811)). A retroactive act is one that "attaches new legal consequences to events completed before its enactment." *Gonzalez v. Cuccinelli*, 985 F.3d 357, 372 (4th Cir. 2021) (quoting *INS v. St. Cyr*, 533 U.S. 289, 321 (2001)). Such government action "neither accord[s] with sound legislation nor with the fundamental principles of the social compact." *E. Enters. v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring) (quoting 2 Joseph L. Story, *Commentaries on the Constitution* § 1398 (5th ed. 1891)). Our legal tradition thus regards retroactivity with "a singular distrust." *Id.*

This disapproval has found expression in various doctrines. Some constitutional doctrines prohibit certain forms of retroactivity, although those are not relevant to this case. *E.g.*, *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 283 (4th Cir. 2004) (discussing "constitutionally impermissible" retroactivity). The Supreme Court has also adopted two rules of statutory interpretation that limit retroactivity, only the second of which applies here.

The first rule concerns whether to "appl[y] the law in effect at the time the [relevant] conduct occurred, or at the time of [the court's] decision," *i.e.*, when to

apply a new statute or regulation retroactively to prior conduct. *Landgraf*, 511 U.S. at 250; *see, e.g.*, *Gonzalez*, 985 F.3d 357. That rule is the subject of many cases but should not be confused with the second rule, which is the one that is relevant here: a statute authorizes retroactive agency action only when it does so in express terms.

The key case for this clear-statement rule is *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). The question in *Bowen* was whether a retroactive regulation was supported by a statutory provision that authorized rulemaking but did not explicitly authorize *retroactive* rulemaking. In that case, the Secretary of Health and Human Services had promulgated a regulation prospectively lowering the wage index, a key figure in calculating Medicare reimbursements to hospitals. *Id.* at 206. The regulation was successfully challenged for failure to comply with notice-and-comment requirements and so was set aside. *Id.* at 206–07. The Secretary later reissued the rule with notice and comment, retroactive to the promulgation of the original rule. *Id.* at 207. The "net result was as if the original rule had never been set aside." *Id.* This second rule, and especially its purported retroactive effect, was challenged in *Bowen*.

A unanimous Supreme Court held that the Medicare Act did not authorize the Secretary to issue the rule. The Court's reasoning was succinct. "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.*

at 208. Any statutory authorization of retroactive rulemaking would, of course, lead to retroactive effects. So, "[b]y the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* This principle is acknowledged by circuit courts across the country. *See, e.g.*, *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) ("An agency may not promulgate retroactive rules absent express congressional authority." (citing *Bowen*, 488 U.S. at 208)); *cf. Leland v. Fed. Ins. Adm'r*, 934 F.2d 524, 528 (4th Cir. 1991) ("It is a fundamental and well established principle of law, however, that statutes are presumed to operate prospectively unless retrospective application appears from the plain language of the legislation.").

As the Supreme Court later explained, the judiciary must ensure that retroactive action is allowed only after "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf*, 511 U.S. at 272–73; *accord Ward*, 595 F.3d at 176. Because "the proper temporal reach of statutes" is a "fundamental policy judgment[]," *Landgraf*, 511 U.S. at 273, Congress must explicitly provide for retroactivity, "[e]ven where some substantial justification for retroactive rulemaking is presented," *Bowen*, 488 U.S. at 208. *Accord Leland*, 934 F.2d at 528 (observing that *Bowen* means that, "even where some substantial

justification for retroactivity is presented, courts should be reluctant to find such authority absent an express statutory grant"). "In other words, where Congress has apparently given no thought to the question of retroactivity whatever, there is no basis for inferring that Congress' intent was any more nuanced than that the statute should not be held to apply retroactively." *Olatunji v. Ashcroft*, 387 F.3d 383, 394 (4th Cir. 2004). Any retroactive agency action must be supported by a statute's clear statement authorizing that action. *See West Virginia v. EPA*, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring) (summarizing clear-statement rules, including the presumption against retroactivity).

It therefore did not matter in *Bowen* that the "judicial invalidation" of the original rule meant that "congressional intent and important administrative goals may be frustrated unless an invalidated rule can be cured of its defect" retroactively. *Bowen*, 488 U.S. at 215. Nor did it matter that the original rule had "provided at least some notice" as to the retroactive rule's contents. *Id.* "Whatever weight" these concerns had, Congress had not expressly authorized retroactive action and so had not affirmatively decided that such concerns outweighed the potential for unfairness. *Id.* Thus, this Court has held that even where retroactivity is "reasonable," the lack of express authority controls. *Hope Natural Gas Co. v. Fed. Power Comm'n*, 196 F.2d 803, 806 (4th Cir. 1952). "We should apply this time-honored presumption against retroactivity unless Congress has clearly manifested its intent to the

contrary." *Baldwin v. City of Greensboro*, 714 F.3d 828, 835–36 (4th Cir. 2013) (simplified). "Anything more . . . is nothing but judicial legislation." *Olatunji*, 387 F.3d at 394.

B. Ratification is retroactive.

By definition, ratification is retroactive. Just as disapproval of retroactive government action is "as ancient as the law itself," *Landgraf*, 511 U.S. at 265 n.17 (quoting *Dash*, 7 Johns. at 503), judges have acknowledged that ratification is retroactive since "the Roman law," *Keighley, Maxsted & Co. v. Durant*, [1901] A.C. 240, 262 (U.K. House of Lords) (Lord Lindley), https://www.google.com/books/edition/The_Law_Times_Reports/CS8yAAAAIAAJ?hl=en&gbpv=1&bsq=historically+that+doctrine+is+no+doubt.

This Court observed in *Gonzalez* that, to determine whether an act is retroactive, courts employ a "commonsense, functional judgment about whether [it] attaches new legal consequences to events completed before its enactment." *Gonzalez*, 985 F.3d at 372 (quoting *St. Cyr*, 533 U.S. at 321). And attaching new legal consequences to past events is the very purpose of ratification. "[R]atification retroactively creates the effects of actual authority" for the act ratified. Restatement (Third) of Agency § 4.02. It does so, the Supreme Court explained, by "operat[ing] upon the act ratified precisely as though authority to do the act had been previously given[.]" *Cook v. Tullis*, 85 U.S. 332, 338 (1873); *see Advanced Disposal Servs. E.,*

Inc. v. NLRB, 820 F.3d 592, 602 (3d Cir. 2016) ("The general rule is that the ratification of an act . . . is treated as effective at the time the act was done." (simplified)).

Thus, a unanimous chorus of courts, from every corner of the Republic, has held for centuries that ratifications are inherently retroactive. As Justice Story wrote for the Supreme Court, "[n]o maxim is better settled in reason and law, than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur*." *Fleckner v. Bank of U.S.*, 21 U.S. 338, 363 (1823). "[A]ccording to the maxim, every ratification has a retroactive effect and is equivalent to a prior command." *Citizens' Bank v. Grove*, 162 S.E. 204, 206 (N.C. 1932). Every single court to have considered the issue has so held. *See, e.g.*, *Jean v. Spurrier*, 35 Md. 110, 114 (1872) (invoking the maxim to hold that ratifications "relate back to the time of the inception of the transaction, and have a complete retroactive efficacy"); *Ruffner v. Hewitt*, 7 W. Va. 585, 605 (1874) (same); *Bailey v. Colton*, 25 S.C. 436, 438 (1886) (same); *Scales v. First State Bank*, 88 Or. 490, 500 (1918) ("[R]atification . . . has a retroactive efficacy, and is equivalent to an original authority."); *Meyers v. El Tejon Oil & Refining Co.*, 29 Cal. 2d 184, 187 (1946) ("[A] ratification has retroactive effect[.]"); *Estes v. Leibsohn*, 248 Iowa 1173, 1182 (1957) ("The rule is well settled that . . . ratification would operate retroactively[.]"); *Dunham-Pugh Co. v. Stephens*, 234 La. 218, 234 (1958) ("Such ratification is retroactive in effect and equivalent to prior

authority."); *Love 1979 Partners v. Pub. Serv. Comm'n of Mo.*, 715 S.W.2d 482, 487 (Mo. 1986) (en banc) ("Ratification gives retroactive vitality to the acts ratified."); *Action For Boston Cmty. Dev., Inc. v. Shalala*, 136 F.3d 29, 34 (1st Cir. 1998) ("All ratifications are retroactive in the sense that they purport to validate a prior action that might otherwise be unauthorized."); *Lewis v. Forest Pharmaceuticals, Inc.*, 217 F. Supp. 2d 638, 660 (D. Md. 2002) ("[R]atification confers retroactive authority on the agent-employee."); *Precedo Capital Grp. Inc. v. Twitter Inc.*, 33 F. Supp. 3d 245, 254 (S.D.N.Y. 2014) ("Thus, ratification is a form of retroactive activity that occurs when . . . ." (citation omitted)); *Matter of Guardianship of MKH*, 382 P.3d 1096, 1099 (Wyo. 2016) ("[R]atification is an agency concept that retroactively creates the effects of actual authority." (simplified)); *Stone Street Partners, LLC v. City of Chicago Dep't of Admin. Hearings*, 88 N.E.3d 699, 708 (Ill. 2017) (By ratifying, principals "thereby retroactively authorize an agent's actions."); *Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 947 (5th Cir. 2024) ("[R]atification can retroactively effect actual authority for the improper official's disputed action.").

Like all ratifications, Spinrad's ratification "attaches new legal consequences" to a past act, specifically the Approach Rule's promulgation in 2021. *Gonzalez*, 985 F.3d at 372 (quoting *St. Cyr*, 533 U.S. at 321). That is, of course, the very reason that Spinrad made the ratification. In particular, Spinrad's ratification in 2022 retroactively confers authority on Rauch for his issuance of the Rule in 2021. In

doing so, the ratification "create[d] a new obligation, impose[d] a new duty, or attache[d] a new disability, in respect to transactions or considerations already past." *Landgraf*, 511 U.S. at 269 (quoting *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CCNH 1814) (Story, J.)). In the absence of effective ratification, the Approach Rule was void due to the Appointments Clause violation,[3] and Plaintiffs were not required to comply with the Approach Rule and, until 2022, were not exposed to liability thereunder. But with an effective ratification, the violation is cured and the Approach Rule is valid, imposing the Approach Rule's requirements on Plaintiffs with respect to their prior actions between 2021 and 2022 and exposing Plaintiffs to potential liability for those actions.

The retroactivity of Spinrad's ratification is also apparent from the fact that it has the same effect as a retroactive rule. An effective ratification of the Approach Rule imposes the rule's approach-and-swim limitations, and related potential liability, on Plaintiffs and others as of 2021. A new rule, explicitly retroactive to

[3] The merits of Plaintiffs' Appointments Clause argument should be assumed at this point, because the District Court bifurcated summary judgment, with the ratification issue to be decided first and, if Plaintiffs prevailed on that point, the Appointments Clause merits to be decided second. JA58 (District Court stating that "we're going to do the ratification question first"). But of course Plaintiffs would brief the merits now if this Court were so to direct.

2021, would have the same effect. Thus, the effect of ratification is demonstrably retroactive.

Up until Plaintiffs raised *Bowen*, the government had agreed that ratification is retroactive. The government had candidly and affirmatively argued that Spinrad's ratification has a "functional retroactivity" because the ratified act "is given effect as if originally authorized by the ratifier." Dist. Ct. ECF No. 16 at 11 n.4 (citation omitted); *cf.* JA244 (ratification) (stating that Spinrad ratifies the Approach Rule "as of September 28, 2021"). Like Plaintiffs, the government drew on *Cook* and the Restatement of Agency, and its conclusion echoed hundreds of years of uncontradicted case law.

The government did not backtrack until Plaintiffs pointed out that retroactive agency actions must be expressly authorized under *Bowen*. The District Court accepted the government's revised argument.

The District Court reasoned that the ratification is not retroactive because "Plaintiffs' rights . . . are unaffected by the ratification." JA259. In particular, in the court's view, the Rule imposed its requirements on Plaintiffs both before and after the ratification, "because the [R]ule was in place since its issuance, at which time it

was presumed valid, and it is in place now, with Dr. Spinrad's ratification relating back to its initial date of promulgation." JA259. Four errors infect this reasoning.[4]

First, Spinrad's ratification, if otherwise effective, retroactively confers authority on Rauch for his issuance of the Rule in 2021. This "attaches new legal consequences" to the Rule's issuance, whatever the effect on Plaintiffs' rights, and is thus retroactive. *Gonzalez*, 985 F.3d at 372 (quoting *St. Cyr*, 533 U.S. at 321). The District Court did not confront this fact.

Second, it cannot be that Plaintiffs' rights under the Approach Rule are unaffected by the (*arguendo* effective) ratification, because, as discussed, the very point of the ratification is to validate the otherwise invalid Approach Rule. Before the ratification, the Approach Rule was issued only "under the color of official title," *Ryder*, 515 U.S. at 180, and was "void," *Collins*, 594 U.S. at 257–58. The ratification was made to validate the Approach Rule by giving the rule effect as though Spinrad had previously authorized its issuance. As the District Court itself later held, the ratification "cures any alleged defects in the merits of the Approach Rule." JA263. Indeed, that is the reason that the court entered judgment for the government.

[4] The District Court relied on a single district court case for support, JA258, but the very passage that the District Court cited *rejected* the "Plaintiffs[']assert[ion] that ratification does not apply retroactively to cure an Appointments Clause violation." *Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 44 (D.D.C. 2017). That cited decision thus joined the unbroken line of courts that have adopted the commonsense conclusion that ratification is retroactive.

Third, the Approach Rule was not "in place since its issuance." JA259. Although literally in the Federal Register, the rule was "an unconstitutional provision," and so was "never really part of the body of governing law (because the Constitution automatically displaces any conflicting . . . provision from the moment of the provision's enactment)." *Collins*, 594 U.S. at 259; *see Ogden v. Saunders*, 25 U.S. 213, 243 (1827) ("The constitution always accompanies the law, and the latter can have no force which the former does not allow to it."). The District Court observed that the Approach Rule had never been "invalidated," JA259, but "[t]he term 'invalidate' is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff. To be clear, . . . the Court of course does not formally repeal the law[.]" *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 627 n.8 (2020) (plurality). Or as this Court put it, "[j]udicial declaration of law is merely a statement of what the law has always been." *Cash v. Califano*, 621 F.2d 626, 628 (4th Cir. 1980). Thus, a declaration that the Approach Rule is unconstitutional would not itself render the regulation void; rather, it would simply recognize that the regulation had always been void. The Approach Rule was not "in place since its issuance," JA259, because it was unconstitutional regardless of whether a judicial declaration had yet recognized it was such.

Fourth, the District Court contradicted itself. It reasoned that ratification is not retroactive in part because the Approach Rule is "in place now, with Dr. Spinrad's ratification relating back." JA259. But the court's reasoning undercuts itself, because the ratification's relation back makes it retroactive. The court's reasoning is also circular: the court concluded that the ratification is effective, because the ratification is not retroactive (and therefore does not need express authorization), because it gives effect to the Approach Rule as though the Rule had always been authorized by Spinrad. This reasoning thus improperly relies on the ratification's own retroactive operation to prove the ratification's validity.

The District Court's specious logic only demonstrates that its conclusion does not reflect a "commonsense, functional judgment." *Gonzalez*, 985 F.3d at 372 (quoting *St. Cyr*, 533 U.S. at 321). The commonsense and correct course has already been charted by the unanimous judgment of every court in this country to have passed on the issue, from the Founding to the present, from Justice Story to state courts: ratification is intrinsically retroactive.

C. No express statutory authority for Spinrad's ratification exists.

Because ratification is necessarily retroactive, it must be expressly authorized by statute. No such clear statement exists, however, and so Spinrad's ratification is *ultra vires*, and the Court should reverse.

The bar for a clear statement is high. "Typically, [the Supreme Court] find[s] clear-statement rules appropriate when a statute implicates historically or constitutionally grounded norms that we would not expect Congress to unsettle lightly." *Jones v. Hendrix*, 599 U.S. 465, 492 (2023). The Court has explained that, to satisfy a clear-statement rule, "something more than a merely plausible textual basis for the agency action is necessary." *West Virginia*, 597 U.S. at 723 (explaining major questions doctrine, a clear-statement rule). "The agency instead must point to clear congressional authorization for the power it claims." *Id.* (simplified).

Clear-statement rules relating to retroactivity are particularly stringent, given the law's "singular distrust" of retroactivity. *E. Enters.*, 524 U.S. at 547 (Kennedy, J., concurring). This Court has required an "undeniably high" standard, "requiring an expression of legislative intent that is obvious from the statute's text." *Ward*, 595 F.3d at 174. "The words used in the statute must be so clear, strong, and imperative that no other meaning can be annexed to them, or the intention of the legislature must be such that it cannot be otherwise satisfied." *Id.* (simplified) (quoting *U.S. Fid. & Guar. Co. v. United States*, 209 U.S. 306, 313 (1908)). There can be "no room for reasonable doubt" that Congress authorized retroactive action; the statute must be "so clear that it could sustain only one interpretation." *Id.* (simplified). As Chief Justice Marshall counseled, "a court . . . ought to struggle hard against a [statutory]

construction" that leads to retroactive effects. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

No statute clearly authorizes Spinrad's ratification. In issuing his ratification, Spinrad invoked his rulemaking powers under 16 U.S.C. §§ 1373 and 1382.[5] Section 1373(a) provides:

> The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 1361 of this title.

[5] Other statutory provisions also do not clearly authorize Spinrad's ratification. *See generally* 16 U.S.C. §§ 1362–1423h. But in any case, the government may rely only on §§ 1373 and 1382 to justify Spinrad's ratification, because these are the only provisions on which Spinrad relied in making the ratification, JA244 (citing only the rulemaking powers under "sections 103 and 112 of the MMPA" as relevant statutory authority), and a court "must judge the propriety of [agency] action solely by the grounds invoked by the agency" at the time of the agency action and "if those grounds are inadequate or improper," the court cannot "substitut[e] what it considers to be a more adequate or proper basis." *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 291 (4th Cir. 2018) (simplified) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)) (holding that agency's failure to invoke 16 U.S.C. § 460a-3 when issuing a permit should usually "end our inquiry" into whether § 460a-3 authorized the permit under *Chenery*—except for the "unusual circumstance" that the agency recited the text of § 460a-3 when invoking another statutory provision and so relied on both provisions); *accord Dep't of Air Force v. Fed. Lab. Rels. Auth.*, 877 F.2d 1036, 1041 (D.C. Cir. 1989) (refusing, under *Chenery*, to consider whether a regulation was authorized by 5 U.S.C. § 7132(c) because the agency "never invoked section 7132(c) as a basis of its regulation" until litigation arose).

And § 1382(a) provides: "The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subchapter."

These provisions do not "obvious[ly]," expressly, or clearly authorize any form of retroactivity, including ratification. *Ward*, 595 F.3d at 174. Rather, "Congress has apparently given no thought to the question of retroactivity whatever," so "there is no basis for inferring that Congress' intent was any more nuanced than that" the statute should not be held to authorize retroactivity. *Olatunji*, 387 F.3d at 394. Because the Court cannot be sure that Congress has "affirmatively" weighed the benefits and costs of ratification, it is not authorized. *Landgraf*, 511 U.S. at 272–73.

Citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), the District Court held that ratification is authorized by the MMPA's rulemaking provisions because it is a means of effectuating rulemaking. JA259–260. Although ratification might aid rulemaking in some instances, that does not mean ratification is not retroactive nor that express statutory authorization is unnecessary. Indeed, treating ratification as part of the rulemaking process means that the ratification effects a retroactive rulemaking, complete in 2022 when the ratification was made but reaching back to conduct in 2021. Such reasoning

runs headlong into *Bowen*'s prohibition of retroactive rules without express statutory authority. Tellingly, the District Court did not even cite—much less engage with—*Bowen*, despite the fact that the decision formed the centerpiece of Plaintiffs' retroactivity argument. Dist. Ct. ECF No. 33 at 2–6.

That Spinrad lacks authority to ratify is bolstered by the fact that the MMPA authorizes the Secretary to make rules under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, and the APA defines a rule as "the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]" 5 U.S.C. § 551(4) (emphasis added). As the D.C. Circuit in *Bowen* and a concurring Justice Scalia concluded, this means that rulemaking authorizations allow for "rules [that] have legal consequences only for the future" and disallow retroactive rules, *Bowen*, 488 U.S. at 216 (Scalia, J., concurring), a framework that reflects that Congress "has been unwilling to confer [retroactive power] upon the agencies," *id.* at 224.

The government may believe it to be convenient, efficient, or even necessary to have the power to ratify. *Contra id.* (Retroactive regulations, being rare, "are evidently not a device indispensable to efficient government."). And "[i]t is quite tempting to read in [statutory provisions] where none exists. One might base that addition upon the legislative history, common sense, reason, [or] supposition[.]

Regardless of the motivation, that perhaps well-meaning approach inevitably smacks of an ill-advised judicial amendment." *United States v. Perkins*, 67 F.4th 583, 609 (4th Cir. 2023). As in *Bowen*, Spinrad may have "reasonable" concerns that "congressional intent and important administrative goals may be frustrated unless an invalidated rule"—or a void rule yet to be invalidated—"can be cured of its defect." *Bowen*, 488 U.S. at 215. But "[w]hatever weight [these] contentions might have in other contexts," the question "is resolved by the particular statutory scheme in question." *Id.* Under *Bowen*, an official "literally has no power" to take retroactive action without express statutory authority. *Cruz*, 596 U.S. at 301. Congress's decision not to provide such authority, even if it "has apparently given no thought to the question," controls. *Olatunji*, 387 F.3d at 394.

III. Any statutory authorization of ratification incorporates a common-law rule that makes Spinrad's ratification *ultra vires*.

Even if ratification were authorized by statutory authority, a common-law timing rule incorporated by Congress and applied by the Supreme Court prevents ratification here.

"Congress is understood to legislate against a background of common-law principles." *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010) (simplified). Thus, "when a statute covers an issue previously governed by the common law, [the courts] interpret the statute with the presumption that Congress intended to retain the substance of the common law." *Id.* As a result, "common law doctrine[s] should be

'read into' a legislative scheme and thereby made statutorily binding upon [an] agency." *Duvall v. Att'y Gen. of U.S.*, 436 F.3d 382, 389 (3d Cir. 2006); *id.* at 387 (holding that an agency's "adjudicatory authority" was limited by the common-law doctrine of collateral estoppel).

"In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534–35 (1993) (simplified). Congressional intent to abrogate the common law must be "evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). And the "burden" falls on the party who seeks to "show that Congress departed from the traditional common-law rule[s]." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 344 (2017).

No relevant statute—and certainly not the rulemaking provisions of the MMPA, on which Administrator Spinrad relied—"speak[s] directly" to ratification's common-law defaults. *Texas*, 507 U.S. at 534. Rather, any statute authorizing ratification is silent as to those defaults. Congress has thus incorporated ratification's common-law principles into any statutory provision authorizing Spinrad's ratification. *See id.* at 535 (requiring state to pay prejudgment interest under common law, where "[t]he statute is silent" as to that *common-law* obligation, despite statutory exemption from *statutory* imposition of interest). The government, which

has the burden of showing that Congress abrogated the common-law defaults, *SCA Hygiene*, 580 U.S. at 344, has not even attempted to carry that burden.

In *FEC v. NRA Political Victory Fund*, the Supreme Court applied a common-law limitation on ratification. 513 U.S. 88 (1994). There, an agency sought certiorari from the Supreme Court without the Solicitor General's required approval. By the time the Solicitor General gave his blessing, the petition deadline had passed. The question before the Supreme Court was whether the Solicitor General's "'after-the-fact' authorization" of the agency's petition was effective. *Id.* at 98.

To answer the question, the Supreme Court turned to common-law "principles of agency law, and in particular the doctrine of ratification." *Id.* From there, it applied the common law's timing rule, as summarized by § 90 of the Second Restatement of Agency: "If an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other unless made before such time." *Id.* (quoting Restatement (Second) of Agency § 90 ("Restatement")). The import of the timing rule is that ratification is permitted only if it precedes certain key events; otherwise, a ratification "simply c[o]me[s] too late in the day to be effective." *Id.*; *accord* Restatement § 90, cmt. a ("[T]he time element is of crucial importance."). This principle "creates an equitable limitation upon . . . ratification" to preserve other parties' "legitimate expectations," Restatement § 90, Reporter's Notes, given that

ratification's retroactivity is inherently "unfair," *id.* § 82, cmt. d. Because the petition deadline had passed by the time of the ratification, the Solicitor General "could not himself have filed a petition" at that time. *NRA*, 513 U.S. at 98. He therefore lacked the power to ratify the petition; his ratification "simply came too late in the day to be effective." *Id.*; *accord Advanced Disposal*, 820 F.3d at 603 (acknowledging that this "timing problem" is a requirement to ratify under *NRA*).

The timing rule extends to situations beyond the passing of a statutory deadline. "Coming within the rule . . . are cases in which an attempt has been made, after action has been begun, to ratify an act which was a prerequisite to the suit." Restatement § 90, Reporter's Notes. That is, once a suit has been brought based on a putative agent's unauthorized act, ratification cannot defeat that suit and destroy the plaintiff's "legitimate expectations" of relief. *Id.*; *see id.* § 338, cmt. a (stating that "ratification . . . destroys any cause of action which the other party may have against the agent because of the agent's lack of power to bind the principal," except where the other party has "br[ought] suit against the agent"). Thus, as the Third Restatement puts it, "the doctrine . . . limit[s] the assertion of defenses in litigation." Restatement (Third) of Agency § 4.05, Reporter's Notes e; *see id.*, Reporter's Notes a (noting that § 4.05 "corresponds in substance to Restatement Second §§ 88, 89, 90, and 95, Comment *b*").

This principle was applied in *Wagner v. City of Globe*, 722 P.2d 250 (Ariz. 1986), which the Supreme Court approvingly cited to support its own use of the timing rule. *NRA*, 513 U.S. at 98–99. In *Wagner*, a police chief fired a police officer without authorization from the city council. The city council later ratified the dismissal, but the officer had already brought a claim for wrongful discharge based on the police chief's lack of authority. *Id.* Citing Second Restatement § 90, the Arizona Supreme Court rejected the ratification because it "would divest the [officer] of a 'right or defense' in derogation of his right to bring the cause of action." *Wagner*, 722 P.2d at 255. Or in *NRA*'s words, "[t]he intervening rights of third persons cannot be defeated by the ratification." 513 U.S. at 98 (quoting *Cook*, 85 U.S. at 338).

Here, Administrator Spinrad made his ratification after Plaintiffs had sued. Indeed, he ratified specifically to destroy Plaintiffs' right to relief. JA244 (ratification recognizing that "[q]uestions have been raised in litigation concerning the authority of . . . officials to issue the Approach Rule" and seeking to "remove any doubt as to its validity"). And like the wrongful termination claim in *Wagner*, Plaintiffs' APA claims challenge a wrongful action taken against them without authority. Accordingly, the ratification was too late to be effective under the common-law timing rule, which Congress incorporated into any statutory authorization and which the Supreme Court recognized and applied in *NRA*.

The District Court held otherwise, but it did not grapple with Plaintiffs' arguments. The court simply held that "[t]he question before the Court is not one of agency law; instead the question presented is one of administrative law." JA261 (simplified). The court, however, did not refute or distinguish the principle that, "when a statute covers an issue previously governed by the common law, [the courts] interpret the statute with the presumption that Congress intended to retain the substance of the common law." *Samantar*, 560 U.S. at 320 n.13. Nor did the District Court confront the fact that this principle extends to administrative law. *See Duvall*, 436 F.3d at 389 (holding that "common law doctrine[s] should be 'read into' a legislative scheme and thereby made statutorily binding upon [an] agency"). The District Court also did not state why it did not follow *NRA*'s reasoning that agency ratifications are "at least presumptively governed by principles of agency law." *NRA*, 513 U.S. at 98.

The District Court rejected the idea that *NRA* held that "the Restatement Second of Agency governs all aspects of agency ratification." JA261. Plaintiffs, however, did not so argue. Plaintiffs argued that *the common law* governs Spinrad's ratification, because Congress presumptively incorporated the common law into any statutory authority for the ratification. Restatements, though not binding, are helpful as summaries of the common law. The District Court did not engage with Plaintiffs' argument. Furthermore, though the Second Restatement is no longer "the most

updated volume," Plaintiffs also relied on the Third Restatement § 4.05, which like the Second Restatement § 90, acknowledges the timing rule and its application to ratifications that postdate the filing of a suit premised on the act ratified. JA261. The District Court did not consider the Third Restatement.

By ruling for Plaintiffs, this Court would appropriately encourage the government to ratify quickly, rather than allow a void rule to sit on the books until a challenge is raised. Assuming a statute authorizes ratification in the first place, the timing rule would still permit ratifications that precede the filing of a related suit and that do not otherwise destroy "[t]he intervening rights" of a plaintiff. *NRA*, 513 U.S. at 98 (quoting *Cook*, 85 U.S. at 338).

Nevertheless, the government may still believe it to be inefficient, strange, or unnecessary to apply the timing rule here. While one can "appreciate these concerns," "[i]t is not [courts'] place to question whether Congress adopted the wisest or most workable policy, only to discern and apply the policy it did adopt." *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 706 (2022). This Court's "task . . . is only to determine the meaning of the statute as passed by Congress, not to question the wisdom of the provision enacted." *Lee v. USCIS*, 592 F.3d 612, 620 n.5 (4th Cir. 2010). The Court determines the meaning of a statutory authorization of ratification by applying the canon that statutes incorporate the common law unless there is "evident" congressional intent to displace the common law. *Samantar*, 560 U.S. at

320 n.13 (quoting *Isbrandtsen*, 343 U.S. at 783). That canon shows that any statutory authorization for ratification of MMPA rulemakings authorizes only timely ratifications, and Spinrad's ratification was not authorized because it was "too late." *NRA*, 513 U.S. at 98.

IV. Ratification merely repeats the delegation's defect.

Even if Spinrad's ratification were supported by statute and permitted by the timing rule, it would suffer from the same constitutional defect as the underlying delegation.

The sole effect of ratification is to retroactively supply authority to do the act ratified.[6] *Cook*, 85 U.S. at 338 (Ratification "operates upon the act ratified precisely as though authority to do the act had been previously given[.]"); Restatement (Third) of Agency § 4.02 ("[R]atification retroactively creates the effects of actual authority."); Restatement § 82 ("Ratification is the affirmance . . . of a prior act . . . , whereby the act . . . is given effect as if originally authorized by him."). Because the act ratified here is Rauch's promulgation of an MMPA rule, Spinrad's ratification seeks to retroactively authorize Rauch to promulgate an MMPA rule. But Spinrad had already given Rauch the authority to promulgate an MMPA rule when he delegated that power downward to Coit and Coit delegated it to Rauch. Thus,

[6] The District Court ignored this when it held that the effect of ratification is to directly "cure[] any Appointments Clause defects that may have been present." JA263.

ratification simply repeats the delegations, and it faces the same problem: the Constitution forbids Spinrad from authorizing an improperly appointed official to issue rules, because rulemaking is a significant power. The ratification is thus invalid, assuming the merits of Plaintiffs' Appointments Clause claims at this stage in the bifurcated summary-judgment process, and the Court should reverse; or stated differently, the ratification's constitutionality rises and falls with the merits of Plaintiffs' Appointments Clause claims, which should be heard.

The result is the same even if ratification were conceived of, not as *authorizing* Rauch to decide whether to issue the Approach Rule, but as retroactively *directing* him to issue that rule.[7] In that instance, Rauch would be carrying out Spinrad's will in promulgating the regulation and so he would not have been exercising a significant power in doing so. But, due to the delegations, Rauch would still be vested with significant powers. JA204 (Assistant Administrator delegating to Deputy Assistant Administrator for Regulatory Programs the power to sign materials for publication in the Federal Register and Code of Federal Regulations); *see* JA201–204 (NOAA Administrator delegating to Assistant Administrator power across 64 different statutes). And the Supreme Court has held that an official vested with *any* significant powers must be appointed as an officer, even when carrying out *non-*

[7] Such a conception, however, would contradict settled precedent that the effect of ratification is to supply authority for an agent to decide whether to act, not to direct an act to be done. *See, e.g.*, *Cook*, 85 U.S. at 338.

significant duties. As the Court reasoned in *Freytag*, even if a Tax Court Special Trial Judge's power to render recommendations in certain tax cases were not significant, his power to render final decisions in *other* cases was significant, and this required him to be appointed as an officer even for his recommendation-only duties. *Freytag v. Comm'r*, 501 U.S. 868, 881–82 (1991) (It was "beside the point" that the judge in *Freytag* had only exercised his recommendation-only powers.).[8] Thus, even if Spinrad had directed Rauch in 2021 to issue the Approach Rule, Rauch—still vested with significant authority to make *other* rules—was improperly appointed and his actions promulgating the Approach Rule were void. Retroactively providing such direction through ratification does not change the result. Again, the ratification rises and falls with the constitutionality of Rauch's appointment, and the Court should reverse to allow the merits of Plaintiffs' claims to be heard.

The government argued below that ruling for Plaintiffs on this ground would bar all ratifications, but the government is wrong. It would still be possible to ratify actions taken by properly appointed officials who lacked prior authority, such as in *NRA*. *See also Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139 (1937) (concerning Maritime Commission's ratification of subpoena issued by Secretary of Commerce, a Senate-confirmed official). And if ratification is considered retroactive

[8] Although this part of *Freytag* was an alternative holding, alternative holdings are binding. *United States v. Ford*, 703 F.3d 708, 711 n.2 (4th Cir. 2013).

direction, it would still be possible under *Freytag* to ratify significant actions taken by non-officer employees who do not hold significant powers on an ongoing basis.

The District Court dismissed these arguments, holding that there is *statutory* authority for officials to delegate powers to lower officials. JA262. But this undisputed conclusion is beside the point. Plaintiffs argued that the *Constitution* requires any authorization for an official to exercise significant powers (including a retroactive authorization through ratification) to be limited to properly appointed officials; and that proper appointment is required for an official holding significant powers even when carrying out another's direction. The District Court did not address these arguments, instead faulting Plaintiffs for "attempt[ing] to shoehorn the merits of their Appointments Clause challenge into" the ratification issue. JA263. But Plaintiffs cannot be held responsible for the issues interacting, and they had raised these arguments even before the District Court bifurcated summary judgment between ratification and the Appointments Clause merits. Dist. Ct. ECF No. 15 at 14, 18–21. The fact that the ratification's validity is tied to the merits of Plaintiffs' claims only underscores that this Court should reverse so that the merits may be heard.

V. The Court should not allow Spinrad to shield his own delegations from judicial scrutiny.

In evaluating the government's arguments, the Court should consider the context of this ratification. The NOAA Administrator delegated his MMPA rulemaking powers to subordinate officials in violation of the Appointments Clause, and one of those officials proceeded to use those powers to issue the Approach Rule. When Plaintiffs sued Spinrad to challenge his delegation as unlawful, Spinrad ratified the Approach Rule with the express intent of defeating the suit. JA244 (ratification recognizing that "[q]uestions have been raised in litigation concerning the authority of . . . officials to issue the Approach Rule" and seeking to "remove any doubt as to its validity"). Spinrad kept the delegations in place, however.

If the Court allows this maneuver, it will do more than deny Plaintiffs relief and contradict the Supreme Court's instruction that "one who makes a timely challenge to the constitutional validity of the appointment of an officer . . . is entitled to relief." *Lucia v. SEC*, 585 U.S. 237, 251 (2018) (simplified). Approving Spinrad's tactic will also permanently immunize his unconstitutional delegations from judicial review. Any challenges to final agency actions will be knocked down by ratification in whack-a-mole fashion, precisely so that the delegations' policy of governance by unconstitutionally appointed officials will continue unchecked. And because litigants know this beforehand, they will not bring such challenges to begin with. *But see id.* at 251 n.5 (Relief for Appointments Clause violations must "create

incentives to raise Appointments Clause challenges."). The result is that the Executive Branch will be rife with persistent violations of a constitutional safeguard meant to stop unaccountable governance. *But see Freytag*, 501 U.S. at 878–79 (simplified) (emphasizing "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers").

This is what happened in *Moose Jooce v. FDA*, 981 F.3d 26 (D.C. Cir. 2020). As here, the *Moose Jooce* plaintiffs challenged the delegated rulemaking authority of an FDA employee under the Appointments Clause. The FDA Commissioner ratified the rule at issue there, and the D.C. Circuit affirmed the case's dismissal. The delegation was never revoked. Freed from judicial scrutiny, the same employee continues to issue a high volume of binding regulations today. *See, e.g.*, 89 Fed. Reg. 48,507 (June 7, 2024); 89 Fed. Reg. 5767 (Jan. 30, 2024); 88 Fed. Reg. 87,670 (Dec. 19, 2023).

Here, another rule restricting Plaintiffs' marine mammal activities is already pending. 86 Fed. Reg. 53,844 (Sept. 28, 2021) (proposed rule regarding spinner dolphin time-area closures). The government has refused to confirm that final action on the proposed rule will be taken by a Senate-confirmed official. *See* Dist. Ct. ECF No. 12-1 at 23 (stating that it "is currently unknown" whether that will be the case). NOAA only needs this Court's green light to repeat the results of *Moose Jooce*.

The D.C. Circuit, though incorrect in *Moose Jooce*, recognized this danger in *Bowen*. That court held that, "[o]bviously, agencies would be free to violate the rulemaking provisions of the APA with impunity if, upon invalidation of a rule, they were free to 'reissue' that rule on a retroactive basis." *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987). This "would, if accepted, make a mockery of the provisions of the APA." *Id.* Precisely the same reasoning applies here: officials would be free to violate the Appointments Clause if they could simply ratify any action that was challenged. Again, this Court can expect that this is Spinrad's plan, given his decision to ratify the Approach Rule while continuing to delegate his rulemaking power. This "makes a mockery," *id.*, not merely of the APA, but of the Appointments Clause, a "significant structural safeguard[] of the constitutional scheme." *Edmond*, 520 U.S. at 659.

Finally, recognizing that ratification is unlawful here would not thwart the MMPA's purpose.[9] Spinrad could have reissued—and still can reissue—a new, prospective Approach Rule. In fact, the D.C. Circuit in *Bowen* had highlighted this method of correcting a defective first rule as one that would comply with "the express terms of the APA and the integrity of the rulemaking process." *Bowen*, 821 F.2d at 758. Yet the government has not sought to exercise this clearly lawful

[9] In any case, even the Approach Rule "recognize[s] that there is not clear evidence of population decline or adverse biological impacts" from spinner dolphins swimming with humans. 86 Fed. Reg. at 53,824.

curative option. Of course, there is one difference: a new rule would have to be issued consistent with the requirements of the APA and could not reach past actions. But that only makes clear that Spinrad's insistence on ratification is because he seeks ratification's retroactive effect. The cure authorized by Congress, however, is limited to prospective rulemaking. And agency officials "must follow the procedures 'specifically authorized' by Congress and cannot rely on their own notions of implied powers in the enabling act," and "arguments to the effect that 'this is just another way of doing it' will not prevail." *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 333 n.15, 334 (1961).

The Court should not endorse Spinrad's attempt—unsupported by statute, forbidden by incorporated common-law principles, and just as unconstitutional as his delegation—to evade judicial scrutiny and entrench a system of governance by unaccountable officials.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the District Court's judgment and permit the merits of Plaintiffs' claims against the Approach Rule and delegations to be heard.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs submit that oral argument would aid this Court, because this case presents complex issues of first impression that bear on the application of a constitutional provision.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 24-1734 **Caption:** Eliza Wille v. Gina M. Raimondo

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