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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RAYMOND LOFSTAD and GUS LOVGREN, Plaintiffs, v. GINA RAIMONDO, in her official capacity as Secretary of the United States Department of Commerce; JANET COIT, in her official capacity as Assistant Administrator for the National Marine Fisheries Service; and NATIONAL MARINE FISHERIES SERVICE, Defendants.	No. 3:22-cv-07360-GC-TJB **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Courtroom 4E Judge: Georgette Castner Magistrate: Tonianne J. Bongiovanni Motion Day: August 7, 2023

Plaintiffs brought suit seeking declaratory and injunctive relief against fishing quota reallocations effected by a rule issued by Defendants. Docket No. 1. Plaintiffs respectfully move for summary judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiffs have standing because the reallocation reduces their income and decreases the value of their fishing assets. There also are no disputed issues of material fact, and Plaintiffs are entitled to judgment as a matter of law because the reallocation was the product of individuals whose appointments to the Mid-Atlantic Fishery Management Council were defective. Defendants' promulgation of the rule was therefore in excess of statutory authority, contrary to constitutional right, in excess of statutory authority, and without observance of procedure required by law. Plaintiffs' motion is supported by the accompanying Memorandum in Support, Statement of Material Facts, declarations, and the Administrative Record.

DATED: April 21, 2023.

Respectfully submitted,

/s/ Jonathan M. Houghton

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Certificate of Service

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Plaintiffs,

v.

GINA RAIMONDO, in her official capacity as Secretary of the United States Department of Commerce; JANET COIT, in her official capacity as Assistant Administrator for the National Marine Fisheries Service; and NATIONAL MARINE FISHERIES SERVICE,

Defendants.

No. 3:22-cv-07360-GC-TJB

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Courtroom 4E
Judge: Georgette Castner
Magistrate: Tonianne J. Bongiovanni

Motion Day: August 7, 2023

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INTRODUCTION

Plaintiffs Raymond Lofstad and Gus Lovgren are Mid-Atlantic commercial fishermen who focus their fishing efforts on summer flounder, scup, and black sea bass. Annual federal regulations set a fishing quota for each of these species. That quota is allocated between the commercial and recreational sectors by separate regulations. On November 17, 2022, the National Marine Fisheries Service ("NMFS") published a final rule that permanently reduced the percentage of quota available to commercial fishermen for these three fish. 87 Fed. Reg. 68,925 (Nov. 17, 2022) ("Rule") (AR3643). This reallocation reduces Plaintiffs' fishing opportunity and thereby injures Plaintiffs.

The Rule was issued under the Magnuson-Stevens Fishery Conservation and Management Act ("Act" or "Magnuson-Stevens Act"). The Act creates a rulemaking process distinct from rulemaking under the Administrative Procedure Act ("APA"). Under the APA, a single agency (1) decides what should be regulated and how (the policy determination), (2) decides that the rule is lawful (the legality determination), and (3) undertakes the administrative steps of issuing the regulation (the ministerial action). *See generally* 5 U.S.C. § 553. In contrast, under the Magnuson-Stevens Act, NMFS conducts the legality determination and takes the ministerial step of publishing the regulation, but does not make the underlying policy determination over Mid-Atlantic fisheries. That instead is vested in another body, namely, the Mid-Atlantic Fishery Management Council ("Council" or "Mid-Atlantic Council").

The rulemaking process under the Magnuson-Stevens Act starts when the

Council adopts a fishery management plan or plan amendment, which captures the Council's policy choice. NMFS then determines the legality of the plan or amendment, approving the measure if it is lawful and rejecting it otherwise. After approval, the Council proposes a regulation to implement the plan or amendment. NMFS then conducts another legality determination, approving the regulation if it is lawful and rejecting it otherwise. If the regulation is approved, NMFS publishes it for comment and then publishes it as a final rule. *See* 16 U.S.C. § 1854(a)–(b).

In September 2021, individuals putatively constituting the Mid-Atlantic Council adopted Amendment 22 to the Fishery Management Plan for Summer Flounder, Scup, and Black Sea Bass, which mandated the injurious reallocations described above. NMFS approved Amendment 22. The putative members of the Council also proposed an implementing regulation, which NMFS approved and later finalized as the Rule. The Rule's reallocations, however, must be vacated.

Because the Mid-Atlantic Council is vested with significant power—given, among other things, its prerogative to set federal fisheries policy for that portion of the Mid-Atlantic seaboard over which it has jurisdiction—the Appointments Clause of the Constitution provides the exclusive method of filling Council seats. None of the Council's 21 putative members was appointed pursuant to the Appointments Clause and so none occupies a Council seat. Thus, though these individuals may have agreed to Amendment 22 and its implementing regulation, these actions have no more effect than 21 members of the public doing the same. Put another way, these actions are void

as actions of the Council, though taken under color of official title.

NMFS was obligated to conclude that the 21 putative Council members had never been appointed to the Council and that the Council had therefore not adopted Amendment 22 and the implementing regulation. NMFS therefore should have concluded that it may not act on those measures. Nevertheless, NMFS approved and promulgated the Rule, which it was not entitled to do under the Magnuson-Stevens Act. Accordingly, the Rule should be held to be unlawful and set aside. *See* 16 U.S.C. § 1855(f)(2)(B); 5 U.S.C. § 706.

LEGAL BACKGROUND

I. The Appointments Clause

"The importance of the Appointments Clause has been recognized since our nation's founding." *Cirko on behalf of Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 153 (3d Cir. 2020). The Appointments Clause was designed to replace the "colonial system" in which "appointments were distributed in support of a despicable and dangerous system of personal influence" that empowered unaccountable officials. *Id.* at 153–54 (simplified). Because of officers' power, the "appointment to offices was seen in the Founding Era as the most insidious and powerful weapon of eighteenth century despotism," *id.* at 154 (simplified), earning it a place amongst the grievances listed in the Declaration of Independence.

In response, the Appointments Clause mandated clear limits that "favored political accountability and neutrality," most significantly, the involvement of Congress.

Cirko, 948 F.3d at 154 (simplified). The Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. By its terms, the Appointments Clause applies only to "officers of the United States," that is, those officials holding "significant authority pursuant to the laws of the United States." *Pa., Dep't of Pub. Welfare v. U.S. Dep't of Health & Hum. Servs.*, 80 F.3d 796, 801 (3d Cir. 1996). For such officers, the Appointments Clause is the exclusive means of appointment. *Lucia v. SEC*, 138 S.Ct. 2044, 2049 (2018).

Significant authority is not a high bar. Among those that the Supreme Court has determined to be officers are not only heads of agencies but also postmasters first class, district court clerks, and election supervisors. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam); *Edmond v. United States*, 520 U.S. 651, 661 (1997) (discussing *Ex parte Siebold*, 100 U.S. 371 (1880)). That is because authority is significant whenever it is "more than ministerial"; that is, "in the course of carrying out … important functions, the [official] exercise[s] significant discretion." *Lucia*, 138 S.Ct. at 2052.

While significant authority separates officers from nonofficers, principal and inferior officers are differentiated by whether the officer "is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. The inquiry is "how much power

an officer exercises free from control by a superior." *United States v. Arthrex*, 141 S.Ct. 1970, 1982 (2021). Inferior officers are those who are adequately controlled by a Senate-confirmed officer. All other officers are principal officers. *Id.* at 1979.

Principal offices may be filled only by Presidential nomination and Senate confirmation. That is also the default method for filling inferior offices. *Edmond*, 520 U.S. at 660. But if Congress provides "by Law," the appointment of an inferior office may be vested in the President, a head of department, or a court of law. *Id.*

II. The Magnuson-Stevens Act and Fishery Management Councils

In the United States, the state and federal governments divide authority to regulate oceanic fisheries. States govern nearshore waters, from the shoreline to three nautical miles offshore, while federal authority extends from three nautical miles to 200 nautical miles offshore. *See* 43 U.S.C. § 1312; 16 U.S.C. § 1856(a)(1).

Fisheries policy for federal waters is set by eight regional Councils created by the Magnuson-Stevens Act. *See* § 1852(a). It was "the purpose[] of the Congress … to establish [the] Councils to exercise sound judgment in the stewardship of fishery resources[.]" § 1801(b)(5). The Councils are charged with preparing fishery management plans ("FMPs") and FMP amendments, § 1852(h)(1), consistent with ten National Standards, *see* § 1851(a). The Act protects the Councils' power to set policy by explicitly stating that any guidelines the Secretary develops regarding the National Standards "shall not have the force and effect of law." § 1851(b). Thus, Councils are limited only by the National Standards and applicable law. FMPs and amendments are,

in turn, implemented by regulations proposed by the Councils. § 1853(c).

Although Councils are entrusted with fisheries policy and oversee some scientific staff, *see* § 1852(g), they do not have the administrative and legal staff of a regulatory agency, *cf.* § 1852(f)(3) ("The Secretary shall provide to each Council such administrative and technical support services as are necessary for the effective functioning of such Council."). In lieu of providing the Council with a General Counsel's Office, the Act directs the Commerce Department to provide those services. When a Council approves an FMP or amendment, the Secretary of Commerce ("Secretary") shall undertake a review "to determine whether [it] is consistent with the national standards, the other provisions of this chapter, and any other applicable law." § 1854(a)(1)(A). The Act tightly controls the Secretary's review process to ensure that she does not stray beyond its bounds. The Secretary must act on the measure "within 30 days" after a comment period. § 1854(a)(3). Any negative action must identify and describe the unlawfulness. *Id.* If the Secretary fails to approve or disapprove the measure within 30 days, it "shall take effect as if approved." *Id.* The Act does not permit the Secretary to block an FMP or amendment on any ground other than illegality. *See generally* § 1854(a).

When a Council approves a regulation to implement an FMP or FMP amendment, the regulation goes through a similar process. "[T]he Secretary shall immediately initiate an evaluation of the proposed regulations to determine whether they are consistent with the fishery management plan, plan amendment, this chapter and other applicable law." § 1854(b)(1). She must arrive at her conclusion within 15

days, and if she disapproves the regulation as unlawful, she must "notify the Council in writing of the inconsistencies and provide recommendations on revisions that would make the proposed regulations consistent with ... applicable law." § 1854(b)(1)(B). If she approves the regulation, she must publish it for public comment, after which she "shall promulgate final regulations within 30 days after the end of the comment period." § 1854(b)(3). She may alter the regulation only if she first "consult[s] with the Council." *Id.* Councils have the discretion to deny consultation and force the promulgation of the regulation as-is. *See* 85 Fed. Reg. 7246, 7247 (Feb. 7, 2020) (stating that NMFS published the rule because the Council failed to consult with NMFS within the time limit, such that NMFS was unable to withdraw or revise the rule).

NMFS exercises the Secretary's powers under the Magnuson-Stevens Act pursuant to departmental delegations. *See United Boatmen v. Locke*, No. 09-cv-5628, 2011 WL 765950, at *1 (D.N.J. Feb. 25, 2011); SUPP3662–65 ¶ II.B.–C.26.

III. The Mid-Atlantic Fishery Management Council

The Mid-Atlantic Fishery Management Council, an independent body within the Executive Branch, "ha[s] authority over the fisheries in the Atlantic Ocean seaward of" New York, New Jersey, Delaware, Pennsylvania, Maryland, and Virginia. § 1852(a)(1)(B). The Act provides that the Council shall comprise 21 voting members with three different modes of appointment.

Governor-Designated Seats: The Act provides that seven seats are to be respectively filled by the governors of the states above plus the governor of North

Carolina. Each seat is to be held by each state's "principal State official with marine fishery management responsibility and expertise." § 1852(b)(1)(A). Each of these officials holds his or her Council seat "so long as the official continues to hold" his or her state position and so cannot be removed by the President. *Id.* These state officials may designate others to fill their own seats. *Id.*

Service Official: Under the Act, one seat is taken by NMFS's Greater Atlantic Regional Administrator, or his designee. § 1852(b)(1)(B).

Governor-Nominated Seats: The Act provides that the governors of the seven states nominate candidates for the remaining 13 seats. § 1852(a)(1)(B), (b)(1)(C), (2)(C). The governors must nominate at least three individuals for each vacancy. § 1852(b)(2)(C). The Secretary makes the final selection for these seats from the nominations. § 1852(b)(2)(C). The Secretary may remove a nominated member "for cause" only if two-thirds of the Council first seeks removal, or if the member violates certain financial conflict-of-interest provisions. § 1852(b)(6)(A)–(B).

FACTUAL BACKGROUND

I. The Putative Members of the Mid-Atlantic Council

Of the 21 putative members of the Mid-Atlantic Council who participated in the vote to approve Amendment 22, two were governor-designated state officials and five were further designees of governor-designated state officials. Statement of Material Facts ("Statement") ¶ 1. Thirteen other individuals had been nominated by governors and selected by the Secretary in accordance with § 1852(b)(2)(C). *Id.* ¶ 7.

The Greater Atlantic Regional Administrator is the relevant NMFS official who sits on the Mid-Atlantic Council pursuant to § 1852(b)(1)(B). *Id.* ¶ 3. Michael Pentony was the putative Regional Administrator. *Id.* ¶ 2. Mr. Pentony was selected by a lesser Commerce Department official, not the Secretary of Commerce or another head of department. *Id.* ¶¶ 4–5. The Regional Administrator is a career NMFS official in the Senior Executive Service ("SES"), *id.* ¶ 6, meaning he cannot be removed from the SES except for cause, *see* 5 U.S.C. §§ 7541–43, though he can be reassigned out of his role as the Regional Administrator to another SES position at will, *id.* § 3395(a)(1)(A).

II. Amendment 22 and the Atlantic States Marine Fisheries Commission

Before the Rule was promulgated, commercial fishermen were allocated 60%, 78%, and 49% of annual quotas of summer flounder, scup, and black sea bass, respectively. 87 Fed. Reg. 49,573, 49,574 (Aug. 11, 2022). On December 14, 2021, the putative members of the Mid-Atlantic Council agreed upon Amendment 22. Statement ¶ 8. The National Marine Fisheries Service approved Amendment 22 as lawful. *Id.* ¶ 9. The putative members of the Council also transmitted to NMFS a proposed regulation to implement Amendment 22, which NMFS approved, published for comment, and then promulgated as a final rule. *Id.* ¶ 10. Consistent with Amendment 22, the Rule permanently reduced commercial allocations of quota for summer flounder, scup, and black sea bass to 55%, 65%, and 45%, respectively. 87 Fed. Reg. at 68,926 (AR3644). Although this effected a reduction of 5%, 13%, and 4% of commercial fishing from the *total* quotas for these species, this represents 8.33%, 16.67%, and 8.16% reductions in

commercial quotas. Statement ¶ 14.[1]

III. The Plaintiffs[2]

Raymond Lofstad is a 64-year-old commercial fisherman living in New York. Statement ¶ 16. He has fished in federal waters under the jurisdiction of the Mid-Atlantic Council since 1977 and has owned and operated a fishing vessel in those waters since 1992. *Id.* ¶ 17. Approximately 50 percent of his total annual catch occurs in Mid-Atlantic federal waters, of which between 40 and 60 percent consists of summer flounder, scup, and black sea bass. *Id.* ¶ 18. Gus Lovgren is a commercial fisherman living in New Jersey. *Id.* ¶ 19. He has fished in federal waters under the jurisdiction of the Council for 19 years and has owned and operated a fishing vessel in those waters for 3 years. *Id.* ¶ 20. Approximately 90 percent of his total annual catch occurs in the federal waters of the Mid-Atlantic, of which between 60 and 80 percent of his catch consists of summer flounder, scup, and black sea bass. *Id.* ¶ 21.

Summer flounder and black sea bass are some of the products on which Raymond and Gus rely on most heavily for income. *Id.* ¶ 22. Accordingly, they use all the fishing opportunity allowed to them for summer flounder and black sea bass,

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[1] Concurrently with the 21 individuals' adoption of Amendment 22, the Atlantic States Marine Fisheries Commission adopted an identical provision. Statement ¶ 15. The Commission is an interstate body whose decisions are adopted by its member states. *See* § 5104. Member states' authority is limited to waters between shore and three nautical miles offshore. *See* 43 U.S.C. § 1312; § 1856(a)(1).

[2] Plaintiffs may introduce extra-record evidence to establish standing. *Am. Littoral Soc'y v. U.S. EPA Region*, 199 F. Supp. 2d 217, 228 & n.3 (D.N.J. 2002).

consistently catching those species up to or near the catch limits imposed on them, and fishing as long as the fishery remains open. *Id.* If they were allowed to catch more summer flounder and black sea bass, they would. *Id.* ¶ 23. Instead, the reduction in commercial allocation will reduce their fishing opportunity—whether by reducing trip limits, reducing landing limits, causing earlier or more frequent seasonal closures, or otherwise—and reduce their income. *Id.* ¶ 24. Already, the 2023 commercial quotas for these fish have dropped compared to 2022, even though the Acceptable Biological Catch (across commercial and recreational fishing) stayed the same. *Id.* ¶ 25; *see* 86 Fed. Reg 72,859, 72,86–62 (Dec. 23, 2021); 88 Fed. Reg. 11, 12 (Jan. 3, 2023).

Raymond's and Gus's fishing operations are optimized for efficiency and profitability, meaning changes to their operations will reduce profitability. Statement ¶ 26. Furthermore, they cannot make up for their lost fishing opportunity without spending more money. *Id.* ¶ 27. For example, Raymond does not possess permits to land fish in states other than New York, and he cannot afford such permits. *Id.* ¶ 28. While Gus possesses landing permits for Virginia and North Carolina, their distance from his fishing grounds means that most of his catch will have expired by the time he landed them, he would have to pay increased fuel costs, and increase his boating time to seven days a week away from home. *Id.* ¶ 29. Market conditions in those states are also less favorable. *Id.* This means landing fish in these states would not make up for his lost revenue. *Id.* Gus cannot afford landing permits other than the ones he already has. *Id.* ¶ 30. They also cannot avoid the reallocations by fishing in state waters. *Id.* ¶ 31.

Raymond and Gus also are unable to increase their catch of other species that they already fish for to a sufficient degree to make up for the loss in revenue due to the reallocations. *Id.* ¶ 32. Catching new species would require significant investments in new permits and gear, which they cannot afford, as well as require significantly more time away from home fishing for species that are less efficiently caught. *Id.* ¶ 33.

The reduction in commercial allocation also impacts Raymond's retail merchandise business, where he sells fishing-related products such as bait. *Id.* ¶ 34. That business is secondary to his fish-retail business, meaning customers come to Raymond to buy fish and happen across merchandise that they would like to purchase. *Id.* Fewer fish to sell will make for fewer customers coming to Raymond, meaning his merchandise sales can also be expected to decline. *Id.*

Raymond and Gus both predict annual losses in the tens of thousands of dollars because of the Rule's reallocation. *Id.* ¶¶ 35–36. Gus has already seen a loss of $40,000 gross over a five-week period in 2023 compared to 2022 due to the reallocation. *Id.* ¶ 36.

The reallocation also reduces the value of Raymond's fishing assets, which constitute a significant portion of his total assets. *Id.* ¶ 37. For example, he possesses specialized nets for commercial fishing of summer flounder, scup, and black sea bass. *Id.* ¶ 38. The reallocations reduce interest in the commercial fishery and reduce the value of Raymond's specialized nets, as well as the value of Raymond's other fishing assets, such as his federal fishing permit for the affected species. *Id.* ¶ 39.

ARGUMENT

The Mid-Atlantic Council is vested with significant power, and so its seats may be filled only pursuant to the Appointments Clause. The 21 putative members who adopted Amendment 22 and its implementing regulation were not, however, selected pursuant to the Appointments Clause, and so they never held seats on the Mid-Atlantic Council. Rather, they acted under only color of official title. Their adoption of Amendment 22 and the regulation had no more effect than 21 members of the public voting to approve those measures. In other words, their approval as a purported official action of the Council was void. NMFS was obligated to reach the above conclusions and so to conclude that Amendment 22 and the proposed regulations were not the product of the Council. It was therefore obligated not to act on Amendment 22 and the proposed regulation. But NMFS instead approved both measures and promulgated the regulation as a final rule, which actions exceeded its power under the Magnuson-Stevens Act and the Constitution. The Rule's reallocations therefore must be set aside.

I. Plaintiffs Have Standing

Plaintiffs in federal court must have standing to pursue their claims. The elements of standing are "(1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Cottrell v. Alcon Labs.*, 874 F.3d 154, 162 (3d Cir. 2017) (simplified). For purposes of the standing inquiry, courts assume that the claims are meritorious. *Id.*

A. Injury-in-fact

The injury-in-fact requirement "distinguish[es] a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *Id.* (simplified). "The injury-in-fact requirement is very generous to claimants," requiring only "some specific, identifiable trifle of injury. It is not Mount Everest." *Id.* (simplified). "[F]inancial harm will easily satisfy" this requirement. *Id.* at 163 (simplified).

For the reasons explained in the Plaintiffs' section of the Factual Background, Plaintiffs are financially harmed by the Rule's reallocation in multiple ways. To briefly restate, first, the reallocation permanently reduces the percentages of summer flounder, scup, and black sea bass quota available to their commercial fishing. Both Raymond and Gus consistently use all the fishing opportunity allowed to them for summer flounder and black sea bass, which are some of the fish on which they rely the most for income. The Rule's reduction of fishing opportunity for these species—in whatever form it takes—will harm them. Indeed, Gus has already lost $40,000 gross attributable to the reallocations of black sea bass quota. The reallocation also reduces the value of Raymond's fishing assets, including assets specific to the three species. And the reduction in take-home fish will reduce foot traffic to Raymond's fish-retailing business and thus reduce incidental sales of Raymond's merchandise. Plaintiffs clearly have a "direct stake in the outcome of [the] litigation." *Cottrell*, 874 F.3d at 162 (simplified).

B. Traceability

Traceability requires that the injury be "fairly traceable to the defendant's allegedly unlawful conduct." *Adam v. Barone*, 41 F.4th 230, 233 (3d Cir. 2022) (simplified). Traceability "is akin to but-for causation." *Id.* at 235. As explained above, Plaintiffs' injury is caused by the Rule's reallocations. The Rule was issued by NMFS, which is directed by Assistant Administrator Coit pursuant to delegated authority from Secretary Raimondo. The injury is therefore traceable to Defendants' conduct. And as Plaintiffs alleged and argue herein, NMFS was not entitled to issue the Rule.

C. Redressability

The injury must be "likely to be redressed by a favorable" decision. *Cottrell*, 874 F.3d at 162 (simplified). If the Court agrees that the Rule's reallocations were improperly adopted, they should be "set aside." § 1855(f)(1)(B). Doing so would redress Plaintiffs' injury by returning commercial allocations to their prior, higher numbers.

II. Council Members Are Officers

An officer is an official with significant federal authority. *Lucia*, 138 S.Ct. at 2051.

A. Significant authority

For an official to possess significant authority, it is sufficient that, "in the course of carrying out … important functions, the [official] exercise[s] significant discretion." *Id.* at 2052 (simplified); *accord Cirko*, 948 F.3d at 152. As noted above, this test encompasses a broad range of authority, ranging from that of heads of agencies to postmasters first class, district court clerks, and election supervisors. *Buckley*, 424 U.S. at 126 (reasoning that, "[i]f a postmaster first class and the clerk of a district court are

inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely [FEC] Commissioners" are officers as well (citations omitted)); *Edmond*, 520 U.S. at 661. In contrast, officials without significant authority are nonofficers, and the Constitution's appointments strictures do not apply to them. Here, because the Council is vested with significant authority, the Appointments Clause provides the exclusive method of filling Council seats.

The Supreme Court explained the meaning of significant authority in *Freytag v. Commissioner*, 501 U.S. 868 (1991). The Court there held that a Tax Court Special Trial Judge ("STJ") exercised significant authority, even when presiding over cases in which the STJ "could not issue the final decision." *Lucia*, 138 S.Ct. at 2052 (describing *Freytag*). In such cases, STJs "prepar[e] the proposed findings and opinion" for a Tax Court judge, who then rules on the case. *Freytag*, 501 U.S. at 880. An STJ's "opinion counts for nothing unless the regular judge adopts it as his own." *Lucia*, 138 S.Ct. at 2054. Yet, STJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Freytag*, 501 U.S. at 881–82. Because STJs exercised "significant discretion" in carrying out these "important functions," STJs possessed significant authority and were officers. *Id.* at 882.

The Court followed *Freytag* in *Lucia*, where the Court held that SEC administrative law judges ("ALJs") exercise significant authority. ALJs have the same powers as STJs to preside over cases, so they "critically shape the administrative record." *Lucia*, 138 S.Ct. at 2053. But ALJs' powers were even more clearly significant

because ALJ decisions have "potentially more independent effect." *Id.* Whereas STJ decisions must be reviewed by a Tax Court judge, "the SEC can decide against reviewing an ALJ decision at all," causing the ALJ decision to "'become[] final'" and be "'deemed the action of the Commission.'" *Id.* at 2054 (quoting 17 C.F.R. § 201.360). The Court thus held that SEC ALJs are officers.

As this discussion reveals, courts look to the full scope of an official's authority, not just the powers exercised in a particular case, to determine the official's officer status. If an official possesses *any* significant powers, even ones not exercised with respect to the challenged action, the official is an officer *for all assigned duties* and is subject to the Constitution's constraints. That's because "it ma[kes] no sense to classify [officials] as officers for some cases and employees for others." *Lucia*, 138 S.Ct. at 2052 n.4. "If a[n] [official] is an … officer for purposes of [some of his duties], he is an … officer within the meaning of the Appointments Clause and he must be properly appointed." *Freytag*, 501 U.S. at 882.

B. The Mid-Atlantic Council possesses significant authority

The Mid-Atlantic Council wields significant authority pursuant to federal law and its members are therefore officers.

1. The Council has exclusive policymaking power over Mid-Atlantic fisheries in federal waters

Chief among the Council's powers is its power to decide federal fisheries policy. As NMFS's top regulatory official Deputy Assistant Administrator for Regulatory

Programs Sam Rauch stated, the Council is "where we make … policy-level decisions" about Mid-Atlantic fisheries; the Mid-Atlantic Council "is basically a mini legislative body" that decides "who, when, and where people get to fish." Ruth Sando, *Rauch, Sam: Oral History Interview* 15, 19 (June 30, 2016) ("Rauch").[3]

The Council carries out this responsibility primarily by crafting fishery management plans and plan amendments. § 1852(h)(1). FMPs are comprehensive frameworks for regulating fisheries. In promulgating such plans and plan amendments, the Council decides the "conservation and management measures" to be employed in the fishery, the amount of fishing permitted, the kinds of permits and fees required, the triggers for fishery closures, and much else besides. § 1853(a)–(b).

As noted above, after adopting an FMP or amendment, the Council submits the measure to NMFS, which reviews it for consistency with law, pursuant to delegation from the Secretary. *See Locke*, 2011 WL 765950, at *1; SUPP3662–65 ¶ II.B.–C.26. If the FMP or amendment would not violate law, *e.g.*, if it would merely contradict NMFS's preferred policy approach, the agency must approve the measure. *See* § 1854(a)(1), (3). Any disapproval must explain how the measure conflicts with law. § 1854(a)(3). Furthermore, if NMFS fails to approve or disapprove an FMP or amendment within the allotted time, "then such plan or amendment shall take effect as if approved." *Id.* Thus, unless the Council's policy violates the law, the Council, rather

[3] https://voices.nmfs.noaa.gov/sites/default/files/2018-09/rauch_samuel.pdf.

than NMFS, decides fisheries policy within its geographical jurisdiction.

The Council also possesses the power to propose any regulation it "deems necessary or appropriate" to implement an FMP. § 1853(c). But these regulations are "proposals" in name only. As with FMPs, NMFS may block a proposed regulation only for violating the law; the policy prerogative remains with the Council. § 1854(b)(1). If the proposed regulation is consistent with applicable law, NMFS "shall" promulgate it as a final rule within 30 days after the notice-and-comment period. § 1854(b)(3). And if the regulation is unlawful, NMFS must return it to the Council for revision. § 1854(b)(2). Again, the Council is in charge. Or as Mr. Rauch put it, NMFS "ultimately issue[s] the regulations … because it resolves what they [the Councils] do as legal," but "they really drive the system." *Rauch, supra*, at 15. "We [NMFS] basically are the auditors of that system." *Id.*

The Council is clearly vested with significant power in issuing FMPs, FMP amendments, and proposed regulations. Through these measures, the Council is empowered to set policy, including permanent fisheries closures, directly affecting the livelihoods of fishermen and their communities. The Council's power is much broader, more discretionary, and more coercive than that of the *Freytag* and *Lucia* adjudicators, who merely take evidence and propose resolutions in discrete cases affecting a handful of parties in accordance with extant statutes and regulations. Since these adjudicators are officers, *a fortiori*, Council members must be officers. Or, as *Buckley* reasoned, "[i]f a postmaster first class and the clerk of a district court are ... officers of the United States

within the meaning of the Appointments Clause, as they are, surely" Council members are officers. 424 U.S. at 126.

The Magnuson-Stevens Act permits the Secretary, through NMFS, to block FMPs, amendments, and proposed regulations that conflict with "applicable law." § 1854(a)(1)(A), (b)(1). But that does not defeat the significance of the Council's power. NMFS merely verifies that a measure is lawful before it goes out the door. § 1854(a)(3), (b). Within the wide range of lawful policy choices, the Council calls the shots. And, according to the Supreme Court, when an executive official is not checked by another "on matters of law *as well as* policy," the official is a *principal* officer, as discussed later—and so necessarily an officer. *Arthrex*, 141 S.Ct. at 1983 (emphasis added).

The Council's policymaking power is clear from the text of § 1854, but the purpose, structure, and other provisions of the Magnuson-Stevens Act confirm the Council's primacy in policymaking. The Act's statement of purpose declares that Congress "establish[ed] Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources." § 1801(b)(5). Furthermore, in establishing the Councils, Congress provided that they "shall have authority over the fisheries" in their respective geographical jurisdictions. § 1852(a). Though Congress constrained that authority with ten statutory requirements, § 1851(a), it specifically prohibited the Secretary from intruding on Councils' autonomy in crafting FMPs, § 1851(b) (providing that the Secretary's "guidelines" regarding the statutory requirements "shall not have the force and effect of law").

The structure of the Magnuson-Stevens Act also reflects the Councils' lead role in fisheries policy. The Act establishes the Councils, § 1852, before addressing the Secretary's powers, § 1854. And Congress granted every Council expansive, general authority, § 1852(a)(1), but limited the Secretary to only highly specific "authority over any highly migratory species fishery" that meets certain geographic conditions, § 1852(a)(3). Even in the section devoted to the Secretary's powers, the Secretary's response to Council action is treated first; later subsections provide for the Secretary's minor unilateral authority. § 1854(a)–(b). In general, the Secretary may exercise power over a fishery managed by a Council only if the Council fails to take necessary action. § 1854(c)(1)(A), (6). But even if the Secretary determines that a fishery has become overfished and remedial action is needed, the Act requires the Secretary to ask a Council to address the issue. § 1854(e)(2). And the Secretary is forbidden from taking unilateral action until the Council has neglected to act for two years. § 1854(e)(5). It is clear that the discretion to make fisheries policy lies with the Council, not the Secretary or NMFS.

2. The Council decides when the rulemaking process starts

Even if, contrary to statute, NMFS had discretion to block Council actions on policy grounds, the Council would still possess significant authority. That's because the Council would nevertheless have significant discretion in performing the important function of crafting FMPs, amendments, and regulations in the first instance. §§ 1852(h)(1), 1853(c). And having significant discretion in performing important functions is all it means to have "significant authority." *Lucia*, 138 S.Ct. at 2047. For

fisheries within the Council's geographical jurisdiction, NMFS cannot begin the regulatory process unilaterally. Rather, it must wait for the Council to begin the process by "transmitt[ing] … a fishery management plan or plan amendment" or "proposed regulations" to NMFS. § 1854(a)(1), (b)(1). So just as the Council (in this hypothetical) requires NMFS's concurrence to enact policy, so too does NMFS need the Council's cooperation to issue FMPs and regulations.

3. The Council's decisions have independent effect

Furthermore, again assuming arguendo that NMFS had discretion to block Council actions on policy grounds, the responsibility for writing the FMPs and amendments would remain with the Council; NMFS holds only the power to approve or disapprove these measures. § 1854(a)(3). If NMFS disapproves the measure, the Council may submit a revised measure. § 1854(a)(4). And when NMFS decides *not* to block an FMP or amendment, it is the *Council's* action that becomes effective as written. The Council is therefore like the ALJ in *Lucia*. There, the ALJ's decision "becomes final and is deemed the action of the Commission" if the SEC "declines review (and issues an order saying so)." *Lucia*, 138 S.Ct. at 2054 (simplified). This meant that the ALJ's decisions could have "independent effect." *Id.* at 2053.

The Council's actions here have even more independent effect than SEC ALJs' decisions. *Id.* at 2054. Whereas SEC ALJ decisions become final only if the SEC enters an order effectively adopting the ALJ decision, the Council's FMP or amendment becomes final by default if the Secretary simply fails to act on it. § 1854(a)(3). No

concurrence in the measure is necessary. And unlike ALJ decisions, which can be revised by the SEC, NMFS may only approve or disapprove a Council FMP or amendment; NMFS cannot revise it and promulgate the revised version as final. § 1854(a)(3), (b)(3). The prerogative remains with the Council.

The Council's power to propose regulations is similar. As with FMPs and amendments, regulations are proposed by the Council in the first instance. If NFMS approves a proposed regulation, it is the Council's decisions that are made final, giving them "independent effect," just as SEC ALJ decisions become final when the SEC declines review. Unlike with FMPs and amendments, though, NMFS may revise proposed regulations within 30 days after the notice-and-comment period. § 1854(b)(3). Such revisions, however, are permitted only if NMFS first "consult[s] with the Council." *Id.* In the absence of consultation within the 30-day period, NMFS "shall" issue the regulation as a final rule. *Id.* And because of the Council's independence, the Council may simply deny consultation for that 30-day period, as the government has argued elsewhere. *See Oceana, Inc. v. Ross*, No. 17-cv-5146, Docket No. 124, at 8–9 (C.D. Cal. Nov. 18, 2019) (government brief) ("NMFS has repeatedly attempted to consult with the Pacific Council," but "NMFS lacks the authority to *compel* the independent Pacific Council to place this item on its agenda or deliberate further on this subject."). Denying consultation forces the Secretary to publish the rule as is. This is precisely how, in 2020, a Council was able to force NMFS to promulgate a regulation over the agency's objections. *See Fisheries off West Coast States*, 85 Fed. Reg. 7246, 7247 (Feb. 7, 2020)

(stating that NMFS published the rule because it was not able to consult with the Council in time, such that NMFS was unable to withdraw or revise the rule).

4. The Council assembles the record

Finally, even if—in direct opposition to statute—the Council lacked any independent policy power, such that its actions were purely precatory, the Council would still wield significant authority because it shapes the administrative record on which any final decision must be based. *Cf. Del. Dep't of Nat. Res. & Envtl. Control v. U.S. Army Corp of Eng'rs*, 722 F. Supp. 2d 535, 542 (D. Del. 2010) (An administrative record consists of the materials that were "directly or indirectly considered" by an agency taking an action. (simplified)); *accord Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989).

In *Freytag*, the STJs' decisions were purely recommendatory, "com[ing] to nothing unless the regular [Tax Court] judge adopts it." *Lucia*, 138 S.Ct. at 2054. Still, STJs possessed significant authority because they had "authority to hear cases and prepare proposed findings and opinions." *Freytag*, 501 U.S. at 874. In doing so, they "critically shape the administrative record" that informs the Tax Court judges' decisions. *Lucia*, 138 S.Ct at 2053. Like STJs, the Council critically shapes the administrative record of a proposed fishery measure. When adopting an FMP or amendment, the Magnuson-Stevens Act requires the Council to specify every relevant detail, such as: "the number of vessels" in the fishery, "the type and quantity of fishing gear used," the type of fish at issue, "the present and probable future condition of ...

the fishery," the likely costs of management measures, those measures' "cumulative conservation, economic, and social impacts," relevant "economic information," the presence of essential fish habitat, the "scientific data which is needed for effective implementation of the plan," and numerous other types of information. § 1853(a). The Council also shapes the record by collecting comments from the public, § 1852(h)(3), and reports from its various advisory committees and panels, § 1852(g)(1)–(3). Thus, even if the Council's adoption of a fishery measure were purely recommendatory, Council members would still be officers due to their role in shaping the administrative record.

5. The Council may block Secretarial actions on policy grounds

Finally, if the Secretary's ability to block Council action for illegality is deemed so significant as to overwhelm the Council's otherwise significant power, then the Council's ability to block Secretarial action on policy grounds must also be a significant power. For example, if the Secretary attempts to "repeal or revoke a fishery management plan for a fishery under the authority of a Council," he must receive the permission of a supermajority of the Council, meaning a small minority of the Council can block the action. § 1854(h). Similarly, if the Secretary wishes to establish a limited access fishing program for a fishery under the authority of a Council, he must obtain the approval of the Council. § 1854(c)(3).

* * *

As demonstrated above, Council members would possess significant authority

even if they lacked exclusive policymaking power over fisheries. But the fact remains that they do possess that exclusive power because NMFS may not block Council actions except for illegality. In so holding, the Court would merely be taking Congress at its word when it stated that it "establish[ed] Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources." § 1801(b)(5). Or Mr. Rauch's word when he said each Council is "where we make ... policy-level decisions" about fisheries—"a mini legislative body" that decides "who, when, and where people get to fish." *Rauch, supra*, at 15, 19. Or, of course, the Court may simply look to the statutory text, which lays out the Council's authority in black and white.

C. Continuing Position

Significant authority under federal law is necessary and sufficient for a position to fall within the scope of the Appointments Clause. But because some cases conclude that a position must also be "continuing" to trigger the protections of the Appointments Clause, *see Lucia*, 138 S.Ct. at 2053, Plaintiffs briefly discuss this issue as well.

Council positions are clearly continuing. They are "created by statute, down to [their] duties, salary, and means of appointment," *id.* (simplified); *see* § 1852(d) (setting compensation), as permanent positions. § 1852(a)(1) ("There shall be established" the Council positions.). No provision of law provides for the sunset or other termination of these Council positions. Their duties are also continuing, in that a Council is responsible at all times for managing fisheries in its geographical jurisdiction.

§ 1852(a)(1)(G).

III. The Putative Council Members Were Not Appointed Pursuant to the Appointments Clause

As officers, Council members may be appointed only pursuant to the Appointments Clause. The Appointments Clause is "among the significant structural safeguards of the constitutional scheme," *Edmond*, 520 U.S. at 659, not a matter of "mere[] ... etiquette or protocol," *Buckley*, 424 U.S. at 125. "[B]y carefully husbanding the appointment power to limit its diffusion," the Founders "ensure[d] that those who wielded it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 883–84. Because individuals who were not appointed to the Council are responsible for Amendment 22 and its implementing regulation, the measure must be vacated.

A. The putative Council members were not appointed as principal officers

The Council's authority and independence are such that Council members are principal officers. Yet, no putative member was nominated by the President and confirmed by the Senate, and the putative members therefore were not appointed to Council seats and so lacked the Council's power.

Principal officers are all officers who do not qualify as inferior. *Arthrex*, 141 S.Ct. at 1979. And "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. The inquiry is "how much power

an officer exercises free from control by a superior." *Arthrex*, 141 S.Ct. at 1982.

"[T]he governing test" for direction and supervision turns on three factors: 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." *Id.* at 1980, 1982. However, if an officer has "the power to render a final decision on behalf of the United States without any ... review by [a] principal officer in the Executive Branch," then the officer is necessarily a principal officer. *Id.* at 1981 (simplified). Under both tests, Council members are principal officers.

First, the Council is not subject to administrative oversight. In *Edmond*, a principal officer exercised administrative oversight over Coast Guard agency adjudicators by "prescribing rules of procedure and formulating policies" that controlled the adjudicators' decisions. *Id.* at 1980. And in *Arthrex*, a principal officer exercised administrative oversight over patent adjudicators by deciding whether the adjudicators would even hear a particular case, selecting the adjudicators to preside over the case, issuing regulations that govern adjudications, and indicating which past decisions bind future adjudications. *Id.*

The Council is not subject to any such oversight. By statute, Councils set their own priorities, establish and direct their own staff, and create their own operating procedures. § 1852(e)–(i). Unlike the adjudicators in *Edmond* and *Arthrex*, the Council's principal power—issuing FMPs and amendments—is protected from interference by the Secretary, who may only "assist" the formulation of FMPs by "establish[ing]

advisory guidelines" that explicitly "shall not have the force and effect of law." § 1851(b). Furthermore, any oversight is conducted not by a Senate-confirmed officer but by NMFS's Assistant Administrator pursuant to delegated authority. *See* Statement ¶ 11 (Decision memo approving regulation was addressed to Assistant Administrator and signed by her Deputy Assistant Administrator for Regulatory Programs Samuel Rauch.); SUPP3662–65 ¶ II.B.–C.26 (delegation). The Assistant Administrator is "appointed by the Secretary, subject to approval of the President," Reorganization Plan No. 4 of 1970 § 2(e)(1), not Senate-confirmed. The Deputy Assistant Administrator for Regulatory Programs is also not Senate-confirmed. Statement ¶ 12.

Second, under the Act, none of the Council members is removable at will by a Senate-confirmed officer. The Act provides that the seven governor-designated members hold their Council seats "so long as the official[s] continue[] to hold" their state positions, and so cannot be removed by the Secretary. § 1852(b)(1)(A). The Regional Administrator is a career SES employee, Statement ¶ 6, and so cannot be removed except for cause, *see* 5 U.S.C. §§ 7541–43. And under the Act, the 13 governor-nominated members are removable by the Secretary only "for cause" and only if two-thirds of the Council first seeks removal of that member, or if the member violates certain financial conflict-of-interest provisions. § 1852(b)(6)(A)–(B).

Third, the Council's policy decisions are not subject to countermand by others in the Executive Branch. As discussed above, the Secretary must approve a Council's fishery measure unless it is illegal. So long as it acts lawfully, the Council's policy

decisions are immune from reversal or correction by another, and that is what matters.

These three points together show that Council members are not directed and supervised by anyone and so must be appointed as principal officers under *Edmond*'s three-factor test. But Council members must also be appointed principal officers under *Arthrex*, because, as discussed above, they have the final word on fisheries policy.

Arthrex held that administrative patent judges ("APJs") working in the Patent and Trademark Office must be appointed as principal officers. *Arthrex*, 141 S.Ct. at 1983. APJs wield the significant authority of deciding the validity of patents in an administrative adjudication. *Id.* at 1980. The Court held that APJs had to be appointed as principal officers because the PTO Director could not directly review their decisions or otherwise "countermand[] the final decision already on the books." *Id.* at 1981–82. Only a panel of APJs could reverse the decision on rehearing. *Id.* Technically, the Director must "take final action to cancel a patent claim or confirm it" after the APJs' decision, but this was a mere "ministerial duty"; the substantive final power still lay with the APJs. *Id.* at 1981 (simplified). "[W]hen it comes to the one thing that makes the APJs officers ... in the first place—their power to issue decisions on patentability"—"[t]he chain of command runs not from the Director to his subordinates, but from the APJs to the Director." *Id.* at 1980–81.

Similarly, the Council's policy judgments cannot be reversed. NMFS may disapprove a fishery measure for illegality, but the policy prerogative remains with the Council. Council members, therefore, cannot be inferior officers, because they are not

"directed ... on matters of law as well as policy." *Id.* at 1983. Furthermore, in rulemaking, the substantive power is not in determining whether a rule is legal but in deciding policy. *See McDougal-Saddler v. Herman*, 184 F.3d 207, 214 (3d Cir. 1999). And the final word on policy lies with the Council.

Notably, the PTO Director possesses myriad other powers to control the course of an adjudication, but *Arthrex* concluded that these powers were insufficient to make APJs inferior officers, because the use of these powers to control the adjudication would "blur the lines of accountability demanded by the Appointments Clause," given that the statute cast the APJs as responsible for the adjudication. 141 S.Ct. at 1982. For example, the Director could decide whether to allow an administrative adjudication at all, which APJs would hear a case, and which past decisions are precedential for future adjudications. *Id.* at 1980. The Director could also end an ongoing adjudication "if he catches wind of an unfavorable ruling on the way." *Id.* at 1981. Or, if a decision had already been issued, he could indirectly reverse the decision by "stack[ing]" the panel that decides the rehearing petition with APJs "assumed to be more amenable to his preferences." *Id.* He could even place himself on such a panel. *Id.*

These powers were irrelevant, the Court explained, because even if, through these "machinations," the Director was able to "indirectly influence" the adjudication and "procur[e] his preferred outcome," the APJs would *still* be principal officers. *Id.* at 1982. That's because these actions would allow "the Director to evade a statutory prohibition on review without having him take responsibility for the ultimate decision."

Id. at 1981. Because the statute cast the APJs as the officials responsible for patentability decisions, "the lines of accountability demanded by the Appointments Clause" required that APJs be appointed as principal officers—even if the Director could indirectly control the patentability decision. *Id.* at 1982. Allowing APJs to be appointed as inferior officers—because the Director could, through his "machinations," be quasi-responsible for adjudicatory outcomes—would unacceptably "blur" those lines. *Id.*

The same is true here. Even if NMFS could indirectly push the Council to adopt NMFS's regulatory preferences, *e.g.*, through the threat of disapproving the Council's preferred measures, that would allow NMFS and the Secretary to "evade a statutory prohibition on [fisheries policymaking] without having [them] take responsibility for the ultimate decision." *Id.* at 1981. The Magnuson-Stevens Act casts the Council as the body responsible for fisheries policy in the Mid-Atlantic. The Act "establish[ed] Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources," § 1801(b)(5), and gave the Mid-Atlantic Council "authority over the fisheries in the Atlantic Ocean seaward of" Mid-Atlantic states, § 1852(a)(1)(B). It empowered the Council to issue regulatory measures, subject only to the lawfulness of those measures, § 1854(a)–(b), and explicitly protected the Council's prerogative from interference by the Secretary otherwise, § 1851(b). Accordingly, Council seats may be filled only by Senate confirmation, even if NMFS's "machinations" could influence the Council's policy choices. *Arthrex*, 141 S.Ct. at 1982. To allow members to be appointed as inferiors because the Secretary claims to have some unspecified portion of

policymaking power would make it unclear "on whom the blame … of a pernicious measure … ought really to fall." *Id.* (quoting The Federalist No. 70, at 476 (A. Hamilton)). To avoid "blur[ring] the lines of accountability demanded by the Appointments Clause," Council members must be appointed as principal officers. *Id.*

Finally, Council members must be appointed as principal officers because they collectively constitute a "head of department." A department for Appointments Clause purposes is a "freestanding component of the Executive Branch." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 511 (2010). Because the Council is not contained in or subordinate to another agency, Council members constitute a head of department. *Cf. Oceana*, No. 17-cv-5146, Docket No. 124, at 8–9 (Defendants noting that the Council is "independent" and that NMFS "cannot force the Council to act"). And heads of departments are by definition principal officers. *Freytag*, 501 U.S. at 884 (identifying principal officers as "including heads of departments"); *United States v. Germaine*, 99 U.S. 508, 511 (1878) ("Principal officer" in the Opinion Clause means head of department.). Council members must be appointed as principal officers for this reason as well.

Because Council members are principal officers, their seats may be filled only by Presidential nomination and Senate confirmation. The 21 putative Council members were not nominated by the President and confirmed by the Senate. *See* § 1852(b)(1)(A) (regarding governor-designated members); Statement ¶ 6 (Greater Atlantic Regional Administrator was hired as a career SES employee); § 1852(b)(1)(C), (2)(C) (regarding governor-nominated members). They were thus never constitutionally appointed as

Council members.

B. The putative Council members were not appointed as inferior officers

Even if Council members need only be appointed as inferior officers, the putative Council members were not so appointed. The default appointment procedure for inferior officers is Presidential nomination with Senate confirmation. *Edmond*, 520 U.S. at 660. Congress may loosen this requirement only within strict limits by vesting the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. None of the 21 putative Council members' appointments satisfies this procedure.

1. Governor-designated individuals

Seven of the putative Council members were "designated ... by the Governor of the State" or were "the designee of such official." § 1852(b)(1)(A). Indeed, when the putative Council members adopted Amendment 22, five of the seven seats were occupied by designees of the governors' designees. *See* Statement ¶ 1. But neither governors nor governors' designees are the President, a head of department, or a court of law, and so they may not fill inferior offices under the Appointments Clause.

The fact that these putative members hold state offices is irrelevant. Council members occupy offices created by federal law and wield significant federal power and so act on the President's behalf. *See Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2191 (2020). They must be appointed as officers of the United States.

2. Service official

One of the putative members was "[t]he regional director of [NMFS] for the geographic area concerned, or his designee." § 1852(b)(1)(B). The relevant regional director is the Greater Atlantic Regional Administrator. Statement ¶ 3. Michael Pentony is the individual putatively appointed as the Regional Administrator. *Id.* ¶ 2. Mr. Pentony was selected for his position by a lesser Commerce Department official, not the President, a head of department, or a court of law. *Id.* ¶¶ 4–5.

3. Governor-nominated individuals

Thirteen individuals were selected by the Secretary, a head of department. But the Act restricted the Secretary's choice to those individuals nominated by a governor. § 1852(b)(2)(C). And governors may nominate as few as "three individuals for each applicable vacancy." *Id.* Under the Act, the Secretary may not reject a nominations list for a vacancy unless one of the nominees fails to satisfy objective statutory qualifications. *Id.* The Secretary may not reject a nominations list because of the individuals' character, policy prescriptions, or likely faithfulness in executing the law. As a result, the Secretary generally must appoint one of the nominees.

This regime violates the Appointments Clause, which ensures that the President can exclude from his officers "those who have different views of policy," "those who come from a competing political party," and those he determines are "not intelligent or wise." *Collins v. Yellen*, 141 S.Ct. 1761, 1787 (2021) (simplified). Yet, through the nominations process, governors can force the Secretary to appoint persons whose

judgment and character she mistrusts and whose policy prescriptions or governance philosophy she disagrees with. The procedure thus splits the appointment power between the Secretary and governors, with the latter possessing the lion's share of the power. The Appointments Clause itself confirms that nomination is part of the appointment power. U.S. Const. art. II, § 2, cl. 2 (President must nominate principal officers as part of their appointment.). The governor-nominated appointments contravene the Appointments Clause, which permits Congress to vest the appointment of inferior officers in the Secretary—not in governors and the Secretary jointly.

That the Secretary is guaranteed *some* choice from among a governor's nominees does not satisfy the Appointments Clause. As recognized in *Myers v. United States*, 272 U.S. 52, 128 (1926), the appointment power is the power to choose, and Congress may not prescribe qualifications for office that "so limit selection and so trench upon executive choice as to be in effect legislative designation." This standard would not permit Congress to narrow an appointment to three *specific* nominees. Shifting this prohibited power to designate specific individuals from Congress to state governors would equally restrict the Secretary's choice and divest her of her appointment power.

These putative Council members' selections did not conform to the Appointments Clause, both because their selections process split the appointment power between the Secretary and governors, and because the governors' discretion so restricted the Secretary's appointment as to be in effect a gubernatorial designation.

* * *

The Appointments Clause provides the exclusive method for filling inferior offices. Because the 21 individuals were not selected pursuant to those procedures, they never filled the Council seats, even if the seats were inferior offices.

C. The unconstitutional appointments mean that the Rule must be vacated

The Appointments Clause provides the sole "permissible methods of appointing 'Officers of the United States[.]'" *Lucia*, 138 S.Ct. at 2049. When an individual's selection does not conform to the Appointments Clause, his or her "appointment ... to office is deficient," and that person acts only "under the color of official title." *Ryder v. United States*, 515 U.S. 177, 180 (1995). This is because the statutory appointment provision, being "unconstitutional[,] ... is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment)[.]" *Collins*, 141 S.Ct. at 1788–89. The result is that those individuals were not appointed to the office and "lack[] the authority to carry out the functions of the office." *Id.* at 1788. Their actions are therefore "void" as actions of their putative offices. *Id.* at 1787.

The 21 individuals were not appointed pursuant to the Appointments Clause and so were never appointed to the Council but acted under color of official title only. Without holding the Council seats, these 21 individuals lacked the authority to start the rulemaking process by adopting Amendment 22 or its implementing regulation, and their actions doing so were therefore "void," *id.*, or in other words, they were

"exercise[s] of power that the actor[s] did not lawfully possess," *id.* at 1788.

NMFS therefore was presented with no amendment or regulation approved by the Council and was thus obligated not to act on the measures submitted by the putative Council members. Instead, it approved their measures as lawful. Without a lawful amendment or proposed regulation adopted by the Council, however, NMFS was not authorized to issue the Rule. The Secretary's unilateral rulemaking power under the Act is limited, *see* § 1854(c), and NMFS did not follow the necessary procedures for unilateral rulemaking, but instead relied on the Council process as the justification and authority for the rulemaking, *see generally* 87 Fed. Reg. 68,925 (final rule) (AR3643–48); *DHS v. Regents of Univ. of Cal.*, 140 S.Ct. 1891, 1907 (2020) ("It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." (simplified)). NMFS's promulgation of the Rule was therefore not in accordance with law, without observance of procedure required by law, and in excess of statutory authority. *See* 5 U.S.C. § 706(2). The promulgation was also contrary to constitutional right, in its assumption that the putative Council members in fact held Council seats, *see id.*, violating both Plaintiffs' "individual constitutional rights" to be governed by accountably appointed policymakers and "the structural imperative of separation of powers," *Cirko*, 948 F.3d at 153. Plaintiffs are therefore entitled to the reallocations mandated by the Rule and Amendment 22 being "set aside." § 1855(f)(1)(B); 5 U.S.C. § 706(2).

Furthermore, even if some Council seats comply with constitutional

requirements, if *any* Council member was incorrectly appointed, the Council as an entity was improperly constituted, with all the results noted above. This is because the Court may not assume that the members serving constitutionally would have approved Amendment 22 and its implementing regulation in the absence of the unconstitutional putative members. In *Free Enterprise Fund*, a firm being investigated by the Public Company Accounting Oversight Board challenged Board members' appointments. 561 U.S. at 511–12. The firm argued that Board members' appointments as inferior officers by the full Securities Exchange Commission were invalid because the Chairman, not the full Commission, was the head of department. *Id.* The government responded that that was irrelevant, as the Chairman had voted with the other Commissioners to appoint the Board members. *Id.* at 512 n.12. The Court, however, rejected the government's argument because "[w]e cannot assume ... that the Chairman would have made the same appointments acting alone[.]" *Id.*; *see also FEC v. NRA Pol. Victory Fund*, 6 F.3d 821, 822, 826 (D.C. Cir. 1993), *as amended* (Oct. 25, 1993) (holding that FEC's enforcement action was invalid because two unconstitutionally appointed, non-voting members could have "influence[d] the other commissioners" by "their mere presence").

Likewise, the Court may not assume that constitutionally serving Council members would have adopted Amendment 22 and the implementing regulation "acting alone" and without the influence of the unconstitutional, putative members. *Free Enterprise Fund*, 561 U.S. at 512 n.12. As the Court made clear in *Seila Law*, separation-of-powers plaintiffs are "not required to prove that the Government's course of

conduct would have been different in a counterfactual world in which the Government had acted with constitutional authority." *Seila Law*, 140 S.Ct. at 2196 (simplified). Likewise, the Third Circuit recognized that "it will often be difficult or impossible for someone subject to a wrongly designed scheme, including an Appointments Clause violation, to show that the design—the structure—played role in his loss." *Cirko*, 948 F.3d at 154 (simplified). If the Council contained any unconstitutionally structured seats, the "scheme" under which Amendment 22 and the Rule were adopted was "wrongly designed," and resulting "harm is presumed." *Id.* (simplified).

Thus, the Court should vacate the Rule's reallocations even if only one Council member was improperly appointed. Of course, if the Court finds 11 or more Council seats were unconstitutionally appointed, the Council lacked a quorum to adopt Amendment 22 or its implementing regulation, § 1852(e)(1), and the Rule's reallocations should also be vacated for that reason.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court declare that the Rule's reallocations violate the Appointments Clause and vacate the same.

DATED: April 21, 2023.

Respectfully submitted,

/s/ Jonathan M. Houghton

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of New Jersey by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RAYMOND LOFSTAD and GUS LOVGREN, Plaintiffs, v. GINA RAIMONDO, et al., Defendants.	No. 3:22-cv-07360-GC-TJB **DECLARATION OF RAYMOND LOFSTAD**

I, RAYMOND LOFSTAD, declare as follows:

1. I am 64 years old. The facts set forth in this declaration are based upon my personal knowledge and, if called as a witness, I could and would competently testify thereto under oath.

2. I have been a commercial fisherman fishing in the federal waters managed by the Mid-Atlantic Fishery Management Council ("Council") since 1977. I have owned and operated a fishing vessel in these waters since 1992.

3. I possess the requisite permits to fish for summer flounder, scup, and black sea bass in the federal waters of the Mid-Atlantic. I also possess the requisite permits to land my federal catch in New York state, where I live. I do not possess any other state landing permits.

4. Approximately 50 percent of my total annual catch occurs in the federal waters of the Mid-Atlantic. Of that 50 percent, between 40 percent and 60 percent of my catch consists of summer flounder, scup, and black sea bass.

5. Black sea bass and summer flounder represent a sizable portion of my overall catch and are some of the products on which I rely most heavily for income.

6. The estimated value of my fishing assets (permits, boats, and specialized equipment) is $1,650,000.

7. I am aware of the rule issued by the National Marine Fisheries Service: *Fisheries of the Northeastern United States; Amendment 22 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan*, 87 Fed. Reg. 68,925-01 (Nov. 17, 2022) ("Rule"). It is my understanding that the Rule reallocates annual catch quota for summer flounder, scup, and black sea bass between recreational and commercial fisherman in the federal waters of the Mid-Atlantic.

8. Prior to the Rule, allocations for each species were as follows: summer flounder, 60 percent commercial to 40 percent recreational; scup, 78 percent commercial to 22 percent recreational; black sea bass, 49 percent commercial to 51 percent recreational.

9. After the Rule, allocations for each effected species are as follows: summer flounder, 55 percent commercial to 45 percent recreational; scup, 65 percent commercial to 35 percent recreational; black sea bass, 45 percent commercial to 55 percent recreational.

10. In 2022, prior to the Rule, the overall annual commercial quota for scup was 20,381,736 lbs. In 2023, after the Rule, the overall annual commercial quota for scup is 14,010,000 lbs.

11. In 2022, prior to the Rule, the overall annual commercial quota for summer flounder was 15,530,000 lbs. In 2023, after the Rule, the overall annual commercial quota for summer flounder is 15,270,000 lbs.

12. In 2022, prior to the Rule, the overall annual commercial quota for black sea bass was 6,470,000 lbs. In 2023, after the Rule, the overall annual commercial quota for black sea bass is 4,800,000 lbs.

13. The overall annual commercial quota for summer flounder and black sea bass is divided amongst the states of the Mid-Atlantic.

14. In 2022, prior to the Rule, the annual commercial quota for summer flounder assigned to New York was 1,470,779 lbs. In 2023, after the Rule, the annual commercial quota for summer flounder assigned to New York is 1,437,768 lbs.

15. In 2022, prior to the Rule, annual commercial quota for black sea bass assigned to New York was 633,203 lbs. In 2023, after the Rule,

annual commercial quota for black sea bass assigned to New York is 469,597 lbs.

16. These reductions in quota were not the result of a change to the Fishery Management Plan framework or changes to the acceptable biological catch, which stayed the same between years. These quota reductions are directly attributable to the Rule's quota reallocations.

17. These reductions in quota directly affect how much I may "land" (meaning the catch I may take home) on any given "trip" (*i.e.*, boating expeditions in which we are allowed to catch fish) by reducing the poundage that may be landed of summer flounder, scup, and black sea bass in proportion to the Rule's reduction in commercial quota.

18. In any given year prior to the rule, my fishing operation would catch summer flounder and black sea bass up to, or near, the catch limits imposed on my vessels, whether the catch limits took the form of trip limits, weekly cumulative catch limits, seasonal closures, a combination of the preceding, or other restrictions on landings.

19. In other words, I use all the fishing opportunity allowed to commercial fishermen for summer flounder and black sea bass.

20. I currently have the capacity to exceed the catch limits imposed on my vessel for all three affected species.

21. I anticipate having the capacity to reach the Rule's catch limits for summer flounder and black sea bass imposed on my vessel in the coming year.

22. If I were allowed the opportunity to fish for more summer flounder and black sea bass, I would catch more of those species.

23. Because the Rule will reduce fishing opportunity for commercial fishermen, whatever form it takes (reduced trip limits, earlier seasonal closures, reduced landing limits, or otherwise), I anticipate a loss in revenue proportional to my loss in fishing opportunity.

24. Further compounding these losses are the expected increases in fishery closures (*i.e.,* periods of time when a fishery may not be fished). When the commercial fishing industry nears its annual allocation of quota for summer flounder, scup, or black sea bass, the pertinent fishery closes.

25. As annual commercial quota allocations for summer flounder, scup, and black sea bass decrease, closures of these fisheries increase (either in frequency or duration).

26. Closures cause massive disruptions to my business (especially closures of the summer flounder and black sea bass fisheries) resulting in periods where I am unable to catch and sell two of my most profitable fish stock.

27. My fishing operation is optimized for efficiency and profitability, so changes to my operation will reduce profitability. I am not able to make up for the lost revenue caused by the increased catch restrictions on summer flounder, scup, and black sea bass through other means without spending more money. For example, I am not able to fish in Mid-Atlantic waters not subject to the Rule's commercial quota reductions. I do not possess other state landing permits that would allow me to land a higher portion of my catch for the affected species or fish in waters not subject to the Rule's quota reduction. I cannot afford to acquire such permits.

28. In addition, I am not able to increase my catch of other species I already fish in a manner sufficient to make up for the lost revenue

caused by the Rule's increased catch restrictions on summer flounder, scup, or black sea bass. Further, catching new species of fish would require significant investments of money in new permits and gear, which I cannot afford; and alterations to my efficient fishing operation will require me to spend significantly more time away from home to make up for lost revenue and increase my fuel costs.

29. I also operate a profitable retail business connected with my fishing operation. In addition to selling some stock to third-party markets, I sell a portion of my catch directly to consumers at farmer's markets and through my fishing retail business. Direct sales are more profitable than sales to third-party vendors. As my catch of summer flounder, black sea bass, and scup decline due to the Rule's quota reallocations, so does my retail fish stock, resulting in lost revenue.

30. In addition to selling a portion of my fish stock directly to consumers, I sell other related retail merchandise, such as bait and similar fishing-related products. Most of these other retail sales are secondary and in addition to purchases of my retail fish stock. As fish sales decline, so will sales of my other retail merchandise.

31. For the reasons stated above, between my fishing operation and retail business, I predict an annual loss of between $15,000 and $30,000 gross because of the Rule's reallocation.

32. My fishing assets constitute a significant portion of my total assets. For example, I possess several specialized nets for catching summer flounder, scup, and black sea bass respectively. This equipment is not as efficient at catching other fish species. This equipment is also designed to catch fish in large values, meaning it is designed for commercial fishing and not recreational fishing.

33. By reducing commercial allocations, the Rule makes entry into the commercial fishery for summer flounder, scup, and black sea bass less appealing, reducing the value of my fishing assets, particularly my specialized nets.

34. The value of my federal fishing permit that enables me to catch summer flounder, scup, and black sea bass in federal waters likewise has decreased in value after the Rule.

35. My lost income is compounded by various debts and other financial obligations associated with my fishing operation. Deferrals of boat maintenance, potential reductions in crewmates and other staff, and

an inability to pay business-related fees and debts, threaten to further injure my business.

* * *

I declare under penalty of perjury that the forgoing is true and correct.

Executed this 14th day of April, 2023, at Hampton Bays, New York.

RAYMOND LOFSTAD

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RAYMOND LOFSTAD and GUS LOVGREN, Plaintiffs, v. GINA RAIMONDO, et al., Defendants.	No. 3:22-cv-07360-GC-TJB **DECLARATION OF GUS LOVGREN**

I, GUS LOVGREN, declare as follows:

1. I am over the age of 18 years. The facts set forth in this declaration are based upon my personal knowledge and, if called as a witness, I could and would competently testify thereto under oath.

2. I have been a commercial fisherman fishing in the federal waters managed by the Mid-Atlantic Fishery Management Council ("Council") for approximately 19 years. I have owned and operated a fishing vessel in these waters for approximately 3 years.

3. I possess the requisite permits to fish for summer flounder, scup, and black sea bass in the federal waters of the Mid-Atlantic. I also possess the requisite permits to land my federal catch in New Jersey (where I live), Virginia, and North Carolina.

4. Approximately 90 percent of my total annual catch occurs in the federal waters of the Mid-Atlantic. Of that 90 percent, between 60 percent and 80 percent of my catch consists of summer flounder, scup, and black sea bass. Summer flounder and black sea bass are among my most profitable fish stock.

5. My total annual catch is consistently over 600,000 lbs. and valued at an estimated $900,000 gross.

6. I am aware of the rule issued by the National Marine Fisheries Service: *Fisheries of the Northeastern United States; Amendment 22 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan*, 87 Fed. Reg. 68,925-01 (Nov. 17, 2022) ("Rule"). It is my understanding that the Rule reallocates annual catch quota for summer flounder, scup, and black sea bass between recreational and commercial fisherman in the federal waters of the Mid-Atlantic.

7. Prior to the Rule, allocations for each species were as follows: summer flounder, 60 percent commercial to 40 percent recreational; scup, 78 percent commercial to 22 percent recreational; black sea bass, 49 percent commercial to 51 percent recreational.

8. After the Rule, allocations for each affected species are as follows: summer flounder, 55 percent commercial to 45 percent recreational; scup, 65 percent commercial to 35 percent recreational; black sea bass, 45 percent commercial to 55 percent recreational.

9. In 2022, prior to the Rule, the overall annual commercial quota for scup was 20,381,736 lbs. In 2023, after the Rule, the overall annual commercial quota for scup is 14,010,000 lbs.

10. In 2022, prior to the Rule, the overall annual commercial quota for summer flounder was 15,530,000 lbs. In 2023, after the Rule, the overall annual commercial quota for summer flounder is 15,270,000 lbs.

11. In 2022, prior to the Rule, the overall annual commercial quota for black sea bass was 6,470,000 lbs. In 2023, after the Rule, the overall annual commercial quota for black sea bass is 4,800,000 lbs.

12. The overall annual commercial quota for summer flounder and black sea bass is divided among the states of the Mid-Atlantic.

13. In 2022, prior to the Rule, the annual commercial quota for summer flounder assigned to New Jersey was 2,337,728 lbs. In 2023, after the Rule, the annual commercial quota for summer flounder assigned to New Jersey is 2,304,717 lbs.

14. In 2022, prior to the Rule, annual commercial quota for black sea bass assigned to New Jersey was 1,294,000 lbs. In 2023, after the Rule, annual commercial quota for black sea bass assigned to New Jersey is 951,085 lbs.

15. These reductions in quota were not the result of a change to the Fishery Management Plan framework or changes to the acceptable

biological catch, which stayed the same between years. These quota reductions are directly attributable to the Rule's quota reallocations.

16. These reductions in quota directly affect how much I may "land" (meaning the catch I may take home) on any given "trip" (*i.e.*, boating expeditions in which we are allowed to catch fish) by reducing the poundage that may be landed of summer flounder, scup, and black sea bass in proportion to the Rule's reduction in commercial quota.

17. In any given year prior to the Rule, my fishing operation would catch summer flounder and black sea bass up to, or near, the catch limits imposed on my vessel in New Jersey, whether the catch limits took the form of trip limits, weekly cumulative catch limits, seasonal closures, a combination of the preceding, or other restrictions on landings.

18. In other words, I use all the fishing opportunity allowed to commercial fishermen for summer flounder and black sea bass.

19. I currently have the capacity to exceed the catch limits imposed on my vessel for summer flounder and black sea bass.

20. I anticipate having the capacity to reach the Rule's catch limits for summer flounder and black sea bass imposed on my vessel in the coming year.

21. If I were allowed the opportunity to fish for more summer flounder and black sea bass, I would catch more of those species.

22. Because the Rule will reduce fishing opportunity for commercial fishermen, whatever form that reduction takes (reduced trip limits, earlier seasonal closures, reduced landing limits, or otherwise), I anticipate a loss in revenue proportional to my loss in fishing opportunity.

23. For example, New Jersey's annual quota for black sea bass and summer flounder is divided between "seasons." In 2022, between January and February ("season one"), the New Jersey weekly quota imposed on vessels for black sea bass was either: option (1), a 3,000-lbs. trip limit twice per week; or option (2), a 6,000-lbs. trip limit once per week.

24. In season one of 2023, the New Jersey weekly quota imposed on vessels for black sea bass was either: option (1), a 500-lbs. trip limit four times per week; option (2), a 1,000-lbs. trip limit twice per week; or option (3), a 2,000-lbs. trip limit once per week—each alternative being less than during the prior year's first season.

25. Further compounding these losses are the expected increases in fishery closures (*i.e.,* periods of time when a fishery may not be fished). When the commercial fishing industry nears its seasonal allocation of quota for summer flounder, scup, or black sea bass, the pertinent fishery closes. As annual commercial quota allocations for summer flounder, scup, and black sea bass decrease, closures of these fisheries increase (either in frequency or duration).

26. For example, in season one of 2023, the black sea bass fishery in New Jersey closed three weeks into the season. The black sea bass fishery did not close during the 2022 season.

27. As a result of the black sea bass fishery's early closure and decreased weakly quota resulting from the Rule's quota relocation, I lost an estimated $40,000 gross over a five-week period in season one of 2023 compared to season one of 2022.

28. My fishing operation is optimized for efficiency and profitability, so changes to my operation will reduce profitability. My fishing vessel operates primarily in the New York–New Jersey Bight Cold Pool (BCP), the most productive fishing grounds in the Mid-Atlantic. The BCP is in federal waters. The BCP allows us the least amount of

travel and expenses, while providing year-round access to all three of our target species (including summer flounder and black sea bass). Hence, catching in the BCP and landing in New Jersey represents the most efficient use of my time at sea.

29. I am not able to make up for the lost revenue caused by the Rule's increased catch restrictions on summer flounder and black sea bass through other means without spending more money. For example, I am not able to fish in Mid-Atlantic waters not subject to the Rule's commercial quota reductions. Although I possess state landing permits for Virginia and North Carolina, I cannot make up for lost revenue by landing in those states due to the increase I would see in fuel costs and less favorable market conditions.

30. Nor is consistently landing in these states feasible, as I would have to increase my boating time to seven days a week and most of my catch will have expired by the time I made port.

31. I do not possess other state landing permits that would allow me to land a higher portion of my catch for the affected species or fish in waters not subject to the Rule's quota reduction. I cannot afford to acquire such permits.

32. In addition, I am not able to increase my catch of other species that I already fish for in a manner sufficient to make up for the lost revenue caused by the Rule's increased catch restrictions on summer flounder and black sea bass. Further, catching new species of fish would require significant investments of money in new permits and gear, which I cannot afford; and alterations to my efficient fishing operation would require me to spend significantly more time away from home to make up for lost revenue and would increase my fuel costs.

33. For the reasons stated above, I estimate an annual loss of between $75,000 and $100,000 gross due to the Rule's increased catch restrictions on summer flounder, scup, and black sea bass. I further estimate that, as a consequence of the Rule, my personal income will decrease between $20,000 and $25,000 in the coming year.

34. My lost income is compounded by various debts and other financial obligations associated with my fishing operation. Deferrals of boat maintenance, potential reductions in crewmates and other staff, and an inability to pay business-related fees and debts threaten to further injure and possibly even bankrupt my business.

* * *

I declare under penalty of perjury that the forgoing is true and correct.

Executed this 18th day of April, 2023, at Bricktown, New Jersey.

GUS LOVGREN

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RAYMOND LOFSTAD and GUS LOVGREN,

Plaintiffs,

v.

GINA RAIMONDO, in her official capacity as Secretary of the United States Department of Commerce; JANET COIT, in her official capacity as Assistant Administrator for the National Marine Fisheries Service; and NATIONAL MARINE FISHERIES SERVICE,

Defendants.

No. 3:22-cv-07360-GC-TJB

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Courtroom 4E
Judge: Georgette Castner
Magistrate: Tonianne J. Bongiovanni

Plaintiffs' Motion for Summary Judgment is GRANTED. Defendants' promulgation of the quota allocations of summer flounder, scup, and black sea bass through the challenged final rule, 87 Fed. Reg. 68,925 (Nov. 17, 2022), was not in accordance with law, contrary to constitutional right, in excess of statutory authority, and without observance of procedure required by law. The allocations are therefore SET ASIDE and Defendants are ENJOINED from enforcing those allocations.

Dated this __ day of _____, 2023.

_____
Georgette Castner
United States District Court Judge

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of New Jersey by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RAYMOND LOFSTAD and GUS LOVGREN,

Plaintiffs,

v.

GINA RAIMONDO, in her official capacity as Secretary of the United States Department of Commerce; JANET COIT, in her official capacity as Assistant Administrator for the National Marine Fisheries Service; and NATIONAL MARINE FISHERIES SERVICE,

Defendants.

No. 3:22-cv-07360-GC-TJB

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Courtroom 4E
Judge: Georgette Castner
Magistrate: Tonianne J. Bongiovanni

The Putative Members of the Mid-Atlantic Council

1. Of the 21 putative members of the Mid-Atlantic Council who participated in the vote to approve Amendment 22, two were governor-designated state officials and five were further designees of governor-designated state officials. *See* 2SUPP4131–32[1] (noting the attendance of Chris Batsavage, Maureen Davidson, Patrick Geer, Kristopher Kuhn, David Stormer, Joseph Cimino, and Mike Luisi on December 14, 2021, when Amendment 22 was adopted); SUPP4128 (designation of Chris Batsavage by Acting Director of North Carolina's Division of Marine Fisheries); SUPP4129 (same of Patrick Geer by Commissioner of Virginia's Marine Resources Commission); SUPP4127 (same of David Stormer by Director of Delaware's Division of Fish and Wildlife); *see Voting Council Members*, Mid-Atlantic Fishery Management Council (Apr. 19, 2023)[2] (noting Maureen Davidson and Kristopher Kuhn are designees of state fishery officials, and Joseph Cimino and Mike Luisi are principal state officials).

2. Michael Pentony is the putative Greater Atlantic Regional Administrator. SUPP3678.

[1] In this statement, AR refers to the Administrative Record, SUPP refers to the Supplement to the Administrative Record, Docket Nos. 26–29, and 2SUPP refers to the Second Supplement to the Administrative Record, Docket No. 32.

[2] https://www.mafmc.org/members (click 2022–2023 Council Member Roster). The document is judicially noticeable. Fed. R. Evid. 201.

3. The Greater Atlantic Regional Administrator is the relevant NMFS official who sits on the Mid-Atlantic Council pursuant to 16 U.S.C. § 1852(b)(1)(B). 2SUPP4131–32 (noting attendance of Mr. Pentony at December 14, 2021, meeting).

4. Mr. Pentony was selected to be the Greater Atlantic Regional Administrator by a Commerce Department official in the Office of Human Resources Management, SUPP3672, or at most the Assistant Secretary for Administration, SUPP3674 (but note the missing signature).

5. The record does not show any approval of Mr. Pentony's selection by the Secretary of Commerce or another head of department. *See* SUPP3678 ("This appointment has been approved by the Departmental Executive Resources Board[.]").

6. The Greater Atlantic Regional Administrator is a career NMFS official in the Senior Executive Service ("SES"). SUPP3680 (see Boxes 5-B, 34).

7. The other 13 putative Council members had been nominated by governors and selected by the Secretary in accordance with § 1852(b)(2)(C). SUPP3705–4059 (nomination packages for Michelle Duval, Danny Farnham, Frederick "Skip" Feller, Earl "Sonny" Gwin, Jr., Francis "Dewey" Hemilright, Jr., Peter Hughes, Scott Lenox, Adam Nowalsky, Paul Risi, Tom Schlichter, Paul "Wes" Townsend, Kate

Wilke, Sara Winslow); 2SUPP4131 (reflecting these individuals' attendance on December 14, 2021, when Amendment 22 was adopted).[3]

Amendment 22 and the
Atlantic States Marine Fisheries Commission

8. On December 14, 2021, the putative members of the Mid-Atlantic Council agreed upon Amendment 22. 2SUPP4137–38; 87 Fed. Reg. 68,925, 68,926 (Nov. 17, 2022) (AR3644).

9. The National Marine Fisheries Service approved Amendment 22 as lawful. 87 Fed. Reg. at 68,926 (AR3644). It identified the measure as non-controversial. AR3596.

10. The putative members of the Council also transmitted to NMFS a proposed regulation to implement Amendment 22, which NMFS approved, AR3592, published for comment, and then promulgated as a final rule ("Rule"). 87 Fed. Reg. 68,925 (AR3643).

11. The NMFS decision memoranda approving the proposed regulation and approving the promulgation of the final rule were addressed to the Assistant Administrator for Fisheries and signed by Samuel Rauch. AR3592, 3637. Rauch, who is the Deputy Assistant Administrator for Regulatory Programs, signed the final rule. AR3637.

[3] The record does not show when putative Council members submitted the proposed regulation implementing Amendment 22 to NMFS, but the parties agree that they did so. *See* Joint Discovery Plan 3.

12. The Deputy Assistant Administrator for Regulatory Programs is not a Senate-confirmed position. *United States Government Policy & Supporting Positions*, U.S. House of Representatives Committee on Oversight and Reform (Dec. 2020)[4] (not listing the Deputy Assistant Administrator as "PAS" or Presidentially nominated and Senate-confirmed).

13. No Senate-confirmed official personally approved Amendment 22 or its implementing regulation. *See* AR3592, 3637.

14. Although the Rule effected a respective reduction of 5%, 13%, and 4% of commercial fishing from the *total* quotas for summer flounder, scup, and black sea bass, 8.33%, 16.67%, and 8.16% reductions in *commercial* quotas.

15. Concurrently with the 21 individuals' adoption of Amendment 22, the Atlantic States Marine Fisheries Commission adopted an identical provision. *See* 87 Fed. Reg. at 68,925–26 (AR3643–44).

Material Facts as to Standing

16. Raymond Lofstad is a 64-year-old commercial fisherman living in New York. Lofstad Decl. ¶¶ 1, 3.

17. He has fished in federal waters under the jurisdiction of the Mid-Atlantic Council since 1977 and has owned and operated a fishing vessel in those waters since 1992. *Id.* ¶ 2.

[4] https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf. The document is judicially noticeable. Fed. R. Evid. 201.

18. Approximately 50 percent of his total annual catch occurs in Mid-Atlantic federal waters, of which between 40 and 60 percent consists of summer flounder, scup, and black sea bass. *Id.* ¶ 4.

19. Gus Lovgren is a commercial fisherman living in New Jersey. Lovgren Decl. ¶ 3.

20. He has fished in federal waters under the jurisdiction of the Council for 19 years and has owned and operated a fishing vessel in those waters for 3 years. *Id.* ¶ 2.

21. Approximately 90 percent of his total annual catch occurs in the federal waters of the Mid-Atlantic, of which between 60 and 80 percent of his catch consists of summer flounder, scup, and black sea bass. *Id.* ¶ 4.

22. Summer flounder and black sea bass are some of the products on which Raymond and Gus rely on most heavily for income. Lofstad Decl. ¶ 5; Lovgren Decl. ¶ 4. Accordingly, they use all the fishing opportunity allowed to them for summer flounder and black sea bass, consistently catching those species up to or near the catch limits imposed on them, and fishing as long as the fishery remains open. Lofstad Decl. ¶ 18; Lovgren Decl. ¶ 17.

23. If they were allowed to catch more summer flounder and black sea bass, they would. Lofstad Decl. ¶ 22; Lovgren Decl. ¶ 21.

24. Instead, the reduction in commercial allocation will reduce their fishing opportunity—whether by reducing trip limits, reducing landing limits, causing earlier or

more frequent seasonal closures, or otherwise—and reduce their income. Lofstad Decl. ¶ 23; Lovgren Decl. ¶ 22.

25. Already, the 2023 commercial quota for summer flounder, scup, and black sea bass has dropped compared to 2022, even though the Acceptable Biological Catch stayed the same between the two years; the quota has been reallocated to recreational fishermen. Lofstad Decl. ¶¶ 8–9, 16; Lovgren Decl. ¶¶ 7–8, 15.

26. Raymond's and Gus's fishing operations are optimized for efficiency and profitability, meaning changes to their operations will reduce profitability. Lofstad Decl. ¶ 27; Lovgren Decl. ¶ 28.

27. They cannot make up for their lost fishing opportunity without spending more money. Lofstad Decl. ¶ 27; Lovgren Decl. ¶ 29.

28. For example, Raymond does not possess permits to land fish in states other than New York, and he cannot afford such permits. Lofstad Decl. ¶ 27.

29. While Gus possesses landing permits for Virginia and North Carolina, their distance from his fishing grounds means that most of his catch will have expired by the time he landed them, he would have to pay increased fuel costs, and increase his boating time to seven days a week away from home. Lovgren Decl. ¶¶ 29–30. Market conditions in those states are also less favorable. *Id.* ¶ 29. This means landing fish in these states would not make up for his lost revenue. *Id.*

30. Gus cannot afford landing permits other than the ones he already has. *Id.* ¶ 31.

31. Raymond and Gus cannot make up for their reduced catch by increasing fishing for summer flounder, scup, and black sea bass in state waters. Lofstad Decl. ¶ 27; Lovgren Decl. ¶¶ 28–29.

32. Furthermore, Raymond and Gus are unable to increase their catch of other species that they already fish for to a sufficient degree to make up for the loss in revenue due to the reallocations. Lofstad Decl. ¶ 28; Lovgren Decl. ¶ 32.

33. For both Raymond and Gus, catching new species of fish would require significant investments in new permits and gear, which they cannot afford, as well as require significantly more time away from home fishing for species that are less efficiently caught. Lofstad Decl. ¶ 28; Lovgren Decl. ¶¶ 29, 30–31.

34. The reduction in commercial allocation also impacts Raymond's retail merchandise business, where he sells fishing-related products such as bait. Lofstad Decl. ¶¶ 29–30. That business is secondary to his fish-retail business, meaning customers come to Raymond to buy fish and happen across merchandise that they would like to purchase. *Id.* ¶ 30. Fewer fish to sell will make for fewer customers coming to Raymond, meaning his merchandise sales can also be expected to decline. *Id.*

35. Raymond predicts an annual loss of between $15,000 and $30,000 gross because of the Rule's reallocation. *Id.* ¶ 31.

36. Gus predicts an annual loss of between $75,000 and $100,000 gross because of the Rule's reallocation, as well as a decrease in personal income of between $20,000 and $25,000. Lovgren Decl. ¶ 33. He has already lost an estimated $40,000

gross over a five-week period in 2023 compared to 2022 due to the Rule's reallocation. *Id.* ¶ 27.

37. The reallocation also reduces the value of Raymond's fishing assets, which constitute a significant portion of his total assets. Lofstad Decl. ¶¶ 6, 32–34.

38. For example, he possesses several specialized nets for catching summer flounder, scup, and black sea bass. These nets are not as efficient at catching other fish species. *Id.* ¶¶ 32–33. These nets are also designed to catch fish in large numbers, meaning they are designed for commercial and not recreational fishing. *Id.* ¶ 32.

39. Reducing commercial allocations of summer flounder, scup, and black sea bass makes entry into the commercial fishery less appealing and reduces the value of Raymond's specialized nets, as well as the value of Raymond's other fishing assets, such as his federal fishing permit for summer flounder, scup, and black sea bass. *Id.* ¶¶ 32–34.

DATED: April 21, 2023.

Respectfully submitted,

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Case Name:	LOFSTAD et al v. RAIMONDO et al
Case Number:	3:22-cv-07360-GC-TJB
Filer:	RAYMOND LOFSTAD GUS LOVGREN
Document Number:	33

Docket Text:
MOTION for Summary Judgment by RAYMOND LOFSTAD, GUS LOVGREN. Responses due by 6/1/2023. (Attachments: # (1) Memorandum in Support, # (2) Declaration of Raymond Lofstad, # (3) Declaration of Gus Lovgren, # (4) Text of Proposed Order, # (5) Statement of Material Facts Not In Dispute)(HOUGHTON, JONATHAN)

3:22-cv-07360-GC-TJB Notice has been electronically mailed to:

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[STAMP dcecfStamp_ID=1046708974 [Date=4/21/2023] [FileNumber=17108424-1] [0b6e7bc57805a416f637bae567884adaed539d8fb7f3e44495621ec35e466f981fef0929a868fda71d139c01f02c2fa31d3383f2528e86c429ac25dd51b41034]]
Document description: Declaration of Raymond Lofstad
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[STAMP dcecfStamp_ID=1046708974 [Date=4/21/2023] [FileNumber=17108424-2] [1dfb8f865c6f9a3c6e45f149406576c471a5891516c9e147e48a0593fa673821d5e9fd20ddcf7706d2f42ff7e4ea723396659aadbe7f3db9f993860fd56e0128]]
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Document description: Text of Proposed Order
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