No. 24-60055

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

George D. Arnesen; Jeffrey Ryan Bradley,

Plaintiffs – Appellants,

v.

Gina Raimondo, Secretary, U.S. Department of Commerce; National Marine Fisheries Service; Janet Coit, NMFS Assistant Administrator; Samuel D. Rauch, III, NMFS Deputy Assistant Administrator for Regulatory Programs; Gulf of Mexico Fishery Management Council, et al.,

Defendants – Appellees.

Karen Bell; A.P. Bell Fish Company, Inc.; William Copeland,

Plaintiffs – Appellants,

v.

Gina Raimondo, Secretary, U.S. Department of Commerce; National Marine Fisheries Service; Janet Coit, NMFS Assistant Administrator,

Defendants – Appellees.

On Appeal from the United States District Court
for the Southern District of Mississippi
Honorable Taylor B. McNeel, District Judge

OPENING BRIEF OF *BELL* APPELLANTS KAREN BELL, A.P. BELL FISH COMPANY, INC., AND WILLIAM COPELAND

MICHAEL POON
DAMIEN M. SCHIFF
MOLLY E. NIXON
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
MPoon@pacificlegal.org
DSchiff@pacificlegal.org
MNixon@pacificlegal.org

CHARLES E. COWAN
Wise, Carter, Child
& Caraway, P.A.
401 E. Capitol St., Suite 600
Jackson, MS 39201
Telephone: (601) 968-5500
cec@wisecarter.com

Attorneys for Plaintiffs – Appellants Karen Bell, A.P. Bell Fish Company, Inc., and William Copeland

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

- *Bell* Appellants: **Karen Bell**, **A.P. Bell Fish Company, Inc.** (which has no parent corporation and no publicly traded corporation owning more than 10% of its stock), and **William Copeland**. Additionally, non-party **Carl Douglas Bell**, who owns shares in A.P. Bell Fish Company, Inc.

- **Counsel for *Bell* Appellants:** Michael Poon, Damien M. Schiff, Molly E. Nixon of the Pacific Legal Foundation; Charles E. Cowan of Wise, Carter, Child & Caraway, PA.

- *Arnesen* Appellants: **George D. Arnesen** and **Jeffrey Ryan Bradley**.

- **Counsel for *Arnesen* Appellants:** Brett A. Shumate, John Henry Thompson, and Louis J. Capozzi, III of Jones Day; James M. Burnham of King Street Legal, P.L.L.C.

- Appellees: **Gina Raimondo**, U.S. Secretary of Commerce; **National Marine Fisheries Service**; **Janet Coit**, Director, National Marine Fisheries Service; **Samuel D. Rauch, III**, Deputy Assistant Administrator, National Marine Fisheries Service; **Gulf of Mexico Fishery Management Council**; and Council Members (and Member designees) **Thomas Frazer**, **Robert Gill**, **Greg Stunz**, **Troy Williamson**, **Susan Boggs**, **Bob Shipp**, **Billy Broussard**, **Jonathan Dugas**, **Michael McDermott**, **Dale Diaz**, **Scott Bannon**, **Kevin Anson**, **Patrick Banks**, **Chris Schieble**, **Jessica McCawley**,

Christopher Sweetman, **Robin Riechers**, **Dakus Geeslin**, **Gen. Joe Spraggins**, **Rick Burris**, and **Andy Strelcheck**.

- **Counsel for Appellees:** John Edward Bies, James E. Graves, III, and Shampa Panda.

/s/ Michael Poon
MICHAEL POON
Attorney of Record for Plaintiffs – Appellants Karen Bell, A.P. Bell Fish Company, Inc., and William Copeland

REQUEST FOR ORAL ARGUMENT

Bell v. Raimondo Plaintiffs-Appellants respectfully request oral argument. This appeal presents important separation-of-powers questions of first impression regarding the requirements of the Appointments Clause and its application to federal fisheries regulations. Additionally, the District Court below found multiple aspects of a federal statute to be unconstitutional. The complexity and importance of these issues warrant argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U.S. Constitution

Statutes

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 16 U.S.C. §§ 1855(f)(1) and 1861(d), because this case petitions for review of a regulation promulgated by the Secretary of Commerce under 16 U.S. Code, Chapter 38.

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

The appeal is timely, because the notice of appeal was filed on February 1, 2024, one day after the District Court's final judgment on January 31, 2024.

STATEMENT OF ISSUES

1. Whether the putative members of the Gulf of Mexico Fishery Management Council are properly appointed under the Appointments Clause.

2. If they are not properly appointed, whether that defect requires the vacatur of the final rule challenged here.

STATEMENT OF THE CASE

Bell v. Raimondo Plaintiffs-Appellants are Gulf Coast commercial fishermen challenging a federal fishery regulation that slashed the commercial quota for greater amberjack by nearly 80% (and also reduced the recreational quota by 74%). *See* 88 Fed. Reg. 39,193 (June 15, 2023) ("Rule"); ROA.10877. The Rule was promulgated under the Magnuson-Stevens Fishery Conservation and Management Act ("Act"), but the Secretary lacked the authority to issue the Rule under the Act. The Rule should be vacated.

I. The Magnuson-Stevens Act

The Act established eight Regional Fishery Management Councils as independent bodies within the Executive Branch. It was "the purpose[] of the Congress … to establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources[.]" 16 U.S.C. § 1801(b)(5). These Councils drive the Act's special rulemaking process to determine fisheries policy within their respective geographic regions.

The Rule was created by the Gulf of Mexico Fishery Management Council ("Council"), which has "authority over the fisheries in the Gulf of

Mexico seaward of" Texas, Louisiana, Mississippi, Alabama, and Florida. § 1852(a)(1)(E). The Council has 17 seats. Five seats are filled by the five respective governors with each state's "principal State official with marine fishery management responsibility." § 1852(b)(1)(A). One seat is taken by "[t]he regional director of the National Marine Fisheries Service" for the Gulf of Mexico, the Southeast Regional Administrator. § 1852(b)(1)(B). The regional director and the governor designees can fill their seats with their own designees. § 1852(b)(1)(A)–(B). For the final 11 seats, the five state governors nominate at least three individuals for each vacancy. The Secretary must make her selection for these vacancies from these nominees, unless one does not satisfy statutory qualifications. In that case, the Secretary must await a qualified slate of nominees from the governor and make her selection therefrom. § 1852(b)(2)(C). She cannot select her own qualified appointee.

The Act creates a two-step rulemaking procedure. First, the Council adopts a fishery management plan ("FMP") or an amendment to such a plan. § 1854(a)(1). The measure is reviewed by the Secretary of Commerce for consistency with statutory factors and "other applicable law." § 1854(a)(1)(A). If the plan or amendment is lawful, the Secretary

must approve it; if she fails to act within 30 days, the measure "take[s] effect as if approved." § 1854(a)(3). Second, the Council adopts a regulation to implement the plan or amendment. § 1854(b)(1). Again, the Secretary reviews the regulation for lawfulness and, if it is lawful, must approve and promulgate it. *Id.*

The Secretary has delegated her authority under the Act to the Administrator of the National Oceanic and Atmospheric Administration ("NOAA"). ROA.9520. The NOAA Administrator has in turn delegated that authority to the Assistant Administrator for Fisheries, who leads the National Marine Fisheries Service ("NMFS"), a component agency of NOAA. ROA.9532–33 ¶ II.C.26.

II. Amendment 54 and the Rule

In October 2022, the 17 putative Council members initiated the two-step rulemaking by approving Amendment 54. ROA.4722–23. NMFS approved Amendment 54 as lawful. ROA.9456–58, ROA.9516. The putative Council members also approved a rule implementing Amendment 54, which NMFS approved as lawful. ROA.9284–86. NMFS promulgated the Rule in June 2023. 88 Fed. Reg. 39,193.

Amendment 54 and the Rule reduced the commercial quota for greater amberjack by nearly 80%, effectively eliminating the ability of commercial fishermen like Plaintiffs to fish for greater amberjack. *Id.* at 39,195; ROA.9285. The Rule resulted in the immediate closure of the fishery for the remainder of 2023, 88 Fed. Reg. 40,121 (June 21, 2023), and will similarly restrict greater-amberjack fishing this year and beyond.

III. The District Court Litigation

On June 16, 2023, some of the Plaintiffs-Appellants here filed *Arnesen v. Raimondo*, challenging the Rule in the District Court for the Southern District of Mississippi. ROA.24. On June 30, 2023, other Plaintiffs-Appellants here filed *Bell v. Raimondo* to challenge the Rule in the same court. ROA.10797.

Bell and *Arnesen* both challenged the Secretary's authority to promulgate the Rule and sued the Secretary, the Assistant Administrator, and NMFS. Specifically, Plaintiffs claimed that NMFS lacked authority to promulgate the regulation, because the Council did not validly adopt Amendment 54 and the Rule. The putative Council members' actions adopting those measures were void, they argued,

because they were not appointed to the Council pursuant to the Appointments Clause.

Arnesen made additional claims and sued additional defendants. ROA.24–28.

The cases were consolidated, and cross-motions for summary judgment were briefed in both cases. ROA.17; ROA.20–22.

On January 31, 2024, the District Court denied Plaintiffs' motions for summary judgment and granted the government's cross-motions for summary judgment. ROA.10922. The court ruled that Plaintiffs have standing to challenge the Rule and that Council members must be appointed as officers pursuant to the Appointments Clause. The court, however, also held that 11 putative Council members were properly appointed and declined to vacate the Rule, reasoning that the 11 formed a quorum and in any case were not the proximate cause of Plaintiffs' injuries.

The District Court entered final judgment for the government in both cases. ROA.10923; ROA.10674. Both sets of Plaintiffs filed notices of appeal on February 1, 2024. ROA.10675–80.

SUMMARY OF THE ARGUMENT

The Secretary of Commerce did not have the power to promulgate the Rule because, under the relevant statutory provision, § 1854(b), she can only approve and promulgate a regulation that had been validly adopted by the Council. Furthermore, the regulation must be supported by an FMP or FMP amendment that had been validly adopted by the Council. *Id.* The Council, however, did not validly adopt the Rule or Amendment 54, because the putative Council members were not appointed consistent with the Appointments Clause, so their actions adopting the relevant measures were void. As a result, the Secretary lacked the necessary statutory predicate to promulgate the Rule, and the Rule must be set aside as contrary to statute, constitutional right, and required procedure. § 1855(f)(1)(B); 5 U.S.C. § 706(2)(B)–(D).

Council members were not but should have been appointed consistent with the Appointments Clause, because they possess continuing positions and significant authority. Council positions are continuing because they are established by law and do not expire. *See* § 1852(a)(1). And the Council possesses significant authority because the Magnuson-Stevens Act vests the Council with primary policymaking

authority over Gulf fisheries and authorizes it to order or forbid the Secretary from taking certain regulatory actions. *See, e.g.*, §§ 1852(h), 1853(c), 1854(a)–(b), (c)(3), (h), 1855(c)(2)(A).

In the District Court, the government argued only against standing and officer status. *See generally* ROA.10462–10508; ROA.10584–10606. The government did not dispute the arguments that follow, *i.e.*, if Council members are officers, they are improperly appointed and the Secretary lacked the power to issue the Rule.

Council members must be Senate-confirmed as principal officers because they are not sufficiently supervised and controlled by a Senate-confirmed official. *See Edmond v. United States*, 520 U.S. 651, 663 (1997). Yet, none of the putative Council members was Senate-confirmed, so their adoptions of Amendment 54 and the Rule were void as actions of the Council, and the Secretary accordingly lacked the statutory power to issue the Rule.

Even if Council members are inferior officers, they were still not properly appointed. The five governor-designated individuals and the NMFS regional administrator were not appointed by the President, a head of department, or a court of law. The procedure for the other 11

members—a system of gubernatorial nomination and Secretarial confirmation—gives a share of the appointment power to state governors in violation of the Appointments Clause. Thus, all 17 seats on the Council are unconstitutionally structured, the Council's adoptions of Amendment 54 and the Rule are void, and the Secretary accordingly lacked the power to issue the Rule.

ARGUMENT

I. Standard of Review

This Court reviews summary judgments de novo. *Davidson v. Fairchild Controls Corp.*, 882 F.3d 180, 184 (5th Cir. 2018). A party is entitled to summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(a)). As the District Court noted, there is no dispute of fact in this case. ROA.10879.

II. Standing

The District Court correctly held that Appellants have standing. Plaintiffs have standing if they show "(1) that they have suffered an injury, (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *Braidwood Mgmt.,*

Inc. v. EEOC, 70 F.4th 914, 924 (5th Cir. 2023) (simplified). *Bell* Plaintiffs are commercial fishermen who fish for greater amberjack, ROA.10293–10302, and so are clearly injured by the Rule's reduction in the commercial quota for greater amberjack. That reduction is traceable to the Secretary, NMFS, and the Assistant Administrator's promulgation of the Rule,[1] and the injury is redressable because the courts are authorized to set aside the Rule if it is found to be unlawful. § 1855(f)(1). The government conceded as much below, as the District Court recognized. ROA.10881. Plaintiffs have standing to challenge Defendants' issuance of the Rule.

III. The Secretary's Rulemaking Power Under the Magnuson-Stevens Act

NMFS issued the Rule under 16 U.S.C. § 1854(b). *See* 88 Fed. Reg. at 39,198 (discussing "section 304(b)(3) of the Magnuson-Stevens Act"). That provision conditions the Secretary's (and so NMFS's) rulemaking power on the satisfaction of a statutory prerequisite. Specifically, the Secretary may promulgate only regulations that have been validly adopted by the Council. Furthermore, the regulation must be supported

[1] *Arnesen* Plaintiffs sued additional defendants. ROA.24–28. The District Court's standing discussion focused on those *Arnesen*-specific issues.

by an FMP or FMP amendment validly adopted by the Council. *See* § 1854(b) (allowing promulgation of regulation adopted by Council under § 1853(c)); § 1853(c) (empowering Council to adopt regulations to implement an FMP or FMP amendment). In the absence of a valid, Council-adopted regulation and FMP or FMP amendment, however, § 1854(b) does not allow the Secretary to issue any rules. In such circumstances, the Secretary's rulemaking power is restricted to conditions and procedures not followed here.[2] *See, e.g.*, § 1854(c).

As explained below, Amendment 54 and the Rule were not validly adopted by the Council, because Council seats may be filled only pursuant to the Appointments Clause, and the putative Council members who approved Amendment 54 and the Rule were not appointed consistent with that Clause.

IV. Council Members Must Be Appointed Pursuant to the Appointments Clause

All continuing positions that hold significant federal authority are offices of the United States. *Lucia v. SEC*, 585 U.S. 237, 245 (2018). The

[2] The government cannot now rely on the Secretary's unilateral rulemaking power, as it was not invoked when the Rule was promulgated. *DHS v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1909 (2020).

Appointments Clause provides the "exclusive means" of filling offices. *Id.* at 244. Because Council seats are continuing and are vested with significant authority, they are offices that may be filled only pursuant to the Appointments Clause.

A. The Appointments Clause

The Appointments 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, "[a] government worker … [who] exercises significant authority pursuant to the laws of the United States." *Burgess v. FDIC*, 871 F.3d 297, 300 (5th Cir. 2017) (simplified). "The Appointments Clause prescribes the exclusive means of appointing 'Officers.'" *Lucia*, 585 U.S. at 244.

Significant authority is not a high bar. Authority is significant whenever it is "more than ministerial"; that is, "[i]n the course of carrying out … important functions, the [official] exercise[s] significant

discretion." *Freytag v. Comm'r*, 501 U.S. 868, 881–82 (1991). Thus, the Supreme Court has held to be officers even postmasters first class, district court clerks, and election supervisors. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam); *Edmond*, 520 U.S. at 661 (discussing *Ex parte Siebold*, 100 U.S. (10 Otto) 371 (1880)).

Significant authority separates officers from nonofficers; but amongst officers, 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. Inferior officers are those who are adequately controlled by a Senate-confirmed officer. All other officers are principal officers. *United States v. Arthrex*, 141 S.Ct. 1970, 1979 (2021). 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 officer may be vested in the President, a head of department, or a court of law. *Id.*

When an individual's selection does not conform to the Appointments Clause, his "appointment … to office is deficient," and he

acts only "under the color of official title." *Ryder v. United States*, 515 U.S. 177, 180 (1995). This is because the relevant 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 v. Yellen*, 141 S.Ct. 1761, 1788–89 (2021). With the statutory provision displaced, those individuals were not appointed to office and "lack[] the authority to carry out the functions of the office." *Id.* at 1788 (contrasting appointment claims with removal claims). Their actions are therefore "void" as actions of their putative offices. *Id.* at 1787.

B. The Council's Continuing Positions

A position must be "continuing" to trigger application of the Appointments Clause. *See Lucia*, 585 U.S. at 245. As the District Court held, ROA.10893, Council positions are continuing. They are "created by statute, down to [their] duties, salary, and means of appointment." *Lucia*, 585 U.S. at 248 (simplified); *see* § 1852(d) (setting compensation). They are permanent positions; no provision of law provides for the sunset or other termination of these Council positions. § 1852(a)(1) ("There shall be established" the 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)(E).

C. The Meaning of Significant Authority

Authority is significant when it is "more than ministerial," so that an official possesses significant authority if, "[i]n the course of carrying out … important functions, the [official] exercise[s] significant discretion." *Freytag*, 501 U.S. at 881–82; *accord Burgess*, 871 F.3d at 302. This test encompasses a broad range of authority, including even that of postmasters first class and district court clerks. *Buckley*, 424 U.S. at 126.

The Supreme Court explained the meaning of significant authority in *Freytag*. 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*, 585 U.S. at 246 (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*, 585 U.S. at 249. 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*, 585 U.S. at 248. But ALJs' powers were even more clearly significant because ALJ decisions have "potentially more independent effect." *Id.* at 248–49. 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 249 (quoting 17 C.F.R. § 201.360). The Court therefore held that SEC ALJs must be appointed as officers.

Finally, 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 must be appointed as an officer *for all assigned duties* and is subject to the

Constitution's constraints. *Id.* at 247 n.4; *Freytag*, 501 U.S. at 882; *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012).

D. The Council's Significant Authority

The District Court correctly held that the Council wields significant authority pursuant to federal law. ROA.10893–94. 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 Gulf fisheries; the Gulf 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]

1. The Council is empowered to compel Secretarial action

The Act empowers the Council to compel the Secretary to issue regulations. "[T]he Secretary *shall* promulgate emergency regulations or interim measures … if the Council, by unanimous vote of the … voting members" "finds that an emergency exists or that interim measures are

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

needed to reduce overfishing." § 1855(c)(2)(A) (emphasis added). This power is not subject to any review in the Executive Branch; if the Council unanimously commands action, the Secretary shall take action. The Secretary's mandatory compliance with the Council's directive under § 1855(c)(2)(A) is underscored by the next paragraph, which provides that "the Secretary *may* promulgate emergency regulations" if the Council's emergency determination is not unanimous. § 1855(c)(2)(B) (emphasis added). This power is surely "more than ministerial"; it is an "important function[]" requiring "significant discretion." *Freytag*, 501 U.S. at 881–82.

2. The Council has exclusive policymaking power over Gulf fisheries in federal waters

The Council also decides fisheries policy through the Act's two-step rulemaking process. *See* § 1854(a)–(b). The process starts when the Council approves an FMP or FMP amendment. § 1852(h)(1). FMPs are comprehensive frameworks for regulating fisheries. *See* § 1853(a)–(b) (regarding FMP contents). The Council also possesses the power to propose any regulation it "deems necessary or appropriate" to implement an FMP. § 1853(c). These authorities empower the Council to set policy, including 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. Following *Buckley*'s reasoning, "[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 (citations omitted).

After adopting an FMP, amendment, or regulation, the Council submits the measure to NMFS, which reviews it for consistency with law, § 1854(a)(1)(A), (b)(1), pursuant to delegation from the Secretary. But that does not defeat the significance of the Council's power. If the fishery measure 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). Within the wide range of lawful policy choices, the Council calls the shots. Or as Mr. Rauch put it, NMFS "ultimately issue[s] the regulations … because it resolves what [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.*

In line with Mr. Rauch's comments, NMFS's review of fishery measures for consistency with the National Standards, § 1851, does not

allow NMFS to reject a measure on policy grounds. First, the National Standards are legal restrictions, not an invitation to weigh policy. *See* § 1854(a)(3)(A) (Any disapproval must "specify … the applicable law with which the plan or amendment is inconsistent."); *see, e.g.*, *Hall v. Evans*, 165 F.Supp.2d 114, 117 (D.R.I. 2001) (vacating regulatory provision that violated National Standards). If NMFS believes that a measure violates the National Standards, the measure *must* be rejected; conversely, if NMFS believes it to be lawful, it *must* be approved. NMFS may have leeway to make that judgment faithfully, but the agency lacks discretion to smuggle a policy prescription into the legal determination.

Second, to the extent that some National Standards are in tension, that protects the Council's prerogative rather than granting the Secretary discretion in rejecting Council measures. Any tension between National Standards presupposes that fishery measures will have to make a trade-off between the relevant values. Thus, it cannot be that resolving the trade-off one way or another necessarily creates an inconsistency with a National Standard. Rather, like when a fishery measure is subject to judicial review, there must be some zone of decision-making within which competing considerations may be balanced and an alternative

chosen, without being deemed inconsistent with law. This has always been the way in which all agency decisions implicating competing values have been reviewed for *lawfulness*, *see Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983), and a lawfulness review is all the Secretary is entitled to, § 1854(a)(3)(A), (b)(1).

Third, the National Standards are limited to ten specific factors. They may be broad in some respects, but they do not encompass all the factors a policymaker might consider. Congressional intent in delegating a power must be judged by "common sense as to the manner in which Congress would have been likely to delegate such power." *West Virginia v. EPA*, 597 U.S. 697, 722–23 (2022) (simplified). If Congress had meant to allow the Secretary to reject a Council measure at will, it would defy common sense to do so through the "oblique [and] elliptical" method of providing a *legality* determination under § 1854(a)–(b) and relying on their *further* reference to ten specific National Standards. *Id.* at 723. The common-sense conclusion is that the Council has the prerogative to choose among the array of lawful policy options. This reading of the statute is supported by § 1851(b), which limits the Secretary's explications of the National Standards to "guidelines" that explicitly

"shall not have the force and effect of law." Protecting Council measures from interference in this way would be pointless if the Secretary could use the National Standards as a blank check to reject Council measures during the lawfulness determination. Shielding Council measures from interference would only make sense if the Council were meant to be in charge, which is the case.

If a lawfulness review deprives officials of officer status, then the Office of Management and Budget's ("OMB's") lawfulness review—which is nearly identical to the Secretary's—means policymakers across the government do not exercise significant authority in promulgating significant rules. *See* E.O. 12866 § 2(b) (OMB "shall carry out" a "review of agency rulemaking … to ensure that regulations are consistent with applicable law."); *id.* § 6(b). That cannot be the case. Policymakers—whether subject to OMB review or Secretarial review—exercise significant authority in selecting a lawful policy.

A similar issue was decided in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). The case related to EPA's authority under the Clean Water Act to transfer EPA's permitting powers to a state. Under the Act, EPA "'shall'" transfer permitting powers

to a state that has met "nine specified criteria." *Id.* at 661 (quoting Clean Water Act). The issue was whether EPA's judgment that the nine criteria had been satisfied was "an exercise of discretion." *Id.* at 671. An environmental organization argued, like the government here, that the decision was discretionary because "the EPA's decision to authorize a transfer is not entirely mechanical; … it involves some exercise of judgment as to whether a State has met the [nine] criteria." *Id.* The Court rejected the argument. "While the EPA may exercise some judgment in determining" whether the criteria are met, it cannot consider a "separate prerequisite to that list." *Id.* "By its terms, the statutory language is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application." *Id.* at 661. Thus, "the transfer of [Clean Water Act] permitting authority is not discretionary, but rather is mandated once a State has met the criteria[.]" *Id.* at 673.

Likewise here, the lawfulness determination is not discretionary. NMFS may not consider a "separate" factor in addition to the National Standards and other law. *Id.* Just as in *National Association*, "the statutory language is mandatory and the list exclusive," *id.* at 661:

Council measures "shall" be approved and implemented if they are lawful, § 1854(a)(3), (b)(1)(A). The Council thus possesses the power to select among lawful policy options in adopting FMPs, amendments, and regulations.

The Council's policymaking power is clear from the text of § 1854, but the purpose and structure of the 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). In establishing the Councils, Congress provided that they "shall have authority over the fisheries" in their respective geographical jurisdictions. § 1852(a). The Act established 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 limited 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 failed to act for two years. § 1854(e)(5). It is clear that the discretion to make fishery policy lies with the Council, not the Secretary.

3. The Council decides when the rulemaking process starts

The Council also has significant discretion in performing the important function of crafting FMPs, amendments, and regulations in the first instance. §§ 1852(h)(1), 1853(c). For fisheries within the Council's geographical jurisdiction, NMFS generally 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 even supposing the Council requires NMFS's concurrence to enact policy, so too does NMFS need the Council's cooperation to issue FMPs and regulations.

4. Council decisions have independent effect

Furthermore, even if NMFS had discretion to block Council actions on policy grounds, the responsibility for writing fisheries measures would remain with the Council. When NMFS decides *not* to block an FMP, amendment, or regulation, it is the *Council's* action that becomes effective as written. The Council is therefore like the ALJ in *Lucia*. There, an ALJ's decision has "independent effect" because it "becomes final and is deemed the action of the Commission" if the SEC "declines review (and issues an order saying so)." 585 U.S. at 248–49 (simplified).

The Council's actions have even more independent effect than SEC ALJs' decisions, because the Council's FMP or amendment becomes final by default if the Secretary simply fails to act on it. § 1854(a)(3). That measure then governs the contents of any implementing regulation. § 1854(b)(1). Furthermore, unlike ALJ decisions, NMFS cannot revise FMPs or amendments; it can only approve or disapprove them. § 1854(a)(3), (b)(3).

The Council's power to adopt regulations is similar. If NMFS approves a Council's regulation, it is the Council's action that is made final, giving it "independent effect." Nominally, NMFS may revise

Council regulations after the notice-and-comment period, § 1854(b)(3), but revisions must be consistent with the Council's FMP or amendment, § 1854(b)(1), and are permitted only if NMFS first "consult[s] with the Council." § 1854(b)(3). Without consultation within a 30-day period, NMFS "shall" issue the regulation as a final rule. § 1854(b)(1). And 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 forced NMFS to promulgate a regulation over the agency's objections. *See id.*; *id.*, Docket No. 131, at 7 (C.D. Cal. Jan. 8, 2020); 85 Fed. Reg. 7246, 7247 (Feb. 7, 2020) (stating that NMFS published the rule without revision because it was not able to consult with the Council in time).

5. 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 recommendary, the Council would still wield significant authority because it shapes the administrative record on which any final decision must be based and issues recommendations.

In *Freytag*, the STJs' decisions were purely recommendary, "count[ing] for nothing unless the regular [Tax Court] judge adopts it." *Lucia*, 585 U.S. at 249. 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*, 585 U.S. at 248. The Fifth Circuit followed *Freytag* in *Burgess*, holding that an FDIC ALJ exercises significant authority because he shapes the administrative record and issues "recommendations" reviewed de novo. 871 F.3d at 302–03 (discussing United States Commissioners). That is because "[e]ach of these functions entails the exercise of discretion, and they are more than ministerial tasks." *Id.* (simplified).

Like STJs, the Council "critically shapes" the administrative record of a fishery measure. When adopting an FMP or amendment, the Magnuson-Stevens Act requires the Council to specify every relevant fact, such as: "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). These are the key facts upon which any final decision must be justified. The Council also shapes the record by collecting comments from the public, § 1852(h)(3), and reports from its advisory committees and panels, § 1852(g)(1)–(3). Thus, even if the Secretary could disagree with Council measures on any grounds—similar to the de novo review of FDIC ALJ recommendations, *see Burgess*, 871 F.3d at 303—Council members would still be officers.

6. The Council may block Secretarial actions on policy grounds

Furthermore, if the Secretary's ability to block Council action for illegality were deemed so significant as to overwhelm the Council's otherwise significant powers under the two-step rulemaking procedure,

the Council would still wield significant power because of its ability to block certain Secretarial action on policy grounds. For example, if the Secretary attempts to "repeal or revoke a fishery management plan for a fishery under the authority of a Council," she 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, she must obtain the approval of the Council. § 1854(c)(3). These veto powers are significant because they are more than ministerial and entail the exercise of discretion. *Burgess*, 871 F.3d at 302–03.

* * *

A single significant power is sufficient to trigger the Appointments Clause. Council members have at least six. And they would retain five of them even if the Secretary could reject Council measures for any reason under § 1854(a)–(b), which she cannot. Therefore, Council members must be appointed as officers.

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

As shown above, Council members must be appointed as officers. Specifically, they must be Senate-confirmed as principal officers, but the 17 putative members were not so appointed. And even if they may be appointed as inferior officers, they were not properly appointed.

The government disputes none of this, unless it raises new arguments on appeal. Accordingly, the District Court should have ruled for Plaintiffs after disagreeing with the government's arguments on standing and significant authority. Instead, the District Court crafted its own arguments against Plaintiffs without notice or the benefit of briefing or oral argument. Those arguments are erroneous.

A. Principal Officers

The Council's authority and independence are such that Council members must be appointed as principal officers. Yet, no putative member was nominated by the President and confirmed by the Senate.

1. The putative members were not properly appointed as principal officers.

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 from *Edmond*" turns on three kinds of control: whether a Senate-confirmed official (1) exercises "administrative oversight" over the officer, (2) may remove the officer without cause, and (3) "could review the [officer's] decisions" before they becomes final. *Id.* at 1980, 1982. *Arthrex* singled out the third factor for special treatment: Principal-officer review is not just one factor to be considered but a requirement for inferior-officer status—in other words, if an official has final say for the Executive Branch, the official must be appointed as a principal officer. *Id.* at 1981. Under both tests, Council members are principal officers.

First, the Council is not subject to administrative oversight. Examples of administrative oversight include "prescribing rules of procedure and formulating policies" to control officers and deciding when adjudicators may hear a case, which adjudicators will hear a case, and which past decisions bind future adjudications. *Id.* at 1980.

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). No official controls what FMPs, FMP amendments, or implementing regulations the Council adopts; indeed, that power 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). No official controls in any way the Council's five other significant powers. Furthermore, any oversight is *in fact* conducted not by a Senate-confirmed officer but by NMFS's Assistant Administrator pursuant to delegated authority. *See* ROA.9532–33 ¶ II.C.26; *see, e.g.*, ROA.9283 (approval of Rule). 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.

Second, no Council member is removable at will by a Senate-confirmed officer. The five governor-designated members cannot be removed by the Secretary at all. § 1852(b)(1)(A). The Regional Administrator is a career SES employee, ROA.9548 (Box 6-B), and so

cannot be removed except for cause, *see* 5 U.S.C. §§ 7541–43. And the 11 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 decisions cannot be countermanded by others in the Executive Branch. As discussed above, under § 1854(a)–(b), the Secretary must approve and promulgate the Council's lawful fishery measures. The fact that she can check a Council measure for legality and is responsible for the last step of promulgating the rule is irrelevant. In *Arthrex*, the Director must "take final action to cancel a patent claim or confirm it" after the Administrative Patent Judges' ("APJs"') decision, but this was a mere "ministerial duty"; the *substantive* final power still lay with the APJs. 141 S.Ct. at 1981 (simplified). Here, in the rulemaking context, the substantive final power is in deciding policy, and review of policy is forbidden to the Secretary. If the Council's policy is lawful, the Secretary is directed to promulgate it. In other words, "[t]he chain of command runs not from the [Secretary] to [the Council], but from the [Council] to the [Secretary]." *Id.* at 1980–81.

Even that minimal role for the Secretary is absent from the Council's exercise of its five other significant powers. For example, the Secretary cannot overturn the Council's decision when it blocks the Secretary's actions under § 1854(h) and (c)(3) or when it forces the issuance of a regulation under § 1855(c)(2)(A). Those decisions are final without opportunity for review. Rather than subjecting the Council to the Secretary's supervision and control, these authorities empower the Council to supervise and control the Secretary.

The *Edmond* factors show that Council members are not directed and supervised by anyone and so must be appointed as principal officers. But Council members must also be appointed principal officers under *Arthrex*, because, as discussed above, they have the final word on fisheries policy generally and also with regard to emergency regulations, limited-access systems, and repeals of FMPs. *See* §§ 1854(a)–(b), (h), (c)(3), 1855(c)(2)(A).

Because Council members are principal officers, their seats may be filled only by Presidential nomination and Senate confirmation. The 17 putative Council members were not nominated by the President and confirmed by the Senate. *See* § 1852(b)(1)(A) (regarding governor-

designated members); ROA.9548 (Box 6-B) (Southeast 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.

2. The District Court erred.

The District Court's error was threefold: (1) The court only considered the Council powers within the two-step rulemaking procedure, ignoring its unreviewable powers regarding emergency regulations, repealing FMPs, and limited-access systems. (2) Rather than employ *Edmond*'s three-factor test, the court only considered whether a Senate-confirmed official reviews the officer's actions, and it incorrectly held that this factor is satisfied by the Secretary's legality review within the two-step rulemaking procedure. (3) The court ignored *Bell* Plaintiffs' point that the Secretary does not in fact review Council measures for legality. That review is conducted by the Assistant Administrator, who is not Senate-confirmed.

As to the first error: The court failed to consider at all the point that the Council has the power to force the issuance of emergency regulations and to block Secretarial attempts to repeal FMPs or create limited-access

systems. These powers are "principal-officer power[s]" because they are significant authorities that are final and unreviewable. *Arthrex*, 141 S.Ct. at 1982. That requires Council members to be Senate-confirmed as principal officers for all purposes. *See Freytag*, 501 U.S. at 882.

As to the second error: The District Court improperly disregarded the first two *Edmond* factors and then incorrectly concluded that the review factor was satisfied as to the Council's powers under the two-step rulemaking procedure.

The Supreme Court is clear that *Edmond*, which provides three factors to consider, is "the governing test." *Arthrex* at 141 S.Ct. at 1982; *id.* at 1980 (discussing the three factors). The District Court accurately recited *Edmond*'s discussion of the three factors, but it concluded that the test is "[w]hether th[e] officer's decision is final and binding," ROA.10895, disregarding the other two factors.

The court then applied its erroneous test. Because the Secretary "acts as a check on the legality and direction" of the Council's plans and regulations under the two-step rulemaking procedure, "the Council acts with inferior, not principal authority." ROA.10897, RE067. The court likened this review to the "same role played by the appellate court in

Edmond." ROA.10897–98. But the officials in *Edmond* were also subject to administrative oversight and removal at will, satisfying all three factors. 520 U.S. at 664. Council members are not subject to such controls here.

The District Court committed a similar error in discussing *Arthrex*. It reasoned that the review factor is all that matters because *Arthrex*'s remedy focused on "allowing review of the judges' decisions." ROA.10898. The court ignored *Arthrex*'s thorough discussion of the PTO Director's extremely strong administrative oversight over APJs, including the power to start and stop their adjudications, assign specific APJs to cases, and choose which past decisions are precedential. *Arthrex*, 141 S.Ct. at 1980. As the Court said, the Director's administrative oversight is so strong that "[h]e is the boss"—but for his inability to review APJ decisions. *Id.* After the Court's remedy provided such review, the two factors together made the Director "the boss" and thus made APJs inferior officers. Nothing in *Arthrex* justified the District Court's neglect of the administrative oversight and removal factors.

Considering all three factors makes sense. An extremely busy official like the Secretary of Commerce cannot review every decision or

even most decisions made in her department.[4] Thus, she must rely mainly on prospective supervision to ensure conformity with her wishes *ex ante*. This kind of control is captured by the two *Edmond* factors disregarded by the District Court. Administrative oversight—like issuing regulations and internal policies—and the threat of removal push officers to carry out the Secretary's policies in the first place. Review, in contrast, is primarily an *ex post* control and one that would be impossible to exercise in all instances. The possibility of review thus cannot be sufficient to constitute supervision and control.

In considering all three factors together, the Secretary does not sufficiently supervise and control the Council's authority under the two-step rulemaking process to render that authority an inferior-officer power. As reviewed *supra*, there is no administrative oversight and no threat of removal at will.

The District Court was also mistaken that the review factor is satisfied by the Secretary's legality review over the Council's two-step

[4] The Council is not even in the Department of Commerce but rather is established as a freestanding body, *see* § 1852(a), which only underscores that it was not meant to be inferior to the Secretary.

rulemaking powers.[5] Though the review factor was satisfied by legality reviews in *Edmond* and *Arthrex*, the agency decisions at issue in those cases were adjudications, where the substantive power lay in deciding questions of law. In contrast, with rulemaking, the substantive power is not in determining whether a rule is legal but in deciding policy. If a legality review were sufficient to satisfy the review factor in rulemakings and—under the District Court's reasoning—destroy principal officer status, then OMB's legality review of significant rules would do the same for officers who issue significant rules.[6] *See* E.O. 12866 § 6(b). That cannot be the case.

On policy, the Council has the final, unreviewable word. *Edmond* and *Arthrex*, as adjudication cases, did not have the opportunity to explain how the review factor is applied in a rulemaking context. But the Supreme Court was not completely silent: *Arthrex* explained that, "[s]ince the founding, principal officers have directed the decisions of inferior officers on matters of law as well as policy." 141 S.Ct. at 1983. The

[5] And again, the Secretary lacks even that minimal review for the Council's other powers, which therefore must be principal-officer powers.

[6] The Rule was designated not significant, 88 Fed. Reg. at 39,198, and so was not reviewed by OMB.

absence of direction on matters of law rendered APJs principal officers. Here, the absence of direction on matters of policy likewise renders Council members principal officers.

As to the third error: Supervision in the Appointments Clause context is not decided on formalities. *See id.* at 1982 (An officer's formal rank or technically greater responsibilities is irrelevant.). As discussed above, it was the Assistant Administrator who reviewed Amendment 54 and the Rule for lawfulness. ROA.9284–86, 9456–58, 9516. That is the standard operating procedure for the legality review. *See, e.g.*, 89 Fed. Reg. 9072, 9073 (Feb. 9, 2024) ("Pursuant to [§ 1854(b)], the NMFS Assistant Administrator has determined that this final rule is consistent with … applicable law."); 89 Fed. Reg. 8557 (Feb. 8, 2024) (same); 89 Fed. Reg. 271 (Jan. 3, 2024) (same); 88 Fed. Reg. 89,313 (Dec. 27, 2023) (same); 88 Fed. Reg. 88,835 (Dec. 26, 2023) (same); 88 Fed. Reg. 88,266 (Dec. 21, 2023) (same); 88 Fed. Reg. 86,838 (Dec. 15, 2023) (same); 88 Fed. Reg. 83,860 (Dec. 1, 2023) (same). Where is the principal-officer oversight? The fact on the ground is that no Senate-confirmed officer conducts even the minimal review required by the Act.

B. The Putative Members Were Not Appointed as Inferior Officers Either

Even if Council members may be appointed as inferior officers, no putative Council member was properly appointed. The Act provides that five seats are designated by governors or by the governors' designees. § 1852(b)(1)(A). And the District Court determined that the regional administrator is a Senior Executive Service career official hired by the Deputy Assistant Administrator for Regulatory Programs. ROA.9541; ROA.10900–01. These six individuals are obviously improperly appointed.

But the 11 governor-nominated individuals are also not properly appointed as inferior officers. Though they are nominally selected by the Secretary, a head of department, her choice is restricted to governors' nominees. § 1852(b)(2)(C). And governors may nominate as few as "three individuals for each applicable vacancy." *Id.* Critically, the Act forbids the Secretary from rejecting 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. *Compare with Collins*, 141 S.Ct. at 1787 (The President must be able to

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." (simplified)). If the Secretary determines that a nominee is not qualified, she must wait for the governor to amend his nominations; she cannot pick her own appointees. § 1852(b)(2)(C).

Bell Plaintiffs argued that this procedure unlawfully splits the appointment power between the Secretary and governors, with the latter possessing the lion's share of the power. The District Court rejected this argument, undertaking a complicated grammatical analysis to conclude that Congress may prescribe qualifications for inferior officers. ROA.10903–06. That is not disputed. The Supreme Court has already held that there is "no conflict between" the "power to prescribe qualifications for office" and the power "of appointment and removal." *Myers v. United States*, 272 U.S. 52, 128 (1926).

And *Bell* Plaintiffs do not challenge the qualifications prescribed by Congress here. *See* § 1852(b)(2)(A). But who may choose *amongst* qualified individuals is explicitly limited by the Appointments Clause. As *Myers* recognized, the "choice" of which individual should occupy a position is the key to the appointment power. *Myers*, 272 U.S. at 128. If

that choice is diffused beyond the permitted appointers, then the Appointments Clause is violated.

The Act empowers governors to nominate members and requires the Secretary to choose from those nominees. The basic question is whether nomination is part of the power of appointment. If so, Congress vested the power of appointment in governors, violating the Appointments Clause.

The question is easy to answer because the Appointments Clause contemplates a highly analogous appointment procedure that was exhaustively considered by the Framers: nomination by the President and confirmation by the Senate. The original understanding of the Appointments Clause is that nomination is part of the appointment power. *See* The Federalist No. 76 (Hamilton) (noting that all agree "that the power of appointment" should be "vested in a single man; or in a select assembly of a moderate number; or in a single man, with the concurrence of such an assembly," and arguing in favor of the last procedure—nomination and confirmation (emphasis omitted)); *see Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912) (noting that "the federalist papers are of great importance, if not conclusive," in ascertaining the

meaning of the Constitution). Indeed, nomination was understood to be the vastly more important part of the appointment power. As Hamilton wrote:

> In the act of nomination, [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment. *There can, in this view, be no difference between nominating and appointing*.

The Federalist No. 76 (emphasis added).

The District Court minimized the governors' nomination power by pointing out that the Secretary has the power to reject unqualified nominees.[7] ROA.10902, 10906. But the Senate's power to reject Presidential nominees is even broader, for the Senate may reject nominees for any reason. Yet that does not diminish the President's nomination power:

> But might not his nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the

[7] The Secretary is authorized to issue regulations regarding qualification, but the regulations may only explain when individuals are knowledgeable regarding fisheries. § 1852(b)(2)(A). Moreover, when a slate of nominees *is* qualified under her regulations, the Secretary cannot reject the list. *Cf.* 50 C.F.R. § 600.215(b)(1) (qualification regulations). The regulations bind her also.

> object of his preference, though perhaps not in the first degree.

The Federalist No. 76. What was important is that, "as no man could be appointed but on [the President's] previous nomination, every man who might be appointed would be, in fact, his choice." *Id.* Thus, any member approved by the Secretary is still *the governor's* choice, not the Secretary's—especially given that, unlike with Senate-confirmation, the Act compels the Secretary to approve one of the governor's nominees when he nominates three qualified individuals.

The government admitted these very points to this Court. In *Delta Commercial Fisheries Ass'n v. Gulf of Mexico Fishery Management Council*, 364 F.3d 269, 271 (5th Cir. 2004), a commercial fishermen's association complained to the Secretary that the Council's membership inadequately represented commercial interests, "but the Secretary responded that his ability to ensure 'fair and balanced' representation is limited because the governors control the pool of available appointees." The government emphasized in its brief that "[t]he Secretary can reject … candidates only if they do not meet the qualifications listed in Section 1852(b)(2)(A) and 50 C.F.R. 600.215," so "if the state governor puts forward a qualified slate …, the Secretary is bound to appoint from those

candidates," even if it "altogether excludes … commercial interests." *Id.*, Brief for the Federal Appellees, 2003 WL 23783211, at *23–*24. After all, "[t]he Secretary has no control over a governor's selection process." *Id.* at *24. The government concluded that "instead of vesting the Secretary with the authority to shape the composition of interests represented by the Council, Congress vested the state governors with the primary responsibility for addressing this issue[.]" *Id.* That is, governors have "primary responsibility" for selecting the Council's membership to shape the Council's policy priorities. The government should not now speak from the other side of its mouth.

A nominator's primacy is underscored by the Founding generation's expectation that the nominator would usually get his way: "It is … not very probable that his nomination would often be overruled," because the Senate could not assure itself "that a future nomination would present a candidate in any degree more acceptable to them." The Federalist No. 76. And that is what the record shows. From 2020 to 2022, the Secretary confirmed 73 nominees and rejected *no* slate of nominees. ROA.9921, 9929, 9939. Furthermore, 50 of the 73 confirmations were the governors' first preferences out of the three nominees for each vacancy. ROA.9924–

26, 9932–36, 9941–43. Putting aside 12 confirmations where the governors stated no preference, *id.*, the governors got their first choice of their three nominees 50 times, or more than 80% of the time—and had one of their three nominees accepted 100% of the time. In every respect, the facts bear out the Framers' expectation that, "in the business of appointments the executive"—that is, the nominator—"will be the principal agent." The Federalist No. 65 (Hamilton).

The Supreme Court also agrees with the Framers. Considering the Founding Era discussion, the Court concluded that *the nominator* is the one who is truly accountable for an appointees' actions: "Assigning the nomination power to the President guarantees accountability for the appointees' actions because the 'blame of a bad nomination would fall upon the president singly and absolutely.'" *Arthrex*, 141 S.Ct. at 1979 (quoting The Federalist No. 77 (Hamilton)). The Senate, as the confirming entity, has only "a degree of accountability." *Id.*; *accord* The Federalist No. 77 (The President and Senate "would participate, *though in different degrees*, in the opprobrium and disgrace" of "an ill appointment." (emphasis added)).

The practical results plainly demonstrate that the Appointments Clause is violated here. Under the Act's distorted framework, accountability for these 11 seats—in addition to the five governor-designated seats—falls principally on five separate governors. A citizen aggrieved by *federal* fisheries policy is thus compelled to petition not the nationally elected President but governors who are not accountable to citizens of 45 states. This exact scenario occurred in *Delta*. The Act thus obliterates the "great principle of unity and responsibility in the Executive Branch," which relies on the Appointments Clause to establish a "clear and effective chain of command down from the President" to give executive power "its legitimacy and accountability." *Arthrex*, 141 S.Ct. at 1979 (simplified).

The fact that the Secretary may choose from three nominees per vacancy makes no difference. The three are still the governors' choices, as is any eventual appointee. The governor, in nominating three individuals, excludes all other qualified individuals. The Secretary, in choosing from qualified nominees, may exclude only two and *must* choose the third, and the Secretary has no means of compelling the governor to

bring forth a particular candidate.[8] *Cf. Myers*, 272 U.S. at 128 (holding that Congress may not prescribe qualifications for office that "so limit selection and so trench upon executive choice as to be in effect legislative designation"). The governor clearly exercises a greater power of selection than the Secretary, as the government itself argued in *Delta*.

The Appointments Clause "carefully husband[s] the appointment power to limit its diffusion." *Freytag*, 501 U.S. at 883. As part of the "separation of powers," the Clause must be applied in a way that "establish[es] high walls and clear distinctions." *Plaut v. Spendthrift*

[8] The Appointments Clause might be satisfied if the nominator were an official inferior to the Secretary and controlled by her, because then the Secretary could compel the official to bring forth her favored candidate. In that case, the official truly would be merely assisting the Secretary and unable to compel her to accept a candidate. *See United States v. Hartwell*, 73 U.S. 385, 393 (1868) (holding without reasoning that an officer's appointment by "the assistant treasurer, at Boston, with the approbation of the Secretary of the Treasury" satisfied appointment as an inferior officer). But "[t]he Secretary has no control over a governor's selection process." *Delta*, Brief for the Federal Appellees, 2003 WL 23783211, at *24. Governors can bring forth whichever candidates they like and, so long as they nominate qualified ones, can force the Secretary to appoint from among their candidates, even if she mistrusts their judgment or character and disagrees with their policy prescriptions. *Compare with Collins*, 141 S.Ct. at 1787 (President must be able to 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." (simplified)).

Farm, Inc., 514 U.S. 211, 239 (1995). The idea that the Clause has, for the past 230-plus years, secretly, anti-textually permitted appointment by gubernatorial nomination with Secretary confirmation is indefensible—so indefensible that the government did not even make this argument below. This Court should not adopt the District Court's error.

VI. The Secretary's Rulemaking Lacked the Key Statutory Prerequisite

As previously discussed, § 1854(b) permits the Secretary to promulgate a regulation only if it has been validly adopted by the Council and if it is supported by an FMP or FMP amendment validly adopted by the Council. Because of the Council's structural defects, however, the Council never validly adopted Amendment 54 or the Rule.

The Appointments Clause provides the sole "permissible methods of appointing 'Officers of the United States.'" *Lucia*, 585 U.S. at 241. When an individual's selection does not conform to the Appointments Clause, his "appointment … to office is deficient," and he acts only "under the color of official title." *Ryder*, 515 U.S. at 180. 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.

This is the case for the 17 putative Council members, and so their adoptions of Amendment 54 and the Rule were void as Council actions. Without a validly adopted FMP amendment and regulation from the Council, the Secretary lacked the power *under statute* to issue the Rule. The government disputed none of this below. As with the principal-inferior officer discussion, the District Court disagreed with *Bell* Plaintiffs by creating its own arguments, drawing on concepts that no party raised, without notice or an opportunity for the parties to respond. None of these sua sponte defenses has merit.

A. Proximate Cause

The District Court's first ground for denying relief was that "the composition of the Council was not the proximate cause of the Commercial Fishers' injury" because the Rule was "ultimately signed off on by the Secretary's Designee, Janet Coit." ROA.10909. The court appeared to miss *Bell* Plaintiffs' theory of relief, which is a *statutory* one:

The Rule must be vacated because the Secretary (and so NMFS and Coit) lacked the authority to issue the Rule under § 1854(b). In such situations, there is no proximate-cause inquiry; there either is or isn't authority.

In more routine Appointments Clause cases, a violation directly voids the action complained of as a *constitutional* matter. *See, e.g.*, *Lucia*, 585 U.S. at 251. If that were Plaintiffs' theory of relief, a proximate-cause analysis might or might not be relevant.[9] But here, the function of the violation is to deprive the Secretary of § 1854(b)'s rulemaking predicate, invalidating the rulemaking as a statutory matter.

Furthermore, Plaintiffs prevail under the direct, constitutional theory of relief anyway. In *Lucia*, an SEC ALJ's decision could only become final if the Commission "issue[d] an order that the ALJ's decision has become final" or actively reviewed the decision and affirmed it. 585 U.S. at 242 (simplified). Thus, the challenged decision in *Lucia* was "ultimately signed off on" by the SEC. ROA.10909. Nevertheless, upon holding that the ALJ's office was improperly structured, the Court

[9] The District Court asserts that "some of the Commercial Fishers concede that proximate causation is a requirement for a merits finding at this stage," ROA.10908, but the court cites a discussion at a hearing in which *Bell* Plaintiffs did not participate.

vacated the decision. 585 U.S. at 251. The ALJ was not too remote from the final decision to warrant relief. To the contrary, the Court straightforwardly reasoned that the "adjudication [was] tainted with an appointments violation" so relief had to issue. *Id.* So too here: The rulemaking was tainted with an appointments violation and relief must issue. It is irrelevant that the Secretary and NMFS took the last step in the rulemaking process. *See Arthrex*, 141 S.Ct. at 1981 (APJ decisions must be implemented by "the Director [who] alone has the power to take final action to cancel a patent claim or confirm it." (quoting dissent)); *cf.* *Freytag*, 501 U.S. at 873 (concerning a tax case in which the STJ provided a recommendation only and a Tax Judge made the final decision).

Even if that were not so, the Assistant Administrator's lawfulness review is not enough to cut off the chain of causation between the Council and the Rule. The essential cause of Plaintiffs' injury is not the Assistant Administrator's determination that Amendment 54 and the Rule are *lawful*. Rather, it is the *policy choice* behind Amendment 54 and the Rule that is the true proximate cause of Plaintiffs' injury. And the putative Council members are the ones responsible for the policy choice. The District Court fails to detect this distinction, referring to the Assistant

Administrator's review only as "rigorous and mostly independent." ROA.10910.

Under the District Court's reasoning, no defect in the Council process can ever result in relief because the Secretary's approval and promulgation will always cut off proximate cause. A minority fisherman would not be able to obtain relief even if a (hypothetical) Council consisting of avowed racists excluded minority fishermen and staff members from the rulemaking process and adopted pretextual fisheries policies that disfavored minority fishermen—simply because a well-intentioned Secretary, uninfected by racism, determined the measures themselves were lawful and promulgated them. That cannot be the case.

There are many offramps between a policy decision and a rule taking effect. OMB, for example, may reject rules as unlawful or if they conflict with presidential priorities. E.O. 12866 §§ 2(b), 6(b). Congress may reject rules under the Congressional Review Act for any reason. 5 U.S.C. § 801(b). Neither of these checkpoints cuts off proximate cause. The Secretary's ability to reject rules as unlawful is only one more such checkpoint.

B. Quorum

The District Court also held that the Rule could not be vacated because six unconstitutional appointees left the Council with a quorum of 11 constitutional appointees, whose decisions the court assumed were not tainted by the unconstitutional appointees. ROA.10911–12, 10915–18; *see* § 1852(e). But this assumption is supported by no case or legal principle, and the District Court did not cite any such case. In fact, every analogous case in the Supreme Court and lower courts employs the opposite rule: Any improperly serving individual on a multi-member body renders the body improperly structured and taints its decisions.[10]

Most on point is the D.C. Circuit's *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994). There, the court dismissed an FEC enforcement action against the NRA because two out of eight FEC members served unconstitutionally. Six voting members were Senate-confirmed, but two *nonvoting* members were appointed by Congress. The nonvoting members, the government argued, "have no *actual* influence on agency

[10] Of course, if nine or more seats are unconstitutionally structured so that the Council lacked a quorum, that is an additional reason for vacatur.

decisionmaking" and so were "constitutionally harmless." *Id.* at 826. In other words, the government argued (as it does here) that the actions of the constitutional members—who had sufficient statutory authority to make decisions by themselves—are presumed to be untainted by the unconstitutional ones. The court held the opposite: The two officials were placed on the Commission "to exercise *some* influence." *Id.* Even if they were "completely silent during all deliberations (a rather unlikely scenario), their mere presence as agents of Congress conveys a tacit message to the other commissioners" and so "has the potential to influence" them. *Id.* The rule is that the presence of improper members "ha[s] some impact (even though the extent of which may be impossible to measure)." *Id.* at 825. The court therefore granted relief. *Id.* at 828.

NRA applies here. The point of placing the five governor-designated officials on the Council is "to exercise *some* influence." *Id.* at 826. Thus, even if they were "completely silent," which they were not as discussed below, their "mere presence as agents of" the five states would be expected to influence the 11 governor-nominated members (who, after all, owe their appointments to the governor designees' bosses). *Id.* So too with the regional administrator's presence as an agent of his appointer the

Deputy Assistant Administrator for Regulatory Programs. The impact "may be impossible to measure," but the presumption is that the impact exists. *Id.* at 825. In fact, the presumption of such an impact is here even stronger than in *NRA*, because the six officials are voting members of the Council, with the deliberation, influence, and compromises that come with voting membership in a multi-member body.

The District Court distinguished *NRA* on the ground that "[h]ere, there is no separation of powers issue." ROA.10916. That is plainly wrong; the Appointments Clause is part of the separation of powers. *See Freytag*, 501 U.S. at 878; *Buckley*, 424 U.S. at 118.

NRA is consistent with the Supreme Court's treatment of analogous situations. In *Nguyen v. United States*, 539 U.S. 69 (2003), a conviction was affirmed by a Ninth Circuit panel consisting of two Article III judges and an Article IV judge sitting by designation. The Court determined that the inclusion of the Article IV judge was not authorized by statute. The government argued, however, that the Ninth Circuit's judgment should not be vacated, because the two Article III judges formed a quorum. The Court disagreed "[f]or two reasons." *Id.* at 82.

First, improper constitution of a multi-member body requires vacatur of that body's purported actions even if properly serving members could by themselves establish a quorum. While "settled law permits a quorum to proceed to judgment when one member of the panel dies or is disqualified," "this Court has never doubted its power to vacate the judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal." *Id.* (collecting cases). Multiple times, the Supreme Court has found it so obvious that an improperly constituted panel's judgment must be vacated—despite the presence of a quorum—that it devoted little discussion to the issue. *See, e.g.*, *United States v. American–Foreign S.S. Corp.*, 363 U.S. 685, 691 (1960) (vacated an en banc judgment in which a retired circuit judge participated). When a panel is improperly constituted, "it [is] inappropriate … to assess … whether the fairness, integrity, or public reputation of the proceedings were impaired by the composition of the panel" or "the merits of petitioners' convictions," *i.e.*, whether the error was harmless. *Nguyen*, 539 U.S. at 80.

"Second, the statutory authority for courts of appeals to sit in panels requires the inclusion of at least three judges in the first instance," so "it

is at least highly doubtful" that the quorum of two judges could have "serve[d] by themselves as a panel." *Id.* at 82–83.

The District Court focused solely on the inapplicability here of the Supreme Court's second reason, ROA.10916, even though the first reason is plainly applicable. A Council with vacancies due to death or disqualification may still act if it has a quorum. But when the Council is improperly constituted, the rule is vacatur; a court does not "assess" whether the regulatory outcome was "impaired by the composition of the" Council. *Nguyen*, 539 U.S. at 80; *see also Free Enter. Fund v. PCOAB*, 561 U.S. 477, 512 n.12 (2010) (Although SEC Chairman voted with rest of SEC in appointing PCAOB members, "[w]e cannot assume … that the Chairman would have made the same appointments acting alone[.]").

NRA and *Nguyen* are explained by the doctrine of structural violations. "[S]tructural error requir[es] automatic reversal without any inquiry into prejudice." *United States v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020) (simplified). And errors are structural "when the error's effects are simply too hard to measure," *id.* (simplified), such as when they "infect [an] entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). The Appointments Clause is a "structural safeguard[.]" *Edmond*,

520 U.S. at 659. As the D.C. Circuit has held, the structural-error doctrine applies to "[i]ssues of separation of powers (including Appointments Clause matters)," because "it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss." *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000). Thus, there is "no rule that a party … must show a direct causal link between the error and the authority's adverse decision." *Id.* Rather, "the opposite is often true"; the assumption of prejudice "is so automatic that it usually goes unmentioned." *Id.*; *accord Cirko on behalf of Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 154 (3d Cir. 2020).

So too here. Because the scheme within which Amendment 54 and the Rule were approved violates the Appointments Clause, harm is presumed. The 17 individuals were so deeply enmeshed in the entire decision-making process that the precise effect of six of them on the outcome cannot be measured. The separation of powers "is a prophylactic device," "rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut*, 514 U.S. at 239. Thus,

"harm is presumed." *Cirko*, 948 F.3d at 154. The rule, as in *NRA* and *Nguyen*, is vacatur.[11]

Plaintiffs thus need not show a link between the governor designees and regional administrator and the regulatory outcome, but even if the Court were to demand such a link, the record here provides one.[12]

On the day the 17 individuals voted for Amendment 54, putative Council member McDermott proposed that an Alternative 6 be created and made the preferred alternative. His motion was the one that ultimately carried. At first, his motion proposed a fixed annual Acceptable Catch Limit of 631,000 pounds, split between the commercial and recreational sectors 80-20. ROA.4882. But he stated that he was

---

[11] In *Collins*, the Supreme Court made an exception to this rule for certain tenure-protection violations, holding that "the challenging party must demonstrate … that the unconstitutional removal provision inflicted harm." *Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 631 (5th Cir. 2022) (simplified) (discussing *Collins*). But the Court explicitly held that tenure-protection violations differed on this principle from Appointments Clause violations, which renders affected actions void. *Id.*

[12] The District Court faults Plaintiffs for failing to point out facts showing that the governor designees or regional administrator "somehow exerted influence and control over the decisions of the others," ROA.10916, but Plaintiffs never had an opportunity to respond to this novel argument, which the court produced for the first time in its order granting summary judgment to the government.

"open to some input on that, if the council has other ideas." *Id.* In the exchange that followed, General Spraggins—a governor designee, ROA.9975, whose appointment the District Court ruled unconstitutional—pushed McDermott to go even further. Repeating that "we don't need to increase the quota" over time, he argued that "we can hold it at 505,000 pounds." ROA.4883; *see also* ROA.4884. No one else advanced the idea of reducing the quota, but McDermott acceded and amended his motion. *Id.* ("I would like to accept the General's recommendation to amend the ACL to the 2022 ABC of 505,000[.]"). The motion carried. ROA.4722. That preferred alternative was then adopted as Amendment 54. ROA.4723. Thus, in the absence of Spraggins's unconstitutional service, there is every indication that Plaintiffs would now have nearly 25% more greater amberjack to fish. And there were undoubtedly countless such instances of persuasion, horse-trading, and compromise over the years of discussion on Amendment 54. Multi-member bodies, after all, were made for deliberation.

One might argue that the 11 governor-nominated individuals would have adopted Spraggins's lower quota acting by themselves, because they voted 10-1 for the final figure. ROA.10911. But there is more specific

evidence that they would have accepted McDermott's original, higher quota without Spraggins's intervention: Only Spraggins spoke in favor of lowering the quota. Any uncertainty about which outcome would have been more likely in the absence of the governor designees and regional administrator only underscores that, when a defect has infected the entire decision-making process, it is futile to engage in counterfactual inquiry. That is precisely what the doctrine of structural violations predicts and was made to resolve. Thus, any such uncertainty cuts in favor of vacating the Rule.

C. De Facto Officer Doctrine

Finally, the District Court considered the de facto officer doctrine. Under the doctrine, "the Court has found a judge's actions to be valid *de facto* when there is a 'merely technical' defect of statutory authority." *Nguyen*, 539 U.S. at 70 (citation omitted). The doctrine has no applicability to constitutional violations, and the Supreme Court has explicitly rejected its application to Appointments Clause claims.

Glidden v. Zdanok, 370 U.S. 530, 536 (1962) (plurality), concluded that the doctrine may apply to a "defect in statutory authorization," but it did not apply to a "challenge … based upon nonfrivolous constitutional

grounds."[13] Such violations, especially where "the constitutional plan of separation of powers" was at stake, are "not merely technical." *Id.* at 535–36.

The Court was even more explicit in *Ryder*, which refused to apply the de facto officer doctrine to an Appointments Clause challenge. *See Rop v. FHFA*, 50 F.4th 562, 586 (6th Cir. 2022) (Thapar, J., concurring in part and dissenting in part) (observing that *Ryder* "sounded the doctrine's death knell"). The Court reasoned that the doctrine did not apply because the challenge "is based on the Appointments Clause … rather than a misapplication of a statute." *Ryder*, 515 U.S. at 182. "In case anyone missed the message, the Court then buried past precedents applying the doctrine." *Rop*, 50 F.4th at 587. Those past cases, the Court stated, did not "explicitly rel[y] on the *de facto* officer doctrine." *Ryder*, 515 U.S. at 183. The Court then limited those cases to their facts with a strong implication that those cases never applied the doctrine at all. *Id.* at 182.

[13] The de facto officer doctrine cannot even paper over all statutory defects. *See Nguyen*, 539 U.S. at 70 (rejecting application of doctrine to the assignment of Article IV judge to a circuit panel in violation of nontechnical statute).

The District Court ties *Ryder*'s result to the need to avoid "a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments." 515 U.S. at 183; *see* ROA.10914 (reasoning that "upholding a fishery regulation is not akin to the 'questionable judicial appointment' present in *Ryder*"). But *Lucia* made clear that concern extended to all Appointments Clause challenges. 585 U.S. at 251 n.5 (recognizing need to "create incentives to raise Appointments Clause challenges" (simplified)). And this Court has already concluded that *Ryder* is not limited to judicial officers. *See D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 353 (5th Cir. 2013).[14]

Since *Ryder*, courts have consistently treated Appointments Clause violations as rendering relevant decisions void, without any suggestion that the de facto officer doctrine applies. *See Collins*, 141 S.Ct. at 1787; *Arthrex*, 141 S.Ct. at 1987; *Lucia*, 585 U.S. at 251–52; *Sidak v. U.S. Int'l Trade Comm'n*, __ F.Supp.3d __, 2023 WL 3275635 (D.D.C. 2023). The District Court's position has no support.

[14] If anything, it is the de facto officer doctrine itself, not *Ryder*, that should be cabined to defective judicial appointments. It is only in such cases that the Court has clearly applied the doctrine. *See Ryder*, 515 U.S. at 180–82 (discussing cases from the 1890's); *id.* at 183 ("Neither *Buckley* nor *Connor* explicitly relied on the *de facto* officer doctrine[.]").

CONCLUSION

For the above reasons, the Secretary lacked authority to issue the Rule, which should be "set aside." § 1855(f)(1)(B). The Court should reverse.

Dated: March 18, 2024.

Respectfully submitted,

MICHAEL POON
DAMIEN M. SCHIFF
MOLLY E. NIXON
CHARLES E. COWAN

/s/ Michael Poon
MICHAEL POON

Attorneys for Plaintiffs – Appellants Karen Bell, A.P. Bell Fish Company, Inc., and William Copeland

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate 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.

/s/ Michael Poon
MICHAEL POON

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It is printed in Century Schoolbook, a proportionately spaced font, and includes 12,982 words, excluding items enumerated in Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2. I relied on my word processor, Microsoft Word, to obtain the count.

/s/ Michael Poon
MICHAEL POON