No. 24-60055

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

George D. Arnesen; Jeffrey Ryan Bradley,

Plaintiffs – Appellants,

v.

Howard Lutnick, 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.

Howard Lutnick, 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

**SUPPLEMENTAL 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, P.A.

- *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: **Howard Lutnick**, 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.
- Amicus: **Cato Institute**.
- **Counsel for Amicus Cato Institute**: Thomas Berry and Alexander Khoury.
- Amici: **Gulf of Mexico Reef Fish Shareholders' Alliance** and **Seafood Harvesters of America**.
- **Counsel for Amici Gulf of Mexico Reef Fish Shareholders' Alliance and Seafood Harvesters of America**: J. Timothy Hobbs, Jr., and Shelby R. Stoner.

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

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**

## Other Authorities

## INTRODUCTION

Assistant Administrator Coit's review of the final rule, 88 Fed. Reg. 39,193 (June 15, 2023) ("Rule"), did not ratify the Council's adoption of Amendment 54 and the Rule under *Braidwood Management, Inc. v. Becerra*, 104 F.4th 930 (5th Cir. 2024), and other precedents. First, Coit's determination that the Rule is lawful did not constitute ratification. Second, even if the review were treated as a ratification, it would be *ultra vires*, as the District Court held on remand. Dist. Ct. ECF No. 107 at 11–12 ("Remand"). Third, the government waived the affirmative defense of ratification by declining to raise it in its Answer, and the Court should not excuse that waiver.

The Court should hold that Coit's review did not ratify the Rule, hold that the putative members of the Council were not properly appointed, and reverse the District Court's grant of summary judgment to the government.

## ARGUMENT

### I. Coit's review was not a ratification

Coit's review is not properly evaluated as a ratification at all. Extensive Supreme Court precedent shows that the effect of review is to

subject the reviewed official to supervision, which goes to the distinction between principal and inferior officers, rather than to ratify the reviewed official's decision. Furthermore, Coit's review lacks essential characteristics of ratification, because it does not purport to affirm a prior act on the merits, nor does it purport to have retroactive effect. In the absence of these characteristics, Coit's review does not ratify the Council's adoption of Amendment 54 and the Rule.

### A. The Supreme Court treats review as supervision, not ratification

The Supreme Court has already told us what the role of review is in Appointments Clause cases: review goes to supervision, which allows officials to be appointed as inferior, rather than principal, officers. It is not ratification, which (the government's theory goes) allows officials to be hired as employees, rather than appointed as officers.

Supervision separates principal officers, who must be Senate-confirmed, from inferior officers, who may be appointed using less stringent procedures. *Braidwood*, 104 F.4th at 943. An officer is supervised if a Senate-confirmed official (1) conducts administrative oversight over his activities, (2) can remove him without cause, and,

critically, (3) reviews his actions. *United States v. Arthrex*, 594 U.S. 1, 13–14 (2021) (discussing *Edmond v. United States*, 520 U.S. 651 (1997)).

*Arthrex* concerned the role of "review by a superior executive officer" in Appointments Clause cases. *Id.* at 14. There, Administrative Patent Judges ("APJs") rendered patentability decisions that were not reviewable by other executive officers. *Id.* As a result, they had to be appointed as principal officers. *Id.* at 23. When the Supreme Court severed statutory provisions, making the APJs' decisions reviewable by the Patent Director, the APJs became inferior officers. *Id.* at 25. APJs did not become employees; their decisions did not become non-significant.

*Arthrex*, then, rejects treating review as ratification. Here, the government's theory is Council seats may be filled by employees so long as their decisions are reviewed. But as *Arthrex* shows, the presence of review helps establish, along with the two other *Edmond* factors, that an official may be appointed as an *inferior officer*, not that they may be hired as employees.

This point is demonstrated clearly in *Freytag v. Commissioner*, where a Tax Court Special Trial Judge's ("STJ's") decision required that the STJ be appointed as an inferior officer, even though the

recommendation was reviewed *de novo* by a properly appointed Tax Court Judge. 501 U.S. 868, 880–81 (1991). Thus, when officials' significant decisions are reviewed, the officials themselves are still exercising significant power and must be appointed as officers. Applied here, although the Council's decision to adopt Amendment 54 and the Rule was reviewed by Coit, the Council's decision was still an exercise of significant power requiring Council members' appointment as officers. The Supreme Court's other cases on review are in accord. *See Edmond*, 520 U.S. at 666 (holding that Court of Criminal Appeals judges required appointment as inferior officers, in part because their decisions were reviewable by Senate-confirmed officers); *Lucia v. SEC*, 585 U.S. 237, 248 (2018) (holding that SEC ALJs exercised significant authority and required appointment as inferior officers even though their decisions were reviewable by the SEC). Holding that reviewed officials may be hired as employees would contradict this precedent.

Another way of arriving at this conclusion derives from *Lucia*'s holding that an official may require appointment as an officer even if he lacks "final decisionmaking authority." *Lucia*, 585 U.S. at 247 n.4. An official who lacks final decisionmaking authority is, necessarily, one who

has his work reviewed and approved by someone else. Thus, an official who has his work reviewed may, under *Lucia*, still require appointment as an officer. That cannot be if review constituted ratification, and if ratification relieved the lower official of the need for appointment as an officer.

### B. Ratification requires an independent evaluation of the merits

Coit's review of the Rule also cannot function as a ratification because she did not approve the Rule on its merits. Rather, she determined only that it was lawful.

As understood by other circuit courts, ratification requires "an independent evaluation of the merits." *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117 (D.C. Cir. 2015); *see also Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016) (A ratifier "must make a detached and considered affirmation of the earlier decision.").

Coit's review and approval of the Final Rule took place under 16 U.S.C. § 1854(b)(1), which charges Coit only with "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." Accordingly, Coit's approval, in her own words, states that she "determined that th[e] proposed rule is consistent with the subject FMP, Amendment 54, provisions of the Magnuson-Stevens Act, and other applicable law." ROA.9286.[1]

Coit's words manifestly show that she determined only that *the Rule is consistent with law*. *Bell* Initial Br. at 5–7. Her words do not reflect an independent evaluation of the merits, that is, a judgment that the Rule should be adopted as a policy matter.

Contrast Coit's statement with a ratification made by the NOAA Administrator two years ago:

> I have independently evaluated the Approach Rule and the basis for adopting it, and I now affirm and ratify the Approach Rule *without deference* to Assistant Administrator Coit's prior decision. I state that I have knowledge of the contents, purpose, and requirements of the Approach Rule and its rulemaking record. I undertake this action based on my careful review of the Approach Rule, my knowledge of its provisions, and *my independent judgment that the Approach Rule was and remains necessary* to protect Hawaiian spinner dolphins, a protected species under the MMPA, from illegal "take" by people wishing to closely swim with or approach the species. Pursuant to my authority as the NOAA Administrator, and based on my independent review of the action and the reasons for taking it, I hereby affirm and ratify

[1] The decision memorandum was signed by Deputy Assistant Administrator Rauch at Coit's direction. *See* ROA.9283 (Coit's approval email with Rauch copied).

> the Approach Rule as of September 28, 2021, including all regulatory analysis certifications contained therein.

87 Fed. Reg. 42,104, 42,104 (July 14, 2022) (emphasis added). This is what an independent review of the merits looks like, and NOAA officials clearly know how to do it. Coit's review cannot function as a ratification because she approved only the Rule's legality, not its merits.

Even assuming that Coit had the power to reject Council measures on any basis, Coit did not exercise that broader review here. Coit's own words show that she was concerned only with the Rule's lawfulness.

### C. Ratifications have retroactive effects

Ratification is by definition retroactive. It functions to "retroactively effect actual authority for the improper official's disputed action." *Braidwood*, 104 F.4th at 947. More specifically, it "operates upon the act ratified precisely as though authority to do the act had been previously given." *Cook v. Tullis*, 85 U.S. 332, 338 (1873). Thus, ratification's retroactive effect is its very purpose. "No maxim is better settled in reason and law, than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur*." *Fleckner v. Bank of U.S.*, 21 U.S. (8 Wheat.) 338, 363 (1823) (Story, J.). "[A]ccording to the maxim, every ratification has a retroactive effect and is equivalent to a prior

command." *Citizens' Bank v. Grove*, 162 S.E. 204, 206 (N.C. 1932). If an act is not retroactive, it cannot be ratification.

Coit's review and approval of the Rule has no retroactive effect. An act has a retroactive effect where it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) (quoting *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CCNH 1814) (Story, J.)). Coit's review and approval does none of this. Accordingly, it cannot be a ratification.

If, nevertheless, Coit's review is deemed to have a retroactive effect, and thus to be a ratification, then it is *ultra vires*. Retroactive agency action must be authorized by a clear statutory statement and there is no such express authority here.

An agency, including its officials, "literally has no power to act . . . unless and until Congress authorizes it to do so by statute." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 301 (2022) (simplified). Thus, Coit's review must be authorized by statute, and for Coit's review to be considered a ratification (and, accordingly, have retroactive effect), the

text of the statute must allow for that interpretation. The Magnuson-Stevens Act's review provisions, however, cannot be interpreted to authorize ratification because the statute lacks a clear statement to that effect.

The disapproval of retroactive government action is "as ancient as the law itself." *Landgraf*, 511 U.S. at 265 n.17 (citation omitted). This disapproval is manifested not only in constitutional restrictions like the Ex Post Facto Clause, but also in a strong presumption against retroactivity in statutory interpretation. The presumption results in several rules, one of which is that a statute authorizes retroactive agency action only when it does so expressly.

The Supreme Court adopted this clear-statement rule in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). The question in *Bowen* was whether a retroactive regulation was supported by a statutory provision that authorized rulemaking but did not explicitly authorize *retroactive* rulemaking. In that case, the Secretary of Health and Human Services had promulgated a regulation prospectively lowering the wage index, a key figure in calculating Medicare reimbursements to hospitals. *Id.* at 206. The regulation was successfully

challenged for failure to comply with notice-and-comment requirements and so was set aside. *Id.* at 206–07. The Secretary later reissued the rule with notice and comment, retroactive to the promulgation of the original rule. *Id.* at 207. The "net result was as if the original rule had never been set aside." *Id.* This second rule, and especially its purported retroactive effect, was challenged in *Bowen*.

A unanimous Supreme Court held that the Medicare Act did not authorize the Secretary to issue the rule. The Court's reasoning was succinct. "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 208. Any statutory authorization of retroactive rulemaking would, of course, lead to retroactive effects. So, "[b]y the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* This principle is acknowledged by circuit courts across the country. *See, e.g.*, *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) ("An

agency may not promulgate retroactive rules absent express congressional authority." (citing *Bowen*, 488 U.S. at 208)).

As the Supreme Court later explained, courts must ensure that retroactive action is allowed only after "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf*, 511 U.S. at 272–73. Because "the proper temporal reach of statutes" is a "fundamental policy judgment[]," *id.* at 273, Congress must explicitly provide for retroactivity "[e]ven where some substantial justification for retroactive rulemaking is presented," *Bowen*, 488 U.S. at 208.

It therefore did not matter in *Bowen* that the "judicial invalidation" of the original rule meant that "congressional intent and important administrative goals may be frustrated unless an invalidated rule can be cured of its defect" retroactively. *Id.* at 215. Nor did it matter that the original rule had "provided at least some notice" as to the retroactive rule's contents. *Id.* "Whatever weight" these concerns had, Congress had not expressly authorized retroactive action and so had not affirmatively decided that such concerns outweighed the potential for unfairness. *Id.*

The bar for a clear statement is high. "Typically, [the Supreme Court] find[s] clear-statement rules appropriate when a statute implicates historically or constitutionally grounded norms that we would not expect Congress to unsettle lightly." *Jones v. Hendrix*, 599 U.S. 465, 492 (2023). The Court has explained that, to satisfy a clear-statement rule, "something more than a merely plausible textual basis for the agency action is necessary." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (explaining major questions doctrine, a clear-statement rule). "The agency instead must point to clear congressional authorization for the power it claims." *Id.* (simplified).

The clear-statement rule for retroactivity is particularly stringent, perhaps due to the law's "singular distrust" of retroactivity. *E. Enters. v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring). A statute "will not be construed to have retroactive effect unless [its] language requires this result." *Walker v. U.S. Dep't of Housing & Urban Dev.*, 912 F.2d 819, 831 (5th Cir. 1990) (quoting *Bowen*, 488 U.S. at 208). Thus, to find that a statute authorizes retroactive agency action, the words of the statute must be "so clear, strong, and imperative, that no other meaning can be annexed to them." *West Virginia*, 597 U.S. at 736 (Gorsuch, J.,

concurring) (quoting *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (Paterson, J.)). As Chief Justice Marshall counseled, "a court . . . ought to struggle hard against a [statutory] construction" that leads to retroactive effects. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

Because ratification is retroactive, the Act authorizes ratification only if it contains a clear statement to that effect; otherwise, it does not authorize ratification and Coit's review, undertaken pursuant to the Act, cannot be a ratification.

The Magnuson-Stevens Act's review provisions, 16 U.S.C. § 1854(a)–(b), contain no suggestion that Congress intended to authorize any sort of retroactive action like ratification. They certainly do not meet the extraordinarily high bar for the clear-statement rule for retroactivity. Instead, the Act's review provisions may be read to authorize a *mere* review of Council measures—and so the Court must accept that interpretation. *See Bowen*, 488 U.S. at 208 (A statute authorizes retroactivity only if its "language requires this result."). Ratification, as a retroactive power, cannot be "read in" to that review, "[e]ven where some substantial justification for" ratification is presented. *Id.* Rather,

Congress must "affirmatively" provide for ratification. *Landgraf*, 511 U.S. at 272. Because Congress did not do so in the Act's review provisions, those provisions do not authorize a ratification. Thus, if Coit's review were analyzed as a ratification, it would be *ultra vires*, because the Act does not authorize ratification.

## II. Coit lacked the power to issue a ratification

Even if a relevant statute authorized Coit to issue ratifications, that authorization is qualified by common-law principles of ratification that Congress incorporated into any relevant statutory authorization for ratification. Those principles, which *Braidwood* has embraced, show that Congress did not authorize Coit to issue a ratification, and so her review could not function as a ratification. Furthermore, those principles and *Braidwood* show that the only effect of Coit's review-as-ratification would be to retroactively authorize the Council to adopt Amendment 54 and the Rule—but that authorization would violate the Appointments Clause because the Clause forbids anyone from giving authority to improperly appointed officials.

A "firmly established principle[] of statutory construction" is that Congress incorporates the common law unless it "clearly and plainly

expressed" a contrary intention. *United States v. Bellard*, 674 F.2d 330, 335 (5th Cir. 1982). This is because "Congress is understood to legislate against a background of common-law principles." *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010) (simplified). Thus, "when a statute covers an issue previously governed by the common law, [the courts] interpret the statute with the presumption that Congress intended to retain the substance of the common law." *Id.* As a result, "common law doctrine[s] should be 'read into' a legislative scheme and thereby made statutorily binding upon [an] agency." *Duvall v. Att'y Gen. of U.S.*, 436 F.3d 382, 389 (3d Cir. 2006).

When the presumption of statutory incorporation of the common law arises, it may be overcome only if congressional intent to abrogate the common law is "evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). To meet this bar, "the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534–35 (1993) (simplified). And the "burden" falls on the party who seeks to "show that Congress departed from the traditional common-law rule[s]." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 344 (2017).

As this Court recognized in *Braidwood*, ratification, including in the administrative context, "rest[s] on basic principles of agency." *Braidwood*, 104 F.4th at 947. Likewise, the Supreme Court held in *NRA* that the agency ratification there was "at least presumptively governed by principles of agency law." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). Because no relevant statute abrogates ratification's common-law defaults, Congress has incorporated ratification's common-law principles into any statutory provision authorizing Coit's review-as-ratification.

### A. Coit lacked the authority to adopt the Rule in October 2022 and February 2023

This Court in *Braidwood*, 104 F.4th at 948, and the Supreme Court in *NRA* recognized that the common law's timing rule applies to agency ratifications. Under that rule, "it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made." *NRA*, 513 U.S. at 98 (simplified). Because this rule is incorporated into any statute authorizing ratification, such a statute only authorizes ratifications by officials who had the power to do the act ratified both at the time the act was done and at the time the ratification was made.

In *NRA*, an agency sought certiorari from the Supreme Court without the Solicitor General's required approval. By the time the Solicitor General gave his blessing, the petition deadline had passed. The question before the Court was whether the Solicitor General's "'after-the-fact' authorization" of the agency's petition was effective. *Id.* at 98.

To answer the question, the Supreme Court turned to common-law "principles of agency law, and in particular the doctrine of ratification." *Id.* From there, it applied the common law's timing rule, as summarized by § 90 of the Second Restatement of Agency: "If an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other unless made before such time." *Id.* (quoting Restatement (Second) of Agency § 90 (1958) ("Restatement")). One requirement stemming from this timing rule is that "it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made." *Id.* (simplified). Because the petition deadline had passed by the time of the ratification, the Solicitor General "could not himself have filed a petition"

at that time. *Id.* He therefore lacked the power to ratify the petition; his ratification "simply came too late in the day to be effective." *Id.*

The Council adopted Amendment 54 and the Rule in October 2022, ROA.4722–23, and Coit's review and approval (the putative ratification) took place in February 2023, ROA.9286. Under the timing rule, Coit's putative ratification was valid only if she possessed the power to take the action ratified—adopt Amendment 54 and the Rule—at both times. She did not, and any ratification was therefore *ultra vires*.

#### 1. Coit was not statutorily authorized to adopt the Rule under the Magnuson-Stevens Act at either time

***Waiting period.*** Coit lacked the power to adopt Amendment 54 and the Rule in October 2022 and February 2023, because the Act required her to wait until April 2023 to act after she identified greater amberjack as being overfished in April 2021.

Because the Act contemplates that the Councils will be the key decisionmakers in federal fisheries regulation, it restricts the Secretary's (and so the Assistant Administrator's) unilateral power in several ways. One restriction is that, when the Assistant Administrator identifies a fishery as overfished, she must wait two years to give the Council time to

act before she may adopt a responsive measure herself. 16 U.S.C. § 1854(e)(5).

Coit, through her staff, formally identified greater amberjack as being overfished on April 7, 2021. ROA.9036. She therefore was required to wait until April 7, 2023, to adopt curative measures. Because October 2022 and February 2023 fall within these dates, she lacked the power to adopt Amendment 54 and the Rule at those times, and she therefore lacked authority to ratify under the timing rule. The District Court ruled for Plaintiffs on these grounds. Remand at 16–17.

The outcome is not changed by the fact that the Rule was promulgated in June 2023, after the two-year period had lapsed.

First, "it is essential that the party ratifying should be able . . . to do the act ratified" *both* "at the time the act was done, [and] also at the time the ratification was made." *NRA*, 513 U.S. at 98 (simplified). Thus, even if June 2023 were considered to be the date of the ratification, Coit still lacked the power to adopt Amendment 54 and the Rule "at the time the act was done"—in October 2022. *Id.* That disability forestalls her ratification.

Second, though the promulgation constitutes the final agency action, ultimately it reflects the judgments reached by officials beforehand. Coit's review under § 1854(b)(1) was the last review provided by the Act, and it took place in February 2023. After she approved the Rule, the statute required her to receive public comment for 30 to 60 days and then promulgate the Rule 30 days thereafter. 16 U.S.C. § 1854(b)(1)(A), (3). Carrying out these ministerial steps did not involve an exercise of Coit's judgment. Indeed, Coit did not even sign the final rule for promulgation; that was done by a lesser functionary, Sam Rauch. ROA.9504.

***Procedural prerequisites.*** Coit also lacked the authority to adopt Amendment 54 and the Rule in October 2022 and February 2023 because she failed to satisfy the procedural requirements that condition her unilateral rulemaking powers. 16 U.S.C. § 1854(c). As the District Court pointed out, Coit could issue her own plan or amendment and implementing regulation "if: (1) the Council fails to develop a plan 'after a reasonable period of time' or (2) she 'disapproves or partially disapproves any such plan or amendment . . . and the Council . . . fails to

submit a revised . . . plan or amendment.'" Remand at 16. "It is undisputed that neither of these prerequisites had occurred[.]" *Id.*

Furthermore, she then must submit the plan to the Council for consideration and comment, as well as provide the public with a 60-day comment period. 16 U.S.C. § 1854(c)(4). Coit must "tak[e] into account" the Council's and the public's comments in issuing the Rule. *Id.* § 1854(c)(5). As the District Court held, none of this happened. Coit did not submit a plan to the Council, and she provided the public with only a 30-day comment period. ROA.9337.

Because Coit never complied with these requirements, she was not authorized to adopt Amendment 54 or the Rule in October 2022 or February 2023, and so could not ratify the Council's adoption of the same.

**2. Coit was not constitutionally qualified to adopt the Rule under the Appointments Clause at either time**

Furthermore, at both times, Coit was improperly appointed and so "lacked the authority to carry out" any duties under the Act, including the adoption of FMP amendments and implementing regulations. *Collins v. Yellen*, 594 U.S. 220, 258 (2021); *cf. Intercollegiate*, 796 F.3d at 117 (holding that only "a properly appointed official" may ratify). Without the

authority to adopt Amendment 54 and the Rule, she lacked the capacity to ratify as well.

It is beyond dispute that Coit must be appointed as an officer because she possesses significant authorities. Through departmental delegations, the Secretary of Commerce has passed enormous portions of her power—power under 64 different statutes—to the Assistant Administrator. ROA.9518–24 (delegations from Secretary to NOAA Administrator); ROA.9531–34 (delegations from NOAA Administrator to Assistant Administrator). Among these statutes are consequential authorities, such as the Secretary's powers under the Magnuson-Stevens Act, the Marine Mammal Protection Act, and the Endangered Species Act. All of these authorities count toward her officer status and whether she was properly appointed. *Freytag*, 501 U.S. at 882.

The Assistant Administrator must be appointed by Senate-confirmation as a principal officer. *Edmond v. United States* provides the "governing test" for distinguishing those who may be appointed as an inferior officer from those who must be Senate-confirmed as a principal officer. *Arthrex*, 594 U.S. at 17. That test 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" before they become final. *Id.* at 13–14, 16–17. However, the Supreme Court in *United States v. Arthrex* singled out review for special treatment: review is not just one factor to be considered but a requirement for inferior-officer status. That is, an official who can make an unreviewable, final decision for the Executive Branch possesses "principal-officer power" and must be Senate-confirmed as an officer. *Id.* at 14–17; *accord Lofstad v. Raimondo*, 117 F.4th 493, 501 (3d Cir. 2024) ("Officers with unreviewable authority are principal officers.").

The delegations vest the Assistant Administrator with the Secretary's authority under 64 statutes. For 63 of them, the authority is without limitation; they do not require Coit to notify or seek the approval of another before taking final and unreviewable action. Whether it is issuing a rule under the Marine Mammal Protection Act, levying ruinous fines under the Endangered Species Act, or otherwise, Coit possesses principal-officer power.[2] Coit, however, was appointed by the Secretary

[2] Indeed, if the government were right that Coit possesses all of the power under the Magnuson-Stevens Act, leaving none for the Councils, that would only further demonstrate that she requires appointment as a principal officer.

of Commerce as an inferior officer only. Reorganization Plan No. 4 of 1970 § 2(e)(1). She is therefore improperly appointed to her position, meaning she acts only "under the color of official title," *Ryder v. United States*, 515 U.S. 177, 180 (1995), and she therefore "lacked the authority" to adopt Amendment 54 and the Rule, *Collins*, 594 U.S. at 258.

Because Coit was always improperly appointed, she lacked authority both when the Council adopted Amendment 54 and the Rule and when she reviewed and approved the Rule. Her review-as-ratification is thus invalid twice over under the common-law timing rule.

This argument is timely. The ratification is before this Court because, after the government completely failed to raise ratification in the District Court, this Court "remand[ed] for *full* district court treatment of the ratification issue." ECF No. 134-1 at 5 (emphasis added). Pursuant to this Court's order, the government was permitted to raise *all* of its ratification arguments before the District Court for the first time. Plainly, Plaintiffs were permitted to respond in the District Court with their own, complete arguments against ratification for the first time, including Coit's improper appointment. *See* Dist. Ct. ECF No. 99, at 13–15 (Plaintiffs' remand brief). When the government is allowed a full-

throated do-over on a defense that it had failed to argue in the first instance, it is improper to force Plaintiffs to respond with one hand tied behind their back.

Even if this argument were considered untimely, this Court must allow it under Supreme Court decisions that courts should reach late Appointments Clause challenges. The Court has held that the tardiness of an Appointments Clause challenge and the accompanying disruption to appellate process are "plainly insufficient" reasons to decline to decide the issue. *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality). For example, the petitioners in *Freytag* not only "fail[ed] to raise a timely objection to the assignment of their cases to" an adjudicator they claimed to be improperly appointed, but they in fact "*consent[ed]* to the assignment." 501 U.S. at 878 (emphasis added). Nevertheless, the Court heard the objection. The Court acknowledged that, "as a general matter, a litigant must raise all issues and objections at trial." *Id.* at 879, But it explained that "the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome . . . the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Id.* (simplified). In

particular, the Court's precedents had "expressly included" an Appointments Clause claim "in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below," and discussed an example in which the claim was raised for the first time *in the Supreme Court* and yet was heard. *Id.* at 878–79 (simplified). Because of the importance of the Appointments Clause claim, the Court held that it "should exercise [its] discretion to hear" the challenge. *Id.* at 879.

Thus, lower courts have applied *Freytag* to decide Appointments Clause challenges "whether or not they were timely presented." *In re Grand Jury Investig.*, 315 F. Supp. 3d 602, 625 (D.D.C. 2018) (simplified); *see Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 821 F.3d 19, 26 (D.C. Cir. 2016); *Willy v. Admin. Review Bd.*, 423 F.3d 483, 490 (5th Cir. 2005). Furthermore, the government had the opportunity to and did brief this issue in the District Court, Dist. Ct. ECF No. 101, at 11–12, and the issue is a purely legal question.

Here, not only is Plaintiffs' objection to Coit's appointment as to ratification timely, but they have raised the objection far earlier than the Appointments Clause claim discussed in *Freytag*, and so the Court

"should exercise [its] discretion to" decide Plaintiffs' objection even if it were not timely. *Freytag*, 501 U.S. at 879.

### B. The Council did not purport to act on Coit's behalf

A second common law rule incorporated into any statutory authority is that a ratification is effective only if the action ratified was purportedly done on behalf of the ratifier. This reflects ratification's roots in agency law. *See Braidwood*, 104 F.4th at 947. The Council, naturally, did not act or purport to act on behalf of Coit, because it was exercising its own authority under the Magnuson-Stevens Act, not acting as Coit's agent. And as *Braidwood* held, an "argument [for ratification] would fail on its own terms" where "no agency relationship exists." *Id.* at 948.

Circuit precedent, Supreme Court cases, and the common law all agree. "Ratification is the affirmance by a person of a prior act which did not bind him but *which was done or professedly done on his account*, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Petro Harvester Operating Co. v. Keith*, 954 F.3d 686, 697–98 (5th Cir. 2020) (simplified) (emphasis added). Thus, "[r]atification does not result from the affirmance of a transaction . . . unless the one acting purported to be acting for the ratifier." Restatement (Second) of

Agency § 85(1) (1958). Or as the Third Restatement put it, "[a] person may ratify an act if the actor acted or purported to act as an agent on the person's behalf." Restatement (Third) of Agency § 4.03 (2006). If this requirement is not satisfied, ratification fails. *Id.*, cmt. b. The Supreme Court applied this principle in *Central National Bank v. Royal Insurance Co.*, 103 U.S. (13 Otto) 783, 786 (1880), which held that a company could not ratify a debt transaction where a corporate agent had borrowed the money "for himself and not the company."

When undertaking a rulemaking, an official can easily note that he is acting for another. For example, the Commodity Futures Trading Commission routinely issues rules through employees, who simply include the notation "Issued . . . by the Commission" in the signature block. *E.g.*, 89 Fed. Reg. 78,793 (Sept. 26, 2024); 89 Fed. Reg. 66,201 (Aug. 15, 2024); 89 Fed. Reg. 51,208 (June 17, 2024). So, too, with the Securities and Exchange Commission. *E.g.*, 89 Fed. Reg. 81,620 (Oct. 8, 2024) ("By the Commission."); 89 Fed. Reg. 70,479 (Aug. 30, 2024) (same).

The Council, however, did not act nor purport to act on Coit's behalf. *See* ROA.9037 (transmittal of Amendment 54 and Rule to the National Marine Fisheries Service). That makes sense, because there is simply no

reason that the Council would have done so. The Council is not an agent of the Assistant Administrator. Rather, the Act vests the Council with *its own* authority to adopt FMP amendments and implementing regulations, and the Council here exercised that authority in adopting Amendment 54 and the Rule. 16 U.S.C. §§ 1852(h)(1), 1853(c).

Another way of viewing this problem is through this Court's conclusion that an "argument [for ratification] would fail on its own terms" where "no agency relationship exists." *Braidwood*, 104 F.4th at 948. No agency relationship exists here because the Council—a freestanding executive body not part of the Commerce Department, 16 U.S.C. § 1852(a)—acted on its own, not Coit's, behalf and exercised its own, not Coit's, authority in adopting Amendment 54 and the Rule. *Braidwood* also held that, where an official's relationship to the ratifier is "characterized by independence," there is no agency relationship and ratification fails. *Id.* And, as previously argued, the Council is characterized by independence due to its strong removal protections and the absence of oversight. *See* ECF No. 60 at 32–37. The government's argument thus "fail[s] on its own terms." *Braidwood*, 104 F.4th at 948.

Any statutory authority for ratification incorporates the common law and so only authorizes ratification of actions that were purported to have been done on behalf of the ratifier. Because the Council did not so purport when it acted, no statute authorized Coit to ratify. Or, put another way, Coit's review was just that and did not function as a ratification.

### C. The Appointments Clause forbids providing the Council with policymaking authority

Ratification's only effect is to retroactively provide an agent with missing authority to take an action. But the Appointments Clause forbids authorizing an improperly appointed official from taking significant action, so the Appointments Clause forbids the ratification.

Circuit precedent, Supreme Court precedent, and the common law all agree ratification's sole effect is to retroactively confer authority for a past act. As *Braidwood* held, ratification "retroactively effect[s] actual authority for the improper official's disputed action." *Braidwood*, 104 F.4th 947. Or, as the Supreme Court has phrased it, ratification "operates upon the act ratified precisely as though authority to do the act had been previously given[.]" *Cook*, 85 U.S. at 338; *see* Restatement (Third) of Agency § 4.02 (2006) ("[R]atification retroactively creates the effects of

actual authority."); Restatement (Second) of Agency § 82 (1958) ("Ratification is the affirmance . . . of a prior act . . . , whereby the act . . . is given effect as if originally authorized by him.").

Thus, Coit's review-as-ratification could do no more than authorize the Council to adopt Amendment 54 and the Rule.[3] However, the Council was *already* authorized by the Magnuson-Stevens Act to take those actions. 16 U.S.C. §§ 1852(h)(1), 1853(c). Coit's review-as-ratification would merely duplicate *ex post* the statute's *ex ante* authorization—and the defect is the same: the Constitution forbids anyone—whether Coit through ratification or Congress through the Act—from giving authority to the Council to adopt fishery measures, because such authority (and a Council's other authorities) is significant power requiring appointment under the Appointments Clause, and the Council is not so appointed, as argued in Plaintiffs' Opening and Reply Briefs.

---

[3] Ratification does not give effect to the action ratified as though the ratifier had taken the action. Hence the requirement that ratification is possible only if the ratifier could have authorized the original actor to take the action. *See* Restatement (Second) of Agency § 84, cmt. a (1958) (noting that a ratification only has "legal consequences" if "the performance of an act by one who has been directed to do it on account of another" would itself have "legal consequences"). The ratifier's own capacity to take the action is necessary, *see supra* pp. 16–18 (discussion regarding timing rule), but not sufficient.

And the Council's power to adopt FMPs, FMP amendments, and implementing regulations is not the only reason that the Council is improperly appointed. Under *Freytag*, *all* of an official's significant authorities count toward his officer status, even when only one (or none) of those authorities was exercised in the case at hand. 501 U.S. at 881–82 (holding that, even if the (b)(4) authority exercised in the case were not significant, the STJ's significant non-(b)(4) authorities would require the STJ to be appointed as an officer even for purposes of his (b)(4) actions); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012) ("*Freytag* calls on us to consider all the powers of the officials in question . . . not just those applied to the litigant bringing the challenge."). In addition to the authorities discussed in the Opening Brief, ECF No. 60 at 18–32, the Council may block the Secretary's attempt to delegate management to a state, 16 U.S.C. § 1856(a)(3)(B) (requiring a three-fourths majority of the Council), force the Secretary to collect information under the Marine Mammal Protection Act, *id.* § 1383a(e)(4), and forbid her from approving certain fishing permits and force her to require permit conditions crafted by the

Council, Pub. L. No. 104-43, 109 Stat. 366, Title VIII § 802 (Nov. 3, 1995). All of these powers contribute to the Council's improper appointment.

Because the Council was improperly appointed, it could not be authorized to take any action. Certainly, it could not be authorized to take significant action. The Appointments Clause's prohibition cannot be circumvented by having that authority come *ex post* as a ratification.

## III. The government failed to plead the affirmative defense of ratification

Finally, ratification is an affirmative defense, and Federal Rule of Civil Procedure 8(c) requires affirmative defenses to be raised "[i]n responding to a pleading."[4] Necessarily, raising an affirmative defense in briefs does not satisfy the rule. Rather, the affirmative defense is waived if it was not raised in a responsive pleading. *Johnson v. Johnson*, 385 F.3d 503, 516 n.7 (5th Cir. 2004). Because Coit's alleged ratification was made months before this suit was filed, and because the government is familiar with the defense of ratification and actively uses it in other

[4] The rule lists 18 affirmative defenses, but the list "is not intended to be exhaustive." Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1271 (4th ed.); *see, e.g.*, *Jones v. Bock*, 549 U.S. 199, 216 (2007) ("We conclude that failure to exhaust is an affirmative defense under the PLRA[.]").

litigation, yet the government did not raise ratification in its Answer, the defense is waived. Dist. Ct. ECF No. 52.

This Court has long recognized that ratification is an affirmative defense. *Petro Harvester Operating Co.*, 954 F.3d at 697 (referring to ratification as an affirmative defense); *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 246 (5th Cir. 2020) (same); *Ferguson v. FDIC*, 164 F.3d 894, 896 (5th Cir. 1999) (same); *Cobb v. Nat. Gas Pipeline Co. of Am.*, 897 F.2d 1307, 1308 (5th Cir. 1990) (same); *see also FDIC v. Niblo*, 821 F. Supp. 441, 460 (N.D. Tex. 1993) ("Ratification is an equitable defense within the purview of Rule 8(c)."). That position reflects the weight of authority. *See Jakimas v. Hoffmann-La Roche, Inc.*, 485 F.3d 770, 773 (3d Cir. 2007); *Mut. Creamery Ins. Co. v. Iowa Nat'l Mut. Ins. Co.*, 427 F.2d 504, 507 (8th Cir. 1970); 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 8.27[4] n.3 (2d ed. 1990). Because the government declined to plead ratification as an affirmative defense, Dist. Ct. ECF No. 52, it waived that defense.

The failure to plead an affirmative defense may be excused only "if the defendant raises the issue at a 'pragmatically sufficient' time and there is no prejudice to the plaintiff." *Johnson*, 385 F.3d at 516 n.7. The

matter must be raised soon enough so that it is a mere "technical failure" and "does not result in unfair surprise." *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009) (simplified). In *Johnson*, raising an affirmative defense in a motion for judgment on the pleadings was early enough. *Johnson*, 385 F.3d at 516 n.7. But "wait[ing] until shortly before trial" is too late. *Id.*

The government not only failed to plead the defense of ratification, but it failed to raise it even at the trial stage. The government raised the defense for the first time on appeal, necessitating an eight-month remand so that the District Court could pass on the issue. To suggest that this constitutes a "pragmatically sufficient time" would give the phrase no meaning. And this procedural history did not result from a mere "technical failure" to comply with Rule 8(c). Instead, it was the government's deliberate choice: the parties fully briefed multiple complex issues in the District Court before remand, and the government had many opportunities to raise the issue of ratification—in its Answer, in response to *Arnesen* Plaintiffs' motion for preliminary injunction, and in briefing the motions for summary judgment. It did not do so despite being well aware of the argument and having raised it in other litigation. *See*

*Braidwood*, 104 F.4th at 948; *Wille v. Raimondo*, No. 22-cv-689, 2024 WL 2832599 (D. Md. June 3, 2024). This Court excuses minor pleading failures, not the extravagance of raising affirmative defenses for the first time on appeal after *declining* to do so in the District Court.

Furthermore, Plaintiffs are plainly unfairly surprised and prejudiced, having had the resolution of their case—required by Congress to be expedited, 16 U.S.C. § 1855(f)(4)—delayed so that the government may have a second bite at an apple that it had already snubbed. Thus, the remand exacerbated the problem rather than ameliorated it. If this Court considers the ratification defense, it will have allowed the government "to lie behind a log and ambush a plaintiff." *Crown Castle Fiber, L.L.C. v. City of Pasadena*, 76 F.4th 425, 439 (5th Cir. 2023) (simplified). The remand already forced Plaintiffs to operate under the Rule's draconian quota reduction for an additional eight months; allowing the government's tardy defense to be heard would further prejudice Plaintiffs.

The government had its chance to raise ratification—in its Answer. It had multiple chances after that to raise the issue in a pragmatically sufficient time—in district-court briefing. It rejected those chances. Rule

8(c) is a requirement, not a suggestion, and no litigant gets a pass. The Court should not give the government special treatment.[5] Just as "men must turn square corners when they deal with the Government," "it is also true . . . that the Government should turn square corners in dealing with the people." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 24 (2020) (simplified). The affirmative defense is waived.

## CONCLUSION

Ratification is simply not the right framework through which to understand Coit's review. The Supreme Court has already explained the limited role played by review in Appointments Clause jurisprudence, and treating Coit's review as ratification would contradict that precedent. Furthermore, Coit's own words in approving the Rule never embraced the Rule as a whole but only determined that the Rule was lawful.

*Braidwood* also requires rejecting the government's ratification defense here: *Braidwood* conditions ratification on an agency relationship, which does not exist here; *Braidwood* accepted the timing

[5] At minimum, if the Court excuses the government's waiver of the ratification defense, it must also allow Plaintiffs' argument that Coit's ratification is defective because she is improperly appointed—even assuming that argument was untimely, which it was not. *See supra* pp. 21–27.

rule, which prohibits ratification here; *Braidwood* held that ratification is retroactive, but Coit's review is not retroactive and lacks the express authorization required for a retroactive agency action; and *Braidwood* held that the effect of ratification is to provide authority, which would simply repeat the constitutional violation here rather than curing it.

Finally, considering the government's newfound ratification defense would abrogate the rights of Plaintiffs under the Federal Rules of Civil Procedure, subject them to unfair surprise and prejudice, and improperly place the government above pleading requirements to which every other party is subject.

The Court should rule, in accord with the District Court, that Coit's review does not function as a ratification.

DATED: May 29, 2025.

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 May 29, 2025, 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

I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(5)–(7). It is printed in Century Schoolbook, a proportionately spaced font, and includes 7,670 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.

DATED: May 29, 2025.

/s/ Michael Poon
MICHAEL POON