UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of Determination III 130 Westport, LLC, and Gerald L. Eubanks, Respondents.	Docket No. SE2303316 Vessel name: M/V Determination III

RESPONDENTS' INITIAL BRIEF

Introduction

Respondents are a vessel captain and owner who have been cited for violating a nautical speeding regulation issued by the Agency. The Agency, however, lacked the power to issue the regulation under the relevant statutory provisions, so the citation should be dismissed. And if the regulation is supported by statutory authority, the statutory authorization is so broad as to be invalid under the nondelegation doctrine. Finally, even if the rule were properly promulgated, Respondents' fine should be reduced.

Background and Stipulated Facts

In 2008, the National Marine Fisheries Service (NMFS), a subagency of the National Oceanic and Atmospheric Administration, which is itself a component of the Department of Commerce, issued the rule *Endangered Fish and Wildlife; Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions With North Atlantic Right Whales*, 73 Fed. Reg. 60,173, 60,173 (Oct. 10, 2008) (Speed Rule). The rule imposed speed restrictions of no more than 10 knots for all vessels 65 feet in length or greater along certain locations and at certain times along the U.S. Atlantic seaboard. *Id.*

According to NMFS the speed limit was necessary to protect the North Atlantic right whale. *Id.* NMFS asserted that 29 right whales had been killed by ship collisions between 1970

and 2005. *Id.* at 60,173−74. The Speed Rule therefore imposed the speed limit from April to November each year, in areas off the coast of Florida, near Delaware Bay, Chesapeake Bay, and Cape Cod, among a handful of other points on the Eastern Seaboard. *Id.* at 60,187−88. The Speed Rule asserted that violations of the speed limit were punishable with civil penalties of up to $10,000 per violation and potential criminal penalties for each violation. *Id.* at 60,183.

The original speed limit expired in 2013. *Id.* at 60,188. However, NMFS vacated its termination date and made the speed limit permanent in 2014. Restatement of Final Rule To Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions To Reduce the Threat of Ship Collisions With North Atlantic Right Whales, 79 Fed. Reg. 34,245, 34,245 (June 16, 2014).

In 2022, NMFS proposed a dramatic expansion of the Speed Rule, proposing to impose the speed restriction on any vessel larger than 35 feet, and expanding the speed zone to essentially any portion of the Eastern Seaboard between Florida and Massachusetts between November and May, and extending up to three miles from the shore. *See* Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, 87 Fed. Reg. 46,921, 46,936−37 (Aug. 1, 2022). In gauging the efficacy of the prior speed limit, NMFS noted a total of 12 right whale mortality or serious injury events involving vessel collisions since 2008, and it could only identify five fatal whale strikes ever where the ship was confirmed to have been traveling faster than 10 knots. *Id.* at 46,924.

In December 2022, Captain Gerald L. Eubanks, at the helm of *M/V Determination III*, traveled a little over 200 miles at speeds over 10 knots through the U.S. southeast seasonal management area (SMA). Respondents, never previously sanctioned, supplied the Agency with vessel logs documenting the weather conditions and explaining that the design of *M/V Determination III*, in particular its fin stabilization system, requires operating the vessel between

12 and 17 knots in the prevailing weather conditions to minimize roll and maximize safety. JX1 at 39–40.

The Agency issued a two-count Notice of Violation and Assessment of Administrative Penalty (NOVA) to Respondents Eubanks and Determination III 130 Westport, LLC, levying a $15,000 penalty. On November 6, 2023, Respondents initiated this adjudication to challenge the citation. On April 26, 2024, the parties filed joint stipulated facts, exhibits, and expected testimony.

Standard of Proof

The government must prove Respondents' liability by a preponderance of the evidence. *See Steadman v. S.E.C.*, 450 U.S. 91, 103–04 (1981). However, Respondents' violation of the Speed Rule is not in dispute.

Argument

I. The Agency lacked statutory authority to promulgate the Speed Rule.

The Agency possessed no authority to issue the Speed Rule or its successors. The Speed Rule purports to find its genesis in section 112(a) of the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1382(a), and section 11(f) of the Endangered Species Act (ESA), 16 U.S.C. § 1540(f). *See* 73 Fed. Reg. at 60,182. Neither provision authorized the issuance of the Speed Rule.

The MMPA provides that the "Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subchapter." 16 U.S.C. § 1382(a)). The MMPA also grants the Secretary of Commerce limited authority to establish "[r]egulations on taking of marine mammals."

> The Secretary [of Commerce], on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of

> individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 1361 of this title.

§ 1373(a). To issue rules under this authority, however, the Secretary must first consult five statutory factors. *Id.*

"General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932). Thus, for statutes "in which a general authorization and a more limited, specific authorization exist side by side," "the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (simplified). "This principle has special force when Congress has targeted specific problems with specific solutions in the context of a general statute," "particularly when the two provisions are interrelated and closely positioned, both in fact being parts of the same statutory scheme." *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 223 (3d Cir. 2004) (simplified).

Here, Congress enacted both a general rulemaking authority under § 1382(a) and—in a closely positioned, interrelated provision in the same statutory scheme—a specific, more limited authority for rules pertaining to the take of marine mammals under § 1373. In such circumstances, the general language of § 1382(a), "although broad enough" to include the rules pertaining to take, cannot be held to extend to such rules. *D. Ginsberg*, 285 U.S. at 208. Rather, because Congress targeted the specific problem of take-related rulemaking with § 1373 in the context of a general statute, including § 1382(a)'s general rulemaking power, all take-related regulations must be made under § 1373; § 1382(a) "will not be held to apply to" take-related regulations, because such regulations are "a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) ("In these circumstances the law

is settled[.]"). A contrary reading would permit the Agency to circumvent the limitations of § 1373 by invoking § 1382(a), making those limitations superfluous and negating Congress's intent to limiting the power to regulate take.

Because § 1382(a) does not authorize the Secretary to regulate the taking of marine mammals, and because the Speed Rule is a regulation on taking of marine mammals, the Speed Rule must be justified under § 1373, not § 1382(a). And § 1373 cannot now support the Speed Rule for two reasons. First, the Agency invoked § 1382(a) as the relevant authority from the MMPA. Because "[a]n agency must defend its actions based on the reasons it gave when it acted," the Agency cannot now defend the Speed Rule on the ground that it was authorized by § 1373. *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). Second, because the Agency relied on § 1382(a) and not § 1373 when it promulgated the rule, it never conducted the analysis of the five statutory factors required to issue a rule under § 1373.

Even if the Agency could rely on § 1382(a), that provision does not authorize the Speed Rule. The authority under § 1382(a) to carry out the MMPA's purposes must be read in light of the MMPA's substantive provisions. After all, "no legislation pursues its purposes at all costs, and … it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1196 (11th Cir. 2019) (simplified). Thus, the MMPA cannot be interpreted to empower the Agency to impose *any* regulation that simply touches on the possibility of a take.

"An agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." *Colorado River Indian Tribes v. National Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006). Rather, such authority is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and

prescribed, for the pursuit of those purposes." *Id.* In *Colorado River Indian Tribes*, the National Indian Gaming Commission issued regulations governing "Class III" gambling, and Indian tribes challenged those regulations as unsupported by statute. The government relied on the Indian Gaming Regulatory Act's general rulemaking authorization to "promulgate such regulations … as [the Commission] deems proper to implement the provisions of the Act," invoking the "congressional purpose to promote integrity in Indian gaming, a purpose the Commission's regulations further." *Id.* The court, however, rejected the government's argument. It reasoned that Congress had contemplated that Class III gambling would be regulated primarily through tribes and states. *Id.* at 140. Because these were the means Congress chose to regulate Class III gambling, any rule related to such gambling must be cabined by that framework. *Id.* The rulemaking authority, although broadly worded, must respect "that Congress wanted to ensure the integrity of Indian gaming … in a particular way." *Id.*; *accord Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94, 96 (2002) (holding that a regulation extended a statute's "substantive" requirements and so failed to "respect and give effect to [Congress's] compromises" and so "cannot be within the Secretary's power to issue regulations 'necessary to carry out' the Act").

This reasoning applies here. Congress enacted the MMPA to protect marine mammals, but it solved that problem with the specific solution of controlling and punishing the take of marine mammals; it chose not to proscribe activity that simply *could* incidentally result in take. § 1372(a)(1), (c), (f). And take is defined to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." § 1362(13). Congress's specific solution of proscribing and punishing take therefore governs the general rulemaking power under § 1382(a), *id.*, even supposing § 1382(a) authorizes regulating the take of marine mammals. Because

§ 1382(a) is thus limited to regulating take and does not extend to prophylactic measures, it does not authorize a measure like the Speed Rule.

Even if § 1382(a) allowed the Agency to regulate activity that merely *could* incidentally result in take, there must be a tight connection between the regulated activity and the possibility of take. *Cf. Man Against Xtinction v. Massachusetts Port Authority*, No. 21-CV-10185-DJC, 2022 WL 344560, at *5 (D. Mass. Feb. 4, 2022) (concluding that aiding and abetting a taking cannot itself be a taking, despite de facto causation, because "[s]uch a connection fails to satisfy common-law proximate causation principles, which rely upon considerations of the fairness of imposing liability for remote consequences").

As the Supreme Court explained in *Ragsdale*, "categorical rules" are justified only when they "reflect broad generalizations holding true in so many cases that inquiry into whether they apply to the case at hand would be needless and wasteful." 535 U.S. at 92–93. "When the generalizations fail to hold in the run of cases—when, for example, a particular restraint of trade does not usually present a pronounced risk of injury to competition—the justification for the categorical rule disappears." *Id.* at 93. In such cases, the categorical rule is "unreasonable." *Id.* at 92; *see* 5 U.S.C. § 706(2)(A) (regarding arbitrary-and-capricious review).

Ragsdale concerned the Family Medical Leave Act (FMLA). The FMLA's "central provision" provides eligible employees with 12 weeks of leave under certain circumstances. *Ragsdale*, 535 U.S. at 86. The FMLA's general rulemaking provision provided that "The Secretary of Labor shall prescribe such regulations as are necessary to carry out" the FMLA. 29 U.S.C. § 2654; *see Ragsdale*, 535 U.S. at 96. The Department of Labor relied on this rulemaking authority to issue a regulation providing that the employer must notify an employee when it counts leave toward the FMLA entitlement; in the absence of such notification, leave taken does not count

toward the entitlement. *Ragsdale*, 535 U.S. at 88. The result is that a leave-taking employee would, in the absence of notification, have an additional 12 weeks of leave to draw upon. An employer challenged this regulation, and the Court agreed. Its reasoning centered on the FMLA's primary requirement that employers provide 12 weeks of leave to employees. "It is not a fair assumption" that violating the regulation (by failing to notify) would deprive employees of the full 12 weeks of FMLA leave "in any but the most exceptional cases," because notified employees may still opt to take some leave, even if doing so counts against their FMLA leave. *Id.* at 93 (citation omitted). As a result, the failure to notify does not "usually present a pronounced risk of" depriving employees of all 12 weeks of FMLA leave, and the rule was therefore "unreasonable." *Id.* at 92–93.

Ragsdale applies directly to the Speed Rule. The Agency issued the Speed Rule under a general rulemaking provision similar to the FMLA's, but a general rulemaking power is limited by *Ragsdale*, which requires that behavior, regulated under a categorical rule, must "usually present a pronounced risk of injury" to the interest protected by the relevant statute. *Id.* at 93. If the protected interest is not harmed in "any but the most exceptional of cases," the rule is "unreasonable." *Id.* at 92–93.

The interest protected by the MMPA and ESA's "central provision[s]," *id.* at 86, is take of a protected animal. But the regulated behavior prohibited by the categorical Speed Rule—driving a vessel longer than 65 feet faster than 10 knots in an SMA—does not "usually present a pronounced risk of" take, which rather occurs only in "the most exceptional cases." *Id.* at 93. This is because the probability of take resulting from a vessel strike is very low. Between 2008 and 2019, there have only been four right whale mortalities and four injuries, JX7 at 34–35, including those caused by vessels not subject to the Speed Rule and those caused outside of the SMAs (including potentially in Canadian waters). In the same period, vessels *subject* to the Speed Rule

transited 8,666,510 nautical miles *within* the SMAs. *Id.* at 61. Even pretending all eight casualties were caused by regulated vessels within the SMAs, the probability of striking a right whale is less than one in a *million* nautical miles transited. And in fact, the record shows only two of the eight casualties likely occurred in SMAs, *id.* at 34–35, meaning the probability of a strike is really less than one in *four* million nautical miles transited.[1]

The Agency will argue that this simply shows the Speed Rule is working. But "it is not possible to determine a direct causal link" between the Speed Rule and any reduction in strikes. *Id.* at 2. And in the 2018–2019 year, vessels subject to the Speed Rule transited 195,282 nautical miles *in violation* of the Speed Rule. *Id.* at 68. That year—the only one for which such non-compliant data is available in the record—there were no strikes of north Atlantic right whales. *See id.* at 34–35. Nevertheless, the Speed Rule imposes liability even when *one* mile or one *foot* is transited above 10 knots. It is obvious that the Speed Rule prohibits behavior that would result in take only in "the most exceptional of cases." *Ragsdale*, 535 U.S. at 93. That is, "in the run of cases" violating the Speed Rule does not result in take; doing so does not "*usually* present a pronounced risk of" take. *Id.* at 93 (emphasis added). Accordingly, the Speed Rule's categorical prohibition of such activity is "unreasonable" and thus, under *Ragsdale*, arbitrary and capricious or otherwise not in accordance with law. *Id.* at 92.

The same principles apply to the ESA's rulemaking provision. The statute provides that "[t]he Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating, are authorized to promulgate such regulations as may be appropriate to enforce this chapter[.]" § 1540(f). Similar to the MMPA, Congress chose to confront the problem

[1] There is not even any indication that these casualties were caused by vessels greater than 65 feet at speeds greater than 10 knots, so there is an even more tenuous connection between the regulated activity and take.

of endangered species by controlling and punishing take or attempted take of relevant species, along with the import, sale, and possession of such species. § 1538. And "take" is exhaustively defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a protected animal or to attempt to do so. § 1532. These terms, all of which require action against a particular animal, do not encompass acts that create a generalized risk of harm created by, for example, a vessel moving at 11 knots. Under the reasoning of *Colorado River Indian Tribes*, § 1540(f) does not extend to prophylactic measures like the Speed Rule. And even if § 1540(f) permitted prophylactic regulations, for the reasons expressed above, the ESA does not authorize a regulation, like the Speed Rule, with so little nexus to the take of a protected species.

The major questions doctrine also counsels against interpreting the MMPA and ESA to authorize the Speed Rule. That doctrine requires "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (*per curiam*) (internal quotation marks omitted). The Speed Rule already imposes costs of $116 million annually. JX3 at 10. The Agency claims the power, under the same statutory authority, to dramatically expand the Speed Rule's geographic reach to nearly the whole East Coast and to regulate vessels as small as 35 feet in length, at an additional annual cost of $46 million. 87 Fed. Reg. at 46,934. But that is only what the Agency has proposed. Under the Agency's reading of the statutes, it may regulate any size vessel, in any geographical location with the presence of some protected animal, and set a speed limit even lower than 10 knots. The Agency's claimed power is the power to essentially shut down critical ports, grind shipping and fishing to a halt, and severely disrupt international trade, with the resulting impacts on every domestic industry and consumer reliant on imports and exports. Under

the major questions doctrine, delegating such power requires Congress to speak more clearly than it has through the general rulemaking provisions of § 1382(a) and § 1540(f).

Finally, if the ESA or MPPA were interpreted to authorize the Speed Rule, such a reading would raise grave doubts as to the constitutionality of those statutes, as explained in the following section. And "[i]t is a bedrock principle of statutory interpretation that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Union Pac. R.R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 892–93 (8th Cir. 2013) (rejecting expansive agency reading of statute). Thus, the Tribunal should interpret the statutes not to authorize the Speed Rule.

Because there is no statutory support for the Speed Rule, the Tribunal should dismiss the NOVA.

II. If the Speed Rule is supported by statutory authority, that authority is unconstitutional under the nondelegation doctrine.

If the Tribunal were to affirm the Agency's interpretation that the Speed Rule falls within the bounds of its statutory authority—even as this interpretation expands the regulations beyond the taking of marine mammals and other endangered species—it would effectively grant the Agency unchecked authority to regulate virtually any activity as it sees fit. Such an expansive delegation of regulatory power would render the relevant statute unconstitutional under the nondelegation doctrine.

By vesting Congress with "[a]ll legislative Powers," the President with "executive power," and the courts with "[t]he judicial power," the Constitution intentionally separates the branches of government to avoid collection of power within a single branch. U.S. Const. art. I, § 1; U.S. Const. art. II, § 1; U.S. Const. art. III, § 1. This nondelegation doctrine "is rooted in the principle of

separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The Constitution mandates that only the people's elected representatives may adopt new federal laws restricting individual liberty. U.S. Const. art. I, § 1 ("*All* legislative Powers herein granted shall be vested in a Congress of the United States [.]") (emphasis added). The grant of "[a]ll legislative Powers" to Congress means that Congress may not transfer to others "powers which are strictly and exclusively legislative"—such as the power to write criminal laws. *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."). Indeed, "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). Agencies, therefore, may not exercise legislative power to declare "what circumstances ... should be forbidden" by criminal laws. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 418–19 (1935).

Courts have recognized that "Congress can give Executive agencies limited discretion to 'implement and enforce the laws.'" *United States v. Pheasant*, No. 21-cr-24, 2023 WL 3095959, at *5 (D. Nev. Apr. 26, 2023) (quoting *Gundy v. United States*, 588 U.S. 128, 135, (2019) (plurality op.)). But the constitutionality of any delegation "sits between Congress properly 'conferring authority or discretion as to [the law's] execution' or improperly delegating exclusively legislative power." *Id*. (quoting *Field v. Clark*, 143 U.S. 649, 693–94 (1892) (quotation omitted)). To determine whether a delegation is constitutionally permissible, courts "must address ... (1) whether Congress has delegated power to the agency that would be legislative power but-for an intelligible principle to guide its use and, if it has, (2) whether it has provided an intelligible principle such

that the agency exercises only executive power." *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022), *aff'd and remanded*, No. 22-859, 2024 WL 3187811 (U.S. June 27, 2024).

As to the first prong, the statutes and accompanying regulations at issue here are quintessentially legislative. A government action fits that bill if it has "the purpose and effect of altering the legal rights, duties and relations of persons ... outside the legislative branch." *Jarkesy*, 34 F.4th at 461 (quoting *INS v. Chadha*, 462 U.S. 919, 952 (1983)). And the Agency creating its own crimes does just that: such regulatory action "alter[s]" what those on vessels sailing the eastern Atlantic seaboard can and cannot do. *Id.* That ability is therefore legislative.

As to the second prong, the authorizing statutes here provide no "intelligible principle" to guide the Agency's lawmaking authority. If the MMPA or ESA were interpreted to authorize the Speed Rule, which defines a new crime, the relevant statute would be unconstitutional. Under the "intelligible principle" standard, Article I forbids giving an agency "unguided" or "unchecked" authority to define a crime. *Gundy*, 588 U.S. at 135–36 (plurality op.). "Administrative" rules may implement a statute, but they may not create new crimes. *See id*. at 145–46. A delegation that "purports to endow [an administrator] with the power to write his own criminal code" "scrambles th[e] design" of the Constitution, which "promises that only the people's elected representatives may adopt new federal laws restricting liberty." *Id*. at 149 (Gorsuch, J., dissenting). Indeed, the relevant statutes purport to let the Agency issue any regulations "necessary and appropriate to carry out the purposes of" the subchapter regulating the conservation and protection of marine mammals, § 1382(a), and those that "may be appropriate to enforce" the chapter regulating endangered species, § 1540(f). That authority is doubly open-ended. NOAA can determine what is "necessary" or "appropriate." *Id.* And it can then write whatever regulations—including

crimes—it thinks might accomplish those ends. *Id.* Nothing in the statutes cabins either decision in any meaningful way.

In fact, the statutes seem to provide no guidance at all on the sort of regulations the Agency can issue. By their language, as general-purpose authorizations, the statutes appear to provide the Agency with unbounded discretion: the Agency could feasibly shut down all commerce in certain coastal zones or impose no restrictions whatsoever; it could set a speed limit of 30 knots, 3 knots, or no limit at all; it could restrict any activity within the coastal zone without clear parameters or constraints. This breadth of discretion raises serious constitutional concerns because it fails to establish any meaningful guidelines or standards to direct the Agency's regulatory decisions. In contrast, the other relevant statutes carefully restrict the Agency's authority to issue other kinds of regulations related to the core prohibitions on taking wildlife provided the agency consider certain factors, *see* § 1373 (requiring Secretary to consult "best scientific evidence available," five broad statutory factors, and make a report to Congress prior to issuing new regulations for taking marine mammals); § 1533 (Secretary required to consider dozens of statutory factors before determining endangered status of species), the statutes underpinning the Speed Rule contain no such limits.

In *Schechter Poultry*, the Supreme Court found a statute allowing an agency to establish rules for "fair competition" among businesses lacked an intelligible principle to guide agency enforcement. *See* 295 U.S. at 541–42. The Court criticized the statute for offering "no standards for any trade, industry, or activity," thereby granting the President nearly unrestricted discretion in approving or creating codes that effectively acted as laws governing national trade and industry. *Id.*

Similarly, in *Panama Refining*, the Court struck down § 9(c) of the National Industrial Recovery Act, which permitted the executive branch to regulate interstate oil transportation

without clear criteria. The Court determined that this provision failed to constrain the President's authority based on specific facts or require any findings as a precondition to regulatory action. 293 U.S. at 415. Essentially, it allowed the executive branch to legislate on petroleum transportation, even imposing criminal penalties, without meaningful oversight or limits. The Court warned that upholding such a delegation would essentially nullify any constraints on Congress's ability to delegate its legislative authority. *Id.* at 430.

More recently, in *United States v. Pheasant*, a district court was confronted with a similarly broad delegation of authority to the Secretary of the Interior to "promulgate regulations on behalf of the BLM [Bureau of Land Management]." 2023 WL 3095959, at *6. The defendant in that case was operating a motorized dirt bike in the Moon Rocks area of Nevada which is managed by the BLM. *Id.* at *1. BLM officers attempted to stop the dirt bikers leading to a confrontation between officers and Mr. Pheasant. *Id.* at *2. Mr. Pheasant was subsequently charged with three counts and argued that two of the counts—"Resisting Issuance of Citation or Arrest" and "Failure to Use Required Taillight at Night"—were based on violations of regulations promulgated under a statute that violates the nondelegation doctrine. *Id.* at *3, 5.

In conducting its nondelegation analysis the *Pheasant* court found that the "regulations [at issue] 'alter' the legal rights of those that use BLM land" and were thus legislative in nature. *Id.* at *6. But the statute lacked any intelligible principle to guide the Agency's adoption and enforcement of regulations. *Id.* at *7 (the rule at issue permitted the Secretary of the Interior to "promulgate rules regarding the management, use, and protection of the public lands"). So too here. If the MMPA and ESA delegations authorize the Speed Rule, then they purport to provide the Secretary of Commerce with "unfettered legislative authority" to prescribe regulations addressing conservation and protection of marine mammals, 16 U.S.C. Subch. II, and endangered

species, 16 U.S.C. Ch. 35. *Pheasant*, 2023 WL 3095959, at *7. Moreover, as part of this extensive legislative delegation, the Agency purportedly has "the power to write regulations criminalizing behavior," *id.*—a power that belongs to Congress and Congress alone. Certainly, there are few greater threats to personal liberty than executive agencies "creat[ing] the very crimes they are tasked with enforcing" which "effectively turns [an agency] into 'the expositor, executor, and interpreter of criminal laws.'" *Id.* (quoting *Aposhian v. Wilkinson*, 989 F.3d 890, 900 (10th Cir. 2021) (Tymkovich, C.J., dissenting) (emphasis omitted)).

Ultimately, if the statutes at issue here authorize the Speed Rule, then they are general-purpose authorizations for the Agency to issue all manner of its own agency-created regulations. And that delegation has spawned regulations with criminal sanctions. That means that the Agency is acting not just with "virtually unfettered" discretion, *Schechter Poultry*, 295 U.S. at 542, and not just as some limited-purpose "expositor, executor, and interpreter of criminal laws," *Aposhian*, 989 F.3d at 900 (Tymkovich, J., dissenting) (emphasis omitted)—either of which would be an issue on its own. The Agency is doing both; acting without any real guidance from Congress, it is setting criminal rules for certain vessels sailing the entire eastern Atlantic seaboard. That violates the nondelegation doctrine. Thus, to the extent the MMPA and ESA authorize the Speed Rule, they are unconstitutional and the Speed Rule is therefore unlawful, such that the NOVA is without regulatory or statutory support. This Tribunal should therefore dismiss the NOVA issued to Respondents.

III. If the Tribunal rules against Respondents, the Tribunal should reduce the $15,000 penalty to $7,500.

If the Speed Rule and its statutory support are valid, then the Tribunal should reduce the assessed penalty to $7,500, given the captain's concern for human and animal life, his low level of culpability, the low risk posed by the violation, and his status as a first-time offender of any

NOAA-enforced law or regulation. Additionally, as the Agency points out, Respondents' culpability was low, being only negligent. Agency Initial Br. at 16–17.

A. The captain acted with concern for human life.

Safety of human life was the priority of the captain, as he noted in his response:

> While traveling through this Seasonal Management Area (SMA) this particular vessel, due to its construction and design, optimally performs between 12 and 17 knots (1700 rpms) to maintain maximum stability, due to its fin stabilization system, in the prevailing weather conditions to reduce roll for the safety of all aboard. Anything less than this speed, in the open ocean, reduces maneuverability of the vessel; thus, 12 to 17 knots (1700 rpms) provides the best minimal steering and maneuverability.

JX1 at 39. At no time did the captain act with malice or ill will towards any life, including sea life. *Cf.* 18 U.S.C. § 3553 (requiring judges in criminal cases to impose sentences "sufficient, but not greater than necessary").

B. The captain acted with concern for sea life.

Furthermore, the captain took multiple steps to mitigate encounters with the North Atlantic right whale. First, he "provided training to the crew on the identification of the northern right whale; such as, the unique pattern of callosities on their heads, the lack of dorsal fin, and distinctive V pattern spray from their blowhole." JX1 at 40. Second, he ordered an "additional lookout on the bridge to assist in spotting the northern right whale." *Id.* Third, he traveled the SAM during daylight hours only [] in order to mitigate any close encounters with the northern right whale." *Id.* The captain's efforts show his attempts to care for sea life. *Cf. United States v. Jones*, 158 F.3d 492 (10th Cir. 1998) (Defendant's good works justified downward departure in criminal case.).

C. No harm befell any North Atlantic right whale, and the risk created was low.

Finally, and most critically, no North Atlantic right whale was injured or killed during this excursion. In other words, the harm for which the statute seeks to minimize risk never occurred.

Cf. U.S. Sent'g Guidelines Manual § 3B1.2 (suggesting downward adjustment in criminal cases for defendant whose part in committing offense makes him substantially less culpable than the average participant).

And even assuming that mortality would likely result "if Respondents had hit an endangered North Atlantic Right whale," Agency Initial Br. at 14, the probability of a strike was exceedingly low. As discussed *supra*, the probability of striking a right whale in an SMA is less than one in 4 million nautical miles transited. *See* JX7 at 34–35, 61. And in the only year for which the record includes data on noncompliant transit, noncompliant vessels transited 195,282 nautical miles in violation of the Speed Rule, *id.* at 68, and there is no evidence of strikes occurring in that year, *id.* at 34–35. Respondents exceeded 10 knots for only slightly more than 200 nautical miles. Thus, the overall risk posed by Respondents' actions was extremely low.

D. Respondents have never been sanctioned.

The Agency points out that recreational vessels have relatively low rates of compliance with the Speed Rule and argue that a $15,000 penalty would make an example out of Respondents. Agency Initial Br. at 18. But Respondents are first-time offenders, not only of the Speed Rule but of *any* NOAA-sanctioned offense. Joint Stipulation ¶ 23. Others' repeated and continual non-compliance should not be a reason to levy a more severe penalty against merely negligent first-time offenders who conscientiously posted lookouts to spot right whales and trained the crew to conduct such lookouts. A lower penalty would be sufficient to deter any future violation by Respondents. Furthermore, a lower penalty would serve general deterrence by demonstrating the difference in liability between an offender who diligently took steps to protect right whales and one who did not.

* * *

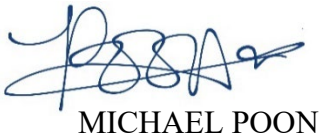
In this situation, a $7,500 penalty is appropriate.

Conclusion

For the reasons described herewith, Respondents respectfully seek dismissal of the NOVA and penalty and, alternatively, a reduction in the penalty to $7,500.

DATED: July 3, 2024.

Respectfully submitted,



MICHAEL POON
Attorney, Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
mpoon@pacificlegal.org
Counsel for Respondents

Certificate of Service

I certify that the foregoing Respondents' Initial Brief was sent on July 3, 2024, in the following manner to the addresses listed below:

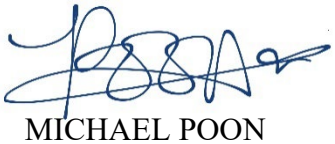
Via electronic submission:

U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900R
12 Pennsylvania Avenue, N.W.
Washington, DC 20460

Via email:

Joseph Heckwolf
Office of General Counsel, Enforcement Section
National Oceanic and Atmospheric Administration
1315 East West Highway, Room 15828
Silver Springs, MD 20910
joseph.heckwolf@noaa.gov

Jamal Ingram
Office of General Counsel, Enforcement Section
National Oceanic and Atmospheric Administration
263 13th Avenue South, Suite 177
St. Petersburg, FL 33701
jamal.ingram@noaa.gov



MICHAEL POON
Attorney, Pacific Legal Foundation