UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAINE LOBSTERMEN'S ASSOCIATION, *Plaintiff-Appellant*, STATE OF MAINE DEPARTMENT OF MARINE RESOURCES; MASSACHUSETTS LOBSTERMEN'S ASSOCIATION; DISTRICT 4 LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKS; LOCAL LODGE 207, *Intervenors-Appellants*, v. NATIONAL MARINE FISHERIES SERVICE; GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE; JANET COIT, IN HER OFFICIAL CAPACITY AS ASSISTANT ADMINISTRATOR FOR FISHERIES, *Defendants-Appellees*, CONSERVATION LAW FOUNDATION; CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE, *Intervenors-Appellees*.	No. 22-5238, consolidated with Nos. 22-5244, 22-5245, 22-5246

MOTION BY APPELLANT MAINE LOBSTERMEN'S ASSOCIATION TO EXPEDITE BRIEFING AND ORAL ARGUMENT

Appellant Maine Lobstermen's Association (MLA) respectfully requests that the Court expedite briefing and oral argument in this case, which involves an

egregious example of administrative overreach that poses an existential threat to the iconic, centuries-old lobster industry in Maine and the rest of New England. The offending agency here is the National Marine Fisheries Service (NMFS), which wears two hats. First, NMFS is the agency responsible for authorizing fisheries in federal waters, including the American lobster fishery. Second, NMFS is the agency responsible for providing opinions as to whether federal agency action is likely to jeopardize a marine species listed as endangered or threatened under the Endangered Species Act (ESA).

In this case, NMFS concluded that it could not authorize the American lobster fishery unless the lobster industry complies with crippling requirements that purportedly make the waters off the coast of Maine more hospitable for an endangered species of whale—the North American right whale. Although few (if any) Maine lobstermen have ever seen a right whale, and although the last documented occurrence of right whale entanglement in Maine lobster gear was non-fatal and occurred almost 20 years ago, NMFS has grown concerned in recent years about a decline in the right whale population that is driven by mortalities that have occurred in Canada. After building models that assessed the "worst case" scenario for the right whale population (not "likely" scenarios, as the ESA requires) and resolving all uncertainty in the data in favor of the whale (an unauthorized approach that essentially guarantees hardship in exchange for speculative or illusory benefits

to the species), NMFS determined that the American lobster fishery had to reduce the risk of right whale entanglement by an industry-imperiling *98%* between 2021 and 2030. For a Maine lobster fleet that, by law, is composed exclusively of small businesses, NMFS' draconian risk reduction requirement is a death sentence. And to add insult to irreparable injury, NMFS has explicitly acknowledged that its policy will do absolutely nothing to restore the right whale population so long as mortalities in Canada continue at current rates.

In the decision below, the district court rejected MLA's challenge to NMFS' unprecedented action after barely engaging with the core legal question: whether NMFS' action is consistent with the ESA. This Court should expedite its review of that decision, as every relevant factor militates in favor of the prompt resolution of this case. The public has a clear need for expeditious appellate review because NMFS' action, and the district court's endorsement of it, has created intolerable uncertainty for an industry that, in Maine alone, brings in hundreds of millions of dollars in revenue each year, employs thousands of people, and sustains numerous communities where there are precious few other employment opportunities. Furthermore, Maine lobstermen are already suffering irreparable injury because NMFS' action undermines the investments necessary to sustain family businesses; they need to make rational decisions about purchasing new equipment or financing existing boats against the backdrop of an agency rule that would make recouping

those investments impossible. And the decision below is subject to substantial challenge (to put it mildly), as this is a textbook example of a case where "agency officials zealously but unintelligently pursu[ed] their environmental objectives" on "the basis of speculation or surmise"—just what the ESA prohibits. *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

MLA has conferred with the parties about the relief requested in this motion. The other appellants, including the state of Maine and other parties that intervened as plaintiffs below, support the relief requested in this motion; NMFS and the other appellees, which are environmental groups that intervened as defendants below, do not take a position on this motion, but no appellee opposes the proposed briefing schedule set forth below. Given the grave threat posed by NMFS' actions, MLA requests expedition and is prepared to brief this case as promptly as the Court wishes.

BACKGROUND

1. Congress enacted the ESA in 1973 and directed the Secretary of Commerce and the Secretary of the Interior to maintain a list of endangered species. *See* 16 U.S.C. §1533(c). The Secretary of Commerce has jurisdiction over most marine species and has delegated responsibility for administering the ESA to NMFS.[1] *See* 50 C.F.R. §402.01(b). As originally promulgated, §7 of the ESA

[1] The Secretary of the Interior has jurisdiction over most terrestrial species.

required a federal agency proposing to undertake any "actions" (known as the "action agency") to "consult[]" with NMFS (known as the "consulting agency") and "tak[e] action necessary to insure" that the proposed actions "do not jeopardize" a listed marine species. Pub. L. 93-205, §7, Dec. 28, 1973, 87 Stat. 884.

After courts interpreted that absolutist language to require the government to halt several major projects, *see, e.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978), Congress amended the ESA "to introduce some flexibility into the Act," H.R. Rep. 95-1625 (1978), at 3; *see* Pub. L. 95-632, Nov. 10, 1978, 92 Stat. 3751; Pub. L. 96-159, Dec. 28, 1979, 93 Stat. 1226. As particularly relevant here, in 1979, Congress amended §7 to require that an action agency consult with NMFS to "insure" only that a proposed action is "not likely to jeopardize" a listed species. 16 U.S.C. §1536(a)(2); *see also, e.g.*, *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1048-49 (1st Cir. 1982) (explaining that this change "softened the obligation on an agency"). At the end of this consultation, NMFS issues a written statement—known as a "biological opinion"—that sets forth its opinion as to whether the proposed action "is likely to jeopardize" a listed species or not. 16 U.S.C. §1536(b)(3)(A); 50 C.F.R. §§402.14(g)(4), (h)(1)(iv).

The 1979 amendments also provide that, to fulfill this objective, "each agency shall use the best scientific and commercial data available." 16 U.S.C. §1536(a)(2). As a unanimous Supreme Court explained in *Bennett v. Spear*, "[t]he obvious

purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." 520 U.S. at 176. "While this no doubt serves to advance the ESA's overall goal of species preservation, … it [is] readily apparent that another objective (if not the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Id.* at 176-77. Consistent with those pronouncements, the regulations implementing the ESA explain that, in assessing the effects of proposed agency action, NMFS must consider only those consequences that are "reasonably certain to occur" and "would not occur but for the proposed action." 50 C.F.R. §§402.02, 402.14(g)(3)-(4).

2. In certain circumstances, NMFS is not only the consulting agency, but also the action agency, as it is the agency responsible for authorizing federal fisheries—including the lobster fishery in federal waters off the coast of Maine. But even in those circumstances, there is no substitute for strict compliance with the statutory framework. The lobster industry has served as a cornerstone of the Maine economy for "centuries." Decl. of Dustin Delano, Dkt.42-3 ¶23 (attached as Exhibit C).[2] Today, the Maine lobster industry generates hundreds of millions of dollars in

[2] "Dkt." refers to the district court docket.

revenue each year, employs thousands of workers, and supports hundreds of businesses. *See* Decl. of Patrice McCarron, Dkt.42-2 ¶¶3-4 (attached as Exhibit B). The structure of the Maine lobster industry is also unique: "There is no corporate ownership of the Maine lobster fleet," and "[b]y law, every Maine lobsterman is a self-employed business owner." Ex.B ¶5; *see* 12 Me. Stat. tit. 12, §§6431-E, G.

The Maine lobster industry is deeply committed to conservation, both to preserve a sustainable lobster resource and to protect other species, including the right whale—an ESA-listed species that historically foraged off the coast of Maine. Since the 1990s, Maine lobstermen have worked together with NMFS and other stakeholders to minimize any potential risk that lobster gear may pose to the health and safety of right whales. *See* 62 Fed. Reg. 39,157 (July 22, 1997). Those efforts worked: Between 1990 and 2011, the right whale population increased by nearly 3% annually to a total of almost 500—a nearly five-fold increase as compared 1935, when commercial whaling reduced the right whale population to only 100. *See* BiOp_1757.[3]

Between 2011 and 2019, however, the estimated right whale population dropped below 400. *See* BiOp_1758-59. Numerous scientists have attributed this recent decline to mortalities and serious injuries caused by fishing gear and vessel

[3] Citations to "BiOp" are in the joint appendix submitted below. *See* Dkt.61.

strikes in Canada's Gulf of St. Lawrence—a location that the right whale frequents far more often today, as oceanic changes have caused the whales and their prey to move away from the Gulf of Maine. *See* BiOp_60661, 18920, 33597, 61537, 25243. In 2017, for instance, Canadian fishing gear and vessel strikes caused 13 documented right whale mortalities and serious injuries; and in 2019, Canadian fishing gear and vessel strikes caused 11 more documented mortalities and serious injuries. *See* Rule_29078, 60679, 60694. By contrast, no documented entanglement of a right whale in Maine lobster gear (*e.g.*, lines) has occurred since 2004, *see* Rule_29078, and "there has *never* been a known North Atlantic right whale serious injury or mortality interaction associated with Maine lobster gear," Dkt.1 ¶6.

3. Nonetheless, in light of the documented mortalities that are overwhelmingly occurring in Canadian waters, NMFS in 2017 reinitiated the consultation process under §7 of the ESA to determine whether it could continue to authorize various federal fisheries, including the American lobster fishery. *See* BiOp_1677. During that process, NMFS identified a purported "need" to develop a new "Conservation Framework" to "further reduce" the risk of right whale "entanglements"—an initiative that, according to NMFS, is required to "meet the mandates of the ESA." BiOp_2149. The Conservation Framework, which NMFS is implementing in multiple phases this decade, is extraordinarily demanding: It requires the American lobster industry to reduce the risk of right whale entanglement

by 98% by 2030, such that the annual rate of mortality and serious injury is an infinitesimally small 0.136. *See* BiOp_1553, 1556; *see also* BiOp_1556 ("[T]his level of reduction in M/SI in the federal fisheries is necessary to ensure the goals of the ESA … are met.").

To arrive at that figure, NMFS used a 50-year population projection model that contained "metrics representing the worst case scenario," which NMFS concedes are "very likely" to "overestimate the likelihood of a declining population." BiOp_1406, 1408, 1556. At the same time, NMFS acknowledges that even full compliance with these draconian measures would not reverse the decline in the right whale population if mortalities in Canada continue unabated. *See* BiOp_2177 ("[T]he NARW population is likely to decline if human-caused mortalities in Canada continue at current rates, regardless of effort in the United States.").

Rather than ask and answer whether the existing authorization for the fishery would likely jeopardize the right whale, NMFS instead provided a Biological Opinion that examined whether authorizing the American lobster fishery *with* the proposed draconian Conservation Framework would likely jeopardize the right whale. *See* BiOp_1683 ("The Framework" is "part of the proposed action[.]"). In providing that assessment, which assumed rather than tested the necessity of crippling restrictions on the fishery, NMFS doubled down on its view that, in

applying the ESA, it must "resolve" all "uncertainty" in the data "in favor of the species" and therefore make "worst case assumptions." BiOp_1286, 1421. NMFS did not identify anything in the text of the ESA that supported its so-called "benefit of the doubt" approach, but rather relied on a single line of legislative history. *See* BiOp_1286 (citing H.R. Conf. Rep. No. 96-697 at 12, 96th Cong., 1st Sess. (1979)). But because NMFS (in its capacity as action agency) had already incorporated this "worst case" approach, NMFS concluded (in its capacity as consulting agency) that the proposed action—authorization of the American lobster fishery subject to the crippling Conservation Framework—likely would not jeopardize the right whale. *See* BiOp_2018.

In September 2021, NMFS' Final Rule implementing the first phase of the Conservation Framework took effect, and that rule required the American lobster industry to achieve a minimum 60% reduction in the risk of right whale entanglement. *See* 86 Fed. Reg. 51,970 (Sept. 17, 2021). To accomplish that objective, the rule (among other things) prohibited lobster fishing in certain prime fishing grounds off the coast of Maine during peak fishing season, and it also required lobstermen to substantially modify their gear. MLA estimates that compliance with these changes will cost Maine lobstermen $45 million to $86 million. Ex.B ¶12.

4. Days after that rule took effect, MLA—which represents nearly 1,000 Maine lobstermen and is the oldest and largest fishing-industry association on the East Coast—filed this suit, challenging NMFS' Biological Opinion, Conservation Framework, and the Final Rule. *See* Dkt.1. Three parties intervened as plaintiffs: Maine's Department of Marine Resources, the Maine Lobstering Union, and the Massachusetts Lobstermen's Association. Three other parties intervened as defendants: the Center for Biological Diversity, the Conservation Law Foundation, and Defenders of Wildlife. MLA and the intervenor-plaintiffs moved for summary judgment, and NMFS and the intervenor-defendants cross-moved for summary judgment.

The district court awarded summary judgment to NMFS and the intervenor-defendants in a decision that sidesteps the grave threat to hardworking lobstermen in Maine and elsewhere created by NMFS' distortions of the ESA framework. *See* Dkt.76 (attached as Exhibit A). Among other things, the court acknowledged that MLA had made a "cross-cutting" argument that the ESA does not support the proposition that NMFS must regulate based on worst-case scenarios in which the evidence is skewed in favor of the species. Ex.A at 12. Although the court emphasized that it did "not hold that the ESA compels the agency's conservative policy towards resolving … scientific uncertainty," and although it also stated that it did not wish to extend "deference" to NMFS, it nonetheless sustained NMFS'

approach after declaring it not "arbitrary and capricious." Ex.A at 13. The court then rejected various other challenges to the Biological Opinion, Conservation Framework, and Final Rule.

ARGUMENT

Under 28 U.S.C. §1657, this Court has authority to "expedite the consideration of any action … if good cause therefor is shown." 28 U.S.C. §1657(a). This Court has explained that "good cause" exists either (1) when "the public generally" has "an unusual interest in prompt disposition" or (2) "delay will cause irreparable injury and … the decision under review is subject to substantial challenge." D.C. Circuit, *Handbook of Practice and Internal Procedures* 34 (2021). MLA amply satisfies both prongs of that test. Accordingly, the Court should grant the motion and establish an expedited briefing and oral-argument schedule in accordance with the proposal set forth below.

1. The public plainly has an unusual interest in the prompt disposition of this case. Indeed, it is no exaggeration to say that the fate of the Maine lobster industry—a national icon—hangs in the balance. *See, e.g.*, Decl. of Patrice McCarron, Dkt.73-1 ¶12 (attached as Exhibit D). After all, NMFS has declared through its Biological Opinion and its expressly incorporated Conservation Framework that the lobster industry may remain in business *only* if, within the next decade, it eliminates virtually *all* of the hypothetical risk of entanglement to the right

whale that NMFS' "worst case" modeling has attributed to the fishery, even though the crippling costs associated with doing so will do nothing to address the real threat to the right whales. And NMFS has already demonstrated that it is committed to following through on that profoundly misguided policy, as it has already promulgated the Final Rule implementing the first phase of the Conservation Framework—a rule that generated over 170,000 written comments and intense public interest. *See* 86 Fed. Reg. at 51,975. All of that explains why even the district court conceded below (with considerable understatement) that "livelihood[s] and traditions" hang in the balance here. Ex.A at 32.

The risk that this case poses not just to the lobster industry but to the broader public in Maine is particularly acute, as underscored by the state's own motion to expedite this appeal. Maine is the most rural state in the Nation, and for over 175 years, the lobster industry—which is the second largest fishery nationwide and the largest by far in the state—has single-handedly sustained numerous small communities along the coast. *See, e.g.*, Ex.B ¶¶3, 8; *see also* Decl. of Genevieve McDonald ¶15 (attached as Exhibit I) ("Lobstering is more than a job. It is our cultural identity and sense of place. It is Maine."). In 2021, for example, the Maine lobster fleet landed over 100 million pounds of lobster valued at approximately $725 million—representing more than 80% of all commercial fishery landings in Maine. *See* Ex.B ¶¶3-4; Decl. of Patrice McCarron ¶6 (attached as Exhibit Q). And the

broader lobster supply chain generates thousands of jobs and nearly $1 billion in additional revenue. *See* Ex.B ¶¶3-4; Decl. of Lawrence Barker ¶¶7-8 (attached as Exhibit H).

Maine's lobster supply chain, however, is built upon thousands of individual small businesses that cannot easily absorb the costs of draconian (and ultimately unnecessary) regulation. As noted, Maine's lobster fishery is not controlled by large corporations with infinite resources; instead, only individual lobstermen are eligible to receive lobstering licenses and to captain lobstering vessels. *See* Ex.B ¶¶5-6. And those small businesses are simply unable to comply with the onerous Conservation Framework, which will effectively require lobstermen to abandon their traditional fishing methods in favor of "ropeless" fishing. Ropeless fishing is not even currently viable, and even if the technology drastically improves, it is exceedingly "unlikely to be operationally feasible" or "cost-effective." Ex.B ¶19; *see also* Ex.C ¶20 ("There is currently no practicable way to carry out an industry-wide ropeless fishery and, even if there were, any transition to ropeless fishing would come with serious financial harm to … business operations, and would disrupt operations across the rest of the Maine lobster fishery."). NMFS' action thus is practically guaranteed to create "immense pressure to replace Maine's owner-operator lobstering system with a heavily consolidated, corporately owned fleet," which "would be a death knell for the Maine lobster industry and our coastal communities." Ex.D ¶7; *see also* Decl.

of Dwight Carver, Dkt.73-2 ¶2 (attached as Exhibit E) ("We lobstermen work around and live off of lobster and the rest of the community lives off of our ability to bring the product in."); Decl. of Cindy Donnell, Dkt.73-3 ¶7 (attached as Exhibit F) ("If MLA's case is not decided, my sons will be regulated out of business because they have no way to meet a 98% risk reduction."); Decl. of Dwight Carver ¶8 (attached as Exhibit K) ("Lobstermen are worried whether they will have a fishery next year as a consequence of NMFS's actions."); Decl. of John Tripp ¶12 (attached as Exhibit L) ("My seven-year-old daughter heard about the challenges facing lobstermen and she started crying, worried that her Dad won't be able to pay the bills and that we could lose our home.").

The district court's decision has only compounded this uncertainty and has "sent a chill through the lobster fishery." Ex.H ¶11. In light of that decision, banks are actively fielding requests by lobstermen who fear defaulting on their loans. *See* Ex.H ¶11. Lobstermen are cancelling plans to apply for new loans, *see* Ex.H ¶11, and cancelling orders for lobstering gear, *see* Decl. of Mark Brooks ¶10 (attached as Exhibit J). And lobstermen are delaying important investments for their boats, engines, and traps. *See* Ex.H ¶11; Ex.F ¶18; Decl. of Russel Munsey ¶5 (attached as Exhibit O). In short, it is beyond debate that it is in everyone's interest to find out as soon as possible whether NMFS' extraordinary efforts to effect a "functional elimination of the lobster fishery" and the lobster-dependent economies in Maine

and New England are lawful or not. Ex.B ¶18; *see also* Decl. of Cindy Donnell ¶7 (attached as Exhibit M) ("For me and my family, it is urgent for us to know whether there is any future for us in this fishery, and things look very bleak."); Decl. of Alexa Dayton ¶5 (attached as Exhibit P) (economist warning of the "significant impact on the Maine economy and social structure").

2. NMFS' regulatory action is not merely creating uncertainty for the future, but is already inflicting irreparable injury, including on MLA members. As noted, NMFS is implementing the Conservation Framework in multiple different phases between 2021 and 2030, and the first phase—which required a 60-70% reduction in entanglement risk—is already in effect via the Final Rule. The Final Rule has required lobstermen to engage in "time consuming," "difficult," and "dangerous" compliance efforts. Ex.C ¶10; *see also* Ex.D ¶8 (compliance with the Final Rule is "costly, inefficient, and disruptive"). Among other things, lobstermen have had to "add[] more traps to each buoy line to remove rope from the water …, weaken[] remaining buoy lines with 1,700-pound inserts so a whale can break free in the rare event it encounters a line," and comply with "a significantly expanded gear marking obligation." Ex.B ¶12.

In addition, the Final Rule has precluded numerous lobstermen from fishing in areas that their licenses explicitly cover. Indeed, for four months of every year—from October 1 through January 31, which is a "peak time when demand and price

are typically strongest"—NMFS has imposed a total closure of a nearly 1,000-square-mile area that encompasses "some of the most productive fishing grounds in the federal waters off the coast of Maine." Ex.C ¶15. Moreover, the affected lobstermen cannot easily relocate their gear to other locations because "Maine's zone management system makes it illegal for lobstermen to move all of their lobster gear outside of a home zone to follow lobster hot spots." Ex.C ¶16; *see also* Decl. of Russel Munsey, Dkt.73-4 ¶¶6-9 (attached as Exhibit G) (describing challenges of coping with the closure); Decl. of Dustin Delano ¶17 (attached as Exhibit N) ("The federal whale plan has already caused me significant financial injury.").

The costs of compliance with the Final Rule are therefore undeniably substantial. For each individual lobsterman, compliance costs run into the thousands of dollars. *See, e.g.*, Ex.C ¶10. For the Maine lobster industry as a whole, compliance costs easily run into the tens of millions of dollars. *See, e.g.*, Ex.B ¶12. And all of these costs produce irreparable injury because, even if MLA prevails on appeal here, it could not recover any of these costs for its members. *See, e.g.*, 5 U.S.C. §702 (the waiver of sovereign immunity in the Administrative Procedure Act does not extend to "money damages" claims); *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) ("Economic harm … is irreparable" when plaintiffs "will not be able to recover monetary damages[.]"); *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d

742, 770-71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.").

3. An expedited appeal to minimize the damage that NMFS is inflicting is all the more appropriate because the district court's decision is subject to substantial challenge. The ESA requires an assessment of whether proposed agency action is "likely to jeopardize" an ESA-listed species, and agencies must use "the best scientific and commercial data available" when making that assessment. 16 U.S.C. §1536(a)(2). In this case, however, NMFS obviously did not consider what would "likely" occur to the right whale population if it continued to authorize the lobster fishery. Quite the opposite, NMFS examined "worst case" scenarios that, by its own admission, are "very likely" to never occur. BiOp_1406, 1408, 1556. On top of that, instead of objectively examining "the best scientific and commercial data available," the agency applied a substantive presumption "in favor of the species" that has no grounding in the ESA's text—as NMFS itself has previously conceded. *See* 84 Fed. Reg. 44,976, 45,000 (Aug. 27, 2019) ("[N]othing in the Act specifically requires [NMFS] to utilize a 'worst-case scenario' or make unduly conservative modeling assumptions."). The net effect is that NMFS engaged in precisely the sort of "zealous[] but unintelligent[]" pursuit of "environmental objectives" that the ESA precludes. *Bennett*, 520 U.S. at 176-77. Compounding this error, NMFS never asked whether the draconian restrictions embodied in its Conservation Framework

were necessary to avoid "likely jeopardy" to the right whale. Instead, it baked all of those restrictions into the proposed agency action and then merely concluded, unsurprisingly, that imposing all of those costly requirements would not jeopardize the species. That approach elides any meaningful inquiry into whether the restrictions are necessary, let alone justified, to ensure survival of the right whale in light of the devastating effect on MLA and Maine more broadly. Indeed, by baking its proposed restrictions into the proposed agency action and then concluding that its own proposal poses "no jeopardy," the agency has converted the ESA into a freewheeling authority to impose draconian restrictions on private industry without congressional authorization. *Cf. West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

The district court's decision sustaining NMFS' action does not remotely justify the agency's worst-case-scenarios and question-begging approach to the ESA. The court expressly refused to hold that the ESA "compel[s]" NMFS' theory that it has a duty to mitigate worst-case scenarios for the right whale. Ex.A at 13. But at the same time, the court also concluded it did not need to "wade into" any "deference debate." Ex.A at 13. That leaves the district court's green light for shutting down a way of life entirely unjustified. Either NMFS' action is unambiguously compelled by the ESA, or it has reasonably interpreted the ambiguous ESA in a manner that is entitled to deference. *See, e.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). If it is neither, it

is ultra vires. At a minimum, the court's confused logic only underscores that its decision is subject to substantial challenge, which is all that matters at this juncture.

3. MLA therefore proposes the following schedule for briefing and oral argument, which no party in this consolidated appeal opposes. MLA, however, is prepared to brief this case on a more expeditious schedule if the Court desires:

Appellants' briefs	November 9, 2022
Appellees' briefs	December 20, 2022
Appellants' reply briefs	January 10, 2023
Oral argument	At the earliest available date after the close of briefing

CONCLUSION

For the foregoing reasons, the Court should grant MLA's motion to expedite briefing and oral argument.

Respectfully submitted,

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