ORAL ARGUMENT SCHEDULED FOR FEBRUARY 24, 2023

No. 22-5238(L), 22-5244, 22-5245, 22-5246

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.

On Appeal from the United States District Court for the District of Columbia,
No. 1:21-cv-02509-JEB

REPLY BRIEF FOR APPELLANT MAINE LOBSTERMEN'S ASSOCIATION

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
A	Appendix
APA	Administrative Procedure Act
CFR	Code of Federal Regulations
ESA	Endangered Species Act
NGOs	Non-Governmental Organizations (Intervenor-Defendants)
NGO.Br.	Intervenor-Defendants' Brief
NMFS	National Marine Fisheries Service
NMFS.Br.	National Marine Fisheries Service's Brief
MLA	Maine Lobstermen's Association
MMPA	Marine Mammal Protection Act

INTRODUCTION

Maine lobster is an American icon—what Presidents serve at state dinners to showcase the best that our Nation has to offer. *See* Zolan Kanno-Youngs, *Biden and Macron Toast Their Alliance With Lobster and American-Made Cheese*, N.Y. Times (Dec. 1, 2022), https://nyti.ms/3hLyOXD. But the National Marine Fisheries Service (NMFS) mistakenly believes that it must regulate the lobster industry out of existence no matter the economic or cultural toll. According to NMFS, §7(a)(2) of the Endangered Species Act (ESA) demands this and requires NMFS to protect the North Atlantic right whale against astonishingly unlikely "worst case scenario[s]," with all uncertainties in the data resolved "in favor of the species." And NMFS believes that it can eliminate that speculative threat by imposing crippling restrictions on the lobster industry on the front end of the §7(a)(2) consultation process—and thereby evade the sensible balancing and cost-benefit scrutiny that the ESA would otherwise require on the back end. None of that has any grounding in the statute, and the district court's decision sustaining those legal errors and imperiling a centuries-old industry cannot stand.

NMFS and the non-governmental organizations (NGOs) supporting it (collectively, Appellees) have no persuasive explanation why NMFS' actions comply with the ESA, which is presumably why NMFS buries its analysis in the back of its brief while all Appellees hide behind pleas for deference. As to whether

the ESA permits NMFS' benefit-of-the-doubt and worst-case-scenario approach, Appellees first insist that NMFS did not, in fact, examine or seek to mitigate unlikely worst-case scenarios. But that asserted denial does not survive even a quick reading of the biological opinion. Appellees' legal arguments in defense of NMFS' actual approach are equally dubious. Appellees posit that the statutory text is silent on how NMFS should deal with uncertainty—a seemingly stunning congressional oversight given the uncertainty inherent in a §7(a)(2) jeopardy analysis—and that NMFS is unconstrained in resolving the inevitable uncertainties. But federal agencies require statutory authority for their actions, and there is no authority for NMFS' approach here. Instead, the statutory text, NMFS' own regulations implementing it, the statutory history, and Supreme Court cases like *Bennett v. Spear,* 520 U.S. 154 (1997)—most of which Appellees ignore or barely address—all confirm that NMFS must objectively assess the best "data" to minimize inevitable uncertainties (not selectively apply data-free presumptions favoring the species) as it assesses the impact on the species in "likely" scenarios (not unlikely worst-case ones). Appellees' contrary view—that NMFS must protect against hypothetical worst-case risks to the species—is a recipe for taking lobster and the Maine lobster industry off the menu and inflicting the sort of needless economic dislocation that Congress sought to avoid in the ESA.

Appellees fare no better in suggesting that NMFS lawfully baked its worst-case-scenario-mitigating conservation framework into the proposed agency action. Indeed, neither defends the district court's theory that NMFS lawfully developed that framework in its capacity as "action agency," because the record fatally undermines it. And only NMFS attempts to offer any justification for the idea that, without consideration of economic consequences, it may develop and impose a conservation plan that requires the lobster industry to achieve a more-than-30-fold reduction in risk in a matter of years. NMFS identifies no statutory text to support that bold claim, and so it ultimately asks the Court to uphold its atextual approach as facilitating "good government." But all it really facilitates is the complete circumvention of the specific conception of good government embodied in the ESA—*e.g.*, using data rather than speculation, employing meaningful cost-benefit analysis, and involving politically accountable actors in particularly difficult cases.

Unable to muster any defense of NMFS' improper action, the NGOs (but not NMFS) contend that no one has Article III standing to challenge the conservation framework, which is a component of the biological opinion under review. But the first phase of that framework (NMFS' 2021 final rule) is already injuring members of the Maine Lobstermen's Association (MLA)—and, no matter how many times Appellees say otherwise, MLA is challenging that rule here. Furthermore, even the NGOs concede (with considerable understatement) that future phases of the

framework "will affect" lobstermen. Article III thus is no impediment. The Court should reverse and order a remand to NMFS without vacatur.

ARGUMENT

I. NMFS' Approach Of Giving The "Benefit Of The Doubt" To The Species And Assessing "Worst Case Scenarios" Contravenes The ESA And Its Implementing Regulations.

In the biological opinion here, NMFS declared that, "to meet the mandates of the ESA," it could authorize the continued operation of the lobster fishery only on condition of compliance with industry-imperiling conservation measures because the right whale faced a possible threat of jeopardy in a concededly unlikely "worst case scenario," which the agency concocted after repeatedly giving "the benefit of the doubt to" and resolving "uncertainty" "in favor of the species." A804, 926, 1071, 1074. The threshold question here is whether this economically ruinous (and scientifically questionable) benefit-of-the-doubt and worst-case-scenario approach is consistent with the ESA and its implementing regulations, the statutory history, and controlling precedent.[1] The answer is plainly no, and Appellees cannot avoid that reality by relegating the issue to the back of a brief, *see* NMFS.Br.41-49, or by stacking one baseless request for "deference" on top of another, *see* NMFS.Br.22, 48; NGO.Br.2, 13, 15, 18, 21, 22, 23. Indeed, while repeated calls for deference

[1] MLA adopts by reference Maine's reply brief, which explains why NMFS fails arbitrary-or-capricious review. *See* Fed. R. App. P. 28(i).

speak volumes about Appellees' confidence in their underlying legal arguments, the Administrative Procedure Act (APA) makes clear that legal questions are for *courts* to resolve. *See* 5 U.S.C. §706.

Appellees begin by trying to minimize the problem. By their telling, all that NMFS did here—"at the margins"—is "evaluate[] the best available data and, when that data revealed two or more reasonably likely outcomes, … select[] the more conservative one." NMFS.Br.20, 42; *see* NMFS.Br.46, NGO.Br.14. That is wishful thinking. While the *district court* described NMFS' action along these lines in a single, citation-free sentence (and even that sentence did not claim that NMFS had skewed the data only in "limited instances," NGO.Br.17), *see* A222, NMFS' *biological opinion* tells a very different story. That opinion candidly acknowledges that, in conducting its jeopardy analysis, NMFS made "worst case assumptions *for several key variables*," and it repeatedly concedes that the worst-case scenario that emerged from that skewed approach will "*very* likely" not occur, which is true of virtually every worst-case scenario (particularly those projected over a half-century).[2] A926, 939 (emphases added); *see, e.g.*, A937 ("[I]t is likely that the

[2] NMFS' contemporaneous statement is unavoidable. For example, it obviously is not "reasonably likely" that 0% of right whales die of natural causes or that the trap/pot fisheries are responsible for 100% of unknown-gear-caused right whale mortalities when the data reveal that such implausible scenarios have *never* occurred before. *See, e.g.*, A816, 151560, 1563, 1936; Dkt.54.

projections underestimate the likelihood of an increasing right whale population and that the actual right whale population will likely fare better than the trajectories indicate."); A939 ("[T]hese projections should not be interpreted as … accurate[.]"). Agency action is reviewed based on the "contemporaneous" record, and "*post hoc* justifications" are disregarded. *DHS v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1909 (2020). That elementary rule forecloses Appellees' belated efforts to minimize NMFS' distortion of "key variables" or its imposition of severe costs to mitigate "remote" "possibilities."[3] A939; NMFS.Br.45-46.

Appellees' felt need to distort the record is understandable, as the benefit-of-the-doubt and worst-case-scenario approach that NMFS *actually* took is legally indefensible. Appellees' primary submission is that NMFS' approach is "consistent with" the text of the ESA because §7(a)(2) requires it to assess the "best scientific and commercial data available" but "says nothing" about how to "approach" the data when there is "uncertainty" and hence a "range of values" in the "data set." NMFS.Br.41, 43, 45; *see* NGO.Br.17. Appellees therefore suggest that NMFS has unfettered "discretion" to give the species the "benefit of the doubt" and "evaluate[]

[3] The NGOs puzzlingly suggest that NMFS "[b]y no means … always assume[d] the worst for right whales" because it assumed that its conservation framework "will be 100 percent effective." NGO.Br.16. But requiring the lobster industry to mitigate the worst-case scenario while leaving *no margin for error* only exacerbates the problem.

a 'worst-case scenario'" as a *policy* matter whenever uncertainty is present in the data, NMFS.Br.42-43, 45; *see* NGO.Br.14 ("policy choices")—which is to say, whenever the agency is conducting any §7(a)(2) analysis, as uncertainty is inherent in this context, *see, e.g.*, Nat'l Research Council, *Science and the Endangered Species Act* 148 (1995) ("[D]ecisions regarding endangered species must always be made in the face of uncertainty[.]").

That submission is flawed on multiple levels. Before an agency throws up its hands and declares an "interpretive question … 'more one of policy than of law,'" it must "exhaust" every "tool" in the "legal toolkit" to discern a statute's meaning. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) (brackets omitted). One need not dig deep in the toolkit to reject Appellees' submission here, as multiple factors foreclose the submission that a command to consider the best available data to evaluate likely scenarios was really an invitation to err on the side of the species and employ speculative, worst-case scenarios to impose draconian burdens whenever the agency confronted uncertainty about something as inherently uncertain as the impact of contemplated future action on an endangered species.

To begin, Congress commanded NMFS to use "*data*" to determine what is "*likely*" to occur to the species. 16 U.S.C. §1536(a)(2) (emphases added). Appellees do not dispute that "data" means actual "information" that is "collected for [a] specific purpose," *Black's Law Dictionary* 356 (5th ed. 1979), nor do they dispute

that "likely" means scenarios that are more "[p]robable" than not, *id.* at 834. A straightforward reading of the statute therefore confirms that NMFS must objectively assess actual information for the specific purpose of determining whether, under the proposed agency action, jeopardy is probable. Factual information and realistic scenarios can inform that inquiry. But an approach that repeatedly "select[s] the value" that poses "higher, rather than lower, risk" to "provide[] the 'benefit of the doubt' to the species," and that focuses on "pessimistic" assumptions and "worst case scenario[s]," affirmatively distorts that inquiry in the direction of whether jeopardy is possible, as opposed to likely. NMFS.Br.41, 44-46; A506, 804, 926. This case illustrates the point. NMFS found its draconian conservation framework necessary only because it repeatedly applied a thumb on the scale in favor of the species (rather than looking at the data objectively) and selected worst-case (rather than realistic) scenarios that are concededly unlikely. The statute does not support that approach, and the mere fact that "scientific data" were considered as part of this skewed and misguided inquiry does not suffice. NMFS.Br.22; NGO.Br.18.

NMFS describes MLA's "interpretation" as without "grounding in the statutory text." NMFS.Br.45, 48. That claim is ironic given that NMFS has not even tried to ground its arguments in the statutory text. And it is especially hard to credit

since the agency itself previously *embraced* MLA's interpretation after examining the same text.

As NMFS explained in 2019 during notice-and-comment rulemaking, "nothing" in the ESA's text instructs NMFS to "utilize a 'worst-case scenario' or make unduly conservative modeling assumptions." 84 Fed. Reg. 44,976, 45,000 (Aug. 27, 2019). Instead, NMFS continued, the language in "section 7(a)(2)" "require[s]" it—"[i]n all instances"—to "draw upon the best scientific and commercial data available to determine if … an activity is reasonably certain to occur" (which only confirms that NMFS does not consider worst-case scenarios "reasonably likely," NMFS.Br.42-43). *Id.* at 44,992; *see id.* at 44,993 (evaluating what is "reasonably certain … is consistent with the [ESA] generally and section 7(a)(2) in particular"). The agency also *rejected* the view of certain commenters who insisted that, "in order to give the benefit of the doubt to the species," it "should consider effects or activities that were possible even if not likely." *Id.* at 44,993. And NMFS further emphasized that a determination about what is reasonably certain to occur "must be based on clear and substantial" or "solid" "information." *Id.* at 44,977. Consistent with all of that, NMFS' regulations repeatedly explain that, to fulfill its duties under §7(a)(2), NMFS must identify what is "reasonably certain to occur" and "reasonably … expected" using "clear and substantial information," 50

C.F.R. §§402.02, 402.17(a)-(b), and they say not a word about a benefit-of-the-doubt or worst-case-scenario approach.

The NGOs have no response to the regulations, while NMFS tries to divert attention toward its "1998 Endangered Species Act Consultation Handbook." NMFS.Br.44. According to NMFS, that handbook "directs" the agency to apply the benefit-of-the-doubt and worst-case-scenario approach, and because it "was developed after notice-and-comment rulemaking," it is "entitled to substantial weight." NMFS.Br.44 & n.11. But just asking for comment on a handbook does not give it the authoritative weight of rules duly promulgated in the CFR, and NMFS studiously avoids asking for deference to the handbook for good reason. Courts are justifiably skeptical of undue reliance on handbooks. *See Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1142 (2018). And even full-blown notice-and-comment regulations are entitled to *zero* weight when they contradict the statute, *see Am. Hospital Ass'n v. Becerra*, 142 S.Ct. 1896, 1903-06 (2022), which NMFS' benefit-of-the-doubt/worst-case-scenario approach does.

Nor does the handbook ever claim otherwise. As NMFS conveniently omits, the only authority that the handbook cites to justify that approach is the same half-sentence of legislative history that NMFS cited in its biological opinion. *See* A1925 (citing H.R. Conf. Rep. No. 96-697 at 12 (1979)); A804 (same). But "legislative history is not the law," *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1631 (2018), and

citing it in a handbook does not change the calculus. In all events, NMFS does not deny that it examined this same piece of legislative history even more recently (during notice-and-comment rulemaking in 2019) and saw no basis for an atextual benefit-of-the-doubt or worst-case-scenario approach: "The use of the words 'benefit of the doubt to the species' in the Conference Report appears intended to provide reassurance that the statutory language, as amended, would remain protective of the species. At most, the language seems to indicate that the statutory language 'is not likely to jeopardize' continues to provide protections to listed species by requiring action agencies to insure that their actions are not likely to jeopardize listed species." 84 Fed. Reg. at 45,007.

Far more relevant to the analysis than a snippet of the *legislative* history is the *statutory* history or evolution, which (despite the NGOs' attempted conflation, *see* NGO.Br.20) is "quite separate." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012); *compare* Statutory History, *Black's Law Dictionary* (11th ed. 2019) ("enacted lineage of a statute"), *with* Legislative History, *id.* ("proceedings leading to the enactment of a statute"). As NMFS acknowledges, when originally enacted in 1973, §7 of the ESA required it "to insure the species would not be jeopardized" in any possible scenario, but in 1979, Congress "relax[ed]" the standard by requiring NMFS to ensure only that jeopardy is not "likely" as judged by the "best available science." NMFS.Br.45, 47. If those

amendments truly permitted NMFS to place a thumb on the scale in favor of the species to prevent unlikely worst-case scenarios, the amendments would have been self-defeating. The agency would still find itself in the pre-1979 position of "prov[ing] an absolute negative": that jeopardy is not a possibility. NMFS.Br.45. Congress rejected that standard as practically untenable, and NMFS is not free to resurrect it. *See Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S.Ct. 768, 779 (2020) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *accord* Scalia & Garner 256.

NMFS protests that this understanding of the statutory history (and the statute more generally) is "wrong," as purportedly "confirmed" by "[s]ubsequent cases." NMFS.Br.47. But the most important "subsequent case" is *Bennett v. Spear*, in which a unanimous Supreme Court held that the language added to §7(a)(2) in 1979 prohibits NMFS from "implement[ing]" the statute based on "speculation or surmise," all while explaining that an "obvious" and "primary" purpose of that language ("if not indeed the primary one") is "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-77. As this case vividly demonstrates, when NMFS gives the benefit of the doubt to the species at every turn and seeks to mitigate speculative worst-case scenarios, the result is precisely the sort of

"uneconomic" jeopardy analysis that *Bennett* says §7(a)(2) is designed to "*prevent*." *Id.* at 177 (emphasis added).

Remarkably, the NGOs never engage with *Bennett*, while NMFS addresses it only on the penultimate page of its brief. *See* NMFS.Br.55. By NMFS' telling, *Bennett* does not "aid[]" MLA because the Supreme Court addressed §7(a)(2) in the context of a "zone of interests" analysis. NMFS.Br.55. True enough, but that hardly renders the Court's analysis dictum or any less authoritative. When identifying a statute's focus for purposes of a zone-of-interests analysis, the Supreme Court does not engage in some extratextual conjuring. It "appl[ies] traditional principles of statutory interpretation" "to determine the meaning of the congressionally enacted provision" at issue. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). That would seem to be particularly true of a zone-of-interests inquiry in an opinion like *Bennett* authored by Justice Scalia. Thus, *Bennett*'s explication of §7's "obvious" and "primary" meaning is a statutory holding that is controlling in all cases involving that provision—this one included.

Rather than grappling with *Bennett*, Appellees seek refuge in various other decisions, like *TVA v. Hill*, 437 U.S. 153 (1978). *See* NMFS.Br.43-44; NGO.Br.4-5. But *Hill* is the last place to look for guidance on the current version of §7, except perhaps for evidence of the approach that Congress wished to discard. As Appellees do not dispute, Congress amended the ESA precisely because it *disagreed* with the

outcome in *Hill*. *See* J.B. Ruhl, *The Endangered Species Act's Fall from Grace in the Supreme Court*, 36 Harv. Envtl. L. Rev. 487, 489-90 (2012) (*Hill* "was ridiculed," "brought sweeping condemnations in Congress," and "has become the extreme outlier in the Court's ESA jurisprudence").

NMFS (though not the NGOs) suggests that two other circuits "have … acknowledged the appropriateness" of its benefit-of-the-doubt-to-the-species approach because they cited the legislative history mentioning that phrase.[4] NMFS.Br.44 (citing *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041 (1st Cir. 1982)). But both decisions long predated *Bennett*, and neither helps NMFS anyway. In *Conner*, the Ninth Circuit said only that "failing to use the best information" and "failing to adequately assess whether the agency action was likely to jeopardize the continued existence of any threatened or endangered species, as required by section 7(a)(2),"—*i.e.*, failing to faithfully apply the statutory text—would fail to "'give the benefit of the doubt to the species.'" 848 F.2d at 1454. *Conner* thus suggests only that NMFS

[4] Appellees repeatedly reference two First Circuit decisions resolving the Maine Lobstering Union's (not MLA's) litigation seeking a preliminary injunction of NMFS' seasonal closure of certain fishing grounds. *See Dist. 4 Lodge v. Raimondo*, 40 F.4th 36 (1st Cir. 2022); *Dist. 4 Lodge v. Raimondo*, 18 F.4th 38 (1st Cir. 2021). Those decisions do not address the statutory questions here, and neither Appellee contends otherwise. Indeed, the complaint in that litigation did not even challenge NMFS' biological opinion.

should protect the species by *adhering* to the statute—not that NMFS may deviate from it by applying pro-species presumptions and analyzing worst-case scenarios. *See NRDC v. Kempthorne*, 506 F.Supp.2d 322, 360 (E.D. Cal. 2007) ("*Conner* does not directly support the broader interpretation … that the agency should err on the side of the species when evaluating uncertain evidence."). And the First Circuit's decision in *Roosevelt* is not materially different. *See* 684 F.2d at 1049 (suggesting that Congress "inten[ded]" "'to give the benefit of the doubt to the species'" by requiring agencies to protect against "likely" jeopardy).

Nor do the other decisions that Appellees invoke move the needle. Several do not involve the ESA. *See* NMFS.Br.43-44; NGO.Br.18, 21 (citing *Balt. Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87 (1983); *Nw. Coal. for Alternatives to Pesticides v. EPA*, 544 F.3d 1043 (9th Cir. 2008); *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384 (D.C. Cir. 1992)). Others do not involve §7(a)(2). *See* NGO.Br.17-18 (citing *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016), *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.—MDL No. 1993*, 709 F.3d 1 (D.C. Cir. 2013), *Building Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001); *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58 (D.C. Cir. 2000)).[5] And those that involve §7(a)(2) do not pass on the arguments that MLA

[5] To the extent that *Alaska Oil & Gas Association* and *In re Polar Bear Litigation* are relevant, it is only because they explain that "likely" means "probable."

asserts here. *See* NMFS.Br.43; NGO.Br.18 (citing *Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893 (9th Cir. 2020); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014)).

Appellees thus do nothing to disturb the conclusion that the statutory text, the implementing regulations, the statutory history, and controlling precedent all confirm that §7(a)(2) of the ESA requires NMFS to make jeopardy determinations after examining likely scenarios as revealed by actual data, not unlikely scenarios that emerge after applying a substantive presumption in favor of the species. NMFS' biological opinion impermissibly adopted the latter approach, and the biological opinion encompasses the conservation framework, which in turn encompasses the final rule, *see* NMFS.Br.12—a rule that, despite Appellees' puzzling statements, *see* NMFS.Br.18; NGO.Br.15, MLA has undoubtedly challenged, *see* MLA.Br.5 (identifying the first issue on appeal as "[w]hether NMFS' biological opinion, conservation framework, and *final rule* are inconsistent with §7(a)(2) of the ESA and its implementing regulations" (emphasis added)). NMFS' legal error thus has indeed "infected" everything at issue here. NMFS.Br.49

Nor, contrary to the NGOs' belief, is that legal error somehow rendered harmless because "NMFS concluded that the continued operation of the lobster fishery '*is not likely to jeopardize* the continued existence of North Atlantic right whales.'" NGO.Br.22. NMFS has allowed the lobster fishery to "continue" only if

it engineers a more-than-30-fold reduction in risk to the right whale, and the agency arrived at that impossible-to-satisfy target based on its mistaken understanding that it had to mitigate an unlikely worst-case scenario to the right whale after stacking the deck in favor of the species. *See, e.g.*, A926, 1074. MLA thus "vehemently oppose[s]," NGO.Br.22, what NMFS did here for good reason: The agency's action is divorced from the statute and causing real-world harm not only to Maine lobstermen, but an entire region, *see* New.Hampshire.Amicus.Br.8-9, 18-22.

II. NMFS Lacked Authority To Incorporate Its Draconian Conservation Framework Into The Proposed Agency Action.

Appellees' arguments that NMFS properly baked the draconian conservation framework into the proposed agency action here are equally meritless. The ESA authorizes a consulting agency to impose conservation requirements only as "reasonable and prudent alternatives" following a jeopardy opinion or as "reasonable and prudent measures" following a no-jeopardy opinion. 16 U.S.C. §§1536(b)(3)(A), (b)(4). NMFS did neither. Rather, NMFS incorporated its conservation framework into the proposed action *before* issuing a jeopardy assessment on the mistaken belief that the "mandates of the ESA" "required" such a maneuver, which resulted in crippling requirements exclusively designed to ward off NMFS' manufactured "worst case scenario." A926, 1071, 1074. The district court sustained this action solely on the mistaken premise that NMFS imposed the conservation framework in its capacity as *action* agency, not *consulting* agency, and

the statute does not "limit" the former's discretion in defining the proposed action. *See* A239.

NMFS pointedly does not defend the district court's reasoning, nor could it. NMFS concedes that it did *not* develop the conservation framework in its capacity as *action* agency, but did so in its capacity as *consulting* agency: "The Protected Resources Division[,] the Service's *consulting* component[,] … developed the Conservation Framework[.]" NMFS.Br.11 (emphasis added). But while even the court below worried that baking the conservation framework into the proposed action would amount to "an unlawful end run around" the ESA if NMFS did so in its capacity as consulting agency, A239, NMFS nevertheless contends that it "was well within its authority" to forge ahead in that manner, NMFS.Br.50. NMFS, however, tellingly does not invoke any *statutory* authority for its actions. Instead, the agency relies entirely on a pair of nearly 30-year-old decisions from the Ninth Circuit. *See* NMFS.Br.50 (citing *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Lane Cnty. Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992)).

Those decisions are plainly insufficient to sustain NMFS' conduct. In *Pacific Rivers Council*, the Ninth Circuit merely rejected the argument from the U.S. Forest Service (the action agency) that it need not consult NMFS at all because NMFS had not listed the potentially impacted species until after the Forest Service adopted certain forest plans. *See* 30 F.3d at 1053-56. And in *Lane County*, the Ninth Circuit

merely held that the Bureau of Land Management (the action agency) had to consult the U.S. Fish and Wildlife Service to determine whether a logging plan would likely jeopardize the species. *See* 958 F.2d at 293-94. How either of those decisions—in which action agencies sought to freeze out consulting agencies altogether—somehow empowered NMFS in its consulting-agency capacity here to develop an industry-annihilating conservation framework through a process nowhere mentioned in the statute, NMFS leaves unexplained.

NMFS thus is forced to argue that its unauthorized approach nonetheless promotes "good government." NMFS.Br.2, 54. As NMFS puts it, "it was clear" that "evaluating the effects of authorizing the fisheries without conservation measures" would have led to a jeopardy finding, so it decided to avert such a finding (a.k.a., circumvent the statute) by "develop[ing]" the conservation framework and defining the "proposed action" to include it, thus guaranteeing a no-jeopardy finding. NMFS.Br.50, 54. The threshold problem with that statement is that NMFS perceived a "clear" and inevitable jeopardy finding only based on its atextual benefit-of-the-doubt and worst-case-scenario approach.

But more fundamentally, Congress has already decided what "good government" looks like in this context, and it is reflected in the text of the ESA itself. *See Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1486 (2021) ("If men must turn square corners when they deal with the government, it cannot be too much to expect the

government to turn square corners when it deals with them."). And that statute does not provide for a step-zero in which the agency circumvents the statutory process—which requires cost-benefit analysis and involves politically accountable officials in difficult cases—by imposing crippling requirements on the front end designed to ward off a jeopardy finding even in the least likely scenarios. Instead, under the statute as written, if there is a clear threat of jeopardy to the species (based on an objective assessment of the action's likely effects), the proper course is for NMFS to propose "reasonable and prudent alternatives," which the agency must test for economic viability. If no such alternatives exist, either NMFS or another party can seek an exemption from the Endangered Species Committee, which has the inestimable advantage of bringing the judgment of politically accountable officials to bear before an industry—and, here, an entire way of life—is eviscerated. *See* 16 U.S.C. §§1536(b)(3)(A), (g)(1); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 652 (2007).

NMFS claims that MLA has "misinterpret[ed]" the ESA and its implementing regulations. NMFS.Br.52. Even if it had issued a "jeopardy determination," NMFS reasons, the conservation framework would not have had to undergo any "economic" "test," and because the agency promises to "consider additional economic concerns" when promulgating "future" rules implementing the framework, it will not "evade[]" "economic analysis." NMFS.Br.52. Wrong again. If NMFS attempted to

implement the conservation framework following a jeopardy determination, it could have done so *only* if the framework qualified as a "reasonable and prudent alternative"—indeed, NMFS identifies no other statutory path—and as NMFS concedes, *see* NMFS.Br.52, its own regulations implementing §7 (correctly) *require* it to demonstrate that such alternatives are "economically and technologically feasible," 50 C.F.R. §402.02; *cf. Michigan v. EPA*, 576 U.S. 743, 752-53 (2015) ("[I]t is unreasonable to read an instruction to an administrative agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost."). Furthermore, the notion that NMFS will adequately "consider" economic concerns in the "future" is impossible to square with NMFS' repeated statements that it *already* made a "*commitment*" to implement its framework when it issued the biological opinion—and did so *without* consideration of the devastating economic consequences. NMFS.Br.1, 14 (emphasis added); *cf. Michigan*, 576 U.S. at 756 ("Cost may become relevant again at a later stage of the regulatory process, but that possibility does not establish its irrelevance at *this* stage."). There is accordingly no denying that NMFS' theory "reads out" the economic analysis that the ESA and the implementing regulations demand. *Dow AgroSciences LLC v. NMFS*, 707 F.3d 462, 474-75 (4th Cir. 2013).

Nor is there any denying that NMFS' statutorily unauthorized theory empowers the agency to cut the statutorily authorized Endangered Species

Committee out of the process entirely. NMFS does not seriously suggest otherwise. Instead, pointing to two fragments of "legislative history," NMFS insists that Congress "planned" all along for the Committee to operate in theory only, with agencies supposed to resolve ESA "conflicts" through backroom channels. NMFS.Br.53. That claim is unsustainable for a host of reasons, including because legislative history is not the law, *see Epic*, 138 S.Ct. at 1631, congressional amendments presumptively have substantial effect, *see Intel*, 140 S.Ct. at 779, and the *Bennett* Court already concluded that the Committee process is crucial to a proper functioning of the statute, *see* 520 U.S. at 177-78. In all events, NMFS' cited congressional reports actually undermine its argument. The first says that "the integrity of the interagency consultation process designated under section 7 of the act [should] be preserved" before predicting that "many, if not most," cases will not require resort to the Committee. H.R. Conf. Rep. No. 95-1804, at 18 (1978). And the second says that the Committee may intervene only if the "consultation process" under §7 proves "unsuccessful in resolving the conflict." S. Rep. No. 95-874, at 3 (1978). Thus, if anything, the legislative history merely confirms that NMFS should follow the consultation process *as set forth in the statute*—which has built-in methods for resolving "conflicts" (*e.g.*, economically viable "reasonable and prudent alternatives"). Similarly, no one doubts that Committee resolution should be the exception and not the rule, but that is because it comes at the end of the statutory

process and because the possibility of intervention by a more politically accountable Committee incentivizes agencies to compromise and act reasonably. Nothing in the legislative history endorses circumventing the entire statutory process, including any possible intervention by the Committee, through the simple expedient of imposing draconian restrictions designed to avoid worst-case scenarios on the front end, so that neither the cost-benefit analysis nor the possibility of Committee intervention—both of which Congress expressly authorized—ever occurs.

NMFS attempts to minimize the impact of its creative workaround by denying that the conservation framework is "crippling." NMFS.Br.50. But it is far too late for NMFS to conduct the required economic analysis now, *see Regents*, 140 S.Ct. at 1909, and NMFS' *ipsit dixit* does not withstand even minimal scrutiny. NMFS does not dispute that compliance with just the *first* phase of the framework—which, among other things, has already resulted in the seasonal closure of the lobster fishery in a massive area off the coast of Maine—will cost Maine lobstermen tens of millions of dollars. *See* Dkt.42-2 ¶12; *see also* NMFS.Br.11 ("The Rule restricts the use of trap/pot gear in particular areas during particular periods, reduces line density, and requires gear modifications and markings, among other measures."). And NMFS itself recently argued in other litigation that "the measures required" to achieve the risk-reduction targets mandated by other phases of the framework—indeed, even achieving targets short of the agency's *ultimate* target—"will have

severe economic and social consequences to the affected fisheries and surrounding communities," like "the end of a viable fishing operation" and "massive disruption in the form of wide closures of fixed gear fisheries." Dkt.228-1 ¶¶7, 12, *Ctr. for Biological Diversity v. Raimondo*, No. 18-cv-112 (D.D.C. filed Sept. 19, 2022).

NMFS thus shifts to offering various reasons why the Committee purportedly "would not have helped" MLA in this case had the agency adhered to the ESA's procedures. NMFS.Br.54. Of course, because NMFS arrogated that decision to itself, no one will ever know. But NMFS' speculative reasoning is illogical in any event. NMFS first declares that, if it issued a jeopardy opinion (based on its unlawful worst-case-scenario approach), it would have adopted the conservation framework as a "reasonable and prudent alternative" and prevented Committee intervention that way. NMFS.Br.54. But that assumes the reasonableness and prudence of the restrictions (and that they are "economically and technologically feasible," 50 C.F.R. §402.02), none of which is true. And if NMFS had made those findings anyway, MLA would have a clear target to challenge in court.

NMFS next contends that, "although private permittees may request an exemption" from the Committee "if requested permits are denied," MLA members could not have sought an exemption because "no permits were denied *here*." NMFS.Br.54 (emphasis added). But that just attempts to make a virtue out of flouting the statute. The only reason permits were not denied here is because the

crippling restrictions were imposed on the front end, the crippling restrictions protected the species against even worst-case scenarios, and thus no permits need be denied. Voila! The agency's maneuvers here manage to evade the entire statutory scheme, including MLA's right to seek Committee review upon a permit denial. But in a system that requires agencies to act only with statutory authority and to follow statutory processes, that is decidedly a bug and not a feature.

Perhaps recognizing that the Committee would inevitably have intervened had NMFS followed the statute and deemed the draconian restrictions necessary to avoid a jeopardy finding, NMFS suggests that the Committee "would have taken [MLA] only so far" because the Committee may grant an exemption only from the ESA, not from the Marine Mammal Protection Act (MMPA), which NMFS describes as "squarely at issue here." NMFS.Br.55. At the outset, NMFS' focus on the MMPA is inconsistent with the biological opinion, which repeatedly states that NMFS imposed the conservation framework to "meet the mandates of the ESA," A1071; *see* A1075 ("This Conservation Framework is … required by the ESA"); A1074 (similar). That is why the district court agreed that NMFS "did not cite its MMPA obligations" to justify its ultimate risk-reduction target. A238. Moreover, there is no question that the agency developed that framework through the ESA process and not through the notice-and-comment procedures required by the MMPA. *See* 16 U.S.C. §1387(f)(7). All that aside, nothing in the MMPA authorizes a worst-case-

scenario approach, so the assumption that the MMPA would require industry-crippling restrictions is unfounded.

Moreover, if the politically accountable Committee *had* found that the continued operation of the lobster fishery is "in the public interest" and "of national or regional significance," 16 U.S.C. §1536(h)(1)(A), and the MMPA still demanded crippling restrictions contrary to the public interest, there is every reason to believe that a politically accountable Congress would step in. In fact, after NMFS filed its brief in this case, Congress passed and the President signed a law that *prevents* NMFS from imposing further conservation restrictions on the lobster fishery under either the MMPA (or the ESA) until at least December 2028. *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. JJ (Dec. 29, 2022). That action is proof-positive that whether the second most valuable fishery in the United States should remain in existence is an "extraordinary" issue and a "major question[]" that NMFS should *not* resolve on its own via a process that circumvents the statute, including the politically accountable Committee. NMFS.Br.55-56; *see West Virginia v. EPA*, 142 S.Ct. 2587 (2022); Maine.Chamber.Amicus.Br.3, 31.

To be sure, the recent legislation only *delays* NMFS' efforts to follow through on its "commitment" to impose additional restrictions on the lobster fishery, NMFS.Br.1, and it does not address the underlying biological opinion or NMFS' final rule implementing the conservation framework's first phase. This litigation

thus remains necessary to address the underlying errors and *permanently* resolve *all* of MLA's objections to the framework (and permanently eliminate the misguided worst-case-scenario mode of analysis that has infected the entire process). And contrary to the NGOs' argument—which NMFS does not join—MLA has Article III standing to challenge it. NGO.Br.34-40.

As the district court correctly explained below when the NGOs packaged this argument in terms of reviewability under the APA (as opposed to Article III standing), the framework is a "necessary part" of the biological opinion here and the "only" way that NMFS avoided a jeopardy finding. A234-35. That means that NMFS itself believes that implementation of the framework is not just possible, but certain to occur—otherwise, it would have had to issue a jeopardy determination. *See* A235. In fact, as already noted, the first phase of that framework is already inflicting substantial actual injury on MLA's members, which obviously suffices for Article III standing. *See TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021) ("actual" injuries suffice).

And even the NGOs concede that latter phases of the framework "will affect the federal lobster fishery." NGO.Br.35. That concession is wise. As NMFS declares on the first page of its brief, it developed the entire conservation framework for the purpose of eliminating the threat to right whales supposedly caused by the lobster fishery. *See* NMFS.Br.1; *see also* NMFS.Br.8 ("Entanglement in fishing gear

is the leading cause of mortality in adult right whales."); NGO.Br.1 ("Th[e] BiOp demonstrated that … the federal lobster fishery is killing right whales at grossly unsustainable levels."). Moreover, NMFS has since declared that compliance with the latter phases of the framework will cause "severe" injury to lobster fishermen—an acknowledgment consistent with the record in this case. *See* Dkt.42-2; Dkt.42-3. Article III requires nothing more. *See Jibril v. Mayorkas*, 20 F.4th 804, 812 (D.C. Cir. 2021). In short, nothing prevents this Court from holding that NMFS' biological opinion and its constituent components (including the conservation framework and final rule) are inconsistent with the ESA, thus necessitating a remand (without vacatur) to the agency.[6]

[6] It is undisputed that this is the appropriate remedy if MLA prevails.

CONCLUSION

The Court should reverse and order a remand to NMFS without vacatur.

Respectfully submitted,

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I hereby certify that:

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January 10, 2023

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I hereby certify that, on January 10, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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