

IN THE

Supreme Court of the United States

DISTRICT 4 LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, LOCAL LODGE 207; DAMON FAMILY LOBSTER
COMPANY, INC.; FOX ISLAND LOBSTER COMPANY, LLC; and
FRANK THOMPSON,

Petitioners,

v.

GINA M. RAIMONDO, in her official capacity as Secretary of the United
States Department of Commerce; JANET COIT, in her official capacity as
Assistant Administrator, NOAA Fisheries; and the
NATIONAL MARINE FISHERIES SERVICE,

Respondents.

To the Honorable Stephen G. Breyer, Associate Justice of the United
States Supreme Court and Circuit Justice for the First Circuit

**EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR IN THE
ALTERNATIVE TO VACATE THE FIRST CIRCUIT'S STAY OF THE
DISTRICT COURT'S PRELIMINARY INJUNCTION**

Michael A. Cunniff (*Counsel of Record*)
Alfred C. Frawley IV
McCLOSKEY, MINA, CUNNIFF & FRAWLEY, LLC
12 City Center
Portland, Maine 04101
(207) 772-6805

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Attorneys for Petitioners

QUESTION PRESENTED

Did the United States Court of Appeals for the First Circuit abuse its discretion by issuing a stay pending appeal of a preliminary injunction entered by the United States District Court for the District of Maine enjoining the Respondents from enforcing a seasonal closure, from October to January each year, from October to January each year, barring the use of vertical buoy lines to harvest lobster in approximately 967 square miles of federal waters approximately 30 miles off the coast of the State of Maine?

PARTIES AND RULE 29.6 STATEMENT

Relief is sought against Respondent Gina M. Raimondo in her official capacity as Secretary of the United States Department of Commerce. Secretary Raimondo supervises and directs all business conducted by the Department of Commerce and is responsible under federal law for ensuring that the actions, decisions and rules of the Department of Commerce comply with all applicable laws. Relief is also sought against Respondent Janet Coit, in her official capacity as Assistant Administrator of National Oceanic and Atmospheric Administration (“NOAA”) Fisheries, and Respondent the National Marine Fisheries Service, an agency within NOAA to which the Secretary of Commerce has delegated the authority to administer rules and regulations concerning fisheries in United States waters.

Relief is sought by Petitioners District 4 Lodge of the International Association of Machinist and Aerospace Workers, Local Lodge 207, f/k/a IAMAW Maine Lobstering Union – Local 207 (the “MLU”), Damon Family Lobster Company, Inc., Fox Island Lobster Company, LLC (“FILCO”), and Frank Thompson individually.

The MLU hereby discloses that it is a division of the International Association of Machinists and Aerospace Workers, District 4. No person, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations (including parent or affiliated corporations, clearly identified as such), or any similar entities, own 10% or more of the MLU.

Damon Family Lobster Company, Inc. hereby discloses that it is wholly-owned by William and Amelia Damon of Stonington, Maine. No other person, associations

of persons, firms, partnerships, limited liability companies, joint ventures, corporations (including parent or affiliated corporations, clearly identified as such), or any similar entities, own 10% or more of Damon Family Lobster Company.

FILCO hereby discloses that it is wholly-owned by Frank and Jean Thompson of Vinalhaven, Maine. No other person, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations (including parent or affiliated corporations, clearly identified as such), or any similar entities, own 10% or more of FILCO.

PROCEEDINGS BELOW

District 4 Lodge of the Internat'l Assoc. of Machinists & Aerospace Workers Local Lodge 207, et al. v. Raimondo et al., Docket No. 1:21-cv-00275-LEW, ECF No. 41, Order Granting in Part Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (D. Me. Oct. 16, 2021), attached hereto as **EXHIBIT 1**.

District 4 Lodge of the Internat'l Assoc. of Machinists & Aerospace Workers Local Lodge 207, et al. v. Raimondo et al., Docket No. 1:21-cv-00275-LEW, ECF No. 64, Order Denying Emergency Motions for Stay Pending Appeal (D. Me. Oct. 16, 2021), attached hereto as **EXHIBIT 2**.

District 4 Lodge of the Internat'l Assoc. of Machinists & Aerospace Workers Local Lodge 207, et al. v. Raimondo et al., No. 21-1873, Opinion Granting Federal Appellants' Motion for Stay Pending Appeal (1st Cir., Nov. 16, 2021), attached hereto as **EXHIBIT 3**.

District 4 Lodge of the Internat'l Assoc. of Machinists & Aerospace Workers Local Lodge 207, et al. v. Raimondo et al., No. 21-1873, Order of the Court on Federal Appellants' Motion for Stay Pending Appeal (1st Cir., Nov. 16, 2021), attached hereto as **EXHIBIT 4**.

ADDITIONAL EXHIBITS

Department of Commerce, National Oceanic and Atmospheric Administration, Final Rule, Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery, 50 C.F.R. Parts 229 and 697 (Sept. 17, 2021), attached hereto as **EXHIBIT 5**.

National Marine Fisheries Service, Greater Atlantic Regional Fisheries Office, through its Sustainable Fisheries Division, Endangered Species Act Section 7 Consultation on the Authorization of the American Lobster, Atlantic Bluefish, Atlantic Deep-Sea Red Crab, Mackerel/Squid/Butterfish, Monkfish, Northeast Multispecies, Northeast Skate Complex, Spiny Dogfish, Summer Flounder/Scup/Black Sea Bass, and Jonah Crab Fisheries (May 27, 2021), attached hereto as **EXHIBIT 6**.

Department of Commerce, National Oceanic and Atmospheric Administration, Final Environmental Impact Statement, Regulatory Impact Review, and Final Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule Volume 1 (June, 2021), attached hereto as **EXHIBIT 7**.

District 4 Lodge of the Internat'l Assoc. of Machinists & Aerospace Workers Local Lodge 207, et al. v. Raimondo et al., Docket No. 1:21-cv-00275-LEW, ECF No. 10-1, Affidavit of the Honorable Troy D. Jackson (D. Me. Oct. 3, 2021), attached hereto as **EXHIBIT 8**.

District 4 Lodge of the Internat'l Assoc. of Machinists & Aerospace Workers Local Lodge 207, et al. v. Raimondo et al., Docket No. 1:21-cv-00275-LEW, ECF No. 10-2, Lobster to Dollars: The Economic Impact of the Lobster Distribution Supply Chain in Maine (D. Me. Oct. 3, 2021), attached hereto as **EXHIBIT 9**.

Letter from Patrick Keliher, Commissioner, Maine Department of Marine Resources, to Michael Pentony, Regional Administrator, National Marine Fisheries Service (Dec. 27, 2019), attached hereto as **EXHIBIT 10**.

District 4 Lodge of the Internat'l Assoc. of Machinists & Aerospace Workers Local Lodge 207, et al. v. Raimondo et al., Docket No. 1:21-cv-00275-LEW, ECF No. 36-1, Declaration of Virginia Olsen (D. Me. Oct. 14, 2021), attached hereto as **EXHIBIT 11**.

NOAA Technical Memorandum NMFS-NE-247, North Atlantic Right Whales – Evaluating Their Recovery Challenges in 2018 (Sept. 2018), attached hereto as **EXHIBIT 12**.

District 4 Lodge of the Internat'l Assoc. of Machinists & Aerospace Workers Local Lodge 207, et al. v. Raimondo et al., Docket No. 1:21-cv-00275-LEW, ECF No. 25-7, Declaration of Michael Asaro, Ph.d (D. Me. Oct. 12, 2021), attached hereto as **EXHIBIT 13**.

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JURISDICTIONAL STATEMENT

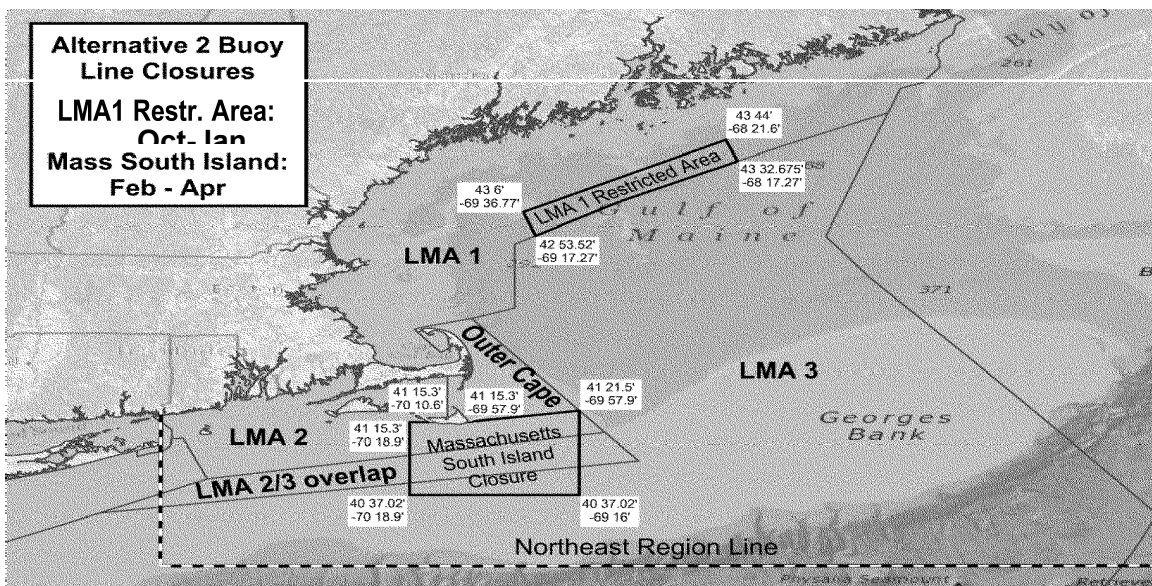
On October 16, 2021, the United States District Court for the District of Maine granted the Petitioners' Motion for a Temporary Restraining Order and Preliminary Injunction and enjoined the Respondents from enforcing a prohibition on the use of vertical buoy ropes in connection with lobster fishing in 967 square miles of federal waters 30 miles off the coast of Maine between October and January each year. *See* APPX-1-29 (the "Injunction Order"). On October 25, 2021, the Respondents filed a Notice of Appeal of the District Court's Injunction Order to the United States Court of Appeals for the First Circuit. This appeal remains pending in the First Circuit.

On November 5, 2021, the District Court denied the Respondents' Emergency Motion for a Stay of the District Court's Injunction Order pending appeal. *See* APPX-30-35. On November 16, 2021, the United States Court of Appeals for the First Circuit granted the Respondents' Motion to Stay the District Court's Injunction Order pending appeal. *See* APPX-36-62 ("First Circuit Opinion"). The First Circuit retained jurisdiction over the Respondents' appeal of the Injunction Order on the merits while remanding the matter to the District Court to resolve any disputes concerning the prompt removal of gear employing vertical buoy lines from the closure area. *See* APPX-64.

The Petitioners now bring the instant application for an emergency writ of injunction or, in the alternative, for vacatur of the First Circuit's stay, pending the filing and disposition of a Petition for a Writ of Certiorari. This Court has jurisdiction over this application pursuant to 28 U.S.C. § 1651(a).

To the Honorable Stephen G. Breyer, Associate Justice of the United States Supreme Court and Circuit Justice for the First Circuit:

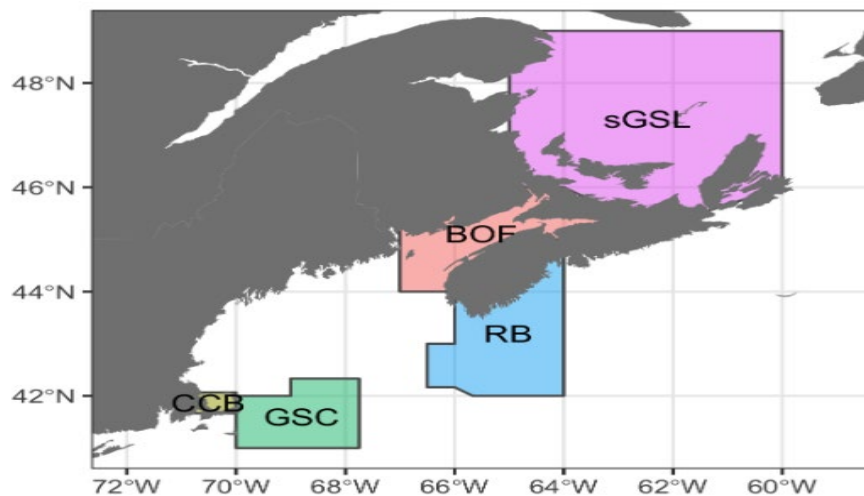
In order to reduce the purported risk of fishing line entanglements involving the endangered North Atlantic right whale, the National Marine Fisheries Service (“NMFS”) promulgated a final rule on August 30, 2021 that, *inter alia*, banned the use of vertical buoy ropes (“VBRs”) in 967 square miles of federal waters 30 miles off the coast of Maine between October and January of each year (the “LMA 1 Restricted Area”). 86 Fed. Reg. 51970; 50 C.F.R. § 229.32(c)(6)(i) (the “Final Rule”).



Although the LMA 1 Restricted Area will remain open to so-called “ropeless fishing,”¹ this “seasonal” VBR ban will act as a permanent closure to lobster fishing in the LMA 1 Restricted Area because virtually all fishermen *only* harvest its waters between October and January, by far the area’s most (and sometimes only) productive season. APPX-1339 at ¶ 6 (Decl. of Virginia Olsen).

¹ “Ropeless” fishing is a technique whereby fishermen retrieve their traps by remotely inflating a bag that brings the trap and groundline to the surface. Because ropeless technology is in its early stages and is prohibitively expensive, it cannot be used effectively other than on a limited, experimental basis.

It is “generally accepted that the Gulf of Maine is not the preferred habitat of right whales and that there is a dearth of evidence to conclude that there has been a taking of a right whale there in recent years.” *See* APPX-23 (Injunction Order). Indeed, there has not been an entanglement linked to Maine fishing gear since 2004. Because “there has been a documented change in right whale prey distribution that has shifted right whales into” Canadian waters since 2010, APPX-494 (2021 BiOp), right whale sightings in the Gulf of Maine have become so rare that NMFS does not conduct aerial surveys over the LMA 1 Restricted Area. Instead, right whales historically aggregate in “the coastal waters of the southeastern United States; the Great South Channel; Jordan Basin; Georges Basin along the northeastern edge of Georges Bank; Cape Cod and Massachusetts Bays; the Bay of Fundy; and the Roseway Basin on the Scotian Shelf.” APPX-480.



From these foraging grounds, female right whales migrate to their fall/winter breeding grounds in the South Atlantic:



Put simply, the North Atlantic right whales’ “migratory paths do not overlap with the LMA 1 Restricted Area.” APPX-12 (Injunction Order).

NMFS did not base the LMA 1 Restricted Area on science but rather a desire to spread the burden of risk reduction across all jurisdictions. Because every VBR theoretically poses a risk of entanglement, and Maine fishermen account for the vast majority of VBRs in federal waters, NMFS reasons that Maine fishermen must bear the brunt of the mitigation burden. This reasoning is critically flawed: because “entanglement risk only exists when lines are present, whales are present, and the lines pose a risk to whales,” APPX-133 (Final Rule), not every VBR poses the same risk of entanglement. And right whales do not frequent the LMA 1 Restricted Area.

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Regulation of Atlantic coast fisheries differs between state and federal waters. Waters within three nautical miles of shore are regulated by the individual states, while waters extending 200 nautical miles from the inner boundary of state waters (known as the Exclusive Economic Zone or “EEZ”) are federal waters regulated by

the Respondents. *See* 16 U.S.C. §§ 1802(11), 1811(a), 1854, 1855(d).

States along the Atlantic coast have established a compact known as the Atlantic States Marine Fisheries Commission (the “Atlantic States Commission”) to coordinate their conservation efforts and share the management of migratory fisheries in their state waters. Pub. L. No. 77-539, 56 Stat. 267 (1942). The Atlantic Coastal Fisheries Cooperative Management Act (“ACA”) encourages this shared responsibility by requiring the Atlantic States Commission to draft interstate fisheries management plans (“FMPs”), pursuant to which each of the member-states regulates the portion of the migratory fishery that falls within their individual waters. 16 U.S.C. § 5104(a). The Maine Department of Marine Resources (“MDMR”) regulates lobster fishing in Maine’s state waters pursuant to an FMP. *See* 12 M.R.S. §§ 6421-6482; 13 C.M.R. 188, ch. 25. Fishing within the EEZ is governed by the Magnuson-Stevens Act (“MSA”). The MSA authorizes NMFS to regulate fishing in federal waters by approving or disapproving of species-specific FMPs developed by regional councils. *See* 16 U.S.C. § 1854. These federal FMPs may include complementary measures recommended by state FMPs. 16 U.S.C. § 5103(b). Lobster fishing in federal waters is governed by 50 C.F.R Part 697.

A. The Endangered Species Act.

Because the North Atlantic right whale is listed as endangered under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, Section 7(a)(2) of the ESA requires NMFS to ensure that any permits it issues for lobster fishing in federal waters are “not likely to jeopardize the continued existence of ” right whales. 16

U.S.C. § 1536(a)(2). If a proposed regulation “is likely to adversely affect” the North Atlantic right whale, NMFS must prepare a “biological opinion” based on the “best scientific and commercial data available” to analyze whether the regulation is likely to jeopardize the continued existence of the species. 50 C.F.R. §§ 402.14. If so, and when there are no “reasonable and prudent alternatives,” Section 7(a)(2) prohibits the action. See 50 C.F.R. §§ 402.14(h)(2). If the regulation is not likely to jeopardize the species’ continued existence but may result in the incidental take of an individual member, NMFS must provide an incidental take statement (“ITS”) along with its biological opinion. 16 U.S.C. § 1536(b)(4)(i)-(ii) & (o)(2).

B. The Marine Mammal Protection Act.

The Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §§ 1361 *et seq.*, prohibits the “taking” of any marine mammal. See 16 U.S.C. § 1371(a). “[T]he incidental taking of marine mammals in the course of commercial fishing operations,” however, is an exception to this general prohibition, so long as any incidental (unintentional) taking is authorized. See 16 U.S.C. § 1387(a)(1). In the case of ESA-listed marine mammals, an incidental take authorization requires a take reduction and recovery plan that concludes that any such take “will have a negligible impact on such species” by not exceeding the potential biological removal (“PBR”) threshold necessary to sustain the population. See 16 U.S.C. § 1371(a)(5)(E). Importantly, the MMPA directs NMFS to craft regulations that will “protect essential habitats, including the rookeries, mating grounds, and areas of similar significance” for the species. 16 U.S.C. § 1361(2). The MMPA also directs NMFS to “tak[e] into

account the economics of the fishery” when implementing regulations designed to reduce the incidental take of marine mammals incident to commercial fishing operations to below PBR. 16 U.S.C. § 1387(f)(2).

C. The Regulatory Flexibility Act and Similar Statutes.

Other authorities inform the Respondents’ rulemaking under the ESA and MMPA. The Regulatory Flexibility Act (“RFA”), for example, requires the Respondents to assess any potential effects that its rulemaking might have on small entities and to consider alternatives that would “minimize any significant economic impact” on those small entities. *See* 5 U.S.C. §§ 603(b)(3) & 604(a). Similarly, Section 102(b) of the National Environmental Policy Act requires Respondents to include “economic and technical considerations” in its analysis of the LMA 1 Restricted Area. 42 U.S.C.A. § 4332(B). And Executive Order 12866 states that every agency “shall assess both the costs and the benefits of the intended regulation” and “shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.” *See* Exec. Order No. 12866 at §§ 1(b)(6)-(7).

D. The Administrative Procedures Act.

Finally, the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 551 *et seq.*, governs judicial review of final agency actions performed under the ESA and MMPA. Under the APA, courts must “hold unlawful and set aside agency action, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706. Section 702 of the APA provides that “[a]

person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof,” while Section 553 of the APA prescribes the procedure an administrative agency must follow when adopting regulations.

STATEMENT OF THE CASE

A. The American Lobster Fishery.

The American lobster fishery is the most valuable fishery on the Atlantic coast. The fishery landed approximately 159 million pounds in 2016 alone. In 2018, 121.3 million pounds of lobster was landed in waters off the coast of Maine (82% of the total lobster landings in the U.S.), representing an ex-vessel value of approximately \$500 million. By comparison, Massachusetts had landings of 17 million pounds in 2019.

Lobster fishing is the most important industry in the State of Maine. Maine’s coastal communities are dependent on lobster fishing due to low alternate wages and limited career options in those communities. In addition to the roughly 4,800 lobster license holders in the State of Maine and 1,100 student license holders, lobster dealers, processors, sternmen, bait dealers, trap builders, boat mechanics, shipyards, and local coastal merchants all depend on the Maine lobster fishery for their very survival. Maine’s lobster supply chain contributes \$1 billion to the State’s economy each year on top of the value of its lobster landings, *not* including restaurants, supermarkets and other retail outlets that sell lobster to consumers. APPX-1290, 1299. Lobstering is integral to the State’s heritage and identity.

The American Lobster fishery is divided into 7 Lobster Management Areas

(“LMAs”): LMAs 1, 2, 3, 4, 5, 6, and the Outer Cape. Each LMA has different effort control restrictions, such as trap limits, minimum/maximum sizes, gear requirements, and closed seasons. Lobster fishing off the coast of the State of Maine occurs in LMA 1, which stretches from Cape Cod Bay to New Brunswick and extends approximately 40 miles from shore. As of 2018, approximately 1,300 federal permits were issued to Maine fishermen for LMA 1, encompassing approximately 1,044,000 traps, making LMA 1 the most productive LMA in the American Lobster fishery, and making Maine federal license holders the most active lobstermen in federal waters. Outside LMA 1 lies LMA 3, the offshore zone. Lobstermen licensed by the State of Maine are not permitted to fish in LMA 3’s federal waters.

Within LMA 1 are seven different Maine Lobster Management Zones. In order to ensure the sustainability of the fishery, Maine law requires its lobstermen to “declare the lobster management zone in which that person proposes to fish a majority of that person’s lobster traps,” meaning state-licensed fishermen who lobster in federal waters within LMA 1 must fish a majority of their traps in the Lobster Management Zone designated on their state license. 12 M.R.S. § 6446(1-A). Gear conflicts within these zones are legendary, with lobster families passing down their fishing territories from one generation to the next. Maine fishermen will protect their fishing grounds from outsiders at all costs. *See generally* JAMES ACHESON, *THE LOBSTER GANGS OF MAINE* (Univ. of N.E. Press) (1988).

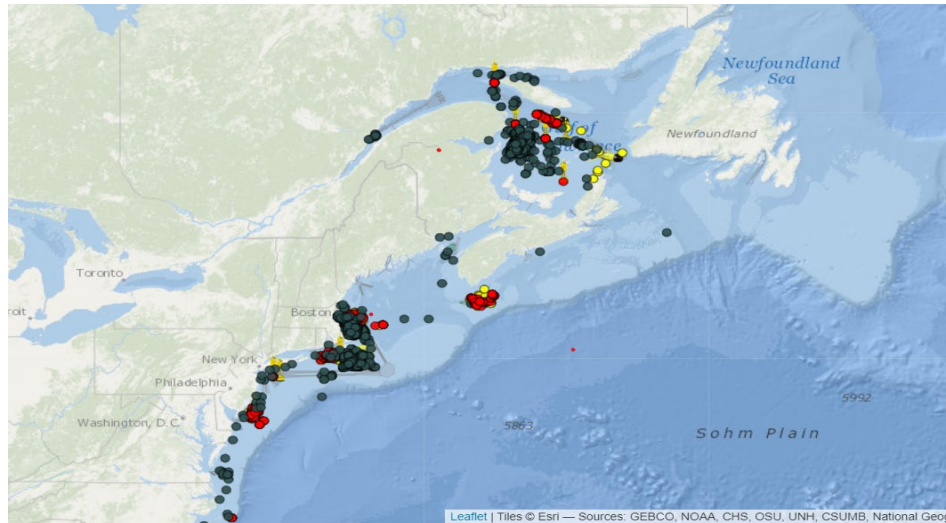
Fishermen harvest lobster utilizing trap and pot gear. A lobster trap is defined as any structure or device other than a net that is fished on the ocean bottom

by a lobster permit holder and is designed for or capable of catching lobsters. Traps must be marked with a trap tag and identified by either the federal or state permit number. Traps/pots may be set singly with each trap having its own surface line and buoy or fished in trawls consisting of two or more traps. Traps/pots must comply with buoy/groundline, storage, weak link, and traps per trawl requirements.

B. The North Atlantic Right Whale.

The North Atlantic right whale has been listed as an endangered species under the ESA since 1973. Right whale sightings in the northern Gulf of Maine are extremely rare; since 2010, “there has been a documented change in right whale prey distribution that has shifted right whales into new areas with nascent risk reduction measures,” mainly to Canadian waters in the Gulf of Saint Lawrence. APPX-494 (2021 BiOp). North Atlantic right whales have increasingly left the Gulf of Maine for Canadian waters as they follow the shift of their primary food source (planktonic copepods) to colder waters. *Id.* Because the Gulf of Maine continues to warm 99% faster than the rest of the world’s oceans, the risk of co-occurrence between right whales and fishing gear in waters off the coast of Maine is steadily decreasing. APPX-1360 (NOAA Tech Memo). As right whales shift their habitat to Canadian waters, right whale sightings have become even less frequent. The map below indicates all North Atlantic right whale sightings between August 25, 2020 and September 15, 2021, with definite visual sightings in gray, definite acoustic sightings in red, and possible acoustic detections in yellow:²

² See <https://apps-nefsc.fisheries.noaa.gov/psb/surveys/MapperiframeWithText.html>.



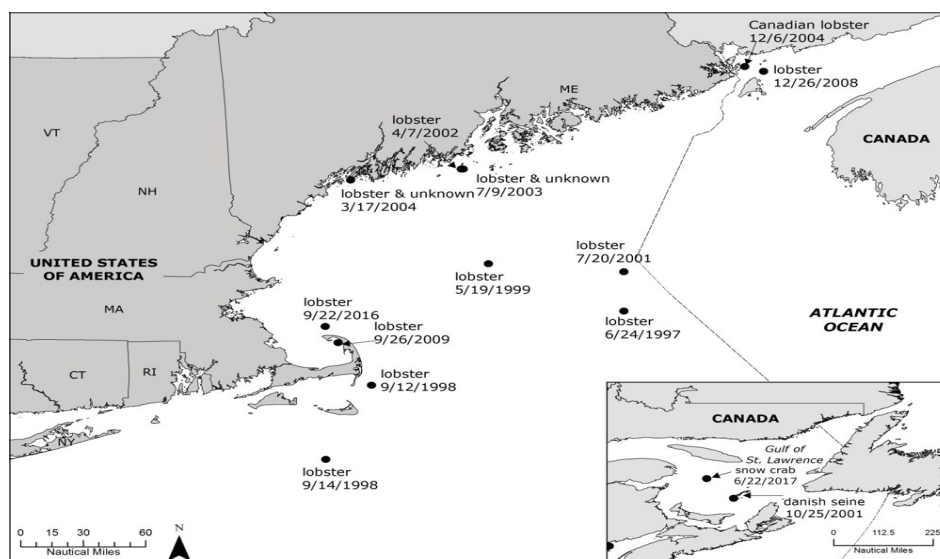
Right whale sightings in Maine's coastal waters are so rare that NMFS does not conduct aerial surveys over the LMA 1 Restricted Area. APPX-169 (Final Rule).

Vessel strikes and entanglement in commercial fishing gear pose the greatest threat of serious injuries and mortalities to right whales. (Of the 30 cases of serious injury/mortality to right whales since 2017, eight have been attributed to vessel strikes). Given the seasonal distribution of North Atlantic right whales and the times when and areas where the American lobster fishery operates, right whales are most likely to overlap with trap/pot gear used in the Gulf of Maine in the spring and summer and throughout the fall and winter in Mid-Atlantic waters. The location and exact sub-fishery in which each entanglement incident occurs, however, can rarely be determined, and there remains great uncertainty regarding the source of entanglement mortality to the right whale population. *See* 85 Fed. Reg. 86,879.

What is certain is that Canadian waters pose a far greater risk of entanglement to right whales than U.S. waters. Canadian fishing gear (particularly snow crab gear) is heavier than U.S. lobster gear, and Canada lacked protections for right

whales until the Spring of 2018. APPX-1362 (NOAA Tech Memo). As of 2016, the number of traps used off the coasts of the Canadian provinces roughly equaled the number of traps used on the coasts of Massachusetts, New Hampshire and Maine combined. *Id.* Of the 30 documented serious injuries/mortalities to right whales between 2017 and 2019, 23 occurred in Canadian waters, whereas only one could be traced to U.S. waters (a vessel strike).³ The *only* entanglement from September 2013 to the present that can be identified as resulting from any U.S. fishery was in 2016 from gear set in Massachusetts state waters. *Id.* With right whales spending even more time in Canadian waters (half of the population spends six months in the Gulf of St. Lawrence alone)⁴ and even less time in the Gulf of Maine, there has not been a single entanglement attributed to Maine lobster gear since 2004:

Entanglements from 1997-2017 for which the set location and type of gear are known.



³ See NOAA Fisheries, 2017-2019 North Atlantic Right Whale Unusual Mortality Event, *available at* <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2019-north-atlantic-right-whale-unusual-mortality-event> (last visited Sept. 28, 2021); 85 Fed. Reg. 86,879.

⁴ Dep't of Fisheries & Oceans, *Integrated Fisheries Management Plan for the Southern Gulf of St. Lawrence*, *available at* <http://www.glf.dfo-mpo.gc.ca/Gulf/FAM/IMFP/2014-Lobster-Overview>.

APPX-1360 (NOAA Tech Memo). In sum, less than 0.2 entanglement-related mortalities and serious injuries per year (or one right whale every five years) can be attributed with any certainty to *any* type of fishing gear in U.S. waters (federal or state), while 0.7 can be attributed with certainty to Canadian waters (or about two right whales every three years). APPX-71 (Final Rule). Despite the fact that Canadian waters are far more deadly for right whales than U.S. waters, NMFS still “lack[s] an actual estimate of the proportion of the right whale population’s exposure to U.S. or Canadian fisheries each year.” *Id.* at 89.

Lobster fishing gear does not pose the only risk of entanglement. Out of 107 total entanglements between 2010 and 2018, 17 were determined to have been caused by trap/pot fishing gear, while 8 were determined to be caused by gillnets/nets. APPX-497 (2021 BiOp); *Conservation L. Found. v. Ross*, 422 F. Supp. 3d 12, 33 (D.D.C. 2019) (“[g]illnet gear, which NMFS points out can be at most 3% of vertical line fishing on the east coast, accounted for 10% of fishery-related right-whale deaths in the last twenty years”). Vertical *and* ground lines used in connection with several non-lobster fisheries – including the red crab, monkfish, bluefish, flounder, scup, black sea bass and Canadian stone crab fisheries – also present risks of entangling North Atlantic right whales. APPX-301-336 (2021 BiOp). For reasons unknown, NMFS does not account for the entanglement risks posed by these fisheries.

C. The Regulatory Scheme.

In 1996, NMFS first convened an Atlantic Large Whale Take Reduction Team (“ALWTRT”) to recommend an Atlantic Large Whale Take Reduction Plan

(“ALWTRP”) designed to reduce mortalities and serious injuries to North Atlantic right whales as a result of commercial fishing operations in federal waters. First adopted in 1997, NMFS must amend the ALWTRP as necessary to meet the requirements of the MMPA. 16 U.S.C. § 1387(f)(7)(F).

1. Background on the ALWTRP.

Since adopting the ALWTRP in 1997, NMFS has focused on improving gear technology to make entanglements less likely to harm or kill whales and on reducing the amount of gear in the water column by restricting where and when gear can be used based on seasonal aggregations of right whales. These efforts have included expanding weak link requirements (designed to cause VBRs to break free from a trap if a whale strikes) in 2007, requiring the use of sinking groundlines in 2009, establishing gear marking requirements in 2010, and increasing the number of traps between VBRs (thereby reducing the number of lines in the water column, a practice known as “trawling up”) in 2015. APPX-1358-59 (NOAA Tech Memo). Although these measures appear to be working, NMFS has not evaluated the effectiveness of its existing regulations since 2009. APPX-98, 130, 136-37 (Final Rule).

Meanwhile, Maine has implemented its own weak link, gear marking, sinking line, and trawling-up requirements in waters exempted by the ALWTRP. APPX-1307 (MDMR ALWTRP Proposal). There is concrete evidence that Maine fishermen have not caused any right whale entanglements in a generation: 81% of all lines removed from entangled right whales have been greater than ½ inch in diameter, while 79% of the lines used in Maine waters have diameters of less than ½ an inch.

APPX-1308. Again, there has not been a single entanglement linked to Maine fishing gear in federal *or* state waters since 2004, and even then, Maine gear was not determined to be the originating cause of the entanglement (and the whale survived). APPX-1361 (NOAA Tech Memo). With right whales shifting their habitat away from LMA 1 to cooler waters in the north and deep Atlantic, the risk of entanglement posed by Maine fishing gear has steadily decreased to near-zero.

2. The 2014 Biological Opinion.

In 2014, NMFS issued a biological opinion (the “2014 BiOp”) that concluded that the American lobster fishery was not likely to jeopardize the continued survival or recovery of North Atlantic right whales. NMFS issued the 2014 BiOp before full-scale adoption of its modifications to the ALWTRP (also in 2014) that implemented protective measures that included the removal of floating lines, a ban on “wet storage” of gear in the water for more than 30 days, the addition of weak links in lines (designed to separate a pot from the weight of a trap in the event a right whale strikes a line), a mandate of sinking ground lines, and “trawling-up” requirements (meaning multiple traps to a pot, resulting in far fewer lines in the water column). The 2014 BiOp included numerical triggers for re-initiation of ESA Section 7 consultation to ensure that any serious injuries or mortalities would not likely reduce appreciably the likelihood of both survival and recovery of right whales. Since the issuance of the 2014 BiOp and the modifications to the ALWTRP, NOAA and NMFS have not been able to identify any lobster gear permitted for use by NMFS in federal waters on a single entangled North Atlantic right whale.

In 2017, an unusual mortality event was declared after a rash of right whale deaths in Canadian waters, causing NMFS to re-initiate Section 7 ESA consultation.⁵ Before the agency could complete that process, however, litigation brought by conservation groups in the District of Columbia determined in August of 2020 that NMFS's 2014 Biological Opinion was unlawful due to its failure to include an ITS, and NMFS was ordered to issue a new biological opinion by May 31, 2021. *See Ctr. for Biological Diversity v. Ross*, 480 F. Supp. 3d 236 (D.D.C. 2020). This aggressive timeline short-circuited the public comment process and hindered NMFS' ability to adequately analyze the available data. The District Court for the District of Columbia, however, refused to order a seasonal closure to the use of VBRs in a right-whale hotspot south of Nantucket because the "short-lived and uncertain reduction in entanglement risk" did not justify the "permanent economic and social damage that could accompany the closure." *Id.* at 256.

3. NMFS's Proposed Rule.

On December 31, 2020, NMFS issued a proposed rule seeking to implement modifications to the ALWTRP to reduce mortality and serious injury to right whales by 60% (the "Proposed Rule"). The Proposed Rule began by acknowledging the disagreements among members of the ALWTRT concerning how much risk reduction was necessary and the metrics used to compare the wide range of proposals "challenged the Team's ability to develop recommendations." 85 Fed. Reg. 86,879.

⁵ NOAA Fisheries, 2017-2019 North Atlantic Right Whale Unusual Mortality Event, *available at* <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2019-north-atlantic-right-whale-unusual-mortality-event>.

As a result of these disagreements, NMFS decided that “risk reduction should be shared across jurisdictions so that no one state or fishing area would bear the bulk of the restrictions,” 85 Fed. Reg. 86,880, notwithstanding the fact that North Atlantic right whales are rarely seen in waters off the coast of Maine, and instead frequent U.S. waters in Cape Cod Bay, the mid-Atlantic, and waters south of Nantucket.

With respect to seasonal closures to VBRs, the Proposed Rule offered three alternatives for public comment: 1) two new seasonal restricted areas (one south of Cape Cod and Nantucket that would be closed between February and April, the other the LMA 1 Restricted Area); 2) not including any LMA 1 Restricted Area; and 3) implementing the LMA 1 Restricted Area only if a 60% reduction in entanglements had not been met based on information available prior to the start of October each year. 85 Fed. Reg. 86,883-34. Importantly, the Proposed Rule noted that NMFS had not made any determination that the LMA 1 Restricted Area was necessary to achieve a 60% reduction in entanglements, and the ALWTRT did not recommend including the LMA 1 Restricted Area in the Proposed Rule. 85 Fed. Reg. 86,882.

4. The 2021 Biological Opinion.

On May 27, 2021, NMFS issued a new biological opinion (the “2021 BiOp”) that concluded that the American lobster fishery would not jeopardize the continued existence of North Atlantic right whales if modifications to the ALWTRP reduced the number of serious injuries/mortalities to right whales caused by federal fisheries by 60%. Although the best available science indicated that Canadian fishing gear is almost *four times* more likely to cause serious injuries/mortalities than U.S. fishing

gear, APPX-71 (Final Rule), NMFS arrived at its 60% reduction target by assuming that 50% of all serious injuries/mortalities occurred in U.S. waters due to the agency’s uncertainty over the location and cause of entanglements. APPX-495-96 (2021 BiOp). The BiOp also assumed that lobster trap/pot gear in U.S. waters had caused 55 undetected mortalities between 2010 and 2018 based on an “appearance of mortality” that resulted from the agency’s inability to locate certain individual members of the species in Canadian waters (where right whales aggregate to forage) due to “insufficient survey effort.” *Id.* at 500-01.⁶ Peer reviewers did not agree on the accuracy of these apportionments. *Id.* at 495-96.

Based on these assumptions, the 2021 BiOp nevertheless assumed that 69.29 entanglements causing serious injuries/mortalities to right whales occurred between 2010 and 2018 in Federal waters (an average of 7.57 a year), even though only 2 serious injuries/mortalities were actually *confirmed* to have been caused by U.S. fishing gear during that same period (and none since 2014). APPX-498-500, 508 (2021 BiOp). NMFS then assumed that *all* entanglements in U.S. waters were caused by lobster trap/pot gear (even though gillnets alone cause half of the known causes of entanglements in U.S. waters) in the Northeast because NMFS also was “unable to partition the entanglement data between the different trap/pot fisheries.” *Id.* at 497-98, 500-01, 504-05. Even with these assumptions, the 2021 BiOp did *not* recommend closing the LMA 1 Restricted Area *unless and until* the “gear and

⁶ See *Supplemental Figure 3, Roberts et al.*, Habitat-based cetacean density models for the United States Atlantic and Gulf of Mexico (2016), *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4776172/> (last visited September 16, 2021).

operational measures [in the Final Rule] cannot reach the targets of the [BiOp's] Conservation Framework.” *Id.* at 504. Although these measures do not take effect until May of 2022, NMFS ultimately implemented the LMA 1 Restricted Area now.

5. The Final Rule.

On August 30, 2021, NMFS published its Final Rule, which was accompanied by a Final Environmental Impact Statement (“FEIS”). The Final Rule modified the ALWTRP to 1) increase the number of traps between VBRs (thereby reducing the number of lines in the water column); 2) require all VBRs to use engineered weak rope or weak rope inserts (designed to break a line free from a trap if a whale strikes); and 3) mandate state-specific gear-marking requirements. The Final Rule also established two new areas seasonally closed to the use of VBRs, including the LMA 1 Restricted Area. The LMA 1 Restricted Area became effective on October 18, 2021, while the other modifications to the ALWTRP do not take effect until May of 2022.

Although NMFS believes the Final Rule will reduce the risk of entanglement by 69%, which “far exceeds” the 60% target needed to achieve a PBR of below 0.8, APPX-125, 135, 141, 166 (Final Rule), the agency expects the LMA 1 Restricted Area to provide only 6.6% of that risk reduction. 85 Fed. Reg. 86,882. Importantly, *none* of the states, scientists, conservation groups or other experts on the highly specialized ALWTRT ever recommended closing the LMA 1 Restricted Area, and NMFS *never* presented the closure to the ALWTRT for its consideration. *Id.*⁷

⁷ Although agency deference is particularly appropriate where the decision “requires a high level of technical expertise,” *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375–77 (1989), the fact that the experts on the highly-specialized ALWTRT did *not* recommend the LMA 1 Restricted Area counsels against affording NMFS much deference in this arena.

D. The District Court's Injunction Order.

On October 16, 2021, the District Court preliminarily enjoined the LMA 1 Restricted Area because the closure “depart[ed] dramatically from the Agency’s past practice of justifying closures based on known and predictable whale aggregations demonstrated by concrete evidence.” APPX-22-23 (Injunction Order). As the District Court recognized, while “[s]urveys have demonstrated the existence of several areas where North Atlantic right whales congregate seasonally,” none of these are close to the LMA 1 Restricted Area. *Id.* at 9-11 (quoting APPX-466 (2021 BiOp)). Indeed, the District Court noted that the agency’s own data indicates that the right whales’ “migratory paths do not overlap with the LMA 1 Restricted Area.” APPX-12 (citing APPX-489 (2021 BiOp)). In the District Court’s opinion, “[t]he right whale’s migratory shift away from Maine in the fall and winter raises the flag that the timing of the LMA 1 closure (October through January) is not calibrated to the co-occurrence of whales and fishing effort, let alone the sort of whale aggregations that have informed other closures implemented by NMFS.” APPX-9-10 (Injunction Order). And as the District Court recognized, NMFS’s own rationale for justifying closures did not support the LMA 1 Restricted area: “[c]losures protect areas of predictable seasonal aggregations of right whales.” APPX-14 (quoting APPX-504 (2021 BiOp)).

The District Court engaged in an extremely detailed analysis of a so-called Decision Support Tool (“DST”) relied upon by NMFS to support its assumptions about the risk reduction impact of the LMA 1 Restricted Area. After unpacking the underlying data (or lack thereof), the District Court concluded that the DST model

only supported the “understanding that there is potential that one or more right whales may transit the LMA 1 Restricted Area during the closure period” based on “markedly thin statistical modeling methodology.” APPX-20, 22 (Injunction Order). The Court found that basing a seasonal closure on the hypothesis that a few whales may transit the LMA 1 Restricted Area because the area formerly was a “viable habitat for right whales” was a conclusion that “departs dramatically from the Agency’s past practice of justifying closures based on known and predictable whale aggregations demonstrated by concrete evidence.” *Id.* at 22-23.

On October 25, 2021, the Respondents filed a Notice of Appeal of the Injunction Order to the First Circuit. On November 5, 2021, the District Court denied the Respondents’ motion to stay that injunction pending appeal because they “fail[ed] to address whether right whales aggregate in the LMA 1 Restricted Area” and instead relied “heavily on modeling techniques to justify the closure without providing or explaining their inputs, and contrary to its own past practices did so to the exclusion of providing any evidence that right whales actually pass through the LMA 1 Restricted Area.” APPX-32-33. The District Court also found that “[t]he seasonal closure should not evade judicial review based on the lack of meaningful data—especially when a preliminary read of the administrative decision suggests a blinkered adherence to predictive modeling when concrete evidence to solve those uncertainties is reasonably available, as is the case here.” *Id.* at 33.

E. The First Circuit’s Opinion.

The Respondents moved for a stay of the District’s Court’s Injunction Order in

the First Circuit Court of Appeals on November 5, 2021. The First Circuit granted that motion on November 16, arguing that the District Court “over-stepped its role in rejecting the judgments of the agency that Congress has charged with protecting endangered marine mammals. And, while there are serious stakes on both sides, Congress has placed its thumb on the scale for the whales.” APPX-40 (First Circuit Opinion). The First Circuit, however, did not go into detail concerning NMFS’s modeling or address any of the flaws that concerned the District Court; instead, the First Circuit simply found that the agency’s modeling “relied on the best evidence it had available and updated the inputs as new information emerged” and that “Congress did not require the Agency to wait” for concrete data that right whales actually use the LMA 1 Restricted Area. *Id.* at 52. Because “[s]cientists cannot trace most known entanglements to specific fisheries,” the First Circuit reasoned, “the lack of a specific case of entanglement attributable to a given area does not mean none have happened in that area or that there is no risk one will happen there in the future.” *Id.* at 54-55.

Ultimately, the First Circuit concluded that “Congress has effectively declared the public interest and weighed the equities in accord with the balance struck by the Agency. Whether the statutory framework that requires this result should be changed is up to Congress, not the courts.” APPX-62 (First Circuit Opinion). The Petitioners now request a writ of injunction pursuant to 28 U.S.C. § 1651(a) or, alternatively, vacatur the First Circuit’s stay of the Injunction Order, pending the filing and disposition of a Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This case presents important questions concerning the scope of a federal administrative agency's power to issue regulations that effectively prevent hundreds of Maine lobstermen from earning a living in the winter months based on hypotheses that are unsupported (and indeed, contradicted by) the agency's data. Can an agency ignore its own statutory mandate and public pronouncements in order to spread burdens across jurisdictions? Can an agency ignore important aspects of the problem and rely solely on predictive modeling without undertaking any effort whatsoever to gather and analyze concrete data? Can an agency rely on external evidence not before it subsequently to justify its rulemaking? And at what point does the ESA's mandate of protecting endangered species foreclose consideration of the economic impact of regulations on small businesses under the RFA?

Maine fishermen have taken great pains to implement mitigation measures at enormous expense to conserve and protect right whales that are not present in the waters where they fish, only to see their efforts ignored by federal agencies that impose additional regulations without analyzing the effectiveness of existing ones. Neither the North Atlantic right whale nor the State of Maine can afford NMFS's continued reliance on substantial uncertainty to promulgate hurried and arbitrary regulations that threaten livelihoods without any demonstrable benefit to the species. Because the hard-working men and women of Maine have borne the burden of onerous, "one size fits all" fishing regulations that treat the Gulf of Maine the same as other Atlantic waters for years, they warrant and deserve the relief sought here.

ARGUMENT

Agency deference did not warrant a stay of the District Court’s Injunction Order because NMFS itself recognized that it only “has authority to implement closures” if “gear and operational measures cannot reach the targets of the Conservation Framework [in the 2021 BiOp].” APPX-286 (2021 BiOp). Although these “gear and operational measures” do not take effect until May of 2022, APPX-74 (Final Rule), NMFS nevertheless has ordered that the closure go into effect *now*. Moreover, the agency itself claims closures only are justified to “protect areas of predictable seasonal aggregations of right whales.” APPX-565 (2021 BiOp). But NMFS *admits* that Maine waters do *not* have “regular feeding aggregations consisting of a large percentage of the right whale population at certain times of the year.” APPX-1380 at ¶ 6 (Decl. of Michael Asaro). Deferring to NMFS’s “expertise,” in other words, compels the conclusion that the LMA 1 Restricted Area is *not* justified.

A. Legal Standard.

The Circuit Justices of this Court have authority to issue injunctions under the All Writs Act, 28 U.S.C. § 1651(a), when applicants’ claims “are likely to prevail,” the denial of injunctive relief “would lead to irreparable injury,” and “granting relief would not harm the public interest.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020) (per curiam) (granting emergency injunctive relief to prevent likely constitutional violations from state law); *see also Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n.*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (injunctive relief under All Writs Act appropriate where the legal rights at

issue are “indisputably clear,” the circumstances are “critical and exigent,” and injunctive relief is “necessary or appropriate in aid of the Court’s jurisdiction” (citations and alterations omitted)).

B. The Petitioners Are Likely to Prevail.

In broad strokes, “an agency rule [is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This standard “obligates the agency to examine all relevant factors and record evidence, and to articulate a reasoned explanation for its decision,” including a rational connection between the facts found and the choice made. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017). That explanation must “reasonably be discerned” from the agency record. *Id.*

1. The District Court Followed NMFS’s Own Mandate.

The salutary purpose of the MMPA is “to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions.” 16 U.S.C. § 1361(2). Accordingly, NMFS’s self-imposed and publicly-proclaimed directive was to craft regulations that “[d]irect[ed] the most protection to areas of predictable high seasonal aggregations of right whales, including substantial risk reduction across areas of

likely occurrence and precautionary measures in other areas to be resilient to ecosystem changes and associated changing whale distribution.” APPX-927 (FEIS). Instead, NMFS included the LMA 1 Restricted Area in the Final Rule because it determined that “risk reduction should be shared across jurisdictions so that no one state or fishing area would bear the bulk of the restrictions.” *See* 85 Fed. Reg. 86,880; APPX-166 (Final Rule). Using this reasoning, NMFS nevertheless allows trap/pot fishing between October and January in *each* of the seven known hotspots where right whales *are* in fact aggregating, including those feeding grounds to which the right whale is currently migrating. APPX-480 (2021 BiOp).

In issuing the Injunction Order, the District Court simply followed the agency’s self-imposed mandate to “[d]irect the most protection to areas of predictable high seasonal aggregations of right whales.” APPX-927 (FEIS). *See also id.* at 930 (acknowledging that NMFS’s task was to identify areas where “persistent aggregations of right whales appear to be seasonally predictable” (emphasis supplied)). As the District Court recognized, “[s]urveys have demonstrated the existence of several areas where North Atlantic right whales congregate seasonally,” none of which are close to the LMA 1 Restricted Area, while the agency’s modeling predicted a possible presence of right whales near the LMA 1 Restricted area in the *spring* only. APPX-9-11 (Injunction Order) (quoting APPX-266 (2021 BiOp)). Because the ESA and the MMPA required NMFS to reduce risks in areas of “significance,” rather than “across jurisdictions,” the agency’s decision to include the LMA 1 Restricted Area in the Final Rule simply so that fishermen in states where

whales *are* aggregating would not “bear the bulk of the restrictions” was arbitrary and capricious on its face. *See* 85 Fed. Reg. 86,880.⁸ *See also* APPX-22-23 (Injunction Order’s finding that NMFS’s closure of the LMA 1 Restricted Area “depart[ed] dramatically from the Agency’s past practice of justifying closures based on known and predictable whale aggregations demonstrated by concrete evidence”). But even if spreading the burden of risk reduction across all jurisdictions in favor of targeting areas of most significance to the species was a proper goal of the agency’s rulemaking efforts, NMFS did not attain it: the agency has never evaluated the impact of fishing activities *in the southern states* where whales breed. APPX-130-31, 136-37 (Final Rule). By relying on predictive modeling to spread the burden of risk reduction across all jurisdictions rather than on concrete evidence that targets areas of most significance to the species, NMFS abrogated its statutory mandate under the MMPA to “protect essential habitats, including the rookeries, mating grounds, and areas of similar significance” for the species. 16 U.S.C. § 1361(2).

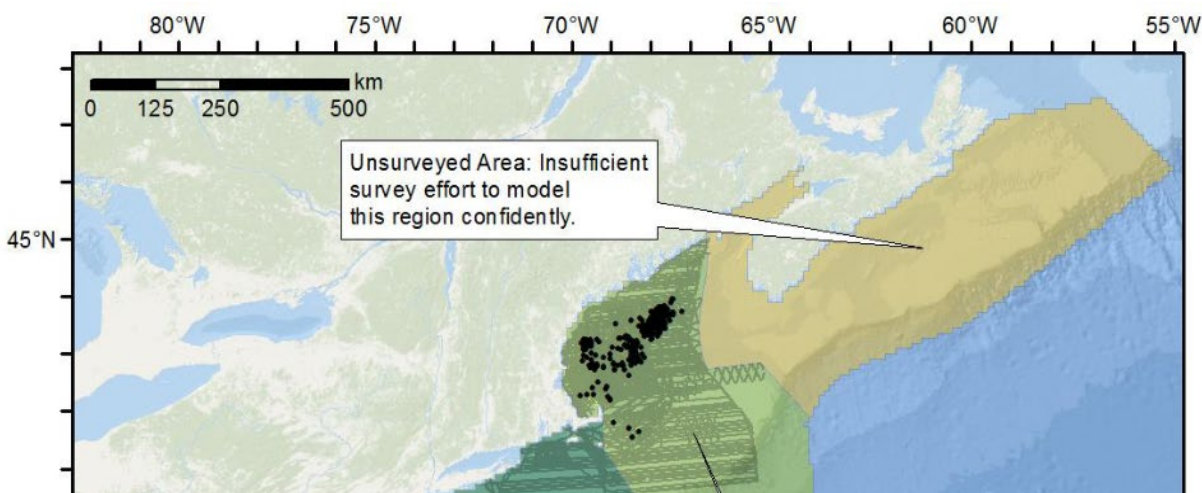
2. NMFS’s DST Modeling was Arbitrary and Capricious.

The District Court properly concluded that the agency cannot ignore aspects of the problem – concrete evidence of areas where “right whales *actually* aggregate” – in favor of “abstract mathematical modeling” that ignores this evidence. APPX-23-24 (Injunction Order). In this case, the abstract co-occurrence modeling NMFS ultimately employed was a “significant departure” from the risk reduction modeling

⁸ This is particularly true since *the Final Rule is still expected to achieve the desired 60% risk reduction across all U.S. waters even without the LMA 1 Restricted Area*. APPX-125, 135, 141, 166 (Final Rule).

that the agency told the ALWTRT it would use. APPX-1312 (MDMR ALWTRP Proposal). NMFS acknowledged substantial uncertainty in each of the models three data sets: 1) the density of lines in the water; 2) the distribution of whales; and 3) the relative threat of gear based on gear strength. APPX-15-16 (Injunction Order) (citing APPX-862, 890 (FEIS)).

With respect to the presence of right whales in the LMA 1 Restricted Area between October and January, the District Court recognized that NMFS’s DST model merely “predict[ed] that right whales ‘may return [to the area in] pre-2010 frequency ... in the future.’” APPX-17 (Injunction Order) (quoting APPX-1054 (FEIS)). The primary basis for this prediction was an external habitat-based density model that confessed an “insufficient survey effort” in Canadian waters resulted in the model’s inability “to model this region confidently”:



APPX-364 (2021 BiOp).⁹ NMFS’s prediction that right whales could return to the

⁹ See also *Supplemental Figure 3, Roberts et al., Habitat-based cetacean density models for the United States Atlantic and Gulf of Mexico* (2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4776172/> (last visited September 16, 2021).

LMA 1 Restricted Area at some point in the future, in other words, was driven by the fact that the agency did not gather any data pertaining to the large swath of Canadian waters where right whales are increasingly aggregating *now*. APPX-89 (Final Rule’s acknowledgment that NMFS “lack[ed] an actual estimate of the proportion of the right whale population’s exposure to U.S. or Canadian fisheries each year.”). Put another way, because the agency did not include areas where right whales are aggregating, NMFS’s model had to predict they would be present somewhere else.

With respect to line density, the District Court recognized that NMFS did not input any actual line density data into the DST but instead relied on permits and landings estimates because NMFS has “not imposed reporting requirements as a condition of licensure for these offshore federal waters.” APPX-18 (Injunction Order). *See also* APPX-890, 991 (FEIS) (acknowledging that “spatial data is generally lacking on how fishing effort is distributed in federal waters . . . within LMA 1”). The agency also ignored “anecdotal reports of higher gear densities on the LMA 3 side than our data indicate[d],” even though the agency questioned “whether we are underestimating gear density and entanglement threat on the LMA 3 side.” APPX-163, 169 (Final Rule). In fact, modeling performed *after* NMFS first proposed the LMA 1 Restricted Area indicated that the LMA 1 Restricted Area was even *less* important than the agency previously thought. APPX-933 (FEIS). But because Maine fishermen are not permitted to fish in LMA 3, an LMA 3 closure would not spread risk across jurisdictions, and NMFS used the lack of spatial data in the DST model to justify the LMA 1 Restricted Area.

Finally, with respect to the relative threat of gear based on gear strength, because the effectiveness of all the mitigation measures that NMFS has implemented since 2009 still had not been evaluated at the time of the agency’s modeling, APPX-98, 130 (Final Rule), NMFS was unable to evaluate the threat of existing gear to right whales. Although the agency itself promised that closure areas would only be implemented “[i]f gear and operational measures cannot reach the targets of the Conservation Framework,” APPX-286 (2021 BiOp), these measures will not be implemented until May of 2022. Accordingly, this core component of the DST model was not really a component at all.

While entitled to deference, courts are not expected “to rubber stamp agency decisions.” *Burt Lake Band of Ottawa & Chippewa Indians v. Bernhardt*, No. CV 17-0038 (ABJ), 2020 WL 1451566, at *6 (D.D.C. Mar. 25, 2020). And while “policymaking in a complex society must account for uncertainty,” that “does not imply that it is sufficient for an agency to merely recite the terms ‘substantial uncertainty’ as a justification for its actions.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 52. See *A Cmty. Voice v. U.S. Env’t Prot. Agency*, 997 F.3d 983, 993 (9th Cir. 2021) (“[A]n agency may not continue to rely on uncertainty for regulatory action or inaction that evades statutory duties”); *Greater Yellowstone Coal, Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) (Where an agency is uncertain about the effects of its action, it may not rely on “‘substantial uncertainty’ as a justification for its actions” (quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 52)). In this case, substantial uncertainty in the underlying data (or lack thereof) drove NMFS’s decision-making

process. *See* 85 Fed. Reg. 86,879 (noting the numerous disagreements among members of the ALWTRT concerning how much risk reduction was necessary and the metrics used to compare the wide range of proposals, which “challenged the [ALWTRT’s] ability to develop recommendations”). Although the First Circuit argued that NMFS “did everything it was supposed to do when using a model: It relied on the best evidence it had available and updated the inputs as new information emerge,” APPX-52 (First Circuit Opinion), NMFS itself concedes that these “inputs” had very little certainty or reliability because:

- 1) The location and sub-fishery where entanglement incidents occur can rarely be determined and, therefore, NMFS was required to “make assumptions on the origin of the gear for cases where that information is not available,” 85 Fed. Reg. 86,879, APPX-495 (2021 BiOp);
- 2) Right whale mortality estimates for 2019 and beyond (*after* Canadian regulations took effect) were not available at the time of the Final Rule, APPX-494 (2021 (BiOp);
- 3) NMFS was “unable to partition the entanglement data between the different trap/pot fisheries,” APPX-504-05 (2021 BiOp);
- 4) VBR and trap/pot configuration data was “uncertain” and “spatial data is generally lacking on how fishing effort is distributed in federal waters . . . within LMA 1,” APPX-890, 991 (FEIS);
- 5) The effectiveness of all the mitigation measures that NMFS had implemented since 2009, including sinking groundlines and weak links, still had not been evaluated, APPX-98, 130 (Final Rule);
- 6) NMFS has not evaluated the impact of fishing activities in the southern states where they breed, APPX-136-37 (Final Rule); and
- 7) NMFS “lack[ed] an actual estimate of the proportion of the right whale population’s exposure to U.S. or Canadian fisheries each year.” APPX-89 (Final Rule).

By continuing to impose punitive regulations on fishermen without undertaking any

efforts to resolve the agency's data gaps, or even evaluating the effectiveness of the agency's existing regulations, NMFS leaves nothing but uncertainty in its wake. *See Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1391 (D.C. Cir. 1985) (while an agency "may resolve even substantial factual uncertainties in the exercise of its informed expert judgment," the agency "may not tolerate needless uncertainties in its central assumptions when the evidence fairly allows investigation and solution of those uncertainties"); *A Cmty. Voice*, 997 F.3d at 986, 993 (agency's continued "failure to explain why such lack of data has persisted for more than a decade, in the face of mounting evidence . . . is arbitrary and capricious," particularly when the agency continues to "justif[y] its inaction by citing to gaps in the scientific literature").

Data necessary to resolve these substantial uncertainties was available, could have been available, or *should* have been available to the agency. APPX-33 (finding that a "read of the administrative decision suggests a blinkered adherence to predictive modeling when concrete evidence to solve those uncertainties is reasonably available, as is the case here"). Here, the agency never placed sound traps along the Maine coast until *this year* (even then, it has not uploaded or analyzed those recordings), and it *still* does not conduct surveys over the LMA 1 Restricted Area. APPX-169 (Final Rule), 933 (FEIS). That is the "best scientific and commercial data available," 50 C.F.R. § 402.14, data that the agency was required to use to confirm that its models were "[d]irect[ing] the most protection to areas of predictable high seasonal aggregations of right whales." APPX-927 (FEIS).¹⁰

¹⁰ Making matters worse, the agency has developed the technology to safely tag and track right

3. The Agency Cannot Rely on Evidence Outside the Record.

“[O]rdinarily review of administrative decisions is to be confined to ‘consideration of the decision of the agency . . . and of the evidence on which it was based.’” *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (quoting *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-715 (1963). “If the decision of the agency ‘is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.” *Id.* The District Court noted that “[d]uring the oral argument on Plaintiffs’ Motion, the Agency read from a website that purports to collect acoustical data collected by a non-governmental entity, but the Agency did not place any such data in the record to substantiate the Agency’s decision-making process.” APPX-24 (Injunction Order). *See also* APPX-33 (“when referencing scientific findings during oral argument, the Agency conceded reading to me from a third-party webpage not included in the record. The opportunity remains to rehabilitate that opening presentation in later proceedings, but my preliminary findings for purposes of Plaintiffs’ motion for injunctive relief were based on the record presented to me at that time, which omits a substantial evidentiary bases for the model”).

The First Circuit went outside the administrative record. “More recent acoustic data posted on the NOAA website shows just what the Agency modeling

whales, a solution to all of NMFS’s substantial uncertainty. APPX-155 (Final Rule). By tagging and tracking whales, the agency would have concrete, real-time data revealing with precision where each member of the species is at any given moment. This data would identify, verify, and justify “areas of predictable seasonal aggregations of right whales” that would permit dynamic fishery management, including when essential, seasonal closures. APPX-504 (2021 BiOp). The reason this seemingly obvious solution has not been implemented? The “global pandemic.” APPX-155 (Final Rule).

predicted: right whale acoustics in and around the LMA 1 restricted area. These data illustrate the benefits of the Agency's decision to act on the basis of its model rather than simply assume that no whales are imperiled in the LMA-1 restricted area during the winter months.” APPX-56 (First Circuit Opinion) (internal citation omitted).¹¹ Obviously, this data was not before the agency at the time it promulgated the Final Rule on August 30, 2021. Moreover, this data was not cultivated by the agency itself but by external source called “Whalemap,” a third-party website that allows anyone and everyone to input a right whale sighting without verification.¹² By relying on external data with suspect evidentiary value, “the Court of Appeals overstepped the bounds of its reviewing authority in issuing the order presently before us.” *Transcon. Gas Pipe Line Corp.*, 423 U.S. at 331-32.

C. A Stay of the District Court’s Injunction Order Will Cause the Petitioners Irreparable Harm and Is Not in the Public Interest.

As the District Court concluded, the “certain economic harms that would result

¹¹ See NOAA, Right Whale Sighting Advisory System, <https://apps-nefsc.fisheries.noaa.gov/psb/surveys/MapperiframeWithText.html>. (last accessed Nov. 16, 2021). The First Circuit also wrongly attributed its consideration of data not in the record to the “plaintiffs’ invitation.” APPX-56 (First Circuit Opinion). It was the *Respondents* who urged the Court to consider this data. See, e.g., *Federal Appellants’ Mot. to Stay* at 22 n.6, 1st Cir. Case No. 21-1783, Doc. No. 001178383 (citing purported acoustic glider data for November 4, 2021). The Petitioners explicitly argued that NMFS “did not place any such data in the record to substantiate the Agency’s decision-making process,” which was why it was so important for the Court to reject a stay of the District Court’s Injunction Order. See *Appellees’ Resp. to Mot. to Stay* at 22-23 n.6, 1st Cir. Case No. 21-1873, Doc. No. 00117808815.

¹² See <https://whalemap.org>. Indeed, according to Whalemap, there was a “definitive” right whale sighting on top of a mountain on Prince Edward Island on August 14, 2019. *Id.* Not uncoincidentally, the “sightings” referred to by the First Circuit were reported to Whalemap on November 4th, the day *before* NMFS moved for a stay of the District’s Court’s Injunction Order in the First Circuit. See *id.* A closer look at this so-called “glider” data reveals that the November 4th detection was also classified as a humpback whale sighting. See http://dcs.whoi.edu/um1021/um1021_um_240_html/um1021_um_240_manual_analysis_table_20211104.html (possible detection of right whale on November 4th questioned as a “[p]ossible HW [humpback whale] calling”).

from allowing this closure to go into effect outweigh the uncertain and unknown benefits of closing some of the richest fishing ground in Maine for three months based on a prediction that it might be a hotspot for right whale entanglement,” while there is an “overriding public interest in insisting on orderly and epistemically sound rulemaking that members of the public have reason to believe is grounded in reality.” APPX-28 (Injunction Order). Even the First Circuit did “not doubt that [the LMA 1 Restricted Area] presents a major financial hardship for those individuals” that “set traps annually in the restricted area,” APPX-60 (First Circuit Opinion), though the Court ultimately concluded that “Congress has effectively declared the public interest and weighed the equities in accord with the balance struck by the Agency” and “has placed its thumb on the scale for the whales.” *Id.* at 40, 62.

Typically, courts considering a request for an injunction must balance the hardships between the Plaintiff and the Defendant. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010). According to the First Circuit, however, in ESA cases “in which the laws the government seeks to implement are aimed at the protection of an endangered species and when the only alleged injury is of an economic kind,” the balance always “tips heavily in favor of the species.” APPX-60-62 (First Circuit Opinion) (quoting *Strahan v. Cox*, 127 F.3d 155, 171 (1st Cir. 1997)). This line of reasoning was spawned by this Court’s statement in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), that Congress made it “abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.” *Id.* at 194. Circuits are split (and the First Circuit has been internally

inconsistent) on whether the balance of harms always weighs in favor of whatever is necessary to prevent irreparable harm to the species. *Compare Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (“In cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties’ competing interests.”) *with Animal Welfare Inst. v. Martin*, 623 F.3d 19, 26 (1st Cir. 2010) (rejecting the Ninth Circuit’s “circumvent[ion] of the traditional injunction inquiry” as “wrong”).

Because this case involves economic harms to small businesses, the balancing of harms cannot be so rigid. By law, every Maine lobsterman is a self-employed small business owner – unlike in other states, there is no corporate ownership of Maine’s lobstering fleet. *See* 12 M.R.S. §§ 6431-E & G. The RFA requires agencies to assess any potential effects that its rulemaking might have on small entities and to consider alternatives that would “minimize any significant economic impact” on those small entities. *See* 5 U.S.C. §§ 603(b)(3) & 604(a). In other words, the ESA does not automatically tip in favor of the species when small businesses are involved.

In this case, the impact of the LMA 1 Restricted Area on Maine’s small lobstering businesses is enormous: even using NMFS’s absurdly low estimates, the costs to the State of Maine’s economy (particularly in Hancock and Knox Counties, where 90% of all landings are harvested from federal waters) would be devastating. APPX-1142-43 (FEIS).¹³ The LMA 1 Restricted Area would impact 123 of Maine’s

¹³ NMFS estimates that affected fishermen will suffer only a 5%-10% reduction in their landings “based on the natural lobster mortality rate.” APPX-92 (Final Rule), 1124 (FEIS). Otherwise, NMFS promises that “[n]early all the lobsters not caught during the restricted area closure are assumed to be caught at other locations or later in the year.” APPX-92 (Final Rule). This hypothesis

largest and most productive fishing vessels, *id.* at 1124, 1139, many of which come from Vinalhaven and in Stonington, the State’s top two lobster ports. *Id.* at 1013. Many of these vessels only fish in the LMA 1 Restricted Area, and they only fish in that area between October and January of each year. APPX-1339 at ¶ 6 (Decl. of Virginia Olsen). These fishermen and their communities have no other means to make a living except by fishing in these waters during this specific time of year, and even the loss of one season will see their vessels repossessed and their gear obsolete due to changing regulations with no funds to update them.

This is not a case where fishermen will simply “relocate their gear to fishing grounds within the same or directly adjacent Maine lobster management zones” as NMFS promises. APPX-92 (Final Rule). First, the LMA 1 Restricted Area provides winter fishing grounds for many families; these fishermen cannot fish in the “same” or “directly adjacent” area in the winter months if they (or others) have already fished those grounds in the summer – they cannot catch the same lobster twice. Second, Maine law requires lobstermen to “declare the lobster management zone in which that person proposes to fish a majority of that person’s lobster traps . . . A person may not place any lobster traps in a zone that is not identified on that person’s license.” 12 M.R.S. § 6446(1-A). Affected fishermen cannot simply “relocate their gear” to “directly adjacent Maine lobster management zones.” Third, even if their permits allow them to locate displaced traps to a “adjacent Maine lobster management zone,” gear conflicts in this State are legendary, and families protect their generational

lacks common sense for the reasons expressed herein.

summer *and* winter fishing grounds at all costs. Finally, groundfishermen from away are almost certain to infiltrate the LMA 1 Restricted Area, where federal law will allow them to keep up to 100 lobsters a day (or 500 per trip) caught as incidental bycatch. *See* 50 C.F.R. § 697.17. By February, Maine fishermen will return to the LMA 1 Restricted Area only to find their harvest depleted and their fishing grounds accosted, if they are able to return at all.

The harm does not stop there. As the District Court correctly noted, NMFS did not properly take into consideration “the local impact of a closure of the LMA 1 Restricted Area.” APPX-25 (Injunction Order). With a loss of substantial revenue at the boat-level, the sternmen, processors, wholesalers, trap builders, mechanics, and other affected parties that depend on the LMA 1 Restricted Area will incur substantial losses as well. Lobster 207 (a wholesale business solely owned by the members of the MLU) stands to lose approximately 4 million pounds in volume due to the closure this year alone. APPX-1341 at ¶ 10 (Decl. of Virginia Olsen). Although Maine’s lobster industry contributes \$1 billion annually to the State’s economy and supports 5,500 jobs directly, NMFS conducted no analysis of the economic impact of the loss of all lobsters harvested from 967 square miles of prime fishing grounds during a season when prices are highest. APPX-1124-25 (FEIS).

The harm caused by the LMA 1 Restricted Area is not merely economic: the threat of a “much more permanent loss of their existing fishing grounds due to regulatory standards that effectively cede th[eir] interests to larger economic forces with which they compete. Specifically, they fear that they will return to the LMA 1

Restricted Area in the spring to find either the area overrun with ropeless traps set by competitors or an ecosystem ruined by ground fishing.” APPX-26-27 (Injunction Order). Moreover, the “logistical difficulties and resulting chaos when a fleet of lobstermen are dislocated from their traditional fishing grounds and find themselves seeking shelter from the storm in other claimed grounds” will cause irreparable turmoil in the coastal communities that are the lifeblood of this State. *Id.* at 26. Put simply, the identity and heritage of the entire State hangs in the balance.

Finally, the LMA 1 Restricted Area is not necessary to prevent irreparable harm to an endangered species. The closure will account for only 6.6% of the Final Rule’s overall 69% risk reduction and is not necessary to achieve its 60% reduction goal. APPX-125, 135, 141, 166 (Final Rule); 85 Fed. Reg. 86,882. NMFS has not “identified a geographic location or discrete temporal period within which emergency action would address a specific entanglement concern.” APPX-133 (Final Rule). Neither the public nor the right whale have any interest in regulations that are designed to placate environmental groups by spreading burdens across jurisdictions and closing winter fishing grounds where right whales are only expected in the spring, APPX-466 (2021 BiOp), while *each* of the seven known hotspots where right whales *are* in fact aggregating, including those feeding grounds to which the right whale is currently migrating, remain open to VBRs. *See id.* at 480. The public has an interest in an agency that works to resolve the agency’s substantial uncertainties on how best to address the entanglement problem by gathering the best available data, not in rulemaking that ignores that data and instead employs predictive

modeling to justify closing areas where right whales do not aggregate, just so that areas where they *do* aggregate can remain open. The public has an interest in rulemaking that analyzes the effectiveness of its past regulatory measures before it destroys hundreds of small businesses. And the public has an interest in rulemaking directed at areas of most significance to the species, not in draconian fishing closures that are “not calibrated to the co-occurrence of whales and fishing effort.” APPX-12 (Injunction Order). The fact that the agency has the necessary tools at its disposal to engage in reasoned rulemaking but fails to employ them counsels against staying a well-considered injunction that will compel the agency to gather data that it has been unwilling to gather in the past.

CONCLUSION

WHEREFORE, the Petitioners respectfully request that the Court issue an emergency writ of injunction reinstating the District Court’s Injunction Order or, in the alternative, an order vacating the First Circuit’s stay of that Order, pending the filing and disposition of a Petition for a Writ of Certiorari.

Dated at Portland, Maine this 24th day of November, 2021.

Respectfully Submitted,

/s/ Michael A. Cunniff
Michael A. Cunniff
(counsel of record)

/s/ Alfred C. Frawley IV
Alfred C. Frawley IV

McCLOSKEY, MINA, CUNNIFF & FRAWLEY, LLC
12 City Center
Portland, Maine 04101
Tel: (207) 772-6805
Fax: (207) 879-9374
mcunniff@lawmmc.com
afrawley@lawmmc.com

Attorneys for Petitioners

Certificate of Service

I hereby certify that on this 24th day of November, 2021, I sent to this Court one original and two copies of the foregoing via Overnight United States Mail. I further certify that, as required by Sup. Ct. R. 29(3), I served one copy of the foregoing via U.S. Mail and electronic mail upon:

TODD KIM
Assistant Attorney General
ERIKA B. KRANZ
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 532-3379
erika.kranz@usdoj.gov

I further certify that, as required by Sup. Ct. R. 29(3), I served one copy of the foregoing via U.S. Mail upon:

Gina M. Raimondo
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Ave. NW
Washington, DC 20230

Janet Coit
Assistant Administrator
NOAA Fisheries Service
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Elizabeth Prelogar
Solicitor General, Room 5616
U.S. Department of Justice
950 Pennsylvania Avenue,
NW Washington, DC 20530-0001
SupremeCtBriefs@USDOT.gov

Dated a Portland, Maine this 24th Day of November, 2021.

/s/ Michael A. Cunniff
Michael A. Cunniff
(counsel of record)

MCCLOSKEY, MINA, CUNNIFF & FRAWLEY, LLC
12 City Center
Portland, Maine 04101
Tel: (207) 772-6805
Fax: (207) 879-9374
mcunniff@lawmmc.com

Attorneys for Petitioners

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