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To:	MLA Fisheries Committee Members
From:	Justin G. Guthrie, YLC Liaison
Date:	October 24, 2024
Re:	2024 Fall MLA Meeting – Fisheries Committee – Recent Case Update

***Lofstad v. Raimondo*, No. 24-1420, 2024 U.S. App. LEXIS 24317 (3d Cir. Sep. 25, 2024)**

FACTS: Plaintiffs, commercial fishermen, challenged the National Marine Fisheries Service's ("NMFS") promulgation of a final rule that altered the allocation of summer flounder, scup, and black sea bass between the recreational and commercial sectors. Plaintiffs alleged harm from this reallocation and objected to the constitutional composition of the Mid-Atlantic Fishery Management Council.

The Mid-Atlantic Fishery Management Council is just one of the eight regional fishery management councils in the United States, promulgated under the Magnuson-Stevens Act. In this case, the Mid-Atlantic Fishery Management Council proposed the rule and the Fishery Management Plan ("FMP") that Plaintiffs challenged.

In short, Plaintiffs argued that the twenty-one members of the Mid-Atlantic Fishery Management Council exercised power of, but were not properly appointed as, "officers" under the Appointments Clause of the United States Constitution; therefore, the NMFS should not have promulgated the challenged rule.

The New Jersey District Court denied Plaintiffs' Motion for Summary Judgment and granted the United States' Motion. On appeal, the Third Circuit Court of Appeals reversed, rendering judgment in favor of Plaintiffs.

ISSUE: Whether the members of the Mid-Atlantic Fishery Management Council are "Officers of the United States" under U.S. Const. art. II, § 2, c. 2., the Appointments Clause, and whether the members of the Mid-Atlantic Council were properly appointed?

HOLDING: The members of the Mid-Atlantic Council were (and are) "Officers of the United States" under U.S. Const. art. II, § 2, c. 2., and they were not properly appointed. The Third Circuit severed the unconstitutional powers that the Mid-Atlantic Council members exercised.

REASONING: Plaintiffs argued that, by proposing the challenged rule, the Mid-Atlantic Fishery Management Council acted as "Officers of the United States" under U.S. Const. art. II, § 2, c. 2., and they had not been properly appointed. The Third Circuit agreed, noting the Constitution

specified the procedure for appointing some federal officials. That is, "principal officers" must be nominated by the President and confirmed by the Senate. However, "inferior officers" may, with congressional approval, be appointed by the President, the Courts of Law, or the Heads of Departments of the executive branch. These procedures do not apply to the hiring of "mere employees." To distinguish "officers" from "mere employees," the United States Supreme Court provided two guideposts.

First, employees' duties may be merely "occasional or temporary," while officers' duties must be "continuing and permanent." *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511-12 (1879)). The United States did not dispute this first guidepost, admitting that the Mid-Atlantic Council members' duties were continuing.

Second, officers must "exercis[e] significant authority" under federal law. *Lucia, supra*. (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). That inquiry turns on how much "power an individual wields in carrying out his assigned functions." *Id*. Having significant duties and discretion to carry them out is significant authority. *Freytag v. Comm'r*, 501 U.S. 868, 881-82 (1991). Power akin to a federal judge's also suffices. *Id*.; *Lucia*, 585 U.S. at 246. So do "broad administrative powers" to make rules, issue advisory opinions, and decide who is eligible to get funds and to run for office without day-to-day supervision. *Buckley*, 424 U.S. at 140-41. Our inquiry also turns on whether another part of the federal executive, legislative, or judicial branch can "control or direct[]" how an official exercises her powers. *Id*. at 126. With respect to this second guidepost, the United States argued that the Mid-Atlantic Council's role was purely advisory. However, the Third Circuit noted that some of the Council members' powers went "well beyond advice" as such members could block some actions by the Secretary of Commerce (e.g., by withholding their assent to a limited access fishery system, the Mid-Atlantic Council members could 'pocket-veto' certain actions by the Secretary of Commerce). Thus, because those powers were considered significant, the Third Circuit found that the Mid-Atlantic Council members were officers, not just "mere employees."

The Third Circuit further found that the Mid-Atlantic Council members were not only officers, but "principal officers." To decide whether an officer is a "principal officer," courts consider whether the officers have power to make final decisions of the United States. *United States v. Arthrex, Inc*., 594 U.S. 1, 13 (2021). That is, officers with "unreviewable authority" are principal officers. *Id*. The Third Circuit found that the Mid-Atlantic Council members held unreviewable authority since no principal officer at any level within the Executive Branch directed and supervised the Mid-Atlantic Council members' pocket vetoes. Instead, these Council members actually exercised their pocket veto power over a "principal officer," the Secretary of Commerce. Thus, the Third Circuit found that the Mid-Atlantic Council members were "principal officers" that should be appointed by the President and confirmed by the Senate. Since the Mid-Atlantic Council members were not so appointed, their appointments were unconstitutional.

The foregoing being the case, the Third Circuit severed the Mid-Atlantic Council's pocket-veto powers in 16 U.S.C. § 1854(c)(3), 1854(h), and 1856 (a)(3)(B), stripping the Council of its significant authority.

***Arnesen v. Raimondo*, No. 24-60055, 2024 U.S. App. LEXIS 21451 (5th Cir. Aug. 23, 2024)**

FACTS: Plaintiffs, commercial fishermen, challenged the constitutionality of the Gulf of Mexico Fishery Management Council on both removal and appointment grounds. The suit there arose from approval of an amendment to a final rule to that region's FMP, recommended by the Gulf of Mexico Fishery Management Council, which significantly reduced the greater amberjack catch limit.

Plaintiffs argued that the rule was void because the Gulf of Mexico Fishery Management Council members were improperly appointed under U.S. Const. art. II, § 2, c. 2. The Southern District of Mississippi initially decided that six of the seventeen Council members were "inferior officers" whose appointments violated the Appointments Clause; however, the decision to implement the rule was not made by those Council members, it was instead made by the Secretary of Commerce's designee, the NMFS' Assistant Administrator. Moreover, according to the Southern District, the remaining eleven Council members were properly appointed. Therefore, the Southern District of Mississippi granted the United States' Motion for Summary Judgment. On appeal, the Fifth Circuit Court of Appeals remanded the case to the Southern District of Mississippi.

ISSUE: Whether the members of the Gulf of Mexico Fishery Management Council were improperly appointed under U.S. Const. art. II, § 2, c. 2., the Appointments Clause, and whether they were unconstitutionally insulated from removal?

HOLDING: On appeal, the Fifth Circuit Court of Appeals remanded the case to the Southern District of Mississippi with instruction to address: 1) whether there was jurisdiction to consider the Plaintiffs' requested relief, i.e., declaring the final rule itself void and enjoining the voting members of the Gulf of Mexico Fishery Management Council from developing further annual catch limits for the greater amberjack fishery in light of the United States' contention that judicial review under 16 U.S.C. § 1655(f)(1)-(2) was limited to "regulation promulgated by the Secretary" and "actions that are taken by the Secretary under regulations which implement a fishery management plan;" and 2) whether the NMFS Assistant Administrator's review and approval of the amendment functioned as a ratification of the Gulf of Mexico Fishery Management Council's actions.

REASONING: The Fifth Circuit noted it was bound by its recent precedent in *Braidwood Mgmt. v. Becerra*, 104 F.4th 930 (5th Cir. 2024), where a district court considered an Appointments Clause challenge to three bodies affiliated with the Department of Health and Human Services. As to one of those three bodies, the district court concluded that its members were "principal officers" who were improperly appointed. The Fifth Circuit affirmed. However, the district court in that case had rejected the Appointments Clause challenge to the two other bodies, and the Fifth Circuit, rather than consider whether those two bodies were constituted by individuals serving in violation of the Appointments Clause, remanded to the district court to allow that court to fully consider the challenges before review by the Fifth Circuit. Following its decision in *Braidwood*, the Fifth Circuit remanded to the Southern District of Mississippi with instructions to address the foregoing issues, noting that it would prefer to be the "court of review, not first view."

***A.P. Bell Fish Co. v. Raimondo*, 94 F.4th 60 (D.C. Cir. 2024)**

FACTS: The NMFS promulgated a final rule that implemented an amendment to the FMP for the Reef Fish Resources of the Gulf of Mexico, which modified/redistributed the allocation of red grouper between the commercial sectors (reducing) and recreational sectors (increasing). Plaintiff, commercial fishermen, challenged the rule, arguing that the NMFS relied upon inconsistent economic analyses, one of which the NMFS itself had previously rejected, and that the NMFS failed to comply with the Magnuson-Stevens Fishery Conservation and Management Act. Specifically, as to the latter contention, Plaintiffs argued that the final rule promulgated by the NMFS lacked the required catch limits and accountability measures and violated National Standards 4 and 9 under the Magnuson-Stevens Act. The United States District Court for the District of Columbia granted Summary Judgment to the NMFS. On appeal, the D.C. Circuit Court of Appeals affirmed, in part, and reversed, in part.

ISSUE: Whether the NMFS improperly applied an economic analysis that it had previously rejected when promulgating a prior rule modifying the allocation of red snapper in 2016 to the instant rule modifying the allocation of red grouper, and whether the NMFS complied with the Magnuson-Stevens Act when promulgating the instant rule under the Administrative Procedure Act ("APA")?

HOLDING: The D.C. Circuit agreed with Plaintiffs in part, finding that the NMFS failed to adequately explain its reliance on the disputed economic analysis and that further analysis was needed to determine how the NMFS' reliance upon an economic analysis it had previously rejected influenced the application of National Standards 4 and 9 to the instant rule allocating red grouper between the commercial and recreational sectors. However, the D.C. Circuit agreed with the district court that the promulgation of the rule complied with the Magnuson-Stevens Act's requirement to establish a mechanism for specifying annual catch limits. As a result, the D.C. Circuit affirmed, in part, and reversed, in part, remanding the case without vacating the rule such that the NMFS could further explain its economic methodology, which would inform whether the rule actually complied with National Standards 4 and 9 under the Magnuson-Stevens Act.

REASONING: According to the D.C. Circuit, historically the NMFS allocated 76% of the annual catch limit for red grouper to the commercial sector and 24% to the recreational sector based upon data from landings collected between 1986 and 2005.

In 2007, Congress directed the NMFS to improve the quality and accuracy of its data collection, leading to the creation of a new survey methodology. In the rule promulgated by the Gulf of Mexico Fishery Management Council with respect to red grouper, the Gulf of Mexico Council recommended changing the commercial and recreational sector allocation to reflect updated data from the new surveys. Ultimately, six allocation alternatives were provided, and the Gulf of Mexico Council chose the third option because it 'best reflected the historical participation by the commercial and recreational sectors, it fairly and equitably distributed the needed reduction in catch between the sectors and provided the greatest net economic benefits to the United States.' Accordingly, the rule reduced the commercial sector's allocation of red grouper from 76% to 59.3% and increased the recreational sector allocation from 24% to 40.7%.

With respect to the disputed economic analysis, the D.C. Circuit noted the NMFS had previously revised the commercial and recreational allocation for the red *snapper* in 2016. In short, when promulgating that prior rule, the NMFS discredited and rejected the "equimarginal principle," which compared the marginal values of the commercial and recreational sectors to determine the level of allocation to each sector and to determine the greatest net economic benefits. The D.C. Circuit noted, however, the NMFS had essentially used that same principle to promulgate the instant rule redistributing the allocation of red grouper. Based on this apparent flaw, the D.C. Circuit remanded because the D.C. Circuit could not discern whether the NMFS would have reached the same result had it not relied upon an economic analysis that the NMFS had previously discredited.

With respect to National Standard 4, which provides that "[i]f it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be . . . reasonably calculated to promote conservation" 16 U.S.C. § 1851(a)(4)(B), the D.C. Circuit found that it did not need to address Plaintiffs' argument that the promulgated rule violated National Standard 4. Instead, the D.C. Circuit found that the rule may be sufficient to promote conservation by substantially reducing catch limits; however, that conclusion would depend on how the NMFS addressed/explained its reliance on the economic analysis it had previously rejected.

With respect to National Standard 9, which directs the NMFS "to the extent practicable," to "minimize bycatch and[,] . . . to the extent bycatch cannot be avoided, [to] minimize the mortality of such bycatch" 16 U.S.C. § 1851(a)(9), the D.C. Circuit found that the NMFS did not consider measures to directly reduce the bycatch of red grouper and other species of fish. However, the D.C. Circuit similarly refused to conclude that the NMFS violated National Standard 9, opting instead to remand.

***Ctr. for Biological Diversity v. Nat'l Marine Fisheries Serv.*, No. 22-5295, 2024 U.S. App. LEXIS 15153 (D.C. Cir. June 21, 2024)**

FACTS: In 2019 the NMFS issued a rule to protect sea turtles against incidental takings. Incidental takings occur when shrimpers, for instance, cast trawl nets into the sea and accidentally ensnare sea turtles. If the sea turtles cannot escape, they drown. However, trawl nets can be fitted with a 'turtle exclusion device,' which allows sea turtles to escape. Previously, the NMFS had never required every shrimper to use a turtle exclusion device, but, before 2019, deep-water shrimpers using otter trawl nets were required to install such devices. Shallower-water shrimpers using skimmer trawls, pusher-heard trawls, and butterfly trawls were not required to install a turtle exclusive device.

In 2016, the NMFS proposed a rule, and the proposal considered seven regulatory options, ranging from: 1) the *status quo*; 2) requiring additional shrimpers to use turtle excluder devices based on vessel length, type of trawl, and fishing location; to 3) requiring all shrimpers to use turtle exclude devices. Among those options, the NMFS preferred the most expensive, which required all shrimpers using skimmer, pusher-head, or butterfly trawls to use turtle excluder devices. After commenters expressed concern, the NMFS promulgated a more modest final rule in 2019, requiring that shrimpers using skimmer trawls on vessels at least forty feet in length must use turtle excluder devices.

In the view of three environmental organizations, the 2019 final rule should have covered at least as many shrimpers as the 2016 proposed rule, and they sued arguing that the NMFS' final rule was arbitrary and capricious because it was inadequately explained, it was not a logical outgrowth of the proposed rule that preceded it, and the NMFS was required by the National Environmental Protection Act ("NEPA") to conduct a species-by-species analysis of the protected turtle populations, rather than an analysis of the aggregate population of protected turtles. The District Court for the District of Columbia granted Summary Judgment to the NMFS, and the D.C. Circuit affirmed.

ISSUE: Whether the NMFS' more modest final rule in 2019, requiring shrimpers using skimmer trawls on vessels at least forty feet in length to use turtle excluder devices, was arbitrary and capricious in violation of the Administrative Procedure Act ("APA"), whether the final rule was a logical outgrowth of the 2016 proposed rule, and whether the 2019 final rule violated the NEPA by not listing the benefits to each protected species of sea turtles?

HOLDING: The NMFS' more modest final rule in 2019 was not arbitrary and capricious, the final rule was indeed a logical outgrowth of the 2016 proposed rule, and the 2019 final rule did not violate the NEPA.

REASONING: The D.C. Circuit noted that it does not set aside agency action when the agency has adequately "explained its logic and the policies underlying its choices," *N. America's Bldg. Trades Unions v. OSHA*, 433 U.S. App. D.C. 294, 325, 878 F.3d 271, 303 (2017) (cleaned up), nor does the court penalize an agency simply because it first proposed a broad rule and later adopted a narrower rule. *Ne. Md. Waste Disposal Auth. v. EPA*, 360 U.S. App. D.C. 129, 142, 358 F.3d 936, 949 (2004). The D.C. Circuit found that the 2019 rule was not arbitrary and capricious. While it did not cover as many shrimpers as the 2016 proposed rule that preceded it, the 2016 proposal was preliminary. It was followed by comments urging the NMFS to impose a smaller economic burden on the fishing industry and the NMFS was free to modify proposed rules based on comments received. The NMFS' final rule reflected a policy choice. That is, under the 2019 final rule, up to 1,158 sea turtles would be saved at an annual cost of $3.7 million while the 2016 proposed rule was projected to save more than twice as many turtles but would have imposed nearly four times the cost on the shrimping industry.

When balancing these projected costs and benefits, the 2019 final rule explained that the covered vessels were expected to encounter sea turtles on the fishing grounds more frequently than smaller, part time vessels. The rule further explained that the shrimpers on those full-time, larger vessels, could better absorb compliance costs. Considered together, these explanations indicated that the 2019 final rule was reasonable. While the D.C. Circuit noted that the environmental groups plainly believed more sea turtles should be protected, even at the expense of shrimpers, the D.C. Circuit noted that even environmental groups had to concede that industry compliance costs were relevant.

The D.C. Circuit also found the 2019 final rule was a logical outgrowth of the 2016 proposed rule. The D.C. Circuit noted that it is proper and often necessary for agencies to continue deliberations and internal decision making after the close of public comment in order to assimilate those comments and arrive at a final policy choice. As applied to the instant matter, the D.C. Circuit found that the 2019 final rule was a logical outgrowth of the 2016 proposed rule because the NMFS made it clear that it intended to account for both the sea turtle conversation and the economic

impact of its proposed regulations. Notably, the final rule in 2019 fell squarely between the range of options in the 2016 proposed rule.

Finally, the D.C. Circuit found that the 2019 final rule did not violate the NEPA. The final rule listed the benefits to protected sea turtles as a whole, and it did not need to separately list the benefits to each protected species of sea turtles. Even if this issue were relevant, however, the D.C. Circuit found that it was not timely raised.

***Wild Fish Conservancy v. Quan*, Nos. 23-35322, 23-35323, 23-35324, 23-35354, 2024 U.S. App. LEXIS 20758 (9th Cir. Aug. 16, 2024)**

FACTS: The NMFS issued a biological opinion in 2019 addressing how certain federal actions would affect the endangered southern resident killer whales and threatened populations of Chinook salmon. The NMFS concluded that the proposed actions complied with the Endangered Species Act ("ESA"). Plaintiffs, however, challenged the 2019 opinion in federal district court, claiming that the NMFS violated the ESA, Administrative Procedure Act ("APA"), and the National Environmental Policy Act ("NEPA").

In August 2022, the Western District of Washington held that the NMFS erred in issuing an incidental take statement that authorized the southeastern Alaska troll fishery to harvest Chinook salmon, despite a potential reduction in prey for killer whales and approving a program that funded Chinook salmon hatcheries to increase prey for killer whales. The NMFS accepted the merits of that decision and began preparing a new biological opinion.

In May 2023, the Western District issued its decision on the proper remedies pending remand, vacating the take statement, but not the prey increase program. The parties appealed the Western District's decision, and the Ninth Circuit reversed the Western District's vacatur of the take statement and affirmed its decision not to vacate the prey increase program.

ISSUE: Whether the Western District of Washington abused its discretion by vacating the NMFS' take statement, which authorized the Alaskan troll fishery's summer and winter Chinook salmon harvests, and whether the Western District properly chose not to vacate the corresponding prey increase program?

HOLDING: The Ninth Circuit found that the Western District abused its discretion by vacating the take statement's authorization of the troll fishery's summer and winter Chinook salmon harvests, but the Western District properly chose not to vacate the prey increase program.

REASONING: Vacatur of unlawful agency actions is the presumptive remedy under the APA, *350 Mont. v. Haaland*, 50 F.4th 1254, 1272 (9th Cir. 2022) (citing *All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1120 (9th Cir. 2018)), district courts remand without vacatur "when equity demands." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). The equitable determination requires district courts to apply the *Allied Signal* test, weighing: 1) the seriousness of the agency's errors, against 2) the disruptive consequences of vacatur. *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (*per curiam*) (citing *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51, 300 U.S. App. D.C. 198 (D.C. Cir. 1993)).

The Ninth Circuit noted that the Western District had held that the NMFS committed serious ESA and NEPA violations when it issued the take statement in 2019. In particular, the Western District found that the NMFS violated the ESA by relying on uncertain and indefinite mitigation from the prey increase program when evaluating and issuing the take statement. However, the Ninth Circuit found that the Western District disregarded the likelihood that the take statement would be supported by better reasoning. As the Western District had recognized elsewhere in its analysis, the prey increase program, previously "uncertain and indefinite," had been running for more than three years and had generated a certain and definite increase in prey by the time the Western District issued its remedies decision. Therefore, according to the Ninth Circuit, the Western District had erred by ignoring that the NMFS' errors, which, though serious, were unlikely to have affected the substance of the decision adopted on remand.

Turning to the second *Allied-Signal* factor, the Ninth Circuit found that the Western District had erred in overlooking the disruptive consequences of vacatur. That is, vacating the take statement would lead to millions of dollars of losses for Alaskan fishermen and their communities. The Western District, however, "glossed over" these significant economic consequences, as well as the downstream social and cultural harms to fishing villages and Alaska natives. The Plaintiffs' expert recognized that there was considerable uncertainty about how the troll fishery affected prey availability and projected that precluding the fishery from harvesting Chinook salmon would only lead to minor benefits for the whales in a given year. The Western District, however, found that vacatur would lead to uncertain but meaningful benefits, and it emphasized that vacatur was required because of the "presumption of vacatur" and its "mandate" to protect the whales. However, the Ninth Circuit found the Western District's analysis improperly predetermined the outcome of the *Allied-Signal* test by double-counting the NMFS' ESA violation as both a serious error and substantive consideration, superseding the disruptive consequences of vacatur.

With respect to the prey increase program, the Ninth Circuit affirmed the Western District. According to the Ninth Circuit, the Western District had correctly held that the NMFS committed serious ESA and NEPA violations but was poised to remedy those missteps and incorporate the results of site-specific NEPA review into a new biological opinion. The Ninth Circuit further agreed that vacatur of this prey increase program would lead to disruptive consequences, including negative environmental consequences because the prey program provided an important targeted source of prey for the killer whales. In addition, vacatur would disrupt unrelated fisheries and federal actions. In view of those disruptions, the Ninth Circuit found the Western District did not abuse its discretion by concluding that the disruptive consequences of vacating the prey increase program outweighed the seriousness of the NMFS' errors.

***Melone v. Coit,* 100 F.4th 21 (1st Cir. 2024)**

FACTS: This matter is one of two appeals in which various residents of Martha's Vineyard and Nantucket opposed the construction of an offshore wind project. In the instant appeal, the First Circuit considered a challenge to the NMFS' issuance of an Incidental Harassment Authorization ("IHA") to the developer, Vineyard Wind—the receipt of which was necessary for the project.

The First Circuit began by recounting the history of the wind project. In relevant part, in May 2021, the NMFS issued the IHA to Vineyard Wind, which authorized the non-lethal incidental

Level B harassment of no more than twenty North Atlantic right whales. The NMFS concluded that, given the mitigation measures adopted by Vineyard Wind during the construction process, no Level A harassment of the right whales in the Vineyard Wind project's geographic area would occur.

In July 2021, Plaintiff, a part time Martha's Vineyard resident and owner of two solar energy companies, joined the instant matter and filed suit in the District of Massachusetts against the NMFS, the Bureau of Ocean Energy Management ("BOEM"), and other federal agencies, alleging that the Vineyard Wind project approvals violated federal law, including the Marine Mammals Protection Act ("MMPA"), 16 U.S.C. § 1361, *et seq*. Vineyard Wind moved to intervene as a defendant in this matter. Eventually, Plaintiff amended his complaint, asserting two counts under the MMPA relating to the NMFS' issuance of the IHA to Vineyard Wind, Count I alleged that the NMFS did not comply with certain timing-related requirements of the MMPA. Count II alleged that the NMFS' interpretation of the various provisions of the MMPA improperly led it to issue the IHA to Vineyard Wind and that such an action violated the Administrative Procedure Act ("APA").

The District Court for the District of Massachusetts granted Summary Judgment to the NMFS and Vineyard Wind, finding as to Count I that the NMFS did not comply with certain MMPA notice procedures, but that any such error was harmless. As to Count II, the District of Massachusetts found that NMFS complied with the MMPA in issuing the IHA to Vineyard Wind. On appeal, the Plaintiff challenged the District of Massachusetts' ruling allowing Vineyard Wind to intervene as a Defendant and its ruling as to Count II. The First Circuit affirmed.

ISSUE: Whether the District of Massachusetts erred in permitting Vineyard Wind to join as a Defendant under Fed. R. Civ. P. 24(b), and whether the NMFS complied with the MMPA in issuing the IHA to Vineyard Wind that allowed Vineyard Wind to proceed with the construction project?

HOLDING: Vineyard Wind's permissive intervention pursuant to Fed. R. Civ. P. 24(b) was proper, and the NMFS complied with the MMPA in issuing the IHA to Vineyard Wind.

REASONING: The District of Massachusetts denied Vineyard Wind's motion to intervene as a matter of right under Fed. R. Civ. P. 24(a), but permitted permissive intervention under 24(b). In so doing, the First Circuit noted Vineyard Wind had significant interests at stake in the litigation and the outcome from the litigation may impair its ability to protect those interests. The First Circuit further noted that Vineyard Wind did not need to establish independent Article III standing before intervening. *See Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658 (2019) (noting that intervenor's participation in support of other existing defendants did not require invoking the court's jurisdiction, and thus did not require that it independently demonstrate standing, until intervenor alone sought to appeal the district court's order).

With respect to Count II, Plaintiff first argued that the NMFS' determination that the incidental harassment of up to twenty North Atlantic right whales constituted a "small number" under the MMPA was arbitrary, capricious, and unlawful under the APA. Second, Plaintiff argued that the NMFS' consideration of the "specified activity . . . within a specific geographic region" where incidental harassment may occur for purposes of the IHA was impermissibly narrow.

With respect to the first argument, the First Circuit noted that Plaintiff's principal argument was the NMFS erred in finding that the proposed incidental harassment of up to twenty right whales (5.4% of the population) constituted a "small number of species," as required to grant the IHA under the MMPA. Under the MMPA, the NMFS may only authorize the incidental take of a "small number of marine mammals of a species or population stock" via issuance of an IHA. *See* 16 U.S.C § 1371(a)(5)(D)(i). The MMPA does not define "small numbers." The First Circuit reviewed the legislative history, however, and noted that Congress recognized the imprecision of the term "small numbers," but was unable to offer a more precise formulation. Accordingly, the NMFS had historically adopted a "proportional approach" whereby it compared "the number of individuals taken to the most appropriate estimation of abundance of the relevant species" to determine whether the authorized take is limited to a "small number" of that species. The First Circuit noted that its sister circuit, the Ninth Circuit, upheld the U.S. Fish and Wildlife Service's use of such a proportional approach under the MMPA as a reasonable interpretation of the MMPA. *See Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012).

In assessing whether Vineyard Wind's activity would harass only a "small number" of right whales, the NMFS determined that, pursuant to the proportional approach, its authorization to inflict Level B, non-lethal harassment, on up to twenty right whales, constituting less than 5.5% of the population stock, was a "relatively small percentage" of that stock. However, at the district court level, the NMFS had argued and defended its proportional approach by noting that the NMFS has set the upper limit for "small numbers" as one-third of a species' population. Plaintiff thus argued that the NMFS improperly rubberstamped Vineyard Wind's proposed Level B harassment of 5.4-5.5% of the right whale population because it was simply less than one-third.

On appeal, the NMFS walked back its framing of the one-third rule, instead, the NMFS argued that the First Circuit did not need to reach the issue of what constituted the upper limit of the term "small numbers" because the NMFS did not rest its "small numbers" finding with respect to the twenty right whales on the one-third rule. The First Circuit agreed, noting the record showed that the NMFS only invoked the one-third upper limit as a "belated *post hoc* rationalization" of its "small numbers" finding in the litigation. There was no evidence in the administrative record that the one-third rule played any role in the decision process or that it was applied in determining whether to issue Vineyard Wind the IHA.

With respect to Plaintiff's second argument—the NMFS' consideration of the "specified activity . . . within a specific geographic region" where incidental harassment may occur for purposes of the IHA was impermissibly narrow—the First Circuit disagreed. Essentially, Plaintiff argued that the NMFS' approach improperly segmented applicant activities and regions so that the IHA appeared to authorize the non-lethal harassment of only "small numbers" of right whales while ignoring the cumulative effect on the species.

The relevant MMPA legislative history showed that Congress intended the "specified activity" be "narrowly identified so that the anticipated effects" resulting from the activity would "be substantially similar." In this case, based on Vineyard Wind's IHA application, the NMFS considered the "specified activity" to be pile driving associated with the project construction during a one-year period, including the use of vessels to support the installation. To have so considered Vineyard Wind's IHA application and the "specified activity" in such a way was not arbitrary nor capricious, according to the First Circuit.

With respect to Plaintiff's argument that the NMFS failed to consider the cumulative effect on the right whales, resulting from other activities apart from those proposed by Vineyard Wind, the First Circuit found that the NMFS did consider the effects of ongoing and past anthropogenic activities aside from Vineyard Wind's project as part of its "negligible impact" analysis, which analyzed the species' density, distribution, population size, growth, and other relevant stressors.

Finally, the First Circuit rejected Plaintiff's argument that the NMFS improperly limited the region in which covered activities would occur to the area delineated by Vineyard Wind in its IHA application—a 74,614-acre portion of the 675 square kilometer area. Plaintiff argued that the region should encapsulate the North Atlantic right whale's broader habitat up and down the eastern shoreline, from Maine to Florida, or at least the entire area south of Martha's Vineyard. Similar to the term discussed earlier, the MMPA did not define "specific geographic region." The legislative history, however, suggested that the region "should not be larger than is necessary to accomplish the specified activity, and should be drawn in such a way that the effects on marine mammals in the region are substantially the same." The NMFS thus argued that it did not have to define the region more broadly. Moreover, the NMFS noted that it already considered the impact of the entire right whale population when it considered the project's impact on the whales' migration through the project area. The First Circuit agreed, finding that the NMFS' delineation of the "specific geographic region" proper.

***Oliver v. U.S. Bureau of Ocean Energy Mgmt. (In re Nantucket Residents)*, 100 F.4th 1 (1st Cir. 2024)**

FACTS: This matter concerns the Vineyard Wind project off the coast of Nantucket and Martha's Vineyard, and, as far as this appeal was concerned, four federal statutes were relevant—the Outer Continental Shelf Lands Act ("OCSLA"), the Endangered Species Act ("ESA"), the Marine Mammal Protection Act ("MMPA"), and the National Environmental Policy Act ("NEPA"). As those statutes apply to the instant matter:

- **The OCSLA**. The OCSLA authorizes the Secretary of the Interior to issue leases for offshore wind development, and the Secretary delegated this task to the Bureau of Ocean Energy Management ("BOEM"). Before issuing such a lease, the BOEM must coordinate and consult with relevant federal agencies, and it must comply with the consultation requirements of other federal statutes, such as the ESA. Once the BOEM issues an offshore lease, the BOEM must also approve a site assessment plan, a construction plan, and an operations plan.

- **The ESA**. Section 7 of the ESA requires the BOEM to consult with the NMFS whenever agency action may affect an endangered marine species, like the North Atlantic right whale. A Section 7 consultation ends with the agency, here the NMFS, issuing a biological opinion. In that opinion, the NMFS must determine if the particular agency action is likely to jeopardize the continued existence of the endangered species based upon the best scientific and commercial data available.

  Section 9 of the ESA prohibits the "take" of an endangered species (i.e., to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect the species or to attempt any such

conduct). An "incidental take" are takes that result from, but are not the purpose of, an agency or applicant's otherwise lawful activity. Some incidental takes are allowed, but incidental take-approval requires the NMFS to issue an "incidental take statement" along with a biological opinion. That statement must, among other things: 1) describe the extent of the anticipated incidental take; 2) outline reasonable measures to reduce and monitor such take; and 3) incorporate measures to comply with the MMPA.

- **The MMPA**. When the animal to be taken is an endangered marine mammal, the NMFS may not issue an incidental take statement under the ESA without authorization under the MMPA, which requires mitigation measures. Under the MMPA, there is Level A and B harassment. The former has the potential to injure a marine mammal or stock. The latter is less serious and has the potential to disturb any marine mammal or stock by causing disruption of behavioral patterns. The NMFS may authorize the incidental harassment of a protected marine mammal if it makes certain factual findings. This permission is called an Incidental Harassment Authorization ("IHA"). *See supra*, *Melone v. Coit*, 100 F.4th 21 (1st Cir. 2024) (where the NMFS' issuance of the IHA to Vineyard Wind was at issue).

- **The NEPA**. When a major federal agency action will have significant environmental effects, the NEPA requires that the acting agency to draft an environmental impact statement, analyzing the reasonably foreseeable environmental effects of the proposed action, the range of technically and economically feasible alternatives to that action, and measures to mitigate the environmental effects of the proposed action. When considering the effects of a proposed action on an endangered species, the environmental impact statement may rely on a biological opinion.

With the foregoing statutory framework in mind, the First Circuit turned to analyzing the history of the Vineyard Wind project.

In 2017, the BOEM made a portion of the Massachusetts Wind Energy area available for lease, subsequently, 675 square kilometers were leased to Vineyard Wind. In 2017, Vineyard Wind submitted a construction and operations plan, proposing to build an offshore wind project in the northern portion of the lease area.

In 2018 the BOEM requested consultation with the NMFS pursuant to Section 7 of the ESA. The NMFS issued its first biological opinion in September 2020, finding that the project would likely not jeopardize the North Atlantic right whale population. The opinion also outlined mitigation measures to reduce the impact on the right whales.

After new science became available, the NMFS reinitiated consultation and issued an updated biological opinion in October 2021. Both the versions of the opinion included incidental take statements concluded that once Vineyard Wind adopted the appropriate mitigation measures, the maximum anticipated take from the project was Level B harassment of twenty North Atlantic right whales caused by installation/construction noise.

In March 2021, the BOEM issued its final environmental impact statement, and in June 2021, relying on the BOEM's final environmental impact statements, the NMFS published notice of its decision to issue an IHA for Level B harassment of up to twenty North Atlantic right whales,

which was the subject of a separate appeal discussed above. *See supra*, *Melone v. Coit*, 100 F.4th 21 (1st Cir. 2024).

In July 2021, the BOEM approved the Vineyard Wind construction and operations plan, but because the NMFS' updated biological opinion was still pending at that time, the BOEM's approval was subject to any new conditions or mitigation measures later identified in the updated biological opinion. In the meantime, the BOEM's approval notice imposed several mitigation measures (e.g., seasonal restrictions, noise attenuation, soft state requirements, clearance and shutdown zones, protected species observers, passive acoustic monitoring, vessel speed limits). The BOEM also imposed post-construction mitigation measures (e.g., clean up the installation sites, monitoring the health of the seabed and local plankton populations, monitoring operational noise for at least three years, and sharing fishing survey data with indigenous tribes and the federal government).

In January 2022, after approving construction, the BOEM adopted the findings of the updated October 2021 biological opinion, after which the BOEM concluded that no further action was required in order for Vineyard Wind to proceed with the wind project.

In August 2021, a group of Nantucket residents, organized as "Nantucket Residents Against Turbines," alleged that involved federal agencies violated the ESA by concluding that the wind project's construction would not jeopardize the critically endangered North Atlantic right whale. Plaintiffs further argued that the BOEM violated the NEPA by relying upon NMFS' flawed analysis. The District of Massachusetts granted Summary Judgment in favor of the BOEM, and the First Circuit affirmed on appeal.

ISSUE: Whether the NMFS violated the ESA by issuing a 'flawed' biological opinion and whether the BOEM violated the NEPA by relying on NMFS' ostensibly flawed biological opinion?

HOLDING: The NMFS' biological opinion was not defective; therefore, the BOEM properly relied on it.

REASONING: The First Circuit began by noting Plaintiffs' critique of the NMFS' biological opinion, upon which the BOEM's environmental impact statement relied, fell into three buckets.

First, Plaintiffs alleged that the biological opinion failed to properly analyze the current status and environmental baseline of the North Atlantic right whale. Second, Plaintiffs alleged that the biological opinion ignored the effects of the Vineyard Wind project on right whales. And third, Plaintiffs alleged that the biological opinion ignored the project's additive effects on the right whale's long-term recovery. The First Circuit kicked over each bucket.

With respect to the first bucket, the First Circuit noted that Plaintiffs argued that the NMFS' biological opinion ignored the Quintana-Rizzo study, highlighting the growing import of southern New England waters for right whale survival. However, the First Circuit found that the biological opinion actually acknowledged the growing importance of southern New England waters for these whales and cited the Quintana-Rizzo study. At bottom, Plaintiffs argued that the NMFS should have weighed the Quintana-Rizzo study more heavily than they did, but courts must exercise "great deference" when evaluating claims about competing bodies of scientific research. *Nat'l Ass'n of Mfrs. v. EPA*, 409 U.S. App. D.C. 425, 428, 750 F.3d 921, 924 (2014). In the First Circuit's

review, they could not say that the conclusions that the NMFS drew from the Quintana-Rizzo study "jumped the rails of reasonableness." *Id*.

With respect to the second bucket, the First Circuit noted that Plaintiffs argued the NMFS' biological opinion and its analysis of the wind project's effects on right whales improperly analyzed the impact of certain effects (e.g., construction and operational noise, line entanglement, and vessel strikes).

As to construction noise, Plaintiffs argued pile driving would cause Level A harassment. The First Circuit disagreed, noting Plaintiffs fundamentally misread the BOEM's biological opinion. That is, Level A harassment did not automatically occur when a right whale was within 7.25 kilometers of pile driving. Instead, a right whale would need to be within the 7.25-kilometer zone and undergo cumulative exposure for 24-hours in order for Level A harassment to occur. Plaintiffs also argued that the NMFS' proposed mitigation measures could not reliably detect a right whale within the 3.2.-kilometer shutdown zone, but the First Circuit found no record data to support the proposition that the NMFS' proposed mitigation measures (e.g., soft start procedures, protected species observes, and passive acoustic monitoring) were ineffective.

With respect to operational noise of the proposed wind turbines themselves, Plaintiffs argued that the NMFS irrationally dismissed a 2021 study that analyzed the effects of wind turbine operational noise on right whales. However, the First Circuit found that Plaintiffs ignored the biological opinion's extensive analysis of that very same study. In short, the biological opinion noted that the study itself acknowledged uncertainty in its methods, which were, at bottom, only "predictions." The biological opinion also noted that the 2021 study did not consider contextual factors that could alter how turbine noise moved through the water, such as depth, sediment, and wind speed. Lastly the study itself suggested that operational noise of the turbine may not be detectable above ambient noise, undermining Plaintiffs' argument that it would harass marine mammals. Accordingly, the First Circuit was not inclined to substitute its judgment for that of the NMFS' in this regard.

With respect to death by entanglement in fishing lines, Plaintiffs argued that the biological opinion failed to account for two phenomena that raise the risk of right whales dying from fishing lines. First, Plaintiffs claimed that the biological opinion ignored the entanglement risk from lines that Vineyard Wind would install to perform fishery studies. The First Circuit rejected this argument, noting the biological opinion expressly considered the risk of entanglement in those lines, and finding it extremely unlikely, given the low density of whales during the period in which Vineyard Wind was scheduled to conduct those studies. Second, Plaintiffs argued that the biological opinion ignored the best available science on entanglement risk, which allegedly suggested that construction and operational noise would drive whales into a nearby fishing area where there were densely concentrated fishing lines. However, the First Circuit found the NMFS considered the broader impact of construction and operational noise on whale distribution patterns, but the NMFS concluded that this possibility of driving whales into a nearby fishing area was unlikely, given that pile driving was banned during months of high whale density in the area.

With respect to vessel strikes, Plaintiffs argued that the NMFS' biological opinion ignored how the Vineyard Wind project would increase the risk of vessel strikes on right whales. The First Circuit found that Plaintiffs could not demonstrate that NMFS acted arbitrarily by relying on ten-

knot vessel speed restrictions to mitigate the risk of vessel strikes. Plaintiffs similarly argued that with an increase in construction and operational noise, right whales would be driven into an area with more vessel traffic. However, the First Circuit noted that it was not clear that there were actually areas near the wind development area with substantially higher vessel traffic—the only areas outside of the leased area with high vessel traffic were (and are) commercial shipping lanes, but those were located 21-30 miles from the wind project area. Plaintiffs failed to explain how construction or operational noise would not dissipate well before a whale had the opportunity to swim 21-30 miles away from the wind project area.

With respect to the third bucket, Plaintiffs argued that the NMFS failed to consider how addictive effects of the wind project would jeopardize the continued existence of the right whale. That is, under the implementing regulations of the ESA, NMFS must "[a]dd the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate [an] opinion as to whether the action is likely to jeopardize the continued existence of" the listed species. 50 C.F.R. § 402.14(g)(4). The First Circuit found that Plaintiffs repeated their previous arguments, which were unavailing. The only new argument presented by Plaintiffs was derived from Plaintiffs' reliance upon the Quintana-Rizzo study, which suggested that widespread wind farm development in southern New England could broadly affect the use of the region by right whales and influence migration throughout the mid-Atlantic. The First Circuit found these generalized statements did not render the biological study's conclusion that Vineyard Wind would not jeopardize the continued existence of the right whale arbitrary and capricious.

Finally, Plaintiffs argued that the BOEM violated the NEPA by relying upon the NMFS' allegedly defective biological opinion. However, the First Circuit noted that while an agency may rely on the findings in a biological opinion, such reliance is arbitrary and capricious if: 1) the biological opinion is defective, or 2) the BOEM blindly relies on the biological opinion without conducting its own independent analysis. According to the First Circuit, neither criterion was satisfied—the NMFS' biological opinion was sound; therefore, the BOEM properly relied on it. Moreover, the BOEM did not blindly rely on the biological opinion. Instead, the BOEM's environmental impact statement included a lengthy analysis of the Vineyard Wind project's likely effects on right whales.

***Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) (No more *Chevron* deference)**

FACTS: New England commercial fishermen who regularly participated in the Atlantic herring fishery sued the NMFS after it promulgated a rule requiring the commercial fishing industry to fund at-sea fishery observer/monitoring programs at an estimated cost of $710.00 per day. The commercial fisherman argued that the Magnuson-Stevens Act, 16 U.S.C. § 1801, *et seq*, did not authorize the NMFS to create these industry-funded monitoring requirements and that the NMFS failed to follow proper rulemaking procedure under the Magnuson-Stevens Act.

The District Court for the District of Columbia granted Summary Judgment to the NMFS based on what it found to be a reasonable interpretation of both the NMFS' authority and the NMFS' adoption of the rule under the Magnuson-Stevens Act and under the *Chevron* framework. The Court of Appeals for the District of Columbia Circuit affirmed. The D.C. Circuit limited its review of the District Court's opinion to the familiar question of whether Congress had spoken clearly, and, if not, whether the implementing the NMFS' interpretation of its authority under the

Magnuson-Stevens Act was reasonable under *Chevron*. On appeal to the D.C. Circuit, the commercial fisherman presented the question of how clearly Congress must state an agency's authority to adopt a particular course of action. The commercial fishermen agreed that the Magnuson-Stevens Act permitted the NMFS to require at-sea monitors/fishery observers, but they argued that NMFS was prohibited from requiring the New England commercial herring fishing industry to pay for them. The NMFS argued that certain provisions of the Magnuson-Stevens Act established the NMFS' authority to require this industry-funded monitoring. Ultimately, the D.C. Circuit found the NMFS' interpretation of the Magnuson-Stevens Act and its authority reasonable under *Chevron*, and that the NMFS was, therefore, owed "*Chevron* deference" as to its interpretation of its own authority to require industry funded at-sea monitoring.

On May 1, 2023, a Writ of Certiorari to the United States Supreme Court was granted on the narrow issue of whether *Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837 (1984) should be overruled or clarified. On June 28, 2024, the Supreme Court overruled *Chevron* and vacated and remanded this matter (6-2).

ISSUE: Whether the Administrative Procedure Act ("APA") requires courts to exercise their own independent judgment in deciding whether a federal agency has acted within its statutory authority?

HOLDING: The APA requires courts to exercise their independent judgment in deciding whether a federal agency has acted within its statutory authority, and courts may not defer to such agency interpretation of the law simply because a statute is ambiguous. Thus, *Chevron* was overruled.

REASONING: The Supreme Court began its analysis by recounting the history of the Magnuson-Stevens Act, which established the eight regional fishery management councils and the development of FMPs that the NMFS approves and promulgates as final regulations. As was relevant in this matter, the Magnuson-Stevens Act provides that FMPs may require fishery observers to be carried aboard domestic fishing vessels to collect data necessary for conservation and management of the fisheries. Notably, the Magnuson-Stevens Act does not contain similar terms addressing whether the Atlantic herring fishermen may be required to actually bear the costs associated with any fishery observers that a plan may mandate.

Interestingly, at one point in time, the NMFS fully funded the fishery observer coverage that the New England Fishery Management Council required in its FMP for the Atlantic herring fishery. However, in 2013, the New England Fishery Management Council proposed an amendment that would shift this cost to the fishing industry. Several years later, the NMFS promulgated a rule adopting that amendment.

The Supreme Court's substantive legal analysis began by noting the history of judiciary's responsibility to adjudicate cases and controversies under Article III of the Constitution, a responsibility envisioned by the Framers, who provided that the final "interpretation of the laws" would be the "proper and peculiar province of the courts." The Federalist No. 37, p. 236 (J. Cooke ed. 1961) (J. Madison). The Supreme Court also noted that it historically embraced the Framers' understanding of the judicial function of the courts, starting with its landmark decision in *Marbury v. Madison*. The Supreme Court, however, recognized it had also respected a counterbalancing principle. That is, exercising independent judgment often included affording due respect to the

Executive Branch's interpretation of federal statutes. The Supreme Court was quick to note, however, that "respect" was simply that—the views of the Executive Branch may have informed the judgment of the courts but did not supersede it.

According to the Supreme Court, the New Deal era led to rapid expansion of the federal administrative process, nevertheless, throughout this time, the Supreme Court continued to adhere to the traditional understanding that questions of law were for the courts. During this period, the Supreme Court treated agency determinations of fact as binding, provided there was evidence to support those findings. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936). However, the Supreme Court did not extend similar deference to agency resolutions of questions of law, which was exclusively a judicial function. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 544 (1940).

In 1946, Congress enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950). The Supreme Court noted that the APA delineated (and delineates) the contours of judicial review of agency action, including § 706 of the APA, which directs the courts to decide all relevant *questions of law*, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. Thus, according to the Supreme Court, the APA codified the unremarkable—courts must decide legal questions by applying their own judgement, and the courts, not federal agencies, should decide all relevant questions of law. The Supreme Court further noted that the APA's legislative history was explicit in this principle. According to both the House and Senate Reports on the legislation, § 706 of the APA "provide[d] that questions of law are for courts rather than agencies to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946).

It was with the foregoing substantive legal history in mind that the Supreme Court turned its attention to *Chevron*, noting the deference that *Chevron* required of courts reviewing agency action could not be squared with the APA.

The Supreme Court noted that *Chevron* (decided by a "bare quorum of six Justices"), triggered a departure from the traditional approach outlined above. In short, *Chevron*'s two-step approach required courts to discern whether Congress had spoken as to the precise issue, and, if Congress had, that was the end of the matter. To discern intent, courts applied traditional tools of statutory construction. However, without mentioning the APA, *Chevron* articulated a second curious step, applicable when Congress had not directly addressed the precise issue. In such a case, where a statute was silent or ambiguous, courts could not simply impose their own construction of the statute. Instead, courts were instructed to set aside the traditional tools of statutory construction and defer to a federal agency if that agency had proffered its own permissible construction of the statute. The Supreme Court noted that *Chevron* eventually became a watershed decision where it its two-step framework was routinely invoked by both the Supreme Court as well as lower courts. However, neither *Chevron* nor any subsequent Supreme Court decision ever sought to reconcile this two-step framework with the APA.

The Supreme Court ultimately found that *Chevron* could not be reconciled with the APA. More specifically, the Supreme Court noted that agency cases should not differ from any other case where a court is required to apply statutory construction to resolve ambiguity. The point of these

construction tools, according to the Supreme Court, was (and is) to apply them to resolve such ambiguities, and this principle is no less true when the ambiguity concerns the scope of a federal agency's own power, which, the Supreme Court noted is actually "an occasion on which abdication in favor of the agency is *least* appropriate."

The Supreme Court also rejected the Government's argument that Congress must intend for federal agencies to resolve statutory ambiguities because agencies have "subject matter expertise" regarding the statutes they administer. The Supreme Court recently found that interpretive issues arising in connection with a regulatory scheme often "fall more naturally into a judge's bailiwick than an agency's." *Kisor v. Wilkie*, 588 U.S. 558, 578 (2019).

Furthermore, as to whether *stare decisis* required the Supreme Court to continue the *Chevron* project, the Supreme Court found it did not since *stare decisis* is not an "inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Instead, the *stare decisis* consideration (or rationalization?) that the Supreme Court found most relevant to *Chevron*'s fate was the quality of the precedent's reasoning and the workability of the rule the precedent established, which, according to the Supreme Court, weighed in favor of letting *Chevron* go.

Finally, the Supreme Court rejected the dissent's thesis, which noted Judges were 'not experts in the field.' The Supreme Court noted that depended on what the "field" was—if the field was that of legal interpretation, then that field had been emphatically the province of the courts and judges for at least 221 years. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 153 (1803). The dissent's point that judges were not a part of either the Executive or Legislative branches was also a whipsaw as far the Supreme Court was concerned, noting judges had always been expected to apply their judgment independently of the political branches, The Federalist No. 78, at 523, and one of those laws, the APA, barred judges from disregarding that responsibility just because a federal agency viewed a statute differently.

***Trump v. United States*, 144 S. Ct. 2348 (2024) (Concurrence from Justice Thomas analyzing the Special Counsel's appointment by the Attorney General under the Appointments Clause)**

CONCURRENCE SYNOPSIS: In his concurrence, Justice Thomas noted that the Attorney General's appointment of a private citizen as a "Special Counsel" to prosecute former President Trump on behalf of the United States may have been unconstitutional. In short, Justice Thomas claimed no office for the Special Counsel had been established "by Law," thus the Constitution's Appointments Clause, U.S. Const. art. II, § 2, c. 2., imposed an important check against President Biden such that he could not create offices at his pleasure. According to Justice Thomas, if there was no law establishing the office that the Special Counsel occupied, then he could not proceed with his prosecution of President Trump. "A private citizen cannot criminally prosecute anyone, let alone a former President." *Trump*, 144 S. Ct. at 2348 (Justice Thomas' concurrence).

Justice Thomas began by noting that the Appointments Clause provided the constitutional process for filling an office. The default process requires nomination by the President and confirmation by the Senate, but the Appointments Clause provided a limited exception for the appointment of "inferior officers." Congress, however, may, "by Law" authorize one of three specified actors to appoint "inferior officers" without the advice and consent of the Senate. *Id*. (citations omitted).

As was relevant in the instant matter, the Attorney General was one such actor that Congress may authorize, "by Law," to appoint inferior officers without confirmation. However, before the President or Attorney General could appoint any such officer, the Constitution requires that the underlying office be "established by Law." *Id*. (citations omitted). While some offices are created by the Constitution, e.g., the President and Vice President, other offices must be established by Law, implying that Congress must create such an office through statute first. *Id*.

As the foregoing applied to Justice Thomas' concurrence, he noted that it was difficult to discern how the Special Counsel held an office established "by Law," as required by the Constitution since, when the Attorney General appointed the Special Counsel, he did not identify any statute that clearly created such an office. Indeed, none of the statutes cited by the Attorney General assuaged Justice Thomas' concern, especially when compared with the clarity of past statutes used for that purpose, which specifically directed and authorized the President to appoint a special counsel to have charge and control of the prosecution of a litigation. *See, e.g*., 68 P.L. 12; 43 Stat. 6; 68 Cong. Ch. 17, a 1924 statute directing the President, with advice and consent of the Senate, to appoint a special counsel for the purposes of prosecuting a specific litigation).

Justice Thomas further noted that, even if the Special Counsel held a valid office, questions remained as to whether the Attorney General filled that office in compliance with the Appointments Clause. That is, if the Special Counsel was a "principal officer," his appointment was invalid because he was not nominated by the President and confirmed by the Senate. If, on the other hand, the Special Counsel was an "inferior officer," Justice Thomas noted that the Attorney General could appoint him without confirmation only if Congress vested such appointment in the Attorney General as a Head of a Department, which did not appear to be the case.

***SEC v. Jarkesy*, 144 S. Ct. 2117 (2024) (No more administrative penalties?)**

FACTS: In the aftermath of the Wall Street Crash of 1929, Congress passed a suite of laws designed to combat securities fraud and increase market transparency. Three such statutes are relevant: the Securities Act of 1933; the Securities Exchange Act of 1934; and the Investment Advisers Act of 1940. These Acts govern the registration of securities, the trading of securities, and the activities of investment advisers. Although each regulates different aspects of the securities markets, their pertinent provisions—collectively referred to by regulators as "the antifraud provisions," target the same basic behavior: misrepresenting or concealing material facts.

To enforce the aforementioned Acts, Congress created the Securities and Exchange Commission ("SEC"). The SEC may bring an enforcement action in one of two forums. It can file suit in federal court, or it can adjudicate the matter itself. The forum the SEC selects dictates certain aspects of the litigation. In federal court, a jury finds the facts, an Article III judge presides, and the Federal Rules of Evidence and the ordinary rules of discovery govern the litigation. But when the SEC adjudicates the matter in-house, there are no juries. The SEC presides while its Division of Enforcement prosecutes the case. The SEC or its delegee—typically an Administrative Law Judge—also finds facts and decides discovery disputes, and the SEC's Rules of Practice govern.

One remedy for securities violations is the imposition of civil penalties. Originally, the SEC could only obtain civil penalties from unregistered investment advisers in federal court. Then, in 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. This Act authorized the SEC to impose such penalties through its own in-house proceedings. Shortly after passage of the Dodd-Frank Act, the SEC initiated an enforcement action for civil penalties against investment adviser George Jarkesy, Jr., and his firm, Patriot28, LLC for alleged violations of the "antifraud provisions" contained in the federal securities laws. The SEC opted to adjudicate the matter in-house. As relevant, the final order determined that Jarkesy and Patriot28 had committed securities violations and levied a civil penalty of $300,000. Jarkesy and Patriot28 petitioned for judicial review. The Fifth Circuit vacated the order on the ground that adjudicating the matter in-house violated the defendants' Seventh Amendment right to a jury trial.

ISSUE: Whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud?

HOLDING: When the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial.

REASONING: Following the analysis set forth in *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989) and *Tull v. United States*, 481 U.S. 412 (1987), the Supreme Court found the instant action implicated the Seventh Amendment because the SEC's antifraud provisions replicate common law fraud. The Supreme Court further found that the "public rights" exception to Article III jurisdiction did not apply because the instant matter did not fall within any of the distinctive areas involving governmental prerogatives where the Supreme Court has concluded that a matter may be resolved outside of an Article III court, without a jury.

The Supreme Court explained that the right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). The Seventh Amendment guarantees that in "[s]uits at common law . . . the right of trial by jury shall be preserved." The right itself is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. *Curtis v. Loether*, 415 U.S. 189, 193 (1974). Rather, it "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Parsons v. Bedford*, 28 U.S. (3 Peters) 433, 447 (1830), that includes statutory claims that are "legal in nature." *Granfinanciera*, 492 U. S. at 53. To determine whether a suit is legal in nature, the Supreme Court noted that courts must consider whether the cause of action resembles common law causes of action, and whether the remedy is the sort that was traditionally obtained in a court of law. Of these factors, the remedy is the most important. And in the instant matter, the remedy was all but dispositive.

For the alleged fraud, the SEC sought civil penalties, a form of monetary relief. The Supreme Court thus found such relief to be legal in nature when it is designed to punish or deter the wrongdoer rather than solely to "restore the *status quo*." *Tull*, 481 U. S., at 422. That is, the SEC's civil penalties were thus "a type of remedy at common law that could only be enforced in courts of law." *Tull*, 481 U. S., at 422. According to the Supreme Court, the close relationship between federal securities fraud and common law fraud confirmed its conclusion. Both target the same basic conduct: misrepresenting or concealing material facts. By using "fraud" and other common

law terms of art when it drafted the federal securities laws, Congress incorporated common law fraud prohibitions into those laws. Furthermore, because the claims at issue in the instant matter implicated the Seventh Amendment, a jury trial was required unless the "public rights" exception applies. Under such exception, Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment. However, the Supreme Court found that exception did not apply.

The Supreme Court noted that it has repeatedly explained that matters concerning private rights may not be removed from Article III courts. That is, if a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory. In contrast, in cases concerning public rights, such matters "historically could have been determined exclusively by [the executive and legislative] branches." *Stern v. Marshall*, 564 U.S. 462, 493 (2011). Certain categories that have been recognized as falling within the exception include matters concerning: the collection of revenue; aspects of customs law; immigration law; relations with Indian tribes; the administration of public lands; and the granting of public benefits. The Court's opinions governing this exception have not always spoken in precise terms, and, notwithstanding the foregoing categories, the presumption is in favor of Article III courts. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U. S. 50, 69, n. 23 (1982).

The Supreme Court reasoned that its decision in *Granfinanciera* decided the instant matter. In that case, the Supreme Court considered whether the Seventh Amendment guaranteed the right to a jury trial "in the face of Congress' decision to allow a non-Article III tribunal to adjudicate" a statutory "fraud claim." 492 U. S. at 50. There the issue was whether Congress's designation of fraudulent conveyance actions as "core [bankruptcy] proceedings" authorized non-Article III bankruptcy judges to hear them without juries. *Id*. at 50. The Supreme Court held that the designation was not permissible, even under the public rights exception. To determine whether the claim implicated the Seventh Amendment, the Supreme Court applied the principles distilled in *Tull*. Because the actions were akin to "suits at common law" and were not "closely intertwined" with the bankruptcy process, the Supreme Court held that the public rights exception did not apply, and a jury was required. *Id*. at 54.

Based on that analysis, the Supreme Court decided that the instant matter was brought under the "anti-fraud provisions" of the federal securities laws and provide civil penalties that can "only be enforced in courts of law." *Tull*, 481 U. S. at 422. The Supreme Court also rejected the SEC's argument that public rights exception applied, noting *Granfinanciera* provided that Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal." *Granfinanciera*, 492 U. S. at 52.