UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GERALD L. EUBANKS and DETERMINATION III 130 WESTPORT, LLC,

Plaintiffs,

v.

HOWARD LUTNICK, in his official capacity as Secretary of the U.S. Department of Commerce, and NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,

Defendants.

No. 8:25-cv-00614-CEH-AAS

BRIEF OF AMICI CURIAE CONSERVATION GROUPS

CORPORATE DISLOSURE STATEMENT

Pursuant to Local Civil Rule 3.03, on March 21, 2025, the Center for Biological Diversity, Conservation Law Foundation, Defenders of Wildlife, and Whale and Dolphin Conservation (Conservation Groups) filed their certificates of interested persons and corporate disclosure statements. *See* ECF Nos. 21–24. The information contained in those filings remains true and correct.

Respectfully submitted this 14th day of January, 2026.

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INTRODUCTION AND STATEMENT OF INTEREST

This case has nationwide implications far beyond Plaintiffs' purportedly limited goal of avoiding liability for violating the 2008 Vessel Speed Rule (Speed Rule), which protects critically endangered North Atlantic right whales from deadly strikes by vessels 65 feet and longer in seasonal management areas. Plaintiffs allege that, in promulgating the Speed Rule, the National Marine Fisheries Service (NMFS) exceeded its rulemaking authorities under the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) to implement necessary and appropriate regulations to effectuate statutory purposes. Plaintiffs also assert that the Speed Rule runs afoul of the nondelegation and/or major questions doctrines.

Although Conservation Groups have no stake in whether the specific citation and civil penalty assessed against Plaintiffs is set aside, the arguments in support of this request are another matter. Ruling for Plaintiffs would throw into question not only rulemaking authority under the ESA and MMPA, statutes Conservation Groups rely on to accomplish their organizational missions, but innumerable other regulations under other statutes, both environmental and otherwise. Fortunately, this Court need not open the door to these consequences, as Plaintiffs' arguments are wholly without merit.

For decades, the U.S. Fish & Wildlife Service (FWS) and NMFS (collectively, the Services) have used their general rulemaking authorities under the ESA and MMPA to issue regulations to prevent incidental take of protected species to halt population declines and promote recovery. In addition to the Speed Rule, these have included regulations closing areas to vessel traffic, setting vessel speed limits, setting approach distances, and closing areas to certain fishing practices. *See, e.g.*, 44 Fed. Reg. 4,745, 4,746 (Jan. 23, 1979)[1] (manatee protection areas rule; MMPA); 51 Fed. Reg. 42,271, 42,271 (Nov. 24, 1986)[2] (Hawaiian waters humpback whale approach rule; ESA and MMPA); 62 Fed. Reg. 6,729, 6,730 (Feb. 13, 1997) (North Atlantic right whale approach rule; ESA and MMPA); 64 Fed. Reg. 70,196, 70,196 (Dec. 16, 1999) (temporary sea turtle restricted area rule; ESA); 66 Fed. Reg. 29,502, 29,503 (May 31, 2001) (Alaskan waters humpback whale approach rule; ESA and MMPA); 67 Fed. Reg. 680, 693 (Jan. 7, 2002) (amending manatee protection areas rule; MMPA); 76 Fed. Reg. 20,870, 20,883 (Apr. 14, 2011) (Northwest Region killer whale approach rule; ESA and MMPA); 86 Fed. Reg. 53,818, 53,821 (Sept. 28, 2021) (Hawaiian spinner dolphin approach rule; MMPA). If Plaintiffs' arguments succeed, then these and any

[1] Conservation Groups cite proposed rules here where they contain the section-specific statement of authority and that statement is absent in the final rule. For the manatee rule, the final rule is at 44 Fed. Reg. 60,962 (Oct. 22, 1979).
[2] Final rule at 52 Fed. Reg. 44,912 (Nov. 23, 1987).

future rules promulgated under the same authorities are also in jeopardy, undermining Conservation Groups' ability to fulfill their missions of protecting and recovering imperiled wildlife.

Plaintiffs' arguments also have major implications for environmental laws more broadly, many of which are also central to Conservation Groups' missions. It is common for such statutes to contain broad delegations of rulemaking authority to the federal agencies entrusted with implementing them. In the Toxic Substances Control Act, Clean Water Act, and Clean Air Act, for example, Congress granted the Environmental Protection Agency the authority to issue regulations "necessary to carry out" the statute. 15 U.S.C. § 2670 (Toxic Substances); 33 U.S.C. § 1361(a) (Water); 42 U.S.C. § 7601 (Air). Congress also granted the Environmental Protection Agency the authority to issue "necessary or appropriate" regulations under the Safe Water Drinking Act. *Id.* § 300j-9(a). In the Magnuson-Stevens Fishery Conservation and Management Act, Congress granted NMFS the authority to prescribe via fishery management plans any measures "necessary and appropriate for the conservation and management of the fishery." 16 U.S.C. § 1853(b)(14); *see also id.* § 1855(d) (general authority to promulgate "such regulations . . . as may be necessary" to implement fishery management plan or carry out any other provision of the statute).

The implications of Plaintiffs' success would resonate far beyond the realm of wildlife and environmental protection, calling into question the legitimacy of any regulation issued under any federal statute that uses "necessary and appropriate" language in granting broad rulemaking authority to agencies tasked to carry out Congress's directives.

ARGUMENT

I. THE SPEED RULE IS WELL WITHIN NMFS'S BROAD RULEMAKING AUTHORITIES UNDER THE ESA AND MMPA

Plaintiffs urge the Court to adopt literalist and reductionist interpretations of the ESA and MMPA to reach the nonsensical conclusion that NMFS's regulatory authority under both statutes is limited to punishing or authorizing, rather than preventing, the take of protected species. *See, e.g.,* ECF No. 41 at 3–5, 17–18. Plaintiffs' distorted version of textualism disregards established principles of statutory interpretation.

Examining the text, structure, purposes, and legislative history of the ESA and MMPA in accordance with these principles demonstrates that Congress intended to grant broad rulemaking authority to the Services to prevent the decline of protected species and to ensure their recovery. The Speed Rule is well within the boundaries of those authorities.

A. Standard of Review

Defendants correctly identify that, in reviewing an agency's exercise of its delegated discretionary rulemaking authority, courts must determine the

"best reading" of a statute. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024). ECF No. 47 at 7. How courts arrive at that best reading warrants further elucidation. Under *Loper Bright*, the court determines whether an agency has acted within its rulemaking authority by evaluating a statute's delegation of authority and its boundaries and whether an agency "has engaged in reasoned decisionmaking within those boundaries." *Id.* (cleaned up). "[T]he role of a reviewing court . . . is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Id.* at 395.

Courts conduct this analysis using the traditional rules of statutory interpretation. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (cleaned up).

Courts put significant emphasis on statutory purposes when examining broad delegations of regulatory authority. *See, e.g.*, *Gundy v. U.S.*, 588 U.S. 128, 141 (2019) ("[B]eyond context and structure, the Court often looks to 'history [and] purpose' to divine the meaning of language. . . .That non-blinkered brand of interpretation holds good for delegations, just as for other statutory provisions.") (citation omitted); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) ("This Court has repeatedly held that the

width of administrative authority must be measured in part by the purposes for which it was conferred[.]"); *Mourning v. Fam. Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (when statute enables an agency to make "such rules and regulations as may be necessary" to implement the law, courts uphold a challenged regulation "so long as it is reasonably related to the purposes of the enabling legislation.") (cleaned up).

As with all statutory analysis, interpreting Congress's intent must go beyond a cramped reading of a single word or phrase. The Supreme Court does not require that a statute list a specific activity for a broad grant of regulatory authority to cover it. *See Am. Trucking Ass'ns, Inc. v. U.S.*, 344 U.S. 298, 310 (1953) (concluding there was "clear and adequate evidence" that the Motor Carrier Act intended to address trip leasing, even absent "an express delegation of power to control, regulate or affect leasing practices"). Rather, it has rejected the contention that "the absence of specific language indicates a purpose of Congress not to require" a condition imposed by regulation, as Congress regularly grants broad authority "in general terms" to capture all the "complexities of [a] subject." *U.S. v. Penn. R. Co.*, 323 U.S. 612, 616 (1945); *see also Permian Basin*, 390 U.S. at 777 ("We cannot . . . conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted."). As *Loper Bright* stated:

> [A] statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes . . . empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as "appropriate" or "reasonable."

603 U.S. at 394–95 (cleaned up). A broad grant of authority includes the ability to implement unspecified details of a statutory scheme so long as "the reviewing court [is] reasonably [] able to conclude that the grant of authority contemplates the regulations issued." *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979).

Legislative history assists the reviewing court. "[E]ven when . . . a statute's meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text." *Dig. Realty Tr., Inc. v. Somers*, 583 U.S. 149, 171 (2018) (Sotomayor, J., concurring). Courts routinely look to legislative history to determine congressional intent when interpreting broad delegations of regulatory authority. *See, e.g.*, *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 365–66 (1986).

Courts find a regulation exceeds delegated statutory authority only where it significantly and fundamentally diverges from the statute's structure or text. *See, e.g.*, *id.* at 375 (rejecting attempt to regulate "nonbank banks" under banking statute); *MCI Telecomms. Corp. v. AT&T*, 512 U.S.

218, 229 (1994) (rejecting de-tariffing rule where the tariff-filing requirement is "the heart of the common-carrier section" of the statute).

B. The Speed Rule Is Well Within NMFS's Broad ESA Authority

Plaintiffs primarily and erroneously argue that the grant of rulemaking authority in ESA section 1540(f) is strictly limited to enforcing statutory prohibitions against unauthorized take. ECF No. 41 at 4–9. Yet the Supreme Court has already analyzed ESA section 1540(f) and found that Congress delegated "broad administrative and interpretive power" to the Services. *Babbitt v. Sweet Home Ch of Cmtys. for a Great Or.*, 515 U.S. 687, 708 (1995). The Court recognized that the "'plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, *whatever the cost*,'" *id.* at 699 (quoting *TVA v. Hill*, 437 U.S. 153, 184 (1978)) (emphasis added). It upheld the challenged regulation as within FWS's authority, given "Congress' intent to provide comprehensive protection for endangered and threatened species." *Id.* The Speed Rule fits well within the ESA's broad delegation of rulemaking authority, consistent with the statute's purpose to protect and recover imperiled species like the right whale.

In addition to Defendants' demonstration that the text, structure, and purpose of the ESA support the Services' authority to issue regulations to prevent take, *see* ECF No. 47 at 9–10, 13–14, legislative history illustrates congressional intent to protect species, including by preventing take. *See, e.g.*,

S. Rep. No. 93-307, 1973 U.S.C.C.A.N. 2989, 2990 (1973) ("[S]ome sort of protective measures must be taken to prevent the further extinction of many of the world's animal species."). Congress therefore declared the ESA's purpose "to provide a program for the conservation" of endangered species, 16 U.S.C. § 1531(b), defining "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided pursuant to this chapter are no longer necessary," *id.* § 1532(3).

In proposing the Speed Rule, NMFS determined that "[c]urrent efforts to reduce occurrence of . . . right whale deaths and serious injury have not been sufficient to alter the trajectory of the species towards extinction." 71 Fed. Reg. 36,299, 36,304 (June 26, 2009). In finalizing it, NMFS determined that "[f]or the . . . right whale population to recover, vessel-related deaths and injuries must be reduced. 73 Fed. Reg. 60, 173, 60,174 (Oct. 10, 2008). The Speed Rule prevents the death or injury of endangered right whales to save the species from extinction and ensure its recovery. It is "appropriate to enforce," i.e., effectuate, the ESA. 16 U.S.C. § 1540(f).

In other statutory contexts, courts routinely consider regulations issued under similar "may be appropriate" language and uphold those regulations as lawful expressions of broad grants of authority. *See, e.g.*, *Pharm. Rsch. & Mfrs. of Am. v. FTC*, 790 F.3d 198, 205–06 (D.C. Cir. 2015) (antitrust

statute); *Sidell v. Comm'r of Internal Revenue*, 225 F.3d 103, 107–08 (1st Cir. 2000) (tax statute); *Beecher v. Comm'r of Internal Revenue*, 481 F.3d 717, 722 (9th Cir. 2007) (same). Any reading of the ESA's broad rulemaking authority as a narrow grant limited to punishing unauthorized past take or authorizing future take, *see* ECF No. 41 at 7–9, runs counter to the judicial treatment of similarly broad rulemaking authorities.

C. The Speed Rule Is Well Within NMFS's Broad MMPA Authority

Plaintiffs summarily attack NMFS's rulemaking authority under MMPA section 1382(a) by cross-referencing their ESA arguments. ECF No. 41 at 17. But they ignore that, in enacting the MMPA in 1972, Congress expressly highlighted the need to address vessel strikes. *See, e.g.*, H.R. Rep. No. 92-707, 1972 U.S.C.C.A.N. 4144, 4147 (1971) ("[A]nother problem to which marine mammals may be inadvertently exposed is the operation of high-speed boats. Manatees and sea otters have been crippled and killed by motorboats and at present the Federal government is essentially powerless to force these boats to slow down or to curtail their operations."); *see also id.* at 4147–48, 4150 (1971) (stating that the statute "would provide the Secretary of the Interior with adequate authority to regulate or even to forbid the use of powerboats in waters where manatees are found"); ECF No. 47 at 27 n.16 (quoting same House report).

Here, NMFS examined the best scientific information on the risks of vessel strikes to right whales and the effectiveness of a speed limit in seasonal management areas to reduce the likelihood and severity of such strikes. *See* 73 Fed. Reg. at 60,176–78. It explicitly found the Speed Rule necessary and appropriate to protect and recover right whales. *Id.* at 60,174 (finding that "developing and implementing an effective strategy to address" the threat of vessel strikes "is essential to recovery of the species" and that "a rule to limit vessel speeds in times and areas where right whales are most likely to occur is necessary."). With that finding, the Speed Rule is well within the MMPA's broad grant of regulatory authority to accomplish its sweeping purposes[3] and does not exceed the boundaries of that delegation. *See also* ECF No. 47 at 15–20.

More generally, so long as agencies make the requisite "necessary and appropriate" findings, courts regularly uphold regulations as lawful expressions of broad rulemaking authority under the same "necessary and appropriate" language as in the MMPA. On remand from the Supreme Court in *Loper Bright*, a district court recently upheld a NMFS fishery management regulation based on a statute that uses the same "necessary and appropriate"

[3] *See, e.g.*, 16 U.S.C. § 1362(2) ("Further measures should be immediately taken to replenish any species or population stock which has already diminished below [optimum sustainable] population."); *see also* ECF No. 47 at 15–16, 26–27; *Kokechik Fishermen's Ass'n v. Sec. of Commerce*, 839 F.2d 795, 802 (D.C. Cir. 1988) (under the MMPA, "[t]he interest in maintaining healthy populations of marine mammals comes first[.]").

phrase as the MMPA. Citing *Loper Bright*, the district court found that 16 U.S.C. § 1853(b)(14) "in no uncertain terms [] delegates to NMFS a large degree of discretionary authority. Such a delegation is not uncommon." *Relentless Inc. v. Dep't of Commerce*, No. 20-108, 2025 WL 1939025, at *4 (D.R.I. July 15, 2025), *appeal docketed*, No. 25-1845 (1st Cir. Sept. 5, 2025).

Outside of the conservation context, courts have upheld regulations under the same "necessary and appropriate" language found in statutes that cover topics ranging from veterans' benefits, *Wayne State University v. Cleland*, 590 F.2d 627, 634 (6th Cir. 1978); securities, *Falcon Trading Group, Ltd., v. SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996), Social Security, *Santise v. Schweiker*, 676 F.2d 925, 933 (3rd Cir. 1982); to food stamps, *State of Missouri ex. rel. Freeman v. Block*, 690 F.2d 139, 142 (8th Cir. 1982). Plaintiffs' cramped reading runs counter to the settled treatment of similarly broad rulemaking authorities.

Plaintiffs' legislative history argument about proposed 2003 MMPA amendments, ECF No. 41 at 5–6, is particularly ill-founded. By 2003, the Services had already relied on the MMPA's broad authorities to promulgate regulations to protect marine mammals from incidental take by vessels—for manatees in Florida, humpback whales in Hawaii and Alaska, and right whales via the approach distance regulation. *See supra* at 2. Indeed, within seven years of the MMPA's enactment, and consistent with explicit legislative

history, FWS relied on the statute to promulgate the manatee protection areas regulation to establish manatee sanctuaries where waterborne activities are seasonally prohibited, 50 C.F.R. § 17.108(a), and refuges where vessel speed is regulated either year-round or seasonally, *id.* § 17.108(c).

Plaintiffs' argument that, in 2003, the administration sought amendments to the MMPA's statutory definition of harassment specifically to establish authority for the Speed Rule, ECF No. 41 at 5–6, is patently untrue. Plaintiffs misleadingly interweave quotations from NMFS official Dr. Rebecca Lent's testimony about a February 2003 administration bill submitted to Congress to amend the definition of harassment with entirely separate statements about the risks of vessel strikes to right whales to bolster their unfounded assertion that, "[t]o support a speed limit, the agencies needed Congress to prohibit activities with *any* risk of harming marine mammals." *Id.* at 6.

There is no linkage in either the oral or written testimony of Dr. Lent or of any other witness about the need to amend the definition of harassment to enable the Speed Rule. Indeed, Dr. Lent's written testimony on ship strikes says the administration bill "would authorize the Secretary to use the *various authorities available under the MMPA* to reduce the occurrence of ship strikes of whales and to encourage the development of methods to avoid ship strikes." *Future of the Marine Mammal Protection Act (MMPA) Before*

the Subcomm. on Oceans, Fisheries, and Coast Guard of the S. Comm. on Commerce, Sci., and Transp., 108th Cong. 7 (2003) (statement of Dr. Rebecca Lent, Deputy Assistant Adm'r for Regulatory Programs, Nat'l Oceanic and Atmospheric Admin.)[4] (emphasis added); *see also id.* at 58 (testimony of Nina Young, Director of Marine Wildlife Conservation, The Ocean Conservancy) (describing section 517, Ship Strikes of Whales, thus: "The Administration's proposed amendment would direct the Secretary of Commerce to use *existing authorities* under the MMPA to reduce the occurrence of ship strikes.") (emphasis added). Plaintiffs' argument that Congress subsequently considered and rejected amendments to the definition of harassment that "would have authorized speed limits," ECF No. 41 at 6, simply falls apart.

II. THE MMPA AND ESA'S BROAD DELEGATIONS OF RULEMAKING AUTHORITY ARE CONSTITUTIONAL

Plaintiffs wrongly assert that, even if the ESA and MMPA grant NMFS the authority to issue the Speed Rule, those authorizations are an unconstitutional delegation of power. ECF No. 41 at 21–25. But the intelligible principle standard for nondelegation questions is "not demanding." *Gundy*, 588 U.S. at 146; *Consumers' Rsch. v. FCC*, 88 F.4th 917, 923 (11th Cir. 2023), *cert. denied*, 144 S. Ct. 2629 (2024). The ESA and MMPA general rulemaking provisions readily meet it.

[4] Available at https://www.congress.gov/108/chrg/CHRG-108shrg88893/CHRG-108shrg88893.pdf.

As Defendants explain in part, ECF No. 47 at 25, the Supreme Court recognizes that practical concerns require courts to uphold broad grants of authority under the nondelegation doctrine. Both the Supreme Court and the Eleventh Circuit have reiterated and relied on this recognition time and again. "The Constitution . . . does not demand the impossible or the impracticable." *Yakus v. U.S.*, 321 U.S. 414, 424 (1944). In many cases, "if [a challenged statute's] delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs." *Gundy*, 588 U.S. at 147. The Eleventh Circuit has observed that, in applying the intelligible principle test, "the Supreme Court has given Congress wide latitude in delegating its powers." *U.S. v. Brown*, 364 F.3d 1266, 1271 (11th Cir. 2004).[5]

Since 1935, the Supreme Court has taken a liberal approach to determining whether Congress has provided an intelligible principle, "over and over uph[olding] even very broad delegations." *Gundy*, 588 U.S. at 146; *see also* ECF No. 47 at 25 n.15 (discussing the only two Supreme Court

[5] Contrary to Plaintiffs' argument that the canon of constitutional avoidance supports finding the ESA's statutory authority overly broad to avoid the nondelegation doctrine, ECF No. 41 at 16–17, when considering that canon in the context of nondelegation challenges, the Supreme Court has used it to support findings that intelligible principles exist rather than to avoid the nondelegation doctrine. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (finding that a construction of the challenged statute that avoided granting the agency "such a sweeping delegation of legislative power that it might be unconstitutional under the [nondelegation doctrine] . . . should certainly be favored.").

decisions finding statutes violated nondelegation doctrine). In deciding nondelegation challenges, the Eleventh Circuit has never found a statutory delegation of authority to violate the doctrine. *See*, *e.g.*, *Consumers' Rsch.*, 88 F.4th at 924; *U.S. v. Ambert*, 561 F.3d 1202, 1213–14 (11th Cir. 2009); *U.S. v. Rigel Ships Agencies, Inc.*, 432 F.3d 1282, 1289–90 (11th Cir. 2005); *Brown*, 364 F.3d at 1271–73.

Both the Supreme Court and Eleventh Circuit have found that a general limitation relating delegated authority to a statute's purpose is a meaningful boundary that satisfies the intelligible principle standard. *FCC v. Consumers' Rsch.*, 606 U.S. 656, 690–91 ("sufficient"); *Whitman v. Am Trucking Ass'n*, 531 U.S. 457, 474–76 (2001) ("requisite to protect public health"); *Nat'l Broad. Co. v. U.S.*, 319 U.S. 190, 216 (1943) ("public interest, convenience, or necessity"); *Brown*, 364 F.3d at 1273 ("necessary and proper"); *Consumers' Rsch.*, 88 F.4th at 924 ("sufficient"). "It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *Lichter v. U.S.*, 334 U.S. 742, 785 (1948). These types of general limitations are read within the context of the relevant statute to help define its bounds. *Am. Power & Light*, 329 U.S. 90, 104 (1946) ("[T]hese standards need not be tested in isolation [and] derive much meaningful content from the purpose of

the Act, its factual background and the statutory context in which they appear.").

In *Brown*, the Eleventh Circuit explicitly found "necessary and proper" language nearly identical to that found in the ESA and MMPA to be inherently limited by the statute's purposes and management directions and to satisfy the intelligible principle standard. 364 F.3d at 1272–74. Under binding circuit precedent, this Court should hold that the ESA and MMPA lawfully delegate authority by allowing NMFS to issue only those rules, such as the Speed Rule, that are appropriate (and, under the MMPA, necessary) to effectuate these statutes' purposes.

III. THE SPEED RULE DOES NOT RAISE MAJOR QUESTIONS

Plaintiffs argue that the Speed Rule poses a major question requiring a higher degree of specificity than normal to find that Congress clearly intended to delegate NMFS the authority to promulgate it. ECF No. 41 at 19–21. This too is a misunderstanding of Supreme Court caselaw. The major questions doctrine is limited to "extraordinary cases," *West Virginia v. EPA*, 597 U.S. 697, 721 (2022), where a rule touches on issues of "economic and political significance." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000). There is no bright-line rule for when the doctrine applies; instead, courts look at whether "indicators from . . . previous major question cases are present." *Biden v. Nebraska*, 600 U.S. 477, 504 (2023). Plaintiffs

allege two such indicators: (1) costs to East Coast vessels and shipping; and (2) discovery of new power under a "long-extant statute." ECF No. 41 at 19–20. But neither supports application of the major questions doctrine.

Plaintiffs cite a 2008 figure of an expected $116 million in annual economic costs of the Speed Rule.[6] ECF No. 41 at 20. Empirical data has since proven this number to be a significant overestimate.[7] Even if it were accurate, the cumulative costs of the Speed Rule since its promulgation are still orders of magnitude lower than the "hundreds of billions of dollars of impact" that have typically been at issue in cases invoking the major questions doctrine based on economic significance. *Mayfield v. Dep't of Labor*, 117 F.4th 611, 616 (5th Cir. 2024); *see, e.g.*, *West Virginia*, 597 U.S. at 715 (1 trillion in 2009 dollars by 2040); *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (hundreds of billions of dollars); *Missouri v. Biden*, 112 F.4th 531, 536 (8th Cir. 2024) ($475 billion); *Biden v. Nebraska*, 600 U.S. at 483 ($430 billion); *Nat'l Council of Nonprofits v. OMB*, 775 F. Supp. 3d 100, 127 (D.D.C. Feb. 25,

[6] Plaintiffs also cite additional projected costs of $46 million annually for a proposed expansion of the 2008 rule that has not occurred and is not relevant. *See* ECF No. 41 at 20.
[7] NMFS-commissioned research since the Speed Rule's promulgation in 2008 has revealed economic impacts far lower than anticipated. *See* Nathan Assocs. Inc., *Economic Analysis of North Atlantic Right Whale Ship Strike Reduction Rule*, at 28 (2012), https://www.mercatus.org/system/files/0648-BB20-Economic-Analysis-Reduce-the-Threat-of-Ship-Collissions.pdf ($44.7 million in 2009); Off. of Protected Res., NOAA Fisheries Serv., *North Atlantic Right Whale (Eubalaena glacialis) Vessel Speed Rule Assessment*, at 30 (2020), https://media.fisheries.noaa.gov/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf ($28.3 to $39.4 million in 2019); *id.* at 45 (characterizing costs as having "been "substantially lower than the initial 2008 estimates.").

2025) ($3 trillion); *Props. of the Villages, Inc. v. FTC*, No. 5:24-CV-316, 2024 WL 3870380, at *7 (M.D. Fla. Aug. 15, 2024) ($400–$488 billion over ten years). Even where annual economic effects are in the hundreds of millions range, courts do not consider them significant enough to invoke the major questions doctrine. *E.g.*, *Mayfield*, 117 F.4th at 616 ($472 million in the first year); *Tennessee v. Becerra*, 131 F.4th 350, 368 (6th Cir. 2025) (annual grants of roughly $258 million in 2023).

Rather than asserting an "extravagant statutory power over the national economy," *Utility Air Regulatory Group v. EPA (UARG)*, 573 U.S. 302, 324 (2014)), or implicating a parade of horribles as to how NMFS might hypothetically invoke its regulatory authority in the future as Plaintiffs argue, *see* ECF No. 41 at 19–21, the Speed Rule before the Court is a limited measure that applies seasonally, in limited geographic areas, to vessels 65 feet and longer that NMFS has found pose a disproportionate risk of killing right whales if they hit them at speeds in excess of 10 knots. *Cf. In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1255 n.8 (11th Cir. 2020) (rejecting major question claim where rule was not "central to [the] statutory scheme" and was "squarely within, instead of outside, the [agency's] expertise").

Nor is the Speed Rule an unprecedented regulation based on a forgotten corner of the MMPA and ESA. In 1979, seven years after Congress

enacted the MMPA, FWS promulgated a regulation to prevent manatee take by boat strikes by establishing time-area closures and vessel speed limits. *See supra* at 2. NMFS began promulgating vessel approach rules to protect marine mammals in 1987. While, prior to 2008, NMFS had never set a vessel speed limit, the Speed Rule does not "bring about an enormous and transformative expansion" of the Services' regulatory authority. *UARG*, 573 U.S. at 324. It is well within NMFS's authority to mitigate vessel strike risk by regulating specific vessel operations in specific times and places.

CONCLUSION

The Speed Rule is squarely within NMFS's delegated rulemaking authorities under the ESA and MMPA to accomplish Congress's goals of protecting and fully recovering endangered species and marine mammals like the right whale. The agency's use of these broad rulemaking authorities in issuing the Speed Rule does not implicate the nondelegation and major questions doctrines. The Court should reject Plaintiffs' statutory and constitutional claims.

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Respectfully submitted this 14th day of January, 2026,

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