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July 6, 2023

Submitted Electronically to

Regulations.gov

Ms. Janet Coit

Assistant Administrator for Fisheries

National Oceanic and Atmospheric Administration

1315 East West Highway

Silver Springs, MD 20910

Mr. David Bernhart

Assistant Regional Administrator

Protected Resources Division

National Marine Fisheries Service, Southeast Regional Office

263 13th Avenue South

St. Petersburg, FL 33701

Re: Proposed Rule: Endangered and Threatened Species: Petition to Establish a Vessel Speed Restriction and Other Vessel-Related Measures to Protect Rice's Whales, RTID 0648-XC760, FR Doc. 2023-06978
Docket ID. No. NOAA-NMFS-2023-0027; 88 Fed. Reg. 20846 (April 6, 2023)

Dear Administrator Coit and Mr. Bernhart:

[Southeastern Legal Foundation](#) (SLF) appreciates the opportunity to respond to the [notice of receipt of petition](#) submitted to National Marine Fisheries Service (NMFS) for rulemaking to establish a year-round 10-knot boat speed limit to protect Rice's whales in their core habitat areas off the Florida gulf (Rice's whale petition). We submit this comment to urge NMFS to refrain from proceeding with the suggested rulemaking. In addition to the comments provided below, SLF agreed with and incorporates by reference the June 21, 2023 comments submitted by the Center for Sportfishing Policy and representatives of the recreational and fishing and boating community (tracking number lj5-uv6e-o3ef) and any other comments from similarly aligned boating and fishing interests.

SLF's interest

SLF is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic[®]. Since 1976, SLF has been going to court for the American

people when the government overreaches and violates their constitutional rights. SLF consistently advocates for the enforcement of constitutional limits upon the federal government and separation of powers. To that end, it regularly pushes back against agency overreach through litigation and public education.

SLF drafts legislative models, educates the public on key policy issues, regularly litigates in cases touching upon these core concerns. SLF has been challenging major agency actions throughout its entire lifespan spanning many topics and agencies. This aspect of its advocacy is reflected in the regular representation of those challenging actions in violation of the constitutional framework. *See, e.g., Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302 (2014); *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court about issues of agency overreach and deference. *See, e.g., Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

In *UARG*, SLF successfully challenged EPA’s attempt to “assert[] newfound authority to regulate millions of small sources” and “rewrite clear statutory terms to suit its own sense of how the statute should operate.” *UARG*, 573 U.S. at 328. In language that seems strangely appropriate given the subject at hand, the Court concluded it was “not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery” in search of ever-expanding regulatory authority. *Id.*

NMFS should decline the invitation to embark upon this unconstitutional and unlawful voyage.

Background

On May 11, 2021, NMFS received a petition from various environmental groups (coalition) to initiate rulemaking procedures under both the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) in the name of protecting endangered Rice’s whales from boat strikes. More specifically, the coalition requests a rule that would outlaw boats of any size at any time of year from traveling more than 10-knots within the waters between approximately Pensacola, FL to Tampa, FL, under pain of serious civil and criminal penalties.

This request represents a breathtaking expansion of existing rules governing boat strikes done in the name of protecting whales. Groups like those that comprise the coalition have been requesting speed limits to be placed upon boats to protect whales for decades, but NMFS has mostly been wise to steer far clear of these treacherous shoals. It should do the same here. Even in the one instance where it has indulged in the fiction that it entertains this authority under existing statutes and the U.S. Constitution, NMFS opted for a rule far less invasive and then declined to enforce it until quite recently.

In 2004, at the behest of a similar coalition, NMFS initiated rulemaking under the ESA and MMPA to reduce vessel strikes to protect right whales via an advance notice of proposed rulemaking. 69 Fed. Reg. 30857 (June 1, 2004); *see also Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 916 (DC Cir. 2008). Shortly thereafter, a similarly comprised coalition submitted a

petition for emergency rulemaking to NMFS “Petition for Initiation of Emergency Rulemaking to Prevent the Extinction of the North Atlantic Right Whale to the Secretary of Commerce, the Administrator of the National Oceanic and Atmospheric Administration, and the Assistant Administrator for Fisheries at NMFS.” (May 19, 2005). *See Defenders of Wildlife*, 532 F.3d at 916. The petition demanded that all ships entering and leaving major East Coast ports travel at speeds obey a speed limit within 25 miles of the port entrances during specified periods. *Id.* Although NMFS denied the request six-months later, *see Petition To Initiate Emergency Rulemaking to Prevent the Extinction of the North Atlantic Right Whale; Final Determination*, 70 Fed. Reg. 56884 (Sept. 29, 2005), the same coalition of environmental groups were simultaneously suing the Coast Guard for failing to fulfill its duties under the ESA by establishing and maintaining vessel shipping lanes in areas inhabited by right whales. *See Defenders of Wildlife*, 532 F.3d at 916-917.

On June 25, 2006, with summary judgment motions pending in the case against the Coast Guard, NMFS issued a proposed rule. *See Proposed Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales*, 71 Fed. Reg. 36299 (June 26, 2006). Then, in the Coast Guard case, the district court ruled on April 5, 2007, in favor of NMFS, *see Defenders of Wildlife v. Gutierrez*, 484 F. Supp. 2d 44 (D.D.C. 2007), but this decision was reversed on July 18, 2008. *Defenders of Wildlife*, 532 F.3d at 928.

On October 10, 2008, NMFS issued a final rule titled, “Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales” (2008 Rule). 73 Fed. Reg. 60173 (Oct. 10, 2008) (enacted at 50 C.F.R. § 224.105). Under the 2008 Rule which remains largely in effect today, NOAA imposed a 10-knot speed restriction on most boats 65’ and up. It only applied in designated zones on the Eastern seaboard for specified times of the year. It originally had a five-year sunset provision to the final rule. *Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales*, 73 Fed. Reg. 60173.

On June 28, 2012, another coalition of environmental groups again submitted a petition titled “Petition for Rulemaking to Prevent Deaths and Injuries of Critically Endangered North Atlantic Right Whales from Ship Strikes.”¹ This petition specifically requested NMFS extend and supposedly improve the conservation effectiveness of the 2008 Rule by, among other things, making it applicable to boats of all sizes and eliminating the sunset provision. This petition was not acted upon by NMFS.

In anticipation of the 2008 Rule’s expiration, NMFS assessed the effectiveness of the rule to evaluate whether to maintain it. *Final Rule to Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales*, 78 Fed. Reg. 73726 (Dec. 9, 2013). NMFS thereby sought public comments

¹ This petition was referenced in n. 14 of their August 5, 2013 comment and the complaint in *Whale and Dolphin Conservation, et al. v. National Marine Fisheries Service, et al.* Case No. 1:21-cv-00112 (D.D.C. Jan. 13, 2021).

regarding the removal of the sunset provision in a proposed rule. *Proposed Rule To Eliminate the Expiration Date Contained in the Final Rule To Reduce the Threat of Ship Collisions With North Atlantic Right Whales*, 78 Fed. Reg. 34024 (June 6, 2013). In response to the request on August 5, 2013, the 2012 coalition submitted a comment again reupping its proposal to make the 2008 Rule to apply to boats all sizes, and to make any voluntary speed limits mandatory, incorporating their petition by reference. On December 9, 2013, NMFS published a final rule eliminating the sunset provision, but maintaining all other aspects of the 2008 Rule. *Final Rule to Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales*, 78 Fed. Reg. 73726 (Dec. 9, 2013). NMFS denied this request as it was not within the scope of the proposed rule. 78 Fed. Reg. at 73734.

On January 30, 2014, NMFS published a notice of receipt and request for public comments on a petition for rulemaking from harbor pilots who sought an exemption to the 2008 Rule for federally maintained, dredged entrance channels and pilot boarding areas on the east coast. *Petition for Rulemaking To Exclude Federally-Maintained Dredged Entrance Channels and Pilot Boarding Areas for Ports From New York to Jacksonville From Vessel Speed Restrictions*, 79 Fed. Reg. 4883 (Jan. 30, 2014). The coalition took the opportunity to comment and demand to broaden the 2008 Rule in a comment on March 3, 2014. On October 15, 2015, NMFS again denied the petition. *Finding for a Petition for Rulemaking To Exclude Federally-Maintained Dredged Entrance Channels and Pilot Boarding Areas for Ports From New York to Jacksonville From Vessel Speed Restrictions*, 80 Fed. Reg. 62008. In so doing, NMFS noted the request to drop the size restriction and expand the designated zones where the speed limit applies. 80 Fed. Reg. at 62011.

On August 6, 2020, the coalition again submitted a petition for rulemaking, titled “Petition for Rulemaking to Prevent Deaths and Injuries of Critically Endangered North Atlantic Right Whales from Vessel Strikes,” pursuant to 5 U.S.C. § 553(e). The 2020 Petition requested that NMFS make the rule applicable to boats of all sizes, and radically expand the areas where it was applicable. Again, NMFS declined to act and so the coalition sued on January 13, 2021. *See Whale and Dolphin Conservation, et al. v. National Marine Fisheries Service, et al.* Case No. 1:21-cv-00112 (D.D.C. Jan. 13, 2021). On August 1, 2022, with cross-motions for summary judgment pending, NMFS filed a notice of proposed rulemaking. *Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule*, 87 Fed. Reg. 46921 (Aug. 1, 2022). On August 9, 2022, the parties stayed the case. NMFS is currently evaluating the comments for this proposed rule.

All of this is to say, environmental groups have been demanding NMFS impose speed limits for recreational boats and expand the zones for a long time. The only time NMFS acceded to their requests, it instituted a rule quite different in that it (1) only affected large, true oceangoing vessels (2) in narrow areas surrounding ports (3) for limited times of the year. And even the much narrower 2008 Rule has never been tested in court. If NMFS puts good sense aside and dramatically builds upon what has done in the past, then it will pose significant constitutional and statutory challenges that may prove insurmountable.

The Proposed Rule violates separation of powers principles.

Separating various governmental powers among three branches of government was one of the most basic features designed by the Framers as a bulwark of liberty. In designing the Constitution, the Framers recognized the dangers of “consolidat[ed] ... power[.]” The Federalist No. 47 (J. Madison). “Their solution to governmental power and its perils was simple: divide it.” *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2202 (2020).

American government therefore has three separate branches of government with different powers: legislative, executive, and judicial. The Constitution vests “[a]ll legislative Powers” in Congress, U.S. Const. art. I, § 1, and Congress cannot “abdicate” or “transfer” “the essential legislative functions with which it is thus vested,” *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935) (quotation omitted). Keeping the various functions within their respective branches is essential.

To ensure that the legislative branch does not unconstitutionally transfer the lawmaking function to the executive branch, courts have long recognized that Congress may not delegate or “transfer[] its legislative power to another branch of Government.” *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019). So essential is the nondelegation doctrine that the Supreme Court has called it “vital to the integrity and maintenance of the system of government ordained by the Constitution.” *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892); *see also Clinton v. City of N.Y.*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”); *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (“Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature.”); *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 34 (D.C. Cir. 2008) (Brown, J., dissenting) (“The nondelegation principle is integral to any notion of democratic accountability.”).

Even when Congress wishes to cede its legislative power, there are constitutional limits. *Loving v. United States*, 517 U.S. 748, 758 (1996) (the nondelegation doctrine was “developed to prevent Congress from forsaking its duties”). The transfer of “powers which are strictly and exclusively legislative” is impermissible. *Gundy*, 139 S. Ct. at 2123 (2019) (plurality op.). For exclusively legislative powers, it is up to Congress alone to “lay[] down policies and establish[] standards.” *See Panama Ref. Co.*, 293 U.S. at 421. “[C]ritical policy decisions” are “the very essence of legislative authority” and can only be made by “the elected representatives.” *Indus. Union Dep’t, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring).

In short, core “legislative power is nondelegable.” *Loving*, 517 U.S. at 777 (Scalia, J., concurring in part and concurring in the judgment). So, in addition to asking whether Congress actually has delegated a power to an agency, NMFS must also address whether “Congress is empowered to delegate the decision at all.” *United States v. Nichols*, 784 F.3d 666, 674 (10th Cir. 2015) (Gorsuch, J., dissenting). The ascertainment of whether Congress has the authority to delegate its legislative powers under Article I, Section 8 turns upon whether the delegation was a “necessary and proper” means “for carrying [the relevant Article I, Section 8 power] into

execution.” See Chad Squitieri, *Towards Nondelegation Doctrines*, 86 Mo. L. Rev. 1239, 1243 (Fall 2022).

Under these basic principles, a rule along the lines requested would be an unconstitutional exercise of legislative power that could not be delegated to NMFS (assuming it was) and lacks an intelligible principle at any rate. It would not be necessary and proper for Congress’s exercise of its constitutional authority under the Commerce Clause—presumably the basis for enacting both the ESA and MMPA—to delegate to NMFS the task of designing a regulation such as the one sought. Congress is fully capable of setting its own policies with regard to setting speed limits for boaters. There is nothing necessary or proper about asking the executive branch to make that determination.

The decision to impose a coastal speed limit affecting countless American boaters and entire industries is a critical policy decision that only Congress can make. There is no historical precedent for allowing an executive branch agency to set a year-round speed limit for boats of all manner of sizes and no court has ever said NMFS can do so under any circumstances. NMFS would be making a policy decision that it cannot exercise, one that would render thousands, if not millions of everyday boaters, *criminals* overnight under 16 U.S.C. § 1375 (MMPA); 16 U.S.C. § 1540 (ESA). See *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019) (“Only the people’s elected representatives in Congress have the power to write new federal criminal laws.”).

The Proposed Rules is a major question and *Chevron* does not apply.

Congress has never given clear congressional authorization for NMFS to address a question of such major significance.

The major questions doctrine implicates similar separation of powers concerns as the nondelegation doctrine but serves to answer the question of whether Congress has awarded power to an agency through vague or silent statutory authorization. “[I]mportant subjects ... must be entirely regulated by the legislature itself,” leaving it to the executive to “act under such general provisions to fill up the details.” *Wyman v. Southard*, 23 U.S. 1, 10 (1825).

A judicial rule that requires Congress to speak clearly on “major questions” ensures a strict separation of powers between the Executive and Legislative branches. *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (“The major questions doctrine works in much the same way to protect the Constitution’s separation of powers.”). American democracy depends on vesting power with the people, in the form of elected representatives, rather than with bureaucracies. See *id.* at 2617 (Gorsuch, J., concurring) (“It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable ‘ministers.’”) (internal citation omitted).

The major questions doctrine establishes that “administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance.” *West Virginia v. EPA*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (internal citation and quotations omitted). The majority opinion specifically rejected

the suggestion of Justice Kagan that “[a] key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems.” *Id.* at 2628 (Kagan, J., dissenting).

Absent a clear statement of congressional authorization, agencies lack the power to issue regulations to address a major question. As explained by Professor Cass Sunstein, major questions operates as a “firm barrier to certain agency interpretation. The idea is not merely that courts will decide questions of statutory meaning on their own. It is that such questions will be resolved unfavorably to the agency. When an agency is seeking to assert very broad power, it will lose, because Congress has not clearly granted it that power.” Cass Sunstein, *There Are Two “Major Questions” Doctrines*, 73 Admin. L. Rev. 475, 477 (2021).

In sum, under the major questions doctrine, courts will ask (1) whether the question is major and (2) whether the agency has a clear statement of congressional authorization. If the agency lacks the clear statement to regulate upon a major question, then it lacks authority to implement the regulation.

The petition involves a major question. To be sure, the question of whether to impose a year-round speed limit on all boats in the waters of Florida gulf is a major one of deep economic and political significance. When agencies seek to use long extant power in a new way that was likely unanticipated by the Congress that enacted the statute, or Congresses since, then it is “telling” evidence that such power was not delegated. *West Virginia v. EPA*, 142 S. Ct. at 2609. History and agency practice are also key as the age of the statute and the novelty of the agency’s authority were significant to the court. *Id.* (quoting *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941).) Obviously, no one in the 1970s, when the ESA and MMPA were enacted, imagined that one day NMFS might think that it could impose a speed limit upon recreational boaters spanning huge swaths of the Florida gulf. Not even the petitioners can show otherwise. They point to a stray comment in the legislative history regarding powerboats striking manatees. Rice’s whale petition at 5-6. But that concern wasn’t embodied in the text of the law, and it is an “egregious” error to rest a regulation “upon a half-sentence in the legislative history.” *Me. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, 2023 U.S. App. LEXIS 14987, at *27, -- F.4th -- (D.C. Cir. June 16, 2023).

The agency has consistently resisted the repeated efforts to put speed limits on recreational boats. And as the Supreme Court has repeatedly admonished, a “lack of historical precedent” is a “telling indication” that agency action is “beyond the agency’s legitimate reach.” *Nat’l Fed’n of Indep. Bus. (NFIB) v. OSHA*, 142 S. Ct. 661, 666 (2022) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)).

Also, the agency is seeking to exercise broad regulatory power over a substantial portion of the economy. The data presented by the representatives of the recreational fishing and boating

community at a recent Oversight House committee on June 6, 2023 showed that the agency has dramatically undersold the economic costs.² Absent congressional involvement, this is improper.

Finally, a question is major when it “seeks to intrude into an area that is the particular domain of state law.” Justice Gorsuch compared this principle to another clear-statement rule: the federalism canon. *West Virginia v. EPA*, 142 S. Ct. at 2621 (Gorsuch, J., concurring). States govern out to three nautical miles, while federal authority extends from the edge of state waters to 200 miles offshore. *See* 43 U.S.C. § 1312; 16 U.S.C. § 1856(a)(1). Indeed, historically it was the states who managed marine sport and commercial fisheries. *See* Cong. Rsch. Serv., *Reauthorization Issues for the Magnuson Stevens Fishery Conservation and Management Act* 31 (May 22, 2014) (CRS Report). It wasn’t until 1976, after the enactment of the MMPA and the ESA, that the federal government declared jurisdiction within 200 miles of the U.S. coast, but still outside state waters. *Id.* But the petitioner’s demand NMFS assert its authority right up to the shoreline where states have always regulated.

Because this question is undeniably major, NMFS can only engage in rulemaking if it has a clear statement of congressional authorization.

NMFS lacks a clear statement under its rulemaking authority. Congress granted NMFS rulemaking authority using only the vaguest and general of terms. Through the MMPA, *see* 16 U.S.C. §§ 1382(a), Congress authorized the agency to prescribe regulations “as are necessary and appropriate to carry out the purposes of this title.” Similarly, under Section 11(f) of the ESA, *see* 16 U.S.C. § 1540(f), Congress authorized the agency to promulgate regulations “as may be appropriate to enforce this Act.” It is “highly unlikely that Congress” authorized such a profound action as imposing a coastal speed limit “through such a subtle device as permission to” act as necessary and appropriate. *Biden v. Nebraska*, 2023 U.S. LEXIS 2793, *28 (2023) (quoting *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)); *id.* at *55 (Barrett, J., concurring) (“Congress’s use of a ‘subtle device’ is not authorization for agency action of ‘enormous importance.’”). Both the MMPA and ESA lack the clear statement of congressional authority necessary to enact the rules that would determine the outcome of a question of such significance.

Alternatively, even if this question is not major, the vague and generalized grants of rulemaking authority in the MMPA and ESA could never justify this sort of rule, period. “It is axiomatic that ‘an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.’” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). To proceed with the requested rulemaking would be a textbook example of taking “an open book ... and chang[ing] the plot line.” *West Virginia v. EPA*, 142 S. Ct. at 2609 (internal quotation

²Beginning at appx. 8:05 mark. The actual effect upon the 63,000 recreational boaters in affected areas would cost 340,000 American jobs and \$84 billion in economic contributions. <https://www.youtube.com/watch?v=3R_NXytygc8>. These economic numbers are incorporated here by reference.

and citation omitted). NMFS does not have rulemaking authority to do what the coalition asks based on a vague grant to act as “necessary” or “appropriate.”

Nor can NMFS expect so-called *Chevron* deference to spare a rule like the one envisioned. The *Chevron* doctrine stands for the proposition that statutory ambiguity in an agency’s enabling powers amounts to an implicit delegation of policymaking authority to resolve the ambiguity so long as the agency’s interpretation is reasonable. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Chevron* set out a familiar two-step test. At step one, the courts ask if Congress has spoken directly to the precise question at issue. If Congress has spoken clearly, the test is at an end, “for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. If the statute is silent or ambiguous with respect to the “specific issue,” then courts proceed to step-two and ask whether the agency’s interpretation is reasonable. *Id.* If it is, then courts generally defer to the agency’s interpretation.

Given the inherent ambiguity in the terms, necessary and appropriate, according deference to an interpretation in favor of this proposed rule would create massive constitutional problems. Courts reach dramatically different results about whether “necessary and appropriate” language is discretion conferring or discretion cabining. Compare *Al-Bihani v. Obama*, 619 F.3d 1, 25 n.11 (D.C. Cir. 2010) (discretion conferring); *United States v. Clark*, 912 F.2d 1087, 1090 (9th Cir. 1990) (same); *Humane Society of the United States v. Bryson*, 924 F.Supp.2d 1228 (D. Or. 2013) (same) with *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (natural reading of “the phrase ‘appropriate and necessary’ requires at least some attention to cost.”); *Mexican Gulf Fishing Co. v. U.S. Dep’t of Com.*, 60 F.4th 956, 965-966 (5th Cir. 2023) (emphasizing “the adjectives *necessary* and *appropriate* limit the authorization contained in this provision.”); *Sanchez v. Att’y Gen. of the U.S.*, 997 F.3d 113, 121 (3d. Cir. 2021) (“the limiting words ‘appropriate and necessary’ instruct that any action . . . must consider case-specific circumstances.”); *Olivas-Motta v. Holder*, 746 F.3d 907, 918 (9th Cir. 2013) (Kleinfeld, J. concurring) (“This ‘necessary and [or] appropriate’ phrase is considerably narrower than the word ‘any’ might be, because it requires necessity and appropriateness.”); *New York Stock Exchange LLC v. Securities & Exchange Commission*, 962 F.3d 541, 561 (D.C. Cir. 2020) (Pillard, J. concurring) (when “evaluat[ing] whether a rule is ‘necessary and appropriate’ under the Exchange Act, the Commission must spell out the need for any proposed rule and its potential drawbacks.”).

The vagueness inherent in such terms creates delegation problems in its own right. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (a vague law “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”); *Gundy*, 139 S. Ct. at 2142 (2019) (in assessing whether the degree of agency discretion exceeds constitutional bounds, the Court frequently looks to its “cases addressing vagueness.”) (Gorsuch, J., dissenting). One scholar observed that the executive and judicial branches “exceed their enumerated powers by purporting to give meaning to gibberish just as surely as they would exceed their enumerated powers by directly inserting their own texts into the Statutes at Large.” Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002). More importantly, under *Chevron*, NMFS

would not be able to claim that its decision to ratchet up its authority is reasonable when courts themselves cannot determine whether the vague authorization to act as “necessary and appropriate” points up or down.

NMFS cannot fill in gaps of knowledge with worst-case scenarios.

NMFS has a history of adopting worst-case assumptions to fill in data gaps when considering rules. Repeatedly at the June 06, 2023 hearing, members of the House oversight committee cited the uncertainties and poor math of the agency when considering its similar rule to enact a speed limit to protect right whales on the Eastern seaboard. NMFS’s tendency recently resulted in the DC Circuit striking down a NMFS biological opinion about right whales and the effect upon them of lobster fishing gear because nothing in the ESA allowed the agency to make the worst-case scenario assumptions that purported to justify such an extreme assessment. *Me. Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, 2023 U.S. App. LEXIS 14987, at **30-31 -- F.4th -- (D.C. Cir. June 16, 2023). The data and studies presented at the hearing are here incorporated by reference and NMFS is advised to consult and address it before engaging in rulemaking.

The failure to identify a problem or show that the benefits outweigh the costs are two considerations that can make a rule irrational. NMFS cannot make any rule rational by filling data gaps with worst-case scenarios. Yet assuming worst-case scenario is the essence of the petition to institute rulemaking. The coalition cannot show that a *single* boat strike on Rice’s whales in the Florida gulf was ever attributable to a boat of a recreational size, and NMFS cannot deduce it based on the evidence presented. Over the last two decades, the coalition cites only *two* instances where Rice’s whales had *evidence* of a strike from a boat of any size, which isn’t the same as saying that it ever happened at all. Rice’s whale petition at 11. Only one of those instances is detailed in the petition, and that event did not result in a mortality. The petitioners then speculate that a majority of boat strikes “*may go undetected.*” Rice’s whale petition at 11 (emphasis added). Maybe or maybe not, but the agency needs proof that a problem exists in the first place. And how many happened from recreational boats? The petition leaves us to guess. The coalition goes further, admitting that the reasons for the whales’ restricted distribution are “unknown.” Rice’s whale petition at 8.

NMFS is not authorized to accept such “wafer-thin” assumptions, *see Biden v. Nebraska*, 2023 U.S. LEXIS 2793, *32 (2023) (quoting *Ala. Ass’n of Realtors v. Dept. of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021)), to factor into its analysis. It needs far more concrete data before it may commence the rulemaking process, especially with regard to imposing criminal speed limits on recreational boats.

NMFS must assess whether this rule strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children, as required by law.

Before initiating rulemaking proceedings, NMFS must assess whether the proposed rule “strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children,” as required by the Treasury and General Government Appropriations Act. Pub. L. No. 105-277, § 654 (1999). This rule will affect family well-being. Boating is an American

pastime. It is woven into the daily fabric of the lives of many Floridians in particular. To outlaw an outdoor activity that generations of Americans have enjoyed with their children out on the waters of the Florida gulf will surely have a dramatic effect on parenting. Countless parents choose to nurture and teach their children by teaching them valuable life lessons among the splendor of the Florida gulf. Any rule impacting a parent’s ability to rear their children through boating activity will harm a family perform its basic functions and substitute governmental activity for the function of a parent in teaching a child safe boating practices.

Conclusion

Thank you in advance for your consideration. SLF respectfully requests that if NMFS decides to venture into these fraught waters, then courts are unlikely to “stand on the dock and wave goodbye as [it] embarks on this multiyear voyage of discovery” in search of ever-expanding regulatory authority. *UARG*, 573 U.S. at 328.

We respectfully request a response if NMFS does decide to proceed with rulemaking. In the response, we request NMFS to respond in writing and to explain how these comments were taken into consideration.

Yours in Freedom,



Southeastern Legal Foundation