23-1736

THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

THOMAS MELONE,
Plaintiff-Appellant
v.

JANET COIT, in her official capacity of Assistant Administrator, of the National Marine Fisheries Service, and the NATIONAL MARINE FISHERIES SERVICE,
Defendants-Appellees

and

VINEYARD WIND 1 LLC,
Intervenor-Appellee,

Appeal from the United States District Court for the District of Massachusetts
No. 1:21-cv-11171
Hon. Indira Talwani

BRIEF AND ADDENDUM OF APPELLANT THOMAS MELONE

November 6, 2023

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

JURISDICTIONAL STATEMENT

Plaintiff Thomas Melone alleges that Defendants National Marine Fisheries Service and its Assistant Administrator for Fisheries (collectively, "NMFS") violated the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1371 *et seq*., and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, in issuing an Incidental Harassment Authorization ("IHA") to Defendant-Intervenor Vineyard Wind 1, LLC ("Vineyard Wind" or "VW") for the take by harassment of marine mammals.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 because the action raises a federal question. The District Court has authority to issue the requested declaratory and injunctive relief pursuant to 28 U.S.C. §§2201, 2202, and 5 U.S.C. §§705, 706. Plaintiff's claims are reviewable under the APA, which empowers courts to set aside agency actions that are unsupported by substantial evidence, or that are "arbitrary and capricious" or "otherwise not in accordance with law" or that are taken "without observance of procedure required by law." 5 U.S.C. §§ 701-706.

The District Court denied Plaintiff's motion for summary judgment and granted Defendants' motion for summary judgment. AD15.[1] Final judgment was entered on August 7, 2023, disposing of all claims. AX62. Plaintiff timely filed a notice of appeal on September 5, 2023. AX63. This Court has jurisdiction over the appeal under 28 U.S.C. §1291.

[1] AD __refers to the Addendum to this brief. AX__ refers to the Joint Appendix.

STATEMENT OF ISSUES

1. Whether the District Court erred by granting Vineyard Wind's motion to intervene?
2. Whether the District Court erred by not overturning the IHA issued to Vineyard Wind.

STATEMENT OF THE CASE

Whether offshore wind is needed (it is not) to reach zero carbon emissions in the electricity sector is not at issue in this case. Also not at issue is the elephant in the room—the offshore wind turbines cannot survive a Category 3 or greater Atlantic hurricane, resulting in the looming potential for catastrophic environmental damage off the coast of Massachusetts from the millions of gallons of oil housed in the planned turbines on the Outer Continental Shelf when a Category 3 or greater hurricane strikes. *See,* Bureau of Ocean Energy Management ("BOEM"), *Final Environmental Impact Statement for Vineyard Wind 1*, at 2-8 ("The WTGs would be designed to endure sustained wind speeds of up to 112 miles per hour (mph)").[2]

This case should involve a straightforward application of statutory and administrative law principles to NMFS's action under the MMPA, which authorizes the "take" of "small numbers" of a species of marine mammals only under limited circumstances. NMFS never made a specific determination as required by the statute of whether the take it was authorizing in the Vineyard Wind IHA (with or without the additional take caused by other citizens from similar activity) constituted a "small number" for the specific species of the North Atlantic Right Whale ("NARW"). Rather, NMFS has a blanket policy that if "take" authorized in a single IHA is less than 1/3 (one-third) of a species, then *ipso facto*, the "take" is of a small number of the species. It's a one size fits all approach from seals to porpoises to species like the NARW teetering on the edge of extinction. And because NMFS does not aggregate the applications for take from other citizens of the same species from

[2] https://www.boem.gov/renewable-energy/state-activities/vineyard-wind-1.

similar overlapping activity (as here even though the statute requires them to do so), under NMFS's approach (blessed by the District Court), it would only take 3 permittees for NMFS to have authorized "take" equal to 100% of a species teetering on the brink of extinction like the NARW.

But in the world of *Chevron*[3] deference on steroids, where a district court makes no independent judgment and simply turns to the agency bureaucrats and asks what they think, you get results that make no sense. If 2.3 million (1/3 of) Massachusetts residents lost power after a storm, no reasonable person would say a "small number" of residents were affected. If the electric utilities said they were raising electric rates by 33%, no one would say that increase was a "small number." If one-third of the NARW population suddenly died, no one would say that was a "small number." If 110 million Americans fell ill tomorrow with COVID-19, no one would say that was a "small number." If a homeless encampment at "Mass and Cass" in Boston suddenly grew to 220,000 (1/3 of Boston's population), no one would say that was a "small number." Common usage makes clear that a "small number of marine mammals" cannot mean one out of every three animals, especially for a species facing extinction, and especially when NMFS puts blinders on as to what other offshore wind citizens are doing at the same time. But yet that is what a "small number" means to NMFS, and the District Court willingly obliged.

The absurdity of the conclusion that 1/3 is a reasonable interpretation of the statute is also confirmed by that phrase's use elsewhere in the MMPA. Congress imposed an identical "small numbers of marine mammals" requirement on

[3] *Chevron USA Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) ("*Chevron*").

authorizing activities that may seriously injure or kill marine mammals. 16 U.S.C. §1371(a)(5)(A)(i); 50 C.F.R. §216.107(a). "'[I]dentical words used in different parts of the same act are intended to have the same meaning.'" *Penobscot Nation v. Frey*, 3 F.4th 484, 497 (1st Cir. 2021) (internal citation omitted).

If NMFS were right that one-third of a species is a "small number," that would mean Congress intended to allow *each* permittee to injure or kill one out of every three animals in each affected marine mammal population. Yet allowing such extensive harm would directly conflict with the MMPA's protective purpose, as it likely would quickly lead to the extinction of species, *see* 16 U.S.C. § 1361(1), (2), (6) (describing the purposes of the MMPA), and certainly would in the case of the NARW, because NMFS has already determined that the NARW cannot lose even a single whale without passing the tipping point to extinction. That number called the PBR or potential biological removal level is 0.7 for the NARW. Such over-the-top actions by administrative agencies are the reason why the United States Supreme Court has reinvigorated the major questions doctrine and is poised to overturn *Chevron* in the upcoming term. *Loper Bright Enterprises v. Raimondo*, No. 22-451, *cert. granted* May 1, 2023, 143 S. Ct. 2429; *Relentless, Inc. v. Dep't of Commerce*, No. 22-1219, *cert. granted* October 13, 2023.

This case also presents a straightforward question of whether Fed. R. Civ. P. 24(b) means what is says, or whether the plain language of the Rule can be ignored by a district court as was done here.

The District Court granted summary judgment for the Defendants solely based upon its application of *Chevron* deference. This timely appeal followed.

A. The Marine Mammal Protection Act.

The MMPA prohibits, with certain exceptions, the "take" of marine mammals in U.S. waters. The term "take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal" (16 U.S.C. §1362(13)). The incidental take of a marine mammal falls under three categories: mortality, serious injury, or harassment (i.e., injury and/or disruption of behavioral patterns). Harassment, as defined in the MMPA for non-military readiness activities, is any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal in the wild (Level A harassment) or any act of pursuit, torment, or annoyance that has the potential to disturb a marine mammal in the wild by causing disruption of behavioral patterns (Level B harassment). Disruption of behavioral patterns includes, but is not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

The primary purpose of MMPA is protection of marine animals. The MMPA was not intended to balance interests between other industries and the protected marine mammals. *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976). The MMPA provides exceptions to the prohibition on take, which give NMFS the authority to authorize the incidental, but not intentional take, of small numbers of marine mammals, provided certain findings are made and statutory and regulatory procedures are met. Incidental take authorizations ("ITAs") may be issued as either (1) regulations and associated Letters of Authorization ("LOA") or (2) an IHA. An IHA is appropriate if the proposed action would result in harassment only (i.e., injury or disturbance)

and is not planned for multiple years. An LOA is required if the actions will result in harassment only (i.e., injury or disturbance) and is planned for multiple years. For an LOA, the Defendants must issue regulations. An LOA may be issued for up to a maximum period of 5 years, and IHAs may be issued for a maximum period of 1 year.

Once NMFS determines an application is adequate and complete, NMFS has a corresponding duty to determine whether and how to authorize take of marine mammals incidental to the activities described in the application. To authorize the incidental take of marine mammals, NMFS is required to evaluate the best available scientific information to determine the common geographic area defined by biogeographic characteristics in which the activity occurs, whether the take would have a negligible impact on the affected marine mammal species, and whether the take involves small numbers of individuals. NMFS must also prescribe the "means of effecting the least practicable adverse impact" on the affected species and their habitat, as well as monitoring and reporting requirements. For an IHA to be used for the activity of U.S. citizens in a common geographic area defined by biogeographic characteristics, NMFS must also determine that the harassment during each period concerned (which cannot exceed one year) does not have the potential to cause death or serious injury (otherwise an LOA must be used). 16 U.S.C. §1371(a)(5)(D)(iv) also imposes a continuing obligation on NMFS which requires NMFS to modify, suspend, or revoke an authorization if the requirements for issuance of an IHA for the collective activity are no longer being met.

SUMMARY OF THE ARGUMENT

The District Court erroneously allowed VW to intervene on a permissive basis under Rule 24(b) because VW does not possess Article III standing and because VW's claim or defense, and the main action, do not have a question of law or a question of fact in common.

The District Court erroneously granted the Defendants summary judgment because:

(i) NMFS never made a specific determination as required by the statute of whether the take it was authorizing in the Vineyard Wind IHA (with or without the additional take caused by other citizens from similar activity) constituted a "small number" for the specific species of the NARW. Rather, NMFS has a blanket policy that if "take" authorized in a single IHA is less than 1/3 (one-third) of a species, then *ipso facto*, the "take" is of a small number of the species. But the statute requires NMFS to make a species-specific determination in the first instance.

(ii) NMFS's one-third policy is an unreasonable interpretation of the statute by any measure.

(iii) The deference shown by the District Court to NMFS is unlawful under the APA, and a complete abdication of the judiciary's constitutional role.

(iv) Improperly allowed segmentation of Vineyard Wind's activities.

(v) NMFS never defined the specified geographical region as required by the statute. Rather NMFS allowed Vineyard Wind to define it and there was no analysis or evidence based upon biogeographic characteristics as required by the statute.

ARGUMENT

I. The District Court Abused Its Discretion By Allowing Vineyard Wind 1 LLC To Intervene.

This Court reviews under an abuse its discretion standard grants of intervention. *See Peaje Investments LLC v. García-Padilla*, 845 F.3d 505, 515 (1st Cir. 2017) (reviewing disposition of motion to intervene for abuse of discretion). The District Court agreed with the Plaintiff that VW did not qualify to intervention as of right. AD1. But the District Court erroneously allowed VW to intervene on a permissive basis.

"[A] court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996). "[T]he putative intervenor [under Rule 24(b)] must ordinarily present: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *EEOC v. Nat'l Children's Ctr., Inc*., 146 F.3d 1042, 1046 (D.C. Cir. 1998).

VW's motion to intervene was timely but it failed to present an independent ground for subject matter jurisdiction between Plaintiff and VW, and VW does not present a defense in common with the action between Plaintiff and the Federal Defendants. Courts that have read Rule 24(b) in accordance with its plain language as imposing an actual substantive requirement have held in situations such as this

case, that permissive intervention is not permitted. The fundamental question for this Court is does Rule 24(b) mean what it says, or can its plain language be ignored?

A. Vineyard Wind Does Not Share With The Main Action A Common Question Of Law Or Fact.

In an identical case to this one, *Habitat Educ. Ctr., Inc. v. Bosworth*, 221 F.R.D. 488, 496 (E.D. Wis. 2004), the putative intervenors sought to intervene on the side of the government in a challenge to government approvals. There the plaintiffs claimed that the United States Forest Service violated the National Environmental Policy Act ("NEPA") and the National Forest Management Act in approving certain logging activities and timber sales in the Cayuga project area of the Chequamegon-Nicolet National Forest in northern Wisconsin. Two trade associations representing commercial logging businesses sought mandatory and permissive intervention claiming that a ruling in plaintiff's favor would reduce the amount of available timber. The court held that the proposed intervenors did not share a claim or defense in common with a claim or defense in the suit reasoning that no claim was made *against* the putative intervenors and the statutes on which the plaintiffs' claims were based did not apply to the putative intervenor:

> In the present case, applicants' claim for permissive intervention fails because applicants have no claim or defense in common with a claim or defense in the suit. The only claim in the suit is plaintiffs' allegation that the forest service failed to comply with various statutory obligations. Applicants make no similar claim. The forest service's defense is that it did in fact comply with the relevant statutes. *Although applicants agree with the forest service's position, it would not be accurate to say that they therefore had a defense in common with the forest service. This is so because plaintiffs make no claim against the applicants and because the statutes on which plaintiffs' claims are based do not apply to applicants*.

(Emphasis added.)

The case here is identical. Plaintiff claims the Federal Defendants failed to comply with various statutory obligations. The Federal Defendants' defense is that they did comply. Plaintiff makes no claim against VW. VW, like all the other offshore wind developers, many other citizens, and many members of Congress, simply agrees with the Federal Defendants' defense. But that cheerleader status does not provide a basis for intervention under Rule 24(b).

The fundamental question is whether Rule 24(b)'s threshold requirement means more than just the putative intervenor wants to line up on the same side as one party. If merely wanting to line up on the same side as a party and take shots at the other side qualifies, then the language "has a claim or defense that shares with the main action a common question of law or fact" is simply superfluous. Sharing a "claim or defense that shares with the main action a common question of law or fact" must be more than the putative intervenor agreeing with one side or wanting to help out with taking shots at the other side.

Another NEPA case is *Idaho Rivers United & Friends of the Clearwater v. Nez-Perce*, 2016 U.S. Dist. LEXIS 199798 (D. Idaho 2016) at *10 where the court denied intervention in a case like here where putative intervenors sought to intervene to defend the government's approvals based upon the putative intervenors' alleged economic interests. *Id.* ("The prospective intervenors have failed to identify any claim or defense on their behalf that shares a common question of law or fact with Plaintiffs' challenges to the Johnson Bar Fire Salvage Project under NEPA, the ESA, or WSRA. Although these two private companies seek to intervene in this action to

protect their economic interests in the two timber salvage contracts, these contracts are byproducts of the Project itself.")

Other cases illustrate why VW does not share a common defense with the main action. In *DSMC, Inc. v. Convera Corp*., 273 F. Supp. 2d 14 (D.D.C. 2002) the plaintiff filed suit against the defendant alleging violations of trade secrets and federal copyrights laws. The claims against the defendant were related to a contract between the plaintiff and the putative intervenor, as a result of which, plaintiff claimed the putative intervenor was allowed to access plaintiff's trade secrets. The court held that there was a common defense: "Clearly the facts at issue in the arbitration and this litigation at least in part overlap: determining whether [the putative intervenor] violated its contract by revealing information to [defendant], and whether [defendant] conspired with [the putative intervenor] to receive the information will involve much of the same factual development. [The putative intervenor] and [the defendant] share the common defense of the arbitration clause of the [plaintiff-putative intervenor] contract and the Federal Arbitration Act." 273 F. Supp. 2d at 27. Here, there are no claims that Plaintiff has made against VW. There is no common defense that VW has because there are no claims in the main action that relate to it. As a result, VW's motion to intervene should have been denied.

B. VW Lacks Article III Standing.

VW also failed to show an independent basis for jurisdiction in an action between Plaintiff and VW, and lacks standing. Standing requires a "claim of injury . . . to a legally cognizable right." *McConnell v. FEC*, 540 U.S. 93, 227 (2003). Rule

24 "promotes the efficient and orderly use of judicial resources by allowing persons, *who might otherwise have to bring a lawsuit on their own* to protect their interests or vindicate their rights, to join an ongoing lawsuit instead." *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996). "[J]udicial efficiency is not promoted by allowing intervention by a party with no interest upon which it could seek judicial relief in a separate lawsuit." *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 840 (8th Cir. 2009).

Here, VW failed to articulate what legally protectable right VW would be able to file suit in the district court to protect. There is no lawsuit that VW could bring on its own against Plaintiff or the Federal Defendants. Thus, VW failed to show an independent basis for jurisdiction in an action between Plaintiff and VW, and lacks standing. As a result, Rule 24 does not allow permissive intervention, and it is an abuse of discretion for the District Court to allow something that the Rule flatly does not permit.[4]

Under the District Court's approach to Rule 24(b), anyone that wanted to uphold the Federal Defendants' actions would qualify for intervention, including all developers of the many offshore wind projects proposed on the Outer Continental

[4] The absence of a claim that VW could bring contrasts with *Cotter v. Mass. Ass'n of Minority Law Enf't Officers*, 219 F.3d 31, 35 (1st Cir. 2000), where the intervenors could have brought an independent claim against the Boston Police Department. This Court explained in a subsequent opinion, *Cotter v. City of Boston*, 323 F.3d 160 (1st Cir. 2003), that the "promotions furthered compelling governmental interests by (a) remedying past discrimination in the Department's promotions of minority officers to sergeant; (b) avoiding the reasonable likelihood of Title VII litigation if the Department made strict rank order promotions." *Id.* at 165. Merely being promoted in 1997 did not wipe out the rights of those promoted officers to seek back-pay or other damages for what the City had conceded was past racial discrimination against those and other officers.

Shelf, potential subcontractors of the VW or other offshore wind projects, politicians, offshore wind turbine manufacturers, and so on. All of those are would-be cheerleaders and would like to see the Federal Defendants' actions sustained. Rule 24(b) requires standing and a common defense with the main action, neither of which apply here. As a result, it was an abuse of discretion to grant VW's motion to intervene.

II. The District Court Erred By Not Vacating The VW IHA And Remanding It Back To NMFS.

This Court reviews de novo orders granting motions for summary judgment, drawing all reasonable factual inferences in the light most favorable to the non-moving part. *HMI. Colt Def. LLC v. Bushmaster Firearms, Inc*., 486 F.3d 701, 705 (1st Cir. 2007).

The primary purpose of MMPA is protection of marine animals. The MMPA was not intended to balance interests between other industries and the protected marine mammals. *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976). The MMPA provides exceptions to the blanket prohibition on take of any kind. The statute gives NMFS the authority to authorize the incidental, but not intentional take, of small numbers of marine mammals, provided certain findings are made and statutory and regulatory procedures are met.

Specifically, the statute provides as follows:

> (i) Upon request therefor by citizens of the United States who engage in a **specified activity** (other than commercial fishing) within **a specific geographic** region, the Secretary shall authorize, for periods of not more than 1 year, subject to such conditions as the Secretary

> may specify, the **incidental**, but not intentional, taking by harassment of **small numbers** of marine mammals of a species or population stock by such citizens while engaging in that activity within that region if the Secretary finds that such harassment during each period concerned—
>
> (I) will have a **negligible impact** on such species or stock, and
> (II) will not have an unmitigable adverse impact on the availability of such species or stock for taking for [certain] subsistence uses . . . .
> (ii) The authorization for such activity shall prescribe, where applicable—
>
> (I) permissible methods of taking by harassment pursuant to such activity, and other means of effecting the **least practicable impact** on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for [certain] subsistence uses . . . .

16 U.S.C. § 1371(D)(a)(5) (emphasis added).

A. The District Court Erred By Not Requiring NMFS To, In The First Instance, Make A Determination Of What Constitutes Small Numbers Of North Atlantic Right Whales.

Congress did not define the term "small numbers of marine mammals *of a species*." (Emphasis added.) The House Report accompanying the proposed amendments to the MMPA noted that the House Committee "recognize[d] the imprecision of the term 'small numbers'[] but was unable to offer a more precise formulation because the concept is not capable of being expressed in absolute numerical limits." H.R. Rep. No. 97-228 at 19 (Sept. 16, 1981), reprinted in 1981 U.S.C.C.A.N. at 1469. The statutory scheme does dictate, however, that the "small numbers" requirement is distinct from the "negligible impact" requirement. *Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012).

Yet while recognizing the "imprecision of the term 'small numbers,'" Congress intended that the smallness of the number would reflect takings that are

"infrequent, unavoidable, or accidental." H.R. Rep. No. 97-228.[5]

The Notice of Issuance of the VW IHA authorized 20 takes of right whales by Level B harassment. NMFS 3515 at 3551. Level B Harassment is considered "take" under the MMPA. NMFS calculated 20 takes to be 5.4% of the right whale population and concluded that this number was a "small number" as required under the MMPA to authorize incidental taking by harassment. *Id*. at 3541. NMFS explained that it considers one-third of a species' population the upper limit of "small numbers." Fed. Defs. Opening Mem. 11-12 [Doc. No. 153] (discussing 83 Fed. Reg. 63,268, 63,375 (Dec. 7, 2018); 86 Fed. Reg. 5,322, 5,439 (Jan. 19, 2021) ("when the estimated number of individual animals taken…is up to, but not greater than, one-third of the most appropriate species or stock abundance, *NMFS will determine that the number of marine mammals taken of a species or stock are small*.") (Emphasis added.)

NMFS' argument regarding "small numbers" is that:

i. The MMPA did not define in either numerical or proportional terms what "small numbers" means. (Plaintiff agrees with that position.)

ii. NMFS has anything less than one-third of a species as a "small

[5] H.R. Rep. No. 97-228, *as reprinted in* 1981 U.S.C.C.A.N. 1458: "the Secretary shall allow the incidental, but not the intentional, taking, by citizens of the United States while engaging in commercial fishing operations, of small numbers of marine mammals of a species or population stock", and "Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock."

numbers." Def. Opening Mem. at 19.

iii. Because the "take" authorized by the VW IHA is less than one-third of the NARW population, the "take" authorized complies with the "small numbers" requirement of the statute. No more thinking or analysis was required and none was undertaken here.

iv. "NMFS's interpretation of the term 'small numbers' is a reasonable interpretation of the term 'small numbers' and entitled to [*Chevron*] deference." Def. Mem., ECF 154, at 20.

The District Court agreed that the NMFS 1/3 rule is entitled to *Chevron* deference—end of story. The District Court then contradicted itself by stating that "the Administrative Record, particularly the Notice of Issuance of the IHA excerpted above, does not indicate that NMFS applied any policy concerning an upper limit on the definition of 'small numbers' in connection with issuing the Vineyard Wind IHA, let alone that NMFS reflexively applied a one-third policy to the potential take by harassment of right whales." AD58, Order at 44. While technically true that those particular documents did not recite the 1/3 rule, as the District Court stated the Defendants conceded that is what happened because that is exactly what is stated in the NMFS rule: "when the estimated number of individual animals taken…is up to, but not greater than, one-third of the most appropriate species or stock abundance, *NMFS will determine that the number of marine mammals taken of a species or stock are small*." Fed. Defs. Opening Mem. 11-12 [Doc. No. 153] (discussing 83 Fed. Reg. 63,268, 63,375 (Dec. 7, 2018); 86 Fed. Reg. 5,322, 5,439 (Jan. 19, 2021).

In the District Court, Plaintiff did not as a threshold matter ask the court rule

on the issue of whether 5.4% of the NARW population constitutes "small numbers." Plaintiff's position is that (even if the Defendants could ignore all other offshore wind activity and IHAs in which other citizens simultaneously engage in the biogeographic area that supports the NARWs' existence), the statute requires NMFS to make a determination for a species. It makes no sense that Congress intended that there would be an across-the-board one-third rule when Congress itself stated that the determination of small numbers of a species is a "concept is not capable of being expressed in absolute numerical limits." H.R. Rep. No. 97-228 at 19 (Sept. 16, 1981), reprinted in 1981 U.S.C.C.A.N. at 1469.

What constitutes "small numbers" for the NARW first must be made by NMFS based *upon specific substantial evidence for the NARW*. The Defendants have never done that. Rather they totaled the number of individuals to be taken and concluded that number constituted "small numbers" simply because that was less their 1/3 internal rule that is uniformly applied to all species, contrary to Congress' direction that it is a species-by-species determination. No other analysis was undertaken or needed in Defendants' view. But the statute allows for the taking by harassment of "small numbers of marine mammals of <u>a</u> species." The language clearly requires an agency determination of what is small numbers on a species-by-species basis. But that is not what NMFS did. NMFS defined small numbers as 1/3 for every species.

That rationale is simply unreasoned and untethered from the statute. "It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Dep't of*

Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1907, 207 L. Ed. 2d 353 (2020) ("*Regents*") (internal citations and quotations omitted.) Here, when NMFS issued the VW IHA, they simply looked to see if the "take" in numerical terms was less than one-third of the estimated remaining population of the NARW. It was, so *ipso facto*, in the Defendants' view the VW IHA's authorized take was a "small number." No other analysis was undertaken or needed in Defendants' view. Because the agency's decision is based upon the absence of a required statutory prerequisite, the District Court cannot proceed further. The agency's decision was The District Court erred by not remanding the case to NMFS and requiring NMFS to make a determination of small numbers specifically for the NARW.

B. NMFS's One-Third Interpretation Of Small Numbers That Applies To All Species, Regardless Of The Status Of The Species, Is Not A Reasonable Interpretation Of The Statute.

"It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Regents,* 140 S. Ct. at 1907 (internal citations and quotations omitted.) Here, the Defendants state that when they issued the VW IHA, they simply looked to see if the "take" in numerical terms was less than one-third of the estimated remaining population of the NARW. It was, so *ipso facto*, in the Defendants' view the VW IHA's authorized take was a "small number." No other analysis was undertaken or needed in NMFS' view. For purposes of this case, the Defendants are stuck with that one-third rule as the basis for its agency action that issued the VW IHA. No amount of *post-hoc* or advocate rationalization can provide alternate

reasons now.

What that presents here are two questions. *First*, is NMFS' one-third rule that applies to all species, regardless of the status of the species, a reasonable interpretation of the statute? *Second*, if it is, then is the Defendants' interpretation entitled to deference? If the answer to the first question is yes, then the issue is framed squarely on whether this Court must defer to the Defendants' interpretation. If the answer to either question is no, then this Court must vacate the VW IHA and Defendants must "deal with the problem afresh by taking *new* agency action." *Regents*, 140 S. Ct. at 1907 (internal citations and quotations omitted, emphasis in original.)

The APA instructs federal courts to "decide all relevant questions of law," including by "determin[ing] the meaning … of the terms of an agency action." 5 U.S.C. § 706. The APA clearly requires federal courts, not bureaucrats that are defendants before them to make the independent determination of the meaning of the terms of an agency action. Under the APA, a reviewing court must not reduce itself to a "rubber stamp" of agency action." *NLRB v. Beverly Enterprises-Massachusetts, Inc*., 174 F.3d 13, 23 (1st Cir. 1999), *Penobscot Air Servs. v. FAA*, 164 F.3d 713, fn. 2 (1st Cir. 1999). But that is exactly what the District Court did. The District Court rubber-stamped the Defendants' one-third-of-every-species-is-a-small-number rule as a reasonable interpretation of the statute. But the District Court faltered on this issue for two reasons. *First*, the District Court did not explain its reasoning as to why 1/3 of the NARW being a "small number" (i.e., the basis of NMFS's agency action) is a reasonable interpretation of a small number of whales

under the statute. Rather, the District Court avoided that question entirely and simply launched into a discussion of whether 5.4% of the NARW was a small number. AD57, Opinion at 43. But even that discussion, which is pre-mature under *Regents*, falls short. The District Court commented that "Plaintiff's reliance on dictionary definitions, and his interpretation of what 5.4% amounts to in the context of electricity customers or right whales does not render NMFS's interpretation unreasonable." *Id*. While Plaintiff disagrees, the District Court's statement does not give any analysis of why the District Court believes the NMFS rule of one-third, or even 5.4% if one jumps ahead, is a reasonable interpretation of the statute.

The District Court added: "Plaintiff additionally contends that 'small numbers' should be interpreted consistently across the MMPA, but nowhere does Plaintiff point to an inconsistent approach." *Id.* That is simply incorrect. Plaintiff pointed out that Congress imposed an identical "small numbers of marine mammals" requirement on authorizing activities that may seriously injure or kill marine mammals. 16 U.S.C. §1371(a)(5)(A)(i); 50 C.F.R. §216.107(a). "'[I]dentical words used in different parts of the same act are intended to have the same meaning.'" *Penobscot Nation*, 3 F.4th at 497 (internal citation omitted). If NMFS were right that one-third of a species is a "small number," that would mean Congress intended to allow *each* permittee to injure or kill one out of every three animals in each affected marine mammal population. Yet allowing such extensive harm would directly conflict with the MMPA's protective purpose, as it likely would quickly lead to the extinction of species, *see* 16 U.S.C. § 1361(1), (2), (6) (describing the purposes of the MMPA), and certainly would in the case of the NARW.

The District Court's final commentary was:

> Finally, Plaintiff asserts that his grievance is with NMFS's policy of setting an upper limit of one-third for the definition of "small numbers" and NMFS "simply looked to see if the 'take' in numerical terms was less than one-third of the estimated remaining population." Pl. Opp. 14-15 [Doc. No. 163]. But the Administrative Record, particularly the Notice of Issuance of the IHA excerpted above, does not indicate that NMFS applied any policy concerning an upper limit on the definition of "small numbers" in connection with issuing the Vineyard Wind IHA, let alone that NMFS reflexively applied a one-third policy to the potential take by harassment of right whales.

But NMFS said that it *did apply* such a reflexive policy. NMFS explained that it considers one-third of a species' population the upper limit of "small numbers." Fed. Defs. Opening Mem. 11-12 [Doc. No. 153] (discussing 83 Fed. Reg. 63,268, 63,375 (Dec. 7, 2018); 86 Fed. Reg. 5,322, 5,439 (Jan. 19, 2021) ("when the estimated number of individual animals taken…is up to, but not greater than, one-third of the most appropriate species or stock abundance, *NMFS will determine that the number of marine mammals taken of a species or stock are small*.") (Emphasis added.)

Finally, the District Court discussed a few cases, but not in the context of the one-third rule, but in the context of 5.4%, jumping the gun by seemingly making a determination that was not made by NMFS, but is required to be made by NMFS in the first instance. The District Court then rejected the only scientific factor related to the NARW—the PBR—and called it a day, still not engaging the issue of why the District Court believes (if it even did) why the one-third rule is a reasonable interpretation of the statute (or even why 5.4% would be a reasonable interpretation of the statute in the case of the NARW.)

Plaintiff did establish that NMFS's one-third rule is not a reasonable interpretation of the statute. Plaintiff argued that the term "small number" should be given its ordinary meaning. "When a term goes undefined in a statute, we give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd*., 566 U.S. 560, 566 (2012). Plaintiff argued that the Defendants' one-third rule defies common sense. If 2.3 million (1/3 of) Massachusetts residents lost power after a storm, no reasonable person would say a "small number" of residents were affected. If the electric utilities said they were raising electric rates by 33%, no one would say that increase was a "small number." If one-third of the NARW population suddenly died, no one would say that was a "small number." If 110 million Americans fell ill tomorrow with COVID-19, no one would say that was a "small number." If a homeless encampment at "Mass. and Cass" in Boston suddenly grew to 220,000 (1/3 of Boston's population), no one would say that was a "small number." Common usage makes clear that a "small number of marine mammals" cannot mean one out of every three animals, especially for a species facing extinction.

The absurdity of the District Court's implicit acceptance that 1/3 is a reasonable interpretation of the statute is confirmed by that phrase's use elsewhere in the MMPA. Congress imposed an identical "small numbers of marine mammals" requirement on authorizing activities that may seriously injure or kill marine mammals. 16 U.S.C. §1371(a)(5)(A)(i); 50 C.F.R. §216.107(a). "'[I]dentical words used in different parts of the same act are intended to have the same meaning.'" *Penobscot Nation,* 3 F.4th at 484 (internal citation omitted). If NMFS were right that one-third of a species is a "small number," that would mean Congress intended

to allow *each* permittee to injure or kill one out of every three animals in each affected marine mammal population. Yet allowing such extensive harm would directly conflict with the MMPA's protective purpose, as it likely would quickly lead to the extinction of species, *see* 16 U.S.C. § 1361(1), (2), (6) (describing the purposes of the MMPA), and certainly would in the case of the NARW.

The District Court and the Defendants criticized the Plaintiff's argument that in the case of the NARW, the PBR (which is 0.7) must set the upper limit for "small numbers." PBR "means that for the species to recover, the population cannot sustain, on average over the course of a year, the death or serious injury of a single individual due to human causes." Federal Register, Vol. 87, No. 146, at 46922 (2022). The PBR is the only number that is based upon science in this case, and it is based upon proportionality. Because the small numbers requirement of 16 U.S.C. §1371(a)(5)(A)(i) and 50 C.F.R. §216.107(a), could not exceed 0.7, and the language is the same as applied to harassment, small numbers must mean a number no greater than the PBR for the species. Thus, no take of any kind of the NARW should be considered to be "small numbers."

The District Court erred by accepting NMFS's rule that the taking of 1/3 of the NARW was a "small number."

C. The District Court Erred By Deferring To NMFS's Interpretation.

The District Court relied solely on *Chevron* deference (and even increased deference) to uphold the Defendants' conclusion that the VW IHA authorized no more than "small numbers." AD46-47, Opinion at 32-33 ("A reviewing court should increase its level of deference where the agency is acting within its area of special

expertise.") (Internal citations and quotations omitted.) As part of its analysis, the District Court relied on *Relentless, Inc. v. U.S. Dep't of Com.,* 62 F.4th 621, 628 (1st Cir. 2023), which the Supreme Court has selected as the vehicle for all nine members of the Court to re-visit *Chevron*.

The District Court should not have deferred at all to NMFS's interpretation of small numbers for two reasons.

First, what constitutes a "small number" of something is not particularly within NMFS's bailiwick. The term "negligible impact" is within NMFS's bailiwick, but not "small numbers." "Small numbers" should be given its ordinary meaning. *Taniguchi,* 566 U.S. at 566. HBO produced a series the "Leftovers," where 2% of the global human population disappeared. No one thought 2% was a small number there. But here we are talking about a whopping 33%. One-third of something is not a small number.

But in the world of *Chevron* deference on steroids, where a district court makes no independent judgment and simply turns to the agency bureaucrats and asks what they think, you get results that make no sense. If 2.3 million (1/3 of) Massachusetts residents lost power after a storm, no reasonable person would say a "small number" of residents were affected. If the electric utilities said they were raising electric rates by 33%, no one would say that increase was a "small number." If one-third of the NARW population suddenly died, no one would say that was a "small number." If 110 million Americans fell ill tomorrow with COVID-19, no one would say that was a "small number." If a homeless encampment at "Mass and Cass" in Boston suddenly grew to 220,000 (1/3 of Boston's population), no one

would say that was a "small number." Common usage makes clear that a "small number of marine mammals" cannot mean one out of every three animals, especially for a species facing extinction, and especially when NMFS puts blinders on as to what other offshore wind citizens are doing at the same time. But yet that is what a "small number" means to NMFS, and the District Court willingly obliged.

Second, Chevron "deserves a tombstone no one can miss." *Buffington v. McDonough*, No 21-972, 598 U.S. __ (November 7, 2022) (*Gorsuch, J.* dissenting). Without *Chevron* deference the VW IHA would be required to be vacated so that the Defendants could make a redetermination, and take new agency action, regarding whether the "take" involves "small numbers."

The judiciary's constitutional role is to exercise its independent judgment "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). A rule of deference that prevents judges from exercising that independent judgment unconstitutionally transfers judicial power to the Executive Branch. *See Perez v. Mortgage Bankers Ass'n,* 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment). What is more, such a rule erodes the judiciary's critical role in checking the excesses of the Executive Branch. *Id.* at 1220-21; *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 655-85 (1996). Making matters still worse from the standpoint of separation-of-powers, such deference effectively combines in a single agency both the power to prescribe and the power to interpret—yet "a fundamental principle of separation of powers . . . [is] that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker v. Northwest*

Environmental Defense Center, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part).

Chevron abdicates the Judiciary's constitutional duty, as shown in this case. It forces federal courts to let executive branch agencies authoritatively interpret the law in pending cases—even when the courts themselves disagree with what the agency says. That is nothing less than a massive "judicially orchestrated shift of power." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016). Neither Congress nor the courts themselves have authority to transfer judicial power to the Executive. That approach is unjustified by the Constitution's text or structure, and unsupported by history.

Under *Chevron*, "we outsource our interpretive responsibilities. Rather than say what the law is, we tell those who come before us to go ask a bureaucrat. In the process, we introduce into judicial proceedings a "systematic bias toward one of the parties." P. Hamburger, *Chevron* Bias, 84 Geo. Wash. L. Rev. 1187, 1212 (2016). Nor do we exhibit bias in favor of just any party. We place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else." *See*, *Buffington v. McDonough*, No 21-972, 598 U.S. __ (November 7, 2022) (*Gorsuch, J.* dissenting)

As Justice Gorsuch explained *Chevron* upends basic principles of constitutional due process of law. It is patently unfair for a court to defer to an agency's interpretation, especially when the agency *itself* is a litigant, before that same court, in the actual case at hand. Judges are supposed to be impartial arbiters of law—not home-team umpires for the Executive Branch. Moreover, the APA

instructs federal courts to "decide all relevant questions of law," including by "determin[ing] the meaning … of the terms of an agency action." 5 U.S.C. § 706. Contrary to that instruction, however, *Chevron* demands that courts *not* decide fundamental, outcome-determinative questions of law. As four Justices have noted, *Chevron* thus conflicts with Section 706, which requires "de novo review on questions of law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 (2019) (Gorsuch, J., joined by Thomas, Alito, and Kavanaugh, JJ., concurring in the judgment) (citation omitted). *Chevron* "flout[s] the language of the Act." Kavanaugh, *supra*, at 2150 n.161.

Chevron also rests on a false presumption about Congressional intent. *Chevron* reasoned that an ambiguity in a statute reflects an implicit delegation of interpretive authority to federal agencies. *Chevron*, 467 U.S. at 844. Most ambiguities in statutes are *un*intentional, and there is no reason to believe that every ambiguity in every statute is both (1) deliberate, and (2) created with the hope that it would be resolved by an agency. Many Justices and commentators have acknowledged that this core premise of *Chevron* is "fictional"—i.e., made up.[6] Why

[6] *See, e.g., Gutierrez-Brizuela*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron*'s claim about legislative intentions is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that"); David Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212 (2001) ("*Chevron* doctrine at most can rely on a fictionalized statement of legislative desire"); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 380 (1986) (acknowledging that *Chevron* rests on a "legal fiction"); Abbe Gluck & Lisa Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 996 (2013) (noting that majority of congressional staffers surveyed indicated "that their knowledge of *Chevron* does not mean that they intend to delegate whenever ambiguity remains in finalized statutory language").

should the meaning of vast swaths of federal law be determined under a doctrine that rests on a premise that no one thinks is valid?

In addition, *Chevron* incentivizes agencies to disregard the law, as the Defendants have done here with their one-third interpretation. As Justice Kavanaugh has explained, "*Chevron* encourages the Executive Branch … to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints." Kavanaugh, *supra*, at 2150; *see also Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) ("[W]e should be alarmed that [the agency] felt sufficiently emboldened by those precedents to make the bid for deference that it did here."). By telling agencies that they are free to adopt any interpretation that is marginally *reasonable*—even if it does not reflect the best view of the statute—*Chevron* discourages fidelity to the rule of law. *Chevron* forces courts to defer to agency interpretations that the courts themselves believe are wrong. That is not consistent with an independent Judiciary or the rule of law.

This state of play, where agencies perceive themselves as near-invincible, was unimaginable to the Framers of both the federal and state constitutions. They "could hardly have envisioned today's vast and varied [] bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities." *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). Perhaps for that reason, neither the federal nor state Constitutions say anything about the existence of administrative agencies. *See also* Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U.L. REV. 1523, 1555 (2013) ("While the Framers were familiar with British ministries' and colonies' charter

governments, the writings on government that Framers like Madison were familiar with did not discuss anything that even approximates the administrative state we have today."). Unlike today's freewheeling administrative state, the first of our "nation's regulatory statutes … contain[ed] detailed and *limited* grants of authority to administrative bodies." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2255 (2001) (emphasis added). Early Congresses also "fought regularly with departments on domestic and international matters" that involved the President's policy directives "being carried out by his immediate cabinet subordinates." Turley, *supra*, at 1556. But over time, "the rise of the regulatory state and the need for administrative discretion" undermined the "strict limits on congressional delegation of power" the Framers had contemplated. Erwin Chemerinsky, *A Paradox Without A Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1107 (1987). Today, "the administrative state has … grow[n] out of control." Peter J. Wallison, *Judicial Fortitude: The Last Chance To Rein In The Administrative State* 134 (1st ed. 2018). The Framers may have considered the legislative "the most dangerous branch," but modern agencies now make the Executive "the constitutional institution to reckon with." Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515,528-29 (2015).

The District Court erred by deferring to NMFS and in the process abdicating its role under the APA and the Constitution.

D. The District Court Erred By Approving The Defendants' Segmentation of Vineyard Wind's Activities.

There is nothing in 16 U.S.C. §1371(a)(5)(D) that supports the District Court's approval of the Defendants' claim that the IHA process is singularly focused one applicant to the exclusion of other applicants, i.e., citizens, engaging in the same activity within the same biogeographic area. The statute provides:

> Upon request therefor by **citizens** of the United States who engage in **a specified activity** (other than commercial fishing) within a **specific geographic region**, the Secretary shall authorize, for periods of not more than 1 year, subject to such conditions as the Secretary may specify, the incidental, but not intentional, taking by harassment of small numbers of marine mammals of a species or population stock *by such citizens* while engaging in that activity within that region if the Secretary finds that such harassment during each period concerned.

(Emphasis added)

The statute refers to "citizens," not a single citizen, i.e., the statute requires a collective approach. Here the specified activity is the development of offshore wind farms pursuant to the Executive Branch's command that "federal agencies [] vigorously promot[e] offshore wind projects."[7] The statute itself indicates a broad approach to specified activity because it specifically carves out "commercial fishing." Commercial fishing is engaged in by many "citizens." It is a single specified activity. The statute does not state that the specified activity is limited to just the applicant. The reasons for the collective approach are obvious. Under the District Court's approval of the Defendants' view, there is no limit to how small an applicant or applicants could slice and dice their activity so that it appears to involve

[7] *See*, Memorandum of law in support of Vineyard Wind 1 LLC's motion for leave to intervene, ECF 6 at 15.

"small numbers," defeating the purpose of the MMPA.

The following project IHA authorizations overlap with VW's and total 185 "takes," far more even than the absurd one-third of the NARW that the Defendants claim constitutes "small numbers." So even under the Defendants' erroneous interpretation of the statute, the aggregate take authorized within overlapping time periods no longer constitutes "small numbers." *See*, ECF 145-1, SUF 49.

Project	Covered activities	Beginning of covered period	End of covered period	NARW Level B Harassment Takes	Date IHA Issued
Vineyard Wind 1	Pile driving only	5/1/2023	4/30/2024	20	5/21/2021
South Fork Wind LLC	Construction	11/15/2022	11/14/2023	13	12/21/2021
Attentive Energy LLC	Marine surveys	9/15/2022	9/14/2023	3	8/16/2022
Atlantic Shores Offshore Wind Bight, LLC	Marine surveys	8/10/2022	8/9/2023	24	8/10/2022
Park City Wind LLC	Marine surveys	9/1/2022	8/31/2023	30	7/19/2022
Vineyard Northeast, LLC	Marine surveys	7/27/2022	7/26/2023	40	7/27/2022
NextEra	Marine surveys	7/1/2022	6/30/2023	8	6/29/2022
VEPCO	Marine surveys	5/27/2022	5/26/2023	5	5/27/2022
Ocean Wind II LLC	Marine surveys	5/10/2022	5/9/2023	11	5/9/2022
Orsted Wind Power North America LLC (Delaware)	Marine surveys	5/10/2022	5/9/2023	11	5/6/2022
Ocean Wind LLC	Marine surveys	5/10/2022	5/9/2023	9	5/9/2022

Kitty Hawk	Marine surveys	8/1/2022	7/31/2023	2	4/20/2022
Ocean Wind LLC	Marine surveys	5/10/2022	5/9/2023	9	5/9/2022

E. *Chevron* Squared—NMFS And The District Court Let VW Define The Specified Geographical Region Under The Statute.

The District Court doubly erred when it came to the term "specified geographical region." The District Court turned the analysis over to Defendants who conceded that they just turn that analysis over to the applicant and rubber-stamp it. *See*, ECF 154, Def. Memo. at 19 ("Applications for incidental take authorizations are required to include the specified geographical region where it will occur. 50 C.F.R. § 216.104(a)(2). Thus, as with its analysis of the 'specified activity,' NMFS/OPR assesses the 'specified geographical region' for which incidental take coverage is being sought as described by the applicant. *See* NMFS 3521")

Thus, the District Court approved deferring to Defendants who, in turn, deferred to Vineyard Wind. This could be called *Chevron*-squared deference.

"Specified geographical region means an area within which a specified activity is conducted and that has certain biogeographic characteristics." 50 C.F.R. §216.103. The Notice of Proposed IHA unlawfully defined the "specific geographic region" extremely narrowly as "the northern portion of the 675 square kilometer (km) (166,886 acre) Vineyard Wind Lease Area OCS– A 0501." The result is an understatement of impacts and a failure to adhere to the requirements of the statute. NMFS's regurgitation of the specified geographical region determined by VW is doubly unlawful and arbitrary and capricious because it is not based upon any analysis of biogeographic characteristics. The specified geographical region must

be determined based upon common biogeographic characteristics. 50 C.F.R. §216.103. Even the narrowest approach would include in the "specified geographic region" at a minimum the entire area south of Martha's Vineyard that has now become an important mating and foraging habitat for the NARW, as depicted in Figure 1 from the *O'Brien 2022*. ECF 154-2 at 507. More broadly, the specified region should be based upon the range of the NARW in the United States because from a biogeographic standpoint, the region in which the NARW exists defines the biogeographic region as to them. But here the Court does not need to decide at this point which region is the appropriate one based certain biogeographic characteristics because NMFS took no look, much less a hard look, at the proper specified geographical region based upon biogeographic characteristics. It just rubber-stamped VW's definition.

H.R. Rep. No. 97-228 explains that *the Secretary*, not the applicant, specifies the "specified geographical region" *and* the specified activity, and that the Secretary must examine the total taking by "citizens" (plural not singular) engaging in that same type of activity in the same biogeographic region. H.R. Rep. No. 97-228 provides the following discussion and example:

> It is the intention of the committee that both the specified activity and the specified region of referred to in section 101(a)(5) be narrowly identified so that the anticipated effects will be substantially similar. Thus, for example, it would not be appropriate ***for the Secretary to specify an activity as broad and diverse as outer continental shelf oil and gas development***. Rather, the particular elements of that activity should be separately specified as, for example, seismic exploration or core drilling. Similarly, the specified geographical 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. ***Thus, for example, it would be***

> ***inappropriate to identify the entire pacific coast of the North American continent as a specified geographical region, but it may be appropriate to identify particular segments of that coast having similar characteristics, both biological and otherwise, as specified geographical regions***.
>
> (Emphasis added).

That direction is exactly what Plaintiff has been arguing. Plaintiff is not arguing that the entire Atlantic coast of the North American continent be designated as the specified geographical region, only those areas in which the NARWs live. Those areas are already identified by the Defendants as being within a certain number of miles from shore stretching from Northern Florida to Maine.

H.R. Rep. No. 97-228 also makes it clear that when the statute referred to "citizens of the United States," it was referring to the aggregate of all citizens of the United States that either, on the one hand engage in commercial fishing, or on the other hand, engage in a specified activity within a specified geographical region (that is not commercial fishing), the scope of the activity and region being defined by the Secretary. Otherwise, the Secretary's responsibility to define both the "specified geographical region" *and* the specified activity, in a biogeographic region makes no sense at all.

The VH IHA should be vacated and remanded to NMFS so that NMFS can determine the specified geographical region.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court, and vacate the Vineyard Wind IHA.

Respectfully submitted this 6th day of November 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 9,654 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in 14-point, Times New Roman font using Microsoft Word.

/s/ Thomas Melone