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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, et al., Plaintiffs, vs. NATIONAL MARINE FISHERIES SERVICE, et al. Defendants.	Case No. 3:21-cv-00255-JMK 3:21-cv-00247-JMK CONSOLIDATED **PLAINTIFFS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT** **[ORAL ARGUMENT REQUESTED]**
WES HUMBYRD, et al., Plaintiffs, vs. GINA RAIMONDO, et al., Defendants.	DATE: APRIL 15, 2022 JUDGE: HON. JOSHUA M. KINDRED

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INTRODUCTION

"That's where we make … policy-level decisions." "[T]hey really drive the system." "[I]t is basically a mini legislative body" that decides "who, when, and where people get to fish." This is how the top regulatory official at the National Marine Fisheries Service ("NMFS"), Sam Rauch, describes the federal fishery councils that are the subject of this suit. Ruth Sando, *Rauch, Sam: Oral History Interview* 15, 19 (June 30, 2016) ("*Rauch*").[1]

These fishery councils were created by Congress to oversee federal fisheries policy, and their power is at the core of this suit. If a federal official possesses "significant" power, the Constitution subjects him to two important limitations: First, he must be appointed in accordance with the procedures of the Appointments Clause, which usually requires Presidential nomination and Senate confirmation. Second, he must be removable at will by the President, subject to narrow exceptions. Together, these provisions make officers subordinate to the President, enabling the public, through the President, to hold the officers accountable for their actions.

The specific council at issue is the North Pacific Fishery Management Council. The Council manages fisheries in federal waters off the coast of Alaska, and the Council exercised that authority to permanently close Cook Inlet's federal commercial salmon fishery as of December 2021. The closure, embodied in a measure called Amendment 14 and in its implementing regulation, destroyed Plaintiffs' decades-long careers and those of many other fishermen.

As demonstrated by the closure, the Council possesses significant authority. Yet, Council members are neither appointed pursuant to the Appointments Clause nor removable at will. Amendment 14 and its implementing regulation were therefore adopted

[1] https://voices.nmfs.noaa.gov/sites/default/files/2018-09/rauch_samuel.pdf.

in violation of the Constitution and must be set aside. Though the government may argue that the Council does not possess policymaking power, the unambiguous text of the fishery councils' organic statute will show that Mr. Rauch is right: the councils are in charge and so must be accountable to the President.

STATEMENT OF LAW AND FACTS

I. The Magnuson-Stevens Act and Fishery Management Councils

In the United States, the state and federal governments divide authority to regulate oceanic fisheries. States govern nearshore waters, from the shoreline to three nautical miles offshore, while federal authority extends from three nautical miles to 200 nautical miles offshore. *United Cook Inlet Drift Ass'n v. NMFS*, 837 F.3d 1055, 1058 (9th Cir. 2016) ("*UCIDA I*").

"The federal government manages its waters through eight regional Councils" created by the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "Act"). *Id.* at 1058. It was "the purpose[] of the Congress … to establish [the] Councils to exercise sound judgment in the stewardship of fishery resources[.]" 16 U.S.C. § 1801(b)(5). Consistent with that purpose, Congress charged the Councils with preparing fishery management plans ("FMPs") and FMP amendments, § 1852(h)(1), to maximize fisheries' long-term benefits, including for commercial fishermen, §§ 1801(a), (b)(3), 1851(a)(8). The fishery management plans are, in turn, implemented through regulations proposed by the Councils. § 1853(c). FMPs, FMP amendments, and regulations must be reviewed by the Secretary of Commerce ("Secretary") before they take effect, but the Secretary may block these regulatory actions only for inconsistency with law. *See* § 1854(a)(1), (a)(3), (b)(1). Barring such inconsistency, the Magnuson-Stevens Act requires that she issue these measures.

§ 1854(a)(3), (b)(1), (3). NMFS exercises the Secretary's powers under the Magnuson-Stevens Act pursuant to departmental delegations. AKR16 (Secretary delegating powers to the NOAA Administrator); AKR3–4 (NOAA Administrator delegating powers to NMFS Assistant Administrator).

II. The North Pacific Fishery Management Council

The North Pacific Fishery Management Council ("North Pacific Council" or "Council") is responsible for creating Amendment 14. The North Pacific Council, an independent body within the Executive Branch, "ha[s] authority over the fisheries in the Arctic Ocean, Bering Sea, and the Pacific Ocean seaward of Alaska," § 1852(a)(1)(G), including the federal waters of Cook Inlet, *UCIDA I*, 837 F.3d at 1060. Its 11 voting members consist of three types, each with a different mode of appointment and a different form of removal protection.

Governor-Designated Seats: Three seats are respectively filled by the governors of Alaska, Washington, and Oregon with each state's "principal State official with marine fishery management responsibility and expertise." § 1852(b)(1)(A). Each holds his Council seat "so long as the official continues to hold" his state position and so cannot be removed by the President. *Id.* These state officials may designate others to fill their own seats. *Id.* When Amendment 14 was adopted, the seats were filled by the state officials' designees. SUPP3, 5–6 (designations); AKR13740 (Follow link, access NPFMC2020_12_07.mp3, and play 8:38:50–8:39:41 for the oral vote.) (The state officials' designees—Ms. Baker, Mr. Tweit, and Mr. Marx—voting to adopt Amendment 14).

Service Official: One seat is taken by NMFS's Alaska Regional Administrator, or his designee. § 1852(b)(1)(B). The Regional Administrator at all relevant times was Jim Balsiger. *See* SUPP9. Dr. Balsiger was appointed by the Assistant Secretary for

Administration of the Department of Commerce. SUPP1. The Regional Administrator is a career NMFS official in the Senior Executive Service ("SES"). *Id.* (see Box 34). As such, Dr. Balsiger cannot be removed from the SES except for cause, *see* 5 U.S.C. §§ 7541–43, though he can be reassigned out of his role as the Regional Administrator to another SES position at will, *id.* § 3395(a)(1)(A).

Governor-Nominated Seats: The governor of Alaska nominates candidates for five seats, and the Washington governor for the last two seats. § 1852(a)(1)(G), (b)(1)(C), (2)(C). The governors must nominate at least three individuals for each vacancy. § 1852(b)(2)(C). The Secretary makes the final selection for these seats from the nominations. *Id.* The Secretary may remove a nominated member "for cause" only if two-thirds of the Council first seeks removal, or if the member violates certain financial conflict-of-interest provisions. § 1852(b)(6)(A)–(B).

III. Cook Inlet and Amendment 14

Cook Inlet is a large inlet connecting the Pacific Ocean to major Alaskan rivers. Because of its width, the inlet contains both nearshore state waters and federal waters in the center of the inlet. Historically, however, NMFS and the Council have left management of Cook Inlet federal waters to Alaska. *UCIDA I*, 837 F.3d at 1058–59.

In 2020, the Council adopted an amendment to an FMP that governs waters adjacent to Cook Inlet. SUPP13. This amendment, Amendment 14, expanded the FMP to include Cook Inlet's federal waters, subjecting the waters to federal management. *Id.* Amendment 14 also shut down those waters to commercial salmon fishing. *Id.* The closure was then implemented in a regulation promulgated on November 3, 2021. 86 Fed. Reg. 60,568. Plaintiffs filed suit six days later, alleging violations of the Appointments Clause and the President's removal powers. *Humbyrd v. Raimondo*, No. 21-cv-247, Docket No. 1 (Nov. 9,

2021) ("Compl."). The closure will likely put Plaintiffs out of business due to the higher costs, lower catch volume and quality, and higher risks of fishing in nearshore state waters. Humbyrd Decl.; Wolfe Decl.; Anderson Decl.[2]

ARGUMENT

The Constitution requires Presidential control over certain powerful federal officials, called "officers of the United States." Specifically, the Appointments Clause requires Presidential control over the appointment of officers, while the Take Care and Executive Vesting Clauses empower the President to fire officers. Together, these Clauses make officers subordinate to the President, enabling the public, through the President, to hold officers accountable for their actions. Because the North Pacific Council's members are officers, yet do not comply with constitutional appointment and removal requirements, their adoption of Amendment 14 was invalid.

I. Council Members Are Officers

An officer is any official who exercises significant federal authority. *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). For example, "rulemaking" is a "significant governmental duty." *Buckley v. Valeo*, 424 U.S. 1, 126, 140–41 (1976) (per curiam). But authority may be significant even when it is not as broad and coercive as rulemaking. For an official to possess significant authority, it is sufficient that, "in the course of carrying out … important functions, the [official] exercise[s] significant discretion." *Lucia*, 138 S. Ct. at 2052 (cleaned up). In contrast, officials without significant and continuing authority are nonofficers, and the Constitution's appointment and removal strictures do not apply to

[2] Plaintiffs have standing. Standing is normally self-evident where, as here, the plaintiff is directly regulated by the challenged action. *Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002). To the extent it is not self-evident, a plaintiff may introduce affidavits outside of the administrative record to prove standing. *Id.*

them. Here, because the Council wields significant authority, its members are officers subject to the Constitution's appointment and removal constraints.

A. Significant authority

The Supreme Court explained the meaning of significant authority in *Freytag v. Commissioner*, 501 U.S. 868 (1991). The Court there held that a Tax Court Special Trial Judge ("STJ") exercised significant authority, even when presiding over cases in which the STJ "could not enter a final decision." *Lucia*, 138 S. Ct. at 2052 (cleaned up) (describing *Freytag*). In such cases, STJs "tak[e] the evidence and prepar[e] the proposed findings and opinion" for a Tax Court judge, who then rules on the case. *Freytag*, 501 U.S. at 880. An STJ's "opinion counts for nothing unless the regular judge adopts it as his own." *Lucia*, 138 S. Ct. at 2054. Yet, STJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Freytag*, 501 U.S. at 881–82. Because STJs exercised "significant discretion" in carrying out these "important functions," STJs possessed significant authority and were officers. *Id.* at 882.

The Court echoed *Freytag* in *Lucia*, where the Court held that SEC administrative law judges ("ALJs") exercise significant authority. ALJs have the same powers as STJs to preside over cases, so they "critically shape the administrative record." *Lucia*, 138 S. Ct. at 2053. But ALJs' powers were even more clearly significant because ALJ decisions have "potentially more independent effect." *Id.* Whereas STJ decisions must be reviewed by a Tax Court judge, "the SEC can decide against reviewing an ALJ decision at all," causing the ALJ decision to "'become[] final'" and be "'deemed the action of the Commission.'" *Id.* at 2054 (quoting 17 C.F.R. § 201.360). Accordingly, the Court held that SEC ALJs are officers.

As this discussion reveals, courts look to the full scope of an official's authority, not just the powers exercised in a particular case, to determine the official's officer status. If an official possesses *any* significant powers, even ones not exercised in a particular matter, the official is an officer *for all assigned duties* and is subject to the Constitution's constraints. That's because "it ma[kes] no sense to classify [officials] as officers for some cases and employees for others." *Lucia*, 138 S. Ct. at 2052 n.4. "If a[n] [official] is an … officer for purposes of [some of his duties], he is an … officer within the meaning of the Appointments Clause and he must be properly appointed." *Freytag*, 501 U.S. at 882.

B. The North Pacific Council possesses significant authority

The North Pacific Council wields significant authority pursuant to federal law and its members are therefore officers. Chief among the Council's powers is its power to decide federal fisheries policy. As NMFS's top regulatory official Sam Rauch stated, the Council is "where we make … policy-level decisions" about fisheries. *Rauch*, *supra*, at 19. Or as the Ninth Circuit put it, "[t]he federal government manages its waters through [the] regional Councils." *UCIDA I*, 837 F.3d at 1058.

The Council carries out this responsibility primarily by crafting fishery management plans and plan amendments, such as Amendment 14. § 1852(h)(1). FMPs are comprehensive frameworks for regulating fisheries. In promulgating such plans and plan amendments, the Council decides the "conservation and management measures" to be employed in the fishery, the amount of fishing permitted, the kinds of permits and fees required, the triggers for fishery closures, and much else besides. § 1853(a)–(b).

After adopting an FMP or amendment, the Council submits the measure to NMFS, which exercises review authority pursuant to delegation from the Secretary. AKR3–4, 16; *Fishermen's Finest, Inc. v. Locke*, 593 F.3d 886, 889 (9th Cir. 2010). NMFS reviews the

submitted measure only for consistency with law; if the FMP or amendment would not violate law, *e.g.*, if it would merely contradict NMFS's preferred policy approach, the agency must approve the measure. *See* § 1854(a)(1), (3). Any disapproval must explain how the measure conflicts with law. § 1854(a)(3). Furthermore, if NMFS fails to approve or disapprove an FMP or amendment within the allotted time, "then such plan or amendment shall take effect as if approved." *Id.* Thus, unless the Council's policy violates the law, the Council, rather than NMFS, decides fisheries policy within its geographical jurisdiction.

The Council also possesses the power to propose any regulation it "deems necessary or appropriate" to implement an FMP. § 1853(c)(1). These regulations are "proposals" in name only. As with FMPs, NMFS may block a proposed regulation only for violating the law; the policy prerogative remains with the Council. § 1854(b)(1). If the Council's proposed regulation is consistent with applicable law, NMFS "shall" promulgate it as a final rule within 30 days after the notice-and-comment period. § 1854(b)(3). And if the proposed regulation is unlawful, NMFS must return it to the Council for revision. § 1854(b)(2). Again, the Council is in charge. Or as Mr. Rauch put it, NMFS "ultimately issue[s] the regulations … because it resolves what they [the Councils] do as legal," but "they really drive the system." *Rauch, supra*, at 15. "We [NMFS] basically are the auditors of that system." *Id.*

The Council clearly wields significant power in issuing FMPs, FMP amendments, and proposed regulations. Through these measures, the Council sets policy directly affecting the livelihoods of fishermen and the communities that depend on them. For example, the Council's adoption of Amendment 14 effectively ended Plaintiffs' decades-long careers as salmon fishermen and destroyed the economic base of towns like Homer

and Soldotna. The Council's power is much broader, more discretionary, and more coercive than that of the *Freytag* and *Lucia* adjudicators, who merely take evidence and propose resolutions in discrete cases affecting a handful of parties in accordance with extant statutes and regulations. Since such adjudicators are officers, *a fortiori*, Council members must also be officers.

C. The Council possesses significant authority despite NMFS's ability to block illegal Council actions

The Magnuson-Stevens Act permits the Secretary, through NMFS, to block FMPs, amendments, and proposed regulations that conflict with "applicable law." § 1854(a)(1)(A), (b)(1). But that does not defeat the significance of the Council's power. NMFS merely verifies that a measure is lawful before it goes out the door. § 1854(a)(3), (b). Within the wide range of lawful policy choices, the Council calls the shots. And, according to the Supreme Court, when an executive official is not checked by another "on matters of law *as well as* policy," the official is a *principal* officer, as discussed later—and so necessarily an officer. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1983 (2021) (emphasis added).

The Council's policymaking power is clear from the text of § 1854, but every other part of the Magnuson-Stevens Act also confirms the Council's primacy in policymaking. The Magnuson-Stevens Act's statement of purpose declared that Congress "establish[ed] Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources." § 1801(b)(5). Furthermore, in establishing the North Pacific Council, Congress provided that the Council "shall have authority over the fisheries" in its geographical jurisdiction. Though Congress constrained that authority with 10 statutory requirements, § 1851(a), it prohibited the Secretary from intruding on Councils' autonomy in crafting FMPs, § 1851(b) (permitting the Secretary to establish "advisory guidelines …

to assist in the development of fishery management plans" but specifying that these guidelines "shall not have the force and effect of law").

The structure of the Magnuson-Stevens Act also reflects the Councils' lead role in fisheries policy. The Act establishes the Councils, § 1852, before addressing the Secretary's powers, § 1854. And Congress granted every Council expansive, general authority, § 1852(a)(1), but limited the Secretary to only highly specific "authority over any highly migratory species fishery" that meets certain geographic conditions, § 1852(a)(3). Even in the section devoted to the Secretary's powers, the Secretary's response to Council action is treated first; later subsections provide for the Secretary's minor unilateral authority. § 1854(a)–(b). In general, the Secretary may exercise power over a fishery managed by a Council only if the Council fails to take necessary action. § 1854(c)(1)(A), (6). But even if the Secretary determines that a fishery has become overfished and remedial action is needed, the Act requires the Secretary to ask a Council to address the issue. § 1854(e)(2). And the Secretary is forbidden from taking unilateral action until the Council has neglected to act for two years. § 1854(e)(5). It is clear that the discretion to make fisheries policy lies with the Council, not the Secretary or NMFS.

Even if, contrary to statute, NMFS had discretion to block Council actions on policy grounds, the Council would still possess significant authority. That's because the Council would nevertheless have significant discretion in performing the important function of crafting FMPs, amendments, and regulations in the first instance. §§ 1852(h)(1), 1853(c). And having significant discretion in performing important functions is all it means to have "significant authority." *Lucia*, 138 S. Ct. at 2047.

For fisheries within the Council's geographical jurisdiction, NMFS cannot begin the regulatory process unilaterally. Rather, it must wait for the Council to begin the process by

"transmitt[ing] … a fishery management plan or plan amendment" or "proposed regulations" to NMFS. § 1854(a)(1), (b)(1). So just as the Council (in this hypothetical) requires NMFS's concurrence to enact policy, so too does NMFS require the Council's cooperation to issue FMPs, amendments, and regulations.

Furthermore, again assuming arguendo that NMFS had discretion to block Council actions on policy grounds, the responsibility for writing the FMPs and amendments remains with the Council; NMFS holds only the power to approve or disapprove these measures. § 1854(a)(3). If NMFS disapproves the measure, the Council may submit a revised measure. § 1854(a)(4). And when NMFS decides *not* to block an FMP or amendment, it is the *Council's* action that becomes effective as written. The Council is therefore like the ALJ in *Lucia*. There, the ALJ's decision "becomes final and is deemed the action of the Commission" if the SEC "declines review (and issues an order saying so)." *Lucia*, 138 S. Ct. at 2054 (cleaned up). This meant the ALJ's decisions could have "independent effect." *Id.* at 2053.

The Council's actions here have even more independent effect than SEC ALJs' decisions. *Id.* at 2054. Whereas SEC ALJ decisions become final only if the SEC enters an order declining review (and so effectively adopts the ALJ decision), the Council's FMP or amendment becomes final by default if the Secretary simply fails to act on it. § 1854(a)(3). No concurrence in the measure—even implicit concurrence like in *Lucia*—is necessary. And unlike ALJ decisions, which can be revised by the SEC on review, NMFS may only approve or disapprove a Council measure; NMFS cannot revise it and promulgate the revised version as final. § 1854(a)(3), (b)(3).

The Council's power to propose regulations is similar. As with FMPs and amendments, regulations are proposed by the Council in the first instance. If NFMS

approves a proposed regulation, it is the Council's decisions that are made final, giving them "independent effect," just as SEC ALJ decisions become final when the SEC declines review. Unlike with FMPs and amendments, though, NMFS may revise proposed regulations within 30 days after the notice-and-comment period. § 1854(b)(3). Such revisions, however, are permitted only if NMFS first "consult[s] with the Council." *Id.* In the absence of consultation within the 30-day period, NMFS "shall" issue the regulation as a final rule. *Id.* And because of the Council's independence, the Council may simply deny consultation for that 30-day period, as the government has argued elsewhere. *See Oceana, Inc. v. Ross*, No. 17-cv-5146, Docket No. 124, at 8–9 (C.D. Cal. Nov. 18, 2019) ("NMFS has repeatedly attempted to consult with the Pacific Council," but "NMFS lacks the authority to *compel* the independent Pacific Council to place this item on its agenda or deliberate further on this subject."). Denying consultation forces the Secretary to publish the rule as is. This is precisely how, in 2020, a Council was able to force NMFS to promulgate a regulation over the agency's objections. *See Fisheries off West Coast States*, 85 Fed. Reg. 7246, 7247 (Feb. 7, 2020) (stating that NMFS published the rule because it was not able to consult with the Council in time).

Finally, even if—in direct opposition to statute—the Council lacked any independent policy power, such that their actions were purely recommendatory, the Council would still wield significant authority by shaping the administrative record on which an eventual final decision is based. In *Freytag*, the STJs' decisions were purely recommendatory, "com[ing] to nothing unless the regular [Tax Court] judge adopts it." *Lucia*, 138 S. Ct. at 2048. Still, STJs possessed significant authority because they had "authority to hear cases and prepare proposed findings and opinions." *Freytag*, 501 U.S. at

874. In doing so, they "critically shape the administrative record" that informs the Tax Court judges' decisions. *Lucia*, 138 S. Ct at 2053.

Like STJs, the Council critically shapes the administrative record of a proposed fishery measure. When adopting an FMP or amendment, the Magnuson-Stevens Act requires the Council to specify every relevant detail, such as: "the number of vessels" in the fishery, "the type and quantity of fishing gear used," the type of fish at issue, "the present and probable future condition of … the fishery," the likely costs of management measures, those measures' "cumulative conservation, economic, and social impacts," relevant "economic information," the presence of essential fish habitat, the "scientific data which is needed for effective implementation of the plan," and numerous other types of information. § 1853(a). The Council also shapes the record by collecting comments from the public, § 1852(h)(3), and reports from its various advisory committees and panels, § 1852(g)(1)–(3). Thus, even if the Council's adoption of a fishery measure were purely recommendatory, Council members would still be officers due to their role in shaping the administrative record.

As demonstrated above, Council members would possess significant authority even if they lacked exclusive policymaking power over fisheries. But the fact remains that they do possess that exclusive power because NMFS may not block Council actions except for illegality. That is the basis on which the Court should hold that Council members are officers. In so holding, the Court would merely be taking Congress at its word when it stated that it "establish[ed] Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources." § 1801(b)(5). Or Mr. Rauch's word when he said each Council is "where we make … policy-level decisions" about fisheries—"a mini legislative body" that decides "who, when, and where people get to fish." *Rauch,*

supra, at 15, 19. Or, of course, the Court may simply look to the statutory text, which lays out the Council's authority in black and white.

II. Council Members Serve in Violation of the Appointments Clause

As officers, Council members must be appointed pursuant to the Appointments Clause. The Appointments Clause is "among the significant structural safeguards of the constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997), not a matter of "mere[] … etiquette or protocol," *Buckley*, 424 U.S. at 125. "[B]y carefully husbanding the appointment power to limit its diffusion," the Founders "ensure[d] that those who wielded it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884–85. In crafting Council members' modes of appointment, Congress created precisely the sort of diffusion the Appointments Clause guards against. Because an unconstitutionally appointed Council is responsible for Amendment 14, the measure must be vacated.

A. Council members were not properly appointed as principal officers

Council members' authority and independence are such that they must be appointed as principal officers. Yet, no member was nominated by the President and confirmed by the Senate, and the members therefore wielded their power unconstitutionally.

Principal officers are all officers who do not qualify as inferior. *Arthrex*, 141 S. Ct. at 1979. And "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. The inquiry is "how much power an officer exercises free from control by a superior." *Arthrex*, 141 S. Ct. at 1982.

"[T]he governing test" for direction and supervision was expressed in *Edmond* and turns on three factors: (1) whether a principal officer exercises "administrative oversight"

over the officer, (2) whether a principal officer may remove the officer without cause, and (3) whether a principal officer "could review the [officer's] decisions." *Id.* at 1980, 1982. However, if an officer has "the power to render a final decision on behalf of the United States without any … review by [a] principal officer in the Executive Branch," then the officer is necessarily a principal officer. *Id.* at 1981 (cleaned up). Under both of these tests, Council members must be appointed as principal officers.

First, the Council is not subject to administrative oversight. In *Edmond*, a principal officer exercised administrative oversight over Coast Guard agency adjudicators by "prescribing rules of procedure and formulating policies" that controlled the adjudicators' decisions. *Id.* at 1980. And in *Arthrex*, a principal officer exercised administrative oversight over Patent Office adjudicators by deciding whether the adjudicators would even hear a particular case, selecting the adjudicators to preside over the case, issuing regulations that govern adjudications, and indicating which past decisions bind future adjudications. *Id.*

The Council is not subject to any such oversight. By statute, Councils set their own priorities, establish and direct their own staff, and create their own operating procedures. § 1852(e)–(i). Unlike the adjudicators in *Edmond* and *Arthrex*, the Council's principal power—issuing FMPs and amendments—is protected from interference by the Secretary, who may only "assist" the formulation of FMPs by "establish[ing] advisory guidelines" that explicitly "shall not have the force and effect of law." § 1851(b). Furthermore, any oversight is conducted not by a principal officer but by NMFS's Assistant Administrator pursuant to delegated authority. AKR3–4, 16; Reorganization Plan No. 4 of 1970 § 2(e)(1) (Assistant Administrator is "appointed by the Secretary, subject to the approval of the President").

Second, none of the Council members are removable at will by an officer "appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. The three governor-designated members hold their Council seats "so long as the official[s] continue[] to hold" their state positions, and so cannot be removed by the Secretary. § 1852(b)(1)(A). The Regional Administrator is a career SES employee, *see* SUPP1 (see Box 34), and so cannot be removed except for cause, *see* 5 U.S.C. §§ 7541–43. And the seven nominated members are removable by the Secretary only "for cause" and only if two-thirds of the Council first seeks removal of that member, or if the member violates certain financial conflict-of-interest provisions. § 1852(b)(6)(A)–(B).

Third, the Council's policy decisions are not subject to contradiction by others in the executive branch. As discussed above, the Secretary must approve a Council's fishery measure unless it is illegal. *See* § 1854(a)(3), (b). So long as it acts consistent with law, the Council's policy decisions are immune from reversal or correction by another, and that is what matters.

These three points together show Council members are not directed and supervised by anyone and as such must be appointed as principal officers under *Edmond*'s three-factor test. But Council members must also be appointed principal officers under *Arthrex*, because, as discussed above, they have the final word on fisheries policy.

Arthrex held that administrative patent judges ("APJs") working in the Patent Office must be appointed as principal officers. *Arthrex*, 141 S. Ct. at 1983. APJs wield the significant authority of deciding the validity of patents in an administrative adjudication. *Id.* at 1980. The Court held that APJs had to be appointed as principal officers since the PTO Director could not directly review their decisions or otherwise "countermand[] the final decision already on the books." *Id.* at 1981–82. Only a panel of APJs could reverse

the decision on rehearing. *Id.* Technically, the Director must "take final action to cancel a patent claim or confirm it" after the APJs' decision, but this was a mere "ministerial duty"; the substantive final power still lay with the APJs. *Id.* at 1981 (cleaned up). "[W]hen it comes to the one thing that makes the APJs officers … in the first place—their power to issue decisions on patentability"—"[t]he chain of command runs not from the Director to his subordinates, but from the APJs to the Director." *Id.* at 1980–81.

Similarly, the Council's policy judgments cannot be reversed. NMFS could disapprove a fishery measure for illegality, but the policy prerogative remains with the Council. The Council members, therefore, cannot be inferior officers, who must be "directed … on matters of law as well as policy." *Id.* at 1983. Furthermore, the legal check is akin to a ministerial duty; in rulemaking, the substantive power is not in determining whether a rule is legal but in making "policy judgments." *Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1188 (9th Cir. 2010). And the final word on policy—the "one thing" that makes Council members officers in the first place—lies with the Council.

In holding that APJs must be nominated and confirmed as principal officers, the Court in *Arthrex* disregarded as irrelevant the Director's myriad other powers. For example, the Director could decide whether to allow an administrative adjudication in the first place, which APJs would hear a case, and which past decisions are precedential for future adjudications. *Arthrex*, 141 S. Ct. at 1980. The Director could also end an ongoing adjudication "if he catches wind of an unfavorable ruling on the way." *Id.* at 1981. Or, if a decision had already been issued, he could indirectly reverse the decision by "stack[ing]" the panel that decides the rehearing petition with APJs "assumed to be more amenable to his preferences." *Id.* He could even place himself on such a panel. *Id.*

These powers were irrelevant, the Court explained, because even if, through these "machinations," the Director was able to "indirectly influence" the adjudication and "procur[e] his preferred outcome," the APJs were *still* principal officers. *Id.* at 1982. That's because these actions would allow "the director to evade a statutory prohibition on review without having him take responsibility for the ultimate decision." *Id.* at 1981. Since statute cast the APJs as the officials responsible for patentability decisions, "the lines of accountability demanded by the Appointments Clause" required that APJs be appointed as principal officers—even if the Director could indirectly control the patentability decision. *Id.* at 1982. Allowing APJs to be appointed as inferior officers—because the Director could, through his "machinations," be quasi-responsible for adjudicatory outcomes—would unacceptably "blur" those lines. *Id.*

The same is true here. Even if NMFS could indirectly push the Council to adopt NMFS's regulatory preferences, *e.g.*, through the threat of disapproving the Council's preferred measures, that would allow NMFS and the Secretary to "evade a statutory prohibition on [fisheries policymaking] without having [them] take responsibility for the ultimate decision." *Id.* at 1981. Since statute casts the Council as the body responsible for fisheries policy, its members must be appointed as principal officers. To allow members to be appointed as inferiors because the Secretary claims to have some unspecified portion of policymaking power would make it unclear "on whom the blame … of a pernicious measure … ought really to fall." *Id.* at 1982 (quoting The Federalist No. 70, at 476 (A. Hamilton)). To avoid "blur[ring] the lines of accountability demanded by the Appointments Clause," Council members must be appointed as principal officers. *Id.*

Finally, Council members must be appointed as principal officers because they collectively constitute a "head of department." A department for Appointments Clause

purposes is a "freestanding component of the Executive Branch." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 511 (2010); *cf. Oceana*, No. 17-cv-5146, Docket No. 124, at 8–9 (C.D. Cal.) (Defendants noting that the Council is "independent" and that NMFS "cannot force the Council to act"). Since the Council is not contained in or subordinate to another agency, Council members constitute a head of department. And heads of departments are by definition principal officers. *Freytag*, 501 U.S. at 884 (identifying principal officers as "including heads of departments"); *Silver v. U.S.P.S.*, 951 F.2d 1033, 1039–40 (9th Cir. 1991) (Officials' appointment as principal officers "is consistent with the [officers'] status as the head of the department."). Council members must be appointed as principal officers for this reason as well.

Council members are not nominated by the President and confirmed by the Senate, § 1852(b)(1)(A) (regarding governor-designated members); SUPP9 (Alaska Regional Administrator was hired as a career SES employee); § 1852(b)(1)(C), (2)(C) (regarding nominated members), and so are not properly appointed as principal officers. Accordingly, they exercised their powers—including their adoption of Amendment 14 and its implementing regulation—unconstitutionally.

B. Council members were not properly appointed as inferior officers

Even if Council members need only be appointed as inferior officers, they were not so appointed. The default appointment procedure for inferior officers is Presidential nomination with Senate confirmation. *Edmond*, 520 U.S. at 660. Congress may loosen this requirement only within strict limits: "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. None of the 11 Council members' appointments satisfy this procedure.

1. Governor-designated members

The Magnuson-Stevens Act provides that the Council shall include "[t]he principal State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State," "or the designee of such official." § 1852(b)(1)(A). These three Council seats are thus taken by individuals designated by governors or even those *further* designated by the governors' designees.[3] Indeed, when the Council adopted Amendment 14, the three seats were occupied by designees of the governors' designees. *See* SUPP3, 5–6 (designations); AKR13740 (Follow link, access NPFMC2020_12_07.mp3, and play 8:38:50–8:39:41 for the oral vote.) (designees of designees—Ms. Baker, Mr. Tweit, and Mr. Marx—voting to adopt Amendment 14). But neither governors nor governors' designees may appoint inferior officers under the Appointments Clause.

The fact that these members hold state offices is irrelevant. Since they wield significant federal power under the laws of the United States, they act on the President's behalf and thus must be appointed as officers of the United States. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020).

[3] The diffusion of appointment power is even worse, because, while the governor identifies which state official has primary responsibility for fisheries, the Oregon and Washington officials are appointed to their state positions by state commissions, not the governor. Or. St. § 496.112(1); SUPP5 (identifying Oregon Director of Fish and Wildlife as governor-designated member); RCW 77.04.055(7); SUPP6 (identifying Washington Director of Fish and Wildlife as governor-designated member).

2. Service official

The Magnuson-Stevens Act provides that the Council shall include "[t]he regional director of [NMFS] for the geographic area concerned, or his designee." § 1852(b)(1)(B). The relevant regional director is the Alaska Regional Administrator, Jim Balsiger. SUPP9.

No congressional act "by Law" vested the appointment of the Regional Administrator in the President, a court, or a head of department—and none of these in fact appointed the Regional Administrator, who was appointed by the Commerce Department's Chief Financial Officer and Assistant Secretary for Administration.[4] SUPP1 (Box 6). The Regional Administrator was thus not properly appointed an inferior officer.

3. Governor-nominated members

Governor-nominated members are nominally appointed by the Secretary, a head of department. But the Secretary may only appoint an individual nominated by a governor. § 1852(b)(2)(C). And governors may nominate as few as "three individuals for each applicable vacancy." *Id.* The governor of Alaska nominates individuals to five seats, and the governor of Washington nominates individuals to the other two seats. § 1852(a)(1)(G).

The Secretary may not reject a nominations list for a vacancy unless one of the nominees fails to satisfy objective statutory qualifications. § 1852(b)(2)(C). The Secretary may not reject a nominations list on any other basis, including the individuals' character, policy prescriptions, or likely faithfulness in executing the law. As a result, for any particular vacancy, the Secretary generally must appoint one of the three nominees offered by the relevant governor.

[4] Dr. Balsiger was appointed over 20 years ago. SUPP1. Today, Regional Administrators are appointed by a NMFS official. *Williams v. Ross*, No. 20-cv-667, Docket No. 19 (D.D.C. July 13, 2020) (so stipulating).

This regime violates the Appointments Clause, which ensures that the President can exclude from his officers "those who have different views of policy," "those who come from a competing political party who [are] dead set against the President's agenda," and those he determines are "not intelligent or wise." *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (cleaned up). Yet, through the Council-nominations process, governors can force the Secretary to appoint persons whose judgment and character she mistrusts and whose policy prescriptions or governance philosophy she disagrees with. The procedure thus splits the appointment power between the Secretary and governors, with the latter possessing the lion's share of the power. The Appointments Clause itself confirms that nomination is part of the appointment power. U.S. Const. art. II, § 2, cl. 2 (President must nominate principal officers as part of their appointment.). The appointment provisions of governor-nominated members therefore contravene the Appointments Clause, which permits Congress to vest the appointment of inferior officers in the Secretary—not in governors and the Secretary jointly.

That the Secretary is guaranteed *some* choice from among a governor's nominees does not satisfy the Appointments Clause. As recognized in *Myers v. United States*, 272 U.S. 52, 128 (1926), the appointment power is the power to choose, and Congress may not prescribe qualifications for office that "so limit selection and so trench upon executive choice as to be in effect legislative designation." This standard would not permit Congress to narrow an appointment to three *specific* individuals, even if the appointer were free to select therefrom. Shifting this prohibited power to designate specific individuals from Congress to state governors would equally restrict the Secretary's choice and divest her of her appointment power.

Accordingly, the appointments process for these seven seats violates the Appointments Clause, both because the process splits the appointment power between the Secretary and governors, and independently because the governors' discretion so restricts the Secretary's appointment as to be in effect a gubernatorial designation.

C. The unconstitutional appointments require the rule to be vacated

Because no putative Council member was properly appointed to his or her office, their adoptions of Amendment 14 and its implementing regulation were "exercise[s] of power that the actor[s] did not lawfully possess." *Collins*, 141 S. Ct. at 1788. Amendment 14 is therefore invalid, and its implementing regulation must be vacated. *Id.*

Furthermore, even if some Council seats comply with constitutional requirements, if *any* Council member was incorrectly appointed, the Council as an entity was improperly constituted, meaning Amendment 14 is invalid and its implementing regulation must be vacated. This is because the Court may not assume the members serving constitutionally would have approved Amendment 14 and its implementing regulation in the absence of the members serving unconstitutionally. In *Free Enterprise Fund*, a firm being investigated by the Public Company Accounting Oversight Board challenged Board members' appointments. 561 U.S. at 511–12. The firm argued that Board members' appointments as inferior officers by the full Securities Exchange Commission was invalid because the full Commission was not the head of department. *Id.* Rather, it argued, only the Chairman of the Commission was the head of department. *Id.* The government responded that, even if that were so, the firm lacked standing, since the Chairman had voted with the other Commissioners to appoint the Board members. *Id.* at 512 n.12. The Court, however, rejected the government's argument because "[w]e cannot assume … that the Chairman would have made the same appointments acting alone[.]" *Id.*; *see also Fed. Election*

Comm'n v. NRA Pol. Victory Fund, 6 F.3d 821, 822, 826 (D.C. Cir. 1993), *as amended* (Oct. 25, 1993) (holding that FEC's enforcement action was invalid because the two non-voting members of the eight-member commission were unconstitutionally appointed and could have "influence[d] the other commissioners" by "their mere presence").

Likewise, the Court may not assume that constitutionally serving Council members would have adopted Amendment 14 and the implementing regulation without the influence of the unconstitutionally serving members. As the Court made clear in *Seila Law*, separation-of-powers plaintiffs are "not required to prove that the Government's course of conduct would have been different in a counterfactual world in which the Government had acted with constitutional authority." *Seila Law*, 140 S. Ct. at 2196 (cleaned up); *see also Nguyen v. United States*, 539 U.S. 69, 82 (2003) (vacating a defendant's conviction where the conviction was affirmed by a circuit panel inappropriately including an Article IV judge—despite two Article III judges voting to affirm).

Thus, the Court should vacate the rule even if only one Council member was improperly appointed. Of course, if the Court finds six or more Council seats were unconstitutionally appointed, the Council lacked a quorum to adopt Amendment 14 or its implementing regulation, § 1852(e)(1), and the rule should be vacated for that reason.

III. Council Members' Removal Protections Violate the Take Care and Executive Vesting Clauses

"Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law*, 140 S. Ct. at 2191 (quoting U.S. Const. art. II, § 1, cl. 1, and § 3). Officers therefore exercise executive power on the President's behalf and so must be removable by him, or those accountable to him, so that he may control their actions and thereby take care that the laws be faithfully executed. *Id*. at 2191–92. "[T]his control is essential to subject Executive

Branch actions to a degree of electoral accountability," "because the President, unlike agency officials, is elected." *Collins*, 141 S. Ct. at 1784. Without the power to remove officers, "the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Free Enterprise Fund*, 561 U.S. at 514. Accordingly, Congress may create removal protections only in highly limited circumstances. First, removal protections are available only to certain types of officers. Second, only certain kinds of removal protections are permitted. The Council's removal protections fail both requirements.

A. Council members are not a type of officer permitted to have removal protections

There are only "two exceptions to the President's unrestricted removal power." *Seila Law*, 140 S. Ct. at 2198. First, "*Humphrey's Executor* [*v. United States*, 295 U.S. 602 (1935)] permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power." *Id.* at 2199. The phrase "legislative functions" does not refer to rulemaking. To the contrary, "the authority to promulgate binding rules" is an executive function that cut against an agency being "a mere legislative or judicial aid." *Id.* at 2200. Rather, "legislative function" refers to "act[ing] as a legislative agency" by "making investigations and reports thereon for the information of Congress." *Humphrey's*, 295 U.S. at 628; *accord Seila Law*, 140 S. Ct. at 2200.

While the Council is a multimember body of experts, it is not balanced along partisan lines, § 1852(b), it does not act as a legislative or judicial agency, and it does exercise the executive power of rulemaking. *Seila Law* expressly limited the *Humphrey's* exception to at-will removal to "officers of the kind … under consideration" in that case.

Id. at 2198 (quoting *Humphrey's Executor*, 295 U.S. at 632). Accordingly, the Council does not qualify for this exception to at-will removal under *Seila Law*.

The second type of officer for which removal protections are permitted is an "inferior officer[] with limited duties and no policymaking or administrative authority." *Id.* at 2200. An example is the "independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials" in *Morrison v. Olson*. *Id.* at 2199.

This exception is inapplicable here. First, Council members must be appointed as principal officers, as discussed above. Second, even if they need only be appointed as inferior officers, they perform expansive policymaking duties, as they have primary regulatory authority over North Pacific fisheries, for which they formulate FMPs and regulations at their discretion. They also perform administrative duties because they "appoint, and assign duties to, an executive director and … other full- and part-time administrative employees," § 1852(f)(1), and they "establish, maintain, and appoint the members of" various scientific bodies to advise the Council on fisheries issues, § 1852(g)(1)(A), (2)–(3). They are not like the independent counsel in *Morrison*, who was "appointed essentially to accomplish a single task"—that of investigating a specific individual for specific crimes. *Morrison v. Olson*, 487 U.S. 654, 672 (1988).

Because Council members fit neither of the narrow exceptions identified in *Seila Law*, no Council member may have any sort of tenure protection; each must be removable at will. *See Seila Law*, 140 S. Ct. at 2206 ("[T]he President's removal power is the rule, not the exception."). Their tenure protections therefore violate the Take Care and Executive Vesting Clauses.

B. The removal protections themselves are not of a permitted type

Even if the Council may enjoy for-cause removal, 10 of the 11 members' protections are so strong as to stymie Presidential oversight and thus to violate the Take Care and Executive Vesting Clauses. As the Court has stated, some standards "may be inappropriate for officers wielding the executive power of the United States." *Free Enterprise Fund*, 561 U.S. at 503; *Arthrex*, 141 S. Ct. at 1982 (An officer was not "meaningfully controlled" where he could be removed only to "promote the efficiency" of the agency. (cleaned up)).

The three governor-designated members serve "so long as the official[s] continue[] to hold" their state positions. § 1852(b)(1)(A). The President therefore cannot fire them even for cause, despite the fact that they "wield executive power on his behalf." *Seila Law*, 140 S. Ct. at 2191. Likewise, there is no provision for the removal of the governor-designated members' own designees. Historically, the governor-designated members replaced their designees freely, SUPP3, 5–6, but given the governor-designated members' own immunity to removal by the President, that does not permit the President to hold the designees' designees accountable.

The seven nominated members' removal protections also fail to satisfy the Take Care and Executive Vesting Clauses. The Secretary may remove these members "for cause" in only two ways. § 1852(b)(6).

First, they may be removed if two-thirds of the Council "first recommends removal." § 1852(b)(6)(A). Requiring a prior recommendation for removal strips the Secretary, and thus the President, of his prerogative to remove an officer; the initiative lies with the Council. Additionally, this procedure creates multiple levels of tenure protection, because to remove a nominated Council member, the Secretary must first gain the assent of other Council members, all of whom are shielded from at-will removal. Indeed, the two-

thirds requirement means the Secretary must gain the assent of at least some nominated members, who themselves cannot be removed without the assent of at least some nominated members, and so on—creating a recursive tenure protection with infinite layers. The result is that four members of the Council can stonewall any attempt to remove a member under this pathway, while remaining immune to removal themselves. The Court has described two layers of for-cause removal protections as "effectively" "eliminat[ing] the President's removal power altogether," so the Take Care and Executive Vesting Clauses certainly do not tolerate an infinite-layered removal protection that requires the consent of the tenured officers themselves to overcome. *Seila Law*, 140 S. Ct. at 2205.

The second pathway, § 1852(b)(6)(B), allows the Secretary to remove a nominated member who violates § 1857(1)(O), a financial conflict-of-interest provision. While this allows the President, through the Secretary, some supervision, it does not satisfy the Constitution. In removal cases, the "ultimate question" is "whether a removal restriction is of such a nature that it impedes the President's ability to perform his constitutional duty." *Seila Law*, 140 S. Ct. at 2199 (cleaned up). Thus, some standards "may be inappropriate for officers wielding the executive power of the United States." *Free Enterprise Fund*, 561 U.S. at 503. For example, in reaffirming that heads of agencies with a single top officer may not enjoy tenure protection, the Court observed that

> [t]he President must be able to remove … officers who disobey his commands [and] also those he finds negligent and inefficient, those who exercise their discretion in a way that is not intelligent or wise, those who have different views of policy, those who come from a competing political party who is dead set against the President's agenda, and those in whom he has simply lost confidence.

Collins, 141 S. Ct. at 1787 (cleaned up).

Section 1852(b)(6)(B) may ensure that the officers disclose their financial interests and recuse themselves from Council decisions pertaining to such interests. *See* § 1857(1)(O). But it does not empower the President to ensure Council members will properly execute the law or to remove a Council member who flagrantly abuses his power, engages in nepotism, or commits criminal malfeasances while in office. Thus, neither removal pathway permits the President to supervise nominated members.

C. The Council's unconstitutional tenure protections require the rule to be vacated

Officials may wield executive power only if they are subject to Presidential control as officers. Because the Council wielded executive power free from such control when it adopted Amendment 14 and the proposed regulation, the amendment is invalid and the rule must be vacated. 5 U.S.C. § 706(2)(B).

1. Amendment 14 is without statutory support, because the rulemaking provisions of the Magnuson-Stevens Act are not severable from the Council's tenure protections

The first remedies question in removal cases is whether the statute is severable from the unconstitutional tenure protections. *Seila Law*, 140 S. Ct. at 2208–09. If the statute is severable, the overall statute is saved from unconstitutionality, and only the tenure protections are held to be unconstitutional. If the statute is not severable from the tenure protections, however, the statute is unconstitutional as a whole. Severability turns on whether the statute is "capable of functioning independently" without the tenure protections, and if so, whether "the statute's text or historical context" suggests that Congress would have preferred the statute to function without the tenure protections. *Id.* at 2209 (cleaned up).

Here, at minimum, the Magnuson-Stevens Act's Council FMP and regulation provisions are not severable from the Councils' structure and are therefore unconstitutional. Without the rulemaking provisions, Amendment 14 and its implementing regulation have no statutory authority and must be vacated.

First, the statute cannot function without the Council, which in turn cannot function without governor-designated members' tenure protections. Those members serve on the Council as long as they occupy their state offices. § 1852(b)(1)(A). Striking this provision from the statute would be meaningless, because the statute—requiring their seats to be filled with the principal state officials with fisheries responsibilities, *id.*—would simply require their reappointment if they were fired. To fully sever their tenure protections, therefore, the Court would have to completely strike the members' positions from the statute. This would be a significant rewriting of the Magnuson-Stevens Act, which the Court should not attempt.

Second, the Act strongly suggests Congress would have preferred state control of fisheries (the default in the absence of an applicable FMP or regulation, § 1856(a)(3)(A)) to Presidential control of fisheries (through control of the Councils). Congress filled the Councils with individuals designated or nominated by state governors, reserving only one appointment for the Secretary (and so the President). § 1852(b)(1)(B); *Rauch*, *supra*, at 15 ("[W]e have one vote."). Congress then made these state-oriented Councils independent from the Secretary both in their substantive powers, § 1854(a)–(b) (Secretary may reject rules only for illegality); § 1851(b) (Secretary's guidelines for FMPs may not be binding), and in their removal protections. It's clear that Congress meant for officials more closely tied to the states and attuned to local concerns to decide fisheries policy. This arrangement would be destroyed if the Court severed Councils' tenure protections—making them

responsive to the President and not the states—while allowing them to retain their regulatory authority. But the balance of power chosen by Congress would be better retained if the Court declined to sever and allowed regulatory control to return to the states.

The tenure protections should not be severed from the Act's FMP and rulemaking provisions.[5] Without those provisions, Amendment 14 and its implementing regulation are without statutory authority and should be vacated.

2. Amendment 14 currently subjects Plaintiffs to the Council's authority, requiring prospective relief

If the tenure protections are severable, the government will argue that relief is not available in removal-power cases unless the plaintiff can show an officer's tenure protection was responsible for the challenged agency action in some way. That principle, however, only applies to some removal cases, excluding this case. And regardless, as discussed in the next section, Plaintiffs can make that showing.

The government's expected argument is based on *Collins*. There, the Federal Housing Finance Agency ("FHFA") had placed mortgage financers Fannie Mae and Freddie Mac into conservatorship and implemented a measure called the "third amendment," which required the companies to continually transfer significant sums to the Treasury Department. *Collins*, 141 S. Ct. at 1770. Company shareholders challenged the third amendment, alleging in part that the FHFA Director's tenure protection was unconstitutional. *Id.* The shareholders sought prospective relief, including an injunction against the third amendment, as well as retrospective relief. *Id.* at 1780. Before the Court's

[5] For the same reasons, the Appointments Clause defects cannot be severed from the Council FMP and rulemaking provisions of the Act. Furthermore, those provisions cannot function without Council members' appointments, which can be rewritten only by Congress.

decision, FHFA eliminated the relevant parts of the third amendment, mooting the request for prospective relief. *Id.*

On the merits, the Court held that the FHFA Director was unconstitutionally protected from removal. *Id.* at 1787. The Court then addressed the remedies issue. Since the request for prospective relief was moot, the Court decided "the only remaining remedial question," which "concerns retrospective relief." *Id.* The shareholders wanted the Court to "completely undo[]" past monetary transfers by holding the third amendment to be void *ab initio*. *Id.* The Court declined. It reasoned that the Directors who implemented the third amendment had been properly *appointed*, so there was no justification to reach into the past and undo actions already taken under the third amendment. *Id.* Nevertheless, other retrospective relief was possible, for the shareholders may have suffered "compensable harm" caused by the tenure protection. *Id.* at 1789. Demonstrating such harm, however, required tracing the shareholders' injury to the tenure protection. *Id.* The Court remanded the case for the lower courts to resolve this issue. *Id.*

Collins thus stands for two propositions: (1) When officers are properly appointed, their actions are not "void *ab initio*" and so the downstream consequences of those actions, *e.g.*, transfers taken pursuant to the third amendment, should not be "completely undone" as a form of retrospective relief. *Id.* at 1787. (2) When removal-power plaintiffs seek monetary relief for "compensable harm," they must make some showing that the tenure protection at issue caused their injury. *Id.* at 1789.

Here, Plaintiffs do not seek retrospective relief. They do not ask the Court to hold Amendment 14 and its implementing regulation to be "void *ab initio*," which would involve "completely undo[ing]" any actions taken pursuant to the measure, *e.g.*, fines issued for its violation. Nor do Plaintiffs seek compensation, which necessarily would

require showing how much compensable harm was caused by the tenure protection. Rather, Plaintiffs seek only the prospective relief of vacating Amendment 14 and the regulation to avoid future harm.[6] Compl. at 26–27.

Because FHFA voluntarily revoked amendment three, *Collins* explicitly refrained from passing on the issue of future harm and prospective relief. 141 S. Ct. at 1787. *Seila Law*, however, provides the rule. There, an accounting firm had been issued a civil investigative demand (essentially a subpoena) by the Public Company Accounting Oversight Board. *Seila Law*, 140 S. Ct. at 2194. The firm, seeking to avoid complying with the subpoena, challenged the Board's removal protections as unconstitutional and prevailed. In reaching that conclusion, the Court determined there that subjecting the firm to the authority of an officer with unconstitutional tenure protections, *e.g.*, by requiring the firm to comply with the subpoena, "inflicts a 'here-and-now' injury" on the individual. *Id.* at 2196. And that injury "can be remedied by a court." *Id.* It was not necessary to "show that the challenged act would not have been taken if the responsible official had been subject to the President's control." *Id.* But because the subpoena had been ratified by another officer, the Court did not deny enforcement of the subpoena but instead remanded the case to determine whether the ratification validated the subpoena. *Id.* at 2211.

Here, Amendment 14 and its implementing regulation continue to be in force, and so Plaintiffs are currently subject to the Council's authority, which it wielded and continues to wield free from Presidential control. Being subjected to executive authority that is not constitutionally and democratically accountable inflicts a "here-and-now" injury on Plaintiffs, now and going forward. *Id.* at 2196. The Court can remedy this injury by holding

[6] Although the Appointments Clause violation means Amendment 14 and its implementing regulation are void *ab initio*, *see Collins*, 141 S. Ct. at 1787–88, the requested relief is entirely prospective, Compl. at 26–27. The removal-powers claim does not allege the fishery measures are void *ab initio* and it likewise requests prospective relief only. *Id.*

Amendment 14 to be invalid and vacating the regulation, with prospective effect. That is the traditional remedy under the APA, 5 U.S.C. § 706(2)(B), and the one endorsed by *Seila Law*.

3. The Regional Administrator's abstention on Amendment 14 demonstrates the position of an officer subject to some Presidential control

Even if Plaintiffs were required to show that Council members' tenure protections contributed to the Council's adoption of Amendment 14, that requirement would be satisfied by the Regional Administrator's vote on Amendment 14. Of all the Council members, the Regional Administrator is the only one accountable to the President. Whereas governor-designated and governor-nominated members have extremely strong tenure protections, Dr. Balsiger may be reassigned at will out of his role as Regional Administrator and into a less interesting or powerful position in the Senior Executive Service. 5 U.S.C. § 3395(a)(1)(A). Dr. Balsiger's vote is therefore our best indication of what an accountable officer—one more sensitive to the impacts of his actions—would do. And Dr. Balsiger is the only one who refused to adopt Amendment 14, choosing to abstain instead. AKR13740 (Follow link, access NPFMC2020_12_07.mp3, and play 8:38:50–8:39:41 for the oral vote.). If the other members of the Council had voted as Dr. Balsiger did, Amendment 14 would not have been adopted.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court declare that Amendment 14 and the regulation violate the Appointments, Take Care, and Executive Vesting Clauses, and vacate the same.

DATED: February 7, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.4(a), this memorandum contains 10,000 words, excluding the items exempted by Local Civil Rule 7.4(a)(4).

s/ Michael A. Poon
MICHAEL A. POON

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record.

s/ Michael A. Poon
MICHAEL A. POON