UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUISIANA SHRIMP ASSOCIATION; JOHN BROWN, LARRY J. HELMER, JR., PENNY ZAR, Plaintiffs, v. JOSEPH R. BIDEN, JR. in his official capacity as President of the United States; GINA RAIMONDO, in her official capacity as UNITED STATES SECRETARY OF COMMERCE; NATIONAL MARINE FISHERIES SERVICE, Defendants.	Civil Action No. 2:24-cv-156 **PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND INCORPORATED REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Louisiana's shrimp industry—an iconic part of the state's economy and cultural identity—now finds itself under unprecedented strain. The combined effects of foreign shrimp imports and increased regulatory burdens have brought this once-thriving industry to the verge of collapse. Despite the absence of meaningful evidence demonstrating significant threats to sea turtles in Louisiana's inshore waters, the federal government has expanded the imposition of sweeping regulations that are both unnecessary and economically devastating. The National Marine Fisheries Service's (NMFS) 2019 Final Rule, which mandates the installation of costly Turtle Excluder Devices (TEDs) on Louisiana's shrimp vessels, represents federal overreach at its worst. This rule undermines decades of established tow-time regulations that have successfully balanced sea turtle conservation with the economic realities of shrimping– the balance upheld by the Fifth Circuit for thirty years.

In their motion for summary judgment, Federal Defendants attempt to justify this radical departure from prior policy by citing vague statutory authority and relying on outdated or speculative data. But the government's motion fails to grapple with the economic harm and practical difficulties this rule imposes on Louisiana shrimpers—while ignoring the absence of data showing that TEDs are necessary in inshore waters. TEDs are cumbersome, ill-suited for inshore conditions, and drastically reduce the efficiency of shrimping operations by frequently clogging with debris. Every hour that shrimpers spend maintaining these devices is time lost from their primary livelihood—catching shrimp.

The Court should deny the government's motion for summary judgment and instead grant Plaintiffs' motion because the Final Rule is arbitrary and capricious under the Administrative Procedure Act (APA) for four reasons. First, for decades, NMFS permitted tow-time restrictions in place of TEDs, and the Final Rule does not offer a reasoned explanation for abruptly revoking

this effective exemption. Second, NMFS has not provided any concrete evidence demonstrating significant incidental takings of sea turtles in Louisiana's inshore waters, undermining the statutory justification for the rule. Third, the government wholly disregarded the shrimpers' significant reliance on the prior tow-time regime. Fourth, the Final Rule violates the Commerce Clause and implicates the Major Questions Doctrine by expanding regulatory authority in a way Congress never clearly authorized. For all of these reasons, vacatur is more than appropriate.

The federal government's sweeping regulatory overreach threatens not just an industry, but the livelihoods of thousands of Louisiana shrimpers. The Final Rule lacks any meaningful justification and imposes unreasonable burdens on an already fragile sector. The Court should reject the government's motion for summary judgment and rule in favor of Plaintiffs.

ARGUMENT

I. The Final Rule is Arbitrary and Capricious Because it Fails to Adequately Justify Revoking the Prior Tow-Time Exemption.

The APA requires agencies to engage in reasoned decision-making, particularly when changing a long-standing policy. Review under the arbitrary and capricious standard is "not toothless." *State v. Biden*, 10 F.4th 538, 552 (5th Cir. 2021). This is especially true when an agency changes a position supported by specific factual findings. *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009). In such circumstances, the agency must acknowledge the change, provide a more detailed justification if new factual findings contradict the prior policy, and consider reliance interests engendered by the previous policy. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). Defendants' Final Rule fails on all these fronts.

For decades, the National Marine Fisheries Service (NMFS) maintained a balance that allowed shrimpers in inshore waters to use tow-time restrictions instead of installing turtle excluder devices (TEDs). This balance was based on specific factual findings that TEDs were unsuitable

for inshore waters due to issues like debris clogging and that tow-time restrictions were sufficient to protect sea turtles. *See State of Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 330–31 (5th Cir. 1988). This balance was codified in multiple prior rulemakings and upheld by the courts. *Id.*

The 1987 TEDs Rule allowed shrimpers to limit their tow-times to 90 minutes or less, in lieu of using TEDs, to ensure that captured turtles could be safely returned to the water. In *Guste*, the Fifth Circuit upheld this balance, recognizing that inshore shrimpers did not face the same risks to sea turtles as offshore trawlers and that TEDs were impractical for inshore vessels due to debris. *Guste*, 853 F.2d at 330. The court further noted that "[i]nshore shrimpers who find the TED onerous need not use it." *Id.* at 331. This policy reflected the reality that TEDs, while necessary offshore, were not appropriate in the debris-filled inshore waters where tow-time restrictions effectively protected turtles. *Id.*

Defendants' new Final Rule upends this long-standing balance without adequately justifying the change. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). The 2019 rule mandates TEDs for inshore skimmer trawlers, despite decades of factual findings supporting tow-time exemptions. *See Guste*, 853 F.2d at 330-31. Defendants claim that enforcement difficulties and concerns about turtle mortality justify the shift, but they fail to provide new data or compelling evidence that tow-time restrictions have become ineffective since NMFS's last assessment in 2013 that validated them. *See* Sea Turtle Conservation; Shrimp Trawling Requirements, 78 Fed. Reg. 9024 (Feb. 7, 2013). In fact, NMFS's own prior rulemaking process in 2013 acknowledged that there was insufficient data to justify TED requirements for inshore vessels. *Id.* The agency withdrew its proposal to mandate TEDs for inshore shrimpers, citing "highly uncertain ecological benefits" and "potentially significant economic ramifications." AR 288-89.

Defendants' failure to engage with these prior factual findings is arbitrary and capricious. The APA mandates that agencies must provide a reasoned explanation for changing course, especially when the prior policy engendered significant reliance interests. *Fox*, 556 U.S. at 515. Defendants must address why they are departing from the previous findings that justified tow-time exemptions, but instead, they act as though the 2013 findings never existed.

Moreover, Defendants neglect to address an obvious alternative: enhanced outreach and enforcement of tow-time restrictions. When an agency rescinds a prior policy, it "must consider the alternatives that are within the ambit of the existing policy." *Texas v. Biden*, 20 F.4th 928, 992 (5th Cir. 2021) (internal citation omitted). NMFS's 2013 decision emphasized outreach as an obvious means to improve compliance and reduce turtle mortality without imposing the economic burden of mandatory TEDs. AR 290 ("These outreach efforts would likely improve compliance and, therefore, decrease sea turtle mortality in the inshore skimmer trawl fisheries in the near term."). The 2019 Final Rule failed to consider this alternative, making it arbitrary and capricious under the APA.

Defendants also disregard the 2014 Biological Opinion (BiOp), which concluded that tow-time restrictions were sufficient to protect sea turtles in inshore waters. The 2014 BiOp explicitly stated that maintaining the status quo was not likely to jeopardize the continued existence of sea turtles, including the Kemp's ridley species. AR 11361. Defendants offer no new data to refute this conclusion. Instead, they simply claim that the 2019 TEDs Rule is necessary without explaining why the findings from the 2014 BiOp no longer hold. Such a failure to engage with prior findings is independently sufficient to set aside the Final Rule. *Fox*, 556 U.S. at 515; *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1912 (2020).

Finally, Defendants' reliance on outdated studies and generalized assertions does not meet the APA's requirement for reasoned decision-making. Defendants cite studies that predate the 2012 rulemaking process and offer no new evidence to support their claim that tow-time restrictions are ineffective. In fact, the studies relied on are outdated and were already considered in prior rulemakings that maintained tow-time exemptions. *See* AR 10974. Using old data to justify a reversal of policy without substantial new evidence is not rational decision-making. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 767 (D.C. Cir. 2009). Defendants' failure to provide a reasoned explanation for overturning long-standing policies that effectively protected sea turtles while balancing economic concerns warrants vacatur.

II. The Final Rule is Arbitrary and Capricious Because the Agency Failed to Demonstrate That There are Incidental Takings Occurring in Louisiana Inshore Waters.

The Final Rule's TED requirement for inshore shrimpers in Louisiana is arbitrary and capricious because NMFS failed to provide sufficient evidence of sea turtle interactions in inshore waters, ignoring critical distinctions between inshore and offshore shrimping. The agency's reliance on questionable data and failure to engage with contrary evidence violate the APA, and the Final Rule should be set aside.

NMFS's 2019 Final Rule mandates the use of turtle excluder devices (TEDs) in inshore waters without adequately demonstrating that deadly incidental takings of sea turtles were occurring in those waters. Plaintiffs have consistently highlighted the absence of conclusive evidence showing sea turtle interactions leading to mortality in the specific areas where many Louisiana shrimpers operate. Defendants' reliance on broad, unsupported assertions about sea turtle mortality, without distinguishing between inshore and offshore waters or considering the data's limitations, is arbitrary and capricious.

Defendants argue that NMFS observer data proves incidental takings in Louisiana's inshore waters, citing various points in the administrative record that show sea turtles were captured during skimmer trawl operations. However, a closer look at this data reveals several critical flaws. While NMFS claims that observer data shows sea turtle captures in inshore waters, the agency fails to show that these interactions are frequent or significant enough to warrant a blanket TED requirement across all Louisiana inshore waters. The agency's data fails to adequately differentiate between offshore and inshore captures, undermining the reliability of its conclusions for the Final Rule.

Plaintiffs acknowledge that some sea turtles may be present in inshore waters, but the data does not show widespread or routine interactions leading to mortality that would justify abandoning the long-standing tow-time exemption. In fact, comments from the Louisiana Department of Wildlife & Fisheries (LDWF) and Mississippi officials raised concerns that NMFS's data exaggerated the frequency of sea turtle interactions in inshore waters. For instance, the LDWF noted that strandings occurred overwhelmingly during periods when there was little or no shrimping activity – that is, they could not have been caused by shrimpers. This key observation, along with similar comments, casts doubt on the necessity of the Final Rule's broad application in inshore waters.

Furthermore, NMFS ignored significant comments on the limitations of its data collection. The Louisiana Shrimp Association noted the fallacy in the "higher mortality rates" analysis and instead calculated that "the average skimmer vessel would likely see one (1) turtle mortality, cause of death unknown, and approximately once every eight (8) annual shrimping years." AR 8622. This is hardly a turtle bloodbath justifying upending the shrimping industry. The LDWF's comment letter noted that NMFS's method of extrapolating data from skimmer trawl observations

to assess overall sea turtle capture rates was inappropriate. AR 8169. The LDWF specifically criticized NMFS for failing to consider the differences between smaller vessels and gear types, leading to inflated estimates of turtle interactions. *Id.* Mississippi echoed these concerns, pointing out that reported strandings were inconsistent with active shrimping periods. AR 8608.

The 1987 Final Rule struck a careful balance by imposing TED requirements on offshore vessels while exempting inshore shrimpers who complied with tow-time restrictions. The Fifth Circuit upheld this approach in *State of Louisiana ex rel. Guste v. Verity*, noting that tow-time restrictions were a reasonable and effective alternative to TEDs in inshore waters. The court further recognized that the debris present in inshore waters made TED use less effective, justifying the distinction between offshore and inshore operations.

In the 2019 Final Rule, NMFS abandoned this regulatory balance without providing a reasoned explanation for doing so. Defendants now rely on observer data that fails to address the specific conditions of inshore waters, such as the presence of debris, and ignore the previously acknowledged challenges of using TEDs in such environments. This unexplained shift in policy, without any new evidence justifying the change, is arbitrary and capricious.

As the Fifth Circuit recently reiterated in *BST Holdings, L.L.C. v. OSHA*, courts have "an affirmative duty" to scrutinize agency actions when they deviate from past practices without sufficient justification. 17 F.4th 604, 614 (5th Cir. 2021). Here, NMFS has failed to provide any meaningful justification for reversing its long-standing position that tow-time restrictions adequately protect sea turtles in inshore waters. The agency's attempt to apply a one-size-fits-all TED requirement, without considering the practical realities of inshore shrimping, is the very definition of arbitrary and capricious rulemaking.

Defendants attempt to dismiss contrary data, including the May 2021 LDWF comment letter, by arguing that it postdates the Final Rule and thus should not be considered. However, this argument misses the point. The burden remains on NMFS to justify its decision based on the data available at the time of rulemaking – which it plainly did not do. The fact that LDWF provided more recent data showing minimal sea turtle interactions only underscores the inaccuracy of the data relied upon by the agency and the agency's failure to adequately consider all evidence that was available during the rulemaking process.

NMFS cannot rely on a selective reading of the record to justify its decision. Even without considering the 2021 LDWF letter, the administrative record contains sufficient evidence of the flaws in NMFS's methodology and its failure to consider comments that challenged the necessity of TEDs in inshore waters. The agency's reliance on older data that does not support its broad regulatory changes cannot withstand arbitrary and capricious review.

Finally, NMFS ignored reasonable alternatives to the TED requirement, such as enhanced outreach and education efforts to improve compliance with tow-time restrictions. In its 2013 withdrawal of a similar proposed rule, NMFS acknowledged that additional outreach efforts would likely improve compliance and reduce sea turtle mortality. In a Decision Memo related to that choice, improvement of outreach efforts was central. AR 286 ("Numerous requests to strengthen outreach, specifically regarding education on tow time requirements, were received by the public and industry during the comment periods for the proposed rule and DEIS… we believe that if followed, [tow times] can be effective at reducing sea turtle mortality."). NMFS also failed to consider other alternatives, such as using technology to monitor tow-times. Yet in the 2019 Final Rule, NMFS disregarded alternatives without explanation, opting instead for a rigid TED mandate.

As the Fifth Circuit held in *Texas v. Biden*, when an agency rescinds a prior policy, it must consider alternatives that were previously deemed effective. NMFS's failure to even consider continued reliance on tow-time restrictions, coupled with enhanced outreach or technological efforts, renders the Final Rule arbitrary and capricious.

III. The Final Rule is Arbitrary and Capricious Because the Agency Disregarded the Reliance Interests of Louisiana Shrimpers and the Costs and Benefits of the Rule.

NMFS's failure to properly account for the significant reliance interests of Louisiana shrimpers and its inadequate consideration of the costs and benefits of the Final Rule make it arbitrary and capricious under the APA. The agency disregarded decades of regulatory precedent that shrimpers depended upon and failed to explain why a new, burdensome TED requirement was necessary in inshore waters. Defendants' arguments to the contrary are unavailing.

The Federal Defendants argue that any reliance on the prior regulatory regime was unreasonable due to the historical development of TEDs and litigation over their use. However, this argument ignores the reality that despite frequent litigation, for more than three decades, NMFS maintained a clear distinction between inshore and offshore shrimping, with the tow-time alternative consistently viewed as sufficient protection for sea turtles in inshore waters. Louisiana shrimpers relied on this established regulatory framework when making critical business decisions, including investment in vessels, equipment, and operations. Forcing these shrimpers to now comply with costly TED requirements in inshore waters—without providing a detailed justification for the change—disrupts these settled expectations.

Defendants cite *Mozilla Corp. v. FCC* to support their claim that reliance on the prior framework was unreasonable due to regulatory uncertainty and litigation. 940 F.3d 1, 64 (D.C. Cir. 2019). But this reliance on *Mozilla* is misplaced. Unlike the regulatory environment in *Mozilla*, which involved a relatively short-lived regulatory scheme that was subject to frequent

legal challenges and itself upended reliance interests, the tow-time exemption for inshore waters has been in place since 1987. In *Mozilla*, the court determined that reliance interests were unreasonable because the regulatory regime in question had only been in place for a few years and had faced persistent legal challenges. Here, in contrast, the tow-time exemption has been in place for decades without substantive legal or regulatory challenges to its validity. Louisiana shrimpers had every reason to believe that this well-established regulatory framework would continue.

Moreover, as *Encino Motorcars* makes clear, when an agency alters a long-standing policy that has engendered substantial reliance, it must provide a detailed explanation for the change. 579 U.S. 211, 222 (2016). NMFS failed to meet this burden. The agency briefly acknowledged industry comments in the Final Rule, but it did not substantively address the significant reliance interests' shrimpers had developed over decades under the prior regime. This failure is legally insufficient. The Supreme Court has held that when reliance interests exist, the agency must not only acknowledge them but also provide a more detailed justification for its policy change than would otherwise be required for a policy created "on a blank slate." *Fox*, 556 U.S. at 515-16. NMFS did not provide such a justification here, rendering the Final Rule arbitrary and capricious.

NMFS's Final Rule also fails to properly consider the costs and benefits of imposing TED requirements in inshore waters. The agency's primary justification for the new TED requirement was that tow-time restrictions were not effective at preventing sea turtle bycatch and mortality. However, NMFS did not present compelling evidence that TEDs would provide any meaningful benefit beyond the existing tow-time regime, which has allowed for significant sea turtle population recovery. As Plaintiffs demonstrated, the population of sea turtles—including the Kemp's ridley turtle—has thrived under the current tow-time restrictions to "historically high" levels. AR 2203-2205.

The Fifth Circuit's decision in *Mexican Gulf Fishing Co. v. U.S. Dep't of Commerce* is highly instructive here. In that case, the court invalidated a rule requiring GPS tracking on charter boats because the agency failed to justify the significant costs imposed by the rule. 60 F.4th 956, 973 (5th Cir. 2023). The court emphasized that "insignificant benefits do not bear a rational relationship to the serious financial ... costs imposed." *Id.* Similarly, here, NMFS failed to justify the significant financial burden the TED requirement imposes on Louisiana shrimpers, particularly when the benefits are speculative at best. The agency provided no evidence that sea turtles were significantly threatened by inshore shrimping operations or that TEDs would achieve a measurable improvement over tow-time restrictions. The financial burden on shrimpers, meanwhile, is clear—Plaintiff LSA outlined the severe adverse effects of the rule on shrimpers, estimating that 50% of part-time shrimping vessels may cease operations due to compliance costs. AR 8616-8618.

Defendants argue that NMFS did consider the costs and benefits of the rule, pointing to the agency's decision to limit the TED requirement to vessels over 40 feet in length as evidence of this consideration. However, this minor modification does not address the larger issue: NMFS still failed to engage with the data showing that the existing tow-time regime has been effective and that the costs of TEDs far outweigh any speculative benefits. By disregarding evidence of sea turtle population growth and the lack of significant turtle interactions with inshore shrimpers, NMFS acted arbitrarily and capriciously in imposing a new and costly regulation. As the agency has made clear as well, it is now looking at an expansion of this already unjustifiable rule to smaller boats. AR 12638.

NMFS's failure to meaningfully respond to Louisiana's petition for an inshore exclusion zone further highlights the inadequacy of its rulemaking process. In May 2021, LDWF requested that the inshore waters of Louisiana be excluded from the TED requirement based on a long-

running bycatch study demonstrating minimal interactions between shrimp trawlers and sea turtles. Ex. A at 9. NMFS did not engage with this data or provide a substantive response to LDWF's request. Instead, the agency dismissed the petition with a blanket statement that it lacked sufficient information to exempt Louisiana's inshore waters. AR 9466.

This failure to engage with relevant state-level data violates the APA's requirement that agencies consider all "relevant factors" in their decision-making. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). LDWF's bycatch study, which spans decades and includes over 128,000 trawl samples, identified only two sea turtle interactions in Louisiana's inshore waters. Ex. A at 3 ¶11. NMFS's refusal to consider this extensive data set—while relying on far smaller and outdated sample sizes to justify its rule—undermines the validity of the Final Rule. As the D.C. Circuit has held, an "agency cannot ignore new and better data" when making regulatory decisions. *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015). By failing to meaningfully engage with Louisiana's extensive data, NMFS violated this principle and failed to comply with the APA.

NMFS's failure to consider the reliance interests of Louisiana shrimpers and its inadequate analysis of the costs and benefits of the Final Rule render the rule arbitrary and capricious. The agency's failure to engage with relevant data, including the extensive LDWF bycatch study, further underscores the legal deficiencies in the rulemaking process. For these reasons, the Final Rule should be vacated.

IV. The Final Rule Violates the Commerce Clause and the Major Questions Doctrine. [1]

The 2019 Final Rule's reach extends beyond Congress's authority under the Commerce Clause, impacting non-commercial, intrastate skimmer trawl operations in Louisiana without clear statutory authority. Defendants argue that this overreach is permissible under the Endangered Species Act (ESA), but their reasoning fails to account for the constitutional limits on federal regulatory power. The Major Questions Doctrine requires Congress to speak clearly when authorizing such expansive regulations. Defendants' failure to point to clear statutory authority makes the Final Rule arbitrary, capricious, and unconstitutional.

The Final Rule impacts non-commercial skimmer trawl operations that engage in shrimping for personal and family consumption—activities that are purely intrastate and do not involve interstate commerce. The record demonstrates that the Final Rule will apply to shrimpers when they are not engaged in any commercial activity. AR 1815; *see also* LDWF Comment at 2 ("[N]on-commercial skimmer trawl vessels harvest shrimp recreationally for their own and their families' consumption"). Under well-established Commerce Clause principles, federal regulation cannot reach purely local, non-economic activities like these.

[1] Beyond the injuries of the named Plaintiffs who wish to be able to shrimp for their own families, Plaintiffs have demonstrated standing under the well-established test for associational standing. *Meredith v. Ieyoub*, 700 So.2d 478, 480 (La. Sept. 9, 1997). First, members of the Louisiana Shrimp Association (LSA) would have standing to sue in their own right, as the Final Rule directly impacts them by imposing costly and burdensome TED requirements on both commercial and non-commercial shrimping activity, jeopardizing their livelihoods and restricting personal use of their catch. *See* Declaration of Acy Cooper, attached hereto as Ex. B. The economic harm and regulatory burden on part-time shrimpers who fish for personal consumption, as noted in AR 1815 and LDWF's comments, establish a concrete, particularized injury that is fairly traceable to the challenged action and redressable by a favorable ruling. Second, the interests the LSA seeks to protect—namely, preserving the viability of shrimping in Louisiana broadly—are germane to its purpose. Finally, the relief sought (declaratory and injunctive relief) does not require the participation of individual members, as it uniformly benefits all members affected by the TED requirements. Thus, Plaintiffs' Commerce Clause claim is properly before this Court.

As the Supreme Court held in *United States v. Lopez*, 514 U.S. 549 (1995), Congress's authority to regulate under the Commerce Clause is not unlimited. The Court invalidated a federal statute that attempted to regulate purely local, non-economic activities—finding that Congress cannot regulate activities that do not substantially affect interstate commerce. *Id.* at 561. Similarly, in *United States v. Morrison*, 529 U.S. 598 (2000), the Court reiterated that non-economic, intrastate activities fall outside the scope of federal regulatory authority. *Lopez* and *Morrison* are directly applicable here, as the Final Rule regulates non-commercial, intrastate activities that do not substantially affect interstate commerce.

Defendants counter by asserting that skimmer trawls are not authorized for recreational fishers and that anyone using this gear would be classified as a commercial fisherman, even if harvesting for personal consumption. AR 9437. However, this classification is a matter of federal regulation, not an inherent characteristic of the activity itself. The fact remains that many skimmer trawl operators in Louisiana engage in non-commercial shrimping, and their activities do not implicate interstate commerce. In its economic analysis, the Final Rule even recognized that shrimpers retain shrimp "personal consumption of harvested shrimp." AR 9477. Regulating these purely intrastate activities exceeds the federal government's Commerce Clause authority and intrudes on the traditional police powers of the state.

Defendants rely heavily on *Gonzales v. Raich*, 545 U.S. 1 (2005), to argue that even non-economic, local activity can be regulated if it is part of a broader regulatory scheme affecting interstate commerce. But *Raich* involved the federal government's regulation of a controlled substance (marijuana), which was intertwined with a comprehensive federal regulatory regime that directly impacted interstate commerce. In contrast, non-commercial skimmer trawl operations do not substantially affect interstate commerce, nor are they part of a broader regulatory scheme with

interstate implications. The factual and legal contexts of *Raich* and the Final Rule are entirely different, and Defendants' reliance on that case is misplaced.

The Major Questions Doctrine applies when an agency asserts authority to regulate in areas that push constitutional boundaries or involve matters of vast economic or political significance. *BST Holdings, L.L.C.*, 17 F. at 617. Under this doctrine, Congress must speak clearly and unambiguously when delegating authority to agencies in such areas. Defendants fail to meet this requirement.

The ESA does not provide clear statutory authority for regulating non-commercial shrimping activities that take place entirely within Louisiana's inshore waters. The ESA's provisions must be understood within the limits of Congress's constitutional powers, including those under the Commerce Clause. Courts have repeatedly held that federal agencies must have clear congressional authorization when regulating in areas that traditionally fall under state control, such as inshore fisheries. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001).

Defendants' reliance on *Raich* and other cases that interpret the Commerce Clause broadly is misplaced. While the ESA grants authority to protect endangered species, that authority is not without limits. When an agency seeks to extend its regulatory reach to non-commercial, purely intrastate activities, it must have clear and specific authorization from Congress. *BST Holdings* is instructive here, as the Fifth Circuit invalidated a federal agency's attempt to regulate private employers' activities, finding that the agency had overstepped its constitutional bounds. Similarly, NMFS's regulation of non-commercial shrimpers exceeds the federal government's Commerce Clause authority.

Defendants attempt to argue that the Major Questions Doctrine is not implicated here because the ESA provides sufficient authority for NMFS to regulate sea turtles. But the Final Rule represents an "enormous and transformative expansion" of NMFS's regulatory authority, requiring a clear statement of congressional intent. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). No such clear statement exists in the ESA. Congress has not spoken clearly to authorize NMFS to regulate non-commercial, intrastate activities that fall within the state's traditional regulatory domain.

Even if NMFS had statutory authority to regulate shrimpers who are operating non-commercially (which it does not), the Final Rule still fails to provide a reasoned explanation for this overreach. The APA requires agencies to provide a rational connection between the facts found and the regulatory choices made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). NMFS has not done so here. The Final Rule imposes the same costly regulatory burdens on shrimpers who are shrimping non-commercially as it does on large scale commercial shrimping operations, without providing any justification for this one-size-fits-all approach.

In response, Defendants argue that NMFS provided a reasoned explanation for requiring TEDs on skimmer trawl vessels based on data showing the ineffectiveness of tow-time restrictions in reducing sea turtle bycatch. However, this justification fails to account for the distinct impact of shrimpers who are operating non-commercially, whose operations are unlikely to affect sea turtles in any meaningful way. NMFS's failure to consider this key distinction further demonstrates the arbitrary nature of the Final Rule.

The 2019 Final Rule exceeds NMFS's authority under the Commerce Clause by regulating non-commercial, intrastate shrimping activities that do not substantially affect interstate commerce. Defendants' attempts to justify this overreach are unconvincing and fail to account for

the constitutional limits on federal regulatory power. Additionally, the Major Questions Doctrine requires clear congressional authorization for such expansive regulatory action, which is absent here. Finally, NMFS's failure to provide a reasoned explanation for extending TED requirements to non-commercial shrimpers renders the Final Rule arbitrary and capricious. For these reasons, the Final Rule should be vacated.

V. Post-*Chevron* Deference, There Is No Basis to Accept the Agency's Self-Serving Claims or the Broad Definition and Regulation of Incidental Takings.

Finally, considering the end of *Chevron* deference, there is no longer any basis to accept the agency's self-serving claims or the broad definition of an incidental "taking" that justifies its regulation of shrimpers in inshore waterways. "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). The Endangered Species Act constitutes the agency's statutory authority, and it is predicated on prohibiting the "tak[ing]" of endangered species. 16 U.S.C.S. § 1538(a)(1)(B). From such simple words, an ever-expanding regulatory regime has spawned for decades. In reliance on *Chevron*, the Supreme Court validated this approach over strong dissent. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 115 S. Ct. 2407, 132 L.Ed.2d 597 (1995). Now, this doctrine of deference has ended, and it is once again "emphatically the province and duty of the judicial department to say what the law is." *Loper Bright*, 144 S. Ct. at 2283 (citing *Marbury v. Madison*, 1 Cranch 137, 177). The agency's view of its regulatory powers – extending into waterways where they admit they lack evidence of sea turtle interactions and therefore "tak[ings" – is unsupported by the text of the statute that supposedly empowers it. After *Loper Bright*, there is little justification to continue to defer to the agency's near-limitless view of its own power.

For the same reason, the Defendants' reliance on the decision of the D.C. Circuit opinion is likewise unavailing. *Ctr. For Biological Diversity v. NMFS*, No. 22-5295, 2024 WL 3083338 (D.C. Cir. June 21, 2024). That decision preceded the Supreme Court's game changing opinion that requires courts to closely scrutinize agency actions and not merely defer to their proclamations.

VI. Vacatur is the Appropriate Remedy.

Vacatur is the standard remedy for agency actions found to be arbitrary and capricious under the APA, and it is the only appropriate remedy here. Defendants' request to delay briefing on the remedy should be denied because both factors under the *Allied-Signal* test for vacatur support that remedy. The two factors are: (1) the seriousness of the deficiencies in the agency's decision, and (2) the potential disruptive consequences of vacatur. *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146 (D.C. Cir. 1993).

First, the seriousness of NMFS's deficiencies is clear. The agency failed to engage with prior factual findings, ignored significant reliance interests, and neglected to consider reasonable alternatives, such as additional outreach or enhanced enforcement of tow-time restrictions. NMFS has provided no new data or compelling evidence to justify the imposition of TEDs in inshore waters. This departure from decades of established practice, without sufficient reasoning, renders the rule arbitrary and capricious. When an agency's action lacks a reasoned explanation and contradicts its prior findings, vacatur is warranted. *Encino Motorcars*, 579 U.S. at 222.

Second, vacatur will not result in serious disruption. While the TED requirement has gone into effect, shrimpers can readily return to the pre-TEDs regime, as the use and maintenance of TEDs requires ongoing effort and costs. Reverting to the prior system of tow-time restrictions involves ceasing the active use of TEDs, a simple process. Unlike more permanent regulatory shifts, this is not a situation where vacatur would undo extensive, irreversible changes. In *Allied-*

Signal, the court declined to vacate a rule because doing so would have required the Commission to refund fees to many parties, creating significant financial and logistical disruptions. In contrast, vacatur of the Final Rule in this case would not require any such refunds or retroactive application of financial penalties. Here, shrimpers can easily revert to the pre-TEDs tow-time regime without incurring significant costs or complications. Moreover, while Defendants point to the conservation imperative of the Final Rule, NMFS has failed to show that TEDs provide significantly greater protection than tow-time restrictions. The benefits of the Final Rule are speculative, and NMFS has not provided adequate justification for the change. Given the flaws in NMFS's rationale, vacatur is appropriate to prevent unnecessary harm to the shrimping industry.

Additionally, vacatur is the default remedy in the Fifth Circuit for unlawful rules. Courts in this Circuit, as well as others, overwhelmingly vacate rules found to violate the APA, without engaging in remand without vacatur analysis. *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019). Here, vacatur would return the industry to the long-standing system of tow-time restrictions, which has been proven effective in protecting sea turtles while minimizing economic burdens on shrimpers. The burden is on Defendants to show that vacatur is unnecessary, and they have failed to do so. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008).

Allowing the Final Rule to stand would reward NMFS's failure to provide reasoned decision-making, particularly in light of decades of reliance interests. The agency's decision was arbitrary, capricious, and unsupported by new evidence. Vacatur is necessary to uphold the principles of rational rulemaking and to prevent further economic harm to shrimpers. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1050 (D.C. Cir. 2021).

For these reasons, this Court should vacate the Final Rule.

CONCLUSION

For all these reasons, the Court should grant Plaintiffs' motion for summary judgment and deny Defendants' cross-motion for summary judgment.

Respectfully submitted,

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Exhibit B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUISIANA SHRIMP ASSOCIATION; JOHN BROWN, LARRY J. HELMER, JR., PENNY ZAR, Plaintiffs, v. JOSEPH R. BIDEN, JR. in his official capacity as President of the United States; GINA RAIMONDO, in her official capacity as UNITED STATES SECRETARY OF COMMERCE; NATIONAL MARINE FISHERIES SERVICE, Defendants.	)	Civil Action No. 2:24-cv-156 **DECLARATION OF ACY COOPER**

DECLARATION OF ACY COOPER

I, Acy Cooper, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

1. I am the President of the Louisiana Shrimp Association (LSA), an organization dedicated to representing the interests of shrimpers across the state of Louisiana, including both commercial and non-commercial shrimpers. I have served in this role since 2014 and have been a commercial shrimper myself for over 50 years.

2. The LSA was formed to protect the rights and interests of Louisiana shrimpers, promote sustainable shrimping practices, and ensure that shrimpers can continue to engage in this vital part of our economy and culture. The LSA advocates for shrimpers in matters of policy, regulation, and industry-wide issues that affect the livelihood of shrimpers and the future of the shrimping industry.

3. The LSA represents over 400 members, consisting of both full-time and part-time shrimpers. Our membership includes individuals who shrimp for commercial purposes as well as

those who engage in shrimping for personal and family consumption. Many of our members, especially the smaller part-time operators, rely heavily on Louisiana's inshore waters for shrimping.

4. The new regulation requiring the use of Turtle Excluder Devices (TEDs) on certain shrimping vessels, including skimmer trawls operating in inshore waters, has caused substantial concern and financial strain for our members. The cost of purchasing, installing, and maintaining TEDs is prohibitively expensive for many part-time shrimpers, who operate on very narrow profit margins. Additionally, the maintenance disrupts shrimping operations, leading to significant loss of shrimp and reduced productivity.

5. Many of our members, particularly those who shrimp part-time, will likely be forced to cease operations due to the cost and burden of complying with the TED requirement. The expense of TED installation and operation is significant, especially for smaller operators who are already struggling due to competition from foreign imports and other industry pressures. Furthermore, shrimpers who engage in non-commercial shrimping for their own and their families' consumption will be harmed from continuing to shrimp under this new rule, depriving them of a crucial source of food and livelihood.

6. For decades, Louisiana shrimpers have operated under a regulatory regime that exempted inshore vessels from the TED requirement so long as they complied with tow-time restrictions. Our members reasonably relied on this regulatory framework when making investment and operational decisions regarding their shrimping activities. The abrupt shift in policy requiring TEDs without adequate justification or consideration of the impact on inshore shrimpers has jeopardized their investments and livelihoods.

7. A portion of our membership consists of shrimpers who fish in Louisiana's inshore waters for personal use, providing shrimp to feed their families. These members are directly impacted by the TED requirement despite not engaging in commercial shrimping activities. The Final Rule's reach to non-commercial shrimpers is not justified by data or evidence of sea turtle interactions in these waters.

8. The interests the LSA seeks to protect in this litigation are central to the organization's purpose. We are advocating for the rights of shrimpers to continue their operations without the undue and unjustified burden imposed by the Final Rule. The LSA is committed to ensuring that the regulatory framework governing shrimping remains fair, sustainable, and does not disproportionately harm smaller operators or non-commercial shrimpers.

9. The relief sought in this litigation, including vacating or modifying the TED requirement, would uniformly benefit all members of the LSA. Both commercial and non-commercial shrimpers are impacted by this rule, and a favorable outcome in this case would ensure that all shrimpers can continue their operations without the unreasonable burdens imposed by the Final Rule.

10. Based on the significant and direct harm to our members caused by the TED requirement, the Louisiana Shrimp Association has a vested interest in this litigation. Our members' livelihoods, reliance interests, and future in the shrimping industry are at stake.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 23, 2024, in Venice, Louisiana.

/s/ Acy L Cooper Jr.
Acy Cooper

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUISIANA SHRIMP ASSOCIATION; JOHN BROWN, LARRY J. HELMER, JR., PENNY ZAR, Plaintiffs, v. JOSEPH R. BIDEN, JR. in his official capacity as President of the United States; GINA RAIMONDO, in her official capacity as UNITED STATES SECRETARY OF COMMERCE; NATIONAL MARINE FISHERIES SERVICE, Defendants.	)	Civil Action No. 2:24-cv-156 **PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS**

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

Under Local Rule 56.1, Plaintiffs respectfully submit the following response to Defendants' Statement of Undisputed Material Facts:

1. **Defendants' Statement:** Five species of sea turtles occur in U.S. waters (Kemp's ridley, loggerhead, leatherback, green, and hawksbill sea turtles), each of which has been listed by NMFS as either endangered or threatened under the ESA. 50 C.F.R. § 223.102(e); id. § 224.101(h).

Response: Not disputed.

2. **Defendants' Statement:** In June 1987, NMFS issued regulations pursuant to its authority under ESA Sections 4(d) and 11(f) to protect sea turtles. Shrimp Trawling Requirements, 52 Fed. Reg. 24244 (June 29, 1987) ("1987 Rule").

Response: Object that the regulations speak for themselves and as to NMFS' claim for statutory authority. NMFS has only the authorities expressly provided by statute—not generic "broad authority." *See, e.g.*, *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S.

355, 357 (1986) ("[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."). Otherwise, not disputed.

3. **Defendants' Statement:** The 1987 Rule requires that shrimp trawlers trawling in offshore waters from North Carolina through Texas use a NMFS-approved TED in their nets during certain times of the year in specific areas. *Id.*; 50 C.F.R. § 223.206(d)(2).

Response: Object that the regulations speak for themselves. Statement disputed as lacking in context. Defendants leave out several important aspects of the 1987 Rule. The Rule based the inshore vs. outshore distinction on several factual findings including the presence of debris in inshore waters: "During hearings on the proposed regulations, commenters urged that TEDs will not be effective inshore because the TEDs will clog with debris that reportedly lines the bottom of these waters, particularly the inshore Gulf waters." *State of La. ex rel. Guste v. Verity*, 853 F.2d 322, 331 (5th Cir. 1988).

4. **Defendants' Statement:** The Fifth Circuit upheld these regulations in *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322 (5th Cir. 1988) (per curiam).

Response: Not disputed, as the Circuit recognized the critical distinction between TED requirements and tow-time restrictions in inshore waterways:

> Since the data was more than adequate to support the tow-time restriction in inland waters, it follows that the Secretary's decision to give shrimpers the option to use TEDs as an alternative is no less supportable. Inshore shrimpers who find the TED onerous need not use it. On the other hand, should shrimpers who experiment with the TED in inshore waters find the device compatible with their needs, they will be free to use it instead of having to haul aboard their nets after every ninety minutes of fishing. The shrimpers can hardly complain that the agency has given them a choice.

Guste, 853 F.2d at 331.

5. **Defendants' Statement:** On May 10, 2012, NMFS published a proposed rule to require the use of TEDs in certain additional trawl types than were included in the 1987 Rule, including skimmer trawls. Shrimp Trawling Requirements, 77 Fed. Reg. 27411 (May 10, 2012) ("2012 Proposed Rule") (AR 000265).

Response: Not disputed that NMFS published the proposed rule in 2012.

6. **Defendants' Statement:** During the development of the 2012 Proposed Rule, NMFS placed federal observers on skimmer trawl vessels to collect additional data on sea turtle interactions. Observers documented the capture of sea turtles on observed trips during 2012-2014 using skimmer trawl gear, including captures that occurred while fishing in inshore waters off Louisiana. AR 010893, 010924, & 010955.

Response: Not disputed that observers documented some sea turtle captures and that these considerations were known and considered when the rule was withdrawn. Otherwise, object and dispute the relevance and the completeness of the data used. See Fed. R. Civ. P. 56(c)(1), (2); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-160 (1970).

7. **Defendants' Statement:** Although observer data both confirmed the presence of sea turtles and documented their capture by skimmer trawl vessels, observations about the size of captured turtles in 2012 led NMFS to withdraw the final rule on February 7, 2013. Shrimp Trawling Requirements, 78 Fed. Reg. 9024 (Feb. 7, 2013) ("Withdrawal Rule") (AR 000288).

Response: Not disputed that NMFS withdrew the final rule in 2013. Otherwise disputed, including that size observations were the sole basis for the withdrawal when the agency identified numerous reasons for the withdrawal including but not limited to "potentially significant economic ramifications a TED requirement would have on fishermen participating in the inshore skimmer trawl fisheries," "highly uncertain ecological

benefits," and a likelihood that education and outreach would address compliance shortcomings. AR 288-90.

8. **Defendants' Statement:** Most of the sea turtles observed were small enough to pass between the required maximum 4-inch bar spacing of the approved TEDs, negating much of the sea turtle conservation benefit expected from the 2012 Proposed Rule. AR 000289, AR 010947.

Response: Not disputed that NMFS made this observation, particularly as sea turtles have thrived under the tow-time restrictions to "historically high" levels. Otherwise objectionable and disputed due to the limited data relied upon by NMFS.

9. **Defendants' Statement:** On December 16, 2016, NMFS published a proposed rule requiring TEDs on almost all vessels in the southeastern U.S. shrimp fisheries. 81 Fed. Reg. 91097 (Dec. 16, 2016), AR 002167 ("2016 Proposed Rule").

Response: Not disputed.

10. **Defendants' Statement:** NMFS explained that, after the 2013 Withdrawal Rule, NMFS completed additional testing and developed new TED configurations to allow small turtles to escape the trawl nets effectively. 81 Fed. Reg. at 91098 (AR 002168).

Response: Not disputed that NMFS made the statement. Otherwise disputed, including the effectiveness of the new TED configurations based on current testing data.

11. **Defendants' Statement:** On December 20, 2019, NMFS issued the Final Rule. 84 Fed. Reg. 70048 (Dec. 20, 2019) (AR 009464).

Response: Not disputed.

12. **Defendants' Statement:** The Final Rule requires skimmer trawl vessels 40 feet and greater in length to use TEDs, as tow time limits may not be as effective in reducing sea turtle bycatch and mortality. *Id.* at 70050 (AR 009466).

Response: Not disputed that this is the requirement of the Final Rule. Otherwise disputed as to the effectiveness of tow time limits.

13. **Defendants' Statement:** The Final Rule was expected to "result in a conservation benefit of 801-1,168 sea turtles annually in the Southeastern U.S. shrimp fisheries." *Id.* at 70049 (AR 009465).

Response: Not disputed that NMFS made this estimate. Otherwise objectionable and disputed due to the questionable methodology used.

14. **Defendants' Statement:** NMFS set the effective date of the Final Rule as April 1, 2021. *Id.* at 70055 (AR 009471).

Response: Not disputed.

15. **Defendants' Statement:** On March 31, 2021, NMFS published a notice delaying the effective date from April 1, 2021, to August 1, 2021, due to safety and travel restrictions stemming from the COVID-19 pandemic. 86 Fed. Reg. 16,676-01 (Mar. 31, 2021) (AR 012339).

Response: Not disputed.

16. **Defendants' Statement:** On September 9, 2021, this Court enjoined the Final Rule in Louisiana inshore waters until February 1, 2022, reasoning that "a brief delay in implementation of the Final Rule to allow appropriate time for all shrimpers to come into compliance will not result in an unreasonable risk to sea turtles." *La. State v. DOC*, 559 F.Supp.3d 543, 549 (E.D. La. 2021).

Response: Not disputed.

17. **Defendants' Statement:** The Final Rule has now been in effect for more than two years.

Response: Not disputed.

Respectfully submitted,

/s James Baehr
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