No. 24-1480

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, INC.,
Plaintiff-Appellee,

v.

JANET COIT, Assistant Administrator, NOAA in her official capacity;
NATIONAL MARINE FISHERIES SERVICE;
GINA M. RAIMONDO, Secretary of the United States
Department of Commerce, in her official capacity,
Defendants-Appellants,

CONSERVATION LAW FOUNDATION, INC.; DEFENDERS OF
WILDLIFE; WHALE AND DOLPHIN CONSERVATION SOCIETY,
Defendants.

Appeal from the United States District Court for the
District of Massachusetts,
No. 1:24-cv-10332 (Hon. William G. Young)

FEDERAL DEFENDANTS' REPLY BRIEF

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INTRODUCTION

The Massachusetts Lobstermen's Association, Inc. ("MALA") challenges a National Marine Fisheries Service ("NMFS") rule implementing an annual seasonal closure of an area of federal waters known as "the Wedge" to vertical buoy lines, which are used in lobster trap/pot fishing. 89 Fed. Reg. 8333 (Feb. 7, 2024) ("Final Wedge Rule"), JA.075. NMFS issued the Final Wedge Rule under the Marine Mammal Protection Act ("MMPA") because the aggregation of vertical buoy lines in the Wedge poses a significant entanglement risk to critically endangered North Atlantic right whales during the whales' migration into and out of Cape Cod Bay. The Final Wedge Rule made permanent a 2022 emergency rule, also issued under the MMPA, closing the Wedge from April 1 to April 30 of that year. 87 Fed. Reg. 11,590 (Mar. 2, 2022) ("2022 Emergency Rule"). In 2023, NMFS extended the 2022 Emergency Rule for the 2023 right whale migration season. 88 Fed. Reg. 7362 (Feb. 3, 2023) ("2023 Extension Rule").

MALA argues that the Final Wedge Rule is barred by a rider attached to the Consolidated Appropriation Act, 2023, that deemed a different NMFS rule "sufficient to ensure that the continued Federal and State authorizations of the American lobster and Jonah crab fisheries are in full

compliance" with the MMPA and the Endangered Species Act. Pub. L. No. 117-328, Div. JJ, § 101(a), 136 Stat. 4459, 6090 (Dec. 29, 2022) ("Rider"). But section 101(b) of the Rider authorizes NMFS "to extend or make final an emergency rule that is in place on the date of enactment of this Act," *i.e.*, December 29, 2022. MALA does not appear to dispute that the Final Wedge Rule "ma[de] final" the 2022 Emergency Rule. The only dispute, therefore, is whether the 2022 Emergency Rule was "in place" on December 29, 2022.

It was. The term "in place" means "established" or "ready to work," and the 2022 Emergency Rule was "ready to work" on December 29, 2022, because NMFS had MMPA authority to extend (and subsequently did extend) the 2022 Emergency Rule for the 2023 right whale migration season. That interpretation is not only consistent with the ordinary meaning of the term "in place," but it is also the only interpretation that gives any practical effect to section 101(b).

MALA's response to this analysis is to insist, in the face of dictionary definitions and common usage, that "in place" can only mean "in effect," and that the 2022 Emergency Rule was not "in place" on December 29, 2022, because the seasonal closure of the Wedge imposed by the Rule was not in effect on that date. But even if "in place" could be read as

synonymous with "in effect" under some circumstances, that reading is implausible in this case because it would render section 101(b) a nullity. As NMFS explained in its opening brief, there were no emergency restrictions "in effect" on the Rider's enactment date, and none were under consideration when Congress drafted the Rider. MALA offers no meaningful response and does not appear to dispute that its interpretation would render section 101(b) without any practical application.

Instead, MALA offers an assortment of diversionary arguments: It raises a meritless jurisdictional challenge that three courts of appeals have rejected. It slays strawman arguments NMFS never made. And it charges NMFS with inconsistent positions NMFS never took. When those distractions are put aside, the narrow question remains: what does it mean for an emergency rule to have been "in place" within the meaning of section 101(b)? Only NMFS's interpretation makes sense of the statutory structure and gives practical effect to section 101(b). MALA's interpretation, by contrast, does neither. NMFS's interpretation is therefore the best reading of the statute, and the judgment of the district court should be reversed.

ARGUMENT

I. NMFS's Notice of Appeal was authorized

MALA's argument that NMFS's notice of appeal was unauthorized is without merit. Indeed, MALA acknowledges that every court of appeals to address this argument has rejected it. *See infra* pp. 5–6. As MALA also acknowledges, MALA Br. 24, the Attorney General has instructed Department of Justice trial attorneys to file notices of appeal to preserve the government's right to appeal in all cases in which the Solicitor General has not made a final determination that no appeal will be taken. U.S. Department of Justice, *Justice Manual* 2-2.132, *available at* https://www.justice.gov/jm/jm-2-2000-procedure-respect-appeals-generally#2-2.132. The Attorney General has the authority to issue that instruction by virtue of his authority to "conduct any kind of legal proceeding" on behalf of the United States. 28 U.S.C. §§ 515, 547. The trial attorney in this case followed the Attorney General's direction and filed a timely notice of appeal. JA.012–13. That should be the end of the matter.

MALA nonetheless asserts that the notice of appeal was invalid because it was not authorized by 28 C.F.R. § 0.20. But § 0.20 is not the source of the Attorney General's authority to require trial attorneys to file notices of appeal. Nor does § 0.20 require the Solicitor General to authorize

the filing of a notice of appeal or otherwise limit the Attorney General's authority to direct the conduct of litigation. *See* 28 U.S.C. § 509 ("All functions of other officers of the Department of Justice … are vested in the Attorney General.").

The filing of a notice of appeal is not a decision "whether" an appeal "will be taken." 28 C.F.R. § 0.20(b). A notice of appeal is a ministerial act that invokes the jurisdiction of the court of appeals and preserves a party's right to seek appellate review. Filing a notice of appeal does not then obligate the appellant to prosecute an appeal. *See* Fed. R. App. P. 42(b) (providing for the voluntary dismissal of an appeal on the appellant's motion). A notice of appeal is no less timely filed if at the time of filing the appellant is uncertain whether it will pursue the appeal, and that is true whether the appellant is a private litigant or the federal government.

Nor, as MALA acknowledges, MALA Br. 22—*and as every court of appeals to have considered the question has recognized*—does § 0.20 say when the Solicitor General must make her decision as to whether the government will pursue an appeal. *Rudisill v. McDonough*, 55 F.4th 879, 886 (Fed. Cir. 2022) (en banc), *rev'd on other grounds* 601 U.S. 294 (2024); *United States v. Hill*, 19 F.3d 984, 991 n.6 (5th Cir. 1994); *Hogg v. United States*, 428 F.2d 274, 280 (6th Cir. 1970). MALA's argument that

those courts' decisions "specifically extend the deadline for the Solicitor General to approve the appeals in violation of ratification principles" is wrong. MALA Br. 25. Those cases all held that § 0.20 does not require the Solicitor General's approval *at all* for the filing of a notice of appeal and that the timing of the Solicitor General's determination therefore has no bearing on whether the notice of appeal was timely. *Rudisill*, 55 F.4th at 885; *Hill*, 19 F.3d at 991 n.6 (adopting the reasoning of *Hogg*); *Hogg*, 428 F.2d at 280.

MALA also emphasizes that the Supreme Court reversed the Federal Circuit's judgment in *Rudisill*. True, but if anything that undermines MALA's argument. The Supreme Court reversed the Federal Circuit's judgment on the merits. 601 U.S. at 314. The Court was obviously aware of the jurisdictional issue—the Federal Circuit had rejected that challenge in the very decision the Supreme Court was reviewing. Yet the Court did not even address it.

Finally, because the Attorney General authorized the filing of a notice of appeal, there was nothing for the Solicitor General to ratify, and MALA's digression into principles of agency law is irrelevant. Similarly, MALA's reliance on *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 93 (1994), is misplaced. As the Federal Circuit explained, that

case involved "an agency of the United States without independent litigating authority" that attempted to file a petition for certiorari without statutory authorization. *Rudisill*, 55 F.4th at 885. By contrast, the notice of appeal in this case was filed by the Department of Justice, which indisputably has the statutory authority to conduct litigation on behalf of the federal government. 28 U.S.C. § 515.

This Court has jurisdiction.

II. This Court's review is de novo

Whether section 101 of the Rider prohibited NMFS from issuing the Final Wedge Rule is a pure question of law reviewed de novo. *Pub. Int. Legal Found., Inc. v. Bellows*, 92 F.4th 36, 45 (1st Cir. 2024); *Hernandez-Miranda v. Empresas Diaz Masso, Inc.*, 651 F.3d 167, 170 (1st Cir. 2011) ("Questions of statutory interpretation are questions of law and are reviewed de novo."). It is irrelevant whether the district court's decision is characterized as summary judgment or judgment after a trial on the merits. *Cf.* MALA Br. 13.

MALA appears to argue that this Court's review is limited to whether the district court abused its discretion because the district court issued a declaratory judgment. MALA Br. 13. The cases MALA cites, however, apply the abuse of discretion standard only to the district court's decision

whether to issue a declaratory judgment as a remedy, not to the legal issues underpinning the declaratory judgment. *See, e.g.*, *Covidien LP v. Esch*, 993 F.3d 45, 52 (1st Cir. 2021) (reviewing the district court's decision to withhold a declaratory judgment sought by a prevailing party after a jury trial). And in any event, "[a] district court by definition abuses its discretion when it makes an error of law." *United States v. Lopez-Matias*, 522 F.3d 150, 154 (1st Cir. 2008) (quotation omitted).

III. The best reading of section 101(b) is that it excluded NMFS's action to "make final" the 2022 Emergency Rule from the Rider's restrictions

A. "In place" has a broader meaning than "in effect"

Throughout its brief, MALA maintains that "in place" can only mean "in effect." MALA Br. 17, 33, 48, 49, 51. But no matter how many times MALA says otherwise, the two terms are not perfect synonyms. "In place" means "working or ready to work; established," whereas "in effect" means "in operation; in force." *New Oxford American Dictionary* (3d ed. 2010) ("*Oxford American*"). Common usage bears out the distinction. For example, a rule that imposes seasonal restrictions might be described as "in place," *i.e.*, "ready to work," year-round, even though it is only "in effect," *i.e.*, "in force," for a portion of the year. *See, e.g.*, 50 C.F.R. § 648.60(b)(2) (closing an area to scallop fishing from August 15 to November 15 each year

the area is open to scallop fishing). Similarly, a plan, such as an emergency evacuation plan, can be "in place" even if it is never used, but it is "in effect" only when it is put "in operation." *See, e.g.*, *Black's Law Dictionary* (12th ed. 2024) ("*Black's*") (defining "black book" as "[a] company's compilation or dossier of antitakeover devices and other defensive procedures that it has put *in place in preparation* for a hostile takeover" (emphasis supplied)). The Administrative Procedure Act also bears out the distinction by typically requiring substantive rules to be in place thirty days before they go into effect. 5 U.S.C. § 553(d).

MALA derides NMFS for relying on non-legal dictionaries to support the proposition that "in place" and "in effect" are not synonyms, MALA Br. 32–33, but the use of generalist dictionaries is a well-established tool of statutory construction. *E.g.*, *Rimini St., Inc. v. Oracle USA, Inc.*, 586 U.S. 334, 343 (2019) (using generalist dictionaries to determine the "ordinary" meaning of a statutory term). Just last term, the Supreme Court consulted dictionaries when considering the meaning of such common words as "and," *Pulsifer v. United States*, 601 U.S. 124, 133 (2024), and "or," *Campos-Chavez v. Garland*, 144 S. Ct. 1637, 1647 (2024). It is therefore entirely appropriate for NMFS—and this Court—to consider those dictionaries when determining the meaning of section 101(b).

MALA next says that *Merriam-Webster's Collegiate Dictionary* ("*Merriam-Webster's*"), cited by NMFS, shows that "in place" only means "in effect," MALA Br. 40, but MALA selectively quotes from that source. According to *Merriam-Webster's*, "in place" means "established, instituted, *or* operational" (emphasis supplied). In other words, it can mean any of those things. *Campos-Chaves*, 144 S. Ct. at 1650 ("'Or' is almost always disjunctive."). Thus, while "in place" can mean "in effect" (which *Merriam-Webster's* defines as "the quality or state of being operative") its meaning is broader and includes things that are "established [or] instituted," even if they are not "operational."

MALA also argues that the other dictionaries NMFS relies on say that "in place" and "in effect" are synonymous. But the very definitions MALA quotes show otherwise. Quoting *Webster's Third International Dictionary*, MALA asserts that to be "on hand" or "present" is the same as "being operative." But a regulation can be "on hand" without "being operative," *e.g.*, when a regulation is suspended. MALA's quotations from *Oxford American* are even further afield. Something that is "established" and "ready to work" need not be "in operation" or "in force" at any given time, *e.g.*, a hostile takeover contingency plan.

Nor is *Black's* any help to MALA. *Black's* does not provide definitions for "in place" or "in effect," but even the related definitions MALA cites do not support its position. *Black's* defines "in force" as "in effect; operative; binding," and "operative" as "[b]eing in or having force or effect," but neither of those definitions says that "in force" or "in effect" is synonymous with "in place," *which is the term Congress used in section 101(b)*. As a proxy for "in place," MALA cites *Black's* definition of "established" as "having been brought about or into existence." But obviously something can be in existence without being "operative," *e.g.*, a seasonal rule, or "binding," *e.g.*, a guidance document. Contrary to MALA's protestations, what each of these dictionaries shows is that "in place" and "in effect" have distinct, if overlapping, meanings.

Unable to marshal affirmative support for its claim that "in place" always means "in effect," MALA faults NMFS for not providing a "plethora" of precedent for the proposition that "in place" has a broader meaning than "in effect." MALA Br. 33 (citing an out-of-circuit case about whether it was prejudicial for a court to call its own witnesses at a criminal trial). MALA then cites a grab bag of cases that it says use "in place" and "in effect" interchangeably. MALA Br. 33–34. But those cases provide MALA little support because they interpret unrelated statutes or, in some instances, no

statute at all. What matters is not how "in place" and "in effect" have been used in other contexts, but how Congress used them in section 101(b). There is no precedent on *that* question because the only court ever to decide the meaning of section 101(b) is the district court in this case. And in any event, none of the cases MALA cites considered the differing meanings of "in place" and "in effect," and none supports MALA's position that "in place" always means "in effect." Accordingly, those cases are not meaningful precedents on the meaning of section 101(b).

Similarly meritless is MALA's argument that the Court would create a split with the D.C. Circuit were the Court to accept NMFS's reading of section 101(b). MALA Br. 36. The D.C. Circuit's opinion in *Maine Lobstermen's Ass'n v. NMFS*, 70 F.4th 582 (D.C. Cir. 2023), never addressed the meaning of section 101(b) or considered whether the 2022 Emergency Rule was "in place" on December 29, 2022. Nor does the fact that the D.C. Circuit used the term "in place" in one section on its opinion and the term "in effect" later in a different section demonstrate that the court was using the two terms in the same sense, much less that the D.C. Circuit was opining that "in place" always means "in effect."

B. Traditional tools of statutory construction favor NMFS's interpretation of section 101(b)

What dictionaries and common usage show is that "in place" is a broad term with multiple meanings. Of course, "in place" *can* mean "in effect." There is nothing in the text of section 101(b), however, that indicates that was the limited sense in which Congress was using the term, and MALA makes no argument that there is, choosing instead to insist, implausibly, that "in place" can only mean "in effect."

Because the meaning of "in place" in section 101(b) cannot be determined by reference to the text alone, its meaning must be ascertained from context. *See Kucana v. Holder*, 558 U.S. 233, 245 (2010) (observing that a word with "many dictionary definitions … must draw its meaning from its context" (quotation omitted)); *Burgos v. Inter Am. Univ.*, 558 F.3d 1, 8 (1st Cir. 2009) (similar). To do so, courts look to the traditional tools of statutory construction to identify the best meaning. *Loper-Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024) ("The very point of

the traditional tools of statutory construction … is to resolve statutory ambiguities."). Those traditional tools support NMFS's view.[1]

1. Statutory structure supports NMFS's view

When Congress uses different words, courts "normally presume" that Congress does so "intentionally and purposely," such that the words carry different meanings. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006) (quotation omitted). The MMPA's emergency-rulemaking provision uses the term "in effect" to refer to the period in which an emergency rule's requirements or restrictions are in force. 16 U.S.C. § 1387(g)(3)(B). Congress's choice of a different term in the Rider, which temporarily restricts NMFS's emergency-rulemaking authority, suggests that it intended for "in place" to have a different meaning. Indeed, it would make little sense for Congress to have intended for "in place" in section 101(b) to have the same meaning that "in effect" has in § 1387(g), given that

[1] MALA repeatedly attempts to characterize NMFS's position as a plea for *Chevron* deference. MALA Br. 15, 43 ("NMFS's efforts to do so are nothing more than an attempt to revive *Chevron* deference *sub silento*."). But NMFS does not seek deference under *Chevron* or any other doctrine. Rather, NMFS asks this Court to reverse the district court's judgment because its interpretation of the statute is the best one, applying ordinary principles of statutory construction—as NMFS explains in this brief and in its opening brief.

no emergency rules affecting the lobster fishery were in force when Congress was considering the Rider.

MALA says that Congress's use of different words in § 1387(g) and section 101(b) is irrelevant because they are two different statutes. But because they both concern the scope of NMFS's emergency-rulemaking authority—section 101(b) effectively amends 16 U.S.C. § 1387—the Rider and the MMPA have to be read in tandem. Moreover, both the Supreme Court and this Court have held that terms normally should be given a consistent meaning when used in "the same or related statutes." *Azar v. Alina Health Servs.*, 587 U.S. 566, 574 (2019); *City of Providence v. Barr*, 954 F.3d 23, 33 (1st Cir. 2020). Congress's choice of different terms in § 1387(g) and section 101(b) therefore suggests that Congress intended for the terms to have different meanings.

2. NMFS's interpretation would give section 101(b) practical effect, but MALA's would not

The most glaring problem with MALA's construction of section 101(b) is that it would render that provision without any possible practical application. MALA does not dispute that if "in place" is read to mean "in effect," then there is no emergency rule to which section 101(b) could apply. Nor does MALA offer any plausible theory to explain why Congress would

have bothered enacting a statutory provision that it knew would have no application.

Were MALA's interpretation the only plausible way to read section 101(b)'s text, that deficiency might not matter. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well *if* the text is unambiguous." (emphasis supplied)). But the text of section 101(b) is *at least* ambiguous, and there is a perfectly reasonable reading of the language of section 101(b) that would give it practical effect. When choosing between plausible interpretations of a statute, the Supreme Court has instructed that courts "must normally seek to construe Congress's work so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant." *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698–99 (2022) (citation omitted). NMFS's construction of section 101(b) is therefore the best reading of the text.

In the district court, MALA hypothesized that Congress could have enacted section 101(b) to accommodate the possibility that NMFS might issue an emergency rule between the time that Congress passed section 101(b) and the time that the President signed the bill enacting it into law. ECF No. 13, at 15. But even putting aside that no emergency rules were

pending at that time, the MMPA's procedural requirements would make it practically impossible for NMFS to issue an emergency rule in the short time the Constitution ordinarily allows between the passage of a bill in Congress and its enactment. *See* 16 U.S.C. § 1387(g)(2); NMFS Br. 39. Such a far-fetched scenario does not show that a possible interpretation makes practical sense. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (rejecting an interpretation of a statute that would restrict the statute's applicability to unusual circumstances not likely to arise in real life). Tellingly, MALA does not renew that implausible hypothetical in this Court.

Instead, MALA asserts that its reading does not make section 101(b) superfluous because "NMFS had a very simple step it needed to take for [section 101(b)] to apply: have an emergency rule in place." MALA Br. 44. This makes no sense. First, NMFS could not have known how Congress would legislate or when. Indeed, the text of section 101(b) was first introduced in Congress on December 20, 2022, *two days* before the statute's passage. *See* S. Amdt. 6552, 117th Cong. (Dec. 20, 2022). But more importantly, the relevant question is not what the agency could have done but the background against which Congress legislated when the statute was enacted. And that background—as MALA does not dispute—is that there were no emergency restrictions "in effect," none in process, and no practical

way of issuing any new emergency restrictions before the Act became law. There is thus no question that MALA's interpretation leaves section 101(b) with no practical effect. MALA has no meaningful response.

Rather than explain how its interpretation could give section 101(b) practical effect, MALA makes a bewildering argument: that by explaining why it would be impossible to issue an emergency rule in the time between section 101(b)'s passage and its enactment, NMFS somehow asked the Court to defer to NMFS's "internal agency processes." MALA Br. 42. NMFS's argument was based on the MMPA's procedural requirements for issuing emergency rules (including consultation requirements), not any internal agency processes. NMFS Br. 39. Nor was NMFS surreptitiously begging for *Chevron* deference. It was simply making the practical point that there was no realistic way NMFS could have issued new emergency restrictions during the necessarily brief period between the Act's passage and its enactment.

MALA's distractions aside, the basic point remains unrebutted: unless Congress intentionally enacted a nullity, it must have had in mind some emergency rule that was in existence prior to section 101(b)'s enactment. That is particularly so in this case because Congress was legislating to address a specific situation with known facts, rather than

laying down general rules to govern future circumstances. The 2022 Emergency Rule was the only such rule affecting the lobster fishery. Section 101(b) is readily construed to apply to the 2022 Emergency Rule, and the Court should reject MALA's contrary interpretation.

3. Context further supports NMFS's view

Because the language and structure of section 101(b) makes clear that NMFS's interpretation is the best one, further inquiry—including analysis of legislative history—is unnecessary. But to the extent this Court opts to consider it, the legislative history of the Rider sheds useful light on its context—and makes clear that the 2022 Emergency Rule was not the type of measure that motivated the Rider.[2]

As MALA notes, Senator Angus King of Maine stated that the purpose of the Rider was to "pause the economic death sentence" for the lobster fishery. 168 Cong. Rec. S9591, S9608 (Dec. 20, 2022). But when he used the term "economic death sentence," Senator King was not referring to any regulation affecting the lobster fishery, but specifically to the judgment in *Center for Biological Diversity v. Raimondo*, No. 18-cv-112, 2022 WL

[2] MALA contends that the Court "cannot" consider the legislative history. MALA Br. 49. But the only reason MALA offers for its position that "in place" should be read to mean "in effect" is its reading of the legislative history. As explained in this section, MALA's view of the legislative history is incorrect.

17039193 (D.D.C. Nov. 17, 2022). As Senator King explained, the purpose of the Rider was to put on hold the *Center for Biological Diversity* judgment, which unlike the Final Wedge Rule would have required NMFS to impose restrictions on thousands of lobster boats, for much of each year, and across vast swaths of ocean.[3] *Id.*

But NMFS issued the 2022 Emergency Rule and began the process of making the seasonal closure permanent months before the *Center for Biological Diversity* judgment. *See* JA.117. Closing the Wedge was thus not part of the "economic death sentence" the Rider was intended to pause, and Senator King's statement does not "go[] directly against NMFS' position." MALA Br. 49. Indeed, Senator King did not mention Massachusetts at all in his statement, even though the Wedge closure almost exclusively affects Massachusetts lobster boats, suggesting that closure of the Wedge was not one of the concerns that motivated Congress to act.

Moreover, Senator King was clear that the Rider was a compromise that preserved the regulatory status quo while technological solutions are developed to reduce the risk to right whales from the use of vertical buoy lines. 168 Cong. Rec. at S9607. The seasonal closure of the Wedge was part

[3] By contrast, the Final Wedge Rule is expected to affect at most 31 vessels for only three months of the year, JA.082, most of which were "wet-storing" their gear in the Wedge rather than actively fishing, JA.087.

of that status quo following the 2022 Emergency Rule, and NMFS had indicated that it expected to extend the Rule or make it permanent. JA.117. Nor can MALA be right when it says that the compromise was limited to deeming the 2021 Take Reduction Plan Rule sufficient, MALA Br. at 52, because section 101(b) unambiguously authorizes NMFS to take additional regulatory actions to "extend or make final an emergency rule that [was] in place on the date of enactment."

The legislative history shows that Congress was concerned with preventing the *Center for Biological Diversity* judgment from going into effect, not with preventing NMFS from implementing a seasonal closure of the Wedge. It also shows that Congress intended to maintain the current regulatory status quo as part of a compromise that would protect the lobster fishery from harsh economic consequences while maintaining then-existing protections for the right whale. That legislative history supports NMFS's interpretation of section 101(b).

IV. The 2022 Emergency Rule was "in place" on December 29, 2022

The 2022 Emergency Rule was in place on December 29, 2022, because it continued to have legal force on that date. Specifically, the rule remained capable of being extended under 16 U.S.C. § 1387(g)(4) for an additional period of up to 90 days. The authority to extend an emergency

rule is not insignificant. The MMPA requires NMFS to engage in multiple consultations before it may issue emergency rules, 16 U.S.C. § 1387(g)(2), but does not require NMFS to engage in any consultation prior to extending an emergency rule, *id.* § 1387(g)(4). The 2022 Emergency Rule thus continued to have legal force as long as it was capable of being extended, and thus it remained in place on December 29, 2022.

NMFS could extend the 2022 Emergency Rule on December 29, 2022, because the MMPA does not require that extensions of an emergency rule be continuous with the rule's initial effective period. NMFS Br. 41–42; *see also HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 390 (2021) ("It is entirely natural—and consistent with ordinary usage—to seek an 'extension' of time even after some lapse."). MALA argues otherwise, but none of those arguments succeed.

First, MALA asserts that the 2022 Emergency Rule could not be extended because MMPA emergency regulations may only remain in effect until the end of the commercial fishing season, 16 U.S.C. § 1387(g)(3)(B). But as NMFS explained, NMFS Br. 42–43, that limitation does not prevent an emergency rule from being extended in a subsequent season. MALA provides no argument to the contrary, but merely relies on the district court's analysis, which NMFS has shown to be mistaken.

Second, MALA says that extensions issued under § 1387(g)(4) must be continuous because section 101(b) refers to an "existing emergency rule." MALA Br. 48. The question, however, is whether the 2022 Emergency Rule was capable of being extended (and thus was "in place") on the date Congress enacted section 101(b), and that question must be answered by reference to the law as it existed at the time of section 101(b)'s enactment, not after. Moreover, section 101(b) creates an exception for an "existing emergency rule" *or* actions "to extend or make final an emergency rule that [was] in place." "Or" is typically disjunctive, *Campos-Chaves v. Garland*, 144 S. Ct. at 1650, so the reference to an "existing emergency rule" is not a limitation on NMFS's authority under section 101(b) to extend or make final rules that were "in place."

Third, rather than respond to the arguments NMFS made, MALA attempts to discredit NMFS's interpretation of its authority under § 1387(g) by asserting that NMFS has "concluded that, so long as an emergency exists, it can continue to issue emergency rules without falling afoul of [the Rider]." MALA Br. 11. But NMFS has never concluded any such thing. Throughout this litigation (and related litigation on the 2023 Extension Rule, below pp. 26–28), NMFS has consistently taken the position that it only had authority to extend the 2022 Emergency Rule once. NMFS has

never claimed that it has authority under section 101(b) to issue multiple extensions. Indeed, NMFS expressly disclaimed such authority in the preamble to the Final Wedge Rule. JA.089 n.7.

Nor, contrary to MALA's argument, has NMFS ever claimed that a regulation remains "in place" forever unless repealed. MALA Br. 32. The 2022 Emergency Rule remained in place on December 29, 2022, because it continued to have legal force, not because it had not been repealed. Bizarrely, MALA argues that NMFS's view would allow the President to resurrect the Sedition Act of 1798, even though that statute provided that it would no longer be "in force" after March 3, 1801. 1 Stat. 596, 597 (July 14, 1798). But obviously a sunset clause is relevant to whether a statute continues to have legal force, and NMFS has never made any argument to the contrary.

Finally, MALA is also wrong when it says that NMFS's position that extensions of emergency rules need not be continuous is inconsistent with NMFS's position in *Starbound, LLC v. Gutierrez*, No. 07-cv-0910, 2008 WL 1752219 (W.D. Wash. April 15, 2008). In *Starbound*, NMFS argued that a challenge to an emergency regulation was moot because the emergency regulation at issue had already been extended to the maximum duration allowed by the Magnuson-Stevens Act and could not be extended further.

Defs.' Cross-Mot. for Summ. J. at 15, *Starbound, LLC v. Gutierrez* (No. 07-cv-0910) (W.D. Wash. Feb 19, 2008), *available at* 2008 WL 7318070. Because the fishing season to which the emergency rule applied had ended, and the next fishing season was not set to begin until after the emergency rule expired, the rule was no longer capable of having any practical effect and the plaintiffs' challenge was moot. *Id.* In *Starbound*, NMFS never "affirmatively represented to the court that its emergency rule expired when the fishing season did," MALA Br. 45, or that an emergency rule could never be extended into a subsequent fishing season.

Unlike in *Starbound*, the 2022 Emergency Rule had not previously been extended, and NMFS retained the authority to extend the 2022 Emergency Rule for the 2023 migration season. There is thus no inconsistency in NMFS's position in the two cases.

In any event, the government (like any private party) is not bound by a previous litigation position unless the doctrine of judicial estoppel applies.[4] *See United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995)

[4] MALA makes a perfunctory reference to the doctrine of judicial estoppel but never explains why it should apply to NMFS's arguments in this case. MALA has therefore forfeited that argument. *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). Nor could MALA make such a showing because NMFS's position in this case is not inconsistent with its position in *Starbound*.

("[T]he rule of judicial estoppel, even when invoked, should be construed narrowly against the government."). While agencies must acknowledge and explain a change in policy, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016), the Supreme Court has never extended that principle to positions an agency takes in litigation. And given the volume of litigation to which the United States is a party, such a rule would be unworkable. *Cf. Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984) (finding "substantial" arguments for "a flat rule that estoppel may not in any circumstances run against the Government").

V. NMFS's position in this case is not inconsistent with its argument that MALA's challenge to the 2023 Extension Rule became moot

There is no inconsistency between NMFS's position in this case and its argument that MALA's challenge to the 2023 Extension Rule became moot after the Extension Rule's effective period ended on April 30, 2023. In the 2023 litigation, NMFS took the position that it would extend the 2022 Emergency Rule only once. *Mass. Lobstermen's Ass'n, Inc. v. NMFS* (No. 23-293 (D.D.C.), ECF No. 31 at 16 (Apr. 3, 2023). As such, MALA's challenge to the 2023 Extension Rule became moot when its effective period ended.

Moreover, even if NMFS did possess the authority to extend the 2022 Emergency Rule more than once, that would not matter because NMFS has been consistent in its position. MALA's suggestion that NMFS acted in bad faith when it represented to the district court in the 2023 litigation that it would not further extend the 2022 Emergency Rule is baseless. NMFS has never suggested that it could extend the 2022 Emergency Rule multiple times, and NMFS acknowledged in the 2023 litigation that MALA could challenge any subsequent rule "mak[ing] final" the 2022 Emergency Rule, *id.* at 17—and, indeed, MALA is doing so here.

NMFS's argument that the Final Wedge Rule is authorized by section 101(b) is also consistent with its view that it lacked the power to extend the 2022 Emergency Rule further. *Contra* MALA Br. 52–54. Unlike the 2023 Extension Rule, the Final Wedge Rule is not an extension of the 2022 Emergency Rule, nor is it an extension of the 2023 Extension Rule.[5] Instead, it is a new permanent rule that "makes final" the 2022 Emergency Rule. NMFS's authority to issue the Final Wedge Rule is 16 U.S.C.

[5] MALA's argument that the 2023 Extension Rule was improper because it did not use the word "extension" in the title is insubstantial. MALA Br. 46. The first sentence of the Federal Register notice says, "NMFS is extending a temporary emergency rule." JA.043. It is also irrelevant because the 2023 Extension Rule is not under review and the validity of the Final Wedge Rule in no way depends on the validity of the 2023 Extension Rule.

§ 1387(g)(1)(A)(ii), which requires NMFS, when necessary, to amend a take reduction plan to address ongoing significant adverse impacts from commercial fisheries. *See also id.* § 1387(f)(7) (authorizing NMFS to issue regulations implementing take reduction plans). The 2023 Extension Rule, by contrast, was authorized by § 1387(g)(4), which provides that NMFS may extend an emergency rule for "an additional period of not more than 90 days or until reasons for the emergency no longer exist, whichever is earlier." Because the 2023 Extension Rule and the Final Wedge Rule were authorized by different provisions of the MMPA, NMFS's view that it lacked authority under section 101(b) to issue additional extensions of the 2022 Emergency Rule has no bearing on NMFS's authority to issue the Final Wedge Rule.

Nor is NMFS's view that MALA's challenge to the 2023 Extension Rule became moot when the Extension Rule's effective period ended inconsistent with NMFS's position that the 2022 Emergency Rule was "in place" on December 29, 2022. The 2022 Emergency Rule remained in place on December 29, 2022, because it was still capable of being extended on that date. By contrast, the 2023 Extension Rule ceased to have legal force when its effective period ended because NMFS lacked the power to extend the rule further.

Finally, MALA misconstrues NMFS's statement in the preamble to the 2023 Extension Rule that it retained the power to extend the 2022 Emergency Rule once during "the continued existence of the emergency." JA.051. By making that statement, NMFS was merely affirming that it has the authority to issue an extension of an emergency rule while the conditions giving rise to the emergency continue to exist. NMFS has also acknowledged that its extension authority is not unlimited, and that "if the extension is unreasonably attenuated from the original emergency rule, an extension is improper." JA.089 n.7. Nor has NMFS ever claimed that it has the authority to issue seriatim extensions of an emergency rule so long as the emergency persists.

In its actions concerning the Wedge, NMFS has followed the process prescribed by the MMPA: It identified conditions having an "immediate and significant adverse impact" on the right whale, 16 U.S.C. § 1387(g)(1), and it issued an emergency regulation to address those conditions, *id.* § 1387(g)(1)(A). When NMFS found that the emergency conditions were ongoing, it extended the emergency rule. *Id.* § 1387(g)(4). Finally, because those conditions continued to persist, it permanently amended the take reduction plan to make final the emergency rule's restrictions. *Id.* § 1387(g)(1)(B). That was no power grab; it was what Congress told NMFS

to do, and NMFS's position on its authority under the MMPA has been consistent throughout this and all related litigation.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(d)(1) because it contains 6,466 words, excluding the parts exempted under Federal Rule of Appellate Procedure 32(f).

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