No. 24-1481

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, INC.,

Plaintiff-Appellee,

v.

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

Defendants-Appellants,

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

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
No. 1:24-cv-10332 (HON. JUDGE WILLIAM G. YOUNG)

REPLY BRIEF OF INTERVENOR DEFENDANTS-APPELLANTS CONSERVATION LAW FOUNDATION, DEFENDERS OF WILDLIFE, AND WHALE AND DOLPHIN CONSERVATION

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2021 Rule	86 Fed. Reg. 51,970 (Sept. 17, 2021)
2022 Emergency Rule	87 Fed. Reg. 11,590 (Mar. 2, 2022)
2023 Emergency Rule	88 Fed. Reg. 7362 (Feb. 3, 2023)
2024 Rule	89 Fed. Reg. 8333 (Feb. 7, 2024)
APA	Administrative Procedure Act
CAA	Consolidated Appropriations Act, 2023
Conservation Groups	Conservation Law Foundation, Defenders of Wildlife, and Whale and Dolphin Conservation
DMF	Massachusetts Division of Marine Fisheries
ESA	Endangered Species Act
MALA	Massachusetts Lobstermen's Association
MMPA	Marine Mammal Protection Act
MRA Wedge	Massachusetts Restricted Area Wedge
NMFS	National Marine Fisheries Service
PBR	Potential Biological Removal

INTRODUCTION

In issuing a final rule under the Marine Mammal Protection Act ("MMPA") in 2021 to amend the Atlantic Large Whale Take Reduction Plan ("2021 Rule"), the National Marine Fisheries Service ("NMFS") inadvertently created a 200 square mile gap in American lobster and Jonah crab seasonal fishing restrictions in federal waters between a new three-month closure in Massachusetts state waters to the east and a longstanding three-month closure in federal waters to the west. This so-called wedge in the Massachusetts Restricted Area ("MRA Wedge") resulted in a hotspot of heavy, dense lobster gear posing significant entanglement risk to critically endangered North Atlantic right whales precisely when they are present.

Following emergency MMPA rules closing the MRA Wedge for April 2022 ("2022 Emergency Rule") and February through April 2023 ("2023 Emergency Rule"), NMFS determined through notice-and-comment rulemaking that protecting right whales from mortality and serious injury associated with static (i.e., persistent) buoy lines requires closing the MRA Wedge annually to fishing with such lines during this three-month period ("2024 Rule").[1]

While the 2024 Rule indisputably affects a limited number of Massachusetts

[1] JA075–091 (2024 Rule, 89 Fed. Reg. 8333 (Feb. 7, 2024)). The 2024 Rule allows lobster fishing using on-demand (ropeless) systems during these three months. Traditional lobster fishing using static buoy lines is allowed in the MRA Wedge for the other nine months of the year.

lobster boats during the three-month closure, it is a far cry from the "economic death sentence" for the entire lobster industry that Massachusetts Lobstermen's Association ("MALA") claims. *See, e.g.*, Appellee MALA's Corrected Principal Brief ("MALA Br.") at 7. The 2024 Rule affects 26 to 31 vessels at an estimated annual cost, including lost revenue, of $339,000 to $608,000 for the three-month period. *See* JA090. For context, NMFS's Final Regulatory Flexibility Analysis estimated that approximately 1,273 entities had at least one Lobster Management Area 1 federal lobster permit in 2021, most of which fish far from the MRA Wedge. NMFS reasonably concluded that "this final rule would directly affect relatively few entities that actually fished with vertical lines in the MRA Wedge within the past five seasons (2017–2021)." *Id.*

When Congress enacted the Consolidated Appropriations Act, 2023 ("CAA"),[2] it expressly deemed the 2021 Rule sufficient to ensure that federal and state authorizations of the lobster fishery comply with the MMPA and Endangered Species Act ("ESA") through the end of 2028, a judicial decision that NMFS violated these laws in issuing the 2021 Rule and the related 2021 Biological Opinion notwithstanding. In enacting § 101(a), Congress did not foreclose

[2] The relevant section is § 101 of Division JJ, Title I, "North Atlantic Right Whales and Regulations." Pub. L. No. 117-328, Div. JJ, § 101,136 Stat. 4459, 6089–90 (2022) (ADD040–041). The addendum ("ADD") is appended to Intervenor Defendants-Appellants' Opening Brief ("Conservation Br."). *See* 1st Cir. R. 28.0.

NMFS's authority to issue other MMPA regulations to protect the right whale from lethal lobster fishery entanglements, including the 2024 Rule, before 2028. In enacting § 101(b), which explicitly states that § 101(a) does not apply to "any action taken to extend or make final an emergency rule" affecting lobster and Jonah crab, Congress clearly had *some* emergency rule in mind. ADD041. The only logical reading is that Congress meant the 2022 Emergency Rule, the one emergency rule NMFS has implemented for this fishery since 1997.

The lower court's interpretation read nonexistent words of prohibition into the CAA, contrary to its plain text and inconsistent with its structure and context. MALA's arguments—and the lower court's ruling—that the 2024 Rule violates the CAA are not supported by principles of statutory construction. The lower court's ruling rendering § 101(b) a nullity should be reversed.

ARGUMENT

I. The Standard of Review Is De Novo

As a threshold matter, the district court ruled that the 2024 Rule violates the CAA and therefore the Administrative Procedure Act ("APA") based on a question of law. ECF No. 67 at 8 (ADD009); *see also* ECF No. 67 at 9–10 (ADD010–011) ("As the trial was cabined to a single legal issue, where the only dispute between the parties was one of statutory interpretation, there was no need for discovery or evidence of facts beyond the administrative record.").

The issue before this Court is one of pure statutory interpretation. The appellate standard of review is de novo. *See McCarthy v. Azure*, 22 F.3d 351, 354 (1st Cir. 1994) ("Because the appeal presents a question of law, appellate review is plenary.").[3] Further, appellate courts always review claims brought under the APA de novo. *Atieh v. Riordan*, 797 F.3d 135, 138 (1st Cir. 2015) ("[O]ur review of the district court's decision in an APA case is de novo."). The APA establishes the standard of judicial review of final agency action. 5 U.S.C. § 706(2). The First Circuit is clear that, for APA cases, "both the district court and this court are *bound* by the same standard of review." *Atieh*, 797 F.3d at 138 (emphasis added).

MALA erroneously asserts that a different standard of appellate review applies depending on whether the lower court issued a summary judgment or a declaratory judgment. MALA Br. at 13–14. An appellate court is bound by the APA's standard of review regardless of the form the lower court's decision takes. *South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 97–98 (1st Cir. 2002) ("That the parties brought the issues forward on cross-motions for summary judgment is

[3] The district court decided the statutory interpretation question without a *Chevron* analysis. ECF No. 67 at 9 n.3 (ADD010) ("Deference to the agency's interpretation plays no part when dealing with a clear congressional command."). The Supreme Court's subsequent overturning of the *Chevron* doctrine in *Loper Bright Enters. v. Raimondo*, 114 S. Ct. 2244, 2273 (2024), is irrelevant. Contrary to MALA's straw man, MALA Br. 42–43, neither NMFS nor litigating counsel invoked this doctrine to promulgate or defend the 2024 Rule. Even prior to *Loper Bright*, the *Chevron* doctrine was irrelevant here because Congress left no gap in the CAA for NMFS to fill. NMFS promulgated the 2024 Rule under the MMPA, not the CAA.

not significant; substance must prevail over form[.]").

MALA cites inapposite cases applying a different standard of appellate review to non-APA claims under the Declaratory Judgment Act. MALA Br. at 13–14 (citing *Covidien LP v. Esch*, 993 F.3d 45, 52–53 (1st Cir. 2021) and cases cited therein). This standard does not apply to an APA case. Where plaintiffs bring claims under both the APA and Declaratory Judgment Act, the First Circuit applies the APA's standard of review. *See Boston Redevelopment Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016) (rejecting argument that "the traditional APA standard of review does not apply to claims brought under . . . the Declaratory Judgment Act."); *Trafalgar Cap. Assoc., Inc. v. Cuomo*, 159 F.3d 21, 26 (1st Cir. 1998) (applying APA standard to appellate review of claims challenging agency action brought under both APA and Declaratory Judgment Act).

II. The District Court's Reading of § 101 Is Inconsistent with Its Language, Structure, and Context

When Congress enacted the CAA, it created a narrow solution to a particular perceived problem—a federal district court decision finding NMFS violated the MMPA and ESA and ordering NMFS to issue a new MMPA regulation to rectify the 2021 Rule by December 9, 2024. *See* Conservation Br. at 16–18, 25–26, 34–36.

It is illegal to take marine mammals under the MMPA, 16 U.S.C. § 1371(a), or endangered species under the ESA, 16 U.S.C. § 1538(a)(1)(B), without express

authorization. NMFS may only authorize incidental take in commercial fishing operations of endangered marine mammals like the right whale under certain conditions. 16 U.S.C. § 1371(a)(5)(E)(i). And it must authorize incidental take of endangered marine mammals under the MMPA before it may issue an incidental take statement in a biological opinion under the ESA. *Id*. § 1536(b)(4)(C). *See Ctr. for Biological Diversity v. Ross*, 613 F. Supp. 3d 336, 347 (D.D.C. 2020).

Without lawful incidental take authorizations, both private parties and federal and state agencies may face ESA liability for incidental take of endangered marine mammals that they directly cause or that they cause others to commit, including by issuing permits that result in unauthorized incidental take. 16 U.S.C. §§ 1538(a)(1)(B), (g). The ESA's take prohibitions "apply to acts by third parties that allow or authorize acts that exact a taking and that, but for the permitting process, could not take place." *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (holding Massachusetts state officers liable for right whale take by licensing commercial gillnet and lobster fishing). The ESA "bans those acts of a third party that bring about the acts exacting a taking. . . . [A] governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated . . . the ESA." *Id.*

When NMFS promulgated the 2021 Rule to reduce the lobster fishery's unlawfully high entanglements of right whales, three plaintiffs, including two of

the Conservation Groups here, challenged it in the U.S. District Court for the District of Columbia for violating the MMPA's requirement to include measures expected to bring right whale mortality and serious injury to below specified levels within six months of implementation. They also challenged NMFS's 2021 Biological Opinion for violating the ESA's incidental take statement requirements, including the requirement that take first be authorized under the MMPA. The plaintiffs prevailed on these claims. *Ctr. for Biological Diversity v. Raimondo*, 610 F. Supp. 3d 252, 273–76 (D.D.C. 2022), *vacated as moot on other grounds*, No. 18-112 (JEB), 2024 WL 324103 (D.D.C. Jan. 29, 2024).

Following remedy briefing, in November 2022, the court remanded the unlawful 2021 Rule without vacatur and ordered NMFS to issue a new rule by December 9, 2024, a date both NMFS and the plaintiffs agreed was appropriate. *Ctr. for Biological Diversity v. Raimondo*, No. 18-112 (JEB), 2022 WL 17039193, at *1 (D.D.C. Nov. 17, 2022), *vacated as moot on other grounds*, No. 18-112 (JEB), 2024 WL 324103 (D.D.C. Jan. 29, 2024). The court remanded the unlawful 2021 Biological Opinion to NMFS but held the question of vacatur in abeyance pending further briefing following issuance of the December 9, 2024, rule. *Id*. at *3. The court gave great weight to NMFS's assertions that vacating the 2021 Biological Opinion, even if deferred somewhat, would cause "massive shutdowns" of the lobster industry because of the agency's alleged difficulty in complying with

the MMPA and ESA incidental take authorization requirements by 2024. *Id*. at *2.

Displeased with this remedy order, the Maine congressional delegation, at the behest of the Maine lobster industry, turned to a legislative solution. The Maine delegation explicitly introduced § 101 to pause the so-called "economic death sentence" to the Maine lobster industry that the district court's remedy order purportedly represented. Floor Statement of Senator Angus King, 168 Cong. Rec. S9591–02, S9607–08 (daily ed. Dec. 20, 2022) (ADD044–045).

And § 101(a) did just that, by legislatively deeming the 2021 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 ESA from enactment through December 31, 2028. Subsection 101(a)(2) requires NMFS to promulgate new lobster fishery regulations consistent with the MMPA and ESA that take effect by December 31, 2028. Subsection 101(a) ensures that federal and state agencies cannot be held liable for MMPA and ESA violations in the interim, because their lobster fishery authorizations (i.e., lobster fishing permits or licenses) are "deemed sufficient" under the 2021 Rule until the 2028 regulation takes effect.

Thus, § 101(a) solved the Maine lobster industry's perceived problem by delaying the deadline for NMFS to cure the ESA and MMPA legal violations it committed in issuing the 2021 Biological Opinion and 2021 Rule. It did not,

however, solve the problem that the Massachusetts Division of Marine Fisheries ("DMF") had repeatedly identified, beginning in January 2022, stemming from the MRA Wedge waters the 2021 Rule inadvertently left open, including the impact that even one right whale entanglement there would have on Massachusetts fishermen. Conservation Br. at 12–16; *see also* DMF Corrected Amicus Curiae Br. at 6–10 (keeping the MRA Wedge open from February through April increases right whale entanglement and mortality risk and impedes the Commonwealth's extensive right whale conservation and enforcement efforts).

While § 101(a) protected the federal and state fishery agencies from MMPA and ESA liability by deeming their lobster fishing authorizations valid through December 31, 2028, it neither abrogated NMFS's MMPA regulatory authority nor insulated the lobster fishery from any new MMPA regulation through 2028, including the 2024 Rule. No matter how much MALA dislikes the MRA Wedge seasonal closure, its argument—and the district court's opinion—find no support in the text, structure, or context of § 101 or its legislative history.

A. The Plain Language of § 101(a) Does Not Bar the 2024 Rule

Misstating the plain language of § 101(a), MALA wrongly asserts that "the CAA precludes NMFS from issuing any new regulations against the lobster fishery . . . because the CAA specifically provided that the *lobster industry* is 'in full compliance' with the MMPA and ESA[.]" MALA Br. at 29 (emphasis added).

While MALA uses many of the same words as § 101(a), it substitutes key language to support its preferred—but erroneous—interpretation that NMFS is prohibited from issuing new lobster regulations through 2028. *See id*. MALA's description of § 101(a) fundamentally conflicts with the statute's plain language.

MALA fails to identify in § 101(a) a single word of prohibition foreclosing NMFS's ability to issue new MMPA regulations for the lobster fishery before 2028. *See* Conservation Br. at 25–28. Although MALA challenges Conservation Groups' assertion that § 101(a) protects NMFS and state fisheries agencies[4] from the type of challenge brought in *Ctr. for Biological Diversity v. Raimondo* for MMPA and ESA violations, MALA Br. at 28–29, its arguments to the contrary rest on a misstatement of the statute's plain language, a reference to an inapposite MMPA provision, and a misapplication of a D.C. Circuit decision. *Id*. at 28–31.

MALA fatally misstates § 101(a)'s plain language. Contrary to MALA's repeated assertions, MALA Br. at 29–31, § 101(a) does not declare that the *lobster industry* is deemed in full compliance with the MMPA and ESA, such that it cannot be further regulated before 2028. Rather, it incontrovertibly deems the 2021 Rule sufficient to ensure that continued *federal and state authorizations* (i.e., the issuance of lobster fishing permits or licenses) are in full compliance with the ESA and MMPA. Subsection 101(a) protects NMFS and state fisheries agencies from

[4] *See Strahan v. Coxe*, 127 F.3d at 163.

lawsuits asserting they have violated the ESA and/or MMPA in issuing these permits. It does not mention the lobster industry, let alone deem it in compliance with the MMPA and ESA through 2028.[5]

MALA then attempts to leverage its substitution of "lobster industry" for "federal and state authorizations" in § 101(a)'s text to argue that MMPA § 118(b)(2), 16 U.S.C. § 1387(b)(2), bars NMFS from promulgating the 2024 Rule (or any other MMPA lobster fishery regulation) before 2029, even though § 101(a) neither explicitly mentions nor implicitly references MMPA § 118(b)(2). MALA Br. at 29–30. This argument fails.

The MMPA mandates that commercial fisheries "shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994." 16 U.S.C. § 1387(b)(1). Fisheries that "maintain insignificant serious injury and mortality levels approaching a zero rate shall not be required to further reduce their

[5] MALA inaccurately asserts that a federal district court "soundly rejected" Conservation Groups' reading of § 101(a) in the context of deciding MALA's motion for preliminary injunction against the 2023 Emergency Rule. MALA Br. at 29 n.3 (citing hearing transcript). The court denied the motion without prejudice based on MALA's failure to demonstrate irreparable harm but did not rule on the statutory interpretation arguments the parties advanced. *Mass. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, No. 23-293 (JEB) (D.D.C.), Minute Entry of Feb. 16, 2023; *see also* 2023 WL 3231450, at *2 (D.D.C. May 3, 2023) (summarizing procedural history and granting NMFS's motion to dismiss as moot).

mortality and serious injury rates."[6] *Id*. § 1387(b)(2).

Again, MALA's fundamental error is that the plain text of § 101(a) does not deem the *lobster industry* (or, more narrowly, the lobster fishery) in compliance with the MMPA—only federal and state fisheries agencies. These are not interchangeable. Commercial fisheries, not the agencies that issue fishing permits, are subject to the MMPA's mandatory zero mortality rate goal requirement. 16 U.S.C. § 1387(b)(1). MALA cannot credibly read into the statute any congressional intent to deem the lobster fishery to have attained the zero mortality rate goal through the end of 2028, thus barring NMFS under MMPA § 118(b)(2) from requiring additional mortality and serious injury reductions.

Simply put, because § 101(a) uses none of the words MALA imputes to it, MALA's interpretation is wrong. *See Murphy v. Smith*, 138 S. Ct. 784, 788 (2018) ("[R]espect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own."); *United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way.").

Taking Senator King's use of the phrase "economic death sentence" out of

[6] The "insignificance threshold" for zero mortality rate goal purposes is generally 10 percent of the potential biological removal ("PBR") level. 50 C.F.R. § 229.2. Right whale mortalities and serious injuries have not been brought below PBR for the past twenty years. JA076.

context, MALA argues that it demonstrates congressional intent to prevent NMFS from promulgating the 2024 Rule or any additional lobster fishery regulation before 2028. MALA Br. at 30. But Senator King's putative "economic death sentence" consisted of the impacts to the Maine lobster industry and coastal Maine communities of the court-ordered revision of the 2021 Rule by December 9, 2024. *See* Conservation Br. at 34 (citing ADD044–045). The MRA Wedge closure constituted no part of this "economic death sentence."[7] Nor is there evidence that the Maine congressional delegation sought to protect the relatively few Massachusetts lobstermen who fish in the MRA Wedge, *see* JA090, via § 101(a).

MALA also misconstrues the D.C. Circuit's jurisdictional finding in *Maine Lobstermen's Association v. National Marine Fisheries Service*, 70 F.4th 582 (D.C. Cir. 2023), to argue throughout its brief that the CAA establishes a ceiling rather than a floor for MMPA lobster regulations. MALA Br. at 1–2, 28–29, 31–32. There, various lobster industry plaintiffs, including MALA, challenged the 2021 Biological Opinion and 2021 Rule. The district court rejected their claims.

[7] MALA falsely asserts that the alleged "economic death sentence" encompasses both the *Center for Biological Diversity* remedy order and the 2021 Rule itself. MALA Br. at 49. Senator King plainly meant only the remedy order. Not only did he explicitly call out the "Federal court here in Washington" for issuing a ruling "that effectively shuts down the entire Maine lobster fishery in 2 years," ADD044, he also referred to the CAA provision as a "compromise" that "leaves in place all of the protective measures that I mentioned—the weak links, the weaker ropes, the ropes out of the water, the marking of the gear." *Id*. NMFS implemented these measures via the 2021 Rule. JA075.

Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., 626 F. Supp. 3d 46 (D.D.C. 2022). The lobster industry plaintiffs appealed. Shortly thereafter, Congress enacted the CAA. NMFS then moved to dismiss as moot based on the CAA. *Me. Lobstermen's Ass'n*, 70 F.4th at 593.

Mootness is inherently a fact-specific question about the availability of a requested remedy in a particular case. *See Berkshire Cablevision of R.I., Inc. v. Burke*, 773 F.2d 382, 384 (1st Cir. 1985). The D.C. Circuit evaluated the CAA in the context of answering this fact-specific question—whether the intervening legislation left the lobster industry plaintiffs without a viable remedy, mooting the case.

The appellate court concluded that "the intervening law [the CAA] does not resolve the issues before us." *Me. Lobstermen's Ass'n*, 70 F.4th at 593. With respect to the 2021 Rule, it found that Congress deemed the rule "sufficient" rather than "necessary" to comply with the ESA and MMPA, leaving room for the plaintiffs' claim that the rule was overly burdensome. *Id*. at 593–94. With respect to the 2021 Biological Opinion, it found that, because NMFS conceded the opinion remained operative and continued to affect the lobstermen, the plaintiffs' claim that the opinion was unlawful was also not moot. *Id*. at 594.

It was in this specific jurisdictional context that the D.C. Circuit stated that the CAA is "best read to set a temporary ceiling, not a floor, for compliance by the

lobster and Jonah crab fisheries." *Id*. at 594. In other words, the CAA did not foreclose the lobster industry's remedies for NMFS's alleged ESA and MMPA violations in issuing the 2021 Rule and 2021 Biological Opinion, although it did foreclose those of the *Center for Biological Diversity* plaintiffs for NMFS's violations in issuing the same decisions. *See Ctr. for Biological Diversity v. Raimondo*, No. 18-112 (JEB), 2024 WL 324103, at *6 (D.D.C. Jan. 29, 2024) (dismissing MMPA claim as moot because CAA precluded district court from "mandating right-whale conservation measures affecting the lobster fishery that are more stringent than the 2021 Final Rule until the new rule takes effect in 2028."). The D.C. Circuit had no occasion to opine directly on what § 101(a) and § 101(b) mean with respect to NMFS's general MMPA regulatory authority or its specific ability to promulgate the 2024 Rule.

Contrary to MALA's argument, MALA Br. at 31–32, rejecting the lower court's erroneous statutory interpretation of § 101(a) here will not risk a circuit split. Conservation Groups' proffered interpretation aligns with the D.C. Circuit's conclusion that "the evident purpose of the [CAA is] to postpone the deadline set by the district court [in *Center for Biological Diversity v. Raimondo*], giving the lobstermen more lead time." *Me. Lobstermen's Ass'n*, 70 F.4th at 593; *see* Conservation Br. at 34–36.

MALA also fails to explain why this Court must unquestioningly apply the

D.C. Circuit's "ceiling not floor" jurisdictional formulation to the very different question of NMFS's regulatory authority to promulgate the 2024 Rule. It is this Court's prerogative to interpret the bounds of the CAA for itself in conducting de novo review. *In re Munce's Superior Petroleum Products, Inc*., 736 F.3d 567, 573 (1st Cir. 2013) ("We are not bound by the precedent of our sister circuits").

There are compelling reasons this Court should decline to follow the D.C. Circuit's lead. As MALA has done here, that court also misstated § 101(a)'s plain language, substituting "the lobster industry" for "Federal and State authorizations" in the operative clause deeming the 2021 Rule sufficient to ensure compliance with the ESA and MMPA without explaining why "the lobster industry" and "federal and state authorizations" should be considered fungible in interpreting the statute. *See Me. Lobstermen's Ass'n*, 70 F.4th at 593–94.

B. The District Court's Reading of § 101(b) Renders It Superfluous

Under the First Circuit's statutory construction methodology, the best reading of the CAA is that the § 101(b) exception must apply to the 2022 Emergency Rule. Conservation Br. at 28–37. While § 101(a) deems the 2021 Rule sufficient to protect federal and state fishery authorizations from MMPA and ESA liability, § 101(b) specifies that it does not apply to "an existing emergency rule" or to "any action taken to extend or make final an emergency rule that is in place on the date of enactment of this Act, affecting lobster and Jonah crab." In drafting

this broad language, Congress can only have meant the 2022 Emergency Rule closing the MRA Wedge—the one MMPA emergency rule affecting the lobster fishery NMFS has promulgated since 1997. Conservation Br. at 19, 36. The structure of § 101, the context in which Congress enacted it, and the legislative history of § 101(a) support this interpretation.

MALA's extensive focus on the supposedly crucial differences in meaning between "in place" versus "in effect," MALA Br. at 32–48, 51–52, 53, 54–56, misses the forest for the trees, producing the absurd result that §101(b) became superfluous the instant it was signed into law. Even if MALA's distinction had merit, under First Circuit precedent, "plain meaning sometimes must yield if its application would bring about results that are . . . antithetical to Congress's discernible intent." *United States v. Gordon*, 875 F.3d 26, 34 (1st Cir. 2017); Conservation Br. at 30–31. Dickering over the meanings of "in place" and "in effect" cannot stand in the way of giving § 101(b) its intended meaning of applying to *some* emergency rule concerning the right whale and the lobster fishery—in context, the 2022 Emergency Rule. "Where a statute can be read in two ways, both of which are literally feasible but only one of which is plausible, common sense dictates that the plausible reading ought to prevail." *Gordon*, 875 F.3d at 37.

Interpreting § 101(b) to exclude the 2022 Emergency Rule from its ambit because that rule was not "in place" in some technical sense would mean that §

101(b) has no application at all, in violation of the canon against surplusage. Conservation Br. at 31–34. This canon recognizes that Congress does not enact meaningless provisions. MALA's sole response is that Congress must have intended § 101(b) to apply to some new emergency rule NMFS could have put in place before the provision took effect. MALA Br. at 44. MALA argues that § 101(b) is not superfluous, but that NMFS failed to "deploy the precatory [sic] steps necessary to trigger CAA § 101(b)'s exception." *Id*.

But § 101 was a last-minute addition to the CAA omnibus spending bill. Congress finalized the CAA on December 23, 2022. President Biden signed it into law on December 29, 2022.[8] If Congress intended § 101(b) to give NMFS the opportunity to put a new emergency rule "in place" after it finalized the bill but before the president signed it, NMFS would have had six days, including two weekend days and a federal holiday, to issue that rule. It is absurd to think Congress intended that result. Reading § 101(b) to exclude the 2022 Emergency Rule renders the provision meaningless.[9]

[8] *See* Congress.gov, *All Actions: H.R.2617 – 117th Congress (2021-2022), H.R.2617 - Consolidated Appropriations Act, 2023*, https://www.congress.gov/bill/117th-congress/house-bill/2617/all-actions (last visited Oct. 8, 2024).

[9] MALA inexplicably claims that NMFS and Conservation Groups take the "exact opposite position" on whether Congress meant § 101(b) to refer to the 2022 Emergency Rule in the absence of legislative history on that section. MALA Br. at 50. Both NMFS and Conservation Groups clearly argue that § 101(b) could only

MALA contends that, had Congress intended § 101(b) to cover the 2022 Emergency Rule, it would have said so.[10] MALA Br. at 50–52. It is true that Congress could have precisely specified in § 101(b) that it meant the 2022 Emergency Rule, as it specified in § 101(a) that it meant the 2021 Rule and no other by including that rule's Federal Register citation. Instead, Congress drafted § 101(b) more broadly. Perhaps Congress lacked time to draft § 101(b) more precisely because of the urgent need to pass an omnibus spending bill to avoid a government shutdown. Perhaps it intentionally drafted § 101(b) broadly to give NMFS maximum flexibility to ensure that future MRA Wedge closure rules would adequately mitigate right whale entanglement risk in both time and space. We do not know why Congress drafted § 101(b) as it did. Nor does it matter. It is up to this Court to interpret the language Congress chose in § 101(b) to give it full effect.

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have applied to the 2022 Emergency Rule. Federal Defendants' Corrected Opening Br. (No. 24-1480) at 40–47; Conservation Br. at 29–34.

[10] MALA asks, "If [Congress meant the 2022 Emergency Rule when it wrote § 101(b)], why did Senator King never mention it?" MALA Br. at 50. The simple answer is because Senator King said nothing about § 101(b) at all. He represents the State of Maine, not Massachusetts coastal communities or the Massachusetts lobster fishery. His floor statement evinces his own constituents' concerns. *See* Conservation Br. at 18–19 (citing ADD044-045).

CONCLUSION

For the foregoing reasons, the lower court's judgment should be reversed.

Respectfully submitted this 11th day of October, 2024,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with:

1. the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 4,881 words; and

2. the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: October 11, 2024

/s/ Erica A. Fuller
Erica A. Fuller

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2024, I filed the foregoing document with the First Circuit Court of Appeals via the CM/ECF system, thereby causing the parties or their counsel of record registered as ECF filers to be served by the CM/ECF system.

Dated: October 11, 2024

/s/ Erica A. Fuller
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