IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS WILLIAMS; GARY BURKE; FRED HEPP; and JEFF HEPP, Plaintiffs, v. WILBUR ROSS, in his official capacity as Secretary of the U.S. Department of Commerce; and NATIONAL MARINE FISHERIES SERVICE, Defendants.	Case No. 1:20-cv-00667-TNM

OCEANA, INC.'S UNOPPOSED MOTION TO INTERVENE AS DEFENDANT

Oceana, Inc. ("Oceana") hereby respectfully moves this Court for leave to intervene as of right in the above-captioned action pursuant to Federal Rule of Civil Procedure 24(a). In the alternative, Oceana moves for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

Pursuant to LCvR 7.1(m), counsel for Oceana contacted counsel for Plaintiffs and Federal Defendants on June 15, 2020, to ascertain their positions on this motion prior to filing. Counsel for Plaintiffs stated on June 23, 2020, that Plaintiffs do not intend to oppose Oceana's intervention; counsel for Federal Defendants stated on June 25, 2020, that Federal Defendants take no position on Oceana's intervention.

In support of this motion, Oceana concurrently files a memorandum of points and authorities, together with a declaration of Dr. Geoffrey Shester. *See* Exhibits A & B. Pursuant to LCvR7(j) and LCvR7(c), respectively, Oceana lodges with this motion its proposed answer and proposed order. *See* Exhibits C & D.

June 26, 2020

Respectfully submitted,

/s/ Lide E. Paterno

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lide E. Paterno
Lide E. Paterno

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS WILLIAMS; GARY BURKE; FRED HEPP; and JEFF HEPP, Plaintiffs, v. WILBUR ROSS, in his official capacity as Secretary of the U.S. Department of Commerce; and NATIONAL MARINE FISHERIES SERVICE, Defendants.	Case No. 1:20-cv-00667-TNM

MEMORANDUM IN SUPPORT OF OCEANA'S
UNOPPOSED MOTION TO INTERVENE

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CO-386
10/2018

United States District Court
For the District of Columbia

CHRIS WILLIAMS; GARY BURKE; FRED HEPP; and JEFF HEPP,

Plaintiff

vs

WILBUR ROSS, in his official capacity as Secretary of the U.S. Department of Commerce; and NATIONAL MARINE FISHERIES SERVICE,

Defendant

Civil Action No. 1:20-cv-00667-TNM

CERTIFICATE RULE LCvR 26.1

I, the undersigned, counsel of record for Oceana, Inc. certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of Oceana, Inc. which have any outstanding securities in the hands of the public:

NONE

These representations are made in order that judges of this court may determine the need for recusal.

Attorney of Record

/s/ Lide E. Paterno
Signature

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INTRODUCTION

Oceana, Inc. ("Oceana") seeks to intervene as a defendant in this case to protect its interests in the final rule, "Fisheries off West Coast States; Highly Migratory Fisheries; California Drift Gillnet Fishery; Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery," 85 Fed. Reg. 7,246 (Feb. 7, 2020) ("the Hard Caps Rule"), which the National Marine Fisheries Service ("NMFS") promulgated pursuant to the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"). NMFS implemented the Hard Caps Rule after nearly eight years of study, input, advocacy, and litigation by Oceana and other stakeholders concerning the harmful effects of mile-long large mesh drift gillnets used for fishing off the coast of California. These drift gillnets target swordfish, but their indiscriminate application results in significant "bycatch"—*i.e.*, non-target species (like whales, turtles, and dolphins) entangled in the nets that are often injured or killed. The commonsense Rule places reasonable limits on nine species of marine mammals and sea turtles caught as bycatch in the drift gillnet fishery. When the species-specific hard caps are reached in a season, the Rule mandates the closure of the fishery for up to a two-year period. Notwithstanding that the prescribed hard-cap levels have not been reached in any of the past five years since they were first recommended and may not be reached anytime soon, four California drift gillnet fishermen ("Plaintiffs") filed this action seeking a judgment declaring that the Hard Caps Rule violates the Magnuson-Stevens Act and the U.S. Constitution, as well as an injunction prohibiting NMFS from enforcing the Rule.

Protecting fish and marine populations is at the core of Oceana's mission. The organization and its members have long worked to promote sustainable fishing practices in the California Current Large Marine Ecosystem. In particular, Oceana advocated to protect its (and its members') interests through the development of the Hard Caps Rule and through litigation successfully

challenging NMFS's attempted withdrawal of the Rule. Plaintiffs' challenge threatens those interests, as the relief Plaintiffs seek—invalidation of the Rule—would undo Oceana's advocacy efforts and undermine its members' ongoing plans to observe, research, and enjoy endangered marine life in the affected area. NMFS's own opposition to implementing the Rule—overcome only after Oceana secured a favorable judgment and subsequent order to enforce that judgment in a related action—indicates it and Secretary Ross (collectively, "Federal Defendants") will not adequately represent Oceana's interests in this litigation.

Accordingly, and for the reasons discussed below, Oceana respectfully requests that this Court grant its unopposed motion to intervene as defendant, either as-of-right or permissively, so that it can protect its and its members' interests in ensuring the full implementation of the Hard Caps Rule that it helped to develop and fought to enforce. Pursuant to LCvR 7.1(m), counsel for Oceana contacted counsel for Plaintiffs and Federal Defendants on June 15, 2020, to ascertain their positions on this motion prior to filing. Counsel for Plaintiffs stated on June 23, 2020, that Plaintiffs do not intend to oppose Oceana's intervention; counsel for Federal Defendants stated on June 25, 2020, that Federal Defendants take no position on Oceana's intervention.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. CALIFORNIA DRIFT GILLNET FISHERY AND BYCATCH

The California Current Large Marine Ecosystem is a migratory destination for large numbers of marine life that feed in its rich and productive waters. From ports in Santa Barbara, Los Angeles, and San Diego, the federally regulated California drift gillnet fishery plies the ecosystem in pursuit of swordfish. Drift gillnet fishermen drag mile-long nets set 200 feet beneath the ocean's surface to form a vertical wall that indiscriminately catches marine life in its path. *See, e.g.*, Final Environmental Assessment, pp. 3-4 (A.R. 0020165-0020269) (describing large mesh

drift gillnet gear). Drift gillnets capture their target swordfish, but that catch comes at the expense of killing and/or injuring other marine life, including whales, dolphins, sea lions, sea turtles, rare sharks, billfish, and rays. *See* Providing Domestically Caught U.S. West Coast Swordfish: How to Achieve Environmental Sustainability and Economic Profitability, November 2015, pp. 4-6 (A.R. 0000024-0000026) (describing West Coast drift gillnet fishery bycatch). The marine life discarded—and often killed—by the drift gillnet fishery is known as "bycatch." Bycatch can "impede efforts to protect marine ecosystems and achieve sustainable fisheries and the full benefits they can provide to the Nation." 50 C.F.R. § 600.350(b).

For decades, state and federal fishery managers have attempted to minimize the injuries and mortalities suffered by protected species in the drift gillnet fishery. *See, e.g.*, Fishery Management Plan and Environmental Impact Statement for U.S West Coast Fisheries for Highly Migratory Species, pp. 50-51 (A.R. 0004544-0005356) (describing management measures implemented to protect species taken in the drift gillnet fishery); *id*. at Appendix C: Bycatch in HMS Fisheries. Despite many efforts to reduce injury and mortality, the fishery continues to kill, injure, and discard a number of non-target species. A 2017 NMFS study estimated that, despite existing conservation measures, between 2001 and 2015 the California drift gillnet fishery captured around 1,500 protected marine species, including large whales, sea turtles, dolphins, seabirds, seals, and sea lions. *See* J.V. Carretta, J.E. Moore, and K.A. Forney, Regression tree and ratio estimates of marine mammal, sea turtle, and seabird bycatch in the California drift gillnet fishery: 1990-2015, NOAA Technical Memorandum, NOAA-TM-NMFS-SWFSC-568, p. 83 (A.R. 0005497-0005585). On average, more than half of the total catch was tossed overboard, earning the nets a fitting name: "Walls of Death." Decl. of Geoffrey Shester, PhD, In Support Of Oceana's Mot. To Intervene ¶ 16 (hereinafter "Shester Decl.") (citing NMFS observer reports).

To limit these marine casualties, organizations and various government entities have long explored instituting "hard caps," or species-based limits, on the amount of bycatch allowed in a given fishing season. The theory behind hard-cap management is as simple as it is reasonable: When a certain number of animals are observed injured or killed in the drift gillnet fishery, the fishery is closed for a predetermined time depending on when in the season the bycatch hard cap was reached.

II. OCEANA

Oceana is a non-profit international advocacy organization dedicated to protecting and restoring the world's oceans through policy, advocacy, science, law, and public education. Oceana is headquartered in Washington, D.C., and has over 210,000 members who live in California, Oregon, and Washington (including over 157,000 in California alone). Shester Decl. ¶¶ 7, 14. It has offices or staff in eleven states, including in Monterey, California. *Id*. ¶ 7. For years, Oceana has devoted considerable resources to studying and communicating the ecological and economic importance of sustainable fisheries management in the California Current Large Marine Ecosystem off the United States West Coast. *Id*. Curtailing the injury and death of protected marine mammals and sea turtles, such as those species that directly benefit from the challenged regulation, is a central focus of the organization's work. *Id*. at ¶¶ 8, 9. Oceana's members and staff also use and enjoy the oceans for numerous activities, including fishing, wildlife observation, scuba diving, snorkeling, boating, swimming, beach walking, research, and study. *Id*. ¶ 14. Oceana's members value and depend upon healthy marine ecosystems for these activities. *Id*.

Oceana and its members are concerned about and directly affected by environmental injury (and the associated harm to their recreational, scientific, and professional interests) caused by unsustainable fishing in the drift gillnet fishery. Shester Decl. ¶ 15. To protect their interests,

Oceana and many of its members rely on limits to the injury that the indiscriminate use of gillnets inflicts on at-risk marine species and their habitats. *Id.* ¶ 17. Oceana and its members have been key moving forces behind the development and adoption of the Hard Caps Rule through participation in administrative processes, public education, policy advocacy, and litigation. *See id.* ¶¶ 10-12; *see also*, Oceana Comment on the Proposed Rule: Proposed Rule: Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery, NOAA-NMFS-2016-0123-0012, December 22, 2016 (A.R. 0000041-61).

III. PROCEDURAL HISTORY

In March 2012, the Pacific Fishery Management Council ("Council") requested that NMFS identify steps to protect non-targeted marine life through "hard caps" in the drift gillnet fishery. 85 Fed. Reg. at 7,247. Many stakeholders, including Oceana and its members, urged the Council and NMFS to phase out the use of large mesh drift gillnet gear off the U.S. West Coast while balancing the economic impact of transitioning away from drift gillnet gear in the West Coast swordfish fishery. *See, e.g.,* PFMC, June 2014, Agenda Item E.2, Situation Summary, Drift Gillnet Fishery Transition Issues, A.R. 0201052-0201054; PFMC, June 2014, Agenda Item E.2.b, Supplemental HMSMT Report, HMSMT Report on Drift Gillnet Fishery Transition Issues (A.R. 0021061-0021079). Having examined the issue for years, consulted with various stakeholders (including Oceana), and considered a number of alternatives (all of which had more significant economic impacts and/or implementation issues than the option ultimately adopted), the Council formally recommended the hard-cap regulations to NMFS. Final Environmental Assessment, June 2017, pp. 62-68 (A.R. 0020165-0020269) (describing the economic effects of the alternatives). The proposed rule required a two-year rolling hard cap on the injury or mortality of protected

marine, mammal, and sea turtle species by the fishery. 81 Fed. Reg. 70,660, 70,661 (Oct. 13, 2016).

After determining that the proposed regulations complied with the Magnuson-Stevens Act, the fishery management plan, and other applicable law, NMFS published the proposed rule on October 13, 2016. 81 Fed. Reg. at 70,661. Noting the rule's express purpose as "manag[ing] the fishery under the [Magnuson-Stevens Act] to protect certain non-target species," NMFS cited two Magnuson-Stevens Act provisions as the primary justification for the rule, Section 303(b)(12) and National Standard 9. *Id.* Section 303(b)(12) provides that fishery management plans may "include management measures in the plan to conserve target and non-target species and habitats, considering the variety of ecological factors affecting fishery populations." 16 U.S.C. § 1853(b)(12). Similarly, National Standard 9 provides that "[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch." 16 U.S.C. § 1851(a)(9).

On June 12, 2017, after the conclusion of the public comment period and following a change in administration, NMFS withdrew the proposed rule, stating that it was "not warranted" at the time. 82 Fed. Reg. 26,902, 26,902 (June 12, 2017). Within the Magnuson-Stevens Act's 30-day statute of limitations, Oceana sued the Federal Defendants in federal court alleging that the withdrawal of the rule was unlawful. Compl., *Oceana, Inc. v. Ross*, No. 17-cv-5146 (C.D. Cal. July 17, 2017), ECF No. 1. On October 24, 2018, the U.S. District Court for the Central District of California ruled in Oceana's favor, holding that NMFS's unilateral withdrawal of the rule (carried out without consulting the Council) was arbitrary and capricious, and exceeded NMFS's authority under the Magnuson-Stevens Act and the Administrative Procedure Act. *Oceana, Inc. v. Ross*, No. 17-cv-5146, 2018 U.S. Dist. LEXIS 185369 (C.D. Cal. Oct. 24, 2018), ECF No. 102.

NMFS initially noticed an appeal from that decision. Although it subsequently dismissed that appeal, it did not take any formal action on the Rule for over a year—and only did so after Oceana filed and successfully litigated a motion to enforce. Mot. To Enforce Court Order, *Oceana, Inc. v. Ross* (C.D. Cal. Nov. 4, 2019), ECF No. 119. The court found that Federal Defendants had "falsely stated" to the Council "that the Court had authorized them to proceed with their negative determination," when that was "effectively the opposite of what the Court ordered." Order on Mot. To Enforce 3-4, *Oceana, Inc. v. Ross*, (C.D. Cal. Jan. 8, 2020), ECF No. 131 (finding Federal Defendants had "moved forward as if the Court instead accepted their argument that the statute *** allowed them to reverse their positive determination," by "mispresent[ing] the Court's Order and send[ing] the Council back to the drawing board"). Expressing concern about whether it could "rely in some degree on the integrity and professionalism of the agency" to "act in good faith," rather than "remand for agency action" again, the court directed NMFS to issue a final rule within 30 days, consistent with the procedures mandated by the Magnuson-Stevens Act. *Id.* at 6-7.

NMFS issued final regulations consistent with the originally proposed regulations on February 7, 2020. 85 Fed. Reg. at 7,247. The Rule "establishes 2-year rolling hard caps on observed mortality and injury to fin, humpback, and sperm whales, leatherback, loggerhead, olive ridley, and green sea turtles, short-fin[ned] pilot whales, and bottlenose dolphins in the [drift gillnet] fishery." *Id.* at 7,247. To implement the hard caps, "NMFS will count observed mortalities and injuries to these species during the current [drift gillnet] fishing season (May 1 through January 31) and the previous fishing season." *Id.* If a protected species hard cap were reached, the fishery would close until "observed mortality and injury of each species during the previous two May 1 through January 31 fishing seasons is below its hard cap value." *Id.* at 7,251. While the rule was

determined to have "negative economic impacts to the [drift gillnet] fleet," the proposed rule had a more "limited economic impact" than the other alternatives considered. *Id.* at 7,249.

Alongside the published Rule, NMFS reiterated that it previously determined that the Rule was consistent with the Magnuson-Stevens Act and all other applicable laws, but also noted that it had attempted to withdraw the Rule over concerns that "the regulations [were] inconsistent with [Magnuson-Stevens Act] National Standard 7 (i.e., conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication)." 85 Fed. Reg. at 7,249. NMFS explained that the adopted regulations reflected "the least costly alternative that did not present significant implementation issues," that the "potential long-term adverse economic effects of the regulations appear to be limited" as the fishery "is not expected to close often under the regulations," and that any economic harm likely depends on vessel operators' own efforts "in reducing the frequency of hard cap species catch in the future." *Id.* at 7,248, 7,250. Nevertheless, NMFS declared that it "intends to review all options for addressing the economic impacts to [drift gillnet] fishery participants through a separate rulemaking, beginning with engagement of the Council to propose revisions through the Council's normal process." *Id.* at 7,249.

On March 6, 2020, Plaintiffs attempted to short-circuit that ongoing administrative process by filing this lawsuit, alleging the Hard Caps Rule violates the Magnuson-Stevens Act's National Standards. Plaintiffs also allege that the appointment and removability of the Council members contravenes the United States Constitution.

ARGUMENT

The Hard Caps Rule safeguards Oceana's interests and its members' interests in maintaining sustainable fisheries and protecting marine life in the California Current Large Marine Ecosystem. Shester Decl. ¶ 16. Oceana has long worked to limit bycatch mortality and injury:

Oceana specifically advocated for, and ultimately sought court intervention for the promulgation of, the challenged Rule. *Id.* ¶ 12. The present action threatens to vacate the protection the Rule provides to Oceana's interests, including by undermining the procedural safeguards Oceana previously brought litigation to enforce. *Id.* ¶ 16. Under the intervention standards discussed below, Oceana's motion should be granted so that it can protect its own and its members cognizable interests.

I. OCEANA HAS STANDING TO INTERVENE AS DEFENDANT

A. The Federal District Court In California Already Determined Oceana Has Standing To Defend The Hard Caps Rule

Oceana has Article III standing to defend the Hard Caps Rule from statutory challenge. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998) (holding that applicants for intervention in this Circuit also must demonstrate Article III standing). Indeed, that threshold determination already has been settled by the federal district court that granted summary judgment on Oceana's claims prohibiting NMFS from withdrawing the Rule based on virtually the same administrative record and the same statutory concerns that Plaintiffs cite here. *Oceana, Inc. v. Ross*, 2018 U.S. Dist. LEXIS 185369 (C.D. Cal. Oct. 24, 2018), ECF No. 102.

"[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). That principle of "[i]ssue preclusion applies to threshold jurisdictional issues like standing" no less than to "issues going to a case's merits." *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015). Since "[t]he requirement that jurisdiction be established as a threshold matter *** is inflexible and without exception *** and without jurisdiction [a] court cannot proceed at all in any cause," *Ruhrgras AG v. Marathon Oil*

Co., 526 U.S. 574, 577 (1999) (first ellipsis in original) (alterations, quotation marks, and internal citations omitted), Oceana's standing to defend the Rule was "actually and necessarily determined by a court of competent jurisdiction in that prior case" in the Central District of California, *Government of Rwanda v. Johnson*, 409 F.3d 368, 374 (D.C. Cir. 2005); *see also Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990) ("[B]efore a federal court can consider the merits of a legal claim, the [party] seeking to invoke the jurisdiction of the court must establish the requisite standing to sue.").

The same conclusion thus follows with respect to Oceana's standing here. *See Yamaha Corp. of Am.*, 961 F.2d at 254 ("Even in the absence of *any* opinion a judgment bars relitigation of an issue necessary to the judgment."). Oceana's (and its members') interests in the enforcement of the Rule have hardly expired in the few months since the federal district court in California necessarily determined that Oceana maintained adequate standing to defend it, *see* Order Granting Oceana's Motion to Enforce Judgment, *Oceana, Inc. v. Ross*, (C.D. Cal. Jan. 8, 2020), ECF No. 131; *see also Foretich v. United States*, 351 F.3d 1198, 1210 (D.C. Cir. 2003) ("A plaintiff must maintain standing throughout the course of litigation."). No "basic unfairness" would result from recognizing that Oceana likewise has standing in this action. *Yamaha Corp. of Am.*, 961 F.2d at 254.[1]

B. Oceana Meets The Requirements For Standing In This Action

Even setting aside principles of issue preclusion, there is no reason for this Court to contradict the prior determination that Oceana has standing to defend the Rule from claims that it

[1] Federal Defendants were adverse to Oceana in the action in the Central District of California. Because that court had "an independent obligation to determine whether subject-matter jurisdiction exist[ed], even in the absence of a challenge from any party," *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006), Plaintiffs' non-appearance in that prior case does not materially affect application of issue-preclusion principles here.

is inconsistent with the Magnuson-Stevens Act. To demonstrate associational standing, an organization "must demonstrate that at least one member would have standing under Article III to sue in his or her own right, that the interests it seeks to protect are germane to its purposes, and that neither the claim asserted nor the relief requested requires that an individual member participate in the lawsuit." *Nat. Res. Def. Council v. EPA*, 489 F.3d 1364, 1370 (D.C. Cir. 2007). As demonstrated by the attached Declaration of Dr. Geoffrey Shester, Oceana meets all three prongs.[2]

First, if Plaintiffs are granted the relief they seek (*i.e.*, invalidation of the Rule), individual Oceana members will suffer a "concrete and particularized" injury that is "actual or imminent" and "fairly *** trace[able]" to that relief, and it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" denying that relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (ellipsis and alteration in original) (internal quotation marks omitted); *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015) ("The standing inquiry for an intervening-defendant is the same as for a plaintiff."). Dr. Shester, an Oceana member, declares that he regularly carries out recreational, scientific, and professional activities in the California Current Large Marine Ecosystem off the West Coast, including "participat[ing] in scuba diving activities"; "conduct[ing] marine research"; and "participat[ing] in still and video photography, on the surface, underwater and from above using drones *** to document marine wildlife and habitats." Shester Decl. ¶ 14; *see also id.* ¶ 21

[2] Standing to intervene, like other aspects of intervention, "should be viewed on the tendered pleadings." *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988); *see* 7C CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1914 (3d ed.) (stating that an intervenor's "pleading is construed liberally in favor of the pleader-intervenor and the court will accept as true the well-pleaded allegations in the pleading" (footnotes omitted)).

(discussing "ocean-related experiences [that are] of primary importance to [his] quality of life"). He also explains that he plans to "continue to use, research, and enjoy these areas in the same manner in the future," but that his ability to do so "depend[s] on a thriving ecosystem and habitats able to support healthy populations of fish, birds, and marine mammals, including the non-targeted species that are *** the subject of the hard caps rule." *Id.* ¶ 14.

The Hard Caps Rule, for which Oceana advocated and secured a favorable court ruling, helps to protect the interests of Oceana's members like Dr. Shester by limiting deaths and injuries of the non-targeted species he regularly studies and enjoys observing. *See* Shester Decl. ¶ 22 (discussing encounters with marine species that "are possible because our laws ensure we prioritize the protection of these species, including by placing hard caps on the number of these species that can be killed or injured by drift gillnet fishing"). Invalidating the Rule (and undoing the litigation success Oceana earned just a few months ago) thus risks lessening the aesthetic, scientific, recreational, and professional value Dr. Shester and Oceana's other members derive from the California Current Large Marine Ecosystem. *See id.* ("My ability to continue conducting research and enjoying the California Current Large Marine Ecosystem with my friends and family is directly impacted by the entanglement of whales and sea turtles in large mesh drift gillnets, a danger likely to occur more frequently if the hard caps rule that Oceana fought to enforce is now invalidated"). That is sufficient to allege injury in fact. *See Nat. Res. Def. Council*, 489 F.3d at 1371 ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.") (quoting *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183, (2000) (internal quotation marks omitted)).

Indeed, the D.C. Circuit's cases "have generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 317 (discussing *Military Toxics Projects v. EPA*, 146 F.3d 948 (D.C. Cir. 1998); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003)). "Those cases stand for the proposition that even where the possibility of prevailing on the merits after remand is speculative," and even where intervenor-defendant seeks "to uphold agency action affecting [its members] indirectly," "a party seeking to uphold a favorable ruling can still suffer a concrete injury in fact." *Id.* at 318.

Because Oceana's injury would result from the relief Plaintiffs seek (*i.e.*, overturning the regulation that Oceana secured and that benefits its members), "it rationally follows the injury is directly traceable to [Plaintiffs'] challenge to the [Rule]; and [Oceana] can prevent the injury by defeating [Plaintiffs'] challenge in the district court proceedings." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 316. In other words, because Oceana "can prove injury, then it can establish causation and redressability": "For standing purposes, it is enough that a plaintiff seeks relief, which, if granted, would injure the prospective intervenor." *Id.* at 316, 318.[3]

Second, there can be no question that protecting its members' interests in the Hard Caps Rule is both germane to and an important part of Oceana's organizational mission to protect the

[3] On top of its members' interests, Oceana's standing is buttressed by the fact that "it won a favorable ruling" enforcing the Rule that effectively "would be lost" if Plaintiffs' challenge to the Rule prevails. *Crossroads Grassroots Policy Strategies*, 788 F.3d at 316. By contrast, Plaintiffs' claimed injury arises only "if the drift gill net fishery shuts down" because the bycatch limits have been reached, Compl. ¶¶ 11-15, ECF No. 1—a speculative event that "is not expected to [occur] often under the regulations," and that depends on whether "vessel operators are successful in reducing the frequency of hard cap species catch in the future," 85 Fed.Reg. at 7,248, 7,250. To the extent the harm to Oceana's members' species-specific interests depends on bycatch rates exceeding the hard cap limits, the same holds true for any harm Plaintiffs allege they will suffer. Indeed, Plaintiffs' case is premised on the notion that the hard cap limits will be breached.

world's oceans and maintain sustainable fisheries, particularly in the affected region. "Oceana has been actively involved in protecting ocean resources off the coasts of California, Oregon, and Washington since 2003, including several wildlife protection and habitat efforts and extensive sustainable fisheries campaigns." Shester Decl. ¶ 7. "Oceana's sustainable fishing campaigns are focused around three main themes: protecting habitats, reducing bycatch, and achieving appropriate catch limits that maintain the role of marine species in the ecosystem." *Id.* ¶ 9. Its "primary goal" in the California drift gillnet campaign is and has been "to ensure that fishery management directly and explicitly accounts for a much wider suite of ecological, social, and economic interests, as required under the law, rather than simply the industry targeting such fish." *Id.* To that end, Oceana advocated for a hard caps rule at several Council meetings since 2014 and Oceana and its members submitted tens of thousands of comments in support of a strong hard caps rule. *Id.* ¶ 12. When NMFS attempted unilaterally to withdraw the proposed rule after having previously determined that it was consistent with the governing legal framework, Oceana filed an action against NMFS, which ultimately resulted in a judicial order directing the agency to promulgate the Rule.

Third, neither the claim asserted nor the relief requested, nor any defense Oceana proposes, requires that an individual member participate in the lawsuit. Oceana regularly litigates actions concerning regulations under the Magnuson-Stevens Act on behalf of itself and its members. Oceana's members and staff, in turn, "rely on [it] to represent their interests," as they have throughout the development of—and litigation concerning—this Rule. Shester Decl. ¶ 24.

In sum, because a ruling in favor of Plaintiffs—invaliding the Hard Caps Rule and allowing the uncapped death and injury of non-target marine life by the drift gillnet fishery—would harm Oceana's members' legally protected interests (and Oceana's own interest in the Rule it recently

and successfully brought a legal action in federal court to enforce), Oceana has standing to intervene as defendant.[4]

II. OCEANA IS ENTITLED TO INTERVENE AS OF RIGHT

This Court follows a "liberal approach to intervention." *Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000). Under Federal Rule of Civil Procedure 24(a)(2), "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). Oceana satisfies each of these elements.

A. Oceana's Motion to Intervene Is Timely

In determining whether an intervention motion is timely, courts consider "all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (quoting *United States v. Am. Tel. & Telegraph, Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). Oceana's motion to intervene is timely because the present case is still in its early stages and Oceana's participation will not prejudice the existing parties.

[4] While Plaintiffs must demonstrate prudential standing, the D.C. Circuit has made clear that, "[w]here an intervenor-defendant establishes Article III standing and meets the dictates of Federal Civil Rule 24, there is no need for another layer of judge-made prudential considerations to deny intervention." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 320; *id.* ("[T]he zone of interests has no applicability to an intervening defendant in a post-*Lexmark [Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)] world.").

The instant motion predates any consideration of the substantive issues in the case and any merits briefing by the parties.[5] *See, e.g.*, *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) (finding intervention timely where, though motion filed after plaintiffs' motion for summary judgment on administrative record, "[t]he Court has not issued any decisions on the merits of the claim"); *Admiral Ins. Co. v. Nat'l Cas. Co.*, 137 F.R.D. 176, 177 (D.D.C. 1991) (intervention motion timely where "[t]he major substantive issues in this case have not yet been argued or resolved"). Plaintiffs' claims and Federal Defendants' (and Oceana's) defenses will be resolved on summary judgment motions based on the pleadings and administrative record; thus, "intervention in this case does not involve the procedural complications that could arise if the existing parties were involved in (or had already completed) discovery. *Gov't Accountability Project v. Food & Drug Admin.*, 181 F. Supp. 3d 94, 95 (D.D.C. 2015); *see Hardin*, 600 F. Supp. 2d at 16 ("[N]o discovery has or will occur in this case, as it is based on the administrative record."). Under these circumstances, in no way would Oceana's intervention "unduly disrupt[] litigation" in this early phase of the case. *Roane v. Leonhart*, 741 F.3d 147, 150-151 (D.C. Cir. 2014) (explaining that "the requirement of timeliness is aimed primarily at preventing" such disruption "to the detriment of the existing parties").

[5] Plaintiffs' motion for summary judgment is currently due July 15, 2020, and Defendants' combined opposition and cross-motion for summary judgment is currently due August 14, 2020. Oceana notified the existing parties' of its intent to intervene on June 15, 2020, one month prior to the current deadline for Plaintiffs to file their summary judgment motion. Out of respect to the existing parties, Oceana waited to file this intervention motion until counsel for Plaintiffs and Federal Defendants provided their clients' positions on Oceana's proposed intervention, which occurred on June 23, 2020, and June 25, 2020, respectively. The parties are presently discussing modest revisions to the schedule for summary judgment briefing to help avoid any duplication between Oceana's and Federal Defendants' arguments and to ensure all parties have adequate time to respond to the other parties' briefs.

While Oceana's interests in intervention are significant (as discussed below with respect to the other intervention factors), granting this motion to intervene at the early stage of the proceedings will not prejudice any party. *See Roane*, 741 F.3d at 151 ("[E]ven where a would-be intervenor could have intervened sooner, in assessing timeliness a court must weigh whether any delay in seeking intervention unfairly disadvantage[s] the original parties.") (internal quotation marks omitted); *see also Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) ("The prejudice prong of the timeliness inquiry 'measures prejudice caused by the intervenors' delay—not by the intervention itself."). Oceana seeks intervention to protect its members' and its own interests in the challenged Hard Caps Rule and to preserve statutory and regulatory protections and rights under the Magnuson-Stevens Act and other applicable laws. Oceana does not raise cross- or counter-claims. *See* Proposed Answer. Moreover, Oceana's intervention would focus on the statutory allegations raised in Plaintiffs' first cause of action, which the Court must resolve before considering the constitutional allegations raised in Plaintiffs' second and third causes of action. *See, e.g.*, *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 80 (2009) (explaining the "quite right" course is for a court "to consider the statutory claim before the constitutional one," as resolution of the former may obviate need for resolution of latter). Oceana's participation therefore would not unduly enlarge the scope of the Court's review in this case.

B. Oceana and Its Members Have Legally Protected Interests at Stake

Rule 24(a)'s "interest test" is not a rigid standard; rather, it is "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967); *see also Jones v. Prince George's Cty.*, 348 F.3d 1014, 1018 (D.C. Cir. 2003) ("[I]ntervenors of right need only an 'interest' in the litigation—not a 'cause of action' or 'permission to sue.'"). Oceana has legally cognizable

interests—protecting marine ecosystems and wildlife in the drift gillnet fishery by capping the number of protected and vulnerable species injured or killed—which are at stake in this litigation. The organization has demonstrated that interest through its years-long work to limit bycatch in the California Current Large Marine Ecosystem, including specifically participating in the development of the Hard Caps Rule, advocating for its promulgation, and successfully bringing litigation to enforce it. Shester Decl. ¶¶ 11-12. "A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995).

Since, as discussed above, Oceana has constitutional standing, "it *a fortiori* has an interest relating to the property or transaction which is the subject of the action." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 320 (internal quotation marks omitted); *see Fund For Animals*, 322 F.3d at 735 (holding the standards for constitutional standing and the second factor of the test for intervention as of right are the same). Oceana's interests in defending the Rule are more than sufficient.

C. If Successful, Plaintiffs' Action Would Impair Oceana's Interests

In applying Rule 24(a)'s impairment requirement, the Court "'look[s] to the 'practical consequences' of denying intervention." *Fund for Animals*, 322 F.3d at 735; *Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978) (inquiry "not limited to consequences of a strictly legal nature"). Oceana meets that requirement here.

If Plaintiffs prevail in this case, the protections to the California Current Large Marine Ecosystem and Oceana's members that the Hard Caps Rule provides—and that Oceana recently secured in its own legal action to enforce the Rule—would be lost. The relief Plaintiffs seek—vacatur of the Rule—thus would eliminate the benefits the Rule affords to Oceana's members effected through guaranteed limitations on the injuries and deaths caused by the drift gillnet fishery

in the affected area. If successful, Plaintiffs' action also would undermine Oceana's mission to promote sustainable fishing in the California Current Large Marine Ecosystem and to preserve the habitat of the many species that reside there, including the years of advocacy and litigation Oceana conducted in support of the Rule.

These threats to Oceana's and its members' interests satisfy the third intervention prong in multiple respects, particularly since Oceana need only demonstrate a "possibility" that its interests "may be practically impaired or impeded by the disposition of the plaintiffs' suit." *Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981). Courts regard as an adequate threat the fact that "[a]n adverse decision in th[e] suit would impair the [intervenor's] interest in the preservation of [species] and their habitats" in a given area. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983); *see also, e.g.*, *Idaho Farm Bureau Fed'n*, 58 F.3d at 1398 (concluding decision to remove species from endangered species list would impair conservation groups' interest in preservation). Even more specific to the procedural history of this Rule, this Court has recognized that where, as here, a proposed intervenor has "spent several years" advocating for a rule—let alone securing a court judgment enforcing it after continued agency inaction—its interest is impaired by the fact that, "[i]f plaintiffs prevail in this case, [intervenor's] efforts may be nullified." *Nat. Res. Def. Council, Inc. v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983). Finally, a public interest group satisfies the third intervention prong when its interest in the challenged regulation "is threatened by the possibility of a 'judicial pronouncement that the [agency action] was contrary to law,'" because it "'would make the task of reestablishing the status quo *** [more] difficult and burdensome' and would have 'persuasive weight with a new court" considering future related actions. *Campaign Legal Ctr. v. Fed. Election Comm'n*, 334 F.R.D. 1, 6 (D.D.C. 2019) (quoting

Crossroads Grassroots Policy Strategies, 788 F.3d at 320) (ellipsis and second alteration in original). Oceana should be permitted to intervene to prevent its interests from being so impaired.

D. Oceana's Interests May Not Be Adequately Represented by Federal Defendants

The final requirement under Rule 24(a)(2) is "not onerous." *Fund for Animals*, 322 F.3d at 735 (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986)). It "is satisfied," the Supreme Court has explained, "if the applicant shows that representation of [its] interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.'" *Id.* (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). An applicant "ordinarily should be allowed to intervene unless it is clear that the [existing] party will provide adequate representation for the absentee[.]" *Id.* at 735 (quoting *Am. Tel. & Telegraph, Co.*, 642 F.2d at 1293).

None of the current parties adequately represents Oceana's interests in this matter. Plaintiffs' interests in invaliding the Rule are, of course, directly adverse to those of Oceana and its members who have long advocated for the protections the Rule provides. But Federal Defendants also are unlikely to adequately represent Oceana's interests. Even in the typical case, "governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736 (citing *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912–13 (D.C. Cir. 1977); *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969)); *see also WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010) ("[I]t is 'on its face impossible' for a government agency to carry the task of protecting the public's interests and the private interests of a prospective intervenor."). The federal government represents a more general interest, which differs in important respects from the particular conservation interests pursued by Oceana. *See, e.g.*, *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 70 (D.D.C. 2006) ("[A] federal

agency's obligation is to represent the interests of the American people, while entities dedicated to hunting and conservation—like proposed intervenors—represent the interests of their members.") (internal quotation marks omitted); *People for the Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6 (D.D.C. 1993) (concluding that government's mandate to design and enforce an entire regulatory system precludes it from adequately representing one party's particular interest in it). Accordingly, this Circuit "look[s] skeptically on government entities serving as adequate advocates for private parties," and has on several occasions "reversed a denial of intervention even [when] the federal agency and prospective intervenor undisputably agreed that the agency's current rules and practices were lawful." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 321; *see, e.g.*, *Fund for Animals*, 322 F.3d at 736; *Costle*, 561 F.2d at 912.

That skepticism is particularly well placed here, given the unique procedural history of the challenged Rule. Throughout the development of the Rule, Oceana urged that the governing statutory framework permitted—in fact, promoted (if not required)—even more stringent limitations on bycatch than NFMS ultimately adopted. *See, e.g.,* Letter to Barry Thom and Lyle Enriquez, NMFS, Re: Drift Gillnet Hard Caps (NOAA–NMFS–2016–0123), December 22, 2016 (A.R. 0000041-0000061); *see also Am. Forest Res. Council v. Hall*, No. 07-0484-JDB, 2007 WL 1576328, at *1 (D.D.C. May 29, 2007) (agreeing that intervenor-Applicants' "interests are not adequately represented by defendants because the Fish and Wildlife Service has been, from Applicants' perspective, insufficiently protective of the [species] and its critical habitat in the course of past litigation and in its proposed rule changes").

After voting for the proposed Rule on the Council floor, determining that the proposed rule was consistent with the Magnuson-Stevens Act and other applicable laws, and publishing the proposed rule for notice and comment, NMFS (following a change in administration) attempted

improperly to withdraw the Rule. *See* Compl., *Oceana, Inc. v. Ross*, (C.D. Cal. July 17, 2017), ECF No. 1. Even after the court ruled in Oceana's favor, holding that NMFS's unilateral withdrawal of the proposed rule was unlawful, Federal Defendants took no action on the rule for over a year; on the contrary, they "falsely stated that the Court had authorized them to proceed with their negative determination." Order on Motion to Enforce 3, *Oceana, Inc. v. Ross*, (C.D. Cal. Jan. 8, 2020), ECF No. 131; *id.* at 4 ("This is effectively the opposite of what the Court ordered."). Although Federal Defendants voluntarily dismissed the appeal they initially filed from the district court's decision, they nevertheless "moved forward as if the Court instead accepted their argument that the statute *** allowed them to reverse their positive determination," by "mispresent[ing] the Court's Order and send[ing] the Council back to the drawing board." *Id.* at 5-6. Only after Oceana successfully filed a motion to enforce that judgment did NMFS finally comply with its statutory duty to promulgate the Hard Caps Rule. Oceana can hardly rely on Federal Defendants to adequately represent its interests given that, since initially publishing the proposed Rule, they have done nothing but ignore it, at best, and actively disavow it, at worst. *See Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) ("We agree with Applicants and reject [plaintiff's] contention that the [government defendant] and Applicants' ultimate objectives are identical where the [government defendant] acted under compulsion of a district court decision gained by Applicants' previous litigation[.]").

The Court need not credit Oceana's own recitation of that (recent) history—Federal Defendants insisted on publishing with the final Rule itself several disclaimers indicating NMFS's lack of commitment to it. The regulations explain that although many comments in support of the proposed rule expressed a "desire for more stringent hard caps," the Council and NMFS instead adopted "the least cost action alternative," and NMFS "found the proposed rule consistent with

the [Magnuson-Stevens Act], its National Standards, and other applicable laws." 85 Fed. Reg. at 7,248-7,249 (emphasis and capitalization omitted). NMFS states that it nevertheless attempted to "withdr[a]w the proposed rule" and only reversed course after Oceana "sued to compel publication of the proposed regulations." *Id*. at 7,247. NMFS cites, as a reason for the Rule's publication, the fact that the federal court found that its withdrawal "exceeded its authority under the [Magnuson-Stevens Act] and the Administrative Procedure Act" and, after a year of continued inaction on remand, expressly "ordered NMFS to publish a final rule." *Id.*; *id.* ("Therefore, NMFS is publishing the hard caps regulations as they were originally proposed, without changes to the regulatory text, in accordance with the order."). Indeed, Federal Defendants' only affirmative defense is that "[t]he challenged agency action was required by Court order." Answer 19, ECF No. 11. "[T]his fact alone demonstrates that the [Federal Defendants] may not put forth as strong of an argument in defense of the [Rule]—particularly the argument that the order's restrictions are mandated by the [relevant statutes] and not just by the district court's order—because the [Federal Defendants] earlier opposed [Oceana] in [its] efforts to secure the restrictions." *Citizens for Balanced Use*, 647 F.3d at 900.

Moreover, NMFS's continued reluctance to defend the Rule's compliance with the governing statutory framework "adds substantial weight to [Oceana's] position that the [Federal Defendants] may be unable or unwilling to pursue vigorously all available arguments in support of [Oceana's] interest." *Citizens for Balanced Use*, 647 F.3d at 900 (discussing government's appeal). Lending support to the few comments opposing the Rule "on the grounds that it is not consistent with the legal requirements outlined in the [Magnuson-Stevens Act] National Standards," NMFS maintains that it "conducted additional economic analysis and found the regulations to be inconsistent with [Magnuson-Stevens Act] National Standard 7 (i.e., conservation

and management measures shall, where practical, minimize costs and avoid unnecessary duplication)." 85 Fed. Reg. at 7,248-7,249. Moreover, in a statement on which Plaintiffs rely, NMFS declared that it "intends to review all options *for bringing the regulations into compliance with the [Magnuson-Stevens Act], particularly National Standard 7*." Compl. ¶ 67 (quoting National Marine Fisheries Service, Final Regulatory Impact Review and Final Regulatory Flexibility Analysis 23 (Jan. 2020)). Oceana maintains, by contrast, that the regulations *already are* in compliance with the Magnuson-Stevens Act, including National Standard 7—as NMFS previously determined. At the very least, this divergence of views raises the "likelihood that [Oceana] will make a more vigorous presentation of the economic side of the argument than would [Federal Defendants]." *Costle*, 561 F.2d at 912.

Finally, although NMFS voluntarily dismissed the appeal it had noticed (from the district court's order that it had acted unlawfully in withdrawing the proposed Rule), the published regulations make clear NMFS's "inten[t]" to use a "separate rulemaking" to effect the "changes to the regulatory text" NMFS claims it was unable to make because of the district court's order. 85 Fed. Reg. at 7,247. It is thus "not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998). The regulations' own disclaimers indicate that if this case were to proceed, Federal Defendants' interests and Oceana's interests "might diverge [even further] during the course of litigation." *Fund for Animals*, 322 F.3d at 736.

Given the minimal showing necessary to find inadequate representation, the Court should grant Oceana's motion to intervene as of right.

III. ALTERNATIVELY, OCEANA MERITS PERMISSIVE INTERVENTION

If this Court denies intervention as of right under Rule 24(a), Oceana requests leave to intervene under Rule 24(b). Permissive intervention is appropriate when an applicant presents three things: (1) "a timely motion"; (2) "a claim or defense that has a question of law or fact in common with the main action"; and (3) "an independent ground for subject matter jurisdiction." *Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

First, as demonstrated above, Oceana's motion is timely: the case is at a preliminary stage, no merits briefing has yet occurred, and no discovery will take place. Oceana's presence will not "delay or unduly complicate" the litigation, "which is progressing in orderly fashion towards probable cross-motions for summary judgment." *100Reports LLC v. United States Dep't of Justice*, 307 F.R.D. 269, 286 (D.D.C. 2014) (quoting *Agee v. CIA*, 87 F.R.D. 350, 352 (D.D.C. 1980)).

Second, Oceana's proposed defense of the Rule not only presents "a question of law or fact in common with the main action," *Nat'l Children's Ctr., Inc.*, 146 F.3d at 1046 —it cannot be disentangled from the main action. Plaintiffs allege, for example, that the Hard Caps Rule "is inconsistent with National Standard 7 because of its severe economic impact"; "violates National Standard 2" because it "is more restrictive than needed to protect affected species"; and "violates National Standard 8" because it is "expected to have significant costs to drift gill net fishery participants, and will likely result in reduced domestic supply of swordfish to west coast markets, in the event of a fishery closure." Compl. ¶¶ 65-74 (internal quotation marks, and alterations omitted). Oceana will defend the Rule by showing, *inter alia*, that each of those assertions lacks merit. *See* Proposed Answer ¶¶ 65-74.

Third, because Oceana seeks to defend the Rule from the statutory allegations Plaintiffs raise, to the extent the Court can exercise jurisdiction over those allegations, Oceana's defenses "are sufficiently related to the main claims in this litigation such that an independent ground for subject matter jurisdiction exists." *Butte Cty. v. Hogen*, Civil Action No. 08-519 (HHK)(AK), 2008 WL 2410407, at *2 (D.D.C. June 16, 2008); *Nat'l Children's Ctr., Inc.*, 146 F.3d at 1046 (explaining purpose of independent subject matter jurisdiction requirement is to ensure court has jurisdiction when a "movant asks the district court to adjudicate an *additional* claim on the merits") (emphasis added). As explained above (and as determined by the federal district court in California), Oceana and its members have a legally protected interest in the Hard Caps Rule that would be harmed by the relief Plaintiffs seek.

To the extent any doubt remains, this Court should exercise its discretion in granting permissive intervention, particularly in light of the unique knowledge, expertise, and interests Oceana has in relation to bycatch and drift gillnet fishing in the affected area. *National Children's Ctr.*, 146 F.3d at 1048 (acknowledging that "Rule 24(b) vests district courts with considerable discretion"). Given its years-long advocacy in favor of the development of this Rule and years-long litigation to enforce it, Oceana will, at a minimum, "be likely to serve as a vigorous and helpful supplement to [Federal Defendants'] defense" of the Rule. *Costle*, 561 F.2d at 912-913. "Many of the[] decisions" raised by Plaintiffs' claims, "after all, turn on questions of very technical detail and data; on the basis of [Oceana's] experience and expertise in [its] relevant field[], [it] can reasonably be expected to contribute to the informed resolutions of these questions when, and if, they arise before the District Court." *Id.* at 913 (footnote omitted).

CONCLUSION

For the reasons set forth above, Oceana respectfully requests that the Court grant it intervention as of right or, in the alternative, permissive intervention. Oceana has lodged its proposed answer as Exhibit C to the motion to intervene.

Dated: June 26, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lide E. Paterno
Lide E. Paterno

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS WILLIAMS; GARY BURKE; FRED HEPP; and JEFF HEPP, Plaintiffs, v. WILBUR ROSS, in his official capacity as Secretary of the U.S. Department of Commerce; and NATIONAL MARINE FISHERIES SERVICE, Defendants.	Case No. 1:20-cv-00667-TNM

DECLARATION OF GEOFFREY SHESTER, PHD,
IN SUPPORT OF OCEANA'S MOTION TO INTERVENE

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I, Geoffrey Shester, PhD, do hereby declare as follows:

1. I am an employee and member of Oceana, Inc. ("Oceana").

2. I submit this declaration in support of Oceana's Motion to Intervene based on my own personal knowledge, and if called upon to testify as a witness, I could and would competently testify thereto.

3. My mailing address is Oceana, 99 Pacific Street, Suite 155C, Monterey, CA, 93940. I live in Marina, California and work in Monterey, California.

4. I am the California Campaign Director and Senior Scientist for Oceana, Inc. (Oceana). I have worked for Oceana from 2002 to 2003 as Fishery Conservation Coordinator, from 2003-2007 as a Science/Policy Consultant, and since April 2010 as California Program Director in the Monterey, California office. I have been a member of Oceana since 2002.

5. In my previous capacities at Oceana, I developed scientific proposals for habitat protections in federal fisheries off California, Oregon, Washington, and Alaska, while completing extensive scientific literature reviews and publications. I also participated in Oceana's campaigns to establish critical habitat for endangered Pacific leatherback sea turtles under the Endangered Species Act, prevent reductions in the Pacific Leatherback Conservation Areas, implement the Pacific Loggerhead Conservation Area, establish approaches for assessing and reducing bycatch through the California Fish and Game Commission, and implement and maintain emergency regulations to protect sperm whales in the California drift gillnet fishery.

6. In my current capacity as California Campaign Director and Senior Scientist, I lead a team of scientists, lawyers, policy analysts, communications specialists, and administrative staff to achieve in-the-water protections for the marine ecosystems off Washington, Oregon, and California. I analyze stock assessments and simulation models for marine mammal and sea turtle

species and other fisheries managed by the National Marine Fisheries Service ("NMFS") and the State of California. I served as a Steering Committee member for California's Herring Fishery Management Plan, and have been a member of the California Dungeness Crab Fishing Gear Working Group tasked with providing recommendations to state and federal decision makers on how to reduce whale and sea turtle entanglements in the Dungeness crab fishery. In my capacity at Oceana, I am familiar with all aspects of Oceana's activities and organizational interests related to the federal management of marine mammal and sea turtle species off the U.S. West Coast by NMFS and the Pacific Fishery Management Council ("Council").

I. THE RULE AT ISSUE IN THIS CASE IS GERMANE TO OCEANA'S INTERESTS

7. Oceana is an international non-profit organization headquartered in Washington, D.C., with several regional offices, including one in Monterey, California and one in Portland, Oregon. Using science, law, and public advocacy, Oceana seeks to make our oceans as rich, healthy, and abundant as they once were. Oceana has been actively involved in protecting ocean resources off the coasts of California, Oregon, and Washington since 2003, including several wildlife protection and habitat efforts and extensive sustainable fisheries campaigns.

8. Oceana's regional wildlife and habitat protection efforts include protecting fin, humpback, and sperm whales, leatherback, loggerhead, olive ridley, and green sea turtles, short-finned pilot whales, and bottlenose dolphins in California's swordfish and thresher shark drift gillnet fishery. Oceana has also successfully worked to implement extensive fishery closures that limit the spatial extent and impacts of bottom trawl fisheries on seafloor habitats while maintaining the bottom trawl industries. These efforts are intended to help achieve our goal of protecting the biodiversity, productivity, and health of the California Current Large Marine Ecosystem, while promoting sustainable commercial and recreational fisheries.

9. Oceana's sustainable fishing campaigns are focused around three main themes: protecting habitats, reducing bycatch, and achieving appropriate catch limits that maintain the role of marine species in the ecosystem. Oceana's California drift gillnet campaign seeks to reduce that fishery's overall high bycatch caused from the use of mile-long drift gillnets used to capture swordfish and thresher sharks. Our primary goal is to ensure that fishery management directly and explicitly accounts for a much wider suite of ecological, social, and economic interests, as required under the law, rather than simply the industry targeting such fish.

10. Oceana regularly participates in Council meetings, including its management teams and advisory bodies. I have attended and participated in Council meetings since 2003. I estimate that in that time I have attended more than 50 Council meetings.

11. Oceana has been fighting since 2006 to protect marine life from the perils of dangerous drift gillnets. Among the estimated 1,460 protected marine species captured in drift gillnets between 2001 and 2015 in the California drift gillnet fishery were large whales, sea turtles, dolphins, seabirds, seals, and sea lions.[1] Several of these species are listed as threatened or endangered under the Endangered Species Act. During this time the fishery has also captured tens of thousands of non-target fish including rare sharks, rays, marlins, and ocean sunfish. Many of these animals are tossed back dead or dying.

12. Oceana raised concerns about bycatch from drift gillnets at several Council meetings since 2006. Oceana advocated in support of hard caps in the California drift gillnet fishery beginning in 2014 when the Council first considered the hard cap regime that led to this

[1] Carretta, J.V., J.E. Moore, and K.A. Forney. 2017. Regression tree and ratio estimates of marine mammal, sea turtle, and seabird bycatch in the California drift gillnet fishery: 1990-2015. NOAA Technical Memorandum, NOAA-TM-NMFS-SWFSC-568. p. 83.

Rule. In 2015 alone, Oceana and its members submitted more than 58,097 comments to the Council and NMFS in support of stronger hard caps. After NMFS attempted to withdraw the proposed hard caps rule in June 2017, Oceana filed litigation against NMFS in federal district court in California, which ultimately was successful in forcing NMFS to promulgate the proposed rule.

13. Oceana has invested and will continue to invest substantial resources in ongoing research and public education regarding the perils of the California drift gillnet fishery's use of their large mesh drift gillnet gear. I co-authored an Oceana report in November 2015 titled "Providing Domestically Caught U.S. West Coast Swordfish: How to Achieve Environmental Sustainability and Economic Profitability," which compared bycatch rates of fishing gears, including drift gillnets, used in North America and Hawaii to catch swordfish. Oceana maintains an active website, publishes a quarterly newsletter, and issues periodic reports and scientific papers through which we highlight these issues and concerns. These resources have been, and will be, used to educate fishery managers and the public about the devastation to marine life caused by these nets and the cleaner gears that can selectively target swordfish such as deep-set buoy gear.

II. THE REGULATIONS AT ISSUE IN THIS CASE BENEFIT OCEANA MEMBERS, INCLUDING ME, BY PROTECTING THE RESOURCE AND STRIKING THE HARD CAP RULE WOULD HARM MY INTERESTS BY TAKING PROTECTION AWAY FROM VULNERABLE MARINE MAMMALS AND SEA TURTLES.

14. Oceana has more than 1.3 million members worldwide, including more than 210,000 members who live in California, Oregon, and Washington; 157,031 members in California alone. Oceana and its members use and enjoy the California Current Large Marine Ecosystem and surrounding area for various purposes, including commercial, recreational, and subsistence fishing; wildlife viewing; bird watching; research; photography; recreation; and solitude. Oceana has hosted wildlife watching cruises on Monterey Bay with members and supporters. Oceana members and staff, including me, participate in scuba diving activities off

Monterey Bay, the Channel Islands, and La Jolla. Oceana members and staff, including me, have conducted marine research in waters off the San Juan Islands, WA; Cape Arago, OR; Newport, OR; the Channel Islands and greater Southern California Bight, and Monterey Bay, CA. Oceana members and staff, including me, participate in still and video photography, on the surface, underwater and from above using drones, within the California Current Large Marine Ecosystem to document marine wildlife and habitats. These activities depend on a thriving ecosystem and habitats able to support healthy populations of fish, birds, sea turtles, and marine mammals, including non-targeted species that are caught by the California drift gillnet fishery and that are the subject of the hard caps rule. Oceana's members and staff, including me, will continue to use, research, and enjoy these areas in the same manner in the future, provided that regulatory efforts like the hard caps rule help to preserve them.

15. Oceana's members in California, Oregon, and Washington include conservationists, commercial and recreational fishermen, subsistence harvesters, scientists, non-consumptive recreational ocean users, wildlife viewers, restaurant owners, and many seafood consumers whose interests are being injured by the use of drift gillnets targeting thresher sharks and swordfish.

16. Oceana and its members' interests (including my interests) are protected by the rule at issue in this case which places strict limits on the bycatch of marine mammals and other species in the California drift gillnet fishery. If these regulations were no longer in place, important protected species that I regularly study would be at risk of further population depletion. According to observer data collected since 2001, on average, over half of the total catch by the California drift gillnet fishery (individual animals, not weight) is tossed overboard. The nets inflict such devastation to marine life that they have earned the name, "Walls of Death."

17. Personally, I have a strong particular interest in the protection of whales, sea turtles, dolphins and the ecological integrity of the California Current Ecosystem. I grew up swimming, kayaking, surfing, bodyboarding, whale watching, sailing, fishing, snorkeling, scuba diving, and bodysurfing in ocean waters off Southern and Central California. My direct observation of large whales and other marine life was inspirational and transformative, giving me a profound spiritual connection to the ocean. I will never forget the pods of sea lions I observed foraging on bait balls of sardines off La Jolla cove, humpback whales I observed lunge feeding on anchovies in Monterey Bay, or the super-pod of Risso's dolphins I saw migrating along the shore off the beach in Carlsbad in search of market squid. These childhood encounters with the California Current Large Marine Ecosystem instilled in me a strong respect for nature, which has shaped my education and career path as well as my lifestyle choices, eating habits, and philosophy.

18. My early experiences with the ocean sparked my interest in, and passion for, a scientific and professional career in marine ecology. I first researched ecosystem concerns as an undergraduate at the University of California, Santa Cruz, where I earned Highest Honors for my double major in Biology and Environmental Studies in 2001. After completing my undergraduate degree, I worked for the Exxon Valdez Oil Spill Trustee Council, studying and addressing long-term impacts of that infamous oil spill on herring and other forage species populations as well as birds and mammals. I subsequently became Fishery Conservation Coordinator at Oceana in Juneau, Alaska, where I worked for a couple of years before deciding to pursue a Ph.D. in Stanford University's Interdisciplinary Program in Environment and Resources. As a teaching assistant while in graduate school, I took graduate and undergraduate students to the ocean to teach about marine life, food webs, and conservation.

19. I have a deep interest in direct research and analysis of the California Current Large Marine Ecosystem, which I have pursued throughout my education and career. I learned to identify marine species and conduct scientific scuba diving research as a graduate student. For my doctoral dissertation research, I designed and executed a pilot fishery observer program to document bycatch in small-scale fisheries and examine fishing fleet dynamics and economics. I have completed and published scientific studies, including bioeconomic fishery models. I have also attended multiple scientific research cruises, including experience in a research submersible documenting fish associations with deep sea corals, and as mentioned above, I served on the Steering Committee for the Pacific Herring Fishery Management Plan recently adopted by the California Fish and Game Commission and implemented by the California Department of Fish and Wildlife.

20. In my recent work at Oceana, I have served as the Expedition Leader for three Oceana at-sea scientific research expeditions using Remote Operated Vehicles to characterize ecosystems off California, Oregon, and Washington. I also was a Principal Investigator on a 2011 collaborative research study published by Oceana and the Monterey Bay National Marine Sanctuary and commercial California halibut fishermen in Monterey Bay, "A Profile of the Hook and Line Fishery for California Halibut in Monterey, California." This study examined fishery economics, catch information, and fisherman behavior, and included an assessment of catch and use of forage species as bait. I also serve on the California Dungeness Crab Fishing Gear Working Group tasked with finding solutions to prevent whale entanglements in fishing gear, which regularly evaluates forage species abundance and distribution off California under its Risk Assessment and Mitigation Program. As part of my current work at Oceana, I participate in aerial and vessel-based surveys of humpback whales and leatherback sea turtles, and have participated

in tagging research on leatherback sea turtles. I plan to continue conducting these activities in the future.

21. I consider ocean-related experiences to be of primary importance to my quality of life. It is important to me to be able to share these experiences with my family, including my wife and young children. My wife and I were married on Carmel Beach in California, with seabirds and dolphins directly offshore. We regularly go kayaking in Elkhorn Slough (Moss Landing, CA) and off Cannery Row (Monterey, CA), most recently in the summer of 2020, where diving seabirds and abundant harbor seals are the most memorable part of the experience. I regularly take my children to local beaches on a weekly basis and on boats for the purpose of wildlife viewing, particularly seabirds, pinnipeds, dolphins, ocean sunfish, and whales. Last summer, I visited beaches in the San Diego area with my family and took both of my children stand-up paddle boarding to observe ocean wildlife in Monterey Harbor. I plan to take my children, friends, and family to the ocean off the coast of California regularly for the rest of my life, to show them the magnificence of our oceans and wildlife. My family has planned multiple trips to Monterey Bay, Marina State Beach, Carmel Beach, and other coastal locations on the U.S. West Coast over the next few years. As just one example, I plan to take my family kayaking and/or paddleboarding in Monterey Bay at least once per month from May 2020 to September 2020 to view whales, dolphins, porpoises, harbor seals, seabirds, sea lions and other wildlife directly dependent on healthy anchovy populations. My time on the water would not be the same without the ability to observe and enjoy these magnificent animals. In 2019, I was fortunate to travel to the gray whale nursery in Laguna San Ignacio off Baja, Mexico. The whales I viewed in the Baja Lagoons are the very same whales that migrate north along the U.S. West Coast and are at risk of becoming

entangled in large mesh drift gillnets and other fishing gear deployed by the California drift gillnet fishery.

22. My ability to continue conducting research and enjoying the California Current Large Marine Ecosystem with my friends and family is directly impacted by the entanglement of whales and sea turtles in large mesh drift gillnets, a danger likely to occur more frequently if the hard caps rule Oceana fought to enforce is now invalidated. Monterey Bay is one of the few places on earth with year-round whale watching opportunities, as the seasonal gray whale migrations are supplemented by foraging behaviors of humpback, blue whales, fin whales, sei whales, and several others. During a kayak trip from Moss Landing in August 2017, and more recently from a fishing vessel in September 2019, I witnessed humpback whales, California sea lions, and several species experiences I will never forget. Encounters like these are possible because our laws ensure we prioritize the protection of these species, including by placing hard caps on the number of these species that can be killed or injured by drift gillnet fishing. The management of the drift gillnet fishery, including strict limits on the bycatch of vulnerable marine mammals and sea turtles under the "Federal Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species," directly impacts my ongoing interests in the health and vitality of the California Current Ecosystem. If the Plaintiffs are successful in this case, and the hard cap rule is invalidated, my interests will be harmed by the removal of the reasonable limits on bycatch of non-targeted species that can be harmed by the indiscriminate use of drift gillnets in this region.

III. OCEANA'S MEMBERS, LIKE ME, RELY ON OCEANA TO REPRESENT OUR INTERESTS

23. Oceana and its members, including me, have an interest not just in the above-mentioned values of the protected species and the ecosystems and economies they support, but also an interest in NMFS's ability and duty to promulgate conservation and management measures

under the authority of the Magnuson-Stevens Fishery Conservation and Management Act. Challenges that undermine that authority and responsibility harm the interests of Oceana and its members.

24. Oceana's members and staff rely on Oceana to represent their interests in the conservation and management of marine resources and ecosystems off the coasts of California, Oregon and Washington, including large whale and sea turtles and the ecosystems and economies they support. More specifically, Oceana's staff and members, like me, work for and financially support the organization because we rely on its litigation to represent our interests in cases like this one. Where practical hurdles make it more difficult for individual members and staff to assert our personal interests directly in a case, like this one, we depend on the organization to represent our interests against challenges to a rule that directly benefits us.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 24th day of June, 2020.

Geoffrey Shester, PhD
Senior Scientist and California Campaign Director
Oceana

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS WILLIAMS; GARY BURKE; FRED HEPP; and JEFF HEPP, Plaintiffs, v. WILBUR ROSS, in his official capacity as Secretary of the U.S. Department of Commerce; and NATIONAL MARINE FISHERIES SERVICE, Defendants.	Case No. 1:20-cv-00667-TNM

[PROPOSED] ANSWER IN INTERVENTION

Defendant-Intervenor Oceana, Inc., through counsel, answers the Plaintiffs' Complaint for Declaratory and Injunctive Relief dated March 6, 2020, as follows. The numbered paragraphs below correspond to the numbered paragraphs in the complaint. Defendant-Intervenor denies each and every allegation in the complaint that is not specifically admitted, answered, or otherwise responded to in this Answer.

1. The allegations in the first sentence of Paragraph 1 consist of Plaintiffs' characterization of their case, to which no response is required. Defendant-Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in the second and third sentences of Paragraph 1, and therefore deny the allegations. In response to the fourth sentence, Defendant-Intervenor lacks sufficient knowledge to admit or deny the allegations pertaining to Plaintiffs' efforts, and therefore deny. Defendant-Intervenor denies the remaining allegations in the fourth sentence.

2. The allegations in the first, second, and third sentences of Paragraph 2 are Plaintiffs' characterization of the final rule *Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery*, 85 Fed. Reg. 7,246 (Feb. 7, 2020) ("Hard Caps Rule"). Defendant-Intervenor avers that the contents of the final rule are identified in the rule itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, they are denied. Defendant-Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in the fourth sentence, and therefore deny the allegations. Defendant-Intervenor deny the allegations in the fifth sentence.

3. The allegations in Paragraph 3 are Plaintiffs' characterization of the provisions of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1851. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, they are denied.

4. Defendant-Intervenor denies the allegations in the first sentence of Paragraph 4. The allegations in the second sentence and the first clause of the third sentence are Plaintiffs' characterization of the Hard Caps Rule. Defendant-Intervenor avers that the contents of the final rule are identified in the rule itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, they are denied. Defendant-Intervenor denies the remaining allegations in the third sentence.

5. Defendant-Intervenor denies the allegations in the first sentence of Paragraph 5. The allegations in the second, third, and fourth sentences are Plaintiffs' characterization of the United States Constitution and the decision in *Buckley v. Valeo*, 424 U.S. 1 (1979). Defendant-Intervenor avers that the contents of those documents are identified in the documents themselves;

to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, they are denied. Plaintiffs' remaining allegations are conclusions of law, which require no response; to the extent a response is required, the allegations are denied.

6. The allegations in the first and second sentences of Paragraph 6 are Plaintiffs' characterization of provisions of the MSA. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, they are denied. The allegations in the third and fourth sentence are Plaintiffs' characterization of their case to which no response is required; to the extent a response is required, Defendant-Intervenor denies the allegations. With respect to the fifth sentence, Defendant-Intervenor admits the Hard Caps Rule was proposed by the Pacific Fishery Management Council. The allegations in the sixth through eighth sentences are Plaintiff's legal conclusions and characterization of their case, to which no response is required; to the extent a response is required, Defendant-Intervenor denies the allegations.

7. The allegations in the first, third, and fourth sentences of Paragraph 7 are Plaintiffs' characterization of their case to which no response is required; to the extent a response is required, dent. The allegations in the second sentence are Plaintiff's legal conclusions and characterization of the United States Constitution to which no response is required; to the extent a response is required, Defendant-Intervenor denies the allegations. The allegations in the fifth and sixth sentences are Plaintiffs' characterization of *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, they are denied.

8. The allegations in Paragraph 8 state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

9. The allegations in Paragraph 9 state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

10. The allegations in the first clause in Paragraph 10 state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations. Defendant-Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in the second clause and therefore denies the allegations.

11. Defendant-Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 11, and therefore denies the allegations.

12. Defendant-Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 12, and therefore denies the allegations.

13. Defendant-Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 13, and therefore denies the allegations.

14. Defendant-Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 14, and therefore denies the allegations.

15. The allegations in the first and third sentences of Paragraph 15 are Plaintiffs' characterization of their case to which no response is required; to the extent a response is required, Defendant-Intervenor denies the allegations. The allegations in the second sentence are Plaintiffs' characterization of the June 2017 Final Environmental Assessment evaluating the Hard Caps Rule. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, they are denied.

16. Defendant-Intervenor admits that Wilbur Ross is the Secretary of Commerce. The remaining allegations in Paragraph 16 consist of Plaintiffs' characterization of their case and legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

17. Defendant-Intervenor admits that the National Marine Fisheries Service is an office within the National Oceanic and Atmospheric Administration, which is an agency within the Department of Commerce. The allegations in the second sentence of Paragraph 17 state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

18. The allegations in Paragraph 18 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1851. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

19. The allegations in Paragraph 19 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. §§ 1852, 1854. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

20. The allegations in Paragraph 20 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. §§ 1853, 1854. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

21. The allegations in Paragraph 21 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1854. Defendant-Intervenor avers that the contents of the MSA are identified

in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

22. The allegations in Paragraph 22 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1851. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

23. The allegations in Paragraph 23 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1851. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

24. The allegations in Paragraph 24 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1851. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

25. The allegations in Paragraph 25 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

26. The allegations in Paragraph 26 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

27. The allegations in Paragraph 27 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

28. The allegations in Paragraph 28 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

29. The allegations in Paragraph 29 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

30. The allegations in Paragraph 30 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

31. The allegations in Paragraph 31 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852, and the regulation set forth at 50 C.F.R. § 600.215. Defendant-Intervenor avers that the contents of the MSA and regulations are identified in the statute and regulations themselves; to the extent the allegations are inconsistent with the plain language, meaning, or context of the statute and regulations, Defendant-Intervenor denies the allegations.

32. The allegations in Paragraph 32 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of the MSA are identified

in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

33. The allegations in Paragraph 33 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

34. The allegations in Paragraph 34 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of the MSA are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

35. The allegations in Paragraph 35 are Plaintiffs' characterization of provisions of the United States Constitution. Defendant-Intervenor avers that the contents of the U.S. Constitution are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

36. The allegations in Paragraph 36 are Plaintiffs' characterization of the legal decisions of *Lucia v. SEC*, 138 S. Ct. 2044 (2018) and *Buckley v. Valeo*, 424 U.S. 1 (1976), documents that speak for themselves; to the extent the allegations are inconsistent with the plain language, meaning, or context of those documents, Defendant-Intervenor denies the allegations.

37. The allegations in Paragraph 37 are Plaintiffs' characterization of *Buckley v. Valeo*, 424 U.S. 1 (1976). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

38. The allegations in Paragraph 38 are Plaintiffs' characterization of *Freytag v. Comm'r*, 501 U.S. 868 (1997). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

39. The allegations in Paragraph 39 are Plaintiffs' characterization of *Edmond v. United States*, 520 U.S. 651 (1997), Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

40. The allegations in Paragraph 40 are Plaintiffs' characterization of *Edmond v. United States*, 520 U.S. 651 (1997). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

41. The allegations in Paragraph 41 are Plaintiffs' characterization of the United States Constitution. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

42. The allegations in Paragraph 42 are Plaintiffs' characterization of *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

43. The allegations in Paragraph 43 are Plaintiffs' characterization of *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Defendant-Intervenor avers that

the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

44. In response to the allegations in Paragraph 44, Defendant-Intervenor admits that the swordfish (Xiphias gladius) is a large migratory fish found throughout the Pacific, Atlantic, and Indian Oceans and has been the subject of a commercial fishery off of the west coast of the United States. Defendant-Intervenor denies the remaining allegations as Plaintiffs' characterization of their case.

45. Defendant-Intervenor admits the allegations in Paragraph 45.

46. Defendant-Intervenor denies the allegations in the first sentence of Paragraph 46. Defendant-Intervenor lacks knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 46 and therefore denies them.

47. Defendant-Intervenor admits the allegations in the first and second sentences of Paragraph 47. Defendant-Intervenor denies the allegations in the third sentence as vague and ambiguous. The allegations in the fourth and fifth sentences are Plaintiffs' characterization of the 2011 National Bycatch Report. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations. The allegations in the sixth sentence are Plaintiffs' characterization of a FAQ document prepared by Federal Defendant National Marine Fisheries Service. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

48. The allegations in Paragraph 48 are Plaintiffs' characterization of three Federal Register notices and one website. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

49. Defendant-Intervenor admits the allegations in the first sentence of Paragraph 49. The allegations in the second sentence of Paragraph 49 are Plaintiffs' characterization of a Council proposal on hard caps. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

50. The allegations in the first sentence of Paragraph 50 are Plaintiffs' characterization of three letters dated December 27, 2016, May 8, 2015, and June 26, 2015, as well as two sets of comments dated from September 2015 and November 2015. Defendant-Intervenor avers that the contents of those documents are identified in the documents themselves; to the extent the allegations are inconsistent with the plain language, meaning, or context of those documents, Defendant-Intervenor denies the allegations. The allegations in the second sentence are Plaintiffs' characterization of their complaint, to which no response is required.

51. The allegations in Paragraph 51 are Plaintiffs' characterization of the September 2015 Council Meeting Record. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

52. The allegations in Paragraph 52 are Plaintiffs' characterization of the proposed rule published at 81 Fed. Reg. 70,660 (Oct. 13, 2016). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent

with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

53. The allegations in Paragraph 53 are Plaintiffs' characterization of the proposed rule published at 81 Fed. Reg. 70,660 (Oct. 13, 2016). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

54. The allegations in Paragraph 54 are Plaintiffs' characterization of the final Hard Caps Rule, 85 Fed. Reg. at 7,247, and the June 2017 Final Environmental Assessment evaluating the Hard Caps Rule. Defendant-Intervenor avers that the contents of those documents are identified in the documents themselves; to the extent the allegations are inconsistent with the plain language, meaning, or context of those documents, Defendant-Intervenor denies the allegations.

55. The allegations in Paragraph 55 are Plaintiffs' characterization of the document published at 82 Fed. Reg. 26,902 (June 12, 2017). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

56. Defendant-Intervenor admits that the withdrawal of the proposed hard caps rule was challenged in the United States District Court for the Central District of California. The remaining allegations in Paragraph 56 are Plaintiffs' characterization of *Oceana, Inc. v. Ross*, No. 17-cv-5146, Docket No. 102 (C.D. Cal. Oct. 24, 2018). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are

inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

57. The allegations in Paragraph 57 are Plaintiffs' characterization of *Oceana, Inc. v. Ross*, No. 17-cv-5146, Docket No. 131 (C.D. Cal. Jan. 8, 2020). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

58. The allegations in Paragraph 58 are Plaintiffs' characterization of the final Hard Caps Rule, 85 Fed. Reg. at 7,246. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

59. Defendant-Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in the first, second, third, and fourth sentences of Paragraph 59, and therefore denies. The allegations in the fifth sentence state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

60. The allegations in Paragraph 60 state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

61. The allegations in Paragraph 61 state legal conclusions to which no response is required. To the extent a response is required, deny.

62. The allegations in Paragraph 62 state legal conclusions to which no response is required. To the extent a response is required, deny.

63. Defendant-Intervenor incorporates by reference the responses in the paragraphs above.

64. The allegations in Paragraph 64 state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

65. The allegations in Paragraph 65 states legal conclusions to which no response is required, and are Plaintiffs' characterization of provisions of the MSA. Defendant-Intervenor avers that the contents of that statute are identified in the statute itself. To the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, and to the extent any response is required, Defendant-Intervenor denies the allegations.

66. The allegations in Paragraph 66 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1851. Defendant-Intervenor avers that the contents of that statute are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

67. The allegations in Paragraph 67 are Plaintiffs' characterization of the January 2020 Final Regulatory Impact Review and Final Regulatory Flexibility Analysis evaluating the Hard Caps Rule. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

68. The allegations in Paragraph 68 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1851. Defendant-Intervenor avers that the contents of that statute are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

69. The allegations in Paragraph 69 are Plaintiffs' characterization of certain comment letters identified in Paragraph 50. Defendant-Intervenor avers that the contents of those documents are identified in the documents themselves; to the extent the allegations are inconsistent with the

plain language, meaning, or context of those documents, Defendant-Intervenor denies the allegations.

70. Defendant-Intervenor denies the allegations in Paragraph 70.

71. The allegations in Paragraph 71 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1851. Defendant-Intervenor avers that the contents of that statute are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

72. The allegations in Paragraph 72 are Plaintiffs' characterization of the June 2017 Final Environmental Assessment evaluating the Hard Caps Rule. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

73. Defendant-Intervenor denies the allegations in Paragraph 73.

74. Defendant-Intervenor denies the allegations in Paragraph 74.

75. Defendant-Intervenor incorporates by reference the responses in the paragraphs above.

76. The allegations in Paragraph 76 consist of Plaintiffs' characterization of their case, to which no response is required; to the extent a response is required, Defendant-Intervenor denies the allegations.

77. The allegations in the first sentence of Paragraph 77 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of that statute are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations. The

allegations in the second sentence state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

78. The allegations in the first sentence of Paragraph 78 are Plaintiffs' characterization of their case to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations. The remaining allegations are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. §§ 1852, 1854. Defendant-Intervenor avers that the contents of that statute are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

79. The allegations in the first clause of the first sentence of Paragraph 79 are Plaintiff's characterization of their case to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations. The allegations in the second clause of the first sentence are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of that statute are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations. The allegations in the second sentence state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

80. The allegations in Paragraph 80 state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

81. The allegations in Paragraph 81 are Plaintiffs' characterization of *Edmond v. United States*, 520 U.S. 651 (1997). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

82. The allegations in Paragraph 82 are Plaintiffs' characterization of provisions of the United States Constitution. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

83. The allegations in the first sentence of Paragraph 83 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of that statute are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, they are denied. The allegations in the second sentence state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

84. The allegations in the first sentence of Paragraph 83 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of that statute are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations. The allegations in the second sentence state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

85. The allegations in the first, second, and third sentences of Paragraph 85 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of that statute are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations. Defendant-Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in the fourth sentence and therefore denies. The allegations in the fifth sentence are Plaintiffs' characterization of *Myers v. United States*, 272 U.S. 52 (1926) and *United*

States v. Espy, 145 F.3d 1369 (D.C. Cir. 1998). Defendant-Intervenor avers that the contents of those document are identified in the documents themselves; to the extent the allegations are inconsistent with the plain language, meaning, or context of those documents, Defendant-Intervenor denies the allegations.

86. The allegations in the first sentence of Paragraph 86 states a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations. The allegations in the second sentence are Plaintiffs' characterization of the National Oceanic & Atmospheric Administration's Organizational Handbook (2015). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

87. The allegations in Paragraph 87 state a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

88. Defendant-Intervenor incorporates by reference the responses in the paragraphs above.

89. The allegations Paragraph 89 state a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

90. The allegations in Paragraph 90 are Plaintiffs' characterization of the United States Constitution. Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

91. The allegations in Paragraph 91 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852, and state legal conclusions. Defendant-Intervenor avers that the contents

of that statute are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations.

92. The allegations in Paragraph 92 are Plaintiffs' characterization of provisions of the MSA, 16 U.S.C. § 1852. Defendant-Intervenor avers that the contents of that statute are identified in the statute itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that statute, Defendant-Intervenor denies the allegations.

93. The allegations in the first, second, and third sentences of Paragraph 93 consist of Plaintiffs' characterization of their case to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations. The allegations in the fourth sentence state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

94. The allegations in the first sentence of Paragraph 94 consist of Plaintiffs' characterization of their case to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations. The allegations in the second sentence are Plaintiffs' characterization of *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Defendant-Intervenor avers that the contents of that document are identified in the document itself; to the extent the allegations are inconsistent with the plain language, meaning, or context of that document, Defendant-Intervenor denies the allegations. The allegations in the third, fourth and fifth sentences state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

95. The allegations in Paragraph 95 state legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenor denies the allegations.

*****

The remaining allegations consist of Plaintiffs' Prayer for Relief; in response, Defendant-Intervenor denies that Plaintiffs are entitled to the relief requested or any relief at all.

AFFIRMATIVE DEFENSES

The final rule, which Plaintiffs challenge, is consistent with the MSA and a prior Court order. Plaintiffs fail to state a claim upon which relief can be granted.

Dated: June 26, 2020

Respectfully submitted,

/s/ Lide E. Paterno

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lide E. Paterno
Lide E. Paterno

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS WILLIAMS; GARY BURKE; FRED HEPP; and JEFF HEPP, Plaintiffs, v. WILBUR ROSS, in his official capacity as Secretary of the U.S. Department of Commerce; and NATIONAL MARINE FISHERIES SERVICE, Defendants.	Case No. 1:20-cv-00667-TNM

[PROPOSED] ORDER GRANTING MOTION TO INTERVENE

This matter came before the Court on Oceana, Inc.'s Unopposed Motion to Intervene as Defendant in the above-captioned action. Having reviewed the motion and supporting documents, and having considered the absence of any opposition thereto, the Court has determined that the motion should be, and hereby is, GRANTED. The Proposed Answer in Intervention, which accompanied the motion to intervene, shall be deemed to have been filed and served by mail on the date of this Order.

Dated: _____, 2020

_____
The Hon. Trevor N. McFadden
United States District Court
For The District of Columbia

NAMES OF PERSONS TO BE SERVED

Pursuant to LCvR7(k), the following is a list of the names and addresses of all attorneys entitled to be notified of the entry of this Proposed Order:

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June 26, 2020

Respectfully submitted,

/s/ Lide E. Paterno

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lide E. Paterno
Lide E. Paterno