

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ALFA INTERNATIONAL SEAFOOD, INC. <i>et al.</i> ,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Case No. 1:17-cv-31-APM
)	
WILBUR L. ROSS, JR. <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
_____)	

**BRIEF OF AMICI CURIAE OCEANA, NATURAL RESOURCES DEFENSE COUNCIL,
AND CENTER FOR BIOLOGICAL DIVERSITY IN SUPPORT OF DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to LCvR 7(o)(5), LCvR 7.1, Federal Rule of Civil Procedure 7.1, and Federal Rule of Appellate Procedure 29, Amici Curiae Oceana, the Natural Resources Defense Council, and the Center for Biological Diversity state that they are nonprofit corporations with no parent corporations, subsidiaries, or affiliates that have outstanding stock shares or other securities in the hands of the public. *See also* Corp. Disc. Statement 1, ECF No. 24-8.

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INTERESTS OF AMICI CURIAE AND SOURCE OF AUTHORITY TO FILE

Oceana, the Natural Resources Defense Council, and the Center for Biological Diversity (Conservation Groups) are nonprofit environmental organizations that advocate on behalf of their members for policies and practices to ensure the sustainability of ocean ecosystems, including through sound management of fisheries around the world.¹ Conservation Groups have decades of experience participating in rulemakings and litigation under the statute at issue in this case—the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Conservation Groups also have been at the forefront of efforts to prevent illegal, unreported, and unregulated fishing as well as seafood fraud. Indeed, Conservation Groups participated in all stages of the rulemaking processes that resulted in the Seafood Traceability Rule, 50 C.F.R. § 300.324, that Plaintiffs challenge in this action.

The Seafood Traceability Rule is a critical first step in addressing the issues of illegal fishing and seafood fraud. The Rule’s data collection and reporting requirements will reduce the flow of illegal and fraudulent seafood into the large and lucrative U.S. market, protecting both domestic consumers as well as law-abiding fishermen. The Rule will also, in turn, deter illegal fishing and seafood fraud in the first instance, reducing the environmentally devastating effects related to those practices. Conservation Groups strongly support the Seafood Traceability Rule and accordingly submit this Amici Curiae Brief in support of Defendants’ motions for summary judgment and in defense of the Seafood Traceability Rule.²

¹ No counsel for a party authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E); LCvR 7(o)(5).

² Conservation Groups have authority to file this brief by order of the Court. *See* May 9, 2017 Minute Order.

SUMMARY OF ARGUMENT

Illegal fishing and the related practice of seafood fraud pose a significant threat to the world's ocean ecosystems and undercut the livelihoods of law-abiding fishermen. The problems of illegal fishing and seafood fraud are exacerbated by the complexity of global seafood supply chains, which allow numerous opportunities for illegally caught or fraudulently mislabeled fish to be combined with legal seafood. Recognizing the United States' significant national interest in combatting illegal fishing and its related ills, Congress empowered the National Marine Fisheries Service (NMFS) to issue regulations as may be necessary to prevent the import of illegally caught seafood into the United States. NMFS adopted the Seafood Traceability Rule at issue in this case as a critical component of a national effort to combat illegal fishing and seafood fraud. The Rule will help prevent the import of illegally caught seafood into the United States by requiring seafood importers to trace certain species of seafood they import back through the supply chain to the initial point of catch. Contrary to Plaintiffs' assertions, the Seafood Traceability Rule neither exceeds NMFS's authority nor impedes any other agency's role in regulating food labeling. Rather, the Seafood Traceability Rule fits squarely within NMFS's broad authority to issue regulations to prevent the import of illegally caught fish into the United States. The Court should therefore uphold the Seafood Traceability Rule.

ARGUMENT

I. Illegal fishing and seafood fraud plague our oceans

A. Illegal fishing and seafood fraud pose a substantial threat to the environment, the livelihoods of law-abiding fishermen, and public health

Through the MSA and other statutes, the United States plays a leading role in sustainable fisheries management and stewardship of the ocean. *See, e.g.*, 79 Fed. Reg. 75,536, 75,537 (Dec.

18, 2014) (AR02665).³ But the United States' management of its domestic fish populations is a small piece of the ocean conservation puzzle: over 90% of seafood consumed domestically is imported. AR44987; AR06934. Byzantine and often-undocumented global seafood supply chains allow illegally caught as well as mislabeled seafood to enter the United States, thereby undermining conservation measures and creating wide-reaching economic, public health, and human rights harms.

Illegal, unreported, and unregulated fishing and its close counterpart, seafood fraud, are a scourge in our oceans. "Illegal" fishing refers to fishing that does not comply with national, regional, or global fisheries conservation and management obligations. AR13102. "Unreported" fishing refers to catch that is not reported or is misreported to relevant authorities. *Id.* And "unregulated" fishing occurs in areas or for fish populations where there are no applicable conservation measures and the fishing is conducted in a manner inconsistent with the responsibility under international law to conserve marine resources.⁴ *Id.* Seafood fraud refers to misrepresenting the quality, quantity, or origin of seafood, or passing it off as a different species (species substitution). *Id.* Seafood fraud overlaps with illegal fishing, as it often results from efforts to conceal illegal fishing. AR13103.

Illegal fishing and seafood fraud are significant global problems. Up to one-third of the world's catch is illegal, unreported, or unregulated, and illegal fishing has been documented at significant levels in over 85% of major ocean areas. AR02713–14. This global problem has domestic ramifications: a 2014 study estimated that between 20% and 32% of wild-caught

³ In this brief, citations to the Administrative Record are provided as "AR" followed by the five-digit Bates number.

⁴ Unless otherwise noted, this brief uses the term "illegal fishing" to refer collectively to illegal, unreported, and unregulated fishing as defined at AR13102.

seafood imports in the United States, valued between \$1.3 and \$2.1 billion annually, were caught illegally. AR44989; AR06934–35. Seafood fraud is also prevalent and occurs during all stages of the seafood supply chain, including prior to import. *See* AR06932; AR13103. A comprehensive 2014 study of seafood in the United States found over 50 types of seafood mislabeled and over 150 species substituted and marketed as another species. AR02707. On average, mislabeling occurred in 22% of tested samples. AR02456–57. But for certain species, consumers were more likely to purchase a mislabeled product than a properly labeled one. *See* AR02486–87, 02493. Mislabeled is not, however, limited to retail sales: a U.S. Food and Drug Administration (FDA) study found that 15% of wholesale and imported seafood lots were incorrectly labeled.⁵

Illegal fishing and seafood fraud wreak havoc on the marine environment and are key drivers in the global overfishing crisis. “By circumventing conservation and management measures and engaging in fraudulent practices, entities engaging in [illegal] fishing and seafood fraud undermine the sustainability of U.S. and global fish stocks and negatively impact general ecosystem health.” AR13101. Illegal fishing operations often ignore catch limits and thus overfish and drive down fish populations to unhealthy levels. Their illicit and undocumented activities distort the information available on fish populations, and make it more difficult for governments to make effective fishery management decisions. AR06538; AR13101–02. Overfishing also injures other wildlife by harming the marine species that depend on these fish for food.

Illegal fishing harms marine ecosystems in other ways as well. Many illegal fishing operations violate laws requiring the use of certain gear or practices to reduce destruction of

⁵ U.S. Food & Drug Admin., *Sampling for Seafood Species Labeling in Wholesale and Imported Seafood 2* (Apr. 2012-Sept. 2013), *available at* <https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Seafood/UCM419983.pdf>.

marine habitats or minimize the often-deadly bycatch of non-target species (such as sea turtles and dolphins). AR13102; *see also* AR01367. The U.S. Marine Mammal Commission concluded that “a direct and substantial link exists between [illegal] fishing and marine mammal bycatch.” AR02670. And one study has found that illegal fishing for toothfish killed more than thirty times as many seabirds as legal fishing. AR14535. Illegal fishing and seafood fraud also thwart conservation measures and protections for vulnerable and endangered species. Indeed, some illegal fishing practices go so far as to directly target marine mammals. For instance, Peruvian longline fisheries harpoon dolphins to use as bait for other fish. AR00293. In addition, endangered and vulnerable species have been substituted and sold as more sustainable species. AR02458–59.

Illegal fishing and seafood fraud also harm those in the seafood industry who obey the law and engage in sustainable practices. The estimated worldwide commercial losses caused by illegal fishing total between \$10 and \$23.5 billion per year. AR00001; *see also* AR44967. Illegal fishing and seafood fraud distort seafood markets in at least two ways: by suppressing prices in the short term and by depleting the long-term viability of fisheries. Illegal fishing suppresses prices by increasing the overall supply of seafood. *See* Mem. Supp. Interv.-Def. Cross-Mot. Summ. J. 2–3, ECF No. 57 (Interv.-Def. Br.). A World Wildlife Fund survey estimates that U.S. fishermen lose as much as \$1 billion in revenue annually *solely* due to the market-flooding effects of illegal fishing. AR14529, 14537. Illegal fishing operations further harm law-abiding fishermen by undercutting their prices. Illegal fishing operations—unhindered by compliance with conservation and other regulations—have lower operational costs than their law-abiding competitors. Seafood fraud only exacerbates the problem by artificially increasing the supply of certain species of fish. Unsurprisingly, seafood fraud is most prevalent in fish species that

command high market prices. *See* AR02707–10.

In the long run, illegal fishing also undermines the viability of the fishing industry by depleting fish populations beyond a sustainable yield. Countries that engage in sustainable fisheries management, like the United States, must account for illegal fishing in their fish population estimates. This leads to lower catch quotas, and thus lower profits, available to legal fishing operations. AR14535. The economic effects of illegal fishing and seafood fraud are particularly insidious because they create a negative feedback loop that provides financial incentives for additional illegal fishing to the detriment of both law-abiding fishermen and countries that properly manage fishing practices within their territorial waters.

Illegal fishing and seafood fraud are not only environmentally and economically unsound, but they also endanger the health of seafood consumers in the United States. When importers or other parties in the supply chain substitute one species of fish with another, they often use fish species associated with health risks, such as scombrototoxin poisoning, parasites, toxins, and aquaculture drugs. AR04784–85; *see also* 80 Fed. Reg. 66,867, 66,869 (Oct. 30, 2015) (AR04466). Substituted fish species also can contain higher levels of mercury than the species they are being sold as. In fact, some substitutes, such as tilefish and king mackerel, are on the federal government’s lists of foods that women who may become pregnant, pregnant women, nursing mothers, and young children should avoid due to their high mercury content. AR02504. In some instances, the substituted species is one that the FDA has advised that humans *never* consume. A 2013 study found that 84% of “white tuna” sampled was in fact escolar, a species of fish the FDA has “advise[d] against the sale of . . . in intrastate/interstate commerce” because it contains a naturally occurring toxin, gempylotoxin, which can cause gastrointestinal problems. AR02639; AR02494.

Finally, illegal fishing has broader humanitarian implications. Boats that do not obey fishing laws are also more likely to ignore labor and safety laws. Illegal fishing is connected to organized crime, human trafficking, and slave labor. AR00770–73, 00810–12; AR02608. Capsizing during illegal fishing is common because owners of illegal fishing operations typically invest little in their vessels, to minimize losses if they are caught and their property is confiscated. AR02608. And illegal fishing takes a toll on fishing communities: in addition to the economic effects described above, illegal fishing has ripple effects in the wider economy by decreasing government tariff and landing tax revenues. AR14539.

B. Illegal fishing and seafood fraud flourish in labyrinthine seafood supply chains

Illegal fishing and seafood fraud are, in many respects, two sides of the same coin. Both are symptoms of the intense competition in global seafood markets and the continued crisis of overfishing that together provide financial incentives for bad actors to cheat. AR44995. And both are exacerbated by the complex and opaque supply chains that allow illegal and fraudulent seafood into the flow of legal seafood products. 80 Fed. Reg. at 66,873 (AR04470); AR44990–91. But they also overlap: seafood fraud can be used to “conceal” or “launder” illegally caught seafood and pass it off as a different, legal, and even more lucrative species. AR02458; AR13103; *see also* AR04375; AR44990–91.

Because illegal fishing and seafood fraud share many of the same root causes, attempts to address the problems run into many of the same roadblocks. Logistically, it is difficult to stop illegal fishing at its source because no nation has the resources to patrol large swaths of international waters. *See* AR13106. Detecting illegal fishing and seafood fraud solely at the point of entry is also difficult. Because most fish are processed at sea or soon after landing, they often cannot be identified at the species level without forensic laboratory analysis, and even forensic

analysis is unable to distinguish between illegally and legally caught fish. *Id.* Self-regulation, even by a few well-intentioned actors, cannot completely address the problem. Economic pressures incentivize seafood companies to secure cheap seafood supplies. AR44995. And the world's fishing fleet currently has more capacity than the sea can sustainably yield. AR02615. Coupled with low rates of enforcement and penalties, the current costs of illegal fishing to the perpetrators are low while the potential profits are high. AR02615–17.⁶

The labyrinthine nature of the seafood supply chain has allowed illegal fishing and seafood fraud to flourish in the shadows. Before reaching U.S. shores, seafood imports typically pass through several intermediaries. AR44991. For example, after a fish is caught, it is often sent to another country for processing (such as canning, filleting, packing, and drying). AR44991–92. Transshipments—the practice of transferring fish between vessels at sea—further complicate the supply chain. Large refrigerated cargo vessels often collect the catches from smaller fishing vessels to prepare and freeze the fish while they are being transported to port. AR00737. These intermediate steps help illegal fishing operations obscure their crimes by providing numerous opportunities for illegally and legally caught seafood to mix, and for species substitution to go undetected. AR44992; AR02620.

The complexity of seafood supply chains is best demonstrated by example. Take, for instance, light canned tuna, one of the most consumed seafood products in the United States. Perhaps all the fish in a can is from a single species of tuna that was caught legally, segregated from other species during transshipment and processing, and imported into the United States for canning. But some of the fish may have been illegally caught on the high seas of the Pacific or

⁶ See also Andrew Jacobs, *China's Appetite Pushes Fisheries to Brink*, N.Y. Times, Apr. 30, 2017, at A1, https://www.nytimes.com/2017/04/30/world/asia/chinas-appetite-pushes-fisheries-to-the-brink.html?_r=0.

Indian Oceans. AR07532; *see also* AR44993. From there, it may have been mixed with legally (and illegally) caught tuna during transshipment at sea, then shipped to Thailand or the Philippines for processing. AR07532; *see also* AR44993. And then, it may have been mixed with fish from additional catches during processing and shipment to the United States. *See* AR07531–32. By the time of import into the United States, there is no way to inspect the tuna to confirm whether it was legally caught.

Pacific cod also illustrates the many points in a supply chain where illegally and legally caught fish may be commingled. *See* AR05796–98. According to the Groundfish Forum, “Pacific cod comes from multiple legal sources in the U.S. and is exported to China for further processing before the value added product is re-imported back into the United States.” AR05799; *see also* AR05796–97. After a U.S. fisherman exports her legally caught cod for processing, the processor may mix these cod with other fish from other vessels during shipment to China or in storage. AR05797. Once in China, the cod may be processed, along with catch from multiple other locations, into frozen fish fillets, loin cuts, or tail pieces. *Id.* And before export back to the United States, these products may be traded between factories, and/or further processed into products like fish sticks or breaded filets. AR05797–98. At each step in this Pacific cod supply chain, “[f]inished products from a number of sources could be mixed into [the U.S. fisherman’s original] legally harvested fish, possibly including fish from an [illegal] source.” AR05798. The U.S. importer of these Chinese-processed cod products currently has no assurance that the product received is the original, legally caught U.S. cod, or even that it is “cod” at all.

Because the seafood supply chain provides many opportunities for bad actors to cheat the system, importers and government officials cannot know which—if any—of the above scenarios are true without documentation of how imported seafood was caught and the path it took to get

from catch to the U.S. border. And without knowing that information, importers and government officials cannot effectively prevent illegally caught and mislabeled seafood from entering U.S. markets. Illuminating the path between catch and import is therefore necessary to stopping illegal fishing and seafood fraud.

II. The Seafood Traceability Rule is a critical step toward addressing illegal fishing and seafood fraud

A. The Seafood Traceability Rule is a culmination of a multi-year, interagency effort to address illegal fishing and seafood fraud⁷

In 2014, President Obama issued a memorandum acknowledging that illegal fishing “undermine[s] the economic and environmental sustainability of fisheries and fish stocks, both in the United States and around the world,” and declaring that it was “in the national interest of the United States to promote a framework that supports sustainable fishing practices and combats seafood fraud and the sale of [illegal] fishing products.” AR00001. The President established an interagency Task Force to recommend a comprehensive plan “to combat [illegal] fishing and seafood fraud that emphasizes areas of greatest need.” AR00002. In doing so, the Task Force was charged with considering “a broad range of strategies, including implementation of existing programs, and, if appropriate, development of new, voluntary or other, programs for seafood tracking and traceability.” *Id.*

The Task Force’s final report recommended fifteen “concrete and specific actions to combat illegal . . . fishing and seafood fraud throughout the seafood supply chain.” AR13101. Among those recommended actions was creation of a traceability program requiring importers to track all seafood from the point of entry in U.S. commerce back to the point of catch. AR13134–

⁷ The administrative process leading to the issuance of the Seafood Traceability Rule is covered in more detail in Federal Defendants’ brief. *See* Mem. Supp. Fed. Defs.’ Cross-Mot. Summ. J. 6–9, ECF No. 56-1 (Fed. Defs.’ Br.).

35. The Task Force recommended that the traceability program first apply to “at-risk species”—those species at significant risk of illegal fishing or seafood fraud—before expanding to all imported seafood. *Id.* The Task Force concluded that such an “integrated program . . . would be a significant step forward in addressing [illegal] fishing and seafood fraud.” AR13134.

Following the Task Force’s direction, a Working Group led by the National Marine Fisheries Service (NMFS) developed a list of thirteen at-risk species and species groups to which the initial phase of the traceability program would apply. *See* 80 Fed. Reg. at 66,870–71 (AR04467–68). The Working Group applied a set of principles—including enforcement capability for the species, complexity of chain-of-custody for the species, and history of species substitution or mislabeling—to ensure this initial list targeted species of highest concern for illegal fishing and seafood fraud. *Id.* at 66,868–69 (AR04465–66). The at-risk list, finalized in October 2015, included many popular seafood species, such as Atlantic and Pacific cod, mahi-mahi (dolphinfish), shrimp, swordfish, and tuna. *Id.* at 66,870–71 (AR04467–68).⁸

NMFS then turned to developing a robust traceability program setting forth baseline permitting, recordkeeping, and reporting requirements for importers of seafood into the United States. After notice and comment, NMFS issued its final Seafood Traceability Rule in December 2016. *See* 81 Fed. Reg. 88,975 (Dec. 9, 2016) (AR06907); 81 Fed. Reg. 6210 (proposed Feb. 5, 2016) (AR04477).

B. The Seafood Traceability Rule addresses illegal fishing and seafood fraud by illuminating seafood supply chains long shrouded in darkness

The premise behind the Seafood Traceability Rule is simple: illegal fishing and seafood

⁸ Both the principles and the list of at-risk species were subject to public notice and comment before finalization. *See* 80 Fed. Reg. 45,955 (proposed Aug. 3, 2015) (AR03970); 80 Fed. Reg. 24,246 (Apr. 30, 2015) (AR02674).

fraud are so prevalent because bad actors can hide their misdeeds within the complex and often opaque supply chains from catch through aggregation, processing, and ultimately import. *See* AR13106; AR04490–91. The Seafood Traceability Rule cuts to the heart of this problem by requiring importers to trace the seafood they import into the United States back through the supply chain to the initial point of catch. 81 Fed. Reg. at 88,975 (AR06907). Transparency as to this basic information makes it more difficult for bad actors to slip their illegal and fraudulent seafood products into the flow of legal products and, ultimately, into American markets.

The Seafood Traceability Rule requires two things of seafood importers. First, they must track and report to NMFS certain information when they import seafood from at-risk species into the United States. This includes basic and essential information about how the seafood was caught—the who, what, where, when, how, and how much—as well as under what legal authority the catch occurred. 50 C.F.R. § 300.324(b)(1)–(3). Second, importers must keep records tracking their seafood from the point of entry back to the initial point of catch, including information about each custodian along the supply chain. *Id.* § 300.324(e). For all but two at-risk species groups, the Rule will go into effect January 1, 2018. 81 Fed. Reg. at 88,997 (AR06929).

The Seafood Traceability Rule is a “significant step forward in addressing [illegal] fishing and seafood fraud.” *Id.* at 88,977 (AR06909). The Rule “will help authorities verify that the fish or fish products [being imported] were lawfully acquired,” and “decrease the incidence of seafood fraud . . . by requiring retention of documentation so that the information reported (*e.g.*, regarding species and harvest location) can be verified.” *Id.* at 88,975 (AR06907). These new enforcement capabilities will in turn deter illegal fishing and seafood fraud by decreasing access to the lucrative U.S. market and thus pushing illegal and fraudulent seafood to “lower value markets.” 81 Fed. Reg. at 6218 (AR04485).

To be sure, the Rule is not a panacea for all illegal fishing and seafood fraud. But it need not be. The Rule is a critical part of the broader set of “inter-related and complementary” Task Force recommendations, AR13101; *see* 81 Fed. Reg. at 88,987 (AR06919), and is intended as only the first rendition of a comprehensive traceability program. While the traceability program under the Rule covers only a subset of seafood most “at risk” of illegal fishing or seafood fraud, 80 Fed. Reg. at 66,868 (AR04465), the program will eventually apply to all seafood imports, 81 Fed. Reg. at 88,976 (AR06908).

As the world’s second-largest seafood importer, the United States has substantial market power to address the incentives for illegal fishing and seafood fraud. AR44987. The United States accounts for around 14% of global seafood imports, and a significant percentage of those imports are the product of illegal fishing. AR44987, 44989. Indeed, a 2014 study estimated that between one-fifth and one-third of wild-caught seafood imports in the United States are illegally caught. AR44989. This estimate matches the estimated percentage of seafood that is the product of illegal fishing *worldwide*, demonstrating that existing U.S. laws and regulations do not significantly deter the import of illegal seafood. *Id.* The Rule, which for the first time will prevent the import into the United States of many types of seafood commonly subject to illegal fishing and seafood fraud without appropriate documentation of legality, marks a significant step toward ending this problem.

III. NMFS has authority to establish the recordkeeping and other requirements in the Seafood Traceability Rule

Through the MSA, Congress delegated broad authority to NMFS to promulgate regulations the agency deems necessary to conserve and manage fisheries. 16 U.S.C. § 1855(d); *Kramer v. Mosbacher*, 878 F.2d 134, 135 (4th Cir. 1989); *Ctr. for Biological Diversity v. Blank*, 933 F. Supp. 2d 125, 130 (D.D.C. 2013). More specifically, the MSA authorizes NMFS to issue

regulations necessary to enforce the Act’s prohibition on the commerce in fish caught through illegal fishing or in contravention of any other country’s laws. *See* 16 U.S.C. §§ 1857(1)(Q), 1861(a). Plaintiffs do not dispute that these provisions provide NMFS the necessary authority to issue the Seafood Traceability Rule to combat illegal fishing; nor do they assert that any of the Rule’s particular provisions are not authorized by the MSA. *See* Mem. Supp. Pls.’ Mot. Summ. J. 13, ECF No. 48-1 (Pls.’ Br.). Therefore, unlike in the cases cited by Plaintiffs, this is not a situation in which an agency lacks *any* statutory authority to issue the regulation. *Cf. Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (“Thus, if there is no statute conferring authority, a federal agency has none.”).⁹ NMFS’s MSA authority to regulate illegal fishing is a sufficient statutory basis for the Seafood Traceability Rule. *See* Fed. Defs.’ Br. 11–16 (discussing MSA authority to issue Rule); Interv.-Def. Br. 6–12 (same).

Notwithstanding their failure to identify any particular provision of the Rule as *ultra vires*, Plaintiffs vaguely argue that the Rule is invalid because unspecified aspects purportedly “cover ‘seafood fraud.’” Pls.’ Br. 14; *see also id.* at 16 (asserting that “the desire to address seafood fraud is inextricably part of the Rule”). But NMFS’s MSA authority to regulate illegal fishing provides the agency ample authority to regulate seafood fraud as necessary to carry out its duty to enforce the Act’s prohibition on the import of illegally caught fish. *See* Fed. Defs.’ Br. 11–16; Interv.-Def. Br. 6–12. Plaintiffs’ position that NMFS may address or consider seafood fraud only if the MSA contains specific provisions on the subject misunderstands both the MSA

⁹ The other cases Plaintiffs rely on are inapposite for this same reason. *See* Pls.’ Br. 14–15 (citing *Gonzales v. Oregon*, 546 U.S. 243, 274–75 (2013) (no statute gave Attorney General authority to ban narcotics use); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–14 (1988) (statute did not authorize retroactive regulation); *Bayou Lawn & Landscape Servs. v. Sec’y of Labor*, 713 F.3d 1080, 1084–85 (11th Cir. 2013) (statute did not give Secretary rulemaking authority); *Am. Library Ass’n v. FCC*, 406 F.3d 689, 705 (D.C. Cir. 2005) (statute did not authorize agency to regulate particular form of technology)).

and the bedrock administrative law regarding an agency's broad authority to regulate as necessary to enforce the provisions of a statute.

A. Plaintiffs' arguments are based on a misunderstanding of the development of the Seafood Traceability Rule

Plaintiffs' argument that seafood fraud is inextricably part of the Seafood Traceability Rule is based largely on the factors the Presidential Task Force and Working Group considered *before* NMFS even proposed the Rule. Pls.' Br. 13, 15–16; *see* 80 Fed. Reg. at 66,868 (AR04465) (explaining that the multi-agency Working Group—not NMFS alone—set criteria and developed list of species subject to the rule).¹⁰ The Task Force and the Working Group included the agency that Plaintiffs contend has the authority to consider seafood fraud—the FDA. *See* Pls.' Br. 13; *see* 80 Fed. Reg. at 66,868 (AR04465) (listing agencies comprising the Working Group); AR13101 (listing agencies comprising the Task Force). So, following Plaintiffs' own arguments, the consideration of seafood fraud in the species list or any other decision made by the Task Force or Working Group was proper because it included FDA. Moreover, even if NMFS were the sole decision-maker, agencies may consider many relevant factors in their broader decision-making processes, even if such factors are not expressly delineated in a statute. *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1230 (D.C. Cir. 2007) (explaining that courts should not “infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute” (citation

¹⁰ Plaintiffs' choice of Atlantic cod to illustrate the role of seafood fraud in the choice of species subject to the Rule is puzzling. Pls.' Br. 16–17. While the Working Group cited seafood fraud among numerous reasons for adding cod to the at-risk list, it also determined that “Atlantic Cod have been targets of [illegal] fishing in parts of the geographic range of the species” and identified that “[a]dditional [illegal] fishing risk is tied to a lack of an effective catch documentation scheme” throughout the species' range. 80 Fed. Reg. at 66,870 (AR04467). So while seafood fraud may have been among the considerations for Atlantic cod, as it was for other species on the at-risk list, illegal fishing was also a basis for its inclusion in the Rule.

omitted)). It therefore was entirely proper for the Working Group (or even NMFS) to consider seafood fraud among other factors when, *inter alia*, designating the species that would be subject to the Rule.¹¹ *See* Fed. Defs.’ Br. 15–16. *Contra* Pls.’ Br. 15–16.

B. NMFS has statutory authority to address seafood fraud

The MSA gives NMFS broad authority to “promulgate such regulations . . . as may be necessary . . . to carry out any . . . provision of [the MSA].” 16 U.S.C. § 1855(d). NMFS has a duty to enforce the MSA’s prohibition on the

import, export, transport, s[ale], recei[pt], acqui[sition], or purchase in interstate or foreign commerce [of] any fish taken, possessed, transported, or sold in violation of any foreign law or regulation or any treaty or in contravention of any binding conservation measure adopted by an international agreement or organization to which the United States is a party.

Id. § 1857(1)(Q); *see also id.* § 1861(a) (enforcement duty). Plaintiffs fail to explain why NMFS’s authority to regulate illegal fishing is inadequate to support the Rule. *See Fla. Health Scis. Ctr., Inc. v. Sec’y of Health & Human Servs.*, 830 F.3d 515, 522 (D.C. Cir. 2016) (“To challenge agency action on the ground that it is *ultra vires*, [a plaintiff] must show a ‘patent violation of agency authority.’ A violation is ‘patent’ if it is ‘[o]bvious’ or ‘apparent.’” (second alteration in original) (citations omitted)).

Congress’s authorization for NMFS to adopt regulations “as may be necessary” to enforce the prohibition on commerce in illegally caught seafood is interpreted broadly. *E.g.*, *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 369 (1973); *Home Care Ass’n of Am. v.*

¹¹ The fact that this Rule is the “initial phase of a traceability program,” 81 Fed. Reg. at 88,994 (AR6926), envisioned by the Task Force’s recommendation to further reduce entry of misrepresented seafood into the United States does not convert the Rule into a “misrepresentation” regulation. *Contra* Pls.’ Br. 13 (misattributing broad traceability objectives of Task Force recommendation to the Seafood Traceability Rule, which does not implement all objectives of the recommendation (citing 81 Fed. Reg. at 88,976–77 (AR06908–09))).

Weil, 799 F.3d 1084, 1092 (D.C. Cir. 2015).¹² When such a grant exists, “the validity of a regulation promulgated thereunder will be sustained so long as it is ‘reasonably related to the purposes of the enabling legislation,’” *Mourning*, 411 U.S. at 369 (quoting *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 280–281 (1969)), and is not otherwise foreclosed by the statute, *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002).

The Supreme Court long ago rejected Plaintiffs’ contention that an agency’s authority is strictly limited to adopting only those measures expressly prescribed by statute. *See* Pls.’ Br. 15–16. In *American Trucking Ass’ns v. United States*, the Court determined that the Interstate Commerce Commission had the authority to require specific terms in lease contracts even though the Commission’s statutory authority did not expressly or implicitly refer to leasing practices. 344 U.S. 298, 308–09 (1953). The Court upheld the rules as a necessary component of the Commission’s statutory duties to, *inter alia*, regulate the rates charged by carriers and to ensure safety. *Id.* at 310. In reaching this conclusion, the Court explained that it is unreasonable to expect “that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected.” *Id.* at 309–10.

This court applied these general principles to the MSA in *National Fisheries Institute, Inc. v. Mosbacher*, 732 F. Supp. 210 (D.D.C. 1990). In that case, the court concluded that NMFS’s general authority under 16 U.S.C. § 1855 to promulgate rules necessary to carry out the provisions of the Act empowered NMFS to develop regulations that were not specifically authorized by the MSA. *Id.* at 216. The regulation at issue in that case prohibited the commercial sale of any billfish caught in U.S. waters as a “conservation measure” to prevent the

¹² *Gonzales* can be further distinguished for this reason. In *Gonzales*, the Court explained that an agency’s “authority is clear [when] the statute gives an agency broad power to enforce all provisions of the statute.” 546 U.S. at 258.

development of a market that could hinder billfish conservation. *Id.* The court rejected plaintiffs' argument that NMFS may not regulate the sale of legally caught fish when the MSA does not directly address the subject. *Id.* (rejecting argument that NMFS may prohibit only those actions specifically listed in 16 U.S.C. § 1857(1)). The court held that "merely because Congress chose to also specify certain actions as unlawful *per se* in § 1857(1)(B)–(I) does not mean that it intended those prohibitions to be the boundaries of [NMFS's] broad rulemaking authority." *Id.* Rather, NMFS had "broad rulemaking authority under the Magnuson Act and in the absence of any clear congressional pronouncement to the contrary" could regulate the sale of billfish to further the Act's conservation mandates. *Id.* at 216–17.

The same is true in this case. Congress granted NMFS the authority to enforce the prohibition on importing illegally caught fish, but left a gap for the agency to fill in determining what is necessary to carry out its enforcement duties. Addressing the accurate identification of seafood at the importation stage is reasonably related to the MSA's requirement to curtail illegal fishing by prohibiting the import of illegally caught fish. *See* 16 U.S.C. § 1857(1)(Q); *see also id.* § 1801(a)(12). Seafood fraud is often used to "conceal" or "launder" illegally caught seafood and pass it off as a different, legal species. AR02458; AR13103; *see also* 80 Fed. Reg. at 66,872 (AR04469) (Working Group finding that seafood fraud and illegal fishing are "different components" but "part of the same system"); 80 Fed. Reg. at 45,959 (AR03974) (noting that seafood fraud through species substitution is often done to mask illegal fishing); AR00289–90 (describing Oceana investigation finding species known to be overfished sold as non-vulnerable species (*e.g.*, Atlantic halibut as Pacific halibut)); AR04368 (finding that seafood fraud plays a role in illegal shrimp fishing where "industrial shrimp fisheries in Mexico occasionally label wild-caught shrimp as farmed, in an effort to continue fishing activities during closed seasons").

In this way, seafood fraud enables the evasion of prohibitions on importing illegally caught seafood. Without documentation showing when, where, and how a fish was caught, a supplier or importer could simply call an illegally caught fish something other than what it is to avoid the restrictions of the import rule. *Cf. Nat'l Fisheries Inst.*, 732 F. Supp. at 216 (explaining that regulation was “necessary to avoid a huge enforcement loophole,” and that “[w]ithout the [regulation], any person attempting to sell a billfish in the United States could simply claim that it was harvested beyond the Atlantic Ocean [exclusive economic zone]” to circumvent the MSA’s relevant conservation objective).

Because seafood fraud is inextricably intertwined with commerce in illegally caught fish, regulating seafood fraud in the importation process is “necessary” for NMFS to effectively carry out its enforcement duties under the MSA. *See Am. Trucking*, 344 U.S. at 311 (finding that agency has authority to address “conditions which may directly frustrate the success of the regulation undertaken by Congress”). Indeed, it would be “an unnatural construction” of the MSA to require NMFS “to sit idly by and wink at practices” that would undercut effective regulation of illegal fishing. *Id.* Rather, the statute’s “grant of general rulemaking power necessary for enforcement compels” a finding that the issuance of a rule that reaches seafood fraud is within NMFS’s power, “despite the absence of specific reference to” seafood fraud in the MSA. *Id.* at 312; *see also Lovgren v. Byrne*, 787 F.2d 857, 864 (3d Cir. 1986) (holding that the “Secretary [of Commerce] was well within his authority in determining that inspection of dock areas where groundfish are unshipped was necessary in order to monitor compliance with the requirements of the [fishery management] plan and obtain necessary management data,” despite lack of express MSA authority to regulate such “areas of custody”).

C. The Seafood Traceability Rule does not unlawfully intrude on FDA’s authority to regulate food labeling

Plaintiffs’ assertion that the Seafood Traceability Rule unlawfully intrudes on FDA’s purported exclusive authority to regulate food labeling is flawed for multiple reasons. *Contra* Pls.’ Br. 13–14. First and foremost, the Rule does not regulate (or even purport to regulate) food labeling and thus cannot possibly tread on any other agency’s authority over food labels. *See* Fed. Defs.’ Br. 11. The mere fact that the Rule requires the identification of seafood at the time of import does not transform it into a labeling measure. The Rule requires importers to file a report with NMFS when importing certain types of seafood; it does not regulate labels on that seafood. 81 Fed. Reg. at 88,996–98 (AR06928–30).

Plaintiffs’ argument also fails because FDA does not possess exclusive authority over labeling.¹³ The Supreme Court has expressly held that “‘Congress did not intend FDA oversight to be the exclusive means’ of ensuring proper food and beverage labeling.” *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2237 (2014) (quoting *Wyeth v. Levine*, 555 U.S. 555, 575 (2009)). In fact, at least six different agencies—including NMFS—have regulatory authority over food labels. *See* U.S. Gov’t Accountability Office, GAO-17-74, Food Safety: A National Strategy Is Needed to Address Fragmentation in Federal Oversight 6–7 (2017), *available at* <http://www.gao.gov/assets/690/682095.pdf>; *see also, e.g.*, 7 U.S.C. §§ 1621–1627 (authorizing NMFS Seafood Inspection Program); AR13106 (describing agencies’ complementary authority to regulate seafood labeling and fraud).¹⁴ Indeed, Plaintiffs acknowledge that FDA shares this

¹³ *Gonzales* and *Bayou Lawn* therefore are inapposite, because in both of those cases Congress had expressly delegated clear and exclusive rulemaking authority to a different agency. *Gonzales*, 546 U.S. at 265–66, 271–72; *Bayou Lawn*, 713 F.3d at 1084.

¹⁴ NMFS already works to detect and prevent seafood fraud through a handful of programs, including its voluntary, fee-for-service Seafood Inspection Program, Hazard Analysis and Critical Control Point consultations, and Quality Management program. *See* NOAA Fisheries,

regulatory sphere with the Secretary of the Treasury and with NMFS. Pls.’ Br. 13, 16 (discussing NMFS’s authority under the Lacey Act).

The fact that FDA has some authority over food labeling does not preclude NMFS from regulating in a related or even the same sphere. *See FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (“Because we live in ‘an age of overlapping and concurring regulatory jurisdiction,’ a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may.” (citation omitted)); *see also* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1134 (2012) (explaining that overlapping agency regulatory duties “are not rare or isolated”). The Supreme Court’s decision in *Massachusetts v. EPA* is instructive. 549 U.S. 497 (2007). There, EPA argued that it did not have authority to “regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to” the Department of Transportation (DOT). *Id.* at 531–32. The Supreme Court disagreed:

But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public’s “health” and “welfare,” a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

Id. at 532 (citations omitted); *see also, e.g., Chem. Mfrs. Ass’n v. EPA*, 673 F.2d 507, 512 (D.C. Cir. 1982) (“Such regulatory overlap is not the same as a situation where two statutes provide mutually exclusive results when applied to the same facts.”).

Seafood Inspection Program, Program Services, http://www.seafood.nmfs.noaa.gov/program_services/program_services.html (last visited May 11, 2017); *see also* AR13106 (describing NMFS’s Seafood Inspection Program as part of the existing seafood fraud regulatory scheme).

The same is true here. NMFS's obligation to prevent the import of illegally caught fish is wholly independent of and does not intrude on FDA's authority to regulate food labeling. Although the agencies' obligations may overlap, Plaintiffs have not identified any way in which the obligations conflict or produce inconsistent results. Rather, the Seafood Traceability Rule complements FDA's duties and, if anything, will help accomplish some of FDA's goals. *See, e.g.*, AR02494; AR02504; AR02639; AR04784 (demonstrating that seafood fraud allows import of fish posing health risks under guise of otherwise healthy fish species). Indeed, FDA was part of the multi-agency Task Force that recommended development of the Rule and the Working Group that delineated the list of species subject to its requirements; presumably, FDA would have objected if it believed that the Rule interfered with its food labeling authority. Under these circumstances, there is no reason to conclude that NMFS's requirement to file import reports at the border for species known to be at risk of seafood fraud will impair FDA's ability to regulate the labeling of fish products sold at retail in the United States. Just as in *Massachusetts*, NMFS and FDA can exercise their overlapping authorities to address seafood fraud while avoiding inconsistencies.

CONCLUSION

For the foregoing reasons, the Court should uphold the Seafood Traceability Rule.

May 12, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2017, I electronically filed the foregoing Brief of Amici Curiae Oceana, Natural Resources Defense Council, and Center for Biological Diversity in Support of Defendants' Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

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