No. 24-1388

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DELMARVA FISHERIES ASSOCIATION, INC., et al.,

Plaintiffs-Appellants,

v.

ATLANTIC STATES MARINE FISHERIES COMMISSION, et al.,

Defendant-Appellee

On Appeal from the United States District Court
For the District of Maryland

BRIEF OF DEFENDANT-APPELLEE ATLANTIC STATES MARINE FISHERIES COMMISSION

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 24-1388 Caption: Delmarva Fisheries Ass'n et al. v. Atl. States Marine Fish. Com'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

Atlantic States Marine Fisheries Commission
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Sean H. Donahue Date: July 31, 2024

Counsel for: Atlantic States Mar. Fisheries Com'n

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INTRODUCTION

The district court properly denied the motion of Plaintiff-Appellants Delmarva Fisheries Association, Inc. et al. (collectively, "Plaintiffs") seeking a preliminary injunction directed at a fishery management plan amendment issued by the Atlantic States Marine Fisheries Commission ("ASMFC" or "Commission"), an interstate compact organization charged with coordinating the management of Atlantic coastal fisheries in state jurisdictional waters. Responding to new data showing hazards to the recovery of the Atlantic striped bass population, the amendment reduced the number of fish that charter boat customers in the Maryland Chesapeake Bay waters may take home, limiting them to one fish, the same limit that already applied to nearly all other States' charter boats, including Virginia-based Chesapeake Bay boats, and to non-charter recreational anglers in all other States.

As the district court correctly recognized, Plaintiffs face a series of independently dispositive obstacles to success on the merits. The first is Article III standing: It is Maryland law, rather than an ASMFC plan, that governs Plaintiffs' fishing activity, and (particularly in light of documented threats to striped bass and Maryland's adoption of limitations more stringent than ASMFC's plan) it is speculative whether the State, which did not join or endorse this litigation, would amend its regulations to weaken restrictions on taking striped bass. Such state lawmaking would be necessary for Plaintiffs to obtain any redress for their asserted

injury. Moreover, Congress has not conferred on private parties like Plaintiffs a cause of action to sue in federal court for judicial review of the ASMFC's management plan, and their claims that a tightening of fishing limits applicable to their customers violated the Takings or Due Process Clauses are meritless in any event. Finally, the equities weigh against a preliminary injunction, since the measures in question protect the striped bass stock and ensure continued fishing opportunities for the public.

STATEMENT OF ISSUES

Whether the district court abused its discretion in denying Plaintiffs' motion for a preliminary injunction, where:

(1) Plaintiffs' Article III standing is doubtful, given that it is speculative whether, were a court to grant the requested injunction, the State of Maryland would choose to rescind the state regulations that govern fishing activity;

(2) Neither Congress, nor the compacting States, has provided a cause of action authorizing federal court review of ASMFC actions;

(3) Plaintiffs' assertions that the tightening of catch limits for striped bass effected a Taking of their private property, or a denial of Due Process, are unlikely to succeed on the merits;

(4) Plaintiffs' objection to the ASMFC's judgments are not properly before the Court and are contradicted by the evidentiary record;

(5) Plaintiffs' suggestions that 30 years of ASMFC management decisions "may be void" were not properly raised below and are meritless; and

(6) Plaintiffs' claim that reducing the limit for their customers' catch from two to one fish causes them irreparable harm rests on implausible and unproven premises, and the requested injunction would imperil the recovery of a critically important fish stock.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to decide an appeal of the district court's denial of an injunction. As explained below, Plaintiffs' Article III standing is doubtful (Argument, I.A) and they lack a viable cause of action (I.B).

STATEMENT OF THE CASE

The ASMFC. More than 80 years ago, all 15 Atlantic coastal States from Maine to Florida "affirmed [their] commitment to cooperative stewardship in promoting and protecting Atlantic coastal fishery resources,"[1] and formed the Atlantic States Marine Fisheries Commission Compact ("Compact"), which Congress approved pursuant to Art. I, § 10, cl. 3, of the Constitution. Pub. L. No. 77-539 (1942), as amended, Pub. L. No. 81-721 (1950).[2] The ASMFC Compact aims to "promote the better utilization of the fisheries, marine, shell and anadromous, of

[1] *See* ASMFC, *About Us*, https://asmfc.org/about-us/program-overview.
[2] *See* https://asmfc.org/files/pub/CompactRulesRegs_Feb2016.pdf.

the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause." Art. I. It reflects the recognition that coastal fisheries are a shared resource that can be depleted, and that no individual State would likely restrain local fishing unless others were doing the same. The States freely entered into the Compact and are free to leave it. Compact, Art. XII.

The ASMFC was formed—and continues to operate—for the express purpose of protecting the long-term viability of the compacting States' fisheries, to ensure that they provide high-quality recreational and commercial fishing resources and experiences for the long term. *See, e.g.*, Compact, Art. IV (noting goal "to assure a continuing yield"); ASMFC, Addendum II to Amendment 7 to the Interstate Fisheries Management Plan for Atlantic Striped Bass ("Addendum II"), § 2.2.2.1 (Jan. 2024) (describing goal of "ensur[ing] the quality of the recreational fishing experience for the sector in the long-term").[3] The Commission is composed of three representatives from each member State: the State's director of marine fisheries; a state legislator; and a public member with fisheries experience appointed by the Governor. Compact, Art. III.

[3] https://asmfc.org/uploads/file/65c54740AtlStripedBass_AddendumII_Am7_Jan2024.pdf.

The ASMFC does not directly regulate fishing activity, and member States retain sovereignty over fisheries within their waters. *See* Compact, Art. IX (Compact does not "limit the powers of any signatory state"). Rather, the Commission was granted the "power to recommend the coordination of the exercise of the police powers of the several states within their respective jurisdictions to promote the preservation of . . . fisheries and their protection against overfishing, waste, depletion or any abuse whatsoever and to assure a continuing yield . . . ." *Id.*, Art. IV. To carry out this responsibility, the Commission develops scientifically grounded management plans to inform member States' management within the relevant fishery. The plans are then implemented by the respective member States, usually by adopting administrative regulations pursuant to state law. *See id.*; *Madeiros v. Vincent*, 431 F.3d 25, 27-28 (1st Cir. 2005). Today, the ASMFC coordinates management of 27 species of marine fish and crustaceans found in the nearshore waters of the Atlantic coastal States, in pursuit of its mission to "assure their sustained availability in fishable abundance on a long-term basis," ASMFC, Interstate Fisheries Management Program Charter ("Charter"), § 6(a)(1) (rev. Aug. 2019),[4] to benefit the public. Typically, the Commission acts through species-specific management boards whose membership includes the ASMFC

[4] https://asmfc.org/files/pub/2019/ISFMPCharter_Aug2019.pdf.

Commissioners from each member State with an interest in that fishery. *See id.* § 4.[5] Management board decisions are reached through an extensive public process, set forth in the Charter, § 6(c). Board decisions may be appealed by any member State to the ASMFC's Interstate Fisheries Management Policy Board, whose membership consists of Commissioners from each State. *Id.* §§ 3(a), 4(h); ASMFC, Appeals Process (Aug. 4, 2022).[6] The state management measures coordinated by the Commission apply in coastal waters subject to state jurisdiction, including inland waters and ocean waters within three nautical miles of the low-water mark. *See, e.g.*, *New York v. ASMFC*, 609 F.3d 524, 527 (2d Cir. 2010); 16 U.S.C. § 1856(a)(1)-(2). ASMFC plans merely establish a "floor" for state efforts; States remain free to adopt "additional conditions and restrictions to conserve [their] fisheries," Compact, Art. IX, as they often do.[7]

Atlantic Striped Bass Conservation. The Atlantic Striped Bass (sometimes called "rockfish" or "stripers") has for centuries been one of the most celebrated

[5] Management boards may also include, as voting members: a representative from the Potomac River Fisheries Commission, the District of Columbia, the National Marine Fisheries Service and/or the U.S. Fish and Wildlife Service. Charter, § 4(b). These outside representatives do not have a vote on the Commission itself.

[6] https://asmfc.org/files/pub/AppealsProcess_August2022.pdf.

[7] Examples of state restrictions that go beyond ASMFC plan requirements include Florida's prohibition on gill nets and entangling nets in state marine waters, Florida Const., Art. 10, § 16(b), and New Jersey's ban on taking horseshoe crabs, NJ Rev. Stat. § 23:2B:21.

species on the Atlantic Coast, supporting valuable commercial and recreational fisheries.[8] Indeed, the recognition that protecting striped bass would require interstate cooperation helped to prompt the ASMFC's formation in the 1940s. *See* Russell, *Striper Wars* 17 (noting the ASMFC Compact was "inspired by concern over the striper's future vulnerability").[9]

Migratory populations of striped bass range from Maine to North Carolina. Striped bass spend their adult lives, which can last 30 years, in estuaries or the ocean. The Chesapeake Bay and its tributaries are especially important for fishery management because they comprise the primary spawning areas for coastal migratory striped bass. Juvenile fish remain in coastal sounds and estuaries like the Chesapeake for three to six years before reaching sexual maturity and joining the adult migratory population in the Atlantic Ocean.

The ASMFC has played a pivotal role in reversing the catastrophic decline of the striped bass population. In its early decades, the Commission undertook studies to assess the state of the striped bass fishery. By the 1970s, data showed a serious

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[8] *See* ASMFC, Atlantic Striped Bass, https://asmfc.org/species/atlantic-striped-bass. After witnessing vast schools of striped bass in Chesapeake Bay in 1614, Captain John Smith wrote: "I myself at the turning of the tyde have seen such multitudes that it seemed to me that one mighte go over their backs drisho'd." (quoted in Dick Russell, *Striper Wars: An American Fish Story* 13 (2006)).

[9] Striped bass is the official state fish (or official saltwater fish) of six Atlantic coastal States: Maryland, New Hampshire, New York, Rhode Island, South Carolina, and Virginia.

decline in the fishery population. ASMFC, *Interstate Fisheries Management Plan for Atlantic Striped Bass of the Atlantic Coast from Maine through North Carolina* ("1981 Plan") 1-1 (Oct. 1981) (noting decline in reported catch from 14.7 million pounds in 1973 to 3.1 million pounds by 1979).[10] Consequently, in 1981, the ASMFC finalized a plan expressly focused on protecting a successful long-term recreational and commercial harvest for the fishery: "[t]o perpetuate the striped bass resource in fishable abundance throughout its range and generate the greatest possible net economic and social benefits from its harvest and utilization over time." *Id.* at 1-3. But these early ASMFC efforts to restore a struggling striped bass stock proved insufficient, in part because of the absence of a mechanism to ensure implementation. *See id.* at 2-6.

The Bass Act. With the absence of an enforcement mechanism frustrating the implementation of the ASMFC's plan, striped bass populations dropped to perilously low levels in the early 1980s. *See* H.R. Rep. 98-1029, at 6-7 (1984).[11] In 1984, Congress responded by enacting the Atlantic Striped Bass Conservation Act, 16 U.S.C. §§ 5151, *et seq.* ("Bass Act"). Congress found that "Atlantic striped bass are of historic commercial and recreational importance and economic benefit to the

[10] http://www.asmfc.org/uploads/file/1981FMP.pdf.
[11] *See also* ASMFC, *Atlantic Striped Bass Management History*, https://asmfc.org/files/AtlStripedBass/AtlanticStripedBassManagementHistory_May2023.pdf.

Atlantic coastal States and to the Nation"; that "[n]o single government entity has full management authority throughout [the species'] range"; and that the species risked "potential depletion in the future." *Id.* § 5151(a). Congress sought "to support and encourage the development, implementation, and enforcement of effective interstate action regarding the conservation and management of the Atlantic striped bass." *Id.* § 5151(b); *see also United States v. Saunders*, 828 F.3d 198, 203 (4th Cir. 2016) (discussing history of the Bass Act and noting that it responded to a "collective action problem").

The Bass Act's central innovation was a federal enforcement mechanism to promote compliance with the management plans the States developed cooperatively and scientifically through the ASMFC and implemented individually through their own administrative processes. The Act calls for the Commission to make a determination whether a State has adopted measures consistent with a relevant ASMFC plan, and to transmit that determination to the U.S. Secretaries of Commerce and Interior. 16 U.S.C. § 5153(a), (c). An affirmative determination is not subject to challenge; in the event of a negative determination, the Secretaries are independently to decide "whether that coastal State is in compliance with the [ASMFC] Plan," and, if not, the Secretaries "shall declare jointly a moratorium on

fishing for Atlantic striped bass within the coastal waters of that coastal State." *Id.* § 5154(a).[12]

Following enactment of the Bass Act, the ASMFC and its member States made strenuous efforts to conserve and rebuild the species—and to protect the economic and social benefits derived from its long-term harvest. Numerous States, including Maryland, went even beyond the ASMFC's plans, imposing outright moratoria on striped bass fishing that lasted many years. ASMFC, *Forging Knowledge Into Change* 52 (2017).[13] As a result, striped bass made what may be the most significant recovery ever experienced for a coastal finfish species and in 1995 were declared "fully recovered," at least for a time.[14] "The resurgence of striped bass along the eastern coast of the U.S. is probably the best example in the world of a species that was allowed to recoup through tough management and an intelligent

[12] While the Bass Act contemplates continued state management (through the ASMFC) of striped bass in state jurisdictional waters, for federal waters, the Act requires the Secretary of Commerce to promulgate regulations "compatible" with the ASMFC plan. 16 U.S.C. § 5158(a)(3), (4). In practice, fishing for striped bass has long been prohibited in federal waters.

[13] https://www.asmfc.org/files/pub/FKIC_Ebook/mobile/index.html#p=62. Maryland and Delaware issued the first moratoria and were soon followed by Connecticut, New York, New Jersey, Virginia, and the Potomac River Fisheries Commission. *Id.*

[14] ASMFC, *Atlantic Striped Bass Management History*, https://asmfc.org/files/AtlStripedBass/AtlanticStripedBassManagementHistory_May2023.pdf.

rebuilding plan." Carl Safina, *The World's Imperiled Fish*, Scientific American, Nov. 1995, at 51-52.[15]

Striped Bass Management and the Science of Stock Assessment. Since its adoption in 1981, the Commission's fishery management plan for striped bass has undergone numerous amendments, based on fluctuations in the fishery's population and in its long-term prospects for avoiding depletion. The currently effective plan is set out in Amendment 7 (2022), as later modified by two addenda, the most recent of which, Addendum II, finalized in January 2024, is at issue here.

To prepare its fishery management plans, the ASMFC uses a complex and extensively peer-reviewed statistical model to assess the size and characteristics of the striped bass population (referred to as a "stock assessment"). *See, e.g.*, ASMFC, Amendment 7 to the Interstate Fishery Management Plan for Atlantic Striped Bass, § 1.2.2 (2022); Nat'l Oceanic and Atmospheric Admin., Northeast Fisheries Science Center, 66th Northeast Regional Stock Assessment Workshop, Assessment Report 457-1170 (Apr. 2019) ("Benchmark Assessment") (explaining and reviewing scientific model ASMFC has used since 2018).[16] The model uses various inputs—

[15] In 1993, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act ("Atlantic Coastal Act"), Pub. L. No. 103-206 (1993); 16 U.S.C. §§ 5101, *et seq*., which employs a mechanism similar to the Bass Act's, for Atlantic coastal fisheries generally. *See Medeiros v. Vincent*, 431 F.3d 25, 27-28 (1st Cir. 2005).

[16] https://asmfc.org/uploads/file/63e6826bFIRST_PAGE_StripedBassBenchmark StockAssessment_SAW66.pdf.

including state- and federally-collected data concerning the number of striped bass taken each year by recreational and commercial fisheries; biological facts (how fast striped bass grow, how old they are when they mature, and how many die each year from natural causes); and trends in population abundance from scientific surveys along the coast—to estimate the quantity of mature females in the population (the "spawning stock biomass"). *See, e.g.*, *id.* at 459-461; Amendment 7 § 1.2.2.[17] The model also estimates—using sophisticated data analytics—the rate at which striped bass die every year due to fishing ("fishing mortality rate") and the number of new striped bass that enter the population every year ("recruitment"), with each year of new fish referred to as a "year-class." *See, e.g.*, Benchmark Assessment at 460, 504-506, 512-543, 566; Amendment 7 at p. 8-9.[18] The model uses all of this information to project the population forward in time. Benchmark Assessment at 566. An independent peer review conducted in 2018 found the current version of the model

[17] Female spawning stock biomass is the reference point because it allows managers to assess whether the fish population can produce enough eggs to sustain the population in the future.

[18] The Benchmark Assessment provides a detailed review of the available indices regarding the striped bass population and chooses the most scientifically grounded to be included in the stock assessments, based on a set of evaluation criteria. It also explains the sources of recreational and commercial catch data and describes the age-based model for estimation of fishing mortality, abundance, and stock biomass. *Id.* at 459-461.

to be scientifically sound and appropriate for management use. *Id.* at 563-565; Amendment 7 at p. 8.

Amendment 7. Amendment 7 to the Interstate Fishery Management Plan for Striped Bass was approved in May 2022, after extensive public meetings held across the Atlantic States and many opportunities for comment and interagency consultation. May 2022 Board Minutes, p. 4 (noting there were 4,689 public comments and 12 hearings in 11 jurisdictions).[19] The Amendment sets out biological reference points (benchmarks used to compare a stock's current status to various desirable and undesirable states, and thereby to gauge the success of management measures), based upon the scientific understanding of the fishery's status. It sets forth measures calculated to achieve those targets, including, for the commercial striped bass fishery, quotas and size limits; and for the recreational fishery, gear restrictions, size limits, bag limits, and seasonal closure requirements. Amendment 7 §§ 4.2, 4.3. Coastal States included in the striped bass management plan implement management measures through their respective state administrative processes, *id.* § 5.0.

In Amendment 7, the ASMFC noted that the "status and understanding of the striped bass stock and fishery" had changed considerably since 2003, when the

[19] https://asmfc.org/uploads/file/63cb1c0aAtlStripedBassBoardProceedings_May2022.pdf.

fishery management plan had last been amended. *Id.* § 1.1. The ASMFC determined that the "stock has been overfished since 2013," *id.*, requiring the Commission to "adjust the striped bass management program to rebuild [female spawning stock biomass] to the target level in a timeframe not to exceed 10 years, no later than 2029," *id.* § 4.4.

To ensure that management measures reflect the best scientific information available, Amendment 7 provides for "adaptive management," *id.* § 4.7, allowing the Management Board to change elements of the plan by adopting new addenda, after consultation with the relevant federal, State, and Commission experts and consideration of comments from "federal agencies and the public at large." *Id*. Accordingly, Amendment 7 includes provisions intended to allow the Board to respond rapidly when subsequent stock assessments indicate that existing measures have not reduced fishing mortality to the levels needed to put the stock on track to rebuild by 2029.

Updated Stock Data and Addendum II. The subsequent 2022 Stock Assessment Update, based on stock data through 2021, found that although the fishing mortality rate had dropped, the fish supply remained lower than threshold targets. *See* Addendum II § 2.2.1. Thus, the stock assessment concluded that striped bass stock was no longer experiencing *overfishing*, but remained *overfished*, *id.*, *i.e.*, its stock levels are low and not enough young fish are produced to replenish and

rebuild to target levels. In contrast, a stock is experiencing *overfishing* when the rate of fishing removals is higher than the stock can sustain. Thus, a fishery can simultaneously be overfished—because the spawning stock has gotten so low that not enough young fish are produced to ensure the stock will maintain itself—while not experiencing overfishing. In such circumstances, reduced fishing activity may be necessary to help move the stock out of overfished status and to a sustainable level, even if overfishing is not occurring. *See, e.g.*, ASMFC, Fisheries Science 101, https://asmfc.org//fisheries-science/Fisheries-Science-101.[20]

In 2022-2023, the Management Board updated stock rebuilding projections to include the most recent (2022) recreational catch data. The updated projections, using the same peer-reviewed model, revealed that the 2022 recreational catch had been much larger than expected—so large as to very likely prevent the stock from rebuilding by 2029 and to adversely affect the stock's overall age structure. Addendum II § 2.1. "The data showed that while commercial removals in 2022 were similar to those in 2021, recreational harvest had increased 88% and recreational live releases by 3%," *id.* § 2.2.1. Recreational removals are of primary importance to the striped bass fishery because, over the past decade, the recreational sector has been responsible for approximately 90% of all removals. *See id.* § 2.2.3; ASMFC, Review

[20] *See also* Kerns Decl. ¶9 (JA 69) (using bank account analogy to explain how absence of overfishing does not guarantee stock recovery).

of the Interstate Fishery Management Plan for Atlantic Striped Bass: 2022 Fishing Year, at 26-27 (updated July 2024) ("2022 Review") (tables showing commercial and recreational removals from 1993 through 2022).[21] The Board concluded that, absent a course correction, the probability of achieving the rebuilding target would drop from very high to very low. Addendum II § 2.2.1 Jan. 2024 Board Minutes, p. 4.[22] In fact, after adjusting the fishing mortality rate to reflect the 2022 removals and assuming this rate would persist for future years, the Board found "the probability of rebuilding [spawning stock biomass] to its target by 2029 [would] drop[] from 97% to 15%." Addendum II § 2.2.1.

Accordingly, in a public meeting in May 2023, the Management Board initiated the process to develop Addendum II. Specifically, the Board was concerned that the fishery's overfished status, combined with data showing successive below-average year-classes, would make it extremely challenging, if not impossible, to rebuild the stock sufficiently. *Id.* § 2. In recent years, stronger striped bass year-classes (2015 and 2018 year-classes) have been supporting the fishery, including the Chesapeake Bay fishery, but the assessment found the 2021-2023 year-classes that will support the Bay's 2024-2026 fishery to be below-average. *Id*. § 2.2.1; Jan. 2024

[21] https://asmfc.org/uploads/file/66997c75StripedBassFMPReview_FY2022_RevJul2024_CommData.pdf.

[22] https://asmfc.org/uploads/file/660c2f66AtlStripedBassBoardProceedings_Jan2024.pdf.

Board Minutes, p. 3. Below-average year-classes cannot sustain the same harvest levels as normal or above-average ones. Dr. Michael Armstrong, a Management Board member who is a marine biologist and Massachusetts Division of Marine Fisheries official, stated at the May 2023 meeting:

> What really worries me is the further we get behind the eightball the more draconian the rules become, and 2026 [spawning stock biomass] is going to start including the weakest year classes we've seen in 40 years. We have never seen four- or five-year classes as weak as they are since the 1980s, in the middle of a stock collapse.

May 2023 Board Minutes, p. 28.[23]

At the May 2023 meeting, the Board adopted emergency measures (a 31-inch maximum-size limit for the ocean fishery to protect the largest, most fecund female fish), *id.*, pp. ii-iii, and voted unanimously to initiate the addendum process, *id.*, p. ii. Thereafter, the Board issued Draft Addendum II, which proposed alterations to the fishery management plan primarily due to the high numbers of recreational removals for 2022. The draft set forth a range of options to reduce fishing pressure, including two that would reduce bag limits for recreational fishing in the Chesapeake Bay from two fish to one for charter boats, and reduce the commercial quota. Draft Addendum II § 3.0. Prior to this, different categories of recreational fishers had different bag limits, with many recreational fishers—including in the Chesapeake

[23] https://asmfc.org/uploads/file/65206fdaAtlStripedBassBoardProceedings_May2023.pdf.

Bay—already subject to the one-fish limit. Shore and private boat fishing had a one-fish limit, as did nearly all charter boats in States outside of Maryland, including in the Chesapeake Bay. *See* 2022 Review, pp. 23-25. Virginia, for example, has had a one-fish limit for charter boats since 2019, including in the Bay, and since 2015, more than half of the ocean States' recreational for-hire fleet has had a one-fish limit. *See, e.g.*, *id*.; ASFMC, Review of the Interstate Fishery Management Plan for Atlantic Striped Bass tbl.9, pp. 24-25 (Oct. 2017).[24] In addition, some supporters of the measures that became Addendum II emphasized that it would have the benefit of avoiding continuing a "mode split," where different components of the recreational fishery are subject to differing management measures. In their view, a mode split causes unjustified inequity among similarly situated fishers. Jan. 2024 Board Minutes, pp. 6, 24-25. The Commission's Law Enforcement Committee cautioned that a continuing a mode split would impair enforcement, *id.*, p. 11.

The Board received 2,832 written public comments on Draft Addendum II and convened 15 public hearings on the proposal, which collectively were attended by many hundreds of people, including some of the Plaintiffs. Jan. 2024 Board

[24] *See* https://asmfc.org/uploads/file/63ed2d7e2016AtlanticStripedBassFMP_review.pdf; Review of the 2019 Fishing Year, https://asmfc.org/uploads/file/63ea860fAtlanticStripedBassFMP_review_2019.pdf. The only other jurisdiction with a two-fish bag limit for charter boats in 2022 was the Potomac River Fisheries Commission. *See* https://asmfc.org/uploads/file/66997c75StripedBassFMPReview_FY2022_RevJul2024_CommData.pdf.

Minutes, p. 5. The vast majority of public comments for the Chesapeake Bay recreational fishery supported a one-fish bag limit for all recreational fishers, including charter boat operators. *Id.*, pp. 5-8. Some commenters favored more stringent measures, such as a moratorium or a restriction that only catch-and-release fishing be allowed for striped bass. Addendum II, Public Hearing Summary, p. 10 (Jan. 16, 2024).[25]

The Commission finalized Addendum II in January 2024. The approved plan modified recreational measures through adjustments to size, bag, and season limits—including changing the bag limit for charter boat fishery in the Chesapeake Bay from two fish to one—and reduced the commercial quota by 7%. Addendum II §§ 3.1, 3.2.[26] Addendum II aims to maintain a level of harvest that will give the striped bass population a substantial probability of rebuilding by 2029—ensuring the sound management of the fishery and increasing the likelihood that future generations of commercial and recreational fishers can continue to reap the fishery's economic and social benefits.

The Management Board will continue to use its peer-reviewed model to conduct regular stock assessments, with one planned to be completed in 2024, and

[25] https://asmfc.org/files/2024WinterMeeting/AtlStripedBassBoardSupp_Jan2024.pdf.

[26] Addendum II also establishes a "slot limit" of 19 inches to 24 inches, with the same fishing seasons as were used in 2022.

will, as always, update the fishery management plan to reflect those assessments. *See* Addendum II § 1.0 (the Board will "consider the results of the upcoming 2024 stock assessment update to inform subsequent management action beyond this addendum"); Press Release, ASMFC, *ASMFC Atlantic Striped Bass Board Approves Addendum II* (Jan. 25, 2024) (quoting Board Chair: "The upcoming 2024 stock assessment will be an important checkpoint on progress toward rebuilding.").[27]

Maryland Regulations to Promote Striped Bass Conservation. Since Addendum II's approval, Maryland has taken actions to address serious concerns about the Chesapeake Bay striped bass stock. Maryland adopted regulations to effectuate Addendum II's measures, including the one-fish bag limits.[28] And Maryland has not brought any action challenging Addendum II in any court, despite the opportunity to do so under the provisions of the Interstate Fisheries Management

[27] https://www.asmfc.org/uploads/file/65b27f9aPR02AtlStripedBassAddendumII_Approved.pdf.

[28] *See* Maryland Dept. of Natural Resources, *Maryland Summer-Fall 2024 Striped Bass Season Begins May 16* (May 15, 2024), https://news.maryland.gov/dnr/2024/05/15/maryland-summer-fall-2024-striped-bass-season-begins-may-16/; MDNR, *Maryland Summer-Fall Striped Bass Season Regulations Include New Maximum Size to Conserve Spawning Stock* (May 15, 2023), https://news.maryland.gov/dnr/2023/05/15/maryland-summer-fall-striped-bass-season-regulations-includes-new-maximum-size-to-conserve-spawning-stock/; MDNR, Public Notice, 2024 Chesapeake Bay Recreational and Charter Boat Striped Bass Summer and Fall Fishery Size Limits—Effective 5/16/2024, https://dnr.maryland.gov/fisheries/Documents/Public_Notices/PubNot_SB_Size_CB_Summer_FallFishery_Effective5_16_2023.pdf.

Program Charter, § 4(h). Neither the Maryland Governor nor Attorney General accepted Plaintiffs' requests that the State do so. Opening Br. 31.

In addition, and although not required by Addendum II or any ASMFC plan provision, the Maryland Department of Natural Resources ("MDNR") opted to impose further, stricter "emergency" measures to reduce fishing pressure on the stock—including canceling the Spring 2024 striped bass trophy fishing season. MDNR, *Maryland Enacts Striped Bass Emergency Regulations to Increase Protections for the Spawning Population* (Feb. 9, 2024).[29] The state agency explained: "The emergency regulations come into effect after five years of below average spawning success for striped bass. In 2023, Maryland's annual striped bass young-of-year index, which tracks reproductive success, was 1.0, well below the long-term average of 11.1." *Id*. It explained that "[t]hese Maryland-specific actions complement additional coast-wide recreational and commercial measures" initiated by the ASMFC, including Addendum II. *Id*.

This Lawsuit. Plaintiffs filed this action on March 7, 2024 (JA 3), claiming the ASMFC acted unlawfully in adopting Addendum II and advancing three counts alleging violations of their federal and state constitutional rights. First, Plaintiffs claimed that the Commission's actions "have caused Plaintiffs to be deprived of their

[29]https://news.maryland.gov/dnr/2024/02/09/maryland-enacts-striped-bass-emergency-regulations-to-increase-protections-for-the-spawning-population/.

rights to property and livelihood secured and guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution without Due Process of Law." Complaint ¶89 (JA 24). Second, Plaintiffs invoked 42 U.S.C. § 1983 and alleged that the actions the Commission "and its compacting States" performed "under the color of authority of state law" had "caused [them] to be deprived of their rights to property and livelihood secured and guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution without Due Process of Law." *Id.* ¶¶93-94 (JA 24). Finally, Plaintiffs asserted that the ASMFC had "deprived [them] of their rights to property and livelihood secured and guaranteed by Article 19 of the [Maryland] Constitution," *id.*, ¶98 (JA 25), and had violated "other state laws and common law[]." *Id.* ¶99 (JA 25).

At a hearing on April 12, 2024 (JA 89-158), the district court denied Plaintiffs' motion from the bench (JA 156-157), finding Plaintiffs unlikely to have standing to sue and unlikely to succeed on the merits. (JA 152-154, 156-157). The court stated that Plaintiffs likely lacked Article III standing; that neither the APA nor Section 1983 provided a right of action; and that Plaintiffs lacked "any viable due process claim" and had "no plausible claim under the takings clause." (JA 153-154).

The court subsequently issued a written memorandum further setting forth its reasoning. (JA 159-165). Noting that the ASMFC "does not directly regulate Plaintiffs," and that Maryland had not chosen to appeal Addendum II's adoption, the

court determined that it was "unclear whether Plaintiffs have Article III standing to sue" and specifically, that "Plaintiffs' alleged injury does not appear to be redressable by a favorable decision in this case." (JA 163).

Even if Plaintiffs had standing, the district court found that they were " "still unlikely to succeed on the merits of their claims." (JA 164). It stated that Plaintiffs did not "plausibly state a takings claim or deprivation of any other federal constitutional right," explaining that "Addendum II does not physically appropriate Plaintiffs' property, nor does it regulate their fishing vessels or gear." *Id*. The court concluded that "Addendum II was issued after a thorough deliberative process in which the State of Maryland participated, and Plaintiffs had notice and opportunity to comment on its measures," and that because "the addendum is not subject to review under the Administrative Procedure Act, 5 U.S.C. § 702, Plaintiffs' allegations as to the addendum being arbitrary and capricious are inapposite." *Id*. (citing *New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 527 (2d Cir. 2010)). It also rejected the Plaintiffs' reliance on 42 U.S.C. § 1983, explaining that "the Commission is not a 'person' within the meaning of the statute, it does not act under 'color of state law,' and Congress did not intend to create a private remedy authorizing private parties to bring federal court actions challenging the Commission's fishery planning decisions." (JA 164-165). Finally, noting that "Plaintiffs must satisfy all four factors of the *Winter* test to warrant the extraordinary

remedy of a preliminary injunction," (JA 165) (citing *Miranda v. Garland*, 34 F.4th 338, 358 (4th Cir. 2022) (quoting *Winter*, 555 U.S. at 20)), and that Plaintiffs had "failed to satisfy their burden on likelihood of success on the merits," the Court did not address the other preliminary injunction requirements. (JA 165).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying Plaintiffs' preliminary injunction motion. Plaintiffs are highly unlikely to prevail on the merits: Their Article III standing to sue is doubtful, since redressing their asserted injury would require that the State of Maryland exercise its sovereign discretion to weaken its striped bass fishing regulations—a course of action that the available evidence not only fails to support, but strongly contradicts. Even if there were Article III standing, Petitioners' suit would still fail at the threshold. Congress has not provided any cause of action to obtain Administrative Procedure Act-style judicial review of the ASMFC's fishery management plans, and Plaintiffs' efforts to conjure such a cause of action from Section 1983 or other sources are futile. And Plaintiffs' claims that a change in the Maryland-side Chesapeake Bay bag limit for charter boats, to conform to the same limit that applies elsewhere and to all other recreational fishers, constitutes a constitutional Taking or Due Process violation are not colorable.

Plaintiffs' fervently asserted claims of irreparable harm from a one-fish bag limit are far from compelling: They do not explain why charter boat customers—

whose primary goal is the experience of fishing—would be driven away by conservation measures that apply everywhere else on the Atlantic coast (including to Virginia-based Chesapeake Bay charter boats) and that allow customers to catch (and release) as many fish as they please, in addition to keeping one fish. On the other side of the balance, if enjoining Addendum II did lead to the undoing of Maryland's regulations, it could imperil the striped bass recovery—harming vital public interest, not least the interest in abundant stock for future fishing seasons.

STANDARD OF REVIEW

This Court "review[s] the denial of a preliminary injunction for whether the record shows an abuse of discretion by the district court, not whether [we] would have granted or denied the injunction." *Pierce v. North Carolina State Board of Elections*, 97 F.4th 194, 210 (4th Cir. 2024) (cleaned up). To obtain the "extraordinary relief" of a preliminary injunction

> a plaintiff must establish the four so-called *Winter* factors: (1) that he's likely to succeed on the merits; (2) that he's likely to suffer irreparable harm if preliminary relief isn't granted; (3) that the balance of equities favors him; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Frazier v. Prince George's Cnty., 86 F.4th 537, 543 (4th Cir. 2023). The "[p]laintiff bears the burden of establishing that each of these factors supports granting the injunction." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (cleaned up).

ARGUMENT

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

A. Plaintiffs Lack Article III Standing.

Plaintiffs lack Article III standing to sue because it is at best speculative that an order setting aside Addendum II would redress their putative injury. Addendum II itself does not regulate Plaintiffs or their customers' fishing or any other private activity; it establishes plans for ASMFC member States to implement. What constrains Plaintiffs' fishing activity are regulations adopted by the State of Maryland. Under both Compact Art. X and the federal statutes reaffirming state police power, *e.g.*, 16 U.S.C. § 5101(a)(4), Maryland has unrestricted authority to adopt and enforce measures more stringent than those contemplated by the Commission's plan.

Because Plaintiffs are not themselves the object of the governmental action they challenge (Addendum II), and because the State of Maryland has ample independent authority to adopt conservation measures for its waters, standing in this case is "substantially more difficult" and it is Plaintiffs' burden "to adduce facts" showing that Maryland's choices "have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). In light of well-documented concerns about the status of

striped bass in Chesapeake Bay—concerns Maryland manifestly shares and has recently adopted *additional* conservation actions to address, *see supra*, pp. 20-21—it is highly uncertain whether the State would relax its fishing rules even if the ASMFC's Addendum were set aside. *See, e.g.*, *Chamber of Commerce of U.S. v. E.P.A.,* 642 F.3d 192, 201 (D.C. Cir. 2011) (where injury to petitioner "hinge[d] on actions" taken by third parties who were the objects of regulation but had opted not to sue, "petitioners carry the burden of adduc[ing] facts showing that those [third-party] choices have been or will be made in such manner as to produce causation and permit redressability of injury") (cleaned up). Plaintiffs cannot base standing "on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *Defs. of Wildlife*, 504 U.S. at 562 (cleaned up).

There are strong reasons to doubt that Maryland would, in fact, alter its regulations to give charter boat operators or commercial striped bass fishers larger allocations if Addendum II were set aside. First, although the State's delegation voted against Addendum II as finally adopted, Maryland did not avail itself of the ASMFC's internal appeal process to challenge Addendum II. *See supra*, pp. 6, 20. Second, even though Maryland, as a party to the Compact, enjoys rights that private parties do not, *see infra*, p. 29, n.30, it did not challenge the Commission's actions in court and indeed declined Plaintiffs' explicit calls to do so. *See* Opening Br. 31.

Third, soon after Addendum II's adoption, State's fishery management agency expressed serious concerns about the status of the striped bass stock, and of its own accord adopted and enforced further substantial, economically significant conservation actions, including a cancellation of the spring striped bass trophy fishing season. *Supra*, p. 21. It is at best speculative that the State would liberalize its fishing regulations at this moment, and Plaintiffs have not met their burden to demonstrate redressability.

B. No Statute or Judicial Doctrine Provides Plaintiffs a Right of Review of ASMFC Fishery Management Plans.

Putting aside Article III difficulties, Plaintiffs' likelihood of success is remote because no act of Congress or judicial doctrine confers on them a right to obtain judicial review of the ASMFC's fishery management decisions.

Plaintiffs have pointed to a shifting array of possible causes of action, but none of their theories is tenable. Their Complaint repeatedly relies on the federal Administrative Procedure Act ("APA"), *see* Complaint ¶¶12, 18-22, 24, 26-28, 81, 86 (JA 6-27), and includes APA-style contentions that the Commission's acts are "arbitrary and capricious," *id*. ¶¶34-47, 54-72, or not in accord with required procedures, *id*. ¶¶48-53.

However, the APA does not authorize review of the Commission's decisions. The ASMFC, an organization composed of States exercising state authority in state jurisdictional waters, "is not a federal agency within the meaning of the APA." *New*

York v. ASMFC, 609 F.3d 524, 527 (2d Cir. 2010). Despite the ASMFC's more than 80-year history, not a single precedent holds that its actions may be challenged under the APA or otherwise subjected to judicial superintendence at the behest of private parties. *See also id.* at 531-37 (canvassing reasons why such review does not fit with statutes or federalism principles).[30]

Plaintiffs have dropped any reliance on the APA, citing it only for purposes of disclaiming its application. *See* Br. 10 (stating that Plaintiffs' "due process rights" are not "asserted under the [APA]," but "arise directly under the U.S. Constitution" and "predecessor embodiments of law"); *see also id.* at 32 ("The introduction of the APA into this case is a non sequitur"). Now, Plaintiffs seek to base their challenge to Addendum II principally on 42 U.S.C. § 1983 (Br. 28-30), which provides a cause of action against "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any [person] to the deprivation of any rights, privileges, or immunities secured by the

[30] This does not mean that the ASMFC's fishery decisions are beyond challenge; the Charter provides for an appeal process by which member States may challenge a fishery management plan, §§ 3(d)(9), 4(h). And member States may sue compacting States or compact organizations to enforce rights under an interstate compact, *see Texas v. New Mexico*, 462 U.S. 554, 569-70 (1983); *Nebraska v. Cent. Interstate Low-Level Radioactive Waste Compact Comm'n*, 187 F.3d 982, 985 (8th Cir. 1999). When (as is typical) Commission plans are implemented through rulemaking by individual member States, members of the public may seek judicial review of those state-issued regulations in state court pursuant to ordinary state judicial review procedures.

Constitution and laws . . . .” But section 1983 does not provide the right of action here. Since “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983,” *Will v. Michigan Dep’t of State Police,* 491 U.S. 58, 71 (1989), an entity composed entirely of state officials and state gubernatorial appointees, *see supra*, p. 4, is not plausibly classified as a “person” for purposes of that statute. *Cf. James v. WMATA*, 649 F.Supp.2d 424, 429–30 (D. Md. 2009) (holding that another interstate compact agency, the Washington Area Metropolitan Transit Authority “is not subject to claims arising under Section 1983 because it is not a ‘person’ for purposes of that statute”); *see also Disability Rts. Council of Greater Wash. v. WMATA,* 239 F.R.D. 9, 20 (D.D.C. 2006) (dismissing a Section 1983 count “as to WMATA because it is not a ‘person’ and therefore cannot be sued under the statute”); *Lizzi v. Alexander,* 255 F.3d 128, 132 (4th Cir. 2001) (rejecting Section 1983 suit because “WMATA possesses Eleventh Amendment immunity”).[31]

Nor does *Ex Parte Young*, 209 U.S. 123 (1908) (cited Opening Br. 29), provide the right of action that is missing here. Among other things, *Young*

[31] *See also Lizzi*, 255 F.3d at 132 (noting that *Hess v. Port Auth. Trans-Hudson Corp*., 513 U.S. 30 (1994), explicitly distinguished WMATA because it (like the ASMFC) is not self-funding). Nothing in the ASMFC’s Compact or the federal act approving it indicate an intent to authorize federal suits (let alone suits for damages) against the Commission itself. And nothing in any federal statute sets out the “unmistakably clear” statutory language requisite to abrogate Eleventh Amendment immunity. *See Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).

authorizes suit only against officers specifically charged with enforcing law, *e.g.*, *Hutto v. South Carolina Retirement System*, 773 F.3d 536, 550 (4th Cir. 2014); it does not authorize suits against organizations like the Commission.

Plaintiffs point to nothing in the Bass Act that creates the kind of statutory right that might be enforceable via Section 1983 suit. And Section 1983's text bears little resemblance to statutory provisions authorizing judicial review of agency decisions based upon an administrative record—even putting aside the fact that Section 1983 authorizes recovery of damages. Congress's overriding purpose in these statutes was to protect the fish stock for the benefit of the public at large; there is nothing suggesting that "Congress *intended to create a federal right*" for charter boat operators. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). In order to be enforceable under Section 1983, a federal statute's "text must be phrased in terms of the persons benefited," *id.* at 284, and "even where a statute is phrased in such explicit rights-creating terms," a plaintiff must demonstrate "that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id.* at 285 (cleaned up).

There is no sign that Congress intended to create a private remedy authorizing private parties to bring federal court actions to review ASMFC fishery planning

decisions, on peril of damages and attorneys fee awards.[32] Plaintiffs, indeed, fail to point to any instances in which courts have allowed Section 1983 to serve as a means of obtaining judicial review of administrative action where Congress has not enacted a judicial review statute. The Supreme Court has refused to read Section 1983 loosely to embrace more than its text allows. *E.g.*, *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973) (declining to read Section 1983 to apply to constitutional violations under color of D.C. law, see Pub. L. No. 96-170, 93 Stat. 1284 (1979)).

Plaintiffs cite *Health and Hospital Corp. v. Talevski*, 599 U.S. 166 (2023) (Br. 29), but that case is of no help. It affirms that when a federal statute is *intended* to secure an individual right to a plaintiff, Section 1983 presumptively affords that individual with a right to seek damages and other relief to vindicate that right. But no relevant statutory language here remotely fits that criterion. *Talevski*, moreover, pointedly reaffirms that a Section 1983 plaintiff must establish that Congress has "unambiguously conferred" "individual rights upon a class of beneficiaries" "to which the plaintiff belongs." *Id.* at 183 (quoting *Gonzaga*, 536 U.S. at 283, 285-286). The Court explained that

[32] The absence of a private right to seek judicial review in federal court was no accident. Compacting States and Congress know how to provide for such rights of judicial review when they want to. *See, e.g.*, Tahoe Regional Planning Compact, Art. VI(j)(3) ("Any aggrieved person may file an action in an appropriate court of the States of California or Nevada or of the United States alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency."), ratified at 96 Pub. L. 96-551, 9Stat. 3233, 3247 (Dec. 19, 1980).

> it must be determined that "Congress intended to create a federal right" *for* the identified class, not merely that the plaintiffs fall "within the general zone of interest that the statute is intended to protect." *Gonzaga*, 536 U.S., at 283. This paradigm respects Congress's primacy in this arena and thus vindicates the separation of powers. *Id.*, at 286. We have held that the *Gonzaga* test is satisfied where the provision in question is "'phrased in terms of the persons benefited'" and contains "rights-creating," individual-centric language with an "'unmistakable focus on the benefited class.'" *Id.*, at 284, 287. Conversely, we have rejected § 1983 enforceability where the statutory provision "contain[ed] no rights-creating language"; had "an aggregate, not individual, focus"; and "serve[d] primarily to direct the [Federal Government's] distribution of public funds." *Id.*, at 290.

Talevski, 599 U.S at 183-84 (cleaned up). Plaintiffs fail to identify any such "rights-creating" language in any of the potentially relevant statutes here.

Plaintiffs spend considerable space insisting the ASMFC is a "regulatory" body (and both a federal and state one), suggesting that the Commission has refused to acknowledge its own legal responsibilities under the Compact and federal statutes including the Bass Act. Br. 18-27. But in no instance do ASMFC plans themselves apply directly to any fisher, vessel, or other private actor. Regulation of fishing activity is accomplished *by the coastal States themselves*, who must either implement a fishery management plan's minimum requirements or, in certain circumstances, become subject to federal regulation of fishing in state waters. *See* 16 U.S.C. §§ 5106, 5154. If Plaintiffs were right that the ASMFC is both a regulatory body and a federal entity, the abrogation of state sovereign immunity effected by Section 1983 would be irrelevant and they would be required

to find a legislative enactment that abrogates—in unmistakably clear terms—*federal* sovereign immunity for these claims. They have not. And there is none.

Nor does Plaintiffs' citation (Br. 30) to *Marbury v. Madison*, 5 U.S. 137 (1803), save the day. *Marbury*'s vision of Article III is consistent with Congress having the authority to determine what kinds of claims may and may not be brought in federal courts, by whom, and when.[33] Entire bodies of law—sovereign (and various other forms of) immunity, *e.g.*, *Fin. Oversight and Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc*., 143 S. Ct. 1176 (2023), statutory preclusion of review, *e.g.*, *Dalton v. Specter*, 511 U.S. 462 (1994); 5 U.S.C. § 701(a)(1), commitment to agency discretion, *Heckler v. Chaney*, 470 U.S. 821 (1985); 5 U.S.C. § 701(a)(2), the principles governing recognition of private rights of action, *Alexander v. Sandoval*, 532 U.S. 275 (2001), and more—would not exist if Plaintiffs' understanding of *Marbury* were correct.

C. Plaintiffs Do Not Plausibly State a Takings Claim

Plaintiffs' principal "constitutional" claim is that Addendum II has taken their private property. This assertion is meritless. It fails at the outset because Plaintiffs have never identified what precise property Addendum II ostensibly took, falling

[33] *Marbury* does not authorize Courts to invent remedies every time there is a "vested legal right," *id*. at 162, 163; *cf.* Opening Br. 31; the Court denied relief in the case itself, because the Constitution withheld from it the authority to award the remedy sought, *id*. at 177. Here, there is no "vested legal right"—nothing like William Marbury's commission—and Congress has not purported to authorize relief.

short of the barest pleading standards. In any event, fishery management measures that limit catch in order to protect the health of fish stocks are not a taking under any relevant test.

1. *Plaintiffs Fail to Identify Any Cognizable Property Interest That Could Be the Basis for a Takings Claim.*

"It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004) (quoting *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)). A takings claim therefore fails if the claimant pleads "no *facts* establishing a diminution in value." *Blackburn v. Dare Cnty.*, 58 F.4th 807, 812 (4th Cir. 2023). That dooms Plaintiff's claim here.[34]

Nowhere do Plaintiffs identify the specific private property alleged to have been taken by the Commission. Plaintiffs' ownership of their vessels and other "business personal property" does not carry with it the right to harvest some particular quantity of striped bass. *See Am. Pelagic*, 379 F.3d at 1381 ("Because the right to use the vessel to fish in the EEZ was not inherent in its ownership of the Atlantic Star, American Pelagic did not suffer the loss of a property interest for purposes of the Takings Clause when its [fishing] permits were revoked."). So,

[34] Even if Plaintiffs did make out a plausible takings claim, the remedy would not be enjoining or invalidating Addendum II, but to sue for just compensation. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984).

attempting to find some other property interest, Plaintiffs venture that their "vessels and other personal business property . . . have been taken"; they also mention their "marina storage and maintenance facilities for their charter boats." Br. 34-35.

These bare allegations are inadequate. In *Blackburn*, the Court dismissed a takings claim because the plaintiffs failed "to allege facts that allow [the court] to infer what diminution they suffered." 58 F.4th at 812. The plaintiffs there "simply allege[d] that there was a taking and then recite[d] the standard for compensation." *Id.* So too here, where Plaintiffs' Complaint made the conclusory claim that a taking "is precisely the situation in this case as to the vessels and other business property of the [Plaintiffs]." (JA 22). Plaintiffs speculate about declines in revenue and the possibility of a "glutted" charter boat market, Br. 13-14, 18, but do not even attempt to show by what amount (if at all) the value of their vessels, gear, or real property has declined. Their mere "legal conclusion[s]" cannot state a takings claim. *Blackburn*, 58 F.4th at 812.

2. Plaintiffs Do Not State a Claim Under Any Relevant Takings Test

The Supreme Court has identified three "takings tests": "(1) a physical appropriation, (2) a use restriction amounting to a per se taking under *Lucas v. v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992), and (3) a taking under *Penn Central*'s balancing test." *Blackburn*, 58 F.4th at 811; *see Cedar Point Nursery v.*

Hassid, 594 U.S. 139, 149 (2021); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Plaintiffs fall short under every test.

There is no "physical appropriation" because nowhere do Plaintiffs identify any physical interference with boats, equipment, or real property by ASMFC, much less the possibility that "government officials or third parties" could "physically occupy or possess" their property. *Blackburn*, 58 F.4th at 811; *see Cedar Point*, 594 U.S. at 149.

A *Lucas* taking occurs when a regulation "denies *all* economically beneficial or productive use of land." 505 U.S. at 1015 (emphasis added). Though Plaintiffs invoke this theory (Br. 35), *Lucas* is a demanding test; it requires not *some* reduction in value, but a "*total* deprivation of value." *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 628 (9th Cir. 2020) (emphasis added); *see Cienega Gardens v. United States*, 331 F.3d 1319, 1344 (Fed. Cir. 2003) (concluding *Lucas* requires loss of "100% of a property interest's value"). Even under Plaintiffs' direst predictions, their property retains value. *Cf.* Opening Br. 18 (noting that their charter boats can be sold).

Finally, under the *Penn Central* test, courts assess "[1] the economic harm of the regulation, [2] 'the extent to which the regulation has interfered with distinct investment-backed expectations,' and [3] 'the character of the governmental action.'" *Quinn v. Bd. of Cnty. Commissioners for Queen Anne's Cnty.*, 862 F.3d

433, 442 (4th Cir. 2017) (quoting *Penn Central*, 438 U.S. at 124). Every factor cuts against Plaintiffs.

Assertions of reduced property value do not tilt the economic harm factor in Plaintiff's favor. "In this Circuit, prevailing on this factor requires that a plaintiff allege that the challenged regulation caused a *substantial* diminution in value to the regulated property." *Blackburn*, 58 F.4th at 812. Assume, implausibly, that Plaintiffs' speculative predictions of 50% to 70% revenue declines for this bass season, Br. 13-14, translate into corresponding decreases in the value of their boats, gear, and waterside property. Yet in this Circuit a 40% decrease in value "weigh[ed] in favor of" the government under *Penn Central*, *Clayland Farm Enterprises, LLC v. Talbot Cnty.*, 987 F.3d 346, 354 (4th Cir. 2021), and in other circuits 75% and 92.5% reductions have been insufficient for takings claims, *Henry v. Jefferson Cnty. Comm'n*, 637 F.3d 269, 277 (4th Cir. 2011) (citing cases from Sixth and Eighth Circuits). Plaintiffs' position is particularly implausible given that the decrease in bag limits from two fish to one merely aligns the bag limits applicable to Maryland Chesapeake Bay charter boat operators with those applicable to everyone else: Virginia-side Chesapeake Bay charter companies; private boat and shore-based recreational fishers in the Bay; as well as recreational fishers up and down the coast. *See* Addendum II, tbl.2, pp. 22-24 (showing that all other jurisdictions are subject to

a one-fish limit). Nor do Plaintiffs claim that their vessels can only be used for fishing for one particular species.

Plaintiffs' putative revenue reductions also do not show economic harm. "[M]ere loss of future profits is a 'slender reed' upon which to rest a takings claim." *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1074 (7th Cir. 2013) (quoting *Andrus v. Allard*, 444 U.S. 51, 66 (1979)); *accord Nekrilov v. City of Jersey City*, 45 F.4th 662, 673 (3d Cir. 2022). And "it is inappropriate to consider only the loss due to prohibited uses, without also considering 'the many profitable uses to which the property could still be put.'" *Goodpaster*, 736 F.3d at 1074 (citation omitted). Consider *Burns Harbor Fish Co., Inc. v. Ralston*, 800 F. Supp. 722 (S.D. Ind. 1992). There, the court rejected a fishing license holder's claim that a *complete ban* on fishing by gill nets had effected a taking of a fishing business's property, reasoning that the ban did not appropriate the plaintiff's license. *Id.* at 730. In contrast, here, there is no ban on any equipment that Plaintiffs use or wish to use. While revenues may be down, their property retains value, both for resale and to continue to fish for striped bass (as well as for other species of fish).

Neither do Plaintiffs show a defeat of reasonable, investment-backed expectations. "[P]articipation in a traditionally regulated industry greatly diminishes the weight of [a claimant's] alleged investment-backed expectations . . . ." *Holliday Amusement Co. of Charleston v. South Carolina*, 493 F.3d 404, 411 n.2 (4th Cir.

2007). The possibility that fishery managers will, in the interest of sustaining the public resource, reduce the allowable catch is a prospect widely recognized among those in this business. The recreational and commercial striped bass fishing industry has experienced many changes in catch limits—including years-long moratoria—over the past 80 years, *see supra*, p. 18. The Bass Act's language shows that Congress intended fishery managers to track the "fluctuations" in the striped bass stock, to remedy "inadequacy of fisheries conservation and management practices," and to guard against "risks" of future depletion. 16 U.S.C. § 5151(a). The management plan for striped bass—not to mention a regulatory history that had included severe declines in fish stock and outright bans on fishing—further notified the public that more stringent restrictions would be imposed when the condition of the stock warranted, *see supra*, pp. 14, 19-20.

Lastly, despite Plaintiffs' intimation that ASMFC "targeted" Addendum II at charter fishers (Br. 36-37), the character of the action also cuts against them. Rather than "target[ing]" charter fishers, ASMFC adopted the one-fish limit in part to *avoid* treating charter boats differently—shore and private boat fishing were already subject to one-fish limits, and by applying the one-fish limit to charter boats, Addendum II avoided continuing a "mode split." *See supra*, p. 18; Jan. 2024 Board Minutes, pp. 11, 24-25. Also, under this *Penn Central* factor, "[a]ll else being equal, a regulation is more problematic when it burdens only a small number

of property owners." *Blackburn*, 58 F.4th at 814. Yet here, Plaintiffs include a trade association with "approximately 500 'for hire' charter vessels," (Opening Br. 1). The very fact that this appeal is brought by multiple parties and multiple trade associations (themselves representing hundreds of vessels) belies the claim that Addendum II affects just a few. *See Blackburn*, 58 F.4th at 814 (noting that the purported taking in *Penn Central* was broadly shared because it affected more than 400 properties). A "broad-based regulation is less likely to be a taking if it provides reciprocal benefits." *Id.* Just so here: Addendum II's long-term goal is ensuring healthy and abundant stocks of striped bass, which in turn ensures that striped bass will be available to charter fishers years into the future.[35]

D. Plaintiffs Do Not Plausibly State a Due Process Violation.

Plaintiffs' brief contains no developed due process argument, but alleged due process violations are cited numerous times, *see* Br. 8, 10, 13, 32, 53. Assuming it is deemed raised at all, the contention that the ASMFC denied Plaintiffs due process in issuing Addendum II is meritless.[36] The ASMFC has not "deprived" Plaintiffs of

[35] Plaintiffs describe several non-fishing challenges faced by the striped bass. (Br. 37-39). But they do not explain these observations' legal significance. Insofar as they are claims that Addendum II was arbitrary and capricious, they fail for the same reason Plaintiffs' other pseudo-APA claims fail.

[36] Plaintiffs' due process claim again fails to account for the fact that ASMFC plans do not directly regulate fishing activity; implementation requires subsequent lawmaking by state governments, employing established state-law legislative or administrative procedures.

any property, so the federal Constitution does not entitle them to any particular process. *See Mandel v. Allen*, 81 F.3d. 478, 480 (4th Cir. 1996) (viable Due Process claim "requires more than a unilateral expectation … Instead there must be a legitimate claim of entitlement.") (cleaned up). But regardless, the Commission afforded ample notice and ample opportunity for Plaintiffs and others to be heard on the question of appropriate measures for striped bass management and whether the specific measures in Addendum II should be adopted as part of the Commission's management plan.

"Fishing, whether commercial or recreational, is not a fundamental right and those engaged in these activities are not a suspect class." *Vickers v. Egbert,* 359 F.Supp.2d 1358, 1361-62 (S.D. Fla. 2005). In some cases, however, courts have considered procedural due process objections (almost always rejecting them in the end) when a claimant has been deprived of a fishing permit or other specific legal entitlement that the relevant public authority was required to grant.[37] But here

[37] *See Foss v. NMFS,* 161 F.3d 584, 586-87 (9th Cir. 1998) (discussing certain Individual Fishing Quotas, legal entitlements based on a "one-time" determination of quota shares based upon historical landings and subject to "mandatory regulations" that leave NMFS with "no discretion to reject applicants who meet the well-delineated statutory criteria for an IFQ permit"). *Compare Pacific Choice Seafood Co. v. Ross*, 309 F.Supp.3d 787, 793 (N.D. Cal. 2018) ("Here, in contrast [to *Foss*], the statutory language explicitly permits NMFS to limit, modify, or even revoke [quota determinations]"); *see also Conti v. United States,* 291 F.3d 1334, 1341 (Fed. Cir. 2002) (permit to harvest swordfish in Atlantic Swordfish fishery does not confer property interest); *Am. Pelagic Fishing Co.,* 379 F.3d at 1374

Plaintiffs do not claim they have been deprived of any permit. They have no protected interest in the additional fish they claim their patrons should be allowed to take home.

There was no procedural violation here at all, let alone one of constitutional moment. The Bass Act, ASMFC's Amendment 7, and longstanding ASMFC practice, all afforded conspicuous notice that limits might be changed to reflect new information. Plaintiffs had ample opportunity to comment both on Amendment 7 and on the ASMFC's proposal to tighten conservation requirements in Addendum II. The troublingly high 2022 catch levels were discussed at the May 2023 public Management Board hearing, the Commission published a Draft Addendum in October 2023 which included the one-fish bag limits, and many public hearings were held on the proposal. *See supra*, pp. 17-81. The public process concerning Addendum II gave Plaintiffs sufficient notice and ample opportunity to be heard. The Due Process Clause does not entitle parties to their preferred policy outcome.

E. Plaintiffs' Challenges to the Fishery Management Decisions Underlying Addendum II are Baseless.

Plaintiffs attack the ASMFC's decision, in the proceedings that resulted in Addendum II, that new scientific data regarding the recreational catch warranted a

(mackerel and herring commercial fishing permit does not confer a Fifth Amendment property interest).

change of management measures, going so far as to claim that the Commission's decision had "No Scientific or Rational Basis." (Br. 40). Based entirely on anecdotal information that the striped bass population is the "best in a lifetime" (Br. 40) (quoting an email from a Chesapeake Bay charter boat operator and a blog post from a New York boat captain), they essentially argue that there is nothing to worry about regarding the state of the striped bass fishery.

There are multiple fundamental problems with these arguments. First, as noted above, neither Congress nor the ASMFC have provided for judicial review of ASMFC fishery management plans. *See supra*, pp. 28-34. And even if there were APA-style review it would be improper to rely upon post-decision litigation declarations (and blog posts and non-sworn emails addressed to a Plaintiff and not to the courts) to impeach the reasonableness of the Commission carrying out its mandate based on its governing documents and its longstanding practices that include decision-making by state representatives, peer-reviewed and time-tested scientific grounding, and extensive public input. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). The States, and Congress, have accorded the Commission the responsibility to stay abreast of the latest scientific information regarding the fishery's status, and the record is abundantly clear that it has done so.

Second, even if there was some lawful basis for judicial consideration of Plaintiffs' attacks, those attacks are misconceived. Plaintiffs assert that there is really no problem with the striped bass fishery—quoting a statement that (in New York) the fishery is "bountiful" (Br. 40) and asserting that striped bass in the Chesapeake Bay are "flourishing" (Br. 42). But these assertions appear to be based almost exclusively on a collection of post-Addendum II emails solicited by Plaintiffs, *see* JA 45-56, which address specific individuals' own fishing experiences and anticipated business impacts as a result of the new limitations. Plaintiffs provide no *scientific* grounds for the assertion that the fishery was "bountiful" and "flourishing" last season, nor for any assertion that it is not in trouble going forward. By contrast, the ASMFC's conclusion that the fishery is overfished and at significant risk of not reaching the established 2029 stock-rebuilding target was backed by sophisticated extensively peer-reviewed statistical models and scientifically collected data, as explained *supra*, pp. 11-13 (describing the science underlying the ASMFC's striped bass stock assessments).[38]

Plaintiffs fail to account for the concern of the ASMFC, and the multiple federal, state, and academic fisheries experts who advised it, and attempt to sow confusion about the status of the fish stock. As explained above, that the

[38] Moreover, catch rates for a fish species can remain high and fairly consistent until very few fish are left (referred to as "hyperstable" catch rates); what comes out of the water in an area is not necessarily representative of stock status.

Commission does not believe overfishing is currently occurring does not mean the stock is in sustainable condition. To the contrary, the stock remains overfished, which means that it is in "critically low" abundance. ASMFC, Fisheries Science 101. The ASMFC is under a duty (one Plaintiffs do not deny) to meet a 2029 rebuilding goal, and the core reason the Commission promulgated Addendum II was that new data showed that—contrary to what the Commission had previously believed—the stock did not have a reasonable probability of reaching the rebuilding goal. Specifically, the most recent data suggest that, absent more rigorous management action, the age structure of the stock would be impaired, threatening the population's future. A healthy, balanced age structure is particularly important for striped bass in part because, unlike other fish that are often sexually mature within a year, striped bass take three to six years to reach sexual maturity, *supra*, p. 7.

A population of fish can yield an abundance of fish within the allowable size limits, but still be in trouble if the ensuing year-classes of reproducing females are too small. As explained above, in recent seasons the comparatively plentiful 2015 and 2018 year-classes have been supporting the Chesapeake Bay fishery, but in the coming few years, the below-average 2021-2023 year-classes—the weakest "since the 1980s, in the middle of a stock collapse"—will support the Bay's fishery. *See supra*, pp. 16-17; May 2023 Board Meeting, p. 28; Amendment 7 § 2.1.1. There have been fewer striped bass entering the population each year to replace those lost

to fishing mortality and natural causes, compared to the height of the fishery in the 2003-2006 period. *See* Jan. 2024 Board Minutes, p.3. Below average year-classes cannot sustain the same levels of harvest as average or above average year-classes. Plaintiffs' anecdotal assertions regarding last season's fishing fail to account for the long-term picture or for the well-settled science used to assess the stock's health and prospects. Catch levels that might have been sustainable when more young striped bass were entering the population are not sustainable now; continuing these catch levels could prevent the population from rebuilding to the target level and potentially drive it to even lower levels. Even if Plaintiffs' anecdotal claims about current fishing conditions were correct, they would not necessarily say anything about whether the stock is on a path toward rebuilding.[39]

Even if Addendum II were reviewed under APA standards, it would easily survive. Plaintiffs' assertions that the Commission should not have considered the updated 2022 recreational catch data in designing Addendum II are unfounded. The Commission's pre-existing plan provided for the possibility that management measures would need to be revisited and tightened if new evidence warranted.

[39] Plaintiffs also complain, incorrectly, that the ASMFC ignored the impacts of the Covid pandemic in its modeling. Br. 43. In fact, the ASMFC removed 2020 from the scientific modeling, recognizing that it was not representative of future fishing effort. *See* Memorandum from Atlantic Striped Bass Technical Committee and Stock Assessment Subcommittee to Atlantic Striped Bass Management Board, at 3 (Apr. 17, 2023), https://asmfc.org/uploads/file/ 645930d6SBTC-SAS_ProjectionsMemo_04.2023.pdf.

Amendment 7 § 4.7. New evidence about the greatly expanded 2022 recreational catch levels posed a clear threat to the stock's age structure—and therefore to the prospects of the species attaining the rebuilding target. The updated stock projections considered for Addendum II used the same peer-reviewed model used for previous stock assessments but adjusted one input based on the newly acquired data (to reflect the 2022 removals and assume this rate was maintained into future years,). *See supra*, pp. 15-16. After careful deliberation, including consultations with a wide variety of expert agencies including the federal National Marine Fisheries Service, and after myriad public hearings and considering thousands of public comments, the Commission identified measures expected to arrest these unfavorable trends—while noting that the matter would be revisited when the next stock assessment (to be completed this year) yielded additional updates about stock status. *See supra*, pp. 19-20.

That decision was reasonable and fully consistent with the ASMFC's statutory and Compact responsibilities. Plaintiffs fail to engage seriously with the ASMFC's analysis and record, resorting instead to anecdotal claims about observations of fish abundance (Br. 6-7), and flat-wrong claims that Atlantic striped bass stock is not really overfished (Br. 42). *Contra* Addendum II § 2.1 (explaining that species was "declared overfished in 2019"). They provide no good grounds for doubting the ASMFC's expert judgment.

F. Plaintiffs' Attacks Upon the ASMFC's Authority are Not Properly Before the Court and Are in Any Event Meritless.

Plaintiffs finally adduce a claim that "Appellee's Exercise of All Post-1984 Powers May Be Void." (Br. 48). Their theory appears to be that ASMFC member States needed to re-enact authorizing legislation approving the Compact, or enter a new compact, after Congress gave the ASMFC responsibilities under the Bass Act in 1984 and the Atlantic Coastal Act in 1993. *See* Br. 48-49.

The argument is not properly before the Court. Plaintiffs did not mention any such theory in their Complaint. *See* JA 6-27. They nowhere raised it in the memorandum in support of their preliminary injunction motion that underlies this appeal. A variant of the theory appeared later, in their response to the Commission's motion to dismiss, in the equivocal form that "it is entirely plausible" that ASMFC's actions are invalid. Response to MTD at 24 (filed May 3, 2024). But "[o]ur litigation system typically operates on a raise-or-waive model: if a litigant fails to raise a claim in a complaint, or a defense in an answer, or to preserve an objection at trial, they are generally out of luck. This model forces efficiency and discourages sandbagging." *Wood v. Crane Co*., 764 F.3d 316, 326 (4th Cir. 2014). "[I]f a party wishes to preserve an argument for appeal, the party must press and not merely intimate the argument during the proceedings before the district court." *In re Under Seal*, 749 F.3d 276, 287 (4th Cir. 2014) (cleaned up). Because this appears to be a *constitutional* argument, it is all the more inappropriate to address it when not

properly raised in the case. *Bell v. Brockett*, 922 F.3d 502, 513 (4th Cir. 2019) ("Litigants must allege constitutional violations with factual detail and particularity.") (cleaned up).[40]

Had this theory been raised below, it would have been extremely unlikely to succeed. First, Plaintiffs' suggestion that the Bass Act and the Atlantic Coastal Act impose requirements counter to the will of the ASMFC member States (Br. 51-53) is entirely fictional: ASFMC member States all have the express right under Article XII of the Compact to withdraw at any time. The fact that they have been working cooperatively for decades is clear evidence of their approval of the regime. (Certainly the fact that a state delegation votes against a particular management measure adopted by the Commission is no proof that the State therefore regarded the ASMFC as lacking *authority*).

Plaintiffs' suggestion that this fishery management regime implicates the "anti-commandeering principle" of *New York v. United States*, 505 U.S. 144 (1992) (cited at Br. 52), also fails. Rather than commandeering the States, the Bass

[40] Plaintiffs never provided notice below under Federal Rule of Civil Procedure 5.1, which requires that when the constitutionality of a federal or state statute is challenged, the party raising the issue must "file a notice of constitutional question" and serve it on the United States. Plaintiffs did later file a Notice with this Court under Federal Rule of Appellate Procedure 44 on May 24, 2024. Doc. 12. Paragraphs 7-9 of their "Notice of Constitutional Challenge of Statutes" purported to raise constitutional challenges to the ASMFC that they had neither timely raised in the district court, nor were the subject of any notice to the United States under Rule 5.1. This sequence reinforces that the challenge was not timely raised.

Act and the Atlantic Coastal Act follow a structure that is common in federal law, offer the States the choice of regulating in accord with specified principles, or of declining to regulate and allowing the federal government to regulate directly. That familiar pattern is entirely constitutional. *See, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). Plaintiffs' argument seeks to deprive the Atlantic coastal States of a practical institutional framework that has proven invaluable to them.

II. THE EQUITIES DISFAVOR INJUNCTIVE RELIEF.

Because Plaintiffs cannot demonstrate a likelihood of success on the merits, they are not entitled to a preliminary injunction. *See Henderson ex rel. NLRB v. Bluefield Hosp. Co., LLP*, 902 F. 3d 432, 439 (4th Cir. 2018). But consideration of the equitable factors provides independent grounds for denial.

Plaintiffs' irreparable harm claims are heatedly advanced but facially implausible. Plaintiffs' assertion that most for-hire charter boat customers will give up fishing in Maryland merely because of laws preventing them from taking a second fish is implausible and unsupported. The assumption that customers would suddenly become unwilling to purchase fishing trips because of a one-fish rather than two-fish bag limit depends upon doubtful assumptions. Charter boat customers do not pay hundreds of dollars to purchase some number of fish (which can be purchased for a tiny fraction of that at the store); they purchase the

experience of fishing. Even with a one-fish bag limit, customers retain the ability to catch and release as many as stiped bass as they wish (as is very common in the fishery where the size limits already required that many caught fish be released). Recreational fishers are familiar with conservation-based limits on catch: for example, Maryland wholly bans fishing for striped bass for two weeks in July because released fish fare poorly when the Chesapeake Bay water is warm,[41] and—as noted—Maryland canceled its 2024 spring trophy season altogether due to concerns about the stock's status, *supra*, p. 21. A tightened bag limit is actually a relatively modest restriction compared to past management measures, and most fishers understand that conservation limits help preserve the resource for future seasons.

Second, Plaintiffs' claims are inconsistent with other areas' experience. All other jurisdictions are and have been subject to the one-fish limit for striped bass. Virginia, another state with an active recreational striped bass for-hire fishing sector, has had a one-fish bag limit in place for its Chesapeake Bay for-hire fleet since 2019. Kerns Decl. ¶30 (JA 79). Indeed, Plaintiffs' own brief further undercuts their claim that one-fish bag limits clash disastrously with consumer needs. Plaintiffs' brief quotes a New York boat captain describing last season's striped

[41] *See* Maryland Fishing, *Striped Bass, Chesapeake Bay and Tidal Tributaries*, https://www.eregulations.com/maryland/fishing/striped-bass.

bass fishing in the New York Bight—an area that was already subject to one-fish bag limits, *see* 2022 Review tbl.2, p. 23—as "downright EPIC," "kinda ridiculous," and "hard to articulate just how good it was." (Br. 40). Plaintiffs have provided no proof that if fishing can be "epic" in the New York Bight with a one-fish bag limit, things would be any different in the Chesapeake Bay.[42]

On the other side of the scale, there is a compelling public interest in the full recovery and long-term health of the striped bass stock, as Congress and the Atlantic coastal States have affirmed. *See* 16 U.S.C. § 5151(a)(1) ("Atlantic striped bass are of historic commercial and recreational importance and economic benefit to the Atlantic coastal States and to the Nation."); *see also* Kerns. Decl. ¶34 (JA 80-81); *Nken v. Holder*, 556 U.S. 418, 436 (2009) (considering whether injunctive relief would "undermine" statutory regime). The Act explains that fishing pressure is one reason the population of this species "has been subject to large fluctuations," 16 U.S.C. § 5151(a)(3)(A), and that the species "risks potential depletion in the future without effective monitoring and conservation and management measures," *id.* § 5151(a)(3)(B).

The measures in Addendum II represented a scientifically-based and

[42] With respect to commercial landings, the limited nature of the imposition on existing practices is also apparent. For the last three years, Maryland has, on average, used less than its full commercial quota—by an average of about 7 percent. *See* Kerns Decl. ¶27 (JA 77).

responsible effort to calibrate the stringency of management to the observed data about stock health—and to try to avoid a situation in which, once again, more draconian measures such as moratoria are required. The record shows a serious risk of lasting harm to the stock's age structure, and thus to its overall health, unless there is a prompt reduction in fishing removals, so that an injunction that forced the bag-limit increase Plaintiffs seek "would seriously threaten the successful rebuilding of the striped bass resource by 2029." Kerns Decl. ¶¶31, 33 (JA 79, 80). Plaintiffs' plea to block this needed and time-sensitive policy is contrary to the public interest in the recovery of this important fish stock.

CONCLUSION

The district court's denial of the motion for a preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that according to the word-count function of Microsoft Word the foregoing brief contains 12,892 words.

/s/ Sean H. Donahue

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2024, I filed the foregoing brief via the Court's CM/ECF system, which will provide electronic copies to counsel of record.

/s/ Sean H. Donahue