

[Oral Argument Not Yet Scheduled]

No. 23-5026

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

A.P. BELL FISH COMPANY, INC., SOUTHERN OFFSHORE FISHING
ASSOCIATION, INC., and GULF OF MEXICO REEF FISH
SHAREHOLDERS' ALLIANCE,

Appellants

v.

GINA RAIMONDO, in her official capacity as Secretary of the United States
Department of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION; and NATIONAL MARINE FISHERIES SERVICE,

Appellees

and

COASTAL CONSERVATION ASSOCIATION and STATE OF LOUISIANA,
Intervenor-Appellees

**BRIEF OF *AMICI CURIAE* CHARTER FISHERMAN'S ASSOCIATION,
THE NATIONAL FISHERIES INSTITUTE, THE RESTAURANT LAW
CENTER, PAPPAS RESTAURANTS, INC., AND FORTUNE FISH &
GOURMET LLC IN SUPPORT OF APPELLANTS AND REVERSAL**

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Center, Pappas Restaurants, Inc., and
Fortune Fish & Gourmet LLC*

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29 and Circuit Rules 26.1 and 29, Amici Curiae Charter Fisherman's Association, The National Fisheries Institute, The Restaurant Law Center, Pappas Restaurants, Inc., and Fortune Fish & Gourmet LLC certify as follows:

A. Except for the following, all parties, intervenors, and *amici* appearing before the District Court for the District of Columbia and in this court are listed in the Appellants' Opening Brief.

1. The Charter Fisherman's Association is a non-profit corporation without any parent corporation and no publicly held corporation owns 10 percent or more of its stock.
2. Fortune Fish & Gourmet LLC is a limited liability company; its parent operating company is Fortune International LLC; and no publicly-held corporation owns 10% or more of Fortune Fish & Gourmet's or Fortune International's limited liability company interests, directly or indirectly.
3. The National Fisheries Institute is a non-profit corporation without any parent corporation and no publicly held corporation owns 10 percent or more of its stock.

4. Pappas Restaurants Inc. is a Texas S Corporation without any parent corporation and no publicly held corporation owns more than 10 percent of its stock.
 5. The Restaurant Law Center states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Restaurant Law Center has no parent corporation, and no publicly held company has 10% or greater ownership in it.
- B. References to the rulings at issue appear in the Appellants' Opening Brief at ii-iii.
- C. Undersigned counsel is not aware of any related cases pending before this court or any other court.

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INTRODUCTION

This case addresses the federal management of the red grouper fishery in the Gulf of Mexico. The district court erred when it upheld actions by the National Marine Fisheries Service (“the Service”) to approve and implement Amendment 53 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico at 87 Fed. Reg. 25,573 (May 2, 2022), JA __, AR 17419-17436, implementing Amendment 53 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, JA __, AR 7946-8268 (“Amendment 53”).

The court concluded that the Service satisfied the requirements established by Congress within the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* (“Fishery Act”). Specifically, the court addressed compliance with the Act’s provisions related to ensuring that fishery management measures shall be “reasonably calculated to promote conservation” and “shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.” *Id.* § 1851(a)(4) (“National Standard 4”); *id.* § 1851(a)(9) (“National Standard 9”). However, Amendment 53 fails to comply with either National Standard 4 or National Standard 9, and the court should have rejected the Services’ attempts to rationalize its adoption of this flawed fishery management plan.

The *Amici Curiae* support the Appellants' request that the court reverse the judgment of the district court, vacate Amendment 53, and remand it to the Service.

INTEREST OF *AMICI CURIAE*¹

Amici Curiae represent an unlikely coalition of stakeholders concerned with the long-term health of the Gulf of Mexico red grouper fishery, as well as the harmful economic impacts resulting from adoption and implementation of Amendment 53 by the Service. Although seafood processors, distributors, and restaurants (and the trade associations that represent them) normally would not ally with charter for-hire vessel operators, in this instance these stakeholders all share the same deep concerns with respect to the agency's arbitrary and ill-considered promulgation of Amendment 53. Specifically, the *Amici Curiae* are troubled by the effect this agency action will have on the availability of red grouper to charter fishing customers, restaurant guests, and retail consumers. Moreover, although red grouper is harvested in the Gulf of Mexico, this is an issue of national interest as well, given that restaurants and retail establishments offer red grouper to the public throughout the country, and charter fishing customers from around the U.S. travel to the Gulf region for the opportunity to catch this fish. The management actions adopted under Amendment 53 will undermine the overall viability of the red grouper fishery, and establish an adverse precedent that has the potential to erode

¹ All parties have consented to the filing of this brief. No party's counsel or other person except *amici* and their counsel authored this brief or contributed money to fund its preparation or submission.

effective, conservation-based management of federal fisheries across other regional fishery management councils.

1. Charter Fisherman's Association

The Charter Fisherman's Association ("Association"), is an industry-leading organization advocating for the federally permitted for-hire fishermen and women of the Gulf of Mexico. The Association's members are part of the recreational fishing sector managed under the Gulf of Mexico Fishery Management Council's ("Gulf Council") Fishery Management Plan for Reef Fish Resources of the Gulf of Mexico. While they are included in the recreational sector and Amendment 53 to this Fishery Management Plan will increase the allocation of red grouper to their sector, the Association opposes this action because it will adversely impact conservation of the fishery resource and create greater risks to their business interests.

2. National Fisheries Institute

The National Fisheries Institute ("NFI"), a non-profit organization, is the nation's largest commercial seafood trade association. NFI represents approximately 300 member companies that collectively provide hundreds of millions of seafood meals to consumers every year. NFI member companies account for a substantial portion of the 1.2 million American commercial

seafood jobs that depend directly upon a reliable supply of fish, including red grouper harvested in the Gulf of Mexico.

3. Restaurant Law Center

The Restaurant Law Center (“Law Center”) is the only independent public Policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce.

Restaurants and other foodservice providers are the second largest private sector employers in the United States.

4. Pappas Restaurants Inc.

Pappas Restaurants Inc. was founded more than 50 years ago and now owns and operates nearly 100 restaurants in eight states. It employs over 8,000 people, including cooks, servers, hosts, cashiers, bussers, dishwashers, managers, truck drivers, facilities maintenance, and warehouse crews.

Headquartered in Houston, Texas, Pappas Restaurants has a strong presence in the Gulf region and sources fresh seafood for its restaurants from the Gulf of Mexico, including red grouper. Pappas also owns Individual Fishing Quota (“IFQ”) shares of red grouper through the Grouper-Tilefish IFQ Program managed by the Gulf Council and the Service. Pappas is

committed to the sustainable management of fisheries resources in the Gulf of Mexico and supports the long-term availability of wild, fresh red grouper and other Gulf fish species for its guests.

5. Fortune Fish & Gourmet LLC

Fortune Fish & Gourmet (“Fortune”) is the Nation’s premier fresh and frozen seafood processor and specialty food distributor servicing fine restaurants, hotels, country clubs and grocers from its seventeen facilities located in the Gulf of Mexico, East Coast, Midwest, and Rocky Mountains regions. From the time of its founding in 2001, Fortune has had a direct relationship with Gulf of Mexico fisheries, including the sourcing of red grouper and red snapper for its seafood customers. Fortune operates seafood processing, distribution or sales facilities in Alabama, Louisiana, and Texas, in addition to its processing facilities in Illinois, Minnesota, Wisconsin, and Missouri.

This coalition of charter for-hire vessel operators, seafood companies and restaurants is deeply concerned with the impact Amendment 53 is having and will continue to have on the availability of red grouper for average Americans. Whether they enjoy fresh, wild seafood at their favorite local restaurant, or purchase it at a grocery store or fish market and cook it for their families at home, American

consumers rely on the commercial fishing and seafood sectors who make these opportunities possible.

The U.S. seafood industry is supported by diverse business engaged in the harvesting, processing, distribution, and sale of fish products throughout the country. The Gulf of Mexico is a key source of wild, fresh seafood, including shrimp, crawfish, red snapper, and red grouper. The vast majority of commercial fishing vessels in the Gulf are owned and operated by family-owned businesses. These families and the crew members they employ put in long hours of backbreaking work to catch and deliver these species to the Gulf shores. They play a critical role in the economic well-being of the Gulf's coastal communities, supporting ports and harbors, gas docks, repair and maintenance facilities, small processing plants, and seafood dealers. Although some of their catch goes directly into coastal seafood restaurants, the bulk of their catch goes into regional and national retail and food service distribution to make wild-caught seafood available to the broader public.

When a specific fishery declines, or in this case is walled off from commercial access via a federal management decision, businesses – along with consumers – are harmed. Commercial fishermen are strictly regulated and cannot easily shift their operations to into another, more promising fishery. Coastal small businesses

dependent on these fisheries may have few if any alternatives to replace revenue lost as a result of fewer vessels making fewer fishing trips with reduced landings.

Such a fishery reduction also creates instability for these businesses and disrupts the supply chain. At the regional and national levels, decisions are made to switch to other fish species, often less desirable than one as popular as red grouper, and this can lead to a disruption to relationships and economic opportunities so important to small, coastal businesses. Reduced availability of red grouper leads to increased prices paid by restaurants sourcing this fish. This raises restaurant costs, which typically are not passed on to their guests, further constraining restaurant operating revenues, hurting them and their employees. The same is true at the retail level, where grocery stores and fish markets substitute other species for red grouper and hope that customers continue to buy fish when they show up at the seafood counter and cannot find one of their preferred choices.

By reducing the commercial sector's share of the annual catch by almost a third in terms of the real-world catch, or nearly 1.2 million pounds, Amendment 53 will sharply reduce the supply of red grouper available to restaurants, grocery stores, and fish markets, and ultimately to consumers.

The damage done by the reduction of red grouper quota allocated to the commercial sector, announced by the Service in December 2022, is just the first shoe dropping. Because Amendment 53 fails to promote conservation and actually

rewards wasteful bycatch caused by private anglers, *Amici* also are troubled by the threat unconstrained fishing efforts and inadequate accountability will have on the long-term viability of red grouper stocks.

The negative consequences of Amendment 53 also fall upon the charter for-hire fishing sector. The substantial re-allocation of red grouper to the recreational sector by Amendment 53 is primarily intended to benefit private anglers who fish for pleasure. Although members of the Charter Fishermen's Association fall within the recreational sector, the perception that this re-allocation is an overall benefit to them is wrong. The Association's strong belief is that the long-term, negative impacts to the health of the red grouper stock overshadow any slight, near-term benefits.

The Association's members operate vessels designed and outfitted to carry recreational anglers offshore for a fee for the purposes of fishing. These charter for-hire businesses are important to the health of the economies in the Gulf States, to the regional environment, and serve to promote recreation and engagement with natural resources in the Gulf by members of the public. Nearly a million Americans rely on the charter for-hire industry every year to access the Gulf. Charter for-hire vessels offer the most cost-effective alternative for individuals and families who cannot afford to own and operate their own boats. Charter vessels are operated by experienced captains and crew who facilitate fishing activities and

ensure the safety of their passengers during what are mostly half-day or full day trips. The vessels provide fishing rods, bait, and the local knowledge needed to maximize the chances of catching elusive fish during the trip.

For many, charter fishing trips in the Gulf of Mexico are a once-in-a-lifetime opportunity and can be planned as much as a year or more in advance. Other customers may return more frequently to take advantage of the expertise of the charter for-hire vessel's captain and crew, and continue to enjoy catching red grouper and other Gulf species. The charter experience is the best way to overcome the significant economic barrier to entry, i.e. boat ownership, that prevents most Americans from being able to fish in the ocean. The Association's perspective is informed by its member charter for-hire vessel operators and the millions of Americans who rely on them.

Collectively, *Amici* view Amendment 53 as an imbalanced federal management decision that irrationally and arbitrarily favors private anglers over regular consumers who seek to enjoy red grouper with their families at home, in restaurants, or through a rare charter fishing experience. *Amici* contend that Amendment 53 ignores applicable statutory standards in its shift of red grouper to the recreational sector, thus marginalizing the economic benefits of the commercial

sector and businesses such as restaurants and retailers that supply red grouper to their guests and customers.²

BACKGROUND

FEDERAL MANAGEMENT OF THE CHARTER FOR HIRE SECTOR OF THE RED GROUPER FISHERY

The Gulf of Mexico red grouper fishery is regulated under the Fishery Act, enacted by Congress to better manage and conserve our nation's federal fisheries, including both the commercial and recreational sectors.

Although included within the recreational sector, the charter for-hire fleet is regulated very differently than private anglers. More similar to the commercial fishing sector, the federal regulatory framework governing charter for-hire vessels limits access to the fishery through a finite number of permits, as well as operational and mandatory reporting requirements. Cumulatively, these regulations ensure that fish, including red grouper, caught by charter for-hire vessel customers

² In its comments on the Proposed Rule for Amendment 53, Pappas Restaurants highlighted this economic impact on its restaurants and their ability to serve customers red grouper. Pappas included in its comments the comprehensive analysis of the *Economic Impacts Associated with Harvest and Marketing of Red Grouper*, which showed that 2020 landings of Red Grouper generated more than \$187 million in total Red Grouper consumer sales. This study also highlighted the more than \$63 million generated by the restaurant and retail sector, supporting more than 900 direct employees in the State of Florida alone in 2021. *Economic Impacts Associated with Harvest and Marketing of Red Grouper*, prepared by Thomas J. Murray & Assocs. (Dec. 2021) (AR at 0014087).

are accounted for and contribute to the effective management of Gulf of Mexico fishery resources. In contrast, private anglers are not subject to any federal licensing or reporting regulations. Charter for-hire vessels also are federally-licensed vessels under 100 gross tons and are subject to U.S. Coast Guard regulations governing for-hire vessels carrying six or fewer passengers. *See* 50 C.F.R. § 622.2.

All charter for-hire vessels in the red grouper fishery must have a federal permit. *See* 50 C.F.R. § 622.20(b). Further, federal regulation limits the number of charter for-hire vessels authorized to participate in the red grouper fishery. *See* 50 C.F.R. § 622.373. This means that the overall fishing effort within the charter for-hire sector is finite, which contributes to greater certainty in management decisions and high levels of industry compliance.

Charter for-hire vessels also are subject to federal recordkeeping and reporting requirements, including filing of electronic fishing reports with the Service prior to any fish being offloaded from the vessel. *See* 50 C.F.R. § 622.26(b)(1) (Charter vessels “must submit an electronic fishing report of all fish harvested and discarded”). This requirement to report both fish retained and fish discarded prior

to the conclusion of the charter trip helps build the accountability record for fishery managers to fully account for red grouper harvested – and in near real time.³

By contrast, private anglers faces no such requirements. Indeed, the private angler component of the recreational sector is neither heavily regulated nor closely monitored. Private anglers need not obtain a federal permit or submit detailed catch and bycatch reports to the Service. Instead, the agency utilizes a series of voluntary and random surveys to compile estimates of fish landed and discarded by private anglers.

Private anglers are effectively unregulated when it comes to bycatch. Bycatch and dead discards in the recreational sector are predominantly the result of catching an undersized fish that must be thrown back, or when private anglers are fishing for other species and catch red grouper that must be thrown back. It also results from high-grading, which is the practice of catching a targeted species of fish, but in the eyes of the private angler it is not big enough and is thrown back in the hope of catching a subsequent larger fish. (AR at 8178) (“High-grading is

³ In February of this year, the Court of Appeals for the Fifth Circuit set aside the Service’s Final Rule to implement the Gulf For-hire Reporting Amendment that was in effect when the Service promulgated regulations to implement Amendment 53. *Mexican Gulf Fishing Co. v. U.S. Dep’t of Commerce*, 60 F.4th 956 (5th Cir. 2023). The Gulf Council is preparing a revised Amendment to address the deficiencies identified by the court. Notwithstanding this very recent change, throughout the development of Amendment 53, the charter for-hire fleet was subject to federal reporting requirements per 50 C.F.R. § 622.26(b)(1).

thought to be underreported in fisheries worldwide . . . , and its prominence in the Gulf red grouper fishery is unknown.”).

SUMMARY OF ARGUMENT

The court should vacate Amendment 53 because it fails to satisfy requirements of the Magnuson-Stevens Act, violates National Standards 9 and 4, jeopardizes the health and viability of the red grouper fishery, puts at risk the availability of fresh, wild caught red grouper to restaurant guests and retail customers at grocery stores and fish markets, and harms the charter for-hire fleet.

ARGUMENT

I. AMENDMENT 53 FAILS TO SATISFY CORE REQUIREMENTS UNDER THE MAGNUSON-STEVENSONS ACT

A. Amendment 53 violates Magnuson-Stevens Act National Standard 4

Amendment 53 does not promote conservation of the red grouper fishery and violates National Standard 4. National Standard 4 sets forth important requirements for a Regional Fishery Management Council and the Service to incorporate into a fishery management plan or subsequent amendment to such plan:

If it becomes *necessary to allocate or assign fishing privileges* among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; [and] (B) *reasonably calculated to promote conservation*. . . .

16 U.S.C. § 1851(a)(4) (emphasis added).

During the Gulf Council's consideration of Amendment 53, it was labeled "Red Grouper Allocations and Annual Catch Levels and Targets." These drafts included the justification for proceeding with an amendment to the Fishery Management Plan for Reef Fish Resources of the Gulf of Mexico, specifically for red grouper, stated as follows under the heading of "Purpose and Need":

The purposes are to revise the red grouper allocation between the commercial and recreational sectors using the best scientific information and to modify the allowable harvest of red grouper based on the results of the recent stock assessment and subsequent OFL and ABC recommendations from the SSC.

The need is to use the best scientific information available to establish Gulf red grouper sector allocations, annual catch limits, and annual catch targets, ensuring that the historical participation by the recreational and commercial sectors is accurately reflected by the sector annual catch limits, and that the recreational annual catch limit is consistent with the data used to monitor recreational landings and trigger accountability measures.

Amendment 53 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico – Revised Draft (Feb. 2021) (AR at 0007688); Revised Draft (June 2021) (AR at 0006520). The final version of Amendment 53 approved by the Gulf Council and dated September 2021 includes the same Purpose and Need statement.

To determine whether Amendment 53 satisfies the requirements of National Standard 4, a court must examine whether it was "reasonably calculated to promote conservation." 16 U.S.C. § 1851(a)(4). In *Groundfish Forum v. Ross*, 375 F. Supp. 3d 72, 89 (D.D.C. 2019), the court held that an allocation decision within an Amendment to a Fishery Management Plan must promote conservation

and not simply be neutral in its impact to the conservation and health of the fishery. Amendment 53 fails to meet this standard, as it embraces and codifies actual harm to the red grouper fishery by increasing bycatch within the recreational sector.

When reviewing the actions leading up to the adoption and promulgation of the Final Rule for Amendment 53, the district court erroneously accepted the characterization advanced by the Service (and the state of Louisiana) that Amendment 53 is not an allocation within the meaning of the Magnuson-Stevens Act. Instead, the district court characterized Amendment 53 as “a distributive decision” that does not trigger the need to ensure that such an allocation also promotes conservation benefits for the fishery, *A.P. Bell Fish Co., Inc. v. Raimondo*, No. 22-cv-1260 (TJK), 2023 WL 122270, at **12-13 (D.D.C. Jan. 6, 2023). The court then used this characterization of Amendment 53 to distinguish its earlier ruling in *Groundfish Forum*, which held that to “promote” means to “advance or further [conservation]” in order to satisfy the requirements under National Standard 4. 375 F. Supp. 3d at 89. In so doing, the Court in effect eviscerated the conservation prong of National Standard 4.

Ultimately, the Court relied on this characterization to improperly narrow its analysis under National Standard 4 of the Act. Despite these linguistic gymnastics to minimize the true impact of the Service’s action on the commercial sector,

Amendment 53 is in fact an allocative decision. As noted by the poet James Whitcomb Riley, “when I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.”⁴ A red grouper may not be a duck, but Amendment 53 is certainly an allocative decision. As such, this Court should take into consideration the full import of National Standard 4, and properly construe the precedent set in *Groundfish Forum* that such allocative decisions must promote conservation.

If upheld, the district court’s interpretation of National Standard 4 could fundamentally undermine the overall purpose of the Fishery Act to both prevent overfishing and achieve optimum yield for federally-managed fisheries in the Gulf of Mexico and throughout the country. To equate a reduction in overall harvest levels to prevent overfishing within a fishery, on the one hand, with the Act’s goal to conserve and expand fisheries in the long-term, on the other, is not a proper reading of the Fishery Act.

B. Amendment 53 violates Magnuson-Steven Act National Standard 9

National Standard 9 establishes a requirement for the Service to regulate federal fisheries such that agency regulations will “to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of

⁴This quote is generally attributed to the American author and poet, James Whitcomb Riley (1849-1916).

such bycatch.” 16 U.S.C. § 1851(a)(9). National Standard 9 is an important element in fulfilling the statute’s overall goal of promoting conservation, which inherently includes the elimination of the wasteful loss of fishery resources in the form of bycatch. By reallocating red grouper from the commercial to the recreational sector, however, Amendment 53 will cause bycatch to *increase* substantially.

In addition to increasing bycatch caused by private anglers, when more fish are allocated to the recreational sector, total landings for both the commercial and recreational sectors must be constrained, *i.e.*, reduced, to account for the greater dead discards from recreational red grouper fishing (*e.g.*, Preferred Alternative 3 and Alternatives 4 and 5 compared to Alternative 2). (AR at 0008070.)

Amendment 53 on its face admits that shifting more Red Grouper to the recreational sector will increase bycatch due to its higher discard and associated mortality levels. This also increases the potential for overfishing because of far greater management uncertainty in the recreational sector due to challenges with reporting actual catch levels. As noted above, the commercial and charter for-hire sectors are tightly regulated and do not have a history of exceeding their annual catch limits.

Since 1988, the available data shows that the private angler fleet has exceeded more than 1,000,000 individual red grouper discards every year. This includes

seven of the ten most recent years with discards exceeding 2,500,000 fish in all but one year, and reaching a high point of 6,828,147 discards in 2009, and averaging 4.14 million red grouper discards per year. (AR at 0008173.) It is estimated that 11.6 percent of the recreational bycatch is discarded as dead. (AR at 0018294.)

Although there is not a separate allocation for charter for-hire boats within the recreational sector of the red grouper fishery, the Gulf Council has established a subsector for charter for-hire vessels under Amendment 40. Amendment 40 to the Reef Fish Fishery Management Plan, 80 Fed. Reg. 22,422 (May 22, 2015). See *Coastal Conservation Ass'n v. U.S. Dep't of Commerce*, 846 F.3d 99 (5th Cir. 2017) (upholding sector separation); The establishment of a subsector for charter for-hire vessels was a key effort by the Association to reduce management uncertainty within the recreational sector:

The Final Rule reiterated NMFS's finding that Amendment 40 will provide the basis for increased flexibility in future management of the recreational sector, and reduce the likelihood of recreational quota overruns, which could negatively impact the rebuilding of the red snapper stock.”

Coastal Conservation, 846 F.3d at 105 (citing 80 Fed. Reg. 22,422).

The Court commented further that in approving subsector allocation for charter boats in Amendment 40 the intent was to protect the interests of the charter for-hire fleet:

The Secretary also described how the privileged position of private anglers—in particular, the access to state waters during state seasons and the lack of limit on private vessels targeting red snapper—had adversely

affected the charter industry, explaining that “[b]y establishing separate sectors, NMFS intends to stabilize the Federal for-hire component’s participation in the sector.”

Id. (citation omitted).

Finally, the Court acknowledged that “while there has been a moratorium on the issuance of new charter vessel permits for Gulf reef fish since 2003, there is no limit on the number of anglers fishing from private recreational vessels that target reef fish species.” *Id.* at 104 (citing 80 Fed. Reg. 3541, 3542 (Jan. 23, 2015) (Notice of Proposed Amendment 40)).

Charter for-hire vessel operators fear that even the very large volume of bycatch acknowledged in Amendment 53 vastly underestimates the true picture on the water. Amici representing seafood and restaurant businesses share this fear, and worry that ineffective management of this fishery resource, especially such a high increase in bycatch, will lead to further reductions to the red grouper quota allocated to the commercial sector.

Several cases highlight the need for meaningful action by the Service to explore and adopt fishery management measures that are designed to reduce bycatch. In *Conservation Law Foundation v. Evans*, 209 F. Supp. 2d 1, 12 (D.D.C. 2002), the court stated: “In simple terms, bycatch kills fish that otherwise would contribute toward the well-being of the fishery or the nation’s seafood consumption needs.” The court acknowledged that the Service must develop regulatory measures that

effectively achieve the requirements of the bycatch provisions included in the Fishery Act. *Id.* While courts have not required the agency to include all conceivable bycatch reduction measures, the Service's decision must at least show a reasonable analysis that it does effectively "minimizes bycatch to the extent practicable," and not just claim it considered the issue. *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 59 (D.D.C. 2012).

Relevant to the current case, that court determined that the Service may not assert that lowering overall catch limits is not sufficient to satisfy the need to actually reduce bycatch pursuant to National Standard 9. *Id.* at 58. Amendment 53 lacks any clear justification by the Service that no additional reduction measures were available to address the high levels bycatch in the recreational sector, nor does it explain adequately why none were practicable.

Under Amendment 53, at the current harvest levels, 640,000 pounds of red grouper that otherwise would be caught, sold, and eaten in restaurants or at home by American consumers will now be floating dead in the Gulf of Mexico *each year* after being discarded by recreational anglers. The *Amici Curiae* are not aware of any federal court decision that addresses a decision by the Service to increase bycatch without linking such decision to a compelling conservation benefit, or one that rests on such high levels of uncertainty in its assumptions in the context of bycatch.

Amendment 53 fails to strike a proper balance by reaching a result that increases bycatch and raises uncertainty in the conservation goals of the red grouper fishery without achieving a counterbalancing objective. It would result in both of the harms the National Standard 9 Guidelines warn about: it would increase uncertainty about total fishing mortality, and it would preclude other more productive uses of fishery resources by redirecting commercial landings (and reducing consumption by U.S. consumers) to cover these increased bycatch and dead discards.

CONCLUSION

For the foregoing reasons, this Court should overturn the District Court's order.

RESPECTFULLY SUBMITTED this 14th day of April, 2023.

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Fortune Fish & Gourmet LLC*

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

1. This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) and 32(g)(1) because, as determined by the “word count” feature of Microsoft Word 2016, the brief contains 4,646 words, excluding the parts of the document exempted by Fed. R. App. R. 32(f).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

Dated: April 14, 2023

/s/ John Sterne, Jr.
John Sterne, Jr.

CERTIFICATE OF SERVICE

I certify that on April 14, 2023, the foregoing Brief of *Amici Curiae* Charter Fisherman's Association, The National Fisheries Institute, The Restaurant Law Center, Pappas Restaurants, Inc., and Fortune Fish & Gourmet LLC was served on counsel of record for all parties through the CM/ECF system.

Dated: April 14, 2023

/s/ John Sterne, Jr.
John Sterne, Jr.