

NOT TAKING THE BAIT: THE FIFTH CIRCUIT’S INTERPRETATION OF THE
MAGNUSON-STEVENSON FISHERY MANAGEMENT AND CONSERVATION ACT

By: Caleb L. Bertrand*

I.	Introduction	44
II.	Background.....	44
	A. A Brief History of Fishing.....	44
	B. The Magnuson-Stevens Fishery Conservation and Management Act.....	48
	1. The Purpose of the Act	48
	2. Territories and Zones Distinguished within the Act.....	48
	3. Implementing the Act	52
	a. Regional Fishery Management Councils.....	52
	b. Fishery Management Plans.....	53
	C. A Plan to Create and Manage Aquaculture Regimes in the Gulf of Mexico	54
III.	Challenging the Creation and Regulation of Aquaculture Regimes under the Act.....	55
IV.	Denying the Agency <i>Chevron</i> Deference	56
	A. Congressional Silence does not Equate to Congressional Authorization.....	56
	B. The Language of the Act does not Support the Appellant’s Interpretation.....	60
	1. Harvesting Should be Read as Synonymous with Catching and Taking.	61
	2. Appellant’s Interpretation would not fit within the Structure of the Act	62
V.	A Dissenting Opinion	65
VI.	Conclusions	67

* J.D. Candidate 2021, Loyola University New Orleans College of Law; B.S.M. 2017, The Tulane University of Louisiana.

I. Introduction

Throughout history, man has utilized the waters of the world for transportation, food, and fun. Fueling the ever-growing human population has promoted the exploration and expansion of our territories to discover new and diverse resources. The seas and various waters of the Earth are no exception. However, as the human population continues to grow, we put a greater strain on once plentiful resources. If left unchecked, these resources may become overwhelmed and overharvested, resulting in irreversible harm and, quite possibly, complete depletion. Congress, in a preemptive effort to protect and sustain the fishery resources within the waters adjacent to the coastal states, has enacted the Magnuson-Stevens Fishery Conservation and Management Act (the Act) to ensure that future generations will be able to enjoy and use these vastly depleted resources.¹

II. Background

A. A Brief History of Fishing

Water is the essence of life. Not only do all known living organisms need it to survive, but mankind has constantly looked to it for the bountiful resources contained therein. Although it may be difficult to pinpoint when man first began exploiting the resources of the Earth's waters, "findings of remains such as fish bones, spines in tools, [and] mollusk shells. . . attest to the significance of fish in prehistoric culture[s]."² Archeologists in various parts of the world have similar findings that indicate that mankind's universal reliance upon both coastal and inland fisheries is not an isolated occurrence unique to only a few cultures.³ Historically, cultures have utilized fisheries for various reasons, such as for gathering food, harvesting building materials, acquiring tools and decorations, and various for various other purposes.⁴

Fishing, as defined within the Act, is the attempt or act of "catching, taking, or harvesting. . . fish; any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or any operations at sea in support of, or in preparation for, any activity [previously] described."⁵ The general concepts and techniques of fishing, excluding those that require combustible engines, have remained widely unchanged throughout recorded history.⁶ However, steam-powered vessels revolutionized the fishing industry.⁷

Steam and combustion engines brought about a surge in the use of the "trawling" technique.⁸ Stronger engines permitted larger nets to be hauled behind the boats for greater periods

¹ See Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C.A. §1801(b) (2018).

² D.F. Gartside & I.R. Kirkegaard, *A History of Fishing* (2004), reprinted in G. LYSENKO, VICTOR SQUIRES & WILLY H. VERHEYE, INTERACTIONS: FOOD, AGRICULTURE AND ENVIRONMENT, 2, 72 (2010) [hereinafter *Interactions*].

³ *Id.*

⁴ *Id.*

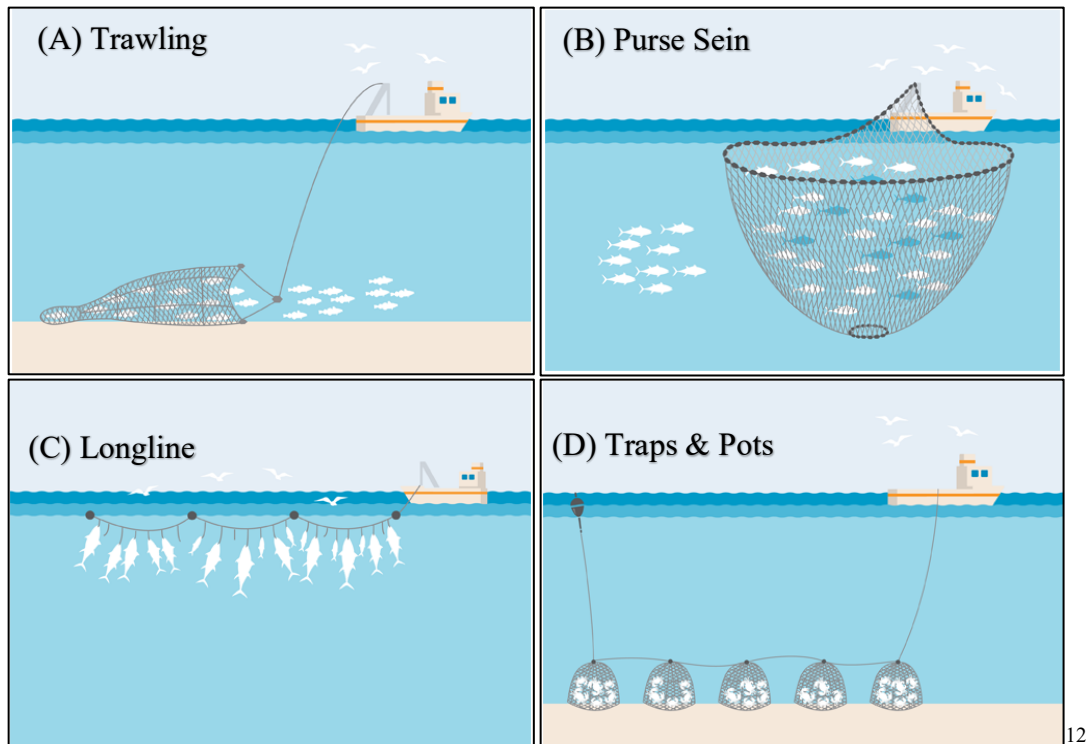
⁵ 16 U.S.C.A. §1802(16)(A-D)(West 2008).

⁶ *Interactions*, *supra* note 2, at 73.

⁷ *Id.* at 76.

⁸ *Id.*

of time permitting the ensnarement of larger quantities of fish.⁹ While trawling, the nets may either be pulled through the water at the surface, in the midwater, or may be weighted and dragged along the bed of the body of water.¹⁰ The ensnared aquatic life is then hauled aboard the vessel, sorted, stored, and transported to land for sale.¹¹ A few common commercial fishing techniques, including trawling, are depicted in the following pictures.



Historically, wars drive creativity and invention. The fishing industry is no exception. The industry significantly benefited from the technological advancements made during World War II.¹³ Post-World War II shipbuilding production costs drastically decreased.¹⁴ Both diesel and gasoline internal combustion engines became far more affordable to install and operate.¹⁵ The standard fishing vessel design underwent significant alterations. During the 1950's, cheaper steel and fuel

⁹ See generally *Commercial Fishing Methods*, Sustainable Fisheries, <https://sustainablefisheries-uw.org/seafood-101/commercial-fishing-methods/> (last visited January 17, 2021) [hereinafter *Sustainable Fisheries*].

¹⁰ *Id.*

¹¹ See *Interactions*, *supra* note 2, at 78.

¹² *Sustainable Fisheries*, *supra* note 10 (illustrating the following: ((A) *Trawling* – the boat hauls a net behind it either at the surface, at midwater, or along the seabed to ensnare fish. (B) *Purse Seining* - the boat uses another boat or a crane to encircle a located school of fish which is then hauled aboard. (C) *Longline* – a Boat runs a long line with a string of hooks set a few feet apart. (D) *Traps or Pots* – the boat sinks baited and weighted pots or traps to the seabed to trap sea life, usually invertebrates.)

¹³ See *Interactions*, *supra* note 2, at 77.

¹⁴ *Id.*

¹⁵ *Id.*

prices combined with cheaper and more proficient propulsion systems permitting shipbuilders to modify the classic driven lines styled vessels that were necessary for sail propelled ships.¹⁶ Ships were being designed with “fuller hull profiles [that] had the advantage of providing more storage and working space.”¹⁷

However, it was not just the vessel’s designs that underwent upgrades. Fishing vessels were outfitted with echo sounding technology, which was initially used to locate submarines and mines.¹⁸ Following the initial improvements, shipbuilders had to contend with a new problem: how to store their increase in fish?¹⁹ Enter, the refrigerator.²⁰ It permitted the catch to stay fresh for longer periods, extending both the duration of the fishing trip and range of the vessels.²¹

These technological advancements combined with decreases in production and fuel costs permitted the exploitation of previously unfishable waters, also known as “fisheries.”²² A fishery is defined in the Act as “one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and any fishing for such stocks.”²³ Record catches resulted from longer excursions out to sea.²⁴ However, these once common occurrences are now a thing of the past. “[C]atches have peaked and declined. Almost half the known stocks of fish are classified as over-fished or have collapsed. . . .”²⁵

The commercial fishing industry remains one of the largest industries in the world despite the knowledge of dwindling fish populations. “In 2019, U.S. commercial fishermen [alone] landed 9.3 billion pounds of seafood valued at \$5.5 billion.”²⁶ However, the 2019 catch was down by approximately 1.0 percent compared to the 2018 catch.²⁷ Profits decreased by approximately 2.0 percent from 2018 to 2019.²⁸ Profits remain significantly high for an industry with limited resources. A possible economic rationale is that demand continues to be high for this diminishing

¹⁶ *Id.*

¹⁷ *Interactions, supra note 2, at 77.*

¹⁸ *Id. at 78.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Interactions, supra note 2, at 78.*

²³ 16 U.S.C.A. §1802(13)(A-B)(West 2008).

²⁴ *Interactions, supra note 2, at 78.*

²⁵ *Id.*

²⁶ *U.S. Fisheries by the Numbers*, Fishwatch U.S. Seafood Facts, <https://www.fishwatch.gov/sustainable-seafood/by-the-numbers> (last visited Jan. 17, 2021).

²⁷ *Id.*

²⁸ *Id.*

resource, which effectively drives the market price higher and thus creates significant profits.²⁹ The top producing species harvested in 2018 were salmon, lobster, crabs, scallops, and shrimp.³⁰

Importantly, these record fish hauls occurred because fishing vessels were now capable of exploiting the previously unreachable fisheries that were beyond the means of earlier fishermen.³¹ Today, “[m]ore than 55 percent of [the] ocean surface is covered by industrial fishing. . . .”³² The geographical area of these fishing grounds is four times greater than that covered by land based agriculture.³³ Catches have peaked and began to decline as fishermen are now running out of new territory to exploit.

However, this trend drove many countries and businesses to seek alternative and more sustainable methods of harvesting fish and shellfish to satisfy the ever-growing demand. An example of such techniques is one that has been used in the Orient for many years, known as “aquaculture.”³⁴ In essence, aquaculture is “fish farming” where wild caught fish are made to spawn and produce stock that is cultivated and gathered at a later date.³⁵ The technique is not limited to just fish and shellfish, but may also include aquatic plant life and crustations as well.³⁶ Currently, aquaculture production accounts for “more than 50percent of all seafood produced for human consumption. . . .”³⁷

Aquaculture production has surged in recent years, with global production outperforming traditional fishing methods by more than 18.32 million tonnes of landed catch.³⁸ “Total reported fish production was 53.4 million tonnes in 2017, with fish production growing at an average annual rate of 5.7% per year [from 2000 through 2017.]”³⁹ However, the majority of this production occurred within inland freshwater facilities and fish farms.⁴⁰ Although fish farms do alleviate some of shortage, the ever growing concern for conserving the natural resources of the coastal waters of

²⁹ U.S. Fisheries by the Numbers, Fishwatch U.S. Seafood Facts, <https://www.fishwatch.gov/sustainable-seafood/by-the-numbers#:~:text=In%202018%2C%20U.S.%20commercial%20fishermen,seafood%20valued%20at%20%245.6%20billion> (last visited Jan. 17, 2021). Increased demand for a diminished supply will cause the cost of that supply to increase, thus generating greater profits. *Id.*

³⁰ *Id.*

³¹ See generally Sarah Gibbens, *Industrial Fishing Occupies a Third of the Planet*, NAT’L GEOGRAPHIC (Feb. 22, 2018), <https://www.nationalgeographic.com/science/article/global-industrial-fishing-footprint-spd#close> (discussing the reach of industrial fishing from information obtained by surveilling marine fishing vessels).

³² *Id.*

³³ *Id.*

³⁴ *Interactions*, *supra* note 2, at 12-13.

³⁵ *Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F.3d 454, 458 n. 5 (5th Cir., 2020).

³⁶ *Aquaculture*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/aquaculture> (last visited Oct. 8, 2021).

³⁷ *Id.*

³⁸ Albert G.J. Tacon, *Trends in Global Aquaculture and Aquafeed Production: 2000-2017*, REVIEWS IN FISHERIES SCIENCE & AQUACULTURE Sept. 6, 2019 at 43, 43.

³⁹ *Id.*

⁴⁰ *Id.* at 44-453

the United States ultimately led Congress to enact the Magnuson-Stevens Fishery Conservation and Management Act.⁴¹

B. The Magnuson-Stevens Fishery Conservation and Management Act

1. The Purpose of the Act

Congress passed the Act in 1976 to combat the rampant overfishing of aquatic species off the coasts of the United States. Specifically, the act is intended to deter the “aggressive fishing practices, especially by foreign trawlers, [that] had imperiled important fish stocks and the coastal economies dependent upon them.”⁴² The Act, via delegation from the Secretary of Commerce under the Commerce Clause, is administered by the National Marine Fisheries Service (NMFS or the Agency).⁴³ NMFS is a division within the National Oceanic and Atmospheric Administration (NOAA).⁴⁴

The Act was implemented by Congress in light of international fishing agreements currently in place, but which Congress deemed inadequate to “prevent or terminate the overfishing of valuable fishery resources.”⁴⁵ The desired effect of the Act would be the rehabilitation of the dwindling endangered and domestic aquatic species of the coastal waters, and to promote optimal and sustainable yields for future generations.⁴⁶ Interestingly, this broached an age old question: what waters fall within the jurisdiction of a State?

2. Territories and Zones Distinguished within the Act

Coastal States have strongly contested just how far their reach out to sea extends for centuries.⁴⁷ As countries continued to push to expand their global footprint, a new trade industry upon the high seas developed to supply and connect newly developed lands.⁴⁸ As trade expanded and control over trade routes grew, the “freedom on the seas” doctrine was put forth by a scholar by the name of Hugo Grotuius.⁴⁹ The idea behind the freedom on the seas doctrine was “that the seas were open to all due to their inherently indivisible nature.”⁵⁰

Although prevalent, exceptions to this general idea arose from technology making international trade on the high seas more common.⁵¹ Thus, the idea of a “territorial sea” was born.⁵² The territorial sea is defined as “the part of territorial waters subject to the jurisdiction of a coastal state usually extending from [the] mean low water mark on the shore or from the seaward limit of

⁴¹ *Gulf Fishemans Ass’n*, 968 F.3d at 456.

⁴² *Id.*; see also 16 U.S.C. § 1801(a)(2).

⁴³ *Gulf Fishermans Ass’n*, 968 F.3d at 457; see 16 U.S.C. §§ 1854 – 55.

⁴⁴ *Id.*

⁴⁵ 16 U.S.C. § 1801(b) (verbs changed from future to present tense).

⁴⁶ See David C. Loring, *The United States-Peruvian “Fisheries” Dispute*, 23 STAN. L. REV. 391, 394-95 (1971).

⁴⁷ See David C. Loring, *The United States-Peruvian “Fisheries” Dispute*, 23 Stan. L. Rev. 391, 394 - 95 (1971).

⁴⁸ *Id.* at 394 (referencing H. Grotius, *De Juri Belli Ac Pacis*, 190 - 91 (F. Kelsey transl. 1925)).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 394-95.

⁵² See Loring, *supra* note 47, at 394 - 95.

a bay or mouth of a river a [single] marine league or 3 geographical miles outward to the open sea.”⁵³

Throughout the years, differing methods have been used to determine the extent of a state’s territorial reach beyond its shores. An early concept of exerting jurisdiction over the suprajacent waters of a coastal state came to be known as the “cannon-shot rule.”⁵⁴ This methodology permitted a coastal state to “exercise jurisdiction as far as its cannon would fire.”⁵⁵ While useful, this limited methodology ultimately gave rise to the more consistent “three-mile rule,” which was an early attempt at uniformity on coastal jurisdiction.⁵⁶

Many coastal states including the United States of America were not satisfied with this limited expansion of jurisdiction. Many U.S. administrations have made the protection of both U.S. commerce and marine resources from naval threats a focal point of their policy.⁵⁷ In 1943, U.S. President Theodore “Teddy” Roosevelt addressed this issue in a letter to the Secretary of State that read:

For many years I have felt that the old three-mile limit. . . should be superseded by a rule of common sense. For instance, the Gulf of Mexico is bounded on the south by Mexico and on the north by the United States. In parts of the Gulf, shallow water extends very many miles off the shore. It seems to me that the Mexican Government should be entitled to drill for oil in the southern half of the Gulf and we in the northern half of the Gulf. That would be far more sensible than allowing some European nation, for example, to come in there and drill.⁵⁸

Then, in 1945, the proclamation of jurisdiction over the continental shelf ultimately led President Harry S. Truman to proclaim jurisdiction over the “natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, (as appertaining to the United States), subject to its jurisdiction and control”.⁵⁹

Eight years after President Truman’s proclamation, Congress enacted the Outer Continental Shelf Lands Act (OCSLA).⁶⁰ OCSLA extends federal jurisdiction of the United States

⁵³ *Territorial Sea*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/territorial%20sea>.

⁵⁴ See *Loring, supra*, note 47, at 395.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *History of Maritime Zones under International Law*, Law of the Sea, <https://nauticalcharts.noaa.gov/data/us-maritime-limits-and-boundaries.html#access-digital-datadaries> [hereinafter *History of Maritime*] (Last visited Jan. 26, 2021).

⁵⁸ *Loring, supra*, note 47, at 397 (quoting Memorandum from President Roosevelt to Secretary of State Hull, June 9, 1943, Dep’t of State file no. 811.0145/11-2844).

⁵⁹ Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1985).

⁶⁰ Outer Continental Shelf Lands Act, 43 U.S.C. § 1331-56 (Westlaw through Pub. L. No.116-259); see also Bureau of Ocean Energy Management, *Outer Continental Shelf Lands Act*, <https://coast.noaa.gov/data/Documents/OceanLawSearch/Summary%20of%20Law%20-%20Outer%20Continental%20Shelf%20Lands%20Act.pdf> (last visited Jan. 30, 2021).

to the subsoil and seabed of the Outer Continental Shelf and all artificial islands, installations, and other devices erected there for the purpose of exploring for, developing and producing subsurface resources.⁶¹ An amendment to OCSLA in 1978 further extended the jurisdiction of the U.S. to facilities “temporarily attached” to the seabed of the Outer Continental Shelf.⁶² Significantly, OCSLA only addresses jurisdictional control over the continental shelf and the minerals and resources thereunder.⁶³ Disputes continue to arise regarding territorial control and fishing rights between coastal states.

By 1982, the United Nations Convention on the Law of the Sea (UNCLOS) had codified what is today considered to be the benchmark of State jurisdiction over the seas.⁶⁴ In addition to the “high seas”, UNCLOS identified three new territorial zones of State jurisdiction: (1) the Territorial Sea; (2) the Contiguous Zone; (3) the Exclusive Economic Zone (the EEZ).⁶⁵ The U.S. is a signee to UNCLOS, but the Senate has never ratified it. However, many of the U.S. statutes are essentially the same. Currently, the standard of measuring zones is “from the official U.S. baseline, recognized as the low water line along the coasts as marked on [NOAA’s] nautical charts in accordance with the articles of the Law of the Sea.”⁶⁶

UNCLOS defines the Territorial Sea of any coastal state as the waters extending up to twelve nautical miles⁶⁷ from its baseline.⁶⁸ Conceptually, the Territorial Sea aligns with a “coastal State’s interest in protecting and managing its coastal waters.”⁶⁹ Within this zone, a signatory State may restrict travel and prohibit entry within certain areas, provided that the vessel has an alternative path for innocent passage, and any passage through the Territorial Sea must be continuous and expeditious.⁷⁰ Additionally, any foreign warship that may enter into this zone may be required to comply with U.S. laws under threat of expulsion from the zone.⁷¹ The U.S. does not extend sovereignty but does retain some control beyond its territorial sea.⁷²

Next, the Contiguous Zone, which acts as a buffer to the Territorial Sea,⁷³ “may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is

⁶¹ 43 U.S.C. § 1331(a)(1).

⁶² 43 U.S.C. § 1333; Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (codified as amended at scattered sections of 43 U.S.C.).

⁶³ 43 U.S.C. § 1331(b)

⁶⁴ *History of Maritime Zones*, *supra* note 57.

⁶⁵ *Id.* The act also identifies the continental shelf, archipelagic waters, and the Area as maritime zones.

⁶⁶ NOAA, *U.S. Maritime Limits and Boundaries*, OFFICE OF COAST SURVEY, <https://nauticalcharts.noaa.gov/data/us-maritime-limits-and-boundaries.html#access-digital-data>. (last visited Mar. 14, 2021).

⁶⁷ 1 nautical mile = 1.15078 mile. NOAA, *What is the difference between a nautical mile and a knot?*, <https://oceanservice.noaa.gov/facts/nautical-mile-knot.html>.

⁶⁸ *U.N. Convention on the Law of the Sea*, art. 3 (Dec. 10, 1982) [hereinafter *UNCLOS*].

⁶⁹ *History of Maritime Zones*, *supra* note 57.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

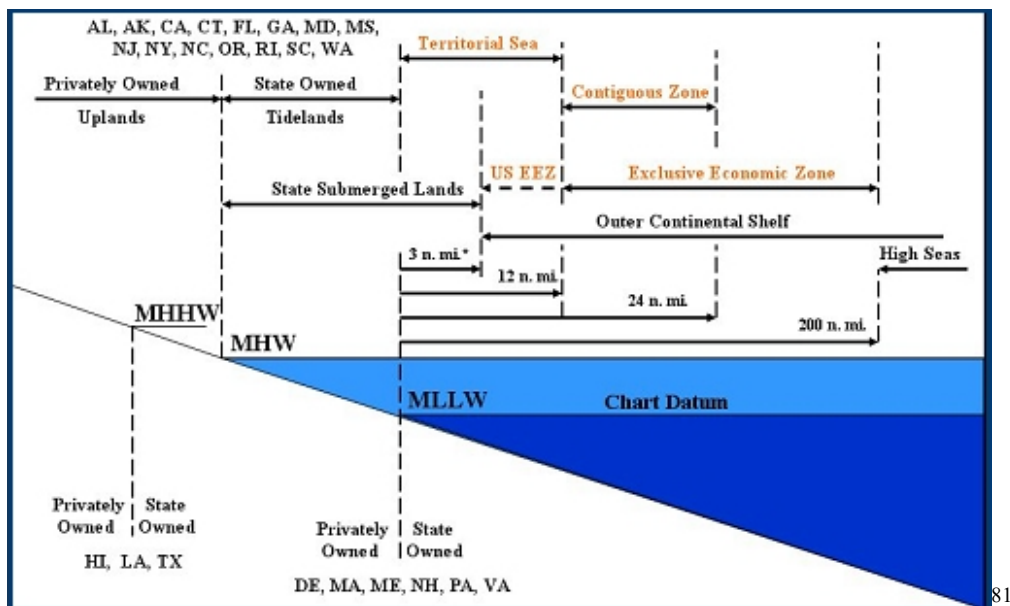
⁷³ *Id.*

measured.”⁷⁴ Within this zone, the U.S. “may exercise the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea.”⁷⁵ Additionally, the U.S. may regulate the removal of foreign flagged vessels and nationals from within this zone.⁷⁶

Finally, the EEZ extends “200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”⁷⁷ Within the EEZ:

... the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds[.]⁷⁸

Although the U.S. does not have exclusive sovereignty within the EEZ, “it does have exclusive sovereign rights and jurisdiction for the exploration and exploitation of natural resources of the seabed, subsoil, water column, and air space in the EEZ.”⁷⁹ The Magnuson-Stevens Act was passed to protect the fisheries identified as a natural resource within the EEZ from being overharvested by foreign trawlers.⁸⁰



⁷⁴ UNCLOS, *supra* note 68, at art. 33(2).

⁷⁵ *Id.* at art. 33(1).

⁷⁶ *Id.*

⁷⁷ UNCLOS, *supra* note 68, at art. 57.

⁷⁸ *Id.* at art. 56(1)(a).

⁷⁹ *History of Maritime Zones, supra*, note 57.

⁸⁰ *Gulf Fishermens Ass’n*, 968 F.3d at 456.

⁸¹ *U.S. Maritime Limits and Boundaries, supra* note 66.

3. Implementing the Act

Congress tasked itself with implementing legislation that would curbe the exploitation of the natural resources within the EEZ by foreign trawlers.⁸² Thus, the Magnuson-Stevens Fishery Conservation and Management Act was enacted in 1976.⁸³ The U.S. has coastlines on the Pacific, Atlantic, and Arctic oceans, as well as borders on the Gulf of Mexico and Bearing Sea.⁸⁴ Consequentially, the Act established eight distinct Regional Fishery Management Councils, each tasked with drafting and developing Fishery Management Plans (FMPs) that ensure the goals of the Act are upheld within all U.S. waters.⁸⁵

a. Regional Fishery Management Councils

The eight regions created by the Act are as follows: (1) The New England Council consists of the States of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut.⁸⁶ It has “authority of the fisheries in the Atlantic ocean seaward of [each] State.”⁸⁷ (2) The Mid-Atlantic Council consists of the States of New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina.⁸⁸ It has “authority over the fisheries in the Atlantic Ocean seaward of [each State] except North Carolina.”⁸⁹ (3) The South Atlantic Council consists of the States of North Carolina, South Carolina, Georgia, and Florida.⁹⁰ It has “authority over fisheries in the Atlantic Ocean seaward of [each State].”⁹¹ (4) The Caribbean Council consists of the Virgin Islands and the Commonwealth of Puerto Rico, and has “authority over the fisheries in the Caribbean Sea and Atlantic Ocean seaward of [each] State and commonwealths, territories, and possessions of the United States in the Caribbean Sea.”⁹² (5) The Gulf Council consists of the States of Texas, Louisiana, Mississippi, Alabama, and Florida, and has “authority over the fisheries in the Gulf of Mexico seaward of [each State].”⁹³ (6) The Pacific Council consists of the States of California, Oregon, Washington, and Idaho, and has “authority over the fisheries in the Pacific Ocean seaward of [each State].”⁹⁴ (7) The North Pacific Council consists of the States of Alaska, Washington, and Oregon, and has “authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska.”⁹⁵ (8) The Western Pacific Council consists of the States of Hawaii, American Samoa, Guam, and the Northern Mariana Islands, and has “authority over the

⁸² *Gulf Fishermens Ass’n*, 968 F.3d at 456.

⁸³ *Id.*

⁸⁴ *Shoreline Mileage of the United States*, NOAA OFFICE OF COASTAL MANAGEMENT, <https://coast.noaa.gov/data/docs/states/shorelines.pdf> (last visited Mar. 14, 2021).

⁸⁵ *See* 16 U.S.C. § 1801(b)(5).

⁸⁶ 16 U.S.C. § 1852(a)(1)(A).

⁸⁷ *Id.*

⁸⁸ *Id.* § 1852(a)(1)(B) (internal parenthesis removed).

⁸⁹ *Id.*

⁹⁰ *Id.* § 1852(a)(1)(C).

⁹¹ *Id.*

⁹² *Id.* § 1852(a)(1)(D).

⁹³ *Id.* § 1852(a)(1)(E).

⁹⁴ *Id.* § 1852(a)(1)(F).

⁹⁵ *Id.* § 1852(a)(1)(G).

fisheries in the Pacific Ocean Seaward of [each State] and [the] commonwealths, territories, and possessions of the United States in the Pacific Ocean Area.”⁹⁶

b. Fishery Management Plans

Each FMP developed by a regional council is submitted to NMFS for review to ensure compliance with the Act.⁹⁷ If a plan is submitted by a regional council but NMFS fails to approve, disapprove, partially approve or amend the plan within “30 days of the end of the comment period[.]” then the plan will take effect within 5 days of the council transmitting the final plan to NMFS.⁹⁸ Next, the plan implemented via separate regulations that are individually reviewed by NMFS for compliance to the Act’s standards.⁹⁹

Each FMP is required to comply with ten national standards for fishery conservation and management.¹⁰⁰ First, the conservation and management measures must prevent overfishing, yet produce sustained optimum yields from the various fisheries.¹⁰¹ Second, the measures must “be based upon the best scientific information available.”¹⁰² Third, individual and interrelated stocks of fish are to be managed in distinctive units, as practicable.¹⁰³ Fourth, the conservation and management efforts cannot discriminate between residents of different states or fisherman individually.¹⁰⁴ However, if it were to become necessary to discriminate between residents of different states, the discrimination must be fair, reasonable, and implemented in such a manner that no individual acquires an excessive share.¹⁰⁵ Fifth, efficiency for the utilization of fishery resources is desired, but economic allocation may not be the sole purpose of the plan.¹⁰⁶ Sixth, the measures must “take into account and allow for variations among and contingencies in, fisheries, fishery resources, and catches.”¹⁰⁷ Seventh, the measures should be economically efficient so as to minimize costs and duplication.¹⁰⁸ Eighth, the measures must utilize economic and social data to understand and incorporate the importance of the fishing industry upon coastal communities so as to sustain their participation in the fishing industry, and the measures must practically minimize any adverse economic impacts on the coastal communities.¹⁰⁹ Ninth, the measures must, as

⁹⁶ *Id.* § 1852(a)(1)(H).

⁹⁷ *See Gulf Fishermens Ass’n*, 968 F.3d at 457.

⁹⁸ 16 U.S.C. § 1854(a)(3 – 5).

⁹⁹ *Id.* § 1853(c).

¹⁰⁰ *Id.* § 1851(a).

¹⁰¹ *Id.* § 1851(a)(1).

¹⁰² *Id.* § 1851(a)(2).

¹⁰³ 16 U.S.C. § 1851(a)(3).

¹⁰⁴ *Id.* § 1851(a)(4).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 1851(a)(5).

¹⁰⁷ *Id.* § 1851(a)(6).

¹⁰⁸ 16 U.S.C. § 1851(a)(7).

¹⁰⁹ *Id.* § 1851(a)(8).

practically possible, minimize bycatch,¹¹⁰ or the mortality of such bycatch.¹¹¹ And tenth, any measures must “promote the safety of human life at sea.”¹¹²

C. A Plan to Create and Manage Aquaculture Regimes in the Gulf of Mexico

Although the Act has been around since 1976, the first plan proposing the establishment and regulation of aquaculture regimes within the EEZ was not put forth by a Council until 2009.¹¹³ The Gulf Council (the Council) developed a plan (the Plan) “for regulating offshore marine aquaculture in the [EEZ of the] Gulf of Mexico.”¹¹⁴ The Plan’s purpose is to “establish a comprehensive regulatory program for managing the development of an environmentally sound and economically sustainable aquaculture fishery in Federal waters of the Gulf. . . [and] increase the yield of federal fisheries [therein] by supplementing the harvest of wild caught species with cultured products.”¹¹⁵

The Plan permitted the Council to approve between five and twenty permits to perform aquaculture operations within the EEZ of the Gulf of Mexico over a ten-year period.¹¹⁶ Each permit holder must renew their permit every five years thereafter,¹¹⁷ and each “would be conditioned on compliance with biological, environmental, recordkeeping, and reporting conditions.”¹¹⁸ The permit would also grant the holder the exclusive right to develop and operate an aquaculture facility within the EEZ for the growth, harvesting, and sale of permitted aquaculture species.¹¹⁹ Additionally, any dealer “who receives species cultured at an offshore aquaculture facility in the EEZ is required to have a Gulf aquaculture dealer permit.”¹²⁰

Within the aquaculture facility, fishermen may use biologics, pesticides, and various drugs that comply with the United States Department of Agriculture (USDA), Environmental Protection Agency (EPA), and Federal Drug Administration (FDA) requirements to promote healthy populations and growth.¹²¹ The Plan established an annual catch limit (the ACL) for the aquaculture regimes within the Gulf EEZ of 64 million pounds, of which no individually permitted fisherman may exceed more than 20 percent of the total ACL.¹²² This figure represents average

¹¹⁰ “Bycatch” is defined in the act as fish “harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards.” *Id.* at § 1802(2).

¹¹¹ *Id.* § 1851(a)(9).

¹¹² *Id.* § 1851(a)(10).

¹¹³ *See Gulf Fishermens Ass’n*, 968 F.3d at 458.

¹¹⁴ *Id.* at 456, 458.

¹¹⁵ *Id.* at 458; *Fisheries of the Caribbean, Gulf, and South Atlantic; Aquaculture*, 81 Fed. Reg. 1762-01, 1762 (Jan. 13, 2016) [hereinafter *Aquaculture*].

¹¹⁶ *Id.*; *see also Fisheries of the Caribbean, Gulf, and South Atlantic; Aquaculture*, 81 Fed. Reg. 1762-01, 1762 (Jan. 13, 2016) [hereinafter *Aquaculture*].

¹¹⁷ *Gulf Fishermens Ass’n*, 968 F.3d at 458.

¹¹⁸ *Id.*

¹¹⁹ *Aquaculture*, 2016 WL 126700(F.R.) at 1762.

¹²⁰ *Id.*

¹²¹ *Id.* at 1764.

¹²² *Id.*

hauls in the Gulf EEZ from 2000 – 2006, excluding menhaden and shrimp hauls.¹²³ Cultured species in the facilities may consist of all species native to the Gulf and currently managed by the Council under current FMPs, excluding shrimp and coral management units.¹²⁴

In addition to the regulations on cultivation, the Plan also distinguishes restricted access zones.¹²⁵ These zones are chosen by the permittee and must be distinguished via approved coordinates and clearly distinguished with flotation devices like buoys.¹²⁶ No recreational or commercial fishing may occur within these boundaries except for those activities pertaining to the aquaculture regime.¹²⁷

III. Challenging the Creation and Regulation of Aquaculture Regimes under the Act

The Plan took effect as an operation of law on September 3, 2009.¹²⁸ “[It] is the first attempt by NMFS or any council to regulated aquaculture under the Act.”¹²⁹ NMFS finalized the Plan’s regulations on January 13, 2016.¹³⁰ A coalition¹³¹ opposing the Plan was formed comprised of both fishing and conservation organizations with mutual concerns for the environmental and economic impact that the regimes would have on the Gulf coast.¹³² The Coalition, now plaintiffs in the lawsuit, challenged the Plan in the Eastern District of Louisiana, with the Honorable Judge Jane Triche Milazzo presiding over the case.¹³³ The Coalition claimed “the [Plan] was invalid because it fell outside of the Council’s authority to regulate fisheries under the Act.”¹³⁴

The plaintiffs moved for summary judgement against the defendants per the Administrative Procedure Act (APA) on the grounds that NMFS exceeded its statutory authority under the Act by implementing the Plan.¹³⁵ Pertinently, the APA states that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”¹³⁶ The defendants filed a cross motion for summary judgment, stating they had not exceeded their statutory authority granted under the Act.¹³⁷ Ultimately, Judge Milazzo granted the plaintiff’s motion for summary judgment, holding

¹²³ *Id.*

¹²⁴ *Aquaculture*, 2016 WL 126700(F.R.) at 1765.

¹²⁵ *Id.* at 1766.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1762.

¹²⁹ *Gulf Fishermens Ass’n*, 968 F.3d, at 459.

¹³⁰ *Gulf Fishermens Ass’n v. National Marine Fisheries Service*, 16-1271 (La. E.D. of La. 09/24/18); 341 F. Supp. 3d 632 at 637 [hereinafter *NMFS*].

¹³¹ *Id.* at 635 n.2. Coalition Members: Gulf Fishermans Assoc., Gulf Restoration Network, Desten Charter Boat Assoc., Alabama Charter Fishing Assoc., Fish for America USA, Inc., Florida Wildlife federation, Recirculating Farms Coalition, Food & Water Watch Inc., and Center for Food Safety.

¹³² *NMFS*, 341 F. Supp at 635.

¹³³ *Id.* at 643.

¹³⁴ *Gulf Fishermens Ass’n*, 968 F.3d, at 459.

¹³⁵ *NMFS*, *supra* note 115, at 637.

¹³⁶ Administrative Procedure Act, 5 U.S.C.A. § 706 (Current though P.L 116-259).

¹³⁷ *NMFS*, 341 F. Supp 3d, at 632.

that “[the Act] does not authorize the regulation of aquaculture, and thus. . . NMFS exceeded its statutory authority in implementing aquaculture regulations.”¹³⁸

The defendants appealed the case to the Fifth Circuit Court of Appeals, raising two issues for review: (1) The lower court erred in denying *Chevron* deference to NMFS’s interpretation of the statute because the statute’s silence regarding aquaculture is ambiguous, and thus *Chevron* deference should have been extended.¹³⁹ (2) Alternatively, the actual text that appears in the Act is sufficiently open-ended so as to give NMFS leeway to create and regulate aquaculture regimes in the Gulf of Mexico.¹⁴⁰ The Fifth Circuit reviewed the record on appeal *de novo*,¹⁴¹ noting that “summary judgment is required when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”¹⁴²

Upon rehearing and argument made in front of a three-judge a panel, the Fifth Circuit Court of Appeals upheld the decision of the lower court in a two-to-one majority.¹⁴³ The sitting panel was comprised of the Honorable Judges Higginbotham, Higginson, and Duncan.¹⁴⁴ Judge Duncan wrote the majority opinion, affirming the district court’s decision,¹⁴⁵ but Judge Higginson, unpersuaded by the Plaintiffs’ arguments and the Majority’s reasoning, wrote a dissent in favor of granting *Chevron* deference to NMFS.¹⁴⁶

IV. Denying the Agency *Chevron* Deference

A. Congressional Silence does not Equate to Congressional Authorization.

NMFS raised two assignments of error on appeal. First, the lower court erred in finding that Congress had directly spoken on whether aquaculture regimes are covered under the Act via its silence on aquaculture within the text; therefore, *Chevron* deference should be denied to NMFS.¹⁴⁷ Specifically, NMFS contended that the Act is silent on the matter and thus ambiguous, and this ambiguity should permit it to put forth its own interpretation of the statute.¹⁴⁸ This would permit NMFS to create and regulate aquaculture regimes within the EEZ of the Gulf of Mexico.¹⁴⁹ However, the appellate court ultimately followed case precedent of denying a “nothing-equals-something” argument for statutory authorization.¹⁵⁰

Chevron deference developed from a case out of the Supreme Court of the United States entitled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁵¹ In *Chevron*, the Supreme Court granted a writ of certiorari to determine whether an EPA regulation permitting

¹³⁸ *Id.*

¹³⁹ *Gulf Fishermens Ass’n*, 968 F.3d, at 459.

¹⁴⁰ *Id.* at 462.

¹⁴¹ *Id.* at 459 (citing *Salinas v. R.A. Rogers, Inc.*, 952 F.3d 680, 682 (5th Cir. 2020)).

¹⁴² *Id.* (citing Fed. R. Civ. P. 56(a)) (internal citations omitted).

¹⁴³ *Id.* at 469.

¹⁴⁴ *Gulf Fishermens Ass’n*, 968 F.3d at 456.

¹⁴⁵ *Id.* at 456.

¹⁴⁶ *Id.* at 469.

¹⁴⁷ *Id.* at 459.

¹⁴⁸ *Id.*

¹⁴⁹ *Gulf Fishermens Ass’n*, 968 F.3d at 459.

¹⁵⁰ *Id.* at 460.

¹⁵¹ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

states “to treat all pollution-emitting devices within [the] same industrial grouping as though they were encased within single *bubble* was based on permissible construction of [the] term *stationary source* in [the] Clean Air Act’s Amendments.”¹⁵² Importantly, the now amended Clean Air Act (CAA) requires states to create permit programs to regulate new or modified stationary sources of air pollution.¹⁵³ However, the “stationary sources” to which the permit program applied was neither defined within the CAA nor addressed by legislation.¹⁵⁴

The EPA regulation permitted each State to adopt plantwide definitions for “stationary sources,” and permitted “an existing plant that contains several pollution-emitting devices [to] install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from [that] plant.”¹⁵⁵ The various units within the plant are enclosed within a “bubble” for regulation purposes.¹⁵⁶ The theoretical bubble describes the practice of looking at the total emissions of the plant as a whole, and the benefits of these plants greatly outweigh the emissions concerns. The bubble concept has been mandated for use in programs where the main goal of the program is to maintain existing air quality.¹⁵⁷ Nonetheless, the appellate court reversed the district court’s holding which permitted the bubble interpretation on the grounds that this amendment’s primary focus is to improve air quality.¹⁵⁸ The Supreme Court ultimately reversed the appellate courts determination on review, thereby affirming the decision of the district court.¹⁵⁹

In overturning the appellate court’s decision, the Supreme Court asked two questions for determining whether an agency’s construction of a statute is appropriate or not.¹⁶⁰ First, has Congress directly spoken to the precise question at issue?¹⁶¹ If Congress has and its intent is clear and unambiguous on the matter, the inquiry is over and deference is not granted.¹⁶² However, if the court determines that Congress has not directly spoken on the precise question at issue or the statute is ambiguous, then the second inquiry “is whether the agency’s [interpretation] is based on a permissible construction of the statute.”¹⁶³ The Court shall not impose its own construction of the statute in light of ambiguity by Congress if the agency has put forth a permissible construction.¹⁶⁴

Using this inquiry, the Supreme Court ultimately upheld the EPA’s interpretation of the CAA.¹⁶⁵ In writing the majority opinion, Justice Stevens stated that “[w]hen a challenge to an agency[’s] construction of a statutory provision, fairly conceptualized, really centers on the

¹⁵² *Id.*

¹⁵³ *Id.* at 840.

¹⁵⁴ *Id.* at 841.

¹⁵⁵ *Id.* at 840.

¹⁵⁶ *See Chevron*, 467 U.S. at 840.

¹⁵⁷ *Id.* at 841.

¹⁵⁸ *Id.* at 842.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See Chevron*, 467 U.S. at 842.

¹⁶² *Id.*

¹⁶³ *Id.* at 843.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 866.

wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by [C]ongress, the challenge [to the agency's construction] must fail."¹⁶⁶ It is upon this premise that NMFS raised its first issue on appeal.

NMFS's first contention is that congressional silence within the Act regarding aquaculture is, at the very least, ambiguous and thus the district court erred in not granting deference to its interpretation of the Act.¹⁶⁷ Generally, in a case where *Chevron* deference is at question, the Court would first look to the text of the act in question to determine whether congress has unambiguously spoken on the matter at hand.¹⁶⁸ Detrimental to NMFS, however, is that the Act does not mention anything regarding a Council's right to regulate either fish farming or aquaculture regimes within its respective zones.¹⁶⁹ In essence, NMFS argues that it has authority to regulate aquaculture or fish farming within the EEZ under the Act because the it "does not unambiguously express Congress's intent to prohibit the regulation of aquaculture."¹⁷⁰ It has thus put forth a "nothing-equals-something" argument, with "nothing" being the lack of text within the Act and "something" being statutory authority. This argument for statutory authorization has historically been denied by the Fifth Circuit.¹⁷¹

In his majority opinion, Judge Duncan likened the Appellee's argument to that made by appellees in both *Texas v. United States* and *Ethyl Corp. v. EPA*.¹⁷² In both cases the "nothing-equals-something" argument was rejected.¹⁷³ In *Ethyl*, the EPA made a "nothing-equals-something" argument in an attempt to impose its own interpretation of the CAA.¹⁷⁴ The EPA argued that it was within its authority to consider "other factors" when determining whether to grant fuel additive waivers for a prohibition of fuel additives set by the CAA if the additives do not interfere with a vehicle's emissions-control systems.¹⁷⁵ The EPA denied a waiver to an applicant because of the negative impact that the additives would have on public health.¹⁷⁶

Like NMFS, the EPA argued that Congress had not spoken on the issue of whether the public health may or may not be considered when determining whether a waiver should be granted under the CAA or not because the CAA is silent regarding public health as a standard.¹⁷⁷ The appellate court ultimately determined that Congress clearly indicated the terms and standards by which the EPA must base its determination, not one of which was public health; thus, the EPA exceeded its statutory authority by considering public health.¹⁷⁸

¹⁶⁶ *Chevron*, 467 U.S. at 866.

¹⁶⁷ *Gulf Fishermens Ass'n*, 968 F.3d, at 459.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 460; *see also* 16 U.S.C. §1802, 1854-55.

¹⁷⁰ *Gulf Fishermens Ass'n*, 968 F.3d at 460.

¹⁷¹ *Id.*

¹⁷² *Id.* at 460 (citing *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995)).

¹⁷³ *Texas*, 809 F.3d at 186; *Ethyl Corp. v. EPA*, 51 F.3d at 1060.

¹⁷⁴ *Ethyl*, 51 F.3d at 1057-58.

¹⁷⁵ *Id.* at 1054 (citing 42 U.S.C. §7545(f)(4)).

¹⁷⁶ *Id.*; 42 U.S.C. §7545 (no mention in the CAA of public health as a standard by which the EPA may decide whether to grant a waiver or not).

¹⁷⁷ *Ethyl*, 51 F.3d at 1057-58.

¹⁷⁸ *Id.* at 1055.

It was upon the *Ethyl* decision that the Fifth Circuit similarly dismissed the claim made by the Department of Homeland Security (DHS) when it claimed that the Immigration and Naturalization Act (INA) did not expressly prohibit DHS from exerting authority by enacting the Deferred Action for Parents of Americans and Unlawful Permanent Residents (DAPA) plan.¹⁷⁹ DAPA would have provided a legal presence for illegal immigrants who were parents of citizens or lawful permanent residents within the United States.¹⁸⁰ Twenty-six of the fifty States sought injunctive relief against DHS to prevent them from implementing DAPA.¹⁸¹

A preliminary motion was granted by the lower court and upheld by the appellate court on the grounds that DHS had exceeded its authority under the INA by claiming ambiguity via Congress's silence on the matter.¹⁸² The issue was discussed by the appellate court as a possible alternative and additional grounds for affirming the injunction imposed by the lower court.¹⁸³ Ultimately, the majority relied upon *Ethyl* to once again reject the nothing-equals-something approach to statutory interpretation.¹⁸⁴ In so doing, Judge Smith, writing on behalf of the majority, echoed the concerns of Chief Judge Edwards' majority opinion in *Ethyl* by stating:

To suggest, as [DHS] effectively does, that *Chevron* step two is implicated at any time a statute does not expressly *negate* the existence of a claimed administrative power. . . is both flatly unfaithful to the principles of administrative law. . . and refuted by precedent. Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron*. . . [.]¹⁸⁵

Looking back to the case at hand, NMFS asserts authority on the grounds that Congress has not expressly withheld the power to create and regulate aquaculture regimes in the Gulf.¹⁸⁶ However, in light of *Chevron* and *Ethyl*, the majority concluded that the Act's silence regarding NMFS's authority does not equate to actual authority.¹⁸⁷ Per prior precedent, "[i]t is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*."¹⁸⁸

Importantly, Congress does not like to "hide elephants in mouseholes."¹⁸⁹ The elephant being the belief that Congress's silence equates to authority to regulate an elaborate aquaculture regime, and the mousehole being that nowhere does the Act mention authorizing NMFS to do

¹⁷⁹ See *Texas*, 809 F.3d at 186.

¹⁸⁰ *Id.* at 155.

¹⁸¹ *Id.* at 146.

¹⁸² *Id.* at 178.

¹⁸³ *Id.*

¹⁸⁴ *Texas*, 809 F.3d at 186.

¹⁸⁵ *Id.* (quoting *Ethyl*, 51 F.3d at 1060).

¹⁸⁶ *Gulf Fishermens Ass'n*, 968 F.3d at 462.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 461 (citing *Ethyl*, 51 F.3d at 1060).

¹⁸⁹ *Id.* at 463 (citing *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 376 (5th Cir. 2018)).

so.¹⁹⁰ One does not fit within the other. For these reasons, the Fifth Circuit properly upheld the district court's determination that the Act unambiguously precludes the Agency from creating an aquaculture regime; thus, NMFS failed to satisfy the first prong of the *Chevron* deference analysis for agency interpretation.¹⁹¹

B. The Language of the Act does not Support the Appellant's Interpretation

NMFS also put forth an alternative avenue by which it contests that it should be permitted deference. It contended that the Act's text as it is currently written is sufficiently open-ended to permit the creation of an aquaculture regime within the designated territories of the EEZ.¹⁹² Again, NMFS directs its focus to the ambiguity of the text itself; however, this time it chose to focus on the text Congress has chosen to use.¹⁹³ The Act grants the Agency to regulate *fisheries*,¹⁹⁴ which by definition extends to and encompasses *fishing*.¹⁹⁵ NMFS focuses on fishing, which is defined in the Act as being "the catching, taking, or *harvesting* of fish."¹⁹⁶ NMFS claims that the term "harvesting" is ambiguous because multiple definitions are equally applicable.¹⁹⁷ Thus, this ambiguity should compel the court to interpret the ambiguity as granting NMFS leeway to regulate aquaculture regimes within the Gulf and other territories under its domain.¹⁹⁸

In essence, NMFS pushed for the use of an alternative agriculture-based definition of *harvest*, which would permit aquaculture in the Gulf.¹⁹⁹ NMFS relies upon Oxford English Dictionary's definition of harvesting, which entails the *reaping* and *gathering* of a *crop*.²⁰⁰ Thus, "the crop reaped [and gathered] from an aquaculture fishery. . . would be the farmed fish. . ." species permitted for cultivation under the Plan.²⁰¹

However, the Majority countered this argument by first examining the exact words of the definition for *fishing* as it sits within the Act.²⁰² Second, the court considered how the agriculture-based definition of harvest would fit within the context of the entire statutory scheme.²⁰³ The majority used this twofold analysis to determine that NMFS's proposed alternative definition does not fit within the Act.

¹⁹⁰ *Id.* at 463.

¹⁹¹ *Gulf Fishermens Ass'n*, 968 F.3d at 460.

¹⁹² *Id.* at 462.

¹⁹³ *Id.*

¹⁹⁴ 16 U.S.C. § 1852(a)(1)(e) (emphasis added).

¹⁹⁵ 16 U.S.C. § 1802(13)(B) (emphasis added).

¹⁹⁶ 16 U.S.C. § 1802(16) (emphasis added).

¹⁹⁷ *See e.g. Gulf Fishermens Ass'n*, 968 F.3d at 462 (referencing *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016)).

¹⁹⁸ *Lee*, 136 S. Ct. at 2142 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)) (internal quotations removed).

¹⁹⁹ *Gulf Fishermens Ass'n*, 968 F.3d at 463.

²⁰⁰ *Harvest*, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/harvest>. (Last visited Oct. 20, 2021).

²⁰¹ *Gulf Fishermens Ass'n*, 968 F.3d at 463.

²⁰² *Id.* at 462-66.

²⁰³ *Id.* at 462, 466-69.

1. Harvesting Should be Read as Synonymous with Catching and Taking.

The Fifth Circuit majority were unpersuaded by NMFS's alternative agriculture based argument for statutory authorization.²⁰⁴ They drew their conclusions by way of interpreting "harvesting" via the *noscitur a sociis*²⁰⁵ canon of statutory interpretation.²⁰⁶ This method of statutory interpretation is utilized when a string of statutory terms are given a related meaning within the statute.²⁰⁷ If one word within a grouping of words is ambiguous, the ambiguous word's meaning is determined by considering the other "associated words" in the string or listing of words, and within the context that the grouping of words appears within the statute.²⁰⁸ Additionally, a court must compare the ambiguous word "to as much of the statute as [will] 'provide interpretive guidance'" for extrapolating its meaning within the statute.²⁰⁹ Therefore, Judge Duncan determined that "the *catching, taking, or harvesting* of fish"²¹⁰ should be read as a singular unit having the same or similar meanings under the statute, thus rejecting NMFS's proposition.²¹¹

Such interpretative methodology was reviewed by the SCOTUS in the case of *S.D. Warren Co. v. Maine Board of Environmental Protection*.²¹² The Plaintiff in this case argued that *noscitur a sociis* should be applied when interpreting the Clean Water Act's (CWA) statute that stated that "discharge when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."²¹³ In essence, the plaintiff argued that the included terms "discharge of a pollutant. . . [and] pollutants" would be redundant unless discharge were to mean something independent of pollutants because discharge is defined as adding one or more pollutants.²¹⁴ Therefore, when read together in the statute *discharge* must have an alternative meaning independent of the qualifying terms so as to eliminate redundancy within the statute.²¹⁵

However, the majority held that the plaintiffs misunderstood how *noscitur a sociis* is utilized for statutory interpretation.²¹⁶ They clarified that for *noscitur a sociis* to be an appropriate means of interpretation, there must be a gathering of terms with common features from which to extrapolate a common meaning.²¹⁷ The majority ultimately held that *noscitur a sociis* was an

²⁰⁴ *Id.* at 462.

²⁰⁵ Latin phrase meaning "it is known by its associates."

²⁰⁶ *Gulf Fishermens Ass'n*, 968 F.3d at 462.

²⁰⁷ *United States v. Bulac*, 930 F.3d 383, 390 (5th Cir. 2019).

²⁰⁸ *Noscitur a sociis*, Merriam-Webster.com Legal Dictionary, <https://www.merriam-webster.com/legal/noscitur%20a%20sociis> (last accessed Oct. 23, 2021).

²⁰⁹ *In re McDaniel*, 973 F. 3d 1083, 1103 (10th Cir. 2020) (quoting *Graham Cty. Soil and Water Conservation Dist. V. United States*, 559 U.S 280, 289 (2010)).

²¹⁰ *Gulf Fishermens Ass'n*, 968 F.3d at 462 (referencing 16 U.S.C. § 1802(16) (emphasis added)).

²¹¹ *Gulf Fishermens Ass'n*, 968 F.3d at 463.

²¹² *S.D. Warren Co. v. Me. Bd. Of Envr. Protection*, 547 U.S. 370, 378 (2006).

²¹³ *Id.* at 379 (quoting Clean Water Act, 33 U.S.C. § 1362(16) (emphasis added)).

²¹⁴ *Id.* (emphasis added)

²¹⁵ *Id.*

²¹⁶ *Id.* at 379-80.

²¹⁷ *S.D. Warren*, 547 U.S. at 379.

inappropriate methodology in this case because there was no grouping of like-situated terms from which to identify an adequate meaning for “discharge”.²¹⁸

Considering NMFS’s claim for application of *noscitur a sociis*, the definitions of the other terms that appear in conjunction with harvesting in the statute must also be determined. Although the Act does not define “catching” or “taking”, Webster’s Dictionary provides that catching is “to capture or seize”²¹⁹ and taking is “to seize or capture physically[.]”²²⁰ Both of these definitions are synonymous to an alternative definition for harvest that is ignored by NMFS, i.e., “to kill or remove wild animals from their habitat.”²²¹ This definition is synonymous to both catching and taking as used in the statute.

Importantly, although the definition put forth by NMFS for harvesting is one definition, “one dictionary entry does not override a term’s surrounding context.”²²² The reverse is true in that a word with ‘many dictionary definitions. . . must draw its meaning from its context.’²²³ Further, federal courts have often used catch, take, and harvest interchangeably when discussing fish and/or fishing.²²⁴ Therefore, when considering all possible definitions for harvesting in conjunction with *noscitur a sociis*, the appellate court majority properly denied application the proposed interpretation put forth by NMFS.

2. Appellant’s Interpretation would not fit within the Structure of the Act

The Agency’s open-ended interpretation of fishing as used in the Act also fails to hold water when put in context with the Act overall. When a question of statutory interpretation arises, a court does not only consider the text in question in isolation, but it also must consider how the interpretation of the text reads “in context and with reference to the larger statutory scheme.”²²⁵ If NMFS’s interpretation of the statute presents inconsistency within the Act’s overall structure, then the Court will not defer to the agency’s statutory interpretation.²²⁶ To hold otherwise would create conflict against original congressional intent.

An example of this conflict arose in *FDA v. Brown and Williamson Tobacco Corp.* where SCOTUS ultimately held that the FDA did not have authority to regulate tobacco products as customarily marketed.²²⁷ The FDA asserted that under the Food, Drug, and Cosmetic Act

²¹⁸ *Id.* at 379-80.

²¹⁹ *Gulf Fishermens Ass’n*, 968 F.3d at 463 (quoting *Catch*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/catch> (last visited Feb. 16, 2021)).

²²⁰ *Id.* (quoting *Take*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/take> (last visited Feb. 16, 2021).)

²²¹ *Gulf Fishermens Ass’n*, 968 F.3d at 463 (quoting *Harvest*, Oxford English Dictionary, <http://tinyurl.com/yc7nkfa9> (last visited Feb. 16, 2021) (internal quotations removed).)

²²² *Id.*

²²³ *Id.* (quoting *Kucana v. Holder*, 558 U.S. 233, 248 (2010)).

²²⁴ *See, e.g.*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 663-64 (1979)

²²⁵ *Sw. Elect. Power Co. v. United States Environmental Protection Agency*, 920 F.3d 999, 1024 (5th Cir. 2019).

²²⁶ *Gulf Fishermens Ass’n*, 968 F.3d at 466 (citing *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014)).

²²⁷ *FDA v. Brown & Williamston Tobacco Corp.*, 529 U.S. 120, 126 (2000).

(FDCA),²²⁸ it had the authority to regulate tobacco products such as cigarettes and smokeless tobacco because nicotine is a “drug” and tobacco products are the “devices” by which the nicotine is delivered to the user.²²⁹ The FDCA does grant the FDA authority to regulate “drugs,” “devices,”²³⁰ and “combination products” which constitute a combination of drugs and devices. . . .²³¹ However, the act defines a “drug” as “articles (other than food) intended to affect the structure or any function of the body[.]”²³² and a “device” as “an instrument, apparatus, implement, machine, contrivance, . . . or other similar or related article, including any component, part, or accessory, which is. . . intended to affect the structure or any function of the body.”²³³

The FDA contended that the statutory definition of “devices” was broad enough to encompass the regulation of tobacco products for sale and distribution under the FDCA.²³⁴ It proposed 60 Fed. Reg. 41314-41787 to combat the sale, distribution, and advertisement of tobacco products towards young people to preemptively prevent tobacco related deaths.²³⁵

However, in reviewing the decisions of the lower courts, SCOTUS utilized the *Chevron* deference test to determine whether the FDA’s statutory interpretation of the FDCA was appropriate within the entirety of the FDCA’s framework.²³⁶ The Court determined that “one of the [FDCA’s] core objectives is to ensure any product regulated by the FDA is ‘safe’ and ‘effective’ for its intended use.”²³⁷ If the FDA were to determine that any product is unsafe under the FDCA, then the FDA is required to remove that dangerous product from the market.²³⁸ Therefore, “if tobacco products were classified as ‘devices’ under the FDCA, then FDA would be required to remove them from the market.”²³⁹

Perplexingly, for the FDA’s argument to hold water, tobacco products would have to be deemed “safe” for consumption by the FDA in light of the negative health statistics it presented to the court in justification for granting authority and control over these products under the FDCA.²⁴⁰ SCOTUS ultimately held that these inconsistencies, in combination with other evidentiary facts, precluded the FDA from enacting regulations for the control of tobacco products under the FDCA because tobacco products could not be considered “devices” without conflicting with the original purpose of the FDCA.²⁴¹

Following this guidance, the Fifth Circuit Court of Appeals not only considered the actual text of the statute that NMFS interpreted as being sufficiently open-ended to permit aquaculture regimes in the Gulf, but also how NMFS’s interpretation of the statute would fit within the overall

²²⁸ 21 U.S.C. § 301 (Current through P.L. 116-259).

²²⁹ *Brown*, 529 U.S. at 125.

²³⁰ 21 U.S.C. §321(g)-(h).

²³¹ 21 U.S.C. §353(g)(1).

²³² 21 U.S.C. §321(g)(1)(C).

²³³ 21 U.S.C. §321(h).

²³⁴ *See Brown*, 529 U.S. at 129-30.

²³⁵ *Id.* at 126.

²³⁶ *Id.* at 132.

²³⁷ *Id.* at 133 (citing 21 U.S.C. § 393(b)(2)).

²³⁸ *Id.* at 134 (citing 21 U.S.C. §§ 355(e)(1)-(3)).

²³⁹ *Brown*, 529 U.S. at 135.

²⁴⁰ *Id.* at 139.

²⁴¹ *Id.* at 159.

framework of the Act. The Act's primary purpose is to "conserve and manage the fishery resources found off the coasts of the United States."²⁴² This theme is present throughout several of the Act's underlying provisions.²⁴³ However, if NMFS's interpretation of the statute were to be accepted and aquaculture regimes were permitted to operate in the coastal waters of the Gulf, it would be in direct conflict with the Act's overarching purpose.

NMFS put forth the proposition that "fisheries" under the Act are synonymous to "aquaculture facilities."²⁴⁴ This is an erroneous comparison because, as the majority indicated, the demands placed upon a fishery under the Act would be impossible for an aquaculture facility to fulfill. Namely, the FMPs enacted under the Act are for the purpose of "*prevent[ing] overfishing and rebuild[ing] overfished stocks.*"²⁴⁵ This is in direct conflict with the concept of aquaculture facilities where the enterprise is in essence a "fish farm." Fish farms operate under the premise that "*all animals cultured are intended for harvest and cannot undergo overfishing or become overfished.*"²⁴⁶ Judge Duncan states in his majority opinion that "[e]quating a 'fishery' with an aquaculture facility effectively erases these [overfishing] provisions from the Act."²⁴⁷

In response, NMFS claimed that the overfishing aid rendered would be towards other fisheries within the gulf, not to the facilities themselves.²⁴⁸ However, this logic is flawed. Specifically regarding overfishing, an FMP must "specify objective[s] and measurable criteria for identifying when *the fishery to which the plan applies* is overfished. . . .²⁴⁹ [and] establish a mechanism for specifying annual catch limits. . . . at a level such that overfishing does not occur *in [that] fishery.*"²⁵⁰ Given this context, the "regulated fishery" would only include each specific aquaculture facility within the EEZ of the Gulf of Mexico, not other fisheries within the same waters. Therefore, there would be no conservation or management within the aquaculture facility because the entire purpose of the facility is the removal of "all [of the] animals cultured" within.²⁵¹

In a final effort for the granting of authority which is sought, NMFS asserted authority to enact the Plan under the general authority granted to it under the Act itself in 16 U.S.C. §

²⁴² *Gulf Fishermens Ass'n*, 968 F.3d at 456.

²⁴³ *See, e.g.*, 16 U.S.C. § 1853(a)(1)(A) (explaining the purpose of FMPs was to conserve and manage fisheries); 16 U.S.C. § 1853(a)(10) (specifying the plan must use objective, measurable criteria to determine when the fishery is being overfished, and the conservation and management measures to prevent such overfishing); 16 U.S.C. § 1853(a)(15) (establishing plans must specify annual catch limits to maintain a level of production so as to combat overfishing); 16 U.S.C. § 1851(a)(1) (stating any FMP must be consistent with national standards including "conservation and management measures [that] shall prevent overfishing).

²⁴⁴ *Id.* at 466.

²⁴⁵ *Id.* (quoting 16 U.S.C. § 1853(a)(1)(A)).

²⁴⁶ Fisheries of the Caribbean, Gulf, and South Atlantic; Aquaculture, 81 Fed. Reg. 1762, 1771 (Jan. 13, 2016)-01 (emphasis added).

²⁴⁷ *Gulf Fishermens Ass'n*, 968 F.3d at 467.

²⁴⁸ *Id.*

²⁴⁹ 16 U.S.C. § 1853(a)(10) (emphasis added).

²⁵⁰ 16 U.S.C. § 1853(a)(15) (emphasis added).

²⁵¹ Fisheries of the Caribbean, Gulf, and South Atlantic; Aquaculture, 81 Fed. Reg. at 1764. 1762-01

1853(b)(14),²⁵² which states that any FMP may “prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.”²⁵³ Therefore, NMFS argued that the regulation of aquaculture is a “necessary and appropriate” measure required to conserve and manage fishing resources, “perhaps by diminishing demand on wild fisheries.”²⁵⁴

However, Judge Duncan again found folly with this logic, as he stated that “the Act requires each management plan to employ conservation techniques for the given fishery, not for all fisheries or the ecosystem as a whole.”²⁵⁵ Simply put, the protected fisheries are the aquaculture facilities, which would be treated as a singular unit. The conditions deemed “necessary and appropriate” must only regard the performance and protection of the aquaculture facilities, not towards all Gulf fishing in general.²⁵⁶ Thus, the FMP falls outside of NMFS’s general authority granted under the Act.

Importantly, the majority noted that NMFS has conceded that “many of the principals and concepts that guide wild stock management under the Act are either of little utility or not generally applicable to the management of aquaculture operations.”²⁵⁷ They further conceded that conceptually, the underlying principals and law established by the act, “do not fit well or are difficult to satisfy with respect to aquaculture, thereby making them seem less useful or even unnecessary.”²⁵⁸ Although NMFS continued to insist that aquaculture regulation falls within the scope of their authority to create and regulate, the Majority upheld the lower court’s determination that these inconsistencies, as well as those previously stated, clearly indicates that Congress did not intend to grant such authority to the NMFS under the Act.²⁵⁹

V. A Dissenting Opinion

The pleadings and reasonings of the NMFS did not fall on deaf ears. One judge sitting on the panel, Judge Stephen Higginson, dissented from the majority opinion, swayed by NMFS’s arguments. In his opinion stated in the dissent, the Act is sufficiently broad to encompass the creation and maintenance of aquaculture regimes within the waters designated under the control of the coastal states. Primarily, he contends that Congress has granted expansive authority to NMFS and the subsequent Councils through the power to exercise “exclusive fishery management authority over *all fish*, and *all Continental Shelf fishery resources*, within the [EEZ].”²⁶⁰ Thus Congress must have intended to grant the NMFS and the Councils the authority to “promote domestic, commercial and recreational fishing under sound conservation and management principles,” and to “encourage development by the United States fishing industry of fisheries which are currently underutilized by the United States fishermen.”²⁶¹

²⁵² *Gulf Fishermens Ass’n*, 968 F3d at 468.

²⁵³ 16 U.S.C. § 1853(b)(14).

²⁵⁴ *Gulf Fishermens Ass’n*, 968 F3d at 468.

²⁵⁵ *Id.*

²⁵⁶ *See Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Gulf Fishermens Ass’n*, 968 F3d at 468.

²⁶⁰ *Id.* at 469 (quoting 16 U.S.C. § 1851, 1854 – 55).

²⁶¹ *Id.*; 16 U.S.C. § 1801(b)(1), (3), (6).

Per Justice Higginson’s reasoning, Congress did not intend to distinguish any one type of fishing technique from another, but intentionally left the door open for future fishing techniques for cultivation to be implemented under the Act.²⁶² As history has shown, fishing techniques and methods have continued to develop throughout the ages, and the techniques of tomorrow may not be overtly visible to the Congress enacting legislation today. Thus, as more modern fishing methods are introduced, they should fall under the coverage of the Act, and under the authority of NMFS and the Councils to regulate them.²⁶³

However, the Majority addressed this issue in its written opinion. Not only was Congress aware of aquaculture techniques at the time the Act was passed, but it also explicitly designated the EPA authority to regulate “aquaculture project[s]” four years prior by amending the Federal Water Pollutions Control Act of 1948.²⁶⁴ It is a well-established principal in deciphering legislative intent that the court “assume[s] that Congress is aware of existing law when it passes legislation.”²⁶⁵ Thus, to argue that Congress’ silence left the door open for future techniques of fishing to combat overfishing may be plausible, but is inapplicable regarding aquaculture because Congress was aware of this technique’s existence at the time of the Act’s drafting.

Judge Higginson further contended that whether the Act does or does not comprehend aquaculture, it is at the very least ambiguous.²⁶⁶ Thus, *Chevron* deference should have been extended to NMFS’s interpretation of the statute, and thereby permit NMFS to regulate aquaculture regimes within the Gulf.²⁶⁷ His logic is based on the grounds that the district court denied deference on the grounds that when the Act was passed in 1976, it was only applicable to “wild” fish; thus precluding farm raised fish from being regulated.²⁶⁸ Alternatively, the majority at the appellate level determined that fish farming is not “fishing” as defined under the Act.²⁶⁹ Judge Higginson stated that although “[e]ach of these understandings are plausible[,] . . . neither is an *unambiguously correct* interpretation of the statutory language [of the Act].”²⁷⁰ Therefore, the Court should have extended deference to NMFS’s interpretation of the statute because it is at least as plausible of a reading of the statute as either of the interpretations put forth.

This argument, while strong, was insufficient to sway either of the other two judges sitting on the appellate review panel. The panel was aware that both the appellants and appellees had previously approached Congress to request the authority sought in this litigation, but both were

²⁶² *Id.* at 469 – 70.

²⁶³ *Id.*

²⁶⁴ Gulf Fishermens Ass’n, 968 F.3d at 466; see 33 U.S.C. § 1328(a).

²⁶⁵ See e.g. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (Holding that there is no recovery for loss of society under general maritime law. Congress was aware that loss of society was not recoverable for railroad workers under the Federal Employers’ Liability Act [FELA] when it incorporated FELA into the Jones Act for a seamen’s recovery); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 – 97 (1946).

²⁶⁶ Gulf Fishermens Ass’n, 968 F.3dd. at 470.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* (emphasis added).

denied congressional authority to regulate aquaculture regimes.²⁷¹ This direct congressional denial of authority combined with both the prior precedents denying a nothing-equals-something argument and *noscitur a sociis* ultimately swayed both Judges Duncan and Higginbotham to deny deference to the appellant's interpretation.

VI. Conclusions

The Majority ultimately held that the Magnuson-Stevens Fishery Conservation and Management Act of 1976 does not authorize NMFS or its subsidiary Councils to create a FMP that establishes and regulates aquaculture regimes within the waters of coastal states.²⁷² It was unpersuaded by NMFS's argument that the Act does not unambiguously foreclose the regulation of aquaculture because the Act is silent on the matter altogether.²⁷³ The Court properly upheld prior precedent that a "nothing-equals-something" argument must fail to be extended *Chevron* deference because "it is only legislative *intent to delegate* such authority that entitles [NMFS] to advance its own statutory construction for review under [*Chevron*]."²⁷⁴ No legislative intent is found where there is silence regarding statutory interpretation.²⁷⁵

Further, Judges Duncan and Higginbotham properly concluded that the text of the statute is not sufficiently open-ended to permit aquaculture regimes, and that if NMFS's interpretation of the statute were to be permitted, it would conflict with other provisions within the Act.²⁷⁶ First, the Court held that the act of "fishing" is not equated to agriculture where the "crop" to be "harvested" is the fish.²⁷⁷ The Court reached this conclusion by use of the *noscitur a sociis* "associated-word" canon of statutory interpretation in combination with definitional similarities between "catch," "take," and "harvest" as used within the fishing community.²⁷⁸ This effectively foreclosed an agriculture based reading of the word "harvest" as it is used within the Act.²⁷⁹ Second, it was properly held that if NMFS's interpretation of the statute were to be permitted, it would conflict with the overall purpose of the Act, which is to manage and conserve fishery resources.²⁸⁰ This is so because the entire purpose of an aquaculture facility is to completely harvest *all* fish found therein.²⁸¹ Thus, conservation and management within the facility would be impossible.

Although Judge Higginson does raise a valid argument that would permit NMFS to interpret the Act as permitting its regulation of aquaculture regimes within the EEZ, the combination of the statutory and doctrinal interpretative methods employed by Judges Duncan and Higginbotham to ultimately conclude that Congress has spoken directly on the matter of NMFS

²⁷¹ Oral Argument at 3:30; 23:45, *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454 (5th Cir., 2020), https://www.ca5.uscourts.gov/OralArgRecordings/19/19-30006_1-6-2020.mp3.

²⁷² *Gulf Fishermens Ass'n.*, 968 F3d at 468.

²⁷³ *Id.* at 461.

²⁷⁴ *Id.* (quoting *Ethyl*, 51 F. 3d at 1060).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 463, 467.

²⁷⁷ *Gulf Fishermens Ass'n.*, 968 F3d at 465 – 66.

²⁷⁸ *Id.* at 463, 465-66.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 468.

²⁸¹ *Id.* at 467-68.

being authorized under the Act to establish and regulate aquaculture facilities were proper under the facts presented. Thus, NMFS, by way of the coastal Councils, may not implement a plan to establish and regulate aquaculture regimes within the coastal waters that fall within their jurisdiction under the current edition of the Magnuson-Stevens Fishery Management and Conservation Act. If Congress desires for the Agency to have such authority, it will either need to amend the Act as it currently reads or enact new legislation that clearly and unambiguously bestows the Agency such authority to do so.