

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

SOUTHEASTERN FISHERIES  
ASSOCIATION, INC., et al.,

*Plaintiffs,*

v.

HOWARD LUTNICK, in his official capacity  
as Secretary of Commerce, et al.,

*Defendants.*

Case No. 26-cv-1533

**BRIEF OF AMICUS CURIAE OCEAN CONSERVANCY IN SUPPORT OF  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to the Federal Rule of Appellate Proc. 26.1 and L.R. 7(o), *Amicus Curiae* Ocean Conservancy respectfully submits the following corporate disclosure statement: Ocean Conservancy has no parent corporation, nor does any person or corporate entity own ten percent or more of the association.

## **INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE**

*Amicus curiae* Ocean Conservancy<sup>1</sup> is a national nonprofit organization that seeks a healthy ocean and thriving planet, forever and for everyone. For more than 50 years, it has used science-based advocacy, research, and education to tackle some of the greatest global challenges facing the ocean, including climate change, plastic pollution, and overfishing. Ocean Conservancy has extensive expertise and a longstanding, demonstrated interest in fishery conservation and management with the end goal of securing healthy fisheries which support the well-being of coastal communities. It has worked for decades for the lawful implementation of the Magnuson-Stevens Act nationwide to end overfishing, effectively conserve and manage fish stocks, and support the advancement of fisheries science that can support sustainable management, including through ensuring that exempted or experimental fishing permits are used appropriately for scientific and conservation purposes. Fundamental to Ocean Conservancy's interests is ensuring that agencies and managers use the best available science in fisheries management, including innovations in fish catch monitoring, reporting, and data management.

Ocean Conservancy has directly engaged in fishery management decisions in the Southeast region and has provided numerous comments to the National Marine Fisheries Service and the South Atlantic Fishery Management Council related to management of the recreational red snapper fishery in the South Atlantic, including comments regarding the Exempted Fishing Permits at issue in this case. Additionally, Ocean Conservancy has expertise and a long history of engaging in red snapper management decisions in the Gulf of Mexico, including efforts to secure a sustainable fishery data collection system that would provide high quality data for management.

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<sup>1</sup> Per Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief wholly or partly, and no person contributed money intended to fund its preparation or submission.

## SUMMARY

Since 1976, the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act” or “Act”) has set U.S. fisheries on a journey from unregulated overfishing towards sustainability and long-term abundance. The Nation’s progress towards that destination has been driven by the statute’s core conservation requirements, particularly its requirements for science-based limits on fishing. The use of so-called “exempted fishing permits”<sup>2</sup> to evade those core requirements would blow a hole in the very sail that has moved U.S. fisheries away from crisis. The Exempted Fishing Permits challenged by Plaintiffs threaten grave harm not just to the South Atlantic red snapper population and those who depend on it, but to the rational, lawful operations of federal fisheries management itself.

Between May 1 and May 5, 2026, Federal Defendants (hereinafter “Fisheries Service”) issued Exempted Fishing Permits to the states of Florida, Georgia, South Carolina, and North Carolina purporting to exempt recreational fishing in those states from regulations that limit catch of South Atlantic red snapper.<sup>3</sup> Most significantly, the challenged Exempted Fishing

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<sup>2</sup> When referring to the broad category of permits that the Fisheries Service calls “exempted fishing permits,” we use the term “exempted fishing permits,” with no capitalization. When referring to the specific permits Plaintiffs challenge, we use the term “Exempted Fishing Permits,” with capitalization. In limited instance where the agency’s regulations refer to “EFPs” and use this abbreviation to lump together exempted and experimental permits, we use “EFPs”.

<sup>3</sup> NMFS, *Exempted Fishing Permit to Test a State-Based Data Collection and Management System for the Recreational Harvest of Red Snapper off Florida for 2026*, PERMIT NO. 26-SERO-01, issued to Florida Fish & Wildlife Conservation Comm’n (May 1, 2026), ECF No. 7-1; NMFS, *Exempted Fishing Permit to Test a State-Based Data Collection and Management System for the Recreational Harvest of Red Snapper off Georgia for 2026*, PERMIT NO. 26-SERO-02, issued to Georgia Dep’t of Nat. Res. (May 5, 2026), ECF No. 7-2; NMFS, *Exempted Fishing Permit to Test a State-Based Data Collection and Management System for the Recreational Harvest of Red Snapper off South Carolina for 2026*, PERMIT NO. 26-SERO-03, issued to South Carolina Dep’t of Nat. Res. (May 4, 2026), ECF No. 7-3; NMFS, *Exempted Fishing Permit to Test a State-Based Data Collection and Management System for the Recreational Harvest of Red Snapper off North Carolina for 2026*, PERMIT NO. 26-SERO-04, issued to North Carolina Div. of Marine Fisheries (May 5, 2026), ECF No. 7-4.

Permits eliminate annual catch limits for the recreational fishing sector in 2026 and expand recreational fishing seasons from a couple of days for all four States to 39 days for Florida and 62 days for Georgia, South Carolina, and North Carolina. *See* Memo. Supp. Pls.’ Mot. Prelim. Inj., ECF 6-1, at 24 [hereinafter “Pls.’ Mot.”]. Available evidence shows that the one-two punch of drastically expanded recreational fishing seasons paired with expunging annual catch limits guarantees that recreational fishing for red snapper will result in massive overfishing. Pls.’ Mot. 28–30. These actions violate the most fundamental requirements of the Magnuson-Stevens Act.

The Fisheries Service may not escape the Act’s basic, substantive requirements by writing itself “get out of jail free” cards in the form of Exempted Fishing Permits. In fact, the concept of an “exempted fishing permit” does not exist anywhere in the Act. Instead, the statute authorizes the Fisheries Service to issue “*experimental* fishing permits” to foster cooperative research that gathers data needed to promote conservation and management. The “*Exempted Fishing Permits*” issued to the States could hardly contradict the Act’s purposes more—they allow greatly expanded fishing for recreational, not research, purposes, that will inevitably undermine red snapper conservation and management. The Fisheries Service’s actions are arbitrary and capricious, not in accordance with law, and entirely outside the authority given to it by Congress. 5 U.S.C. § 706(2)(A), (C).

## **ARGUMENT**

The Fisheries Service’s decision to allow a free-for-all of unsustainable fishing for South Atlantic red snapper represents a wholesale abdication of its duties to conserve and manage the Nation’s fisheries. Congress has provided the agency with specific instructions as to what measures it must use to manage fish populations and what goals those measures must achieve. As described below, the Fisheries Service’s use of a nebulous, self-created “exempted” permitting scheme to evade rather than fulfill its statutory responsibilities has no basis in the

Magnuson-Stevens Act. The plain text, context, and legislative history of section 318(d) demonstrate that Congress never contemplated, much less intended, that the “experimental” permits it authorized would be used to create an enormous loophole in its carefully constructed management system. Nor did Congress hide any secret exits elsewhere in the statute. The Court should find that Plaintiffs are likely to succeed on these grounds and grant their Motion for Preliminary Injunction.

**I. The Exempted Fishing Permits Purport to Exempt the Main Source of Mortality in the South Atlantic Red Snapper Fishery—the Recreational Sector—from Annual Catch and Overfishing Limits.**

The Fisheries Service’s issuance of the four Exempted Fishing Permits represents an unprecedented and lawless deregulation of fishing activity. Among other things, the Permits exempt recreational fishing in federal waters adjacent to Florida, Georgia, South Carolina, and North Carolina from the Act’s central means for preventing and ending overfishing—the annual catch limit requirement. Florida Permit 2; Georgia Permit 2; S. Carolina Permit 2; N. Carolina Permit 2. In doing so, they will allow steep increases in catch of South Atlantic red snapper, which is already on the brink of being overfished. Pls.’ Mot. 29. The requirement to prevent overfishing is literally the number one, overarching requirement for fishery management under the Magnuson-Stevens Act. National Standard One requires that all fishery management measures must prevent overfishing. 16 U.S.C. § 1851(a)(1). The D.C. Circuit has long held that this requirement must take priority over short-term economic interests. *Nat. Res. Def. Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000). And as explained in Section II.B.1. *infra*, the annual catch limit requirement is the key, nondiscretionary means the Act requires the Fisheries Service to employ to prevent overfishing.

In spite of those clear requirements, the Fisheries Service decided to eliminate any numerical limit on recreational catch of South Atlantic red snapper and instead allow massively

increased fishing for red snapper that indisputably will result in overfishing. Recognizing the Magnuson-Stevens Act prohibits the decisions the agency was determined to make, it attempted to cloak them in the innocuous sounding clothing of an “exempted fishing permit.” *See* Pls.’ Mot. 13–15. But just as a wolf in a bonnet is still a wolf, a decision to allow otherwise unlawful and unsustainable fishing in the guise of “exempted fishing permits” is still illegal.

The Act does not grant the Fisheries Service any authority to lift statutorily mandated requirements through these Exempted Fishing Permits. Tellingly, the agency does not cite any statutory authority in its permits. For each permit, the Fisheries Service instead states that it is issuing an “exempted fishing permit” “in accordance with procedures established at 50 CFR § 600.745(b).” Florida Permit 1; Georgia Permit 1; S. Carolina Permit 1; N. Carolina Permit 1. That regulation, in turn, identifies Magnuson-Stevens Act section 318(d) as the only specific source of statutory authority for the regulation. 74 Fed. Reg. 42786, 42786 (Aug. 25, 2009); 16 U.S.C. § 1867(d). But section 318(d) addresses only “experimental” fishing. It does not authorize “exempted” fishing permits at all, much less authorize any kind of permit, however labeled, that exempts fishing from the Act’s core conservation and management requirements.

## **II. The Magnuson-Stevens Act Does Not Authorize the Fisheries Service to Exempt Fishing from the Statute’s Core Requirements.**

The Magnuson-Stevens Act authorizes one form of “EFP”: the *experimental* fishing permit, which is meant to foster cooperative research to gather data to advance conservation and management of a fishery while operating within the confines of the Act’s conservation and management requirements. The Fisheries Service used an invented other form of “EFP”: the *exempted* fishing permit, to grant a permit which purports to exempt fishing activities from regulatory requirements. No provision of the Magnuson-Stevens Act expressly authorizes it to do so. Regardless what the permits are called, however, it is beyond question that the Fisheries

Service lacks any statutory authority to exempt fishing activities—and particularly an entire sector of a fishery—from the Act’s bedrock conservation and management requirements.

The analysis below begins with a brief review of the Fisheries Service’s creation and use of exempted fishing permit regulations it relies as authority for its issuance of the Exempted Fishing Permits. The broad authority the agency has claimed through regulation, however, stands in sharp contrast with the experimental permits the Act actually authorizes and the directives it provides for fishery conservation and management. Applying the traditional tools of statutory interpretation in examining the text, context, or legislative history of section 318(d) leads to the inexorable conclusion that Act does not authorize, and in fact prohibits, the agency’s issuance of the Exempted Fishing Permits. Examining the rest of the statute yields the same result: a complete void of statutory authority to exempt recreational fishing for South Atlantic red snapper from the Magnuson-Stevens Act’s core requirements.

**A. A Brief History of “EFPs”**

The Fisheries Service relies on its exempted fishing regulations (50 C.F.R. § 600.745(b)) as its source of legal authority for the Exempted Fishing Permits. But those regulations cannot grant the agency authority that the statute itself does not. To understand how very untethered the challenged Exempted Fishing Permits are from any Magnuson-Stevens Act authority, it is helpful to understand the origins and evolution of the Fisheries Service’s “exempted fishing” regulations. This history provides the starting point for analyzing the statutory basis for these regulations in Section B below. It also demonstrates that even the Fisheries Service’s own regulations did not contemplate the use of exempted fishing permits as a tool to deregulate any entire fishing sector, as the Exempted Fishing Permits have done.

At bottom, the “exempted fishing permit” is a vehicle the Fisheries Service created through regulation to carve out exceptions for various kinds of limited fishing activities that

would otherwise violate provisions found in applicable fishery management plans or their implementing regulations, not to authorize violations of the fundamental mandates of the statute itself. None of the types of fishing the agency permitted via exemptions was named in the statute until 2006, when Congress expressly authorized experimental fishing to support conservation and management needs. Rather than revising its regulations to clearly reflect Congress' direction to promote *experimental* fishing, the Fisheries Service lumped it into its statutorily questionable exempted fishing regulations.<sup>4</sup> But even then, the Fisheries Service acknowledged that "exempted" fishing activities had to comply with the Magnuson-Stevens Act itself. The challenged Exempted Fishing Permits blatantly violate it.

1. Early regulations concerning exempted fishing permits.

The legal basis for the exempted fishing regulations is rather nebulous. The Fisheries Service promulgated regulations governing "exempted fishing" in 1996, "to distinguish clearly among scientific research activities, exempted fishing, and exempted educational activities" and to standardize procedures for issuing exempted fishing permits for each of the "exempted" categories. 61 Fed. Reg. 26435, 26435 (May 28, 1996). The agency explained that the rulemaking was necessary to clearly distinguish "scientific research activity which is conducted by a scientific research vessel," from "exempted fishing," which the Act does not mention. 61 Fed. Reg. at 26435 (final rule); 61 Fed. Reg. 10712, 10713 (Mar. 15, 1996) (proposed rule, explaining "Because exempted fishing has sometimes been confused with scientific research activity, this proposed rule would clarify NMFS' view that these are distinct activities.")). The

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<sup>4</sup> While the legal basis of the exempted fishing regulations is questionable, the Court need not decide whether the regulations themselves are invalid in order to rule for Plaintiffs. The Court need only find that the Fisheries Service's issuance of the Exempted Fishing Permits at issue here is unlawful. As explained herein, these Permits are far outside any sort of permitting contemplated by the Magnuson-Stevens Act or even the agency's exempted fishing regulations.

distinction is important: the Magnuson-Stevens Act expressly exempts scientific research activity conducted by a scientific research vessel from its definition of “fishing,” and thus from its requirements for how the agency must manage fishing. 16 U.S.C. § 1802(16) (definition of “fishing”). It does not exclude or exempt other kinds of fishing activities from those requirements.

In the rule, the Fisheries Service first defined “scientific research activity” to include activities designed to further scientific studies that might otherwise count as “fishing,” including “sampling, collecting, observing, or surveying the fish or fishery resources within the EEZ, at sea, on board scientific research vessels, to increase scientific knowledge of the fishery resources or their environment, or to test a hypothesis as part of a planned, directed investigation or study conducted according to methodologies generally accepted as appropriate for scientific research.” 61 Fed. Reg. at 26438. Those activities do not require a permit as they are not considered “fishing” under the Act.

It then noted that other kinds of activities, namely “[d]ata collection designed to capture and land quantities of fish for product development, market research, and/or public display are not scientific research activities.” *Id.* The 1996 regulations included this limited set of “non-scientific research” activities as among those that could be “permitted under exempted fishing procedures.” The agency did not specify any particular statutory provision as authority for exempted fishing permits; it simply cited the entire statute. *Id.* at 26438 (citing 16 U.S.C. § 1801 *et seq.*). It posited that “exempted fishing ... has been regulated under fishery management plans” prepared by councils or the Fisheries Service, and suggested that “[a]uthority to allow exempted fishing in any regulated fishery would be established through the governing [fishery management plan] and/or its implementing regulations.” *Id.* at 26435. The regulations specified

that exempted fishing permits could be granted to allow “for limited testing, public display, data collection, exploratory, health and safety, environmental cleanup, and/or hazard removal purposes, the target or incidental harvest of species managed under an FMP or fishery regulations that would otherwise be prohibited.” 61 Fed. Reg. at 26439. Without much discussion, the regulations essentially treated “exempted” and “experimental” as interchangeable, including them in a single definition. 61 Fed. Reg. at 26435, 26438. However, even these broadly worded regulations contemplated exemptions for “limited” activities, not the wholesale deregulation of a fishery sector.

2. The Fisheries Service’s 2009 regulatory changes in response to the 2006 Magnuson-Stevens Act amendments.

The Fisheries Service amended its exempted fishing permit regulations in 2009, purportedly to reflect changes made in the 2006 Magnuson-Stevens Reauthorization Act, Pub. L. No. 109-479. Those amendments added section 318, 16 U.S.C. § 1867, titled “Cooperative Research and Management Program.”<sup>5</sup> Section 318(d) authorizes the Fisheries Service to issue

*Experimental Fishing Permits:*

(d) EXPERIMENTAL PERMITTING PROCESS

Not later than 180 days after [the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006], the Secretary, in consultation with the Councils, shall promulgate regulations that create an expedited, uniform, and regionally-based process to promote issuance, where practicable, of experimental fishing permits.

16 U.S.C. § 1867(d). The Act does not define “experimental permitting” or “experimental

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<sup>5</sup> The cooperative research provision postdates another provision meant to promote research: Section 404, Fisheries Research, 16 U.S.C. § 1881c, added by Pub. L. No. 104-297, 110 Stat 3559 (1996).

fishing permit.”<sup>6</sup>

But rather than creating a clearly delineated program for issuing *experimental* permits, as Congress directed, the Fisheries Service muddied the waters by lumping the newly authorized permits in with pre-existing, agency-created permits: “Under the 1996 exempted fishing regulations, exempted and experimental fishing were treated synonymously as the terms had been used interchangeably in the regions . . . . This rulemaking continues the practice of using the terms interchangeably.” 74 Fed. Reg. at 42786. It largely maintained the same definition of “exempted or experimental fishing” as it had established in 1996:

Exempted or experimental fishing means fishing from a vessel of the United States that involves activities otherwise prohibited by this chapter VI, but that are authorized under an exempted fishing permit (EFP). The regulations in § 600.745 [governing scientific research activity, exempted fishing, and exempted recreational activity] refer exclusively to exempted fishing. References elsewhere in this chapter to experimental fishing mean exempted fishing under this part.

74 Fed. Reg. at 42793 (codified at 50 C.F.R. § 600.10). Notably, the Fisheries Service again failed to cite any specific provision of the Magnuson-Stevens Act that authorizes its regulations.

74 Fed. Reg. at 42792 (citing the entire Act). But it repeatedly characterized the 2009 regulations as a response to Congress’ direction in section 318(d) to establish regulations governing experimental permitting and relied on that provision as authority for its regulations. *See, e.g.*, 74 Fed. Reg. at 42786, 42789, 42790.

As explained below, Congress’s desire to establish a uniform, expeditious experimental fishing permitting process arose from the need to better meet research needs associated with increased (and increasingly important) conservation and management requirements. In its

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<sup>6</sup> The 2006 amendments also added the annual catch limit requirement, 16 U.S.C. § 1853(a)(15), to the “Required Provisions” that all fishery management plans must contain. Pub. L. No. 109-479, § 104, 120 Stat. 3575, 3584 (2007).

proposed 2009 regulations, the Fisheries Service explained that the 1996 Magnuson-Stevens Act amendments, including new requirements with respect to essential fish habitat, rebuilding overfished fisheries, and especially minimizing bycatch and the mortality of bycatch, led to increased interest in fisheries research. 72 Fed. Reg. 72657, 72657 (Dec. 21, 2007). It also noted the addition of section 318(d) in the 2006 Magnuson-Stevens Act amendments. *Id.* The agency emphasized the need to expand research on fish behavior as well as the development and testing of new gear and fishing techniques to minimize bycatch. *Id.* It also noted the need to further clarify what constitutes scientific research using a scientific vessel, which is not a regulated form of fishing under the Magnuson-Stevens Act, versus various forms of fishing and gear testing that are useful for data gathering and are subject to Magnuson-Stevens Act requirements. 72 Fed. Reg. at 72657–58.

It is apparent that Congress wanted to encourage fishermen to participate in cooperative research that would support conservation and management requirements, and recognized that greater clarity was needed to help fishermen understand what activities were covered and how their fishing activities might qualify as “experimental.” But the Fisheries Service also carried over purported authority to issue exempted fishing permits for public display and exploratory fishing that are not related to the research purposes of section 318. Overall, rather than focusing on “experimental” fishing designed to gather data as directed in the 2006 Amendments, the revised regulations focus on clarifying various types of “EFPs” and promoting some more uniformity in the application and review processes for them.<sup>7</sup> However, while the 2009 regulations did not narrow the definition of “exempted” fishing, they also did not expand it. Like

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<sup>7</sup> Even here, however, the agency acknowledged that issuance of an EFP is an action that must comply with applicable laws. *See, e.g.*, 74 Fed. Reg. at 42787.

the earlier regulations, the current regulations still contemplate exemptions for “limited” activities. 50 C.F.R. § 600.745(b)(1). And the Fisheries Service confirmed in the final rule that activities permitted under the regulations would have to comply with the Act’s annual catch limit requirement as well as its overall requirement to prevent overfishing. 74 Fed. Reg. at 42788.

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To sum up, the Fisheries Service relies on its exempted fishing regulations as authority to issue the challenged Exempted Fishing Permits to free recreational fishing for red snapper from annual catch limits and the prohibition against overfishing. But its own regulations do not go this far. Even if the regulations purported to authorize such sweeping exemptions from statutory requirements, the statute itself does not. The agency may not manufacture that authority through regulation. Only Congress can confer such power. Turning to the statute itself, is obvious that Congress did not grant the authority the Fisheries Service has unlawfully exercised.

**B. Section 318 Does Not Authorize the Fisheries Service to Exempt Fishing Activities from the Act’s Conservation and Management Requirements.**

To withstand the current challenge, the Fisheries Service must demonstrate that it has clear statutory authority to exempt the South Atlantic red snapper recreational fishing sector from the fundamental Magnuson-Stevens Act requirements to prevent overfishing and manage catch through annual catch limits. The agency cannot point to any such authority.

In discerning whether the Magnuson-Stevens Act authorizes the Fisheries Service’s sweeping use of “Exempted Fishing Permits” to fundamentally alter management of the recreational fishing sector, the Court’s first task is to examine the statute’s plain language and employ traditional tools of statutory construction to determine its best meaning. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400–01 (2024). The Court may look to legislative history to help it resolve any ambiguity in the statutory language. *Bostock v. Clayton Cnty.*, 590 U.S. 644,

654–55 (2020). Here, the statute’s plain text requires the Fisheries Service to prevent overfishing specifically by establishing and enforcing annual catch limits and does not even mention, much less authorize, any ability to exempt any fishing activities from those core requirements. The statutory provision that the Fisheries Service cites as authority for its exempted fishing permit regulations, sec. 318(d), plainly speaks to *experimental* fishing in the context of a cooperative research and *management* program designed to enable fishery managers to fulfill the Act’s requirements—not to escape them. The language of these provisions is plain enough to decide the matter, particularly when read in the context of the Act as a whole. Unsurprisingly, the legislative history of these simultaneously introduced provisions confirms that meaning.

1. Read in the context of the Magnuson-Stevens Act as a whole, section 318(d) clearly authorizes experimental activities to support fulfilling conservation and management duties, not a means to escape them.

Before examining the plain text of section 318(d) itself, it is useful to understand its place within the Magnuson-Stevens Act and particularly within the 2006 amendments to the Act. “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” A court must therefore interpret the statute “as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned up).

The 2006 amendments to the Magnuson-Stevens Act added both the annual catch limit requirement the Exempted Fishing Permits purport to eliminate and the Experimental Permitting Process provision the agency relies on as authority for those challenged permits. Pub. L. No. 109-479, § 104(a)(10), 120 Stat. at 3584 (“Fishery Management Plan Requirements”); § 204, 120 Stat. at 3614–15 (“Cooperative Research and Management”).

The annual catch limit requirement is the cornerstone of the Magnuson-Stevens Act's effort to prevent and end overfishing of the Nation's fish populations. Congress specifically added this requirement to the Magnuson-Stevens Act in 2006 because it found that "overfishing is still occurring in a number of fisheries, even those fisheries under a rebuilding plan," and that "[i]n many cases, this has resulted from failure of a plan to require adherence to scientifically-established mortality limits from one year to the next." S. Rep. No. 109-229, at 21 (2006); *see also Flaherty v. Bryson*, 850 F. Supp. 2d 38, 44 (D.D.C. 2012) (a goal in amending the Act was "to set a firm deadline to end overfishing in America" (cleaned up)). Even though Congress had added a number of requirements in the 1996 Sustainable Fisheries Act amendments to combat overfishing, it recognized that in 2006 "overfishing of overfished stocks remain[ed] a significant problem." 151 Cong. Rec. S12840, S12850 (Nov. 15, 2005) (statement of Sen. Stevens). "The Committee intends that these annual catch limits, taken with the existing overfishing and rebuilding authorities, will ensure full compliance with the Magnuson-Stevens Act." S. Rep. No. 109-229, at 6–7.

At the same time that Congress enacted the annual catch limit requirement it saw as the essential solution to ongoing overfishing, it enacted the Experimental Permitting Process provision as part of the section directing the establishment of a Cooperative Research and Management Program. § 318, 120 Stat. at 3614 (codified at 16 U.S.C. § 1867). A brief walkthrough of the Cooperative Research and Management Program section, 16 U.S.C. § 1867, demonstrates the context in which the Act authorizes experimental fishing permits and what those permits may and may not allow. Subsection (a) directs the Secretary of Commerce to establish a cooperative research and management program "to address needs identified under this Act and under any other marine resource laws enforced by the Secretary." 16 U.S.C. § 1867(a).

In other words, Congress directed the establishment of a research program that would support fulfilling Magnuson-Stevens Act and other legal requirements for fishery management.

Subsections (b) and (c) direct funding for eligible projects that address “critical needs” and “form part of a coherent program of research focused on solving priority issues.” *Id.* § 1867(b), (c).

Subsection (c) directs the agency to prioritize funding chiefly for conservation-oriented research, including projects to support stock assessments, assess bycatch and post-release mortality of bycatch, reduce bycatch, and identify habitat areas for conservation. *Id.* § 1867(c)(1)–(4).<sup>8</sup>

Reading subsection (d), “Experimental Permitting Process,” in this broader context, it is plain that the experimental fishing permits it contemplates are meant to fill gaps in data and find new ways to meet the Act’s conservation and management requirements.

On the flip side, it takes a considerable stretch in logic to say that “experimental” permits authorized as part of a “Cooperative Research and *Management*” provision may lawfully be used as a means to “*exempt*” fishing activities from the very conservation and management measures the research is supposed to support. Indeed, nothing in this section or in the Magnuson-Stevens Act as a whole gives the Fisheries Service general authority to *exempt* fishing activities from any legal requirements, even where the activity does promote research or data gathering, let alone indicate that Congress meant for experimental fishing permits to become a vehicle to deregulate fisheries.

Such a reading would have to presume that Congress added the annual catch limit requirement as a non-discretionary measure that all fishery management plans must include

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<sup>8</sup> The sole example of a priority project that is not conservation-focused is a project that collects and compiles economic and social data. 16 U.S.C. § 1867(c)(5). The challenged Permits do not fill this role either. Even if they did, that function cannot surmount the basic expectation that projects funded or permitted under this section must support fulfilling conservation requirements rather than make an end-run around them.

while simultaneously and silently giving the Fisheries Service an unlimited “get out of jail free” card to violate that requirement under the guise of an experimental fishing provision that says nothing about exemptions from legal requirements. But the Supreme Court has held that “Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass ’ns*, 531 U.S. 457, 468 (2001). Had Congress intended to allow the Fisheries Service to use the newly minted experimental permitting process to exempt regulated fishing activities from the newly minted annual catch limit requirement (or any other conservation and management requirements), it would have to say so explicitly. It said no such thing.<sup>9</sup>

The only sensible reading of the 2006 amendments and the way the added provisions work together is that the experimental permitting process is meant to support conservation requirements—not to provide an escape hatch from them. The annual catch limit requirement is integral to the overarching requirement to prevent and end overfishing. The experimental permitting process is part of an effort to promote research that supports the Act’s conservation and management requirements, including preventing and ending overfishing. Using “Exempted Fishing Permits” to exempt an entire fishery sector from annual catch limits and allow overfishing to occur turns the statute on its head. It is the exact opposite of what Congress intended.

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<sup>9</sup> Moreover, contrary to the agency’s apparent belief, it may not simply create its own “exempted fishing” authority through FMPs. The Magnuson-Stevens Act prescribes in detail the measures all FMPs must contain and other, additional *restrictions* on fishing that FMPs may contain. 16 U.S.C. §§ 1853(a), (b). The Act does not allow the Fisheries Service to pick and choose which FMP requirements to honor, must less provide any authority to write itself a ticket to escape complying with any of them.

2. The “E” in EFP matters—the plain text of the Act authorizes “Experimental” fishing, not “Exempted” fishing.

Turning to section 318(d) itself, our analysis begins with the ordinary public meaning of the words used in that provision. *Bostock*, 590 U.S. at 654–55. The plain text of section 318(d), titled “*Experimental* Permitting Process,” directs the Fisheries Service to “promulgate regulations that create an expedited, uniform, and regionally-based process to promote issuance, where practicable, of *experimental* fishing permits.” 16 U.S.C. § 1867(d) (emphasis added). The words “exempt” or “exempted” appear nowhere in this subsection.

The words “experimental” and “exempted” have distinct meanings in plain, everyday usage. “Experimental” means “using new methods, ideas, substances, etc. that have not been tried before, usually in order to find out what effect they have,” or “relating to or using scientific experiments (= tests).” *experimental*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/experimental> (last visited May 12, 2026). While “exempt” means “not having to obey a rule or to do something that is usually necessary.” *exempt*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/exempt> (last visited May 12, 2026). “Experimental” permits advance research and testing, consistent with section 318’s overall purpose to advance cooperative research. “Exempted” permits simply excuse fishermen from having to comply with legal requirements.

Congress was certainly aware of these different meanings when it added section 318. Congress in fact used both of these terms in their commonly understood meanings in the Magnuson-Stevens Act as a whole and in section 318 specifically. When Congress uses different terms in the same statute—much less in the same provision, enacted at the same time—the terms are presumed to have different meanings. *Pulsifer v. United States*, 601 U.S. 124, 149 (2024) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170–

171 (2012)) (“In a given statute, the same term usually has the same meaning and different terms usually have different meanings.”); *see also Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1235 (D.C. Cir. 2003) (quoting *Transbrasil S.A. Linhas Aereas v. Dep’t of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986)) (“[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms have different meanings.” (alteration in original)).

Notably, section 318 itself uses the term “exempted” instead of “experimental” when addressing projects that are not subject to certain requirements: “(f) EXEMPTED PROJECTS—The procedures of this section shall not apply to research funded by quota set-asides in a fishery.” 16 U.S.C. § 1867(f). The Act similarly uses the term “exempt” elsewhere in the statute specifically to denote situations in which otherwise applicable legal requirements do not apply to specific entities or activities. *See* 16 U.S.C. §§ 1855(i)(1)(F)(iv) (exempting certain Alaskan community fishing entities from state law requirements); 1881(g)(2) (stating certain recreational fishers are “exempt” from federal registration requirements). Where Congress meant to release specific fishing activities from certain legal requirements, it did so by declaring them “exempt”. Where it meant to promote cooperative research activities with fishermen that would gather data necessary for conservation and management, it did so by authorizing “experimental” permits.

3. The legislative history of section 318(d) confirms that the experimental permits it authorizes must advance fishery conservation and management, not exempt fishing from them.

Legislative history for this provision demonstrates a clear emphasis on research, data collection, and conservation. Using exempted fishing permits as means to deregulate fishing or simply allow more fishing without additional research and conservation requirements is entirely inconsistent with the intent of the provision. In this instance, the Fisheries Service’s use of Exempted Fishing Permits to transfer management of recreational red snapper fishing to the four

States and allow massively increased, unsustainable fishing could not be further from what Congress intended.

The April 4, 2006, Senate Report from the Committee on Commerce, Science, and Transportation regarding the 2006 Magnuson-Stevens Act Amendments provides:

*Section 204. Cooperative research and management program.*

This section would create a new section 317 of the Magnuson-Stevens Act. This new section would establish a cooperative research and management program to fund partnerships between Federal and State entities in *research* and management activities *that are consistent with the goals of the Magnuson-Stevens Act*. The program would be implemented on a regional basis and be developed and conducted through partnerships among Federal and State managers and scientists, commercial and recreational fishing industry participants, and educational institutions.

Project eligibility would be based on a determination of critical need by the Councils, made in consultation with the Secretary. Funding would be awarded on a competitive basis and based on regional needs with priority given to projects designed to: (1) *collect data* to improve stock assessments, (2) *assess bycatch or post release mortality*, (3) *reduce bycatch or post release mortality*, (4) identify or *conserve* habitat areas of particular concern, and (5) *collect and compile socio-economic data*. The Committee expects the Secretary to be sensitive to the *research needs* of each fisheries region and the expectation that each region should be treated fairly with respect to such allocation.

New subsection 317(d) would direct the Secretary to establish a uniform, but regionally based, expedited permitting process for *projects under this section* within six months after enactment. Any programs funded through quota set-asides within a fishery would be exempt from the requirements of this section.

S. Rep. No. 109-229, 38–39 (emphases added).

Notably, “projects under this section” refers to research and data collection projects described elsewhere in the section that meet scientific and data needs and promote conservation. In other words, section 318(d) does not authorize or contemplate a catch-all permitting program to cover all instances in which the Fisheries Service wishes to exempt various types of fishing from otherwise applicable legal requirements. In order to qualify as a project subject to section

318(d), the project must serve research and management needs, advance conservation objectives, and be consistent with the Act's goals—which include, above all else, preventing and ending overfishing. 16 U.S.C. §§ 1851(a)(1), 1853(a)(1)(A).

The Exempted Fishing Permits serve none of these conservation and management goals. Just the opposite: they strip away the Act's core annual catch limit requirement and openly allow overfishing of red snapper. Moreover, the agency's contention that these permits will allow data to be gathered to facilitate *eventual* management by the States cannot excuse the Fisheries Service from carrying out its non-discretionary statutory duties to manage fishing with annual catch limits and prevent overfishing of red snapper *now*.

**C. No Other Provision of the Magnuson-Stevens Act Authorizes the Exempted Fishing Permits.**

Seeking to exhaust all possibilities, Ocean Conservancy has examined the rest of the Act for any possible, slender reed upon which the agency might hang its regulatory authority. There is none.

While the Fisheries Service waves a hand at the entire act as authority for its regulations, the final rule for the 2009 EFP regulations only mentions two specific statutory provisions other than section 318(d): 305(d) and 402(e) (codified at 16 U.S.C. §§ 1855(d) and 1881a(e), respectively). 74 Fed. Reg. at 42792 (stating the rule is “consistent with” these sections). Neither one allows the Fisheries Service to exempt itself from statutory requirements.

Indeed, far from allowing the agency to sidestep its legal duties, section 305(d) gives the Fisheries Service “general responsibility to carry out any fishery management plan or amendment approved or prepared by [the agency], *in accordance with the [Act]*” and authorizes it to promulgate regulations “as may be necessary to discharge such responsibility or *to carry out* any other provision of this [Act].” 16 U.S.C. § 1855(d) (emphases added). The agency's use of

the Exempted Fishing Permits to *evade* fishery management plan and statutory requirements is the opposite of what section 305(d) authorizes.

Section 402(e) (“Resource Assessments”) provides nowhere to hide either. It simply allows the Fisheries Service to use the private sector to provide vessels, equipment, and services necessary to survey fishery resources “when the arrangement will yield statistically reliable results,” and overall promotes expanded annual fishery resource assessments. 16 U.S.C. § 1881a(e). The Exempted Fishing Permits are not being used to survey the red snapper population, much less with statistically reliable results. Even if they were, nothing in this provision authorizes the Fisheries Service to throw over its basic responsibilities to conserve and manage fisheries simply because the fishing is happening from a private vessel.

The only part of the statute that gives the agency broad authority to enact unspecified measures for a fishery is section 303(b), 16 U.S.C. § 1853(b). Far from providing an escape hatch from conservation and management requirements, that provision lists a variety of additional restrictions to further conservation and management of fish populations and their habitat that the agency can place on fishing activities, 16 U.S.C. §§ 1853(b)(1)–(12), and provides a catch-all provision that allows “other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.” 16 U.S.C. § 1853(b)(14). Exempting fishing from conservation and management requirements is the opposite of what this provision contemplates.

In sum, the Fisheries Service cannot point to a single provision of the Magnuson-Stevens Act that allows it abdicate its duties to apply annual catch limits for all fishing of South Atlantic red snapper and prevent overfishing of this highly sought-after and oft-beleaguered species.

## CONCLUSION

For all of the reasons set forth above, the Fisheries Service lacks any statutory authority to exempt recreational fishing for South Atlantic red snapper from the Magnuson-Stevens Act annual catch limit requirement or to allow fishing levels for the species that will likely cause overfishing and lead to the species once again becoming overfished. The Court should find for Plaintiffs on these grounds and grant their Motion for Preliminary Injunction.

Respectfully submitted this 15th day of May, 2026.

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