

JAMES S. BURLING, Alaska Bar No. 8411102  
Email: JBurling@pacificlegal.org  
DAMIEN M. SCHIFF,\* Cal. Bar No. 235101  
Email: DSchiff@pacificlegal.org  
MICHAEL A. POON,\* Cal. Bar No. 320156  
Email: MPoon@pacificlegal.org  
Pacific Legal Foundation  
555 Capitol Mall, Suite 1290  
Sacramento, California 95814  
Telephone: (916) 419-7111

OLIVER J. DUNFORD,\* Fla. Bar No. 1017791  
Email: ODunford@pacificlegal.org  
Pacific Legal Foundation  
4440 PGA Blvd., Suite 307  
Palm Beach Gardens, Florida 33410  
Telephone: (561) 691-5000

*\*Pro Hac Vice Pending*  
*Attorneys for Petitioners and Plaintiffs*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

WES HUMBYRD; ROBERT WOLFE; and  
DAN ANDERSON,  
Petitioners and Plaintiffs,

v.

GINA RAIMONDO, in her official capacity  
as Secretary of the U.S. Department of  
Commerce; JANET COIT, in her official  
capacity as Assistant Administrator for the  
National Marine Fisheries Service; and  
NATIONAL MARINE FISHERIES  
SERVICE,

Respondents and Defendants.

No. 3:21-cv-00247-JWS

**PETITION FOR REVIEW & COMPLAINT**  
**(16 U.S.C. § 1855; 5 U.S.C. § 706)**

**INTRODUCTION**

1. “Since time immemorial Alaska has been blessed with a natural food resource in the form of annual migrations of salmon.” *Metlakatla Indian Cmty., Annette Island Rsrv. v. Egan*, 362 P.2d 901, 903 (Alaska 1961), *judgment aff’d in part sub nom., Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), and *vacated in part on other grounds*, 369 U.S. 45 (1962). This gift of nature “has always been one of the basic food resources of the people as well as the basis of their main industry,” forming “the principal source of income for a large portion of Alaska’s labor force.” *Id.*

2. Wes Humbyrd, Robert Wolfe, and Dan Anderson (“Petitioners” or “Plaintiffs”) are fishermen who make their livelihoods engaging in this integral part of Alaskan identity. For decades, Wes, Bob, and Dan have fished for salmon in Cook Inlet, investing their lives in a craft that feeds their communities, their families, and themselves.

3. In December, this time-honored way of life will be permanently wiped out from Cook Inlet.

4. The cause is a rule approved by Defendant National Marine Fisheries Service (“NMFS” or “Service”) through power delegated by Defendant Gina Raimondo, the Secretary of Commerce. *See Fisheries of the Exclusive Economic Zone Off Alaska; Cook Inlet Salmon; Amendment 14*, 86 Fed. Reg. 60,568 (Nov. 3, 2021) (“Rule”). In less than a month, the Rule will permanently close the commercial salmon fishery in Cook Inlet’s federal waters—not because the fishery is overfished or for any

other conservation or environmental reason, but simply because the government finds it too bothersome to coordinate with the State of Alaska in managing the fishery.

5. This casually destructive rule must be vacated, however, because it violates the Constitution’s Appointments Clause and Take Care Clause. These “essential” structural provisions of the Constitution are accountability-preserving mechanisms. *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021). Their basic function is to ensure presidential control over the agents who exercise executive power on his behalf.

6. The Appointments Clause reserves the exercise of significant federal power, including rulemaking and policymaking power, to “Officers of the United States.” *Buckley v. Valeo*, 424 U.S. 1, 140–41 (1976) (per curiam). Such officers must be appointed by the President with the advice and consent of the Senate, except that Congress may by law vest the appointment of “inferior” officers in the President alone, the courts of law, or the heads of departments. U.S. Const. art. II, § 2, cl. 2. These limitations make the President responsible for the selection and oversight of executive officials with significant power; and the American people can then hold him responsible for poor appointments.

7. Though the Rule here was approved for publication by the National Marine Fisheries Service, the policy choice behind the Rule was made by the North Pacific Fishery Management Council (“Council”). The Council is an independent policymaking body created by the Magnuson-Stevens Fishery Conservation and Management Act (“Act” or “Fishery Act”) to manage fisheries off the coast of Alaska.

Pursuant to the Act, the Council issues fishery management plans (“FMPs”), amendments to those plans, and implementing regulations. The Rule implements Amendment 14, an amendment to the Salmon FMP, which regulates salmon fishing in federal waters off the coast of Alaska. Under the Act, when the Council proposes a regulation, the Service must issue it as a final rule, provided only that the regulation is consistent with the Act and other applicable law. The Council thus decides the essential policy questions governing fishery management. Accordingly, Council members wield power reserved for officers.

8. Furthermore, the breadth of their policymaking power, combined with their statutorily granted discretion and independence, means that Council members must be appointed as non-inferior officers, sometimes called principal officers. Yet, none of the Council’s members who adopted the Rule was appointed by the President with the advice and consent of the Senate. Moreover, even if inferior officers could wield the Council’s power, the Council members were not properly appointed as inferior officers. Accordingly, the Constitution forbade them from proposing the Rule, and the Rule is void.

9. The Take Care Clause subjects federal officials exercising officer powers to another accountability mechanism. The Take Care Clause, with the Executive Vesting Clause, requires that officers be removable by the President, so that he is able to take care that the laws be faithfully executed. This powerful mechanism for oversight persists even if the President has other means of controlling an officer.

Given the breadth of the President’s supervisory powers and responsibilities, only limited removal protections are permissible.

10. First, only two types of officers may have tenure protection: “multimember bod[ies] of experts, balanced along partisan lines, that perform[] legislative and judicial functions and [are] said not to exercise any executive power,” and “inferior officers with limited duties and no policymaking or administrative authority.” *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199–2200 (2020). For reasons explained herein, the Council is neither and may not receive tenure protection.

11. Second, any tenure protection must not be so stringent as to impede the President’s supervision. Yet, 10 of the 11 members of the Pacific Council enjoy such strong tenure protection that they cannot be effectively overseen. Seven members cannot be removed unless a Council supermajority consents or if the members violate certain financial conflict-of-interest provisions. Some members cannot be removed at all. These protections, by stymieing the President’s efforts to oversee the members’ duties, violate the Take Care Clause. And because the Rule was effected by Council members wielding officer power outside of presidential oversight, the Rule is void.

## **JURISDICTION AND VENUE**

12. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); *id.* § 2201 (authorizing declaratory relief); *id.* § 2202 (authorizing injunctive relief); 16 U.S.C. § 1855(f) (providing for judicial review of Fishery Act regulations); *id.* § 1861 (providing district court jurisdiction over cases

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