

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELIZA WILLE
75-5595 Mamalahoa Highway
Holualoa, HI 96725

SHELLEY CAREY
PO Box 1359
Kailua-Kona, HI 96745

LISA DENNING,
PO Box 1041
Kealahou, HI 96750

Plaintiffs,

v.

GINA RAIMONDO, in her official capacity as
Secretary of Commerce
1401 Constitution Ave., N.W.
Washington, DC 20230

NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway, 14th Floor
Silver Spring, MD 20910
Maryland County: Montgomery

RICHARD SPINRAD, in his official capacity
as Administrator of the National Oceanic and
Atmospheric Administration
1401 Constitution Ave., N.W., Room 5128
Washington, DC 20230

JANET COIT, in her official capacity as
Assistant Administrator for Fisheries
1315 East-West Highway, 14th Floor
Silver Spring, MD 20910
Maryland County: Montgomery

Defendants.

No. 8:22-cv-689

COMPLAINT

INTRODUCTION

1. The natural resources of Hawaii are renowned for their beauty, diversity, and accessibility. Their presence is so central to Hawaii's identity and economy that the state constitution forbids *not* making reasonable use of these resources. *See Kauai Springs, Inc. v. Planning Comm'n of Cnty. of Kauai*, 133 Haw. 141, 172 (2014); *In re Water Use Permit Applications*, 94 Haw. 97, 141 (2000).

2. Among Hawaii's popular attractions are spinner dolphins, a playful, social animal that often seeks out human encounters in nearshore waters. In turn, a productive industry of boat captains and dolphin guides has sprung up to introduce locals and tourists alike to the experience of being approached by and swimming with these gregarious marine mammals. These dolphins have also played a key part in some psychotherapy practices, which have found that dolphin-based experiential therapy can have a profound impact on those struggling with mental illness.

3. Last September, however, this fruitful and mutually beneficial relationship between humans and dolphins was destroyed.

4. The cause is a rule adopted by the Deputy Assistant Administrator for Regulatory Programs ("DAARP"), an employee at Defendant National Marine Fisheries Service ("NMFS"). *See Swim With and Approach Regulation for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act*, 86 Fed. Reg. 53,818 (Sept. 28, 2021) ("Rule"). Effective October 2021, the Rule permanently banned swimming with or approaching Hawaiian spinner dolphins—not because spinner dolphins are in decline, or because there are any confirmed negative impacts of

swimming with them. Rather, the DAARP concluded that allowing people and dolphins to swim with each other may lead dolphins to expend energy that they really ought to spend caring for their young and eating their food—a state of affairs that the employee decided was illegal “harassment” of the dolphins. *Id.* at 53,819.

5. Plaintiffs are among the boat captains, guides, and mental health professionals whose professional lives and personal finances have been upended by the Rule. Plaintiffs challenge the Rule as a violation of the Appointments Clause. Under that structural provision of the Constitution, officials who possess significant federal power, including rulemaking power, must be appointed as “Officers of the United States.” *Buckley v. Valeo*, 424 U.S. 1, 140–41 (1976) (per curiam). 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.

6. The DAAARP, Samuel Rauch, is a career civil servant. As a career employee, Mr. Rauch was not appointed pursuant to the Appointments Clause. Yet he holds vast rulemaking power as the official at NMFS in charge of regulations and policymaking. As a result, Mr. Rauch holds his post unconstitutionally and lacked the power to adopt the Rule. The Rule must therefore be vacated.

7. Plaintiffs also challenge the agency actions by which Mr. Rauch came to possess his authority over Plaintiffs. Mr. Rauch's rulemaking power was not vested in his post by statute but by a chain of departmental delegations of authority. But because the Appointments Clause does not permit non-officers to be vested with rulemaking authority over Plaintiffs and other individuals, the delegations are unconstitutional and must be vacated.

JURISDICTION AND VENUE

8. 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); and 5 U.S.C. §§ 701–06 (judicial review provisions of the Administrative Procedure Act).

9. Venue in the District of Maryland is proper because the offices of the Defendants are located within the district, and a substantial part of the acts or omissions giving rise to this action occurred within the district. 28 U.S.C. § 1391(e).

PARTIES

Plaintiffs

10. Eliza Wille, Shelley Carey, and Lisa Denning are Hawaii residents and participants in commercial or professional activities directed toward Hawaiian spinner dolphins.

11. Eliza Wille is a psychotherapist, with a master's degree in psychology from the London School of Economics and a bachelor's degree in psychology from the University of Hawaii. Her career has included eight years participating in cognition

research on dolphins. Most recently, Eliza conducted her psychotherapy practice at Hawaii Island Recovery, a small residential treatment center on Kona Island that focuses on substance abuse, addiction, and related mental disorders. Eliza's practice focuses on experiential therapy, rather than talk therapy. Experiential therapy places clients in unfamiliar situations that surface strong emotions, which the therapist and client then discuss and process together. This form of therapy—which includes art, nature, and equine therapy—is especially helpful for those who have difficulty surfacing or grasping their emotions by themselves in a traditional talk-therapy setting. Eliza started employing dolphin encounters in her experiential therapy 10 years ago. In her experience, dolphin encounters have been a powerful part of her practice, creating turning points for many patients' mental health journeys. The encounter can bring to the surface anxiety and feelings of being overwhelmed and losing control in Eliza's patients, which she can then help them process and overcome. In learning to manage these emotions in the context of a dolphin encounter, Eliza's patients also learn to manage their emotions in everyday contexts. The Rule prevents Eliza from offering this key part of her psychotherapy practice. Shortly after the Rule went into effect, Eliza was furloughed by Hawaii Island Recovery, as the clinic continued to grapple with the COVID-19 pandemic. Eliza continues to work toward other opportunities to conduct her practice, including building a private practice. But so long as the Rule stands, Eliza will be unable to offer dolphin encounters as part of her practice, whether at Hawaii Island Recovery or in private practice.

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