IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

MEXICAN GULF FISHING COMPANY, *et al.*,	:	Civil Action No. 2:20-cv-2312
	:	
	:	Section "E" (1)
	:	
Plaintiffs,	:	Judge Suzie Morgan
	:	
v.	:	Magistrate Judge Janis Van Meerveld
	:	
U.S. DEPARTMENT OF COMMERCE, *et al.*,	:	
	:	Memorandum in Support of Summary Judgment
	:	
*Defendant*s.	:	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants assert they may subject Plaintiffs to warrantless and suspicionless GPS surveillance "24 hours a day, every day of the year" simply because Plaintiffs fish. *See* 50 C.F.R. §§ 622.26(b)(5)(ii)(B), 622.374(b)(5)(iv)(B); ECF No. 79-1 at 36-41. The Fourth Amendment, however, protects all Americans, regardless of their vocation, and makes no distinction whether violations occur by land, sea, or air. The Final Rule violates Plaintiffs' Fourth Amendment rights under both property- and privacy-based approaches to that Amendment. What's worse, Plaintiffs are burdened with the costs of their own "anchor bracelets," as the Final Rule compels them to purchase unwanted equipment—in violation of the Commerce Clause—and to devote space on their vessels to the equivalent of a government spy—a clear physical taking of private property for public use.

While no regulatory purpose can excuse the Final Rule's unconstitutionality, Defendants do not even try to identify what conservation goals this privacy invasion serves. Instead, they brazenly admit the purpose of this panopticon surveillance program is to ensure that the National Marine Fisheries Service ("NMFS") would not have "to increase staffing to a level infeasible with current funding." ECF No. 79-1 at 46; *see also id.* at 16 (admitting purpose of Final Rule is to address "NMFS's staffing and funding constraints."). However, making up for staffing and budgetary shortfalls is not an appropriate regulatory purpose under the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. §§ 1801 et seq. The Court should therefore grant class-wide injunctive and declaratory relief in response to the Final Rule's gross violations of (1) constitutional rights, (2) delegated statutory authority, (3) procedural rulemaking requirements under the Administrative Procedure Act ("APA"); and (4) the Regulatory Flexibility Act ("RFA").

BACKGROUND

Class Plaintiffs are federally permitted charter-boat operators who take small groups of customers on fishing trips in the Gulf of Mexico ("Gulf"). They regularly use their boat to take

personal trips unrelated to fishing. *See, e.g.,* Declaration of Billy Wells, ECF No. 25-2, ¶ 5 ("I also use the vessel for personal non-fishing trips.") and Declaration of Allen Walburn, ECF No. 25-3, ¶ 5 ("I use [vessels] not only as a business, but personally to take family and friends to dinner or on other non-fishing events"). Defendants do not dispute "there may be certain situations where plaintiffs are using their vessels for personal, rather than business uses." ECF No. 79-1 at 35 n.17. Nor do they dispute that Gulf charter-boat operators are all small businesses. 85 Fed. Reg. at 44,014.

Based on judicially noticeable statistics on Defendants' own websites, charter-boat operators comprise a tiny portion of total recreational fishing in the Gulf (approximately 3%), which in turn, comprises a tiny portion of overall Gulf fishing (approximately 7%). ECF No. 73-1 at 8-10. These statistics indicate that charter boats account for a vanishingly small portion (approximately 0.2%) of total Gulf of Mexico fishing. *Id.* at 10. Yet, the burden on their constitutional rights is crushing. Defendants do not dispute the merits of these statistical estimates and instead claim they "cannot verify how Plaintiffs calculated the stated percentages, including which species of 'fish' were included." ECF No. 79-2 at 13-14. Plaintiffs' calculations are readily verifiable because they are based on Defendants' own data. *See* ECF No. 73-1 at 8 n.1, 9 n. 4. There is no reason for Defendants to be confused regarding which fish species were used. Plaintiffs' opening brief and factual statement clearly list the nine species of fish used in estimating the charter-boat portion of recreational fishing (3%). *See id.* at 4 and 73-2 at 3-4. This list comes directly from NOAA's own website: "Popular Recreational Species in the Gulf of Mexico."[1] The statistics regarding total recreational catches as a proportion of total Gulf catches (7%) comes from NOAA's own website for total 2019 catches. *See* ECF No. 73-1

[1] According to NOAA, the most "Popular Recreational Species in the Gulf of Mexico" are: (1) spotted seatrout; (2) gray snapper; (3) red drum; (4) white grunt; (5) sand seatrout; (6) Atlantic croaker; (7) Spanish mackerel; (8) sheepshead; and (9) red snapper. NOAA Fisheries, *Gulf of Mexico Saltwater Recreational Fisheries Snapshot* (Oct. 11, 2017), available at https://www.fisheries.noaa.gov/resource/educational-materials/gulf-mexico-saltwater-recreational-fisheries-snapshot (last visited October 13, 2021).

at 8 n.3. At a minimum, Defendants should know which species were used to compute their own 2019 total-catch statistics. Finally, the estimate for charter fishing as a proportion of total Gulf fishing is computed by multiplying the charter portion of recreational fishing (3%) by the recreational portion of total fishing (7%), which is 0.2%. *See* ECF No. 73-2 at 10.

While free to do so, Defendants tellingly presented no alternative calculations or estimates to dispute the conclusion that the impact of charter fishing in the Gulf is miniscule. They instead contend their own fishing statistics are "beyond the APA scope of review," which is "limited to the administrative record that was before the agency." ECF No. 79-2 at 13-14. The Fifth Circuit, however, has made clear that courts may take judicial notice of agency websites. *See Hawk Aircargo, Inc. v. Chao.*, 418 F.3d 453, 457 (5th Cir. 2005). Despite Defendant's feigned ignorance of their own statistics, there is no genuine material dispute that charter fishing comprises a vanishingly small portion—approximately 0.2%—of overall fishing in the Gulf

NMFS issued the challenged rule pursuant to the MSA on July 20, 2020. *Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries*, 85 Fed. Reg. 44,005 (July 21, 2020) ("Final Rule"). It was first proposed on October 16, 2018. *Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries*, 83 Fed. Reg. 54,069 (Oct. 16, 2018) ("NPRM"). Broadly speaking, the Final Rule contains two requirements: electronic fish reporting and GPS tracking.[2]

Under the electronic-fish-reporting requirement, charter-boat operators must "submit an electronic fishing report of all fish harvested and discarded, and *any other information requested* by [NMFS]

[2] Defendants' brief and factual statement frame the Final Rule as containing three components, separating what Plaintiffs call the "GPS tracking" into "VMS" and "hail-out" components. ECF No. 79-1 at 16; ECF No. 79-2 at 6. Plaintiffs prefer to treat the VMS and hail-out components together as parts of a single "GPS-tracking requirement" because they both unnecessarily collect data regarding a boat's location (as opposed to fish-related data) and thus present similar legal issues. The difference in framing is cosmetic.

for each trip." 50 C.F.R. §§ 622.26(b)(1), 622.374(b)(1)(i) (emphasis added). The regulatory text does not define what "other information" means, although the Final Rule's preamble states that "NMFS will require the reporting of five economic values per trip: The charter fee, the fuel price and estimated amount of fuel used, number of paying passengers, and the number of crew for each trip." *Id.* at 44,011. Plaintiffs' challenge of the electronic-fish-reporting requirement is limited to the reporting of the above-listed "five economic values." *Id.* They do not challenge the reporting of "all fish harvested and discarded." The electronic-fish-reporting requirement became effective on January 5, 2021. *Id.* at 44,004.

Under the GPS-tracking requirement, charter-boat operators are required to purchase, install, and operate a GPS-capable vehicle monitoring system ("VMS") approved by NMFS. Charter-boat operators must grant NMFS and the Coast Guard access to the vessel's GPS data, and the "[h]ourly position reporting requirement" states that VMS devices must "archive[] the vessel's accurate position at least once per hour, 24 hours a day, every day of the year." 50 C.F.R. §§ 622.26(b)(5)(ii)(B); 622.374(b)(5)(iv)(B). Additionally, charter-boat operators must notify NMFS before taking a trip and declare whether the trip is for charter fishing. *Id.* §§ 622.26(b)(6), 622.374(b)(6). If yes, the operator must also report the expected duration and destination of the charter-fishing trip. *Id.* Plaintiffs challenge the GPS-tracking requirement in its entirety. Declaring trips became mandatory on January 5, 2021, while the Final Rule "delayed indefinitely" the requirement to hourly report GPS locations. *Id.* at 44,004.[3]

Defendants claim the GPS-tracking requirement is needed to address "NMFS's staffing and funding constraints" regarding "validating fishing effort and trip reports" and "the enforceability of the reporting program." ECF No. 79-1 at 16. "The alternative to validating such a trip [through GPS

[3] Now scheduled for December 13, 2021. *See* ECF Nos. 77 and 77-1.

tracking] would be to require plaintiffs to submit 'no fishing' reports and to increase staffing to a level infeasible with current funding [authorized by Congress]." *Id.* at 46. As explained below, staffing and budgetary needs do not justify subjecting all charter-boat operators to panopticon surveillance and compelling them to purchase unwanted tracking devices. Nor is it a "necessary" or "appropriate" regulatory purpose under the MSA. *See* 16 U.S.C. § 1853(a)(1)(A).

STANDARD OF REVIEW

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nola Spice Designs, LLC v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)).

Generally, "in the context of judicial review of an administrative agency's decision … the administrative record provides the complete factual predicate for the court's review." *Town of Abita Springs v. U.S. Army Corps of Eng'rs*, 153 F. Supp. 3d 894, 903 (E.D. La. 2015) (internal quotation marks and citation omitted). "However, courts may also consider matters of which they may take judicial notice," which "may be taken at any stage of the proceeding," *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017–18 (5th Cir. 1996) (quoting Fed. R. Evid. 201(f)). Judicial notice may be taken of information on a government agency's website. *Hawk Aircargo*, 418 F.3d at 457.

"A reviewing court must set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" *Markle Ints., LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 754 (E.D. La. 2014), *aff'd*, 827 F.3d 452 (5th Cir. 2016), *vacated and remanded sub nom. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018) (citing 5 U.S.C. § 706(2)).

Contrary to Defendants' claim, the standard of review is not "highly deferential." ECF No. 79-1 at 17. Rather, "courts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making." *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979) (citing 5 U.S.C. § 706(2)(B)). "Accordingly, when reviewing constitutional claims under the APA, courts apply a de novo standard of review." *Exxon Mobil Corp. v. Mnuchin*, 430 F. Supp. 3d 220, 228–29 (N.D. Tex. 2019). "[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

ARGUMENT

I. THE GPS-TRACKING REQUIREMENT SUBJECTS PLAINTIFFS TO UNCONSTITUTIONAL SEARCHES

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Fourth Amendment analysis consists of a two-step inquiry: (1) does the government conduct constitute a "search," and (2) if so, is it "unreasonable?" Defendants insist that forced installations of tracking devices that enable the federal government to acquire the GPS coordinates of every charter boat in the Gulf of Mexico every hour[4] "does not constitute a search." ECF No. 79-1 at 34. This assertion is contrary to common sense, reason, and well-established law. Defendants' contention that GPS tracking is somehow reasonable—despite not being supported by warrants, probable cause, or even reasonable suspicion—likewise fails.

A. Continuous GPS Tracking of a Privately Owned Vehicle Is a Search

Defendants' lead Fourth Amendment argument is that "Plaintiffs have not demonstrated that the VMS intrudes into a protected area, and so have failed to prove the [GPS-tracking] requirement is

[4] Or every four hours when the boat is docked. *See* 85 Fed. Reg. at 44,4406-07.

a search under the Fourth Amendment." ECF No. 79-1 at 35 (citing *Carroll v. United States*, 267 U.S. 132, 146 (1925)). The sole authority they cite, *Carroll*, does not support the proposition that government intrusion into privately owned vehicles is not a *search*. Rather, that case established the "motor vehicle" exception for the Fourth Amendment's *warrant* requirement. *Collins v. Virginia*, 138 S. Ct. 1663, 1669 (2018) ("The Court has held that the search of an automobile can be reasonable without a warrant. The Court first articulated the so-called automobile exception in *Carroll v. United States*[.]"). An exception to the warrant requirement for a reasonable search makes sense only if inspection of a motor vehicle is a Fourth Amendment search in the first place. Thus, Defendants' contention that installing VMS devices on charter boats to track their GPS coordinates "does not constitute a search," *see* ECF No. 79-1 at 34, is meritless. Indeed, Defendants' own brief repudiates this position a few pages later when summarizing *United States v. Jones*, 565 U.S. 400, 404 (2012): "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitute[s] a 'search' under the Fourth Amendment." *Id.* at 41 (quoting *Jones*, 565 U.S. at 404).

In *Jones*, the government attached a GPS device to a motor vehicle to track its movements. *Id.* at 403. The Court held that government intrusion onto private property, *i.e.,* the vehicle, to obtain information was a search. *Id.* at 404-05. Under this property-based approach to the Fourth Amendment, "a search occurs when the government: (1) trespasses upon a constitutionally protected area, (2) to obtain information." *Taylor v. City of Saginaw*, 922 F.3d 328, 332 (6th Cir. 2019) ("*Taylor I*") (citing *Jones*, 565 U.S. at 404). This is so even if the intrusion is *de minimis* or if the information obtained lies in plain view. *Id.* In *Taylor I*, the Sixth Circuit applied *Jones* to hold that a city performed a "search" when it chalked the tire of a motor vehicle parked in a public space to verify the duration it was parked. *Id.* at 332. The Final Rule's GPS-tracking requirement results in a far greater invasion of private

property—permanent installation of VMS devices on private vehicles—and obtains far more detailed information—24-hour location data—than the city obtained by chalking tires in *Taylor*.

Defendants' attempt to distinguish the Final Rule's GPS tracking of private vehicles from the unconstitutional GPS tracking of a private vehicle in *Jones* unsurprisingly fails. They begin with a misleading and out-of-context quotation from *Patel v. City of Montclair*, 798 F.3d 895, 898 (9th Cir. 2015), that "[p]rivate commercial property is not one of the enumerated items that the Fourth Amendment protects." ECF No. 79-1 at 41. That case, however, concerned police officers who "came onto the *public* areas of the Galleria Motel and cited Patel for code violations" found there, and merely held that "areas of the Galleria Motel *open to the public* are not within the enumerated items in the Fourth Amendment." *Montclair*, 798 F.3d at 896, 900 (emphases added). *Montclair* explicitly clarified that it did not disturb Supreme Court cases holding that "the reach of the Fourth Amendment [covers] *those areas of private property that are not open to the public*." *Id.* (emphasis in original). Here, the charter boats on which the government seeks to install tracking devices are not open to the public. That is the underlying premise of the charter-boat business: only paying customers may come aboard to go on fishing trips. And the public obviously has no access to charter boats when they are docked or being used for personal purposes.

Defendants next argue that, "[e]ven after *Jones*, individuals operating those vessels on public waterways have a significantly reduced expectation of privacy in the location of their vessels." ECF No. 79-1 at 41. This argument is simply irrelevant because *Jones*'s property-based definition of Fourth Amendment search does not depend on a person's reasonable expectation of privacy. The Supreme Court made this point crystal clear when applying the property-based approach in *Florida v. Jardines*, 569 U.S. 1 (2013), which concerned the deployment of a drug-sniffing dog on to a suspect's property. The Court held that "we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline

is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." *Id.* at 11. This case is easily resolvable by that same bright-line property-right rule: that the Final Rule would gather information by physically intruding on to Plaintiffs' property is enough to establish a search. *Taylor I*, 922 F.3d at 332.

Defendants finally argue that GPS tracking is permissible under *Jones*'s property-based approach because "Plaintiffs have agreed to comply with … GPS monitoring [] in exchange for the benefits of a federal permit[.]" ECF No. 79-1 at 42. The existence of this lawsuit, however, evinces Plaintiffs' disagreement with GPS monitoring. Defendants cannot coerce Plaintiffs to surrender their Fourth Amendment protections by threatening their ability to earn a living. Although a "search conducted pursuant to a valid consent is constitutionally permissible," *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973), consent must be "in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id.* at 248; *see also Johnson v. United States*, 333 U.S. 10, 13 (1948) (consent to search is invalid when "granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right"). If the government cannot conduct trespassory searches of a charter boat directly, "it cannot do so indirectly by conditioning the receipt of [a] government benefit," here a fishing permit Plaintiffs need to earn a living, "on the applicant's forced waiver of his Fourth Amendment right." *Lebron v. Sec'y, Fla. Dep't of Child. & Fams.*, 710 F.3d 1202, 1217 (11th Cir. 2013); *see also Nat'l Fed'n of Fed. Emps. v. Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987) ("[A] search otherwise unreasonable cannot be redeemed by … exaction of a 'consent' to the search as a condition of employment."). Thus, the Final Rule's coercive intrusion onto Plaintiffs' private vehicles to obtain their location is indisputably a search under the property-based approach to the Fourth Amendment.

In the alternative, GPS tracking also constitutes a search under *Katz*'s privacy-based approach to the Fourth Amendment, which defines a search as an invasion of a person's reasonable expectation

of privacy. Defendants' core argument to the contrary relies on *Katz*'s statement that "[w]hat a person knowingly exposes to the public … is not a subject of Fourth Amendment protection." ECF No. 79-1 at 44 (quoting *Katz v. U.S.*, 389 U.S. 347, 351(1967)). Defendants add that "[t]he location of charter vessels on public waterways fall squarely under the open fields doctrine," *id.* at 44, which states that a reasonable expectation of privacy does not extend into an area where nothing "bar[s] the public from viewing open fields," *Oliver v. United States*, 466 U.S. 170, 179 (1984). This line of argument, however, fails to account for the distinction drawn by Fourth Amendment law between brief viewings and long-term recordings of public activity. The Defendants fail to grapple with the lesson that new (and cheaper) technology is to be scrutinized with regard to the Constitution. *Kyllo v. United States*, 533 U.S. 27, 36 (2001). Twenty-four-hour GPS surveillance was once expensive and difficult. Now it is inexpensive. That should not make such monitoring ubiquitous because permanent surveillance is, like the panopticon, a difference in kind, not just in degree of Constitutional abridgment.

As early as 1987, the Fifth Circuit distinguished long- and short-term surveillance in *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987). The court acknowledged a short flyover to observe a person's fenced-in backyard was not a search under the "plain view" doctrine. *Id.* at 251 (citing *California v. Ciraolo v.* 476 U.S. 207 (1986)). It nonetheless concluded that "a video camera that allowed [the government] to record all activity in [a person]'s backyard" for 30 days was a search because such "indiscriminate video surveillance raises the spectre of the Orwellian state." *Id.* The Fifth Circuit determined that a person's "expectation to be free from this type of video surveillance in his backyard is one that society is willing to recognize as reasonable," and "[t]he government's actions therefore qualify as a search under the fourth amendment." *Id; see also People v. Tafoya*, 2021 CO 62, ¶ 46 (Sup. Ct. Colorado 2021) ("continuous surveillance of Tafoya's curtilage for more than three months" using a pole camera was Fourth Amendment search despite "public exposure" of the area).

Although it did not cite *Cuevas-Sanchez*, the Supreme Court followed the same logic in *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). In that case, the Court explicitly recognized that, in the short term, "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements" because "the movements of the vehicle and its final destination had been 'voluntarily conveyed to anyone who wanted to look[.]" *Id.* 2215 (quoting *United States v. Knotts*, 460 U.S. 276, 281 (1983)). This did not prevent the Court from declaring that "individuals have a reasonable expectation of privacy in the *whole of their physical movements*" and holding prolonged tracking of a person's movement was a Fourth Amendment search. *Id.* at 2217 (emphasis added).

"*Carpenter* solidified the lines between short-term tracking of public movement," which typically is not a search, and "prolonged tracking that can reveal intimate details through habits and patterns. The later form of surveillance invades the reasonable expectation of privacy that individuals have in the whole of their movement," and is therefore a search. *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 341 (4th Cir. 2021). This distinction "is wholly consistent with the statement in *Katz* that '[w]hat a person knowingly exposes to the public … is not a subject of Fourth Amendment protection,' because the whole of one's movements, even if they are all individually public, are not knowingly exposed in the aggregate." *Commonwealth v. McCarthy*, 142 N.E.3d 1090, 1103 (2020); *see also United States v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010), *aff'd in part sub nom. United States v. Jones*, 565 U.S. 400 (2012) ("[T]he whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil.").

Here, it is of no moment whether Plaintiffs exposed their individual trips to a customer or the public, *see* ECF No. 79-1 at 44, because they would still "have a reasonable expectation of privacy in the whole of their physical movements" including their purely personal non-fishing movements.

Carpenter, 138 S. Ct. at 2213. This expectation of privacy does not disappear simply because they are on seafaring vessels. As this Court said in *United States v. Cunningham*, "[b]ecause there is a reasonable expectation of privacy in [non-public] areas of a vessel, warrantless searches that extend beyond the scope of document and safety inspections require reasonable suspicion of criminal activity or probable cause, depending on the intrusiveness of the search." 1996 WL 665747, at *3 n.1 (E.D. La. Nov. 15, 1996). Under the GPS-tracking requirement, the government would track and record Plaintiffs' movements "24 hours a day, every day of the year." § 622.26(b)(5)(ii)(B). As such, it violates their reasonable expectations of privacy and constitutes a search under the privacy-based approach to the Fourth Amendment.

Defendants next contend that *Carpenter*'s reasoning is "explicitly limited" to tracking cell phones. *See* ECF No. 79-1 at 43. According to Defendants, because "Plaintiffs use their charter vessels with less frequency than ordinary Americans use their cell phone," tracking of vehicles is not a search. *Id.* To be sure, the *Carpenter* Court said that, because many people take their cellphones everywhere they go, cellphone records "present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*." *Id.* at 2218. But that does not suggest long-term GPS monitoring of vehicles falls into a Fourth Amendment safe harbor. Rather, five concurring justices in *Jones* agreed that "longer term GPS monitoring" of a vehicle "impinges on expectations of privacy" and therefore constitutes a Fourth Amendment search. *Jones*, 565 U.S. at 430 (Alito, J., concurring); *id.* at 415 (Sotomayor, J. concurring).

In *United States v. Diggs*, 385 F. Supp. 3d 648, 652 (N.D. Ill 2019), the court relied on "the reasonable expectation of privacy identified by the *Jones* concurrences and reaffirmed in *Carpenter*" to conclude that GPS tracking of a vehicle associated with a criminal suspect for a month was a search. The suspect merely "'regularly drove the [vehicle] but did not own it and was not its only driver." *Id.* The court nonetheless concluded that "given the duration and level of detail of the GPS data, the

possibility that some of the data does not reflect [the suspect's] movements does not push the government's acquisition of the data back over the line at which it became a search." *Id.* In other words, there is no need for complete co-location between an individual and a vehicle being tracked—as there might be with a cell phone—for such tracking to violate the reasonable expectation of privacy. It is enough that the individual "regularly" operates the vehicle. *Id.* at 652.

Leaders of a Beautiful Struggle, 2 F.4th 330, further undermines Defendants' cellphone-like co-location requirement for GPS tracking to constitute a search. In that case, the *en banc* Fourth Circuit applied *Carpenter* to hold that Baltimore's city-wide aerial surveillance program violated citizens' reasonable expectation of privacy, even though "the tracks are often shorter snippets of several hours or less." *Id.* at 342. The court held that "location tracking in multi-hour blocks, often over consecutive days, with a month and a half of [data]" was "enough to yield 'a wealth of detail,' greater than the sum of the individual trips," and thus crossed into a Fourth Amendment search. *Id.* Charter-boat operators similarly take trips that last for a few hours at a time, and therefore, like Baltimore citizens, they would be subject to "location tracking in multi-hour blocks." The aggregation of "multi-hour blocks" of GPS surveillance is even more invasive than the "often" daily aerial surveillance in *Leaders of a Beautiful Struggle*, 2 F.4th at 342, because the Final Rule tracks Plaintiffs "every day of the year," 50 C.F.R. §§ 622.26(b)(5)(ii)(B), 622.374(b)(5)(iv)(B). At bottom, the lack of perfect co-location does not prevent prolonged GPS tracking of Plaintiffs' vehicles from being a search under the privacy-based approach to the Fourth Amendment.

Defendants next argue that "*Carpenter* did not disturb the application of *United States v. Miller*, 425 U.S. 435 443, (1976) to other types of information." ECF No. 79-1 at 43 (cleaned up). *Miller* is wholly inapposite as it concerned the collection of financial records by the government from a bank. 425 U.S. at 440. Miller's Fourth Amendment challenge failed because he could "assert neither ownership nor possession" over the financial records, which were "business records of the banks."

Id. The Final Rule, in contrast, would collect GPS location data directly from Plaintiffs. Plaintiffs do not, as Defendants suggest, "expose" GPS location data to customers in the same way that Miller exposed financial records to the bank. *See* ECF 79-1 at 44. Most fundamentally, no records of Plaintiffs' GPS locations exist—the point of this lawsuit is to prevent Plaintiffs from being forced to create and expose to NMFS records of their own movements. Plaintiffs could not have exposed non-existent records to customers or anyone else.

Defendants' assertion that "the [GPS] location of for-hire charter vessels [] is more like the business records at issue in *Miller* than the cell phone location data in *Carpenter*," ECF No. 79-1 at 43, is absurd on its face. Common sense dictates that one type of location data (*i.e.*, GPS) should be treated similarly as another type of location data (*i.e.*, cellphone), and differently from financial data that have nothing to do with movement (*i.e.*, bank records). The law follows this logic. The *Carpenter* Court explicitly recognized that GPS location data and cellphone location data are alike for Fourth Amendment purposes. 138 S. Ct. at 2213 ("As with GPS information, the time-stamped [cell phone] data provides an intimate window into a person's life."). The Court further declared "[t]here is a world of difference between the limited types of [banking] information addressed in … *Miller* and the exhaustive chronicle of location information." *Id.* at 2219. In other words, *Miller*'s holding regarding exposure of financial records to a third-party bank is inapplicable to this GPS-tracking case, and therefore does not prevent GPS tracking from constituting a Fourth Amendment search.

B. Warrantless and Suspicionless GPS Tracking Is Not Permitted Under the Pervasively Regulated Exemption

Absent an exemption, "in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015). Defendants contend that precompliance review is unnecessary for GPS tracking because charter fishing is a "pervasively

regulated" industry in which warrantless searches are permitted. *See New York v. Burger*, 482 U.S. 691 (1987). This contention is mistaken because charter fishing is not "pervasively regulated" under the Supreme Court's recent clarification that only industries posing an inherent public danger are subject to that narrow exemption. *Patel*, 576 U.S. 409. *See* ECF No. 73-1 at 23-25. Even if it were so regulated, GPS tracking would still be unconstitutional under the three-prong test articulated in *Burger*, 482 U.S. at 702-03, to assess the constitutionality of a warrantless inspection scheme in such industries.

Defendants rely on the fact that "the MSA … expressly provides for warrantless search of vessels" to argue that "the regulatory scheme puts individuals in the industry firmly on notice that periodic inspection will take place and that no reasonable expectation of privacy exists in areas where the inspections occur." ECF No. 79-1 at 36-37. This is circular logic. A challenged warrantless inspection regime "cannot be cited as proof of pervasive regulation justifying elimination of the warrant requirement; that would be obvious bootstrapping." *Burger*, 482 U.S. at 720 (Brennan J., dissenting). Even the *Patel* defendant was not so brazen: "The City wisely refrains from arguing that [the challenged inspection regime] itself renders hotels closely regulated." 576 U.S. at 425. Defendants thus must cite evidence other than the MSA's inspection regime to support their contention that the MSA's inspection regime authorizes warrantless searches.

Defendants cite cases from the Third and Ninth Circuits that predate *Patel* by decades recognizing fishing as a pervasively regulated industry. *See* ECF No. 79-1 at 37-38. Plaintiffs' opening brief, however, already explained why these cases hold little water after *Patel*. *See* ECF No. 73-1 at 25 (citing *Lovgren v. Byrne*, 787 F.2d 857, 865 (3rd Cir. 1986) and *United States v. Raub*, 637 F.2d 1205, 1209 (9th Cir. 1980)). The "pervasively regulated" holdings in the pre-*Patel* fishing cases were based on the fact that commercial fishing was subject to licensing, *Byrne*, 787 F.2d 865 n.5, "highly detailed regulations," *Raub*, 637 F.2d 1205, 1209, and "a comprehensive and predictable governmental presence," *Balelo v. Baldridge*, 724 F.2d. 753, 765 (9th Cir. 1984)). After *Patel*, however, being subject to

licensing requirements and other regulations, even extensive ones, no longer qualifies an industry as pervasively regulated. 576 U.S. at 425. For example, the Fifth Circuit recognized that "[t]here is no doubt that the medical profession is extensively regulated and has licensure requirements," but nonetheless held "the medical industry as a whole is not a closely regulated industry." *Zadeh v. Robinson*, 928 F.3d 457, 465-66 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) (holding warrantless inspection of medical records was unconstitutional). This Court should follow the Fifth Circuit's post-*Patel* approach whereby extensive regulation and licensing requirements are not enough for the "pervasively regulated" exemption over contrary pre-*Patel* decisions from other circuits. Charter boats are not as highly regulated as doctors. To the extent they are regulated, it is for how many fish they catch and when. Always tracking charter boats' whereabouts, even when not fishing, is not part of any regulatory purpose, pervasive or otherwise. Moreover, licensing requirements and regulations concerning the time, place, and manner of doing business are commonplace. "If such general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify." *Patel*, 576 U.S. at 425. It was therefore necessary to clarify that historical regulation is not enough and ensure "pervasively regulated" remains "a narrow exception" that does not "swallow the rule" of the warrant requirement. *Id.* at 424-25.

Patel also held that an industry must "pose[] a clear and significant risk to the public welfare" to qualify as being pervasively regulated. 576 U.S. at 424. None of Defendants' pre-*Patel* cases found fishing inherently poses a clear and significant public danger. They have little persuasive value regarding whether charter fishing is pervasively regulated under current law. While Defendants respond that "*Patel* does not limit the businesses that may qualify as closely regulated to only those that pose an 'inherent danger' to the public," *id.* n. 19, cases they cite support the opposite conclusion. According to Defendants, "even after *Patel* many courts have extended the 'closely regulated' industry doctrine to other industries." ECF No. 79-1 at 38 (collecting cases). Tellingly, every case they cite as

extending the exemption did so only after finding a significant public danger posed by the industry at issue. *See, e.g., Calzone v. Olson*, 931 F.3d 722, 724 (8th Cir. 2019), cited at ECF No. 79-1 at 38 ("Missouri has a substantial interest in ensuring the safety of the motorists on its highways"); *Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 284 (6th Cir. 2018), cited at ECF No. 79-1 at 38 ("Precious metals dealing, too, presents an analogous danger because it provides thieves with a marketplace by which to sell stolen articles made of precious metals."); *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transportation*, 840 F.3d 879, 894 (7th Cir. 2016), cited at ECF No. 79-1 at 38 ("Congress has long recognized commercial trucking as a dangerous industry. Danger to the public has lain at the center of the hours of service rules since 1935."); *Killgore v. City of S. El Monte,* 3 F.4th 1186, 1192 (9th Cir. 2021) cited at ECF No. 79-1 at 38 (warrantless inspection was needed "to better control illicit operations and protect and promote the public health, safety and welfare").[5]

Defendants mistakenly suggest the overlap between "posing a significant risk" and being "closely regulated" is coincidental. ECF No. 38 n.19 (asserting that "*Patel* … simply recognized that the industries the Supreme Court deemed closely regulated in the past involved 'a clear and significant risk to the public welfare'") (quoting 576 U.S. at 424). Not so. The *Patel* Court held that hotels are not closely regulated because, "[u]nlike liquor sales, firearms dealing, mining, or running an automobile junkyard, nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare." 576 U.S. at 424 (internal citations omitted). In other words, the lack of inherent public danger was the reason for decision. The Fifth Circuit followed *Patel* to inquire "whether the industry would

[5] Defendants also cite *Zadeh*, 928 F.3d at 565-66, but mischaracterize that decision as "assuming that the medical profession is closely regulated." ECF No. 79-1 at 38-39. *Zadeh* actually held that "the medical industry as a whole is *not* a closely regulated industry." 928 F.3d at 566 (emphasis added). Defendants also cite *Rivera-Corraliza v. Morales*, 794 F.3d 208, 2019 (1st Cir. 2015), which is not relevant to post-*Patel* law as it explicitly stated "*Patel* does not apply in this case [] because of the qualified-immunity overlay." *Id.* at 223.

pose a threat to the public welfare if left unregulated" in determining whether the "pervasively regulated" exemption applies. *Zadeh*, 928 F.3d at 465. In *Taylor v. City of Saginaw*, the Sixth Circuit did the same and concluded that "municipal parking plainly does not pose a clear and significant risk to the public welfare" and thus was not a closely regulated industry. 11 F.4th 483 (6th Cir. 2021) ("*Taylor II*") (cleaned up). *Taylor II* did not consider any other factor and found lack of inherent public danger *alone* disqualified the industry from being pervasively regulated. *Id.*

Defendants claim in a footnote "that the operation of a fishing vessel with paying passengers does involve a safety risk" and cite (without any explanation) a series of Coast Guard regulations. ECF No. 79-1 at 38 n. 19. But they never suggested that the GPS-tracking requirement is somehow related to safe operation of fishing vessels. Nor can they, as the Final Rule is authorized under the MSA, which is concerned with conservation and not maritime safety.[6] Defendants' citation to "congressional findings of MSA discussing dangers of overfishing," *see id.*, is also unavailing. The risk must be related to direct physical danger to members of the public, not some abstract and attenuated concept of overfishing, particularly as it is unrebutted that charter fishing's impact on Gulf fish stocks is miniscule.

[6] In any event, the Coast Guard's inspection authority to perform safety inspections of maritime vessels under 14 U.S.C. § 522—which NMFS does not wield—cannot justify constant GPS surveillance of citizens without suspicion of wrongdoing. Recognizing the need for Fourth Amendment protection to match technological and social change, the *en banc* Fifth Circuit rejected the notion that "the Coast Guard's power to search nautical vessels is today as unrestricted as when [Justice] Marshall" sat on the Supreme Court. *United States v. Williams*, 617 F.2d 1063, 1086 (5th Cir. 1980) (en banc). Rather, it concluded any "search of 'private' areas of the hold of either an American or foreign vessel … when there is no reason to suspect [wrongdoing], is *today* unreasonably intrusive." *Id.* (emphasis added). That was 1980. Today, Supreme Court precedent accounting for modern technology recognizes that a physical trespass to collect long-term GPS records constitutes an unreasonable invasion of privacy, *see Carpenter*, 138 U.S. at 2218 and *Jones*, 565 U.S. at 404, and thus must be supported by at least reasonable suspicions under the Coast Guard's inspection powers. *See Cunningham*, 1996 WL 665747, at *3 n.1 (["[W]arrantless searches that extend beyond the scope of document and safety inspections require reasonable suspicion of criminal activity or probable cause, depending on the intrusiveness of the search.").

In sum, *Patel* clarified the "pervasively regulated" exemption in meaningful ways: being "extensively regulated and ha[ving] licensure requirements" is not a sufficient condition, *Zadeh*, 928 F.3d at 465-66, but "pos[ing] a clear and significant risk to the public welfare" is a necessary one, *Patel*, 576 U.S. at 424. Defendants have adduced no evidence that charter fishing is inherently dangerous to the public. Accordingly, this Court should not extend the "pervasively regulated" exemption to charter fishing.

Even if charter fishing were pervasively regulated, the GPS-tracking requirement must still satisfy the Fourth Amendment's reasonableness requirement. *Morales*, 794 F.3d at 217 ("Judges must never forget that while the Constitution okays warrantless searches in some situations, it *never* okays unreasonable ones.") (Emphasis added). To the extent warrantless searches are permitted in the context of the fishing industry, they must stop when Plaintiffs are not fishing. The Final Rule makes no such distinction and tracks Plaintiffs' movement regardless of whether they are using their vessels to take a fishing trip or a romantic getaway.

The GPS-tracking requirement flunks the three-part test articulated by *Burger* to determine whether an inspection regime of a pervasively regulated industry is reasonable: (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be 'necessary' to further [the] regulatory scheme"; and (3) the "inspection program, … must provide a constitutionally adequate substitute for a warrant." 482 U.S. at 702-03. "A warrantless inspection, … even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as [all] three criteria are met." *Burger*, 482 U.S. at 702. According to Defendants' own case, "the *Burger* test is a carefully-drawn screen … all courts … must jealously protect, lest [the pervasively regulated] warrantless-search exception destroy the Fourth Amendment." *Morales*, 794 F.3d at 217 (footnotes omitted), cited at ECF No. 791 at 38.

Applying the *Burger* test jealously, the *Patel* court held Los Angeles's hotel-inspection regime "fails the second and third prongs of this test." 576 U.S. at 426. The same result should obtain with respect to the Final Rule's GPS-tracking requirement. But it should fail the first prong too, as there is no "substantial" government interest in tracking industry actors with no known propensity to overfish or violate the law, especially when they are using their vessels for personal reasons unrelated to fishing.

Regarding *Burger*'s "necessary to further the regulatory scheme" requirement, Defendants justify GPS tracking as being "critical for validating … reports" and "the enforceability of the reporting program." ECF No. 79-1 at 16. The City in *Patel* also claimed warrantless inspection was needed to validate and enforce recordkeeping regulations. 576 U.S. at 427 ("[P]recompliance review would fatally undermine the [statutory] scheme's efficiency by giving operators a chance to falsify their records."). The Supreme Court "rejected this exact argument" because it "could be made regarding any recordkeeping requirement." *Id.* Virtually every regulatory regime has some sort of recordkeeping requirement. If record integrity were a sufficient justification to circumvent the warrant requirement, the Fourth Amendment would become a nullity. Validating reports cannot justify NMFS's warrantless GPS tracking. This defect alone proves fatal to the GPS-tracking requirement. *See Zadeh*, 928 F.3d at 465 (striking down warrantless inspection regime based on a single *Burger* criterion being unmet).

Warrantless inspection also fails *Burger*'s "necessary" requirement if there is an alternative. *Patel*, 576 U.S. at 427. Defendants explicitly concede one exists here: "If NMFS were not able to use the VMS the alternative to validating such a trip would be to require plaintiffs to submit 'no fishing' reports." ECF No. 79-1 at 40. Defendants present no reason why "no fishing" reports are unworkable, except that they may increase NMFS's workload and thereby would require the agency to "increase staffing." *Id.* at 46. But this argument is also foreclosed by *Patel*, 576 U.S. at 427. The Supreme Court rejected the City's claim that following warrant procedures to inspect hotels "will prove unworkable given the large number of hotels" because the Court found "there is no basis to believe … measures

will be needed to conduct spot checks in the vast majority of them." *Id.* Defendants likewise present no reason why NMFS cannot use "spot checks" to validate "no fishing" reports, and thus cannot show that GPS surveillance is "necessary" to advance MSA's conservation regime under the *Burger* test. This is particularly true as Plaintiffs are already reporting their customers' fish catches after each trip under the electronic-fish-reporting requirement, which is not challenged here.

The GPS-tracking requirement also fails *Burger*'s "constitutionally adequate substitute for a warrant" requirement, under which a warrantless inspection regime "must be carefully limited in time, place, and scope." *Burger*, 482 U.S. at 703 (internal quotation marks omitted). In *Patel*, the Court found Los Angeles's inspection regime was "constitutionally deficient … because it fails sufficiently to constrain police officers' discretion as to which hotels to search and under what circumstances." 576 U.S at 427. The GPS-tracking requirement likewise fails because it would establish a wholly unconstrained and unlimited panopticon.

Comparing the Final Rule against Defendants' own pre-*Patel* cases upholding warrantless MSA inspections illustrates the rule's constitutional deficiency. In *United States v. Kaiyo Maru No. 53*, 699 F.2d 989, 996 (9th Cir. 1983), cited at ECF No. 79-1 at 36, "the inspection [was] made in the context of a regulatory inspection system of business premises which is *carefully limited in time, place, and scope*." (Emphasis added). In contrast, the Final Rule would collect all location data at all times from all regulated persons in all Gulf locations, including docks, even when they are not engaging in regulated activities. The Third Circuit in *Byrne*, 787 F.2d at 867, cited at ECF No. 79-1 at 36, affirmed warrantless inspection because "[t]he scope of the inspection is limited to only those times *when* and those places *where groundfish may be found*." (Emphases added). NMFS, however, plans to collect GPS data regardless of whether there might be fish onboard, including when a charter boat is docked or being used for non-fishing purposes. And in *Gulf of Maine Trawlers v. United States*, the court explained that "[t]he Magnuson Act provides for warrantless searches of vessels *reasonably believed* to be in violation of

provisions of the Act and for the seizure of fish therein." 674 F. Supp. 927, 932–33 (D. Me. 1987), cited at ECF No. 79-1 at 36 (emphasis added). But GPS tracking under the Final Rule does not depend on reasonable belief or even suspicion of an MSA violation. The Final Rule contains no limits whatsoever to ensure warrantless GPS tracking respects Fourth Amendment boundaries.

Defendants' brief reinforces the limitless scope of the GPS-tracking requirement. Apparently offered as evidence of their self-restraint, Defendants point out that GPS tracking "applies *only* to those owners and operators of charter vessels who choose to take paying passengers out to fish for federally regulated species—not to 'ordinary citizen[s].'" *Id.* at 40 (emphasis added). Stopping short of Stalinist surveillance of ordinary citizens is not the Fourth Amendment's benchmark. Subjecting every regulated person to continuous, warrantless, and suspicionless GPS tracking does not "provide a constitutionally adequate substitute for a warrant," as required under *Burger*, 482 U.S. at 703. Rather, it is precisely the sort of "purely discretionary" regime the Fifth Circuit found unacceptable in *Zadeh*, 928 F.3d at 465.

Defendants also contend that adequate constraint is provided by the fact that "the VMS requirement is specific to the fishing vessel instead of the persons on the fishing vessel." ECF No. 79-1 at 40. But tracking a vessel obviously also tracks all persons aboard the vessel, especially the captain. Besides, the Fourth Amendment does not merely protect "persons" from unreasonable searches, it also protects their "effects," U.S. Const. amend. IV, and "[i]t is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment," *Jones*, 565 U.S. at 404.

Finally, Defendants argue that "permit holders know they must comply with NMFS's regulation and are on notice that transmitting the vessel's location via VMS is part of the cost of doing business in this closely regulated industry." EFC 79-1 at 40. This simply restates the "closely regulated" exemption. The entire point of the *Burger* test is to ensure Fourth Amendment protection applies to closely regulated businesses. If being in a closely regulated business were all that is needed to satisfy

the test, then the *Burger* test would be entirely unnecessary. This Court should not apply the *Burger* criteria with laxity and instead must "jealously protect" its boundaries. *Morales*, 794 F.3d at 217.

Regardless of whether this Court approaches the Fourth Amendment through the lens of property or privacy, there can be no doubt that forced installation of a GPS device to track a private vehicle "24 hours a day, every day of the year" is a search. 50 C.F.R. §§ 622.26(b)(5)(ii)(B), 622.374(b)(5)(iv)(B). Defendant cannot rely on the "pervasively regulated" exemption to justify warrantless search through GPS tracking because charter fishing is not pervasively regulated under the Supreme Court's instructions to limit that exemption to inherently dangerous industries. *See Patel*, 576 U.S at 424-25. And even if charter fishing were pervasively regulated, the Final Rule's GPS-tracking requirement would still be unconstitutional because it is not "necessary" to achieve a legitimate statutory purpose and contains no constraints to safeguard against abuse. *See Burger*, 482 U.S. at 702-03.

II. THE MANDATORY INSTALLATION OF A VMS DEVICE IS A PER SE PHYSICAL TAKING UNDER THE FIFTH AMENDMENT

A. Plaintiffs' Takings Clause Claim Is Properly Before the Court

As Defendants recognize, the First Amended Complaint ("FAC") asserts a Fifth Amendment "due process claim relating to purchase of VMS device." ECF 79-1 at 29 (citing ECF No. 54 at ¶¶ 29, 82). The Complaint specifically complains that a Fifth Amendment violation results from the government's improper "seizure," ECF No. 54 at ¶¶ 82, which it defines as "the taking possession of … property." *See Merriam-Webster Online Dictionary,* available at https://www.merriam-webster.com/dictionary/seizure. That is enough to state a Fifth Amendment takings claim. Further, paragraph 84 of the FAC, under the same Count One, entitled "Warrantless GPS Surveillance via the VMS is Unconstitutional" explicitly alleges "Defendants lack the authority to require such complete panopticon-like surveillance of Plaintiffs' activities *and to insert a device on Plaintiffs' vessels at their expense.*"

(Emphasis added). It is a clear statement that placing such a device on the vessel is an unconstitutional seizure. *See also* ECF No. 54 ¶¶ 1, 29, 82, 87, 113(i) and the Prayer for Relief "A" (all alleging Fifth Amendment violation or describing the VMS device as a taking without due process of law).

The Tucker Act also does not bar this Court from hearing a Takings Clause claim because its jurisdictional limit applies only to claims against the federal government for money damages. *See* 28 U.S.C. §1491(a)(1). Here, Plaintiffs do not seek money damages but injunctive and declaratory relief. The Supreme Court's decision in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), illustrates why declaratory judgment is appropriate here. There, local authorities threatened to deny a Florida landowner a development permit unless he agreed to a pay to develop certain wetlands. The Florida Supreme Court dismissed the landlord's Takings Clause claim on the ground that, because he refused the condition, no taking had occurred. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011). The Supreme Court reversed and unanimously announced that property owners may sue for Takings Clause violations when the government uses a permit condition to pressure them into "voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Id.* at 605; *see also id.* at 620 (Kagan, J., dissenting) (agreeing with majority that a Takings Clause violation may occur "when the government denies a permit until the owner meets the condition"). The Court further explained that, under "the unconstitutional conditions doctrine … [e]xtortionate demands for property in the [] permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation." *Id.* at 607.

The Takings Clause thus prohibits the government from conditioning the grant of a permit on an applicant's surrendering property interests that would otherwise constitute a Fifth Amendment taking. *Id.* That is precisely what the Final Rule does: unless charter-boat owners acquiesce to the permanent occupation of their vessels with an unwanted VMS device, they will not be granted a fishing

permit. Declaratory relief is the ideal remedy to protect property owners from such unconstitutional coercion. Without such relief, property owners who face an unconstitutional Takings Clause condition would be forced to decide between, on one hand, forfeiting the permit and, on the other, surrendering their property rights. That is precisely the type of dilemma declaratory relief is designed to resolve. Accordingly, the Court can and should hear Plaintiffs' Takings Clause claim under the Declaratory Judgment Act.

B. Mandatory Installation of a VMS Device Constitutes a Permanent Physical Taking of Private Property

Turning to the merits of Plaintiffs' Takings Claim, Defendants do not dispute that the GPS-tracking requirement involves a permanent physical occupation of private property. Instead, they attempt to distinguish the occupation by a VMS device from occupation by cables in *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 421 (1982), on the ground that the cables were owned by a third-party company. ECF No. 79-1. This is a distinction without a difference: Plaintiffs are being forced to "permanently affix" equipment they do not want onto their private property. It makes no difference that Plaintiffs nominally own the VMS devices since they were forced by the government to purchase and install them. Regardless of who owns the VMS devices, what matters is that the devices serve a "public use," *i.e.*, establishment of a 24-hour GPS-surveillance program.

Defendants also contend that, because the permanent physical occupation at issue here "is a condition of Plaintiffs' federally-issued permit, [it] does not constitute a taking of any property right held by Plaintiffs." ECF No. 79-1 at 33. This implies *Loretto*'s result would have been different had New York mandated a permanent physical occupation of property as a condition of receiving a "landlord" permit. But that would obviously violate the unconstitutional conditions doctrine, which prohibits the government from burdening constitutional rights, including the right to just compensation when property is taken for public use, by coercively withholding a permit. *Koontz*, 570

U.S. at 607; *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987).

The government may sometimes "require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking." ECF No. 79-1 (citing *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079-80 (2021)). "The inquiry … is whether the permit condition bears an 'essential nexus' and 'rough proportionality' to the impact of the proposed use of the property." *Cedar Point*, 141 S. Ct. at 2079 (quoting *Dolan*, 512 U.S. at 386). Here, there can be no "essential nexus" because the sole reason behind requiring Plaintiffs to "permanently affix" VMS devices to their boats is to obviate additional staff. ECF No. 79-1 at 46 ("The alternative … would be … to increase staffing). That goal bears no relationship to the MSA's conservation goals, let alone satisfies the "essential nexus" requirement.

Even if there were some sort of conservation nexus, the proportionality requirement would remain unmet. Sometimes a takings issue is avoided "[w]hen the government conditions the grant of a benefit such as a permit, license, or registration on *allowing access* for reasonable health and safety inspections." *Cedar Point*, 141 S. Ct. at 2079. The permit condition Defendants seek to impose is not a right of access but rather a permanent physical occupation that cannot satisfy any concept of proportionality. *See Nollan*, 483 U.S. at 832 (holding that permit condition that amounted to "permanent physical occupation" was a taking). By making physical occupation of charter boats by VMS devices a condition of fishing permits, Defendants "impermissibly burden the right not to have property taken without just compensation." *Koontz*, 570 U.S. at 607. The Court should enter a declaratory judgment saying so.

III. THE GPS-TRACKING REQUIREMENT IS NOT AUTHORIZED UNDER THE MSA

A. The MSA Does Not Authorize Mandatory Purchase of Unwanted VMS Devices

Defendants may not force Plaintiffs to *purchase* VMS devices under 16 U.S.C. § 1853(b)(4) because that provision merely authorizes NMFS to "require the *use* of specific types of … equipment." (Emphasis added). If a regulated person uses certain equipment to fish, say nets, § 1853(b)(4) authorizes NMFS to require "use of specific types" of net. But NMFS cannot require him to purchase a *type* of equipment for which he has no use, for instance, forcing a lobster fisherman to purchase a harpoon gun. Moreover, because fishing is what is regulated under the MSA, NMFS's authority to require using certain types of equipment must be limited to fishing equipment. The agency cannot, for instance, require all fishing vessels to be equipped with audio-recording devices to hear everything said onboard under the theory that such conversations might reveal a conspiracy to overfish. A contrary interpretation to permit mandatory purchase of unwanted equipment would render the MSA unconstitutional as exceeding Congress's Commerce Clause powers. "The Framers gave Congress the power to regulate commerce, not to compel it[.]" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 555 (2012)("*NFIB*"). As such, the Commerce Clause does not authorize Congress to "compel individuals not engaged in commerce to purchase an unwanted product." *Id.*

Defendants fail to distinguish *NFIB* with the assertion that mandatory purchase of unwanted VMS devices "does not *compel* Plaintiffs to engage in commerce" because "Plaintiffs are free to decide whether to obtain a [fishing] permit." ECF No 79-1 at 21 (emphasis in original). By that logic, the Individual Mandate in *NFIB* also would not have compelled anyone to engage in commerce, since individuals were free to pay a penalty instead of purchasing mandatory insurance. *Id.* at 519 ("[T]hose who do not comply with mandate must make a shared responsibility payment to the Federal Government.") (Cleaned up). The Supreme Court concluded otherwise: the threat of the penalty was simply the mechanism by which individuals were compelled to purchase unwanted insurance.[7] *NFIB*,

[7] The Individual Mandate in *NFIB* was ultimately upheld under Congress's power to tax, which none of the Defendants may wield.

567 U.S. at 555. Similarly, the threat of withholding a fishing permit is how NMFS would compel charter-boat captains to purchase unwanted VMS devices. Denial of fishing permits is far more coercive than the penalty in NFIB since Plaintiffs' livelihoods depend on them. As such, the VMS mandate is not free choice but rather compulsion. *Garrity v. New Jersey*, 385 U.S. 493, 497–98 (1967) ("The option to lose their means of livelihood … is the antithesis of free choice."). Accordingly, the Court should not interpret authority under 16 U.S.C. § 1853(b)(4) to permit such an unconstitutional mandate to engage in unwanted commerce.

B. GPS Tracking Is Neither a 'Necessary' Nor 'Appropriate' Conservation Measure

Defendants also cannot justify the GPS-tracking requirements under 16 U.S.C. § 1853(a)(1)(A)'s grant of authority to take measures that are "necessary and appropriate for the conservation and management of the fishery." According to Defendants, this "'empower language' represent[s] a 'delegation of authority to the agency'" without discernible limits. *See* ECF 79-1 at 18 (citing 16 U.S.C. §§ 1853(a)(1)(A), (b)(4), (b)(14)); *see also* 79-1 at 20. The Court should reject such unbounded delegation, which would transform the MSA into an enabling act that negates the Constitution's separation of powers. The Court should instead interpret § 1853(a)(1)(A)'s "necessary and appropriate" language to require NMFS to ensure a regulation's costs are justified by its conservation benefits. *See Nat'l Grain & Feed Ass'n v. OSHA.*, 866 F.2d 717, 733 (5th Cir. 1988) (holding that "necessary or appropriate" delegation language "encompasses a specie of cost-benefit justification"). The GPS-tracking requirement fails because its sole benefit is to address "NMFS's staffing and funding constraints," not conservation of the fishery.

"Article I, § 1, of the Constitution vests all legislative powers herein granted … in a Congress of the United States. This text permits no delegation of those powers." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 473 (2001) (cleaned up). Where Congress delegates regulatory power to an agency, it must supply "an intelligible principle to guide the [agency's] use of discretion." *Gundy v. United States*,

139 S. Ct. 2116, 2123 (2019). While the Supreme Court has yet to articulate the precise parameters of the intelligible-principle test, *see id.* at 2131 (Alito, concurring); *id.* at 2138 (Gorsuch, J. dissenting), granting an agency power to take any "necessary and appropriate" measures without additional limits crosses the line into unconstitutional delegation of legislative power. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980).

In *American Petroleum*, the Supreme Court held that authority to issue regulations that are "necessary or appropriate to provide safe or healthful employment" constituted such a "sweeping delegation of legislative power that it might be unconstitutional," unless the agency was required to quantify the risk being regulated. *Id.* at 641, 646 (cleaned up). Any statutory interpretation that authorizes an agency to regulate in whatever manner it deems "necessary or appropriate" to achieve vague policy objectives, such as workplace health and safety, "raise[s] a serious nondelegation issue" and thus must be rejected. *Int'l Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991). The powers asserted here under 16 U.S.C. §§ 1853(a)(1)(A) and (b)(14) have the same unconstitutional breadth—Defendants contend NMFS may take any measure it deems "necessary and appropriate." ECF No. 79-1 at 18. "A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *American Petroleum*, 448 U.S. at 646.

To avoid a nondelegation violation, the Court should instead construe the MSA's delegation of authority to take "necessary and appropriate" measures to mean that NMFS must ensure benefits, in terms of conservation objectives, justify the costs of its regulations. The Fifth Circuit interpreted nearly identical language requiring "OSHA … standard[s] [to] be 'reasonably necessary or appropriate' to protect employee safety" to "encompass[] a specie of cost-benefit justification." *Nat'l Grain*, 866 F.2d at 733. "Although the agency does not have to conduct an elaborate cost-benefit analysis, it does have to determine whether the benefits expected from the [regulation] bear a reasonable relationship to the costs imposed[.]" *Alabama Power Co. v. OSHA*, 89 F.3d 740, 746 (11th Cir. 1996) (interpreting

the same "necessary or appropriate" language). This approach accords with the Supreme Court's reasoning in *Michigan v. EPA*, 576 U.S. 743 (2015). There, the Court held that consideration of both costs and benefits were needed to satisfy a Clean Air Act requirement for the EPA Administrator to deem certain regulations to be "appropriate and necessary." *Id.* at 752. This was because "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Id.* The National Standards listed at 16 U.S.C. § 1851 further reinforce the need for MSA regulations to be justified by a reasonable relationship between costs and benefits. In particular, Standard Seven states that "[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication," while Standard Eight says "[c]onservation and management measures shall, … to the extent practicable, minimize adverse impact on [fishing] communities." 16 U.S.C. § 1851(a)(7), (a)(8).

The Final Rule asserted that GPS tracking "best balances the need to collect and report timely information with the need to minimize the cost and time burden to the industry." 85 Fed. Reg. at 44,012. As Plaintiffs' opening brief explained, however, the Final Rule did not identify any actual conservation benefits, let alone quantify those benefits and balanced them against costs. *See* ECF No. 73-1 at 36. Defendants respond that the Final Rule stated that GPS tracking "is an additional mechanism to verify [charter] vessel activity." ECF No. 79-1 at 25 (citing 85 Fed. Reg at 44,012). But that does not answer how an *additional* verification mechanism—on top of preexisting location reports and new electronic-fish-reporting requirements—benefits conservation objectives. There is no finding whatsoever that charter boats are not accurately reporting where, when and how much fish they catch. The new electronic fish reports, which Plaintiffs do not challenge, further improve accuracy and timeliness of reports, while the GPS-tracking requirement adds no quantifiable conservation benefits.

NMFS made no effort to measure benefits to ensure they justify any costs imposed. A necessary first step to do so would have been to consider the impact of charter fishing on Gulf

fisheries. But Defendants admit that their own charter-fishing data was not part of "the administrative record that was before the agency." ECF No. 79-2 at 13-14. Without considering such data it would not have been possible to determine whether the conservation benefits of GPS tracking justify costs and are therefore "appropriate." *See Michigan*, 576 U.S. at 752. Without more—and there is no more—an "additional mechanism to verify of [charter] vessel activity" is not a conservation benefit that can justify the costs of 24-hour GPS tracking.

Neither the record nor Defendants' brief explains how 24-hour GPS tracking of charter boats benefits Gulf of Mexico fisheries, let alone weighs those benefits against costs imposed. The only beneficiary of the GPS-tracking requirement Defendants identify is NMFS's personnel budget. ECF No 79-1 at 46 ("The alternative … would be … to increase staffing"). That does not count as a conservation benefit that could justify costs and thereby ensure MSA regulations are "necessary" and "appropriate" under § 1853(a)(1)(A). If budgetary savings counted, then the § 1853(a)(1)(A)'s "necessary and appropriate" standard would lack any limiting intelligible principle, and the Court would have to set aside the Final Rule on nondelegation grounds. Congress did not delegate the power to issue the GPS-tracking requirement to NMFS or any other agency. Whether this violates the current nondelegation doctrine or other legal doctrines that have arisen in its place, this Court should not allow the agencies to wield such legislative power. *See Gundy*, 139 S. Ct. at 2141-42 (Gorsuch, J. dissenting) (describing nondelegation doctrine and judicial doctrines used to enforce it).

IV. THE FINAL RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

A. Mandatory Reporting of Business Information Fails the Logical Outgrowth Test and Was Issued Without Addressing the Gulf Council's Concerns

The Final Rule's preamble states that electronic fish reports must include "[t]he charter fee, the fuel price and estimated amount of fuel used, number of paying passengers, and the number of crew for each trip." 85 Fed. Reg. at 44,011. According to Defendants, "it is unnecessar[y] to apply the

logical outgrowth test" to these "five specific questions" because they "merely provide more detail" regarding what the NPRM's statement that electronic fishing report would include "socio-economic data." ECF No. 79-1 at 21-22. But that is not an argument to bypass the logical-outgrowth test; it simply restates the test's condition: "Final rules under APA notice-and-comment rulemaking must be the 'logical outgrowth' of the proposed rule." *Texas Ass'n of Mfrs. v. CPSC*, 989 F.3d 368, 381 (5th Cir. 2021). The logical-outgrowth test applies, and the Final Rule fails.

It beggars imagination and credulity that the NPRM's reference to "socio-economic data," 83 Fed. Reg. at 54,071, provided sufficient notice such that regulated persons "should have anticipated the agency's final course," in requiring reporting of the above-listed business information. ECF No. 79-1 at 22 (quoting *Huawei Techs. v. FCC*, 2 F.4th, 421, 447 (5th Cir. 2021). "[S]ocio-economic data"' means data "of, relating to, or involving a combination of social and economic factors." ECF No. 73-1 at 27 (quoting *Merriam-Webster Online Dictionary,* available at https://www.merriam-webster.com/dictionary/socioeconomic (last visited October 13, 2021)). Examples includes age, education, work experience, income, and the like. None of the five types of business data qualify because they do not relate to any *social* factor.

Tellingly, when the preamble of the Final Rule finally announced the mandatory collection of such data, it did not refer to them as "socio-economic data," but rather as "*economic* information" and "*economic* values." 85 Fed. Reg. at 44,011 (emphases added). There is nothing *social* about the "five economic values." *Id.* So, the NPRM's reference to "socio-economic data" could not have put anyone on notice that the Final Rule would require reporting of purely economic data and certainly not this intrusive economic data. Had it done so, the comments would have been numerous and scathing.

Even if the purely economic data announced in the Final Rule could somehow be categorized as "socio-economic data," the NPRM would still have failed to put interested parties on notice. Any definition of "socio-economic data" that encompasses "[t]he charter fee, the fuel price and estimated

amount of fuel used, number of paying passengers, and the number of crew for each trip," 85 Fed. Reg. at 44,011, would be so capacious that an interested party reviewing the NPRM "would have had to divine the agency's unspoken thoughts" to know what precise data would be requested in the Final Rule. *CSX Transp., Inc. v. STB,* 584 F.3d 1076, 1079–80 (D.C. Cir. 2009). As such, the mandatory reporting of such business information "fails the logical outgrowth test and thus violates the APA's notice requirement." *Id.*

The Final Rule also failed to address the Gulf Council's recommendation *against* collecting charter fees and crew sizes due to such information being "potentially ambiguous" and "difficult to validate." ECF No. 73-1 at 34; *see also* ECF No. 70-4 at 35 (AR 11541). Defendants respond by quoting passages suggesting that the Gulf Council determined charter fee and crew size could be useful. ECF No. 79-1 at 23. But that merely shows the Council recommended against collecting that data due to ambiguity and validation concerns *despite* recognizing their potential value. As such, ambiguity and difficulty in validation are important factors that an agency must not "fail to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 43 (1983). There is no record explanation of why such concerns were overridden, which renders collection of that data arbitrary and capricious.

B. The Final Rule Ignored Fourth Amendment Objections

Commenters objected that GPS tracking would result in "a violation of [their] 4th Amendment rights," ECF Nos. 67-4 at 8 (AR 08180); *id.* at 21 (AR 08193); 68-2 at 21 (AR 08237), which protects individuals from warrantless and suspicionless government collection of individuals' location data. *See Leaders of a Beautiful Struggle*, 2 F.4th at 341. According to Defendants, NMFS apparently "interpreted" these Fourth Amendment objections to raise "a concern about the location data from the VMS being acquired by 'other agencies[,]'" and responded to that *disclosure* concern, instead of the actual Fourth Amendment concern regarding government *collection* of location data. ECF No. 79-1 at 25. Responding

to a question other than the one being asked falls far short of the APA's requirement to respond to significant comments. *See Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 343 (D.C. Cir. 2019) ("The [agency], however, must also respond to significant points raised by the comments, especially when those comments challenge a fundamental premise underlying a [rule]."). Defendants' argument amounts to a concession that the NMFS ignored commenters' Fourth Amendment objections, and thus the Final Rule must be vacated for being arbitrary and capricious. *Id.* at 345-47 (vacating rule where agency "failed to address three categories of public comments that warranted response.").

C. The Final Rule Failed to Respond Adequately to Undue Burden Objections

Commenters also objected that GPS tracking imposes an undue burden on charter-boat operators, *i.e.*, benefits do not justify costs. *See, e.g.*, ECF Nos 67-2 at 20 (AR 08130); 67-4 at 4 (AR 08179); 67-4 at 12 (AR 08184). As explained above, the Final Rule's assertion that GPS tracking "best balances the need to collect and report timely information with the need to minimize the cost" is unsupported. *See supra* at Argument Section III.B (quoting 85 Fed. Reg. at 44,012). On the benefits side of the ledger, Defendants admit the purpose of GPS tracking is to address staffing shortfall by reducing verification workload, *see* ECF No. 79-1 at 16, 46, but they fail to explain how GPS verification serves conservation goals, especially since plaintiffs are already electronically reporting fishing data, including when, where and how many fish are caught.

On the cost side, the Final Rule ignores burdens placed on charter-boat captains' Fourth Amendment right to be free from suspicionless government surveillance. That oversight alone renders any purported cost-benefit balancing defective. The Final Rule also understated financial costs. ECF No. 73-1 at 36-37, 40-41. While NMFS provides a reimbursement plan to cover financial costs, that plan would not cover monthly fees, which the Final Rule confirms "will be the responsibility of the fisherman." 85 Fed. Reg. 44,013. Reimbursement thus does not ignoring the "$60 to $85 per month" data plan that users of cellular VMS devices would have to bear. *Id.* at 44,015. In response to

commenters who expressed a concern that a VMS malfunction means "the vessel would not be able to go fishing …, which could cause significant economic and social harm[,] … NMFS encourage[d] Gulf for-hire permit holders to consider having an appropriate backup as for other necessary equipment." *Id.* at 44,012. The financial costs of the Final Rule therefore should also have accounted for the price of a backup device, which may not be covered by the reimbursement policy.

V. THE FINAL RULE VIOLATES THE REGULATORY FLEXIBILITY ACT

The improper accounting of regulatory costs on charter-boat operators, all of whom are small businesses, *see* 85 Fed. Reg. at 44,014, also constitutes a violation of the RFA. *See* ECF No. 73-1 at 39-41. Additionally, Defendants' proffered explanation that a no-GPS alternative was rejected "because it would not require GPS unit hardware to be permanently affixed to the vessel," ECF No. 79-1 at 28-29 (quoting 85 Fed. Reg. 44,016), is circular and thus violates the RFA's requirement to evaluate alternatives in good faith, 5 U.S.C. § 603(c).[8]

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' cross motion for summary judgment, grant Plaintiffs' motion for summary judgment, declare the Final Rule unlawful, and enjoin its application against the Class Plaintiffs.

[8] While vacatur is appropriate for the Final Rule's constitutional, statutory, and APA defects, the proper remedy for this RFA violation is remand. *See U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 42-43 (D.C. Cir. 2005).

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2021, an electronic copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/*s*/John J. Vecchione